1 APRIL 2011

JUDGMENT

CASE CONCERNING APPLICATION OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

(GEORGIA *v.* RUSSIAN FEDERATION)

PRELIMINARY OBJECTIONS

AFFAIRE RELATIVE À L'APPLICATION DE LA CONVENTION INTERNATIONALE SUR L'ÉLIMINATION DE TOUTES LES FORMES DE DISCRIMINATION RACIALE

(GÉORGIE c. FÉDÉRATION DE RUSSIE)

EXCEPTIONS PRÉLIMINAIRES

1er AVRIL 2011

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(GEORGIA *v.* RUSSIAN FEDERATION)

PRELIMINARY OBJECTIONS

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JUDGMENT

Present: *President* OWADA; *Vice-President* TOMKA; *Judges* KOROMA, AL-KHASAWNEH, SIMMA, ABRAHAM, KEITH, SEPÚLVEDA-AMOR, BENNOUNA, SKOTNIKOV, CANÇADO TRINDADE, YUSUF, GREENWOOD, XUE, DONOGHUE; *Judge* ad hoc GAJA; *Registrar* COUVREUR.

In the case concerning application of the International Convention on the Elimination of All Forms of Racial Discrimination,

between

Georgia,

represented by

Ms Tina Burjaliani, First Deputy-Minister of Justice,

H.E. Mr. Shota Gvineria, Ambassador of Georgia to the Kingdom of the Netherlands,

as Agents;

Mr. Payam Akhavan, LL.M., S.J.D. (Harvard), Professor of International Law, McGill University, Member of the Bar of New York,

as Co-Agent and Advocate;

Mr. James R. Crawford, S.C., LL.D., F.B.A., Whewell Professor of International Law, University of Cambridge, Member of the Institut de droit international, Barrister, Matrix Chambers,

Mr. Philippe Sands, Q.C., Professor of Law, University College London, Barrister, Matrix Chambers,

Mr. Paul S. Reichler, Foley Hoag LLP, Washington D.C., Member of the Bars of the United States Supreme Court and the District of Columbia,

as Advocates;

Ms Nino Kalandadze, Deputy-Minister for Foreign Affairs,

Mr. Giorgi Mikeladze, Consul, Embassy of Georgia in the Kingdom of the Netherlands,

Ms Khatuna Salukvadze, Head of the Political Department, Ministry of Foreign Affairs,

Ms Nino Tsereteli, Deputy Head of the Department of State Representation to International Human Rights Courts, Ministry of Justice,

Mr. Zachary Douglas, Barrister, Matrix Chambers, Lecturer, Faculty of Law, University of Cambridge,

Mr. Andrew B. Loewenstein, Foley Hoag LLP, Member of the Bar of the Commonwealth of Massachusetts,

Ms Clara E. Brillembourg, Foley Hoag LLP, Member of the Bars of the District of Columbia and New York,

Ms Amy Senier, Foley Hoag LLP, Member of the Bars of the Commonwealth of Massachusetts and New York,

as Advisers,

and

the Russian Federation,

represented by

H.E. Mr. Kirill Gevorgian, Director, Legal Department, Ministry of Foreign Affairs of the Russian Federation,

H.E. Mr. Roman Kolodkin, Ambassador of the Russian Federation to the Kingdom of the Netherlands,

as Agents;

Mr. Alain Pellet, Professor at the University Paris Ouest, Nanterre-La Défense, member and former Chairman of the International Law Commission, associate member of the Institut de droit international,

Mr. Andreas Zimmermann, Dr. jur. (Heidelberg University), LL.M. (Harvard), Professor of International Law at the University of Potsdam, Director of the Potsdam Center of Human Rights, Member of the Permanent Court of Arbitration,

Mr. Samuel Wordsworth, member of the English Bar, member of the Paris Bar, Essex Court Chambers,

as Counsel and Advocates;

Mr. Evgeny Raschevsky, Egorov Puginsky Afanasiev & Partners,

Mr. M. Kulakhmetov, Adviser to the Minister for Foreign Affairs of the Russian Federation,

Mr. V. Korchmar, Principal Counsellor, Fourth CIS Department, Ministry of Foreign Affairs of the Russian Federation,

Mr. Grigory Lukyantsev, Senior Counsellor, Permanent Mission of the Russian Federation to the United Nations, New York,

Mr. Ivan Volodin, Acting Head of Section, Legal Department, Ministry of Foreign Affairs of the Russian Federation,

Mr. Maxim Musikhin, Counsellor, Embassy of the Russian Federation in the Kingdom of the Netherlands,

Ms Diana Taratukhina, Third Secretary, Permanent Mission of the Russian Federation to the United Nations, New York,

Mr. Arsen Daduani, Third Secretary, Embassy of the Russian Federation in the Kingdom of the Netherlands,

Mr. Sergey Leonidchenko, Attaché, Legal Department, Ministry of Foreign Affairs of the Russian Federation,

Ms Svetlana Shatalova, Third Secretary, Embassy of the Russian Federation in the United States of America,

Ms Daria Golubkova, expert, Ministry of Foreign Affairs of the Russian Federation,

Mr. M. Tkhostov, Deputy Chief of Administration, Government of North Ossetia-Alania,

Ms Amy Sander, member of the English Bar, Essex Court Chambers,

Mr. Christian Tams, LL.M., Ph.D. (Cambridge), Professor of International Law, University of Glasgow,

Ms Alina Miron, Researcher, Centre for International Law (CEDIN), University Paris Ouest, Nanterre-La Défense,

Ms Elena Krotova, Egorov Puginsky Afanasiev & Partners,

Ms Anna Shumilova, Egorov Puginsky Afanasiev & Partners,

Mr. Sergey Usoskin, Egorov Puginsky Afanasiev & Partners,

as Advisers,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

1. On 12 August 2008, the Government of Georgia filed in the Registry of the Court an Application instituting proceedings against the Russian Federation in respect of a dispute concerning "actions on and around the territory of Georgia" in breach of the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter "CERD") of 21 December 1965.

In its Application, Georgia, referring to Article 36, paragraph 1, of the Statute, relied on Article 22 of CERD to found the jurisdiction of the Court and also reserved the right to invoke Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 as an additional basis for jurisdiction.

2. In accordance with Article 40, paragraph 2, of the Statute, the Application was communicated forthwith to the Government of the Russian Federation by the Registrar; and, in accordance with paragraph 3 of that Article, all States entitled to appear before the Court were notified of the Application.

3. On 14 August 2008, Georgia, referring to Article 41 of the Statute and to Articles 73, 74 and 75 of the Rules of Court, filed in the Registry of the Court a Request for the indication of provisional measures in order "to preserve [its] rights under CERD to protect its citizens against violent discriminatory acts by Russian armed forces, acting in concert with separatist militia and foreign mercenaries". In accordance with Article 73, paragraph 2, of the Rules of Court, the Registry transmitted a certified copy of this Request forthwith to the Russian Government.

4. On 15 August 2008, the President, referring to Article 74, paragraph 4, of the Rules of Court, addressed a communication to the two Parties, urgently calling upon them "to act in such a way as will enable any order the Court may take on the request for provisional measures to have its appropriate effects".

5. On 25 August 2008, Georgia, referring to "the rapidly changing circumstances in Abkhazia and South Ossetia", filed in the Registry an "Amended Request for the Indication of Provisional Measures of Protection"; the Registry immediately transmitted a certified copy of this Request to the Russian Government.

6. Since the Court included upon the Bench no judge of Georgian nationality, Georgia availed itself of its right under Article 31, paragraph 2, of the Statute and chose Mr. Giorgio Gaja to sit as judge *ad hoc* in the case.

7. By an Order of 15 October 2008, the Court, after hearing the Parties, indicated certain provisional measures to both Parties. The Court also directed each Party to inform it about compliance with the provisional measures.

8. By an Order of 2 December 2008, the President of the Court, taking account of the agreement of the Parties, fixed 2 September 2009 as the time-limit for the filing of a Memorial by Georgia and 2 July 2010 as the time-limit for the filing of a Counter-Memorial by the Russian Federation. Georgia's Memorial was filed within the time-limit thus prescribed.

9. On 26 January 2009, the Agent of Georgia submitted a "Report of Georgia to the Court in Compliance with Paragraph 149 (D) of the Order of 15 October 2008". On 8 July 2009, the Agent of the Russian Federation submitted to the Court a "Report of the Russian Federation on Compliance with the Provisional Measures indicated by the Order of the Court of 15 October 2008".

10. On 31 July 2009, in accordance with Article 43 of the Rules of Court, the Registrar addressed the notification provided for in Article 63, paragraph 1, of the Statute to all States parties to CERD; on the same day, the Registrar also sent to the Secretary-General of the United Nations the notification provided for in Article 34, paragraph 3, of the Statute.

11. On 1 December 2009, within the time-limit set by Article 79, paragraph 1, of the Rules of Court, as amended on 5 December 2000, the Russian Federation raised preliminary objections to the jurisdiction of the Court. Consequently, by an Order of 11 December 2009, the Court, noting that by virtue of Article 79, paragraph 5, of the Rules of Court, the proceedings on the merits were suspended, fixed 1 April 2010 as the time-limit for the presentation by Georgia of a written statement of its observations and submissions on the preliminary objections made by the Russian Federation. Georgia filed such a statement within the time-limit so prescribed, and the case thus became ready for hearing in respect of the preliminary objections.

12. By a letter dated 1 April 2010, the Registrar, in accordance with Article 69, paragraph 3, of the Rules of Court, transmitted to the United Nations copies of the written pleadings filed in the case and asked the Secretary-General of the United Nations to inform him whether or not the Organization intended to present observations in writing within the meaning of the said provision. The Registrar further stated that, in view of the fact that the current phase of the proceedings related to the question of jurisdiction, any written observations should be limited to that question. In a letter dated 30 July 2010, the Senior Legal Officer in charge of the Office of the Legal Counsel indicated that the United Nations did not intend to submit any such observations.

13. Pursuant to Article 53, paragraph 2, of the Rules of Court, the Court, after ascertaining the views of the Parties, decided that copies of the pleadings and documents annexed would be made accessible to the public on the opening of the oral proceedings.

14. Public hearings on the preliminary objections raised by the Russian Federation were held from Monday 13 September to Friday 17 September 2010, at which the Court heard the oral arguments and replies of:

For the Russian Federation: H.E. Mr. Kirill Gevorgian,
H.E. Mr. Roman Kolodkin,
Mr. Samuel Wordsworth,
Mr. Alain Pellet,
Mr. Andreas Zimmermann.

For Georgia: Ms Tina Burjaliani,
Mr. Paul S. Reichler,
Mr. James R. Crawford,
Mr. Payam Akhavan,
Mr. Philippe Sands.

15. At the hearings, Members of the Court put questions to the Parties, to which replies were given in writing, within the time-limit fixed by the President in accordance with Article 61, paragraph 4, of the Rules of Court. In accordance with Article 72 of the Rules of Court, each of the Parties submitted comments on the written replies provided by the other.

*

16. In the Application, the following requests were made by Georgia:

"The Republic of Georgia, on it own behalf and as *parens patriae* for its citizens, respectfully requests the Court to adjudge and declare that the Russian Federation, through its State organs, State agents, and other persons and entities exercising governmental authority, and through the South Ossetian and Abkhaz separatist forces and other agents acting on the instructions of or under the direction and control of the Russian Federation, has violated its obligations under CERD by:

(a) engaging in acts and practices of 'racial discrimination against persons, groups of persons or institutions' and failing 'to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation' contrary to Article 2 (l) *(a)* of CERD;

(b) 'sponsoring, defending and supporting racial discrimination' contrary to Article 2 (l) *(b)* of CERD;

(c) failing to 'prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination' contrary to Article 2 (l) *(d)* of CERD;

(d) failing to condemn 'racial segregation' and failing to 'eradicate all practices of this nature' in South Ossetia and Abkhazia, contrary to Article 3 of CERD;

(e) failing to 'condemn all propaganda and all organizations . . . which attempt to justify or promote racial hatred and discrimination in any form' and failing 'to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination', contrary to Article 4 of CERD;

(f) undermining the enjoyment of the enumerated fundamental human rights in Article 5 by the ethnic Georgian, Greek and Jewish populations in South Ossetia and Abkhazia, contrary to Article 5 of CERD;

(g) failing to provide 'effective protection and remedies' against acts of racial discrimination, contrary to Article 6 of CERD.

The Republic of Georgia, on it own behalf and as *parens patriae* for its citizens, respectfully requests the Court to order the Russian Federation to take all steps necessary to comply with its obligations under CERD, including:

(a) immediately ceasing all military activities on the territory of the Republic of Georgia, including South Ossetia and Abkhazia, and immediate withdrawing of all Russian military personnel from the same;

(b) taking all necessary and appropriate measures to ensure the prompt and effective return of IDPs to South Ossetia and Abkhazia in conditions of safety and security;

(c) refraining from the unlawful appropriation of homes and property belonging to IDPs;

(d) taking all necessary measures to ensure that the remaining ethnic Georgian populations of South Ossetia and the Gali District are not subject to discriminatory treatment including but not limited to protecting them against pressures to assume Russian citizenship, and respect for their right to receive education in their mother tongue;

(e) paying full compensation for its role in supporting and failing to bring to an end the consequences of the ethnic cleansing that occurred in the 1991-1994 conflicts, and its subsequent refusal to allow the return of IDPs;

(f) not to recognize in any manner whatsoever the *de facto* South Ossetian and Abkhaz separatist authorities and the fait accompli created by ethnic cleansing;

(g) not to take any measures that would discriminate against persons, whether legal or natural, having Georgian nationality or ethnicity within its jurisdiction or control;

(h) allow Georgia to fulfil its obligations under CERD by withdrawing its forces from South Ossetia and Abkhazia and allowing Georgia to restore its authority and jurisdiction over those regions; and

(i) to pay full compensation to Georgia for all injuries resulting from its internationally wrongful acts."

17. In the written proceedings on the merits, the following submissions were presented on behalf of the Government of Georgia in its Memorial:

"On the basis of the evidence and legal argument presented in this *Memorial*, Georgia requests the Court to adjudge and declare:

1. that the Russian Federation, through its State organs, State agents and other persons and entities exercising governmental authority, and through the *de facto* governmental authorities in South Ossetia and Abkhazia and militias operating in those areas, is responsible for violations of Articles 2 (1) *(a)*, 2 (1) *(b)*, 2 (1) *(d)*, 3 and 5 of the 1965 Convention by the following actions: (i) the ethnic cleansing of Georgians in South Ossetia; (ii) the frustration of the right of return of Georgians to their homes in South Ossetia and Abkhazia; and (iii) the destruction of Georgian culture and identity in South Ossetia and Abkhazia;

2. that the Russian Federation is responsible for the violation of the Court's Order on Provisional Measures of 15 October 2008 by the following actions: (i) acts of discrimination, including by violence, against Georgians in South Ossetia and Abkhazia; (ii) the frustration of the right of return of Georgians to their homes in South Ossetia and Abkhazia; (iii) the destruction of Georgian culture and identity in South Ossetia and Abkhazia; and (iv) the obstruction of access to humanitarian assistance;

3. that the Russian Federation is under an obligation to cease all actions in contravention of its obligations under Articles 2 (1) *(a)*, 2 (1) *(b)*, 2 (1) *(d)*, 3 and 5 of the 1965 Convention and the Court's Order on Provisional Measures, including all acts of discrimination as well as all support, defence, sponsorship of, or efforts to consolidate, such discrimination, and to provide appropriate assurances and guarantees that it will refrain from all such acts in the future;

4. that the Russian Federation is under an obligation to re-establish the situation that existed before its violations of Articles 2 (1) *(a)*, 2 (1) *(b)*, 2 (1) *(d)*, 3 and 5 of the 1965 Convention, in particular by taking prompt and effective measures to secure the return of the internally displaced Georgians to their homes in South Ossetia and Abkhazia;

5. that the Russian Federation is under an obligation to compensate for the damage caused by its violations of Articles 2 (1) *(a)*, 2 (1) *(b)*, 2 (1) *(d)*, 3 and 5 of the 1965 Convention and of the Court's Order on Provisional Measures with such compensation to be quantified in a separate phase of these proceedings."

18. In the preliminary objections, the following submissions were presented on behalf of the Government of the Russian Federation:

> "For the reasons advanced above, the Russian Federation requests the Court to adjudge and declare that it lacks jurisdiction over the claims brought against the Russian Federation by Georgia, referred to it by the Application of Georgia of 12 August 2008."

In the written statement of its observations and submissions on the preliminary objections, the following submissions were presented on behalf of the Government of Georgia:

> "For these reasons Georgia respectfully requests the Court:
>
> 1. to dismiss the *Preliminary Objections* presented by the Russian Federation;
>
> 2. to hold that it has jurisdiction to hear the claims presented by Georgia, and that these claims are admissible."

19. At the oral proceedings on the preliminary objections, the following submissions were presented by the Parties:

On behalf of the Government of the Russian Federation,

at the hearing of 15 September 2010:

> "The Russian Federation requests the Court to adjudge and declare that it lacks jurisdiction over the claims brought against the Russian Federation by Georgia, referred to it by the Application of Georgia of 12 August 2008."

On behalf of the Government of Georgia,

at the hearing of 17 September 2010:

> "Georgia respectfully requests the Court:
>
> 1. to dismiss the preliminary objections presented by the Russian Federation;
>
> 2. to hold that the Court has jurisdiction to hear the claims presented by Georgia and that these claims are admissible."

*

* *

I. INTRODUCTION

20. It is recalled that in its Application, Georgia relied on Article 22 of CERD to found the jurisdiction of the Court (see paragraph 1 above). Article 22 of CERD reads as follows:

> "[a]ny dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement".
>
> CERD entered into force as between the Parties on 2 July 1999.

21. It is further recalled that in its Application, Georgia also reserved the right to invoke Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 as an additional basis for jurisdiction (see paragraph 1 above). Georgia did not however subsequently invoke this Convention as a basis for the Court's jurisdiction.

22. The Russian Federation has raised four preliminary objections to the Court's jurisdiction under Article 22 of CERD. According to the first preliminary objection put forward by the Russian Federation, there was no dispute between the Parties regarding the interpretation or application of CERD at the date Georgia filed its Application. In its second preliminary objection, the Russian Federation argues that the procedural requirements of Article 22 of CERD for recourse to the Court have not been fulfilled. The Russian Federation contends in its third objection that the alleged wrongful conduct took place outside its territory and therefore the Court lacks jurisdiction *ratione loci* to entertain the case. During the oral proceedings, the Russian Federation stated that this objection did not possess an exclusively preliminary character. Finally, according to the Russian Federation's fourth objection, any jurisdiction the Court might have is limited *ratione temporis* to the events which occurred after the entry into force of CERD as between the Parties, that is, 2 July 1999.

II. FIRST PRELIMINARY OBJECTION — EXISTENCE OF A DISPUTE

23. The Russian Federation's first preliminary objection is that "there was no dispute between Georgia and Russia with respect to the interpretation or application of CERD concerning the situation in and around Abkhazia and South Ossetia prior to 12 August 2008, i.e. the date Georgia submitted its application". In brief, it presented two arguments in support of that objection. First, if there was any dispute involving any allegations of racial discrimination committed in the territory of Abkhazia and South Ossetia, the parties to that dispute were Georgia on the one side and Abkhazia and South Ossetia on the other, but not the Russian Federation. Secondly, even if there was a dispute between Georgia and the Russian Federation, any such dispute was not one related to the application or interpretation of CERD.

24. Georgia, in response, contends that the record shows that, over a period of more than a decade prior to the filing of its Application, it has consistently raised its serious concerns with the Russian Federation over unlawful acts of racial discrimination that are attributable to that State, making it clear that there exists a long-standing dispute between the two States with regard to matters falling under CERD.

25. The Parties, in elaborating their positions, addressed the legal requirements for the existence of a dispute and the facts in the record in this case.

1. The meaning of "dispute"

26. On the law, the Russian Federation contends in the first place that the word "dispute" in Article 22 of CERD has a special meaning which is narrower than that to be found in general international law and accordingly more difficult to satisfy. The Russian Federation submits that, under CERD, States Parties are not considered to be in "dispute" until a "matter" between those parties has crystallized through a five-stage process involving the procedures established under the Convention. This contention depends on the wording of Articles 11 to 16 of CERD and the distinctions they are said to make between "matter", "complaints" and "disputes". Under Article 11, paragraph 1, of CERD, a State Party which considers that another State Party is not giving effect to the provisions of the Convention "may bring the matter to the attention of the Committee [on the Elimination of Racial Discrimination established by and elected under the Convention]". According to the Russian Federation, Article 11 sets out a procedure to be followed under CERD, including transmission of "the matter" to the State Party concerned, its making of written explanations to the Committee clarifying the matter and the remedy, if any, it has taken (para. 1). If the matter is not adjusted to the satisfaction of both parties, either by bilateral negotiations or any other procedure within six months either State has the right to refer the matter again to the Committee (para. 2). The Committee is to deal with the matter after it has ascertained that domestic remedies have been exhausted (para. 3). It may "[i]n any matter referred to it" call upon the States concerned to supply any other relevant information (para. 4) and the States concerned are entitled to representation in the proceedings of the Committee while "the matter is under consideration" (para. 5).

27. The Russian Federation points out that it is only after those five stages are completed that in Article 12 the word "dispute" (in the phrase "parties to the dispute") appears. In its submission:

> "In contrast to Article 11, where the term 'dispute' is carefully avoided, there are some six references to 'States parties to the dispute' in Article 12. This cannot be inadvertent — the parties evidently wished to distinguish between the communication and adjustment of a non-crystallized matter, and the point at which that matter had been escalated via a 5-stage process such that it could then, but only then, be properly characterized as a dispute."

The same distinction, says the Russian Federation, between the non-crystallized "matter" and the "dispute" is reflected in the relevant parts of the Committee's Rules of Procedure. Article 16 also uses both terms in establishing that the provisions of CERD "concerning the settlement of disputes or complaints shall be applied without prejudice to other procedures for settling disputes or complaints" laid down in other instruments. The reference to "complaints" in that provision is explained, according to the Russian Federation, by the drafting history which shows that the term "complaint" was the term originally used for "matter" in Article 11. The wording, confirmed by the drafting history, in the Russian Federation's submissions, leads to the conclusion that:

> "as a matter of the interpretation of the word 'dispute' in Article 22 in its relevant context, a specific degree of crystallization is required for there to be a 'dispute' at all. And, even on Georgia's case on the relevant facts, that degree of crystallization is manifestly absent."

*

28. Georgia, in its submissions, rejects the argument that the term "dispute" in Article 22 has a special meaning. It contends that the relevant provisions of CERD, particularly Articles 12 and 13, use the terms "matter", "issue" and "dispute" without distinction or any trace of any special meaning. While in Article 12, paragraph 1, the term "dispute" (in the phrase "parties to the dispute") does appear early in the provision, the subject-matter of the process for amicable solution remains identified as "the matter". Further, although the word "dispute" is used in paragraphs 2, 5, 6 and 7 of Article 12, once the process prescribed in that provision is completed, Article 13, paragraph 1, which regulates the final stage of the process, uses the terms "matter", "issue" and "dispute". Moreover, the usage by the Committee on the Elimination of Racial Discrimination in Article 72 of its Rules is not consistent on this matter, whatever weight may be given to them in the interpretation of the Convention.

* *

29. The Court does not consider that the words "matter", "complaint", "dispute" and "issue" are used in Articles 11 to 16 in such a systematic way that requires that a narrower interpretation than usual be given to the word "dispute" in Article 22. Further, the word "dispute" appears in the first part of Article 22 in exactly the same way as it appears in several other compromissory clauses adopted around the time CERD was being prepared: "Any dispute between two or more States Parties with respect to the interpretation or application of this Convention . . ." (e.g., Optional Protocol of Signature to the Conventions on the Law of the Sea of 1958 concerning the

Compulsory Settlement of Disputes, Article 1; Single Convention on Narcotic Drugs of 1961, Article 48; Convention on the Settlement of Investment Disputes between States and Nationals of other States of 1965, Article 64). That consistency of usage suggests that there is no reason to depart from the generally understood meaning of "dispute" in the compromissory clause contained in Article 22 of CERD. Finally, the submissions made by the Russian Federation on this matter did not in any event indicate the particular form that narrower interpretation was to take. Accordingly, the Court rejects this first contention of the Russian Federation and turns to the general meaning of the word "dispute" when used in relation to the jurisdiction of the Court.

30. The Court recalls its established case law on that matter, beginning with the frequently quoted statement by the Permanent Court of International Justice in the *Mavrommatis Palestine Concessions* case in 1924: "A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons." (*Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11.) Whether there is a dispute in a given case is a matter for "objective determination" by the Court (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74). "It must be shown that the claim of one party is positively opposed by the other" (*South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328) (and most recently *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 40, para. 90). The Court's determination must turn on an examination of the facts. The matter is one of substance, not of form. As the Court has recognized (for example, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 315, para. 89), the existence of a dispute may be inferred from the failure of a State to respond to a claim in circumstances where a response is called for. While the existence of a dispute and the undertaking of negotiations are distinct as a matter of principle, the negotiations may help demonstrate the existence of the dispute and delineate its subject-matter.

The dispute must in principle exist at the time the Application is submitted to the Court (*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 25-26, paras. 42-44; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 130-131, paras. 42-44); the Parties were in agreement with this proposition. Further, in terms of the subject-matter of the dispute, to return to the terms of Article 22 of CERD, the dispute must be "with respect to the interpretation or application of [the] Convention". While it is not necessary that a State must expressly refer to a specific treaty in its exchanges with the other State to enable it later to invoke that instrument before 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*, pp. 428-429, para. 83), the exchanges must refer to the subject-matter of the treaty with sufficient clarity to enable the State against which a claim is made to identify that there is, or may be, a dispute with regard to that subject-matter. An express specification would remove any doubt about one State's understanding of the subject-matter in issue and put the other on notice. The Parties agree that that express specification does not appear in this case.

2. The evidence about the existence of a dispute

31. The Court now turns to the evidence submitted to it by the Parties to determine whether it demonstrates, as Georgia contends, that at the time it filed its Application, on 12 August 2008, it had a dispute with the Russian Federation with respect to the interpretation or application of CERD. The Court needs to determine (1) whether the record shows a disagreement on a point of law or fact between the two States; (2) whether that disagreement is with respect to "the interpretation or application" of CERD, as required by Article 22 of CERD; and (3) whether that disagreement existed as of the date of the Application. To that effect, it needs to determine whether Georgia made such a claim and whether the Russian Federation positively opposed it with the result that there is a dispute between them in terms of Article 22 of CERD.

32. Before the Court considers the evidence bearing on the answers to those issues, it observes that disputes undoubtedly did arise between June 1992 and August 2008 in relation to events in Abkhazia and South Ossetia. Those disputes involved a range of matters including the status of Abkhazia and South Ossetia, outbreaks of armed conflict and alleged breaches of international humanitarian law and of human rights, including the rights of minorities. It is within that complex situation that the dispute which Georgia alleges to exist and which the Russian Federation denies is to be identified. One situation may contain disputes which relate to more than one body of law and which are subject to different dispute settlement procedures (see, for example, *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Judgment, I.C.J. Reports 1980*, pp. 19-20, paras. 36-37; *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, pp. 91-92, para. 54); the Parties accepted that proposition.

33. The Parties referred the Court to many documents and statements relating to events in Abkhazia and South Ossetia from 1990 to the time of the filing by Georgia of its Application and beyond. In their submissions they emphasized those with an official character. The Court will limit itself to official documents and statements.

34. The Parties also distinguished between documents and statements issued before 2 July 1999 when Georgia became party to CERD, thus establishing a treaty relationship between Georgia and the Russian Federation under CERD, and the later documents and statements, and, in respect of those later documents and statements, between those issued before the armed conflict which began on the night of 7 to 8 August 2008 and those in the following days up to 12 August when the Application was filed. Georgia cited statements relating to events before 1999 "not as a basis for Georgia's claims against Russia in this action, but as evidence that the dispute with Russia over ethnic cleansing is long-standing and legitimate and not of recent invention". The Court will also make a distinction between documents issued and statements made before and after Georgia became party to CERD.

35. The documents and statements also vary in their authors, their intended, likely and actual recipients or audience, the occasion of their delivery and their content. Some are issued by the Executive or members of the Executive of one Party or the other — the President, the Foreign Minister, the Foreign Ministry and other Ministries — and others by Parliament, particularly of Georgia, and members of Parliament. Some are press statements or records of interviews, others are internal minutes of meetings prepared by one Party. Some are directed to particular recipients, particularly by a member of the Executive (the President or Foreign Minister) to the counterpart of the other Party or to an international organization or official such as the United Nations Secretary-General or the President of the Security Council. The other Party may or may not be a member of the organization or body. One particular category consists of reports submitted to treaty monitoring bodies, such as the Human Rights Committee, the Committee on the Elimination of Racial Discrimination, and the Committee against Torture. Another category is made up of Security Council resolutions adopted between 1993 and April 2008 relating to Abkhazia. Other documents record agreements between various parties or are formal minutes of their meetings. The parties sometimes include the "Abkhaz side", the "South Ossetian side", the "North Ossetian side", in some cases with Georgia alone and in the others with Georgia and Russia and both "Ossetian sides". The reference to "parties" may sometimes be elaborated as "parties to the conflict" or "parties to the agreement". The United Nations High Commissioner for Refugees (UNHCR) and the Organization for Security and Co-operation in Europe (OSCE) have also been signatories in appropriate cases, but are not named as parties to the agreements.

36. The Russian Federation, in addressing the above matters, emphasized the need, if documents and statements were to be evidence of a dispute between it and Georgia, that they be presented by members of the Georgian Executive and in such a way that the document or statement would, or would be expected to, come to the attention of the authorities of the Russian Federation. It accordingly contended that statements and resolutions adopted by the Georgian Parliament or statements made by Parliamentary officers were not relevant. Georgia replied that a number of those Parliamentary resolutions were "adopted by the foreign ministry and submitted to the United Nations as statements of the government's position".

37. The Parties gave their main attention to the contents of the documents and statements and the Court will do likewise, while taking account of the various matters addressed in the previous two paragraphs. It observes at this stage that a dispute is more likely to be evidenced by a direct clash of positions stated by the two Parties about their respective rights and obligations in respect of the elimination of racial discrimination, in an exchange between them, but, as the Court has already noted, there are circumstances in which the existence of a dispute may be inferred from the failure to respond to a claim (see paragraph 30). Further, in general, in international law and practice, it is the Executive of the State that represents the State in its international relations and speaks for it at the international level (*Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, I.C.J. Reports 2006*, p. 27, paras. 46-47). Accordingly, primary attention will be given to statements made or endorsed by the Executives of the two Parties.

38. The Parties in addressing the contents of the various documents and statements considered (1) the alleged parties to the various disputes or conflicts, (2) the various roles which the Russian Federation played and (3) the different subject-matter of the disputes. On the first, the Russian Federation contended that the principal relationships in issue were between Georgia on the one side, and Abkhazia or South Ossetia on the other, while Georgia submitted that the relationships were between it and the Russian Federation. On the second matter, which is related to the first, the Russian Federation emphasized that its role was as facilitator in contacts and negotiations between Georgia and the Abkhaz and South Ossetian sides and as peacekeeper while Georgia contended that the Russian Federation had a more direct role, which included the facilitating and tolerating of acts of racial discrimination by the separatists. And, on the third, the Russian Federation submitted that the primary dispute which existed between Georgia on one side and Abkhazia and South Ossetia on the other was about the status of the regions. The primary dispute that existed between Georgia and the Russian Federation was about the allegedly unlawful use of force by the Russian Federation after 7 August 2008. Georgia by contrast emphasized the references in the statements to "ethnic cleansing" and to the obstacles in the way of the return of refugees and internally displaced persons (IDPs). The Court will take account of those matters as it reviews the legal significance of the documents and statements to which the Parties gave their principal attention.

39. Before it considers those documents and statements, the Court addresses the agreements reached in the 1990s and the Security Council resolutions adopted from the 1990s until early 2008. Those agreements and resolutions provide an important part of the context in which the statements which the Parties invoke were made. In particular they help define the different roles which the Russian Federation was playing during that period.

3. Relevant agreements and Security Council resolutions

40. So far as South Ossetia is concerned, Georgia and the Russian Federation on 24 June 1992 concluded an agreement on principles of settlement of the Georgian-Ossetian conflict (the Sochi Agreement). In the preamble they declared that they were striving for the immediate cessation of the bloodshed and achieving a comprehensive settlement of the conflict between the Ossetians and Georgians; they were guided by the desire to witness a speedy restoration of peace and stability in the region; they reaffirmed their commitment to the principles of the United Nations Charter and the Helsinki Final Act; and they acted in the spirit of respect for human rights and fundamental freedoms, as well as the rights of ethnic minorities. The agreement provided for a ceasefire and a withdrawal of armed formations (with particular contingents of the Russian Federation identified); and, to exercise control over the implementation of those measures, a mixed control commission was to be established, consisting of representatives of all parties involved in the conflict. It was to work in close co-operation with the joint group of military observers already agreed to. The parties were to start negotiating immediately on the economic recovery of the regions located in the conflict zone, and the creation of proper conditions for the return of refugees. The first decision of the Joint Control Commission (JCC) adopted on 4 July 1992 was to determine that the joint forces (later known as the Joint Peacekeeping Forces) would have 1,500 persons

(500 from each of Georgia, the Russian Federation and the Ossetian side) with 900 in reserve. In a Georgia-Russian Federation Protocol of Negotiations of 9 April 1993, the delegations agreed, in the context of the Georgian-Ossetian conflict, to render support to the endeavours of the Conference on Security and Co-operation in Europe (CSCE) aimed at facilitating a dialogue between the parties to the conflict in order to secure a peaceful and comprehensive settlement and to creating conditions for the return of refugees to the places of their permanent residence.

41. Two years later, on 31 October 1994, an Agreement on the Further Development of the Georgian Ossetian Peaceful Settlement Process and on the JCC was signed by the Georgian Party, the Russian Federation Party, the South-Ossetian Party and the North-Ossetian Party in the presence of the CSCE representatives. The Agreement distinguished between "the Parties" and the "Parties in conflict". The "Parties", recognizing the urgent need for a wholesale settlement of the Georgian-Ossetian conflict, agreed on the need further to develop the process of peaceful settlement of that conflict. They noted that the JCC had "largely fulfilled its functions of ensuring control of [the] ceasefire, withdrawing armed units and maintaining safety measures, thus laying [the] foundation for the process of political settlement" and they decided that the JCC would be a permanent body of the four Parties involved in settling the conflict and mitigating its consequences. The "Parties in conflict" reaffirmed their obligations to resolve all differences through peaceful means. In December 1994 the JCC stated that the Russian Federation battalion of the peacekeeping forces was the guarantor of relative stability in the area.

42. In the course of 1997, 1998 and 1999, the JCC and bodies established by it met and adopted decisions for the voluntary return of IDPs and refugees. Those meetings continued until at least 2004. The record of the last in the case file, held on 16 April 2004, states that "the preliminary stage [on certain matters] within the competence of the JCC has been completed" and the JCC requests the Governments of the Russian Federation and Georgia to give instructions to appropriate ministries and calls for regular meetings between the Governments to discuss progress.

43. On 31 March 1999, the JCC stated its opinion that "the peacekeeping forces keep on being a major sponsor of the peace and a calm life". It also noted the positive contribution of the OSCE Mission in Georgia.

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44. So far as Abkhazia is concerned, the President of the Russian Federation and the Chairman of the State Council of the Republic of Georgia on 3 September 1992 signed the Moscow Agreement. Their discussions, they recorded, had involved "leaders of Abkhazia, the North Caucasus Republics, Regions and Districts of the Russian Federation". The agreement provided for a ceasefire, confirmed the necessity of observing the international norms in the sphere of human rights and minority rights, the inadmissibility of discrimination, and provided that "[t]he Troops of

the Russian Federation, temporarily deployed on the territory of Georgia, including in Abkhazia, shall firmly observe neutrality". A protocol of negotiations signed by Georgia and the Russian Federation on 9 April 1993 provided for the functioning of the Commission for Control and Inspection in Abkhazia, composed of representatives appointed by the Georgian authorities including those from Abkhazia and the authorities of the Russian Federation. It was to guarantee compliance with the ceasefire and to perform other functions agreed by the Parties represented in the Commission. A special group was to address the return and accommodation of refugees and IDPs and measures were to be taken to protect the human rights of minorities (see paragraph 40).

45. On 9 July 1993 the Security Council requested the Secretary-General to make the necessary preparations for a military observer mission once the ceasefire between the Government of Georgia and the Abkhaz authorities was implemented (Security Council resolution 849 (1993)). The ceasefire agreement was signed on 27 July 1993 with the mediation of the Deputy Foreign Minister of the Russian Federation in the role of facilitator and the joint commission was established. The parties considered it necessary to invite international peacekeeping forces in the conflict zones; "[t]his task may be shared, subject to consultation with the United Nations, by the Russian military contingent temporarily deployed in the zone". The United Nations Observer Mission in Georgia (UNOMIG) was established by Security Council resolution 858 (1993) on 24 August 1993. On the outbreak of fighting in September, the Security Council, in the words of its President, "strongly condemn[ed] this grave violation by the Abkhaz side of the . . . ceasefire agreement of 27 July 1993" (United Nations doc. S/26463), and the representative of the Russian Federation recorded the deep concern felt in the Russian Federation at the violation by the Abkhazian side of its ceasefire agreement (United Nations doc. S/PV.3295). On 19 October 1993 the Council, expressed its deep concern at the human suffering caused by conflict in the region and at reports of "ethnic cleansing" and other serious violations of international humanitarian law, reaffirmed its strong condemnation of the grave violation by the Abkhaz side of the ceasefire agreement and affirmed the right of refugees and displaced persons to return to their homes. It reiterated its support for the efforts of the Secretary-General and his Special Envoy, in co-operation with the Chairman-in-Office of the CSCE and with the assistance of the Government of the Russian Federation as a facilitator, to carry forward the peace process with the aim of achieving an overall political settlement (Security Council resolution 876 (1993)).

46. At the first round of negotiations between the Georgian and Abkhaz sides, held in Geneva from 30 November to 1 December 1993, under the aegis of the United Nations, with the Russian Federation as facilitator and a representative of the CSCE, the parties committed themselves not to use force or the threat of force during the peaceful settlement negotiations, stated that the maintenance of peace would be promoted by an increase in the number of international observers and by the use of international peacekeeping forces, agreed to exchange prisoners of war, to find an urgent solution to the problem of refugees and displaced persons, and to have a group of experts prepare a report on the status of Abkhazia. On 4 April 1994 a Quadripartite Agreement on Voluntary Return of Refugees and Displaced Persons was signed by the Abkhaz and Georgian sides as "the Parties", as well as by the Russian Federation and UNHCR. In that Agreement, the Russian Federation undertook certain obligations relating to the return of refugees and displaced persons.

47. The Geneva process continued for more than a decade and was assisted by the Group of Friends of the Secretary-General (France, Germany, the Russian Federation, the United Kingdom and the United States). Georgia and the Russian Federation again proposed that the Security Council consider the question of a peacekeeping operation to be carried out by the United Nations or with its authorization, relying, if necessary, on a Russian Federation military contingent (joint letter of 4 February 1994 (United Nations doc. S/1994/125); see also the Georgian/Abkhazian declaration of 4 April 1994). The Security Council did not respond to that proposal and on 14 May 1994 the Georgian side and the Abkhaz side in the Agreement on a Ceasefire and Separation of Forces agreed that "[t]he peacekeeping force of the Commonwealth of Independent States and the military observers . . . shall be deployed in the security zone to monitor compliance with this Agreement." On 30 June 1994 the Security Council "[n]ote[d] with satisfaction the beginning of Commonwealth of Independent States (CIS) assistance in the zone of conflict, in response to the request of the parties" (Security Council resolution 934 (1994); see also Security Council resolutions 901 (1994) and 937 (1994)).

48. Over the following years, until 15 April 2008, the Security Council adopted a series of resolutions regarding the situation in Abkhazia, Georgia, with recurring elements. It is convenient at this point to quote passages addressing those recurring elements from resolutions adopted in 1994 and 1996. In resolution 937 (1994), the Security Council:

> "*Reaffirming* its commitment to the sovereignty and territorial integrity of the Republic of Georgia, and the right of all refugees and displaced persons affected by the conflict to return to their homes in secure conditions, in accordance with international law and as set out in the Quadripartite Agreement . . .,
>
> . . . . . .
>
> *Stressing* the crucial importance of progress in the negotiations under the auspices of the United Nations and with the assistance of the Russian Federation as facilitator and with the participation of representatives of the Conference on Security and Cooperation in Europe (CSCE) to reach a comprehensive political settlement of the conflict, including on the political status of Abkhazia, respecting fully the sovereignty and territorial integrity of the Republic of Georgia, based on the principles set out in its previous resolutions,
>
> . . . . . .
>
> 2. *Calls upon* the parties to intensify their efforts to achieve an early and comprehensive political settlement under the auspices of the United Nations with the assistance of the Russian Federation as facilitator and with the participation of representatives of the CSCE, and *welcomes* the wish of the parties to see the United Nations continue to be actively involved in the pursuit of a political settlement;

3. *Commends* the efforts of the members of the CIS directed towards the maintenance of a cease-fire in Abkhazia, Republic of Georgia, and the promotion of the return of refugees and displaced persons to their homes in accordance with the Agreement signed in Moscow on 14 May 1994 in full cooperation with the United Nations High Commissioner for Refugees (UNHCR) and in accordance with the Quadripartite Agreement;

4. *Welcomes* the contribution made by the Russian Federation, and indications of further contributions from other members of the CIS, of a peace-keeping force, in response to the request of the parties, pursuant to the 14 May Agreement, in coordination with UNOMIG . . . and in accordance with the established principles and practices of the United Nations;

. . . . . .

9. *Reaffirms* its support for the return of all refugees and displaced persons to their homes in secure conditions, in accordance with international law and as set out in the Quadripartite Agreement . . .”

Similarly, in resolution 1036 (1996), the Security Council:

“*Stressing* the need for the parties to intensify efforts, under the auspices of the United Nations and with the assistance of the Russian Federation as facilitator, to achieve an early and comprehensive political settlement of the conflict, including on the political status of Abkhazia, fully respecting the sovereignty and territorial integrity of Georgia, . . .

Reaffirming also the right of all refugees and displaced persons affected by the conflict to return to their homes in secure conditions in accordance with international law and as set out in the Quadripartite Agreement of 14 April 1994 . . .

. . . . . .

Noting that the Moscow Agreement of 14 May 1994 on a Cease-fire and Separation of Forces (S/1994/583, annex I) has generally been respected by the parties with the assistance of the Commonwealth of Independent States (CIS) peace-keeping forces and the United Nations Observer Mission in Georgia (UNOMIG),

Expressing its satisfaction with the close cooperation and coordination between UNOMIG and the CIS peace-keeping force in the performance of their respective mandates and *commending* the contribution both have made to stabilize the situation in the zone of conflict,

. . . . . .

3. *Reaffirms* its full support for the efforts of the Secretary General aimed at achieving a comprehensive political settlement of the conflict, including on the political status of Abkhazia, respecting fully the sovereignty and territorial integrity of Georgia, as well as for the efforts that are being undertaken by the

Russian Federation in its capacity as facilitator to intensify the search for a peaceful settlement of the conflict, and *encourages* the Secretary-General to continue his efforts, with the assistance of the Russian Federation as facilitator, and with the support of the Organization for Security and Cooperation in Europe (OSCE), to that end;

. . . . . .

8. *Calls upon* the parties to improve their cooperation with UNOMIG and the CIS peace-keeping force in order to provide a secure environment for the return of refugees and displaced persons and *also calls upon* them to honour their commitments with regard to the security and freedom of movement of all United Nations and CIS personnel and with regard to UNOMIG inspections of heavy weapons storage sites;

9. *Welcomes* the additional measures implemented by UNOMIG and the CIS peace-keeping force in the Gali region aimed at improving conditions for the safe and orderly return of refugees and displaced persons, and all appropriate efforts in this regard."

As appropriate, the Court refers back to these standard paragraphs and highlights particular elements later in this part of the Judgment.

49. In September 2003 the Council of Heads of States of the CIS, expressing its gravest concern over unsettled problems resulting from the conflict in Abkhazia (Georgia), decided to extend the term of stay and the mandate of the collective peacekeeping forces until a conflicting party requested that the operation should be discontinued, in which event the withdrawal was to be effected within a month; the concluding statement on the meetings between President Putin and President Shevardnadze, held on 6 and 7 March 2003, was essentially to the same effect. It was only after the armed conflict of August 2008 that Georgia made such a request, on 1 September 2008.

4. Documents and statements from the period before CERD entered into force between the Parties on 2 July 1999

50. The Court recalls that it is examining the documents and statements issued before 2 July 1999 and invoked by Georgia in light of Georgia's contention that its dispute with the Russian Federation "over ethnic cleansing is long-standing and legitimate and not of recent invention" (paragraph 34 above). These earlier documents and statements may help to put into context those documents or statements which were issued or made after the entry into force of CERD between the Parties.

51. The earliest document invoked by Georgia as supporting its submission that it has a dispute with the Russian Federation about racial discrimination is a letter of 2 October 1992 from the Vice-Chairman of the State Council of Georgia to the President of the Security Council (United Nations doc. S/24626). That letter and a related appeal to the CSCE described aspects of the "large-scale offensive" in Abkhazia by "Abkhaz separatists in conjunction with mercenary terrorists", and continued that "[t]he conspiracy of the Abkhaz separatists and the reactionary forces in Russia is quite apparent". Both documents also claimed that the attackers were armed

with "tanks and other modern weaponry, the kind the Russian army is currently equipped with". The appeal added that the influx of organized armed groups from the territory of the Russian Federation had increased, by land and sea routes, controlled by the Armed Forces of the Russian Federation. Contrary to the submission made by Georgia to the Court, the statements do not claim the Russian Federation was facilitating ethnic cleansing. Accordingly, the Court does not consider that they are evidence that the Russian Federation was participating in support, sponsorship and defence of the discriminatory activities of the separatist authorities in the early 1990s, as Georgia has alleged.

52. On 17 December 1992 the Georgian Parliament adopted a statement which referred to "the mass shooting of civilian Georgian population and the policy of ethnic cleansing" and to "armed Abkhaz separatists together with Russian reactionary forces apparently follow[ing] a violent way of disrupting Georgia's territorial integrity". It continued by listing alleged "immediate involvement of Russian armed forces in the conflict on the side of the extremist separatists". The emphasis throughout is on the alleged use by the Russian Federation of armed force and disruption of Georgia's territorial integrity and sovereignty. The Georgian Parliament does not claim that the Russian Federation had engaged in ethnic cleansing. Accordingly, the Court cannot take the Parliamentary statement into account for the purposes of the present case.

53. In a Note Verbale to the Secretary-General of 25 December 1992, Georgia forwarded a letter from Mr. Shevardnadze, Chairman of the Georgian Parliament and Head of State, about "[t]he illegal penetration of the Georgian territory by foreign nationals fighting for the Abkhaz military units against Georgia . . . Particularly disturbing is the participation of the Russian troops stationed in Abkhazia on the side of Abkhaz extremists." (United Nations doc. S/25026.) Again the emphasis was on the alleged use of armed force and the violation of Georgia's territorial integrity as well as on the peaceful settlement of what was referred to as "the Abkhaz problem". While the letter referred to the bombing of civilian targets by "the reactionary forces ensconced within the political circles of the Russian Federation", the letter distinguishes these forces and circles from the Government of the Russian Federation. Further, it does not mention racial discrimination. For those reasons, the Court does not consider that this letter demonstrates the existence of a dispute between the two Parties about racial discrimination.

54. On 1 April 1993 the Parliament of Georgia, in an appeal to the United Nations, the CSCE and international human rights organizations, stated that a "policy of ethnic cleansing is being implemented in a part of the Georgian territory, Abkhazia, that is controlled by the separatist group of Gudauta, by means of Russian troops". This "policy" it evaluated as a continuation of aggression, aimed at Georgia's territorial integrity and independence. The Georgian Parliament added that "Russia . . . bears full responsibility for the . . . policy." The Georgian Parliament on the same day issued a Decree to the same effect and called on the Council of National Security and Defence of Georgia to take all measures necessary to ensure the return of IDPs to their homes. There is no evidence that this statement and Decree were endorsed by the Georgian Executive. The Court accordingly cannot give them any legal significance for the purposes of the present case.

55. On 27 April 1993 the Georgian Parliament, in a Decree on the withdrawal of Russian Military Units from the conflict zone in Abkhazia, expressed its belief "that the root cause of the tragic events in Abkhazia, Georgia is the Russian Federation's attempt to annex, in fact, a part of the territory of Georgia" and decreed that "[t]he Head of State of Georgia shall appeal to the President of the Russian Federation to withdraw the Russian troops from Abkhazia". It recited that "[g]enocide and ethnic cleansing of the Georgian population is taking place in the territory under the control of the Russian troops and Abkhaz separatists". The recital to the Decree alleged that the Russian Federation had violated the Moscow Agreement of 3 September 1992 (see paragraph 44 above). On the record before the Court, the Georgian Government did not make the appeal which the Parliament had decreed. What the record does show is that Russian Federation armed forces remained in Georgia under the various agreements reached in the early 1990s until the time of the armed conflict in August 2008 (paragraph 49 above). Taking account of the Parliamentary character of the Decree, the fact that it was not followed up by the Georgian Executive, and its emphasis on withdrawal of the troops rather than on ethnic cleansing, the Court cannot give it any legal significance for the purposes of the present case.

56. On 20 September 1993, President Shevardnadze in a letter forwarded to the President of the Security Council wrote from "besieged Sukhumi". He said that "[t]his land has been a cradle to both Georgians and Abkhaz" but that the Moscow Agreement of 3 September 1992 "was trampled by the boots of the mercenaries". He did not doubt the sincerity of the efforts of the President of the Russian Federation to promote a settlement to the conflict; "in this, however, he is impeded by the same force which is trying to crush us". He continued:

> "That notwithstanding, I appeal once again to Boris Nikolaevich Yeltsin, to the United Nations Security Council and Mr. Boutros-Ghali, to the entire progressive and democratic Russian nation and to all the peoples of the world: do not allow this monstrous crime to be committed, halt the execution of a small country and save my homeland and my people from perishing in the fires of imperial reaction. The world must not condone the annihilation of one of its most ancient nations, the creator of a great culture and heir to exalted spiritual traditions." (United Nations doc. S/26472.)

Given that appeal and the reference in the letter to Abkhazia being "the fuse with which [the Abkhaz separatists] intend to blow up not only Shevardnadze's Georgia but also Yeltsin's Russia", the Court does not consider that this letter can be read as Georgia making a claim regarding racial discrimination against the Government of the Russian Federation.

57. In a letter of 12 October 1993, the Georgian President requested a meeting of the Security Council. The letter began with a reference to the "savage massacre of the civilian population [by the Gudauta armed groups]". It declared the belief of the Georgian Republic that the facts about ethnic cleansing and genocide of the peaceful population in Abkhazia required a severe condemnation by the Council. "If we take into consideration multiple statements by Abkhaz separatists, we need to acknowledge that there is a serious threat placed upon the territorial integrity of the Georgian Republic." He expected the Council to use its authority "to coerce Abkhaz leaders to cease their abominable violations of human dignity and the heartless slaughter of

these persecuted ethnic Georgians", and expressed the hope that the Council would instruct all United Nations members to desist in their support of Abkhaz separatists. The only reference to the Russian Federation was to the fact that the Gudauta side was "equipped with state-of-the-art weapons, currently at the disposal of the Russian military forces" (United Nations doc. S/26576). Given that the only reference to the Russian Federation in the letter was an incidental one, and that the letter emphasized the responsibility of Abkhaz separatists, the Court does not consider that the letter makes a relevant claim against the Russian Federation.

58. On 12 October 1994, the Georgian Parliament in a statement about the situation in the Georgian-Abkhaz conflict zone said it had become "extremely tense again". The statement made various allegations against "the Abkhaz separatists", in particular relating to their impeding the return of thousands of refugees. All the "facts ha[d] taken place in the 'security zone', which must be controlled by the peacekeepers of the Russian Federation". The statement concludes by rejecting any separation of Abkhazia from Georgia and calling on the international organizations involved in the peace process and the Russian Federation for the release of kidnapped people and the suppression of any attempt of disrupting the peace process. The Court is unable to see any claim against the Russian Federation of a breach of its obligations relating to the elimination of racial discrimination in that Parliamentary statement.

59. The Georgian Parliament on 17 April 1996 adopted a resolution on measures for the settlement of the conflict in Abkhazia. It stated that "separatist forces", using the most severe methods, through ethnic cleansing and genocide, had separated Abkhazia from Georgia for the time being. It continued:

> "Despite long-standing negotiations between the sides participating in the conflict of Abkhazia under the auspices of the UN and mediated by Russia, the intransigent stand of separatists obstructed compromise on the questions of the repatriation of hundred thousands of refugees and the determination of the status of Abkhazia within the territory of Georgia. The separatist regime uses every means to strengthen its military potential, to set up independent state structures and attributes, to distort history, and to spread misanthropic racist ideology. The CIS Heads of States decisions taken in Almaaty, Minsk and Moscow are not implemented. The separatists with the support of external forces purposefully and unilaterally violate these agreements. Peacekeeping Forces, designated by Russia in agreement with the CIS and the UN, to this day are unable to fulfill their function. They failed to secure the safety of the population, to prevent ethnic cleansing and genocide of the Georgian population, to render a real assistance to return refugees and internal displaced people to their homes."

The Parliamentary resolution referred to the Russian Federation "as an interested side", along with the United Nations, and not as a participant in the conflict. The only other references to the Russian Federation were to the mandate and to the withdrawal of the peacekeeping forces:

> "As the Russian Peacekeeping Forces under the CIS mandate cannot provide the safe return of internally displaced persons and refugees and the protection of their lives and dignity, and in the event that the current mandate is retained and Georgian proposals are not considered in a new mandate, then the peacekeeping operations shall be considered as having no prospects and Peacekeeping Forces shall be withdrawn within two month's time."

Again there is no claim regarding the Russian Federation's compliance with its obligations relating to the elimination of racial discrimination. Rather, the claim is that the peacekeeping forces are unable to fulfil their functions. Accordingly, the Court sees this Parliamentary resolution as having no legal significance for the purposes of the present case.

60. On 30 May 1997 the Georgian Parliament issued a "Decree on the Further Presence of Armed Forces of the Russian Federation deployed in the zone of Abkhaz Conflict under the Auspices of the Commonwealth of Independent States". Like the Decree described in paragraph 55, it dealt with the withdrawal of the Russian Federation troops, but only in certain circumstances. It notes in its first sentence that "no tangible progress has been achieved, either in terms of return of refugees and IDPs to their homes or in terms of restoration of jurisdiction of Georgia in Abkhazia". The peacekeeping forces, it continued, "carr[ied] out the function of border forces, thereby substantially supporting and strengthening the separatist regime of Abkhazia, which . . . opposes . . . step by step return of refugees and IDPs to their homes". But those Parliamentary statements provide arguments for the proposed actions relating to the withdrawal of troops and do not expressly allege breaches by the Russian Federation. In the opinion of the Court, they provide no basis for finding that a dispute exists between the two Parties concerning the Russian Federation's compliance with its obligations owed to Georgia relating to the elimination of racial discrimination.

61. The Georgian Parliament on 27 May 1998 made a statement that: "The recent tragedy in Gali District once again demonstrated that the Abkhaz separatists continue implementation of the policy of genocide and ethnic cleansing in the territory occupied by them." It continued with references to "the Abkhaz separatists" and the "armed separatists", and stated that

> "[t]he Russian peacekeeping forces, deployed in the region under the auspices of the Commonwealth of Independent States, did nothing to confront the actions of the Abkhaz side. Instead, in a number of cases, they assisted separatists in conducting punitive operations against peaceful population.
>
> The conduct of peacekeepers during the 20-26 May events in Gali District, amounted to a gross violation of bilateral and multilateral agreements, total ignorance of Decisions by the Council of CIS Heads of States and of the UN Security Council.
>
> The Parliament of Georgia declares that together with the separatist leaders, the CIS peacekeeping forces are to a large extent responsible for the tragedy in Gali District, as they in fact facilitated raids against peaceful population and destruction of villages in their entirety."

There is no evidence that this Parliamentary statement, directed at "separatists" and alleging violations of agreements which could not at that time have included CERD, was known to the authorities of the Russian Federation. Those authorities would, by contrast, have known that on 26 May 1998 Georgia had written to the President of the Security Council referring to "the recent tragic events that have taken place in the Gali region of Abkhazia, Georgia". That letter discussed the actions of "the armed Abkhaz military units" and, referring to one situation, stated that "the interference of the Commonwealth of Independent States (CIS) peacekeepers averted the massacre of the Georgian population" (United Nations doc. S/1998/432). The letter continues that the CIS peacekeepers "have so far been unable to prevent the carnage", not that they were supporting or participating in it.

62. On 16 June 1998, the Georgian Permanent Mission again wrote to the President of the Security Council expressing Georgia's "extreme indignation in connection with the developments in the Gali district . . . where the ethnic cleansing of the Georgian population is continuing openly". All the actions described in the statement are attributed to "so-called Abkhaz militia forces" and "Abkhaz separatist leaders". The statement concluded by expressing the Government's "confidence in the ability of international political organizations, first of all, the United Nations and the Commonwealth of Independent States, to assess the situation that has come about and take urgent measures" (United Nations doc. S/1998/516). Again, the Court observes the lack of any allegation directed at the Russian Federation regarding compliance with its international obligations. On the contrary, Georgia was looking to the Russian Federation, in its role within the Security Council and the CIS, to address the situation. Accordingly, the Court cannot give any legal significance to this letter for the purposes of this case.

63. The Court has now reviewed the documents and statements which Georgia invokes to demonstrate that in the period before it became bound by CERD it had a dispute with the Russian Federation about racial discrimination by the latter, especially Russian Federation forces, against ethnic Georgians. The Court concludes that none of the documents or statements provides any basis for a finding that there was such a dispute by July 1999. The reasons appear in the foregoing paragraphs in respect of each document or statement. They relate to the author of the statement or document, their intended or actual addressee, and their content. Several of the documents and statements emanated from the Georgian Parliament or Parliamentary Officers and were neither endorsed nor acted upon by the Executive. Finally, so far as the subject-matter of each document or statement is concerned, it complains of actions by the Abkhaz authorities, often referred to as "separatists", rather than by the Russian Federation; or the subject-matter of the complaints is the alleged unlawful use of force, or the status of Abkhazia, rather than racial discrimination; and, where there is a possibly relevant reference, usually to the impeding of return of refugees and IDPs, it is as an incidental element in a larger claim — about the status of Abkhazia, the withdrawal of the Russian Federation troops or the alleged unlawful use of force by them.

64. It follows from this general finding of the Court and the specific findings made in earlier paragraphs that Georgia has not, in the Court's opinion, cited any document or statement made before it became party to CERD in July 1999 which provides support for its contention that "the

dispute with Russia over ethnic cleansing is long-standing and legitimate and not of recent invention" (paragraph 34 above). The Court adds that even if this were the case, such dispute, though about racial discrimination, could not have been a dispute with respect to the interpretation or application of CERD, the only kind of dispute in respect of which the Court is given jurisdiction by Article 22 of that Convention.

5. Documents and statements from the period after CERD entered into force between the Parties and before August 2008

65. It is convenient first of all to consider as a group the reports made after 1999 by the two Parties to treaty monitoring committees. These reports relate to CERD, the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR), and the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). Georgia in its first report to the Committee on the Elimination of Racial Discrimination, submitted in 2000, said this:

> "Georgia unreservedly condemns any policy, ideology or practice conducive to racial hatred or any form of 'ethnic cleansing' such as that practised in the Abkhaz region of Georgia following the armed conflict of 1992-1993. Hundreds of thousands of displaced persons, a large majority of whom are women, elderly persons and children, lost their homes and means of survival and became exiles in their own country. Such has been the outcome of the policy pursued by the authorities of the self-proclaimed 'Republic of Abkhazia', the aim of which has been to 'cleanse' the region of Georgians and — in many cases — representatives of other nationalities as well. Georgia firmly believes that a policy founded on racial hatred is a fundamental infringement of human rights and should be unconditionally proscribed, condemned and eliminated." (United Nations doc. CERD/C/369/Add.1.)

The Court observes that this passage — the only one invoked by Georgia — directs no criticism against the Russian Federation, nor was such criticism made by the Georgian representative before the Committee, by any member of the Committee or by the Committee in its concluding observations (United Nations docs. CERD/C/SR.1453, CERD/C/304/Add.120, CERD/C/SR.1454). Indeed, the Georgian representative before the Committee said that her Government was currently involved in negotiations to resolve the complicated situation and that the Russian Federation might have an important part to play in that regard.

66. Georgia quotes this passage from its combined second and third reports to the Committee on the Elimination of Racial Discrimination submitted on 21 July 2004:

> "Under this article of the Convention, it must be reiterated that, owing to the continuing political crisis in Abkhazia and South Ossetia, during the reporting period Georgia was not in a position to protect citizens of these regions from criminal acts. In this connection, it should be stressed that Georgia does not absolve itself of responsibility for the situation in this part of its territory, which includes its responsibility to safeguard human rights and freedoms." (United Nations doc. CERD/C/461/Add.1.)

Again, the Court observes that the passage directs no criticism against the Russian Federation, nor did the Georgian representative appearing before the Committee or any member of the Committee or the Committee itself (United Nations doc. CERD/C/SR.1706).

67. In reporting in 2006 to the Committee against Torture (United Nations doc. CAT/C/SR.699), Georgia stated that:

> "A particular problem arose in Abkhazia, where Russian peacekeepers were in some instances aiding or abetting criminal separatists and were thereby, actively or by omission, contributing to human rights violations in the region. Most of the human rights violations in the territory affected ethnic Georgians, and the de facto authorities in Abkhazia bore a heavy responsibility for such violations."

Although there was some criticism of the Russian Federation here, this did not amount to an allegation against the Russian Federation regarding the latter's compliance with its obligations relating to the elimination of racial discrimination under CERD.

68. The Russian Federation in its submissions calls attention to the fact that Georgia, in reporting on its implementation of the two International Covenants on human rights, including in its report on the ICCPR in 2006 (United Nations doc. CCPR/C/GEO/3), similarly directed no criticism regarding racial discrimination against the Russian Federation; Georgia did not contest this submission. The Russian Federation also notes that under CERD, Georgia had available to it the procedure for State to State complaints provided in Articles 11 to 13.

69. The Court observes that a State may claim that another State is in breach of its obligations under CERD without initiating that process. It also observes that in general the process under which States report on a regular basis to the monitoring committees operates between the reporting State and the committee in question; it is a process in which the State reports on the steps which it has taken to implement the treaty. The process is not designed to involve other States and their obligations. Taking account of those features and of the actual reports referred to in this case, the discussions of and the observations on them, the Court does not consider that in this particular case the reports to the committees are significant in determining the existence of a dispute.

70. In respect of other post-July 1999 statements, Georgia begins by referring to a meeting on 14 September 2000 at which its Ambassador in Moscow observed to the Deputy Chairperson of the State Duma of the Russian Federation that representatives of the legislative and executive bodies and other bodies of the Russian Federation had established active contacts with the separatist régime of Abkhazia. The Georgian notes of that meeting, contrary to Georgia's submission to the Court, make no reference to ethnic cleansing but do refer to the deadlock in negotiations caused by the Abkhazian separatist administration.

71. The next document invoked by Georgia is a resolution adopted by the Georgian Parliament in October 2001. This resolution begins with a reference to the suffering arising "from the tragic results of separatism, international terrorism and aggression". It alleged that since the deployment of Russian Federation peacekeepers under the auspices of the CIS, the policies of ethnic cleansing had not stopped. In this resolution, the Russian Federation now appeared as a party involved in the conflict. Since its peacekeeping forces had failed to carry out their mission, the Parliament considered the further presence of the CIS collective peacekeeping forces inexpedient and proposed to the President of Georgia (1) to implement the procedures for the withdrawal of those forces and (2) to appeal to the United Nations, the OSCE and governments of friendly countries to deploy international peacekeeping forces in the conflict zone. The Georgian Government took no action at that time to have the peacekeeping forces withdrawn and in terms of point (2), as noted above (paragraph 47), it had, with the Russian Federation, earlier called for an international peacekeeping force possibly including a Russian Federation contingent.

72. This Parliamentary resolution is to be seen in the context of the unanimous Security Council resolutions 1339 and 1364 adopted earlier in 2001, in January and July. Those Council resolutions again welcomed the important contributions that UNOMIG and the CIS peacekeeping forces continued to make in stabilizing the situation in the zone of conflict, and strongly supporting the sustained efforts of the Secretary-General and his Special Representative, with the assistance of the Russian Federation, in its capacity as facilitator, as well as the Group of Friends of the Secretary-General and of the OSCE, to promote the stabilization of the situation and the achievement of a comprehensive settlement. A Georgian representative attended the January 2001 meeting of the Security Council. In his speech he expressed Georgia's "appreciation to the Secretary-General and his Special Representative for Georgia . . . as well as the Group of Friends of the Secretary-General, for their tireless efforts in the process of achieving a comprehensive settlement of the conflict in Abkhazia, Georgia". He emphasized the upcoming meetings between Abkhaz and Georgian representatives and, while he was critical of one paragraph of the draft resolution before the Council, he made no reference at all to the paragraphs about CIS peacekeepers and the role of the Russian Federation as facilitator. Without further discussion, the resolution was adopted (United Nations doc. S/PV.4269).

73. The Court, in assessing the October 2001 Parliamentary resolution, as with the other documents and statements invoked by the Parties, must have regard, among other matters, to the distinct roles of the Russian Federation, in the CIS peacekeeping forces, as facilitator and as one of the Friends of the Secretary-General. In that context and given that the Parliamentary resolution had not been endorsed by the Georgian Government, the Court cannot give it any legal significance for the purposes of the present case.

74. Security Council resolution 1393 (2002), containing the standard paragraphs, had been adopted on 31 January 2002, when the Georgian Parliament on 20 March 2002 adopted a resolution which noted that its October 2001 resolution had not been acted on and resolved that it was necessary to implement its requirements. The new Parliamentary resolution criticized the CIS

peacekeeping forces: in reality, it said, they fulfilled the functions of border guards between Abkhazia and the rest of Georgia and failed to perform the duties envisaged by their mandate of providing protection of the population and creation of conditions for the secure return of IDPs. Further, major violations of human rights and freedoms on an ethnic basis had been carried out with the assistance of external military force. Once again, the Georgian Executive did not act upon this resolution, and it is to be seen in the context of the series of Security Council resolutions and the actions taken under, and by reference to, them. Accordingly the Court gives the Parliamentary resolution no legal significance for the purposes of the present case.

75. In April 2002, the Minister for Foreign Affairs of the Russian Federation in talks with the Georgian Ambassador in Moscow denied that the Russian Federation had supplied arms and ammunition to Abkhazia. It does not appear from the Georgian record of the talks that any claims which were made in those talks related to ethnic or racial discrimination.

76. In January 2003 a delegation of the Georgian Parliament, led by its Speaker, had discussions in Moscow with a group of Russian Federation parliamentarians including the Chairperson of the Council of the Federation and the Chairperson of the State Duma. In its submissions, Georgia called attention to a statement by the Georgian side, when talking about the CIS peacekeeping forces, suggesting the Russian Federation peacekeepers move out of the Gali District to facilitate the process of refugee return which, it said, the Russian Federation side rejected. The Georgian record of the discussion continued in this way:

> "While discussing the possibility of withdrawal of peacekeeping forces from Abkhazia, the Russian side was expressing a clearly negative attitude. However, it has been pointed out many times that if there is relevant request from the Georgian side, the Russian peacekeeping forces will leave the territory of Georgia. According to the statement of Russia, if the 'blue helmets' are pulled out of Abkhazia, the UN observers will also leave the region. The Russian colleagues expressed doubt about how the Georgian party would be able to control the situation independently and avoid the threat of renewing the hostilities."

This is an exchange between parliamentarians and no claim of racial discrimination against the Russian Federation appears in that exchange. Accordingly, the Court can give it no legal significance for the purposes of the present case.

77. In January 2004, Mikhail Saakashvili, shortly after his election as President of Georgia but before he assumed office, in a radio interview in answering a question about Abkhazia, said:

> "it is primarily the issue of our relations with Russia. The Russian generals are in command there, they have a military contingent there which played a very negative role . . . [M]ost of the population there is ethnically Georgian or was ethnically Georgian. Those people were thrown out by Russian troops and local separatists and we need to change the situation."

Georgia submits that this statement directly accused the Russian Federation and its forces of complicity in ethnic cleansing against ethnic Georgians in Abkhazia. While there may be some force in that contention, the President-elect immediately followed the passage emphasized by Georgia by saying that "primarily the way to change that [the situation in Abkhazia] is peaceful talks, offering them [the people in Abkhazia] better alternatives in terms of Georgian economic development, Georgia's integration into Europe". He said of Abkhazia "[b]asically that is a lawless place . . . it's really a black hole . . . Of course Russia doesn't want to give up the control over it so we have to talk to them and make them realise that we're an independent state . . . But on the other hand we want to be on good terms with them." The statement has to be seen in the immediate context of the wide-ranging and informal character of the interview and in the broader context of the relationship between the two countries in relation to Abkhazia. Security Council resolution 1524 (2004) adopted two weeks after the interview contained the standard paragraphs commonly included in Security Council resolutions, relating among other things to the various roles of the Russian Federation (see paragraphs 48 and 71). Further, the record does not include any specific follow-up by the new President or under his instructions to whatever claim might have been made against the Russian Federation in the interview.

78. The next relevant document in the record is a letter of 26 July 2004 by President Saakashvili to President Putin. It primarily concerns contingents of "illegal armed formations" in South Ossetia, beyond the numbers agreed in 2003; armed attacks; the granting of Russian Federation citizenship there; criminal activity; and the resulting need for political dialogue at a plenipotentiary level and an increased role for the OSCE. Regarding Abkhazia, the Georgian President raised issues about the territorial integrity of Georgia. The President of the Russian Federation in his reply proposed measures which should be taken with a view to the stabilization of the situation and the creation of conditions for the resumption of the political dialogue. The letters do not mention the return of refugees and IDPs.

79. On 26 January 2005, the Georgian Permanent Representative to the United Nations in a letter to the President of the Security Council wrote about "the recent developments in the conflict-resolution process in Abkhazia, Georgia" (United Nations doc. S/2005/45) including the "self-styled presidential elections" there, characterized as "illegal and illegitimate"; the fact that nearly 80 per cent of the current population has Russian citizenship; and the ignoring by the Russian Federation of the basic visa régime. Despite those developments, the Ambassador continued, the central authorities of Georgia were ready to resume negotiations with the Abkhaz side. The letter then referred to "refugees and IDPs — victims of ethnic cleansing — who already for longer than a decade are waiting for their basic right — the right to live at home — to materialize". Referring to abductions which allegedly occurred on "election" day, the letter claimed that "these excesses were committed in front of CIS peacekeepers, who did nothing to protect peaceful civilian people . . . I have to state once more that the CIS peacekeeping force is rather far from being impartial and is often backing Abkhaz separatist paramilitary structures." Two days later the Security Council at a meeting which had that letter before it and which was attended by a Georgian representative adopted, without any debate (United Nations doc. S/PV.5116), a resolution which included the standard references to the CIS peacekeeping forces and the Russian Federation's role as a facilitator (resolution 1582 (2005)).

80. On 11 October 2005 the Georgian Parliament in a resolution "condemn[ed] the recent developments in the conflict regions existing on the territory of Georgia (Abkhazia, and the former South Ossetian Autonomous District)". The resolution assessed as "extremely negative" the activity and the fulfilment of the current mandate by the peacekeeping forces in Abkhazia and the former South Ossetian Autonomous District and it contemplated the cessation of those peacekeeping operations and the denunciation of the relevant international agreements in certain circumstances starting from February 2006 in South Ossetia and July in Abkhazia.

81. This Parliamentary resolution was referred to in a letter of 27 October 2005 by the Permanent Representative of Georgia to the President of the Security Council. That letter did not contain any endorsement of the Parliamentary resolution. The Permanent Representative's letter mentioned one positive development (a 4 August 2005 meeting on security guarantees) which, he said, had been marred by a large-scale Abkhaz military exercise in the zone of responsibility of the Russian Federation peacekeeping forces. The letter also mentioned the banning of instruction in the Georgian language in Gali schools — a claim which, in the Court's assessment, is not directed at the Russian Federation. It was impossible, the letter continued, to avoid commenting on the behaviour of the facilitator — the Russian Federation — especially when several alarming trends, which were listed, had taken place. Annexation was being carried out against a small and friendly neighbouring country. The Permanent Representative, after referring to the Parliamentary resolution, said this:

> "It seems that the Russian-led peacekeeping operation has, in fact, exhausted its potential and the only effective way is to have a full-scale international, I would underline — truly international — United Nations-led peacekeeping operation.
>
> The Georgian leadership is firmly committed to a peaceful settlement of the conflict on its territory, weighing ethnic inclusiveness and integration, safeguarding human rights and freedoms. Despite all of the above-mentioned we still believe that there is no military solution — on the contrary, we are confident that it is counterproductive. Our policy of proactive engagement has long-term goals to get Abkhaz society out of isolation, to expose them to democratic values and beliefs, recognizing fundamental human rights of internally displaced persons and refugees, first of all the right to return to their homes, regardless of their ethnicity, to establish an environment of trust and mutual respect." (United Nations doc. S/2005/678.)

The Court is unable to see in this letter any claim against the Russian Federation by the Georgian Government of breaches of obligations under CERD.

82. On 9 November 2005 the Georgian Permanent Representative transmitted the 11 October Parliamentary resolution to the United Nations Secretary-General. He asked that the resolution be circulated as a General Assembly document under agenda items concerning the prevention of armed conflict (item 12) and the review of peacekeeping (item 32), but made no reference to other items on that session's agenda, including racial discrimination (item 69) and displaced persons (item 39) (United Nations doc. A/60/552).

83. The official position of the Georgian Executive in this period was further illustrated in comments made by the Georgian Prime Minister in a December 2005 press conference, and which were subsequently circulated at a meeting of the JCC. Here the Prime Minister described the "extraordinarily constructive position of the Russian diplomacy in the matter [of the peace process in South Ossetia]", noted that "Russia is a guarantor of long-term peace in the Caucasus" and stated his belief that "the recent steps of Russia will bring positive momentum into the relations between the two countries".

84. On 26 January 2006, the Security Council held a private meeting on the situation in Georgia. The Official Communiqué of the meeting records only that a Georgian representative, the Special Envoy of the President of Georgia, made a statement and that a representative of the Russian Federation made a statement, without giving any indication of the content of the statements (United Nations doc. S/PV.5358). Georgia includes in its pleadings a "Statement by . . . [the] Special Representative . . .". That statement is very critical of various actions of the Abkhaz side. The statement contains this passage about the role of the Russian Federation:

> "One of the members of the Security Council, member of the Group of Friends and the facilitator of the peace process — namely the Russian Federation — suddenly has decided to disassociate itself from supporting the basic principle — principle of territorial integrity of Georgia within its internationally recognized borders . . . That is why for the first time in the history of Security Council deliberations we have no draft resolution prepared by the Group of Friends.
>
> Mr. President,
>
> This change of position of the one of the prominent members of P5 is not just a slight shift or correction. Renouncement of the principle of determining the status of Abkhazia within the State of Georgia does mean the following: support of the secessionism as a phenomenon; endorsement of ethnic cleansing of more than 300,000 citizens of Georgia; questioning the basic principle of the modern world architecture — the principle of territorial integrity and inviolability of internationally recognized borders.
>
> Mr. President,
>
> I am representing the people who were forcefully expelled from their homes and are not allowed to return. I am representing the people who count every day of their exile and who look with a hope to this Council for its work and resolutions. I am representing the community which follows very closely every move in the peace process in Abkhazia, Georgia."

The Court observes that the reference to "ethnic cleansing" does not include an allegation that the Russian Federation participated in, or facilitated, that action. After some delay, at the end of March 2006, the Security Council, with a Georgian representative present and without debate (United Nations doc. S/PV.5405), adopted resolution 1666 (2006) including standard paragraphs about the CIS peacekeeping forces and the role of the Russian Federation as facilitator, as well as a reaffirmation of the territorial integrity of Georgia.

85. On 15 February 2006, in a resolution forwarded to the Secretary-General by the Georgian Permanent Representative, the Georgian Parliament in terms of its resolution of 11 October 2005 assessed "extremely negatively" the fulfilment of the obligations by the peacekeeping forces in the former autonomous district of South Ossetia and assessed the actions of the Russian Federation as an ongoing attempt at annexation of this region of Georgia. It accordingly instructed the Government of Georgia to start the implementation of the provisions of that earlier resolution. Again, there is nothing in the record to show that the Georgian Government took those steps. As with the October 2005 Parliamentary resolution (paragraph 82 above), the 16 February 2006 letter of transmittal from the Georgian Permanent Representative to the Secretary-General requested that the letter and the February 2006 Parliamentary resolution be circulated as a General Assembly document under agenda items relating to armed conflict and peacekeeping, but not racial discrimination or displaced persons (United Nations doc. A/60/685).

86. On 18 July 2006 the Georgian Parliament adopted a resolution in terms of its resolutions of 11 October 2005 and 15 February 2006 about both regions. It said that, unfortunately, no progress had been achieved in terms of the settlement of the conflicts within the time frame defined by those resolutions. It continued:

> "Instead of demilitarization, the drastic increase of military potential of those armed forces under subordination of de facto authorities of Abkhazia and the former Autonomous District of South Ossetia, drastic activation of terrorist and subversive actions, complete collapse of security guarantees for peaceful population, permanent attempts to legalize the results of ethnic cleansing the fact of which had been repeatedly recognized by the international community, massive violation of fundamental human rights and ever-increasing international criminal threats so characteristic of uncontrolled territories — this is a reality brought about as a result of peacekeeping operations."

The resolution then said that the rejection by the Russian Federation of a peace plan "can be assessed as support for separatists and as a permanent attempt to annex Georgia's territory". The Parliament resolved to entrust the Government of Georgia with the task of launching necessary procedures to immediately suspend the so-called peacekeeping operations and to have the armed forces of the Russian Federation withdrawn.

87. In this case the authorities of the Russian Federation were plainly aware of the Georgian Parliament's action since on 19 July 2006, the day after it was adopted, the Permanent Representative of the Russian Federation to the United Nations transmitted to the Secretary-General a statement by their Foreign Ministry critical of the resolution. The statement includes the following passages:

> "The Russian Federation regards the decision as a provocative step designed to aggravate tension, destroy the existing format of negotiations and shatter the framework of legal agreements for the peaceful settlement of the Georgian-Abkhaz

and Georgian-Ossetian conflicts. The accusations that the decision makes against the Russian Federation constitute a disgraceful attempt to shift the blame to others.

. . . . . .

It should not be forgotten that the format of the negotiation process, which, besides the Russian Federation, involves the United Nations, the Organization for Security and Cooperation in Europe, the Commonwealth of Independent States and the member States of the Group of Friends of the Secretary-General on Georgia, was agreed upon by all parties to the conflicts. The irresponsible actions of Tbilisi are capable of ruling out any possibility of peaceful settlement of the conflicts.

The Russian Federation will take such measures as are necessary to ensure compliance with existing international agreements, prevent the destabilization of the situation in the region and protect the rights and interests of Russian citizens living there." (United Nations doc. S/2006/555.)

88. The Permanent Representative of Georgia transmitted the text of the 18 July 2006 resolution of the Georgian Parliament to the Secretary-General on 24 July 2006, again asking for it to be circulated to the General Assembly under the same agenda items as for the Parliamentary resolutions of October 2005 and February 2006 (see paragraphs 82 and 85 above) (United Nations doc. A/60/954). According to the record, the Georgian Government took no action in terms of the resolution.

89. The Court recalls Georgia's emphasis on those Parliamentary resolutions which were transmitted to the United Nations (paragraph 36 above), and sees it as significant that on all those occasions when the Georgian Government transmitted Parliamentary resolutions to the Secretary-General to be circulated as official United Nations documents, that Government did not refer to those agenda items which relate to the subject-matter of CERD, such as racial discrimination, or, as the case may be, refugees and IDPs, or, indeed, human rights instruments more generally.

90. On 11 August and 4 September 2006 the Georgian Permanent Representative transmitted to the Secretary-General and President of the Security Council Foreign Ministry statements about abuses of human rights in Abkhazia (United Nations docs. A/60/976-S/2006/638, S/2006/709). The primary allegations were against "the Abkhazian side", but it was also said that the Russian Federation (CIS) peacekeepers continued to "[turn] a blind eye to gross violation of . . . human rights". The Foreign Ministry stated that the "existing situation . . . leads us to register once more the incapability (or the absence of will) of the CIS peacekeeping forces to duly perform their functions, which points yet again to the necessity of modifying the existing format of peace operations . . .". According to the 4 September statement of the Ministry, the "Russian peacekeepers cannot . . . ensure the protection of the safety, dignity and human rights of the

peaceful population, including internally displaced persons and refugees, as prescribed by [four] Security Council resolutions". This fact "provide[d] an added proof of the correctness of the Georgian Parliament's decision to withdraw Russian peacekeepers . . .". The 11 August statement made specific reference to three conventions but not to CERD and neither of the two documents made direct claims against the Russian Federation of racial discrimination.

91. In October the Security Council, with no reference to the two documents, adopted resolution 1716 (2006) with standard provisions about the Russian Federation as a facilitator and the role of the CIS peacekeeping forces. Again, the Georgian representative who was present made no comment regarding the paragraphs in the draft resolution relating to the CIS peacekeepers and the role of the Russian Federation as facilitator, and the resolution was adopted without debate (United Nations doc. S/PV.5549). In view of these considerations, the Court does not consider that the Foreign Ministry statements have any legal significance for the purposes of the present case.

92. On 3 October 2006 the Georgian Permanent Representative to the United Nations in a statement at a press conference said this:

> "It is crystal clear, that the Russian peacekeeping force is not an impartial, nor international [contingent]. It failed to carry out the main responsibilities spelled out in its mandate — create favorable security environment for the return of ethnically cleansed hundreds of thousands of Georgian citizens. It became the force that works to artificially alienate the sides from one another."

Georgia in its submissions cites this statement as raising the dispute again — the Court presumes that this means the dispute about racial discrimination by the Russian Federation — but the Permanent Representative's next sentence was this:

> "The Russian political leader's statements and actions once again make clear that what we are dealing with is not a fundamentally ethnic conflict, but rather one stemming from Russia's territorial ambitions against my country."

Particularly taking into account this clarification by the Permanent Representative, the Court concludes that it cannot give any legal significance to the statement made at the press conference for the purposes of the present case.

93. On 14 November 2006 President Saakashvili, in an address to the European Parliament, which as an organ of the European Union contains no representatives from either Georgia or the Russian Federation, said that "over 300,000 Georgians were ethnically cleansed from Abkhazia in the early 1990s". President Saakashvili noted that "the Russian administration" had been accused of responsibility for these earlier events. His only reference, in a wide-ranging address, to disputes

was in the context of Georgia's "separatist problems": "[o]ur disputes continue because they are based on recidivist territorial claims . . ." President Saakashvili's statement demonstrates that the primary dispute concerned territorial claims and the references to ethnic cleansing by the Russian Federation were with respect to events which took place in the early 1990s. These events were not current at the time of the President's address, and pre-dated Georgia's accession to CERD. As such the Court does not see President Saakashvili's statement as evidence of a dispute between the Parties on matters under CERD. The Court takes the same view of the press statement made by the Georgian Foreign Ministry on 22 December 2006.

94. The President of Georgia in his address of 26 September 2007 to the General Assembly referred to the majority of residents of the two regions as "prisoners of the morally repugnant politics of ethnic cleansing, division, violence and indifference". He continued:

> "The story of Abkhazia, where up to 500,000 men, women, and children were forced to flee in the 1990s, is of particular relevance — one of the more abhorrent, horrible and yet forgotten ethnic cleansings of the twentieth century. In the time since Russian peacekeepers were deployed there, more than 2,000 Georgians have perished and a climate of fear has persisted." (United Nations doc. A/62/PV.7.)

Near the end of his address, he stated that "[t]he only obstacle to the integration of South Ossetia [into Georgia] is a separatist regime that basically consist of elements from security services from neighbouring Russia that have no historical, ethnic or cultural links to the territory". In respect of Abkhazia he had earlier said that "these disputes are no longer about ethnic grievances".

95. In September and October 2007, March and April 2008, the Georgian Permanent Representative to the United Nations sent statements by the Georgian Ministries of Foreign Affairs and Internal Affairs to the Secretary-General and President of the Security Council (United Nations docs. S/2007/535; S/2007/589; A/62/765-S/2008/197; A/62/810). The first, third and fourth are concerned with the status of the regions, the actions of separatists, and military activities. None make any reference to racial discrimination or ethnic cleansing (except for the last) or to the Russian Federation's responsibility for such actions. The last does refer to ethnic cleansing but only in the context of the Russian Federation "planning to recognize" the documents of authorities which were created through ethnic cleansing. Its call on the Russian Federation to engage more actively in the safe return of IDPs cannot, in the Court's opinion, be understood as a claim against the Russian Federation regarding compliance with its obligations under CERD, for instance a claim of impeding return of IDPs on racial grounds. Two other features of that document might be noted: first, it alleges breaches by the Russian Federation of three named conventions, but not CERD; secondly, when Georgia transmitted this statement to the Secretary-General on 17 April 2008, it requested that it be circulated as a General Assembly document under an agenda item relating to protracted conflicts in the region and the implications for international peace, security and development (United Nations doc. A/62/810).

The second statement contains this passage:

> "The Georgian side expresses its extreme concern about this fact [the identity of a militant who had been killed], proving that separatist illegitimate armed forces are constantly receiving support from a party which is supposed to be a facilitator of the conflict resolution process. Regretfully, we have been witnessing such a pattern of behaviour for 14 years. At the same time high-ranking Russian officials consider [sic] ordinary support and training to so-called anti-terrorist units, which in reality by nature are illegitimate military formations of the de facto Abkhaz regime, and are responsible for ethnic cleansing that took place in Abkhazia, Georgia.
>
> The Georgian Government once again reminds all States of paragraph 8 of Security Council resolution 876 (1993), in which the Council called on all States to prevent the provision from their territories or by persons under their jurisdiction of all assistance, other than humanitarian assistance." (United Nations doc. S/2007/589.)

Again the reference to ethnic cleansing is not stated as a claim against the Russian Federation regarding compliance with its obligations under CERD.

96. Georgia referred the Court to six further statements made between January 2006 and September 2007 by its Foreign Ministry and by its Ministry for Conflict Resolution Issues. The complaints against the Russian Federation are limited to the Russian peacekeepers' "culpable inaction", "criminal inaction" and "even encouragement" of the actions of the separatist authorities, and are not related to racial discrimination. Accordingly, the Court gives the statements no legal significance for the purposes of the present case. (See similarly the statement of 22 November 2007.)

97. On 19 April 2008 the Georgian Foreign Ministry in a press statement referred to the "*de facto* annexation of Georgia's integral parts . . . and neglect of human rights of an absolute majority of the regions' population — victims of ethnic cleansing". The statement is primarily about the status of the two regions and Russian Federation policies and practices relevant to those regions and makes no claim against the Russian Federation about racial discrimination.

98. On 21 April 2008 the Georgian President made a "special statement" about "aggressive steps taken" by the Russian Airforce. The only reference to racial discrimination was to past events which occurred before CERD entered into force between the Parties and related to the 1992-1993 Russian Federation bombing: "[e]thnic cleansing . . . took place [at] that time and [a] new aggressive regime was established".

99. On 12 May 2008 the President of Georgia addressed representatives of five European Union member States who were visiting Georgia, about what he referred to as the peace plan relating to Abkhazia, avoiding conflict, securing territorial integrity and return of refugees, alleged breaches of norms of international conduct by the Russian Federation, relating to incursions into

Georgian airspace, illegal movement of Russian Federation peacekeeping forces, the status of the regions and the issuing by the Russian Federation of passports. The European Union, he said, must state that it will never recognize any kind of breakaway of Georgian territory and will never recognize the results of ethnic cleansing. Again there is no claim against the Russian Federation of breaches of its obligations under CERD.

100. The final exchange between Georgia and the Russian Federation before armed conflict broke out in August 2008 consists of a letter of 24 June 2008 from President Saakashvili to President Medvedev and President Medvedev's reply of 1 July. The Georgian President offered a number of proposals for the President of the Russian Federation to consider "directed at the substantial decrease of tension, restoration of trust and assistance in peaceful settlement of the conflict in Abkhazia, Georgia". Two of the proposals refer to refugees and IDPs.

> "Free Economic Zone will be created in the territory of Gali and Ochamchire Districts of Abkhazia, where the population is practically absent at present. Mixed Georgian-Abkhazian Administrations and mixed Georgian-Abkhazian law enforcement organs will be created in both districts. Safe and dignified return of refugees and IDPs to Gali and Ochamchire Districts will be organized. The Georgian side undertakes to provide social welfare fully for the population of these districts.
>
> . . . . . .
>
> [T]he parties to the conflict could also conclude a separate agreement about non-use of force and return of IDPs and refugees to the entire territory of Abkhazia, Georgia."

An additional proposal was for the continuation of the peacekeeping operation of the CIS with a reviewed mandate. The Georgian President proposed that the Russian Federation be one of the guarantors of the agreements which he was to negotiate in line with these proposals.

101. The President of the Russian Federation in his reply said that he had attentively reviewed the proposals on the problems of regulation of the Georgian-Abkhazian conflict, noting that "[m]ost of the elements can be relevant at different stages of regulation" and that "[y]our principal partner must be Abkhazia" which would presume a full-scale negotiation process. Having stated that "[u]nfortunately, the sides [to the conflict] feel deep mutual mistrust as of today", the President of the Russian Federation continued:

> "In this situation, frankly speaking it is difficult to imagine, for example, creation of joint Georgian-Abkhaz administration or law-enforcement organs in any district of Abkhazia. It is also apparently untimely to put the question of return of refugees in such a categorical manner. Abkhazs perceive this as a threat to their national survival in the current escalated situation and we have to understand them.

> Because of this, I propose to concentrate on the initial and most important for today — the real measures directed towards decreasing the tensions and restoration of trust that will allow resuming the process of Georgian-Abkhaz regulation which was ceased in July 2006."

He then went on to address other matters in the Georgian list, and concluded with reference to two of them in this way:

> "We are also ready to discuss your proposal regarding the creation of Russian-Georgian intergovernmental commission on the issues of economic rehabilitation of Abkhazia. As far as I understand that would mean cancellation of sanction introduced in January 1996 on the basis of the Decision of the CIS Heads of States on the Sanctions against Abkhazia. By the way, in terms of directions, this would have been consonant with the measures taken by Russian side within the framework of the April Order of the President of the Russian Federation.
>
> And of course we will welcome Georgia to join the process of preparation for 2014 Olympic Games in Sochi.
>
> In sum, quite a specific and positive agenda of our joint actions is being emerged."

102. Georgia sees the response on the issue of the return of IDPs as "a categorical rejection" of their return, and evidence of a legal dispute between Georgia and the Russian Federation "concerning the return of ethnic Georgians to the regions of Georgia from which they had been expelled because of their ethnicity".

103. As the Parties have said, this exchange is important, given its timing, the position and responsibility of the authors of the letters and the contents of the letters. The Court finds that the letters do not evidence a dispute between the Parties about the obligations of the Russian Federation in respect of the impeding of the return of refugees and IDPs for reasons of racial discrimination: Georgia is approaching the Russian Federation as a facilitator, as a potential guarantor and in terms of its role in the CIS peacekeeping forces. The Abkhaz side (the other "party to the conflict") is the party which under the proposals would, with Georgia, have the role of facilitating the return of the IDPs and refugees. No proposal was made by Georgia to the Russian Federation for the latter to take action with respect to the return of IDPs and refugees.

104. The final document on which Georgia relies, before those issued at the time of the armed conflict in August 2008, is a press release of its Foreign Ministry issued on 17 July 2008. In answer to a question relating to a statement by the Foreign Minister of the Russian Federation about the signing of a non-use of force agreement between Georgia and Abkhazia and the return of refugees, the Ministry said that the statement was completely at variance with the mandate of the CIS collective peacekeeping forces: they were to create conditions for the unconditional and dignified return of refugees and IDPs. Moscow's true design it said, was

> "to legalize results of the ethnic cleansing instigated by itself and conducted through Russian citizens in order to make easier annexation of the integral part of Georgia's internationally recognized territory, which the Russian Federation tries to achieve via military intervention in Abkhazia, Georgia. Moscow's insistence on the signing of another treaty on the non-use of force serves the same immoral goal as well."

The Court considers that the reference to ethnic cleansing may again be read as relating to the events of the early 1990s. This reference is to be understood in the context of the principal theme of the press release, that is, the concern of Georgia in relation to the status of Abkhazia and the territorial integrity of Georgia. In light of the record it remains unclear whether the press release came to the attention of the Russian Federation. In any case, the press release raised the issue of the proper fulfilment of the mandate of the CIS peacekeeping force, and not the Russian Federation's compliance with its obligations under CERD.

105. The Court, on the basis of its review of the documents and statements issued by the Parties and others between 1999 and July 2008 concludes, for the reasons given in relation to each of them, that no legal dispute arose between Georgia and the Russian Federation during that period with respect to the Russian Federation's compliance with its obligations under CERD.

6. August 2008

106. Armed hostilities began in South Ossetia during the night of 7 to 8 August 2008. According to the Report of the Independent International Fact-Finding Mission on the Conflict in Georgia established by the Council of the European Union, on that night:

> "a sustained Georgian artillery attack struck the town of Tskhinvali. Other movements of the Georgian armed forces targeting Tskhinvali and the surrounding areas were under way, and soon the fighting involved Russian, South Ossetian and Abkhaz military units and armed elements. It did not take long, however, before the Georgian advance into South Ossetia was stopped. In a counter-movement, Russian armed forces, covered by air strikes and by elements of its Black Sea fleet, penetrated deep into Georgia, cutting across the country's main east-west road, reaching the port of Poti and stopping short of Georgia's capital city, Tbilisi. The confrontation developed into a combined inter-state and intra-state conflict, opposing Georgian and Russian forces at one level of confrontation as well as South Ossetians together with Abkhaz fighters and the Georgians at another." (Report, Vol. 1, para. 2.)

107. The conflict continued for five days. On 12 August the President of the French Republic (which held the rotating Presidency of the European Union) took the initiative and, following discussions with the President of the Russian Federation, proposed six principles "to bring about a permanent ceasefire in the Ossetian-Georgian zone of the conflict". Following negotiations, the plan was signed by Abkhazia and South Ossetia on 14 August, by Georgia on 15 August, and by the Russian Federation on 16 August 2008. The agreed principles were:

> (1) non-use of force; (2) the absolute cessation of hostilities; (3) free access to humanitarian assistance; (4) withdrawal of the Georgian armed forces to their permanent positions; (5) withdrawal of the Russian armed forces to the line where they were stationed prior to the beginning of hostilities; pending the establishment of international mechanisms, the Russian peacekeeping forces will take additional security measures; (6) an international debate on ways to ensure security and stability in the region.

108. The first statement cited by Georgia from this period is its Presidential Decree on the Declaration of a State of War and Full Scale Mobilization of 9 August 2008. The Decree begins by referring to "[s]eparatists [who] are engaged in massive violation of human rights and freedoms, armed assaults on peaceful population and violence". The Russian Federation armed attack, it continues, provided "full support of the separatist forces". The Russian Federation "military aggression" required the exercise of the right of self-defence as provided in Article 51 of the Charter and other documents. The Court observes that this decree does not allege that the Russian Federation was in breach of its obligations relating to the elimination of racial discrimination. Its concern is with the allegedly unlawful use of armed force.

109. In a press conference with foreign journalists held on 9 August 2008, President Saakashvili made a statement which began with allegations about "Russia . . . launch[ing] a full scale military invasion of Georgia". The President said that he also had to indicate:

> "that Russian troops, Russian tanks that moved in, into South Ossetia on their way expelled the whole ethnically Georgian population of South Ossetia. This morning they've committed the ethnic cleansing in all areas they control in South Ossetia, they have expelled ethnic Georgians living there. Right now they are trying to set up the ethnic cleansing of ethnic Georgians from upper Abkhazia — Kodori Gorge."

On the following day, 10 August 2008, the Georgian representative, at a meeting of the Security Council called at Georgia's request, in his initial statement referred to "the process of exterminating the Georgian population", but the first explicit reference to racial discrimination came in the initial statement by the representative of the Russian Federation:

> "What legal terms can be used to describe what has been done by the Georgian leadership? Can we use 'ethnic cleansing', for example, when, over a number of days, nearly 30,000 of the 120,000 people of South Ossetia have become refugees who have fled to Russia: more than a quarter of the population. They went across the border from South Ossetia to the North at great risk to their lives. Is that ethnic cleansing or is it not?" (United Nations doc. S/PV.5953, 10 August 2008, p. 8.)

The Georgian representative responded that "[w]e cannot [turn a blind eye] now because that is exactly Russia's intention: to erase Georgian statehood and to exterminate the Georgian people" (*ibid.*, p. 16). The representative of the Russian Federation in the next statement in the debate

countered that "the intention of the Russian Federation in this case is to ensure that the people of South Ossetia and Abkhazia not fear for their lives or for their identity" ((United Nations doc. S/PV.5953, 10 August 2008, p. 17). The Court observes that civilians in regions directly affected by ongoing military conflict will in many cases try to flee — in this case Georgians to other areas of Georgia and Ossetians to the Russian Federation.

110. On 11 August 2008 the Georgian Ministry of Foreign Affairs released a statement to the effect that:

> "According to the reliable information held by the Ministry of Foreign Affairs of Georgia, Russian servicemen and separatists carry out mass arrests of peaceful civilians of Georgian origin still remaining on the territory of the Tskhinvali region and subsequently concentrate them on the territory of the village of Kurta.
>
> Georgia appeals to the International Red Cross and other humanitarian and international organizations and the international community as a whole to immediately take decisive and effective measures for the evacuation of this population from the conflict zone."

111. On that same day, 11 August, President Saakashvili in a CNN interview stated the following:

> "And what was left of upper Abkhazia has been bitterly attacked for the last two days. And right now, as we speak, there is an ethnic cleansing of whole ethnic Georgian population of Abkhazia taking place by Russian troops. I directly accuse Russia of ethnic cleansing there. And it's happening now.
>
> The other thing is that, if you go down to South Ossetia, where also being held from half of the South Ossetia, which we always controlled, they fully expelled a couple of days ago the whole Georgian population. Russian troops have moved first to occupy the town of Gori, which is around 40 kilometres from Tskhinvali, the original capital of South Ossetia."

112. On the following day, 12 August 2008, the Foreign Minister of the Russian Federation in a Joint Press Conference with the Minister for Foreign Affairs of Finland in his capacity as Chairman-in-Office of the OSCE, said the following:

> "A couple of days after [US Secretary of State] Rice had urgently asked me not to use such expressions, Mr. Saakashvili . . . claimed hysterically that the Russian side wanted to annex the whole of Georgia and, in general, he did not feel shy of using the term ethnic cleansings, although, true, it was Russia that he accused of carrying out those ethnic cleansings."

113. The Court observes that while the Georgian claims of 9 to 12 August 2008 were primarily claims about the allegedly unlawful use of force, they also expressly referred to alleged ethnic cleansing by Russian forces. These claims were made against the Russian Federation directly and not against one or other of the parties to the earlier conflicts, and were rejected by the Russian Federation. The Court concludes that the exchanges between the Georgian and Russian representatives in the Security Council on 10 August 2008, the claims made by the Georgian President on 9 and 11 August and the response on 12 August by the Russian Foreign Minister establish that by that day, the day on which Georgia submitted its Application, there was a dispute between Georgia and the Russian Federation about the latter's compliance with its obligations under CERD as invoked by Georgia in this case.

7. Conclusion

114. The first preliminary objection of the Russian Federation is accordingly dismissed.

III. SECOND PRELIMINARY OBJECTION — PROCEDURAL CONDITIONS IN ARTICLE 22 OF CERD

1. Introduction

115. The Court will now turn to consider the Russian Federation's second preliminary objection.

116. The essence of this objection is that Article 22 of CERD, the sole jurisdictional basis invoked by Georgia to found the Court's jurisdiction, contains two procedural preconditions, namely, negotiations and referral to procedures expressly provided for in CERD that must both be fulfilled before recourse to the Court is had. The Russian Federation contends that, in the present instance, neither precondition was met.

117. Article 22 reads:

> "Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement."

118. There is much in this compromissory clause on which the two Parties hold different interpretations. First they disagree on the meaning of the phrase "[a]ny dispute . . . which is not settled by negotiation or by the procedures expressly provided for". The Russian Federation

maintains that the phrase imposes a precondition to the jurisdiction of the Court, in that it requires that an attempt must have been made to resolve the dispute by the means specified in Article 22 and that that attempt must have failed before the dispute can be referred to the Court. Georgia on the other hand interprets the phrase as imposing no affirmative obligation for the Parties to have attempted to resolve the dispute through negotiation or through the procedures established by CERD. According to Georgia, all that is required is that, as a matter of fact, the dispute has not been so resolved.

119. Secondly, the two Parties also offer different interpretations of the co-ordinate conjunction "or" in the phrase "[a]ny dispute . . . which is not settled by negotiation *or* by the procedures expressly provided for". The Russian Federation maintains that the two preconditions are cumulative, and that fulfilment of only one or the other would not therefore be sufficient. Georgia takes the opposite view arguing, as a matter of textual exegesis, that the two preconditions — assuming them to be so — are alternative.

120. Thirdly, assuming that negotiations are a precondition for the seisin of the Court, the two Parties disagree as to what constitutes negotiations including the extent to which they must be pursued before it can be concluded that the precondition under Article 22 of CERD has been fulfilled. Additionally, they disagree as to the format of negotiations and the extent to which they should refer to the substantive obligations under CERD.

121. The Court will begin by presenting the arguments of the Parties regarding the above-mentioned issues concerning the interpretation of Article 22 of CERD. It will then give its interpretation of the Article and determine whether the second preliminary objection of the Russian Federation is well based in law and in fact.

2. Whether Article 22 of CERD establishes procedural conditions for the seisin of the Court

122. The Parties deploy a number of arguments in support of their respective interpretations of Article 22 of CERD, relating to: *(a)* the ordinary meaning of its terms in their context and in light of the object and purpose of the Convention, invoking, in support of their respective positions, the Court's jurisprudence dealing with compromissory clauses of a similar nature; and *(b)* the *travaux préparatoires* of CERD.

(a) *Ordinary meaning of Article 22 of CERD*

123. Starting with the ordinary meaning of Article 22, the Russian Federation argues that the present tense in the English expression "which is not settled" is not used merely to describe a state of fact but requires that a previous attempt to settle the dispute has been made bona fide. According to the Russian Federation, this is all the more evident in the French version ("qui n'aura

pas été réglé"), where the future perfect tense signifies that a previous action (i.e., an attempt to settle the dispute) must have taken place before the next stage can be embarked upon (i.e., referral to the Court). This is, in its view, the only possible common sense interpretation of Article 22 confirmed by the textual analysis of other authentic texts of CERD.

124. The Russian Federation further invokes the principle of effectiveness of interpretation in order to reject Georgia's interpretation of the phrase "which is not settled" in Article 22 as a mere observation of facts. It points out that such interpretation not only runs against the ordinary meaning of this provision, but also deprives it of any effect: it renders it tautological and meaningless since it would merely state the obvious and leave a key phrase of the provision without appropriate *effet utile*. To underline this argument, the Russian Federation asks rhetorically what would be the purpose of introducing the phrase "by negotiation or by the procedures expressly provided for in this Convention" in Article 22 if no logical and legal consequence is to be derived from it? In its view, this phrase must *add* something to the word "dispute": the only disputes which fall within the ambit of the clause are those that cannot be settled by the means indicated therein. Consequently, according to the Russian Federation, the right to have recourse to the Court, and reciprocally the competence of the Court to entertain the claim, depend on attempts to satisfy this condition and cannot arise unless and until such attempts have been made and have failed.

125. In addition, the Russian Federation relies on the Permanent Court's dictum in the *Mavrommatis Palestine Concessions* case: "before a dispute can be made the subject of an action at law, its subject matter should have been clearly defined by means of diplomatic negotiations" (*Judgment No. 2, 1924, P.C.I.J., Series A, No. 2,* p. 15). Taking this position into account, it contends that the interpretation alleged by Georgia would be tantamount to imposing on the Court the heavy burden of determining a dispute the contours of which the Parties have not determined.

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126. Georgia adopts a different interpretation. Referring to the ordinary meaning of the words in their context and in light of the object and purpose of CERD, it maintains that Article 22 does not establish any express obligation to negotiate nor does it establish any obligation to have recourse to the procedures provided for in Articles 11 and 12 of CERD. It points out that none of these conditions or pre-conditions are to be found in the actual text of Article 22; more specifically, Article 22 says nothing — expressly or implicitly — about any general duty to attempt to settle the dispute before seising the Court.

127. Georgia seeks support for this interpretation of Article 22 in the Court's Order of 15 October 2008 in the present case, where the Court held that:

> "the phrase 'any dispute . . . which is not settled by negotiation or by the procedure expressly provided for in this Convention' does not, in its plain meaning, suggest that formal negotiations in the framework of the Convention or recourse to the procedure

> referred to in Article 22 thereof constitute preconditions to be fulfilled before the seisin of the Court" (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008*, p. 388, para. 114).

Suggesting that what was "a plain meaning" then must be a "plain meaning" now, Georgia contends that the text of Article 22 does not support the Russian Federation's position that it contains preconditions to the seisin of the Court.

128. Georgia further maintains that the phrase "[a]ny dispute . . . which is not settled" is merely a statement of fact. This assertion is buttressed by the fact that the drafters of CERD refrained from using any express language of priority or the phrase "cannot be settled" (as has been done in many other conventions), which in Georgia's view clearly means something more than the phrase "is not settled". It maintains that this was a deliberate choice of the drafters of CERD: if they had intended to include the conditions that the Russian Federation now reads into the text they would have done so. Consequently, according to Georgia, the ordinary meaning of the terms of Article 22 of CERD can only be interpreted as expressing "an intention of the drafters" not to impose any preconditions to the seisin of the Court.

* *

129. Before providing its interpretation of Article 22 of CERD, the Court wishes, as a preliminary matter, to make three observations.

First, the Court recalls that in its Order of 15 October 2008 it stated that "the phrase 'any dispute . . . which is not settled by negotiation . . .' does not, in its plain meaning, suggest that formal negotiations in the framework of the Convention . . . constitute preconditions to be fulfilled before the seisin of the Court" (*ibid.*, para. 114). However, the Court also observed that "Article 22 does suggest that some attempt should have been made by the claimant party to initiate, with the Respondent Party, discussions on issues that would fall under CERD" *(ibid.)*.

The Court further recalls that, in the same Order, it also indicated that this provisional conclusion is without prejudice to the Court's definitive decision on the question of whether it has jurisdiction to deal with the merits of the case, which is to be addressed after consideration of the written and oral pleadings of both Parties. It stated that:

> "the decision given in the present proceedings in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case or any questions relating to the admissibility of the Application, or relating to the merits themselves" (ibid., para. 148; see also *Anglo-Iranian Oil Co. (United Kingdom* v. *Iran), Preliminary Objection, Judgment*, *I.C.J. Reports 1952*, pp. 102-103; *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Provisional Measures, Order of 10 July 2002, I.C.J. Reports 2002*, p. 249, para. 90).

130. Secondly, the Court is called upon to determine whether a State must resort to certain procedures before seising the Court. In this context, it notes that the terms "condition", "precondition", "prior condition", "condition precedent" are sometimes used as synonyms and sometimes as different from each other. There is in essence no difference between those expressions save for the fact that, when unqualified, the term "condition" may encompass, in addition to prior conditions, other conditions to be fulfilled concurrently with or subsequent to an event. To the extent that the procedural requirements of Article 22 may be conditions, they must be conditions precedent to the seisin of the Court even when the term is not qualified by a temporal element.

131. Thirdly, it is not unusual in compromissory clauses conferring jurisdiction on the Court and other international jurisdictions to refer to resort to negotiations. Such resort fulfils three distinct functions. In the first place, it gives notice to the respondent State that a dispute exists and delimits the scope of the dispute and its subject-matter. The Permanent Court of International Justice was aware of this when it stated in the *Mavrommatis* case that "before a dispute can be made the subject of an action in law, its subject-matter should have been clearly defined by means of diplomatic negotiations" (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 15).

In the second place, it encourages the Parties to attempt to settle their dispute by mutual agreement, thus avoiding recourse to binding third-party adjudication.

In the third place, prior resort to negotiations or other methods of peaceful dispute settlement performs an important function in indicating the limit of consent given by States. The Court referred to this aspect reflecting the fundamental principle of consent in the *Armed Activities* case in the following terms:

> "[The Court's] jurisdiction is based on the consent of the parties and is confined to the extent accepted by them . . . When that consent is expressed in a compromissory clause in an international agreement, *any conditions to which such consent is subject must be regarded as constituting the limits thereon*." (*Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 39, para. 88; emphasis added.)

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132. The Court will now proceed to examine the reference in Article 22 of CERD to "negotiation or [to] the procedures expressly provided for" in CERD, with a view to ascertaining whether they constitute preconditions to be met before the seisin of the Court.

133. Leaving aside the question of whether the two modes of peaceful resolution are alternative or cumulative, the Court notes that Article 22 of CERD qualifies the right to submit "a dispute" to the jurisdiction of the Court by the words "which is not settled" by the means of peaceful resolution specified therein. Those words must be given effect.

In the *Free Zones of Upper Savoy and the District of Gex* case, the Permanent Court of International Justice had occasion to apply the well-established principle in treaty interpretation that words ought to be given appropriate effect. It stated that:

> "in case of doubt the clauses of a special agreement by which a dispute is referred to the Court, must, if it does not involve doing violence to their terms, be construed in a manner enabling the clauses themselves to have appropriate effects" (*Free Zones of Upper Savoy and the District of Gex, Order of 19 August 1929, P.C.I.J., Series A, No. 22*, p. 13).

The International Court of Justice also emphasized the importance of the same principle in the *Corfu Channel* case, where it said:

> "It would indeed be incompatible with the generally accepted rules of interpretation to admit that a provision of this sort occurring in a special agreement should be devoid of purport or effect." (*Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 24; see also *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 25, para. 51.)

By interpreting Article 22 of CERD to mean, as Georgia contends, that all that is needed is that, as a matter of fact, the dispute had not been resolved (through negotiations or through the procedures established by CERD), a key phrase of this provision would become devoid of any effect.

134. Moreover, it stands to reason that if, as a matter of fact, a dispute had been settled, it is no longer a dispute. Therefore, if the phrase "which is not settled" is to be interpreted as requiring only that the dispute referred to the Court must in fact exist, that phrase would have no usefulness. Similarly, the express choice of two modes of dispute settlement, namely, negotiations or resort to the special procedures under CERD, suggests an affirmative duty to resort to them prior to the seisin of the Court. Their introduction into the text of Article 22 would otherwise be meaningless and no legal consequences would be drawn from them contrary to the principle that words should be given appropriate effect whenever possible.

135. The Court also observes that, in its French version, the above-mentioned expression employs the future perfect tense ("[t]out différend . . . qui n'aura pas été réglé par voie de négociation ou au moyen des procédures expressément prévues par la convention"), whereas the simple present tense is used in the English version. The Court notes that the use of the future perfect tense further reinforces the idea that a previous action (an attempt to settle the dispute) must have taken place before another action (referral to the Court) can be pursued. The other three authentic texts of CERD, namely the Chinese, the Russian and the Spanish texts, do not contradict this interpretation.

136. The Court further recalls that, like its predecessor, the Permanent Court of International Justice, it has had to consider on several occasions whether the reference to negotiations in compromissory clauses establishes a precondition to the seisin of the Court.

As a preliminary matter, the Court notes that, though similar in character, compromissory clauses containing a reference to negotiation (and sometimes additional methods of dispute settlement) are not always uniform. Some contain a time-element for negotiations, the expiry of which would trigger a duty to arbitrate or to have recourse to the Court. Furthermore, the language used contains variations such as "is not settled by" or "cannot be settled by". Sometimes, especially in older compromissory clauses, the expression used is "which is not" or "cannot be adjusted by negotiation" or "by diplomacy".

The Court will now consider its jurisprudence concerning compromissory clauses comparable to Article 22 of CERD. Both Parties rely on this jurisprudence as supportive of their respective interpretations of the ordinary meaning of Article 22.

137. In the *Armed Activities* case, the Democratic Republic of the Congo (DRC) invoked *inter alia* Article 29, paragraph 1, of the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) which used the formula "which is not settled by negotiation". The DRC denied that the compromissory clause in question contained four preconditions. According to the DRC, the clause contained only two conditions, namely that the dispute must involve the application or interpretation of the Convention and that it must have proved impossible to organize arbitration (*Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 37, para. 85). The Court, noting that the DRC had made "numerous protests against Rwanda's actions in alleged violation of international human rights law", went on to say: "[w]hatever may be the legal characterization of such protests as regards the requirement of the existence of a dispute between the DRC and Rwanda for purposes of Article 29 of the Convention, that Article requires also that any such dispute be the subject of negotiations" (*ibid*., pp. 40-41, para. 91).

138. In the same case, the Court, after having found that there was no dispute within the ambit of Article 75 of the World Health Organization (WHO) Constitution, went on to note, that:

> "even if the DRC had demonstrated the existence of a question or dispute falling within the scope of Article 75 of the WHO Constitution, it has in any event not proved that the other preconditions for seisin of the Court established by that provision have been satisfied, namely that it attempted to settle the question or dispute by negotiation with Rwanda or that the World Health Assembly had been unable to settle it" (*ibid*., p. 43, para. 100).

139. Similarly, in its Advisory Opinion on the *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, the Court was asked to determine whether the United States was obliged to enter into arbitration procedure with the United Nations under Section 21, paragraph *(a)*, of the United Nations Headquarters Agreement, which provides that

> "*[a]ny dispute* between the United Nations and the United States concerning the interpretation or application of this agreement . . . *which is not settled* by negotiation or other agreed mode of settlement, shall be referred for final decision to a tribunal of

> three arbitrators" (*Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, I.C.J. Reports 1988*, p. 14, para. 7; emphasis added).

The Court noted that in order to be able to answer that question, it must, upon determination that there exists a dispute between the United Nations and the United States concerning the interpretation or application of the Headquarters Agreement, "satisfy itself that [that dispute] is one 'not settled by negotiation or other agreed mode of settlement'" (*ibid.*, p. 27, para. 34).

140. The Court observes that in each of the above-mentioned cases where the compromissory clause was comparable to that included in CERD, the Court has interpreted the reference to negotiations as constituting a precondition to seisin.

141. Accordingly, the Court concludes that in their ordinary meaning, the terms of Article 22 of CERD, namely "[a]ny dispute . . . which is not settled by negotiation or by the procedures expressly provided for in this Convention", establish preconditions to be fulfilled before the seisin of the Court.

(b) Travaux préparatoires

142. In light of this conclusion, the Court need not resort to supplementary means of interpretation such as the *travaux préparatoires* of CERD and the circumstances of its conclusion, to determine the meaning of Article 22.

However, the Court notes that both Parties have made extensive arguments relating to the *travaux préparatoires*, citing them in support of their respective interpretations of the phrase "a dispute which is not settled . . .". Given this and the further fact that in other cases, the Court had resorted to the *travaux préparatoires* in order to confirm its reading of the relevant texts (see, for example, *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 27, para. 55; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1995*, p. 21, para. 40; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002*, p. 653, para. 53), the Court considers that in this case a presentation of the Parties' positions and an examination of the *travaux préparatoires* is warranted.

* *

143. The Russian Federation contends that the compromissory clause contained in Article 22 was a result of a compromise reached during the CERD negotiations between the supporters and the opponents of the possibility of unilateral seisin of the Court. In its view, the discussions in the

Third Committee of the United Nations General Assembly reveal that even the supporters of the unilateral seisin acknowledged that recourse to the Court should be conditioned by previous attempts to settle the dispute through other means. Moreover, the Russian Federation asserts that the compromissory clause was a stumbling block in the CERD negotiations and was eventually accepted only due to the introduction of such conditions designed to address the concerns that various States had in submitting themselves to the jurisdiction of the Court. This was achieved through the adoption of "the Three-Power" amendment proposed by Ghana, Mauritania and the Philippines, which added after the phrase "is not settled by negotiation" the reference to the "procedures expressly provided for in CERD".

144. In the Russian Federation's view, the discussions in the Third Committee and the unanimous adoption of the "Three-Power" amendment confirm that the drafters considered the seisin of the Court as a last resort, after the settlement procedures referred to in Article 22, including negotiations, had been attempted and exhausted.

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145. Georgia, for its part, contends that the clause providing for the Court's jurisdiction and the clauses introducing the CERD conciliation mechanism were considered as separate and distinct by the drafters throughout the drafting process. According to Georgia, the CERD mechanism was thus intended to be applied without prejudice to other procedures for the settlement of disputes.

146. Moreover, Georgia asserts that no statements were made during the final discussions at the Third Committee to the effect that recourse to the Court was conditional upon previous attempts to settle the dispute through the CERD conciliation machinery or through negotiation, or that these two modes of dispute settlement were cumulative. In Georgia's view, the reference to the CERD mechanism and to negotiations was included in the compromissory clause in Article 22 merely to point out the existence of a non-mandatory opportunity to resort to alternative settlement procedures before seising the Court, and was not intended to establish preconditions to such seisin.

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147. The Court notes that at the time when CERD was being elaborated, the idea of submitting to the compulsory settlement of disputes by the Court was not readily acceptable to a number of States. Whilst States could make reservations to the compulsory dispute settlement provisions of the Convention, it is reasonable to assume that additional limitations to resort to judicial settlement in the form of prior negotiations and other settlement procedures without fixed time-limits were provided for with a view to facilitating wider acceptance of CERD by States.

Beyond this general observation relating to the circumstances in which CERD was elaborated, the Court notes that the usefulness of the *travaux préparatoires* in shedding light on the meaning of Article 22 is limited by the fact that there was very little discussion of the expression "a dispute which is not settled".

A notable exception and one to which some significance must be attached is the statement by the Ghanaian delegate, one of the sponsors of the "Three-Power" amendment on the basis of which the final wording of Article 22 of CERD was agreed. He stated: "[T]he Three-Power amendment was self-explanatory. Provision has been made in the draft Convention for machinery *which should be used in the settlement of disputes before recourse was had to the International Court of Justice*." (United Nations, *Official Records of the General Assembly, Twentieth Session, Third Committee*, 1367th Meeting, doc. A/C.3/SR.1367, 7 December 1965, p. 485, para. 29; emphasis added.) It should be borne in mind that this machinery encompassed negotiation which was already mentioned expressly in the text proposed by the Officers of the Third Committee (United Nations Economic and Social Council, Draft International Convention on the Elimination of All Forms of Racial Discrimination, suggestions for final clauses submitted by Officers of the Third Committee, United Nations doc. A/C.3/L.1237, 15 October 1965, Art. VIII).

The Court notes that whilst no firm inferences can be drawn from the drafting history of CERD as to whether negotiations or the procedures expressly provided for in the Convention were meant as preconditions for recourse to the Court, it is possible nevertheless to conclude that the *travaux préparatoires* do not suggest a different conclusion from that at which the Court has already arrived through the main method of ordinary meaning interpretation.

3. Whether the conditions for the seisin of the Court under Article 22 of CERD have been fulfilled

148. Having thus interpreted Article 22 of CERD to the effect that it imposes preconditions which must be satisfied before resorting to the Court, the next question is whether these preconditions were complied with.

149. First of all, the Court notes that Georgia did not claim that, prior to seising the Court, it used or attempted to use the procedures expressly provided for in CERD. The Court therefore limits its examination to the question of whether the precondition of negotiations was fulfilled.

(a) *The concept of negotiations*

150. Regarding negotiations, the Russian Federation refers to several factors that were taken into consideration by the Court in its jurisprudence when evaluating whether or not negotiations have been attempted and have reached a deadlock, such as the duration of negotiations and the authenticity of efforts to reach a negotiated conclusion. Based on its review of the Court's case law in this regard, it concludes that whatever form they may take, substantially, negotiations are an exchange of points of view on law and facts, of mutual compromises in order to reach an agreement. In this regard, it refers to the decision of the Permanent Court of International Justice in the *Free Zones of Upper Savoy and the District of Gex* case, in which the judicial settlement of

international disputes was considered to be "simply an alternative to the direct and friendly settlement of such disputes between the parties" (*Order of 19 August 1929, P.C.I.J., Series A, No. 22*, p. 13). The Russian Federation further points to the Permanent Court's Advisory Opinion on *Railway Traffic between Lithuania and Poland*, where the obligation to negotiate was defined as an obligation "not only to enter into negotiations but also to pursue them as far as possible with a view to concluding agreements", even if an obligation to negotiate does not imply an obligation to reach agreement (*Advisory Opinion, 1931, P.C.I.J., Series A/B, No. 42*, p. 116).

151. In addition, relying on the separate opinion of Judge Sir Gerald Fitzmaurice in the *Northern Cameroons* case, the Russian Federation contends that the threshold to find the existence of negotiations is high; that it excludes mere disputations, such as in the form of exchange of arguments between States "across the floor of an international assembly, or circulating statements of their complaints or contentions to its member States" (*Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 123, separate opinion of Judge Sir Gerald Fitzmaurice). Moreover, on the basis of Judge Fitzmaurice's opinion, the Russian Federation contends that a dispute certainly cannot be considered as "settled by negotiation", when there was no attempt at "direct discussions between the parties" *(ibid.)*. Furthermore, the Russian Federation cites the Judgment in the *Armed Activities* case as supporting its contention that mere protests cannot amount to negotiations (*Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, pp. 40-41, para. 91).

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152. For its part, Georgia rejects the Russian Federation's definition of what constitutes negotiations (particularly its differentiation between "disputation" and "negotiation" and its contention that mere protests cannot amount to negotiation), as unreasonably stringent and departing from the established jurisprudence of the Court. According to Georgia, the case law of this Court and of its predecessor, the Permanent Court of International Justice, demonstrates that the threshold for negotiations is low; that substance is more important than form; that it is for the parties to determine whether further negotiations are likely to be fruitful; and that no purpose is to be served in the pursuit of hopeless or futile negotiations. In short, as per Georgia's submissions, the determination of the existence of negotiations is a relative and flexible one.

153. In particular, Georgia suggests that there is no requirement to follow a specific procedure or format of negotiations. It further contends that even very brief informal discussions in either bilateral or multilateral settings involving, for example, a simple communication of protest to a silent or intractable party, would constitute negotiations. In sum, according to Georgia, any indirect exchange between the parties to a dispute would constitute negotiations.

154. Furthermore, Georgia contends that negotiations between the Parties in this case need not expressly refer to CERD or its substantive provisions. Relying on the Court's Judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (*(Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, pp. 428-429, para. 83) and on its Order of 15 October 2008 in the present case, Georgia concludes that the only requirement is that the subject-matter of the dispute under CERD — i.e., racial discrimination — must have been discussed.

155. Finally, Georgia contends that the ordinary meaning of the phrase "*is not* settled by negotiation", as opposed to "*cannot* be settled by negotiation", only requires evidence that Georgia has made an attempt at negotiations and not that such negotiations have reached a deadlock (emphasis added by Georgia in its Written Statement).

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156. The Court must first address a series of issues involving the nature of the precondition of negotiations, namely: assessing what constitutes negotiations; considering their adequate form and substance; and determining to what extent they should be pursued before it can be said that the precondition has been met.

157. In determining what constitutes negotiations, the Court observes that negotiations are distinct from mere protests or disputations. Negotiations entail more than the plain opposition of legal views or interests between two parties, or the existence of a series of accusations and rebuttals, or even the exchange of claims and directly opposed counter-claims. As such, the concept of "negotiations" differs from the concept of "dispute", and requires — at the very least — a genuine attempt by one of the disputing parties to engage in discussions with the other disputing party, with a view to resolving the dispute.

158. Clearly, evidence of such an attempt to negotiate — or of the conduct of negotiations — does not require the reaching of an actual agreement between the disputing parties. In this regard, in its Advisory Opinion on *Railway Traffic between Lithuania and Poland*, the Permanent Court of International Justice characterized the obligation to negotiate as an obligation "not only to enter into negotiations, but also to pursue them as far as possible, with a view to concluding agreements

[even if] an obligation to negotiate does not imply an obligation to reach agreement . . ." (*Railway Traffic between Lithuania and Poland, Advisory Opinion, 1931, P.C.I.J., Series A/B, No. 42*, p. 116; see also *North Sea Continental Shelf (Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 48, para. 87; *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)*, Judgment of 20 April 2010, para. 150).

159. Manifestly, in the absence of evidence of a genuine attempt to negotiate, the precondition of negotiation is not met. However, where negotiations are attempted or have commenced, the jurisprudence of this Court and of the Permanent Court of International Justice clearly reveals that the precondition of negotiation is met only when there has been a failure of negotiations, or when negotiations have become futile or deadlocked (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 13); *South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, pp. 345-346; *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Judgment, I.C.J. Reports 1980*, p. 27, para. 51; *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, I.C.J. Reports 1988*, p. 33, para. 55; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 122, para. 20).

160. Furthermore, ascertainment of whether negotiations, as distinct from mere protests or disputations, have taken place, and whether they have failed or become futile or deadlocked, are essentially questions of fact "for consideration in each case" (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 13). Notwithstanding this observation, the jurisprudence of the Court has outlined general criteria against which to ascertain whether negotiations have taken place. In this regard, the Court has come to accept less formalism in what can be considered negotiations and has recognized "diplomacy by conference or parliamentary diplomacy" (*South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 346).

161. Concerning the substance of negotiations, the Court has accepted that the absence of an express reference to the treaty in question does not bar the invocation of the compromissory clause to establish jurisdiction (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 428, para. 83). However, to meet the precondition of negotiation in the compromissory clause of a treaty, these negotiations must relate to the subject-matter of the treaty containing the compromissory clause. In other words, the subject-matter of the negotiations must relate to the subject-matter of the dispute which, in turn, must concern the substantive obligations contained in the treaty in question.

162. In the present case, the Court is therefore assessing whether Georgia genuinely attempted to engage in negotiations with the Russian Federation, with a view to resolving their dispute concerning the Russian Federation's compliance with its substantive obligations under CERD. Should it find that Georgia genuinely attempted to engage in such negotiations with the Russian Federation, the Court would examine whether Georgia pursued these negotiations as far as possible with a view to settling the dispute. To make this determination, the Court would ascertain whether the negotiations failed, became futile, or reached a deadlock before Georgia submitted its claim to the Court.

(b) ***Whether the Parties have held negotiations on matters concerning the interpretation or application of CERD***

163. Against the background of these criteria, the Court now turns to the evidence submitted to it by the Parties to determine whether this evidence demonstrates, as stated by Georgia, that at the time it filed its Application on 12 August 2008, there had been negotiations between itself and the Russian Federation concerning the subject-matter of their legal dispute under CERD, and that these negotiations had been unsuccessful.

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164. As previously noted (see paragraph 33), the Parties referred the Court to several documents and statements relating to events in Abkhazia and South Ossetia from 1990 to the time of filing by Georgia of its Application. On the specific issue of the existence of negotiations on matters falling under CERD, Georgia submits evidence which in its view demonstrates that negotiations involving delegations from Georgia and the Russian Federation concerning the subject-matter of the present dispute have progressed, unsuccessfully, in numerous fora, including but not limited to: (i) the United Nations Geneva Process and the Coordinating Council for Georgia and Abkhazia, and the Group of Friends of Georgia; (ii) the Joint Control Commission for the Georgian-Ossetian Conflict Settlement; (iii) the Organization for Security and Co-operation in Europe; and (iv) the Council of the Heads of State of the Commonwealth of Independent States.

Georgia further alleges that the evidence which it submitted demonstrates the existence and subsequent failure of high-level bilateral negotiations between Georgia and the Russian Federation relating to various aspects of the present dispute.

165. Such negotiations are considered by Georgia to have dealt with specific matters falling under CERD, namely, the Russian Federation's direct participation in ethnic cleansing and other acts of discrimination against ethnic Georgians in South Ossetia and Abkhazia; the Russian Federation's prevention of ethnic Georgian IDPs from exercising their right of return to their homes in South Ossetia and Abkhazia; the Russian Federation's support, sponsorship and defence of discrimination against ethnic Georgians by other parties; and the Russian Federation's failure to prevent discrimination against ethnic Georgians in areas under its control.

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166. For its part, the Russian Federation, in addressing the above claims, essentially contends that the bilateral and multilateral contacts between itself and Georgia have not dealt with the question of racial discrimination, and thus cannot constitute negotiations on matters falling under

CERD. Precisely, the Russian Federation, upon commenting on the facts in the record, submits that, "[a]t no occasion in their bilateral relations did Georgia articulate any claim of racial discrimination by Russia, and Georgia and Russia did not engage in negotiations in respect of any such claim". Similarly, the Russian Federation puts forth that the contacts between Georgia and the Russian Federation within the framework of international organizations, or in other multilateral fora, call for the same conclusion as the one made in respect of bilateral negotiations, namely that there have never been negotiations on the dispute alleged by Georgia on the application of CERD.

* *

167. The Court recalls its conclusions regarding the Russian Federation's first preliminary objection, as it is directly connected to the Russian Federation's second preliminary objection. After examination of the evidence submitted by the Parties, the Court concluded that a dispute between Georgia and the Russian Federation falling within the ambit of CERD arose only in the period immediately before the filing of the Application. Specifically, the evidence put forth by Georgia which pre-dates the beginning of armed hostilities in South Ossetia during the night of 7 to 8 August 2008 failed to demonstrate the existence of a legal dispute between Georgia and the Russian Federation on matters falling under CERD.

168. It stands to reason that it was only possible for the Parties to be negotiating the matters in dispute, namely, the Russian Federation's compliance with its obligations relating to the elimination of racial discrimination, between 9 August 2008 and the date of the filing of the Application, on 12 August 2008, i.e., the period during which the Court found that a dispute capable of falling under CERD had arisen between the Parties.

169. The Court's task at this point is therefore twofold: first, to determine whether the facts in the record show that, during this circumscribed period, Georgia and the Russian Federation engaged in negotiations with respect to the matters in dispute concerning the interpretation or application of CERD; and secondly, if the Parties did engage in such negotiations, to determine whether those negotiations failed, therefore enabling the Court to be seised of the dispute under Article 22.

170. Before the Court considers the evidence bearing on the answers to those two questions, it observes that negotiations did take place between Georgia and the Russian Federation before the start of the relevant dispute. These negotiations involved several matters of importance to the relationship between Georgia and the Russian Federation, namely, the status of South Ossetia and Abkhazia, the territorial integrity of Georgia, the threat or use of force, the alleged breaches of international humanitarian law and of human rights law by Abkhaz or South Ossetian authorities and the role of the Russian Federation's peacekeepers. However, in the absence of a dispute relating to matters falling under CERD prior to 9 August 2008, these negotiations cannot be said to have covered such matters, and are thus of no relevance to the Court's examination of the Russian Federation's second preliminary objection.

171. The Court begins its examination of the relevant evidence by recalling Georgia's factual narrative of the alleged failed negotiations which it contends took place between the night of 7 to 8 August and 12 August 2008. According to Georgia, after 8 August 2008, when it alleges the Russian Federation commenced its campaign of ethnic cleansing against ethnic Georgians in South Ossetia and Abkhazia, the former urgently attempted to engage with the latter to bring the violence against Georgian civilians to a halt. With diplomatic relations suspended, Georgia claims it appealed to the Russian Federation for talks via the United Nations. On 10 August 2008, Georgia explains that it requested an emergency session of the Security Council, during which it informed the Council of the gross human rights violations then being perpetrated against ethnic Georgians by the Russian Federation's armed forces that amounted to a process of exterminating the Georgian population. According to Georgia, the Russian Federation's Permanent Representative used the Security Council session to acknowledge, and deny, the public address President Saakashvili had made the previous day in which he explicitly accused the Russian Federation of perpetrating ethnic cleansing. Finally, Georgia submits that the Russian Federation's Minister for Foreign Affairs publicly made clear that further contacts between Georgia and the Russian Federation were impossible.

172. Georgia seeks to support this presentation of facts, which in its view demonstrates how it attempted to negotiate with the Russian Federation, and how these attempts were unsuccessful, by submitting certain documents and statements to the Court. These documents and statements are of relevance both to the first and the second preliminary objection raised by the Russian Federation and the Court has therefore already addressed them in its consideration of the first preliminary objection (see paragraphs 109 to 113). The first statement cited by Georgia from this period is a press briefing dated 9 August 2008 from the Office of the President of Georgia. In this statement made during a meeting with foreign journalists, President Saakashvili declared that:

> "Russian troops, Russian tanks that moved in, into South Ossetia on their way expelled the whole ethnically Georgian population of South Ossetia. This morning they've committed the ethnic cleansing in all areas they control in South Ossetia, they have expelled ethnic Georgians living there. Right now they are trying to set up the ethnic cleansing of ethnic Georgians from upper Abkhazia — Kodori Gorge."

173. The second document submitted by Georgia as evidencing negotiations during the relevant period is the *procès-verbal* of the Security Council meeting convened upon Georgia's request (United Nations doc. S/PV.5953, 10 August 2008), during which the Georgian representative described at length the armed activities taking place on Georgian territory. Accusing the Russian Federation of misconduct, the Georgian representative declared that "[t]he process of exterminating the Georgian population and annihilating Georgian statehood is in full swing".

174. In his subsequent statement before the Security Council, the Russian Federation's representative placed the blame on Georgia for the outbreak of armed activities. In doing so, he accused Georgian authorities of ethnically cleansing a portion of its own population:

> "So how can we describe this action by the Georgian leadership? It has been said that aggression is only when one party attacks another. But if the aggression is carried out against your own people, is that in any way better? What legal terms can be used to describe what has been done by the Georgian leadership? Can we use 'ethnic cleansing', for example, when, over a number of days, nearly 30,000 of the 120,000 people of South Ossetia have become refugees who have fled to Russia: more than a quarter of the population. They went across the border from South Ossetia to the North at great risk to their lives. Is that ethnic cleansing or is it not? Should we describe that as genocide or not? When out of that population of 120,000, 2,000 innocent civilians die on the first day, is that genocide or is it not? How many people, how many civilians must die before we describe it as genocide?"

175. During the same meeting, both Georgia's and the Russian Federation's representatives made additional comments to the Security Council members. The Georgian representative urged the members to take action by declaring that "Russia's intention [is] to erase Georgian statehood and to exterminate the Georgian people". Responding to the Georgian representative's allegation as to the Russian Federation's intention, the latter's representative asserted that "the intention of the Russian Federation in this case is to ensure that the people of South Ossetia and Abkhazia not fear for their lives or for their identity".

176. Finally, Georgia also submits the transcript of a press conference held in Moscow on 12 August 2008 — the date of Georgia's filing of its Application — by the Russian Federation's Minister for Foreign Affairs and the Minister for Foreign Affairs of Finland and Chairman-in-Office of the OSCE.

177. The Court takes note of certain significant elements of the content of this press conference. First, the Russian Federation places the blame for the outbreak of armed activities on the present Georgian leadership. Secondly, the Russian Federation asserts that it has "no trust in Mikhail Nikolayevich Saakashvili," and that "mov[ing] to mutually respectful relations . . . is hardly possible with the present Georgian leadership". Thirdly, the Russian Federation announces that its "approaches toward the negotiation process will undergo substantial change". Fourthly, the Russian Federation proposes its view of the essential next steps in the restoration of peace, including the cessation of armed activities, and the "signing of a legally binding agreement on the non-use of force" between Georgia, Abkhazia and South Ossetia. Fifthly, the Russian Federation has received confirmation from the Chairman-in-Office of the OSCE that Georgia is ready for the conclusion of such a pledge on the non-use of force. Additionally, the Russian Federation's Foreign Minister declared that:

> "As a matter of fact, it will be no exaggeration to say that the talk is about ethnic cleansings, genocide and war crimes [committed by Georgia].
>
> . . . . . .
>
> Mr. Saakashvili . . . claimed hysterically that the Russian side wanted to annex the whole of Georgia and, in general, he did not feel shy of using the term ethnic cleansings, although, true, it was Russia that he accused of carrying out those ethnic cleansings."

178. The Court makes two observations on the basis of the Russian Federation's Foreign Minister's remarks. First, with regard to the subject-matter of CERD, the Court notes that the topic of ethnic cleansing had not become the subject of genuine negotiations or attempts at negotiation between the Parties. The Court is of the view that although the claims and counter-claims concerning ethnic cleansing may evidence the existence of a dispute as to the interpretation and application of CERD, they do not constitute attempts at negotiations by either Party.

179. Secondly, the Court observes that the issue of negotiations between Georgia and the Russian Federation is complex. On the one hand, the Russian Federation's Foreign Minister manifested his discontent with regard to President Saakashvili personally, and stated that he "do[es] not think that Russia will have the mindset not only to negotiate, but even to speak with Mr. Saakashvili" and that "Mr. Saakashvili can no longer be our partner and it would be best if he left". On the other hand, the Foreign Minister did not make his desire to see President Saakashvili "repent" for his "crime against our citizens" a "condition for ending this stage of the military operation", and for resuming talks on the non-use of force. He further stated that:

> "As to Georgia, we have always treated and continue to treat the Georgian people with deep respect. We continue to want to live with them in friendship and harmony and are convinced that the Georgian people will yet display their wisdom."

180. Notwithstanding the tone of certain remarks made by the Foreign Minister of the Russian Federation about President Saakashvili, the Court considers that overall the Russian Federation did not dismiss the possibility of future negotiations on the armed activities in which it was engaged at the time, and on the restoration of peace between Georgia, Abkhazia and South Ossetia. However, the Court considers that the subject-matter of such negotiations was not the compliance by the Russian Federation with its obligations relating to the elimination of racial discrimination. Therefore, regardless of the Russian Federation's ambiguous and perhaps conflicting statements on the subject of negotiations with Georgia as a whole, and President Saakashvili personally, these negotiations did not pertain to CERD-related matters. As such, whether the Russian Federation wanted to end or to continue negotiations with Georgia on the matter of the armed conflict is of no relevance for the Court in the present case. Consequently, remarks by the President and by the Foreign Minister of the Russian Federation regarding the prospects of talks with the Georgian President did not terminate the possibility of CERD-related negotiations, as those were never genuinely or specifically attempted.

181. In sum, the Court is unable to consider these statements — whether in the Georgian presidential press briefing or at the Security Council meeting — as genuine attempts by Georgia to negotiate matters falling under CERD. As outlined in detail with regard to the Russian Federation's first preliminary objection, the Court considers that these accusations and replies by both Parties on the issues of "extermination" and "ethnic cleansing" attest to the existence of a dispute between them on a subject-matter capable of falling under CERD. However, they fail to demonstrate an attempt at negotiating these matters.

182. The Court is thus also unable to agree with Georgia's submission when it claims that "Russia's refusal to negotiate with Georgia in the midst of its ethnic cleansing campaign, and two days prior to the filing of the Application is sufficient to vest the Court with jurisdiction under Article 22". The Court concludes that the facts in the record show that, between 9 August and 12 August 2008, Georgia did not attempt to negotiate CERD-related matters with the Russian Federation, and that, consequently, Georgia and the Russian Federation did not engage in negotiations with respect to the latter's compliance with its substantive obligations under CERD.

183. The Court has already observed (see paragraph 149) the fact that Georgia did not claim that, prior to the seisin of the Court, it used or attempted to use the other mode of dispute resolution contained at Article 22, namely the procedures expressly provided for in CERD. Considering the Court's conclusion, at paragraph 141, that under Article 22 of CERD, negotiations and the procedures expressly provided for in CERD constitute preconditions to the exercise of its jurisdiction, and considering the factual finding that neither of these two modes of dispute settlement was attempted by Georgia, the Court does not need to examine whether the two preconditions are cumulative or alternative.

184. The Court accordingly concludes that neither requirement contained in Article 22 has been satisfied. Article 22 of CERD thus cannot serve to found the Court's jurisdiction in the present case. The second preliminary objection of the Russian Federation is therefore upheld.

IV. THIRD AND FOURTH PRELIMINARY OBJECTIONS

185. Having upheld the second preliminary objection of the Russian Federation, the Court finds that it is required neither to consider nor to rule on the other objections to its jurisdiction raised by the Respondent and that the case cannot proceed to the merits phase.

*

* *

186. The Court in its Order of 15 October 2008 indicated certain provisional measures. This Order ceases to be operative upon the delivery of this Judgment. The Parties are under a duty to comply with their obligations under CERD, of which they were reminded in that Order.

*

* *

187. For these reasons,

THE COURT,

(1) *(a)* by twelve votes to four,

Rejects the first preliminary objection raised by the Russian Federation;

IN FAVOUR: *President* Owada; *Judges* Al-Khasawneh, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Cançado Trindade, Yusuf, Greenwood, Donoghue; *Judge* ad hoc Gaja;

AGAINST: *Vice-President* Tomka; *Judges* Koroma, Skotnikov, Xue;

(b) by ten votes to six,

Upholds the second preliminary objection raised by the Russian Federation;

IN FAVOUR: *Vice-President* Tomka; *Judges* Koroma, Al-Khasawneh, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Yusuf, Greenwood, Xue;

AGAINST: *President* Owada; *Judges* Simma, Abraham, Cançado Trindade, Donoghue; *Judge* ad hoc Gaja;

(2) by ten votes to six,

Finds that it has no jurisdiction to entertain the Application filed by Georgia on 12 August 2008.

IN FAVOUR: *Vice-President* Tomka; *Judges* Koroma, Al-Khasawneh, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Yusuf, Greenwood, Xue;

AGAINST: *President* Owada; *Judges* Simma, Abraham, Cançado Trindade, Donoghue; *Judge* ad hoc Gaja.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this first day of April, two thousand and eleven, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of Georgia and the Government of the Russian Federation, respectively.

(Signed) Hisashi OWADA,
President.

(Signed) Philippe COUVREUR,
Registrar.

President OWADA and Judges SIMMA, ABRAHAM, DONOGHUE and Judge *ad hoc* GAJA append a joint dissenting opinion to the Judgment of the Court; President OWADA appends a separate opinion to the Judgment of the Court; Vice-President TOMKA appends a declaration to the Judgment of the Court; Judges KOROMA, SIMMA and ABRAHAM append separate opinions to the Judgment of the Court; Judge SKOTNIKOV appends a declaration to the Judgment of the Court; Judge CANÇADO TRINDADE appends a dissenting opinion to the Judgment of the Court; Judges GREENWOOD and DONOGHUE append separate opinions to the Judgment of the Court.

(Initialled) H. O.

(Initialled) Ph. C.

_____

JOINT DISSENTING OPINION OF PRESIDENT OWADA, JUDGES SIMMA, ABRAHAM AND DONOGHUE AND JUDGE *AD HOC* GAJA

Agreement as to rejection of the first preliminary objection concerning the existence of a dispute, but not with the Court's reasoning — Lack of flexibility in objective determination of the existence of a dispute — Existence of a dispute within the subject-matter of CERD well before 9 August 2008 — Reference to the separate opinions — Disagreement with the Court's position sustaining the second preliminary objection, concerning the procedural conditions laid down by Article 22 of CERD — Questionable character of the Court's analysis of the issue as to whether Article 22 of CERD establishes mandatory preconditions — Argument drawn from the "effectiveness" principle relevant but not controlling — Literal meaning of the wording "any dispute which is not settled by" — No account taken of the fact that this clause departs from the general rule — Uncertainty characterizing the Court's prior jurisprudence as to the meaning to be ascribed to clauses of this type — Unjustified failure to apply the Court's most recent jurisprudence as to the time when the conditions for the Court's jurisdiction have to be fulfilled — In so far as Article 22 of CERD lays down mandatory preconditions, the alternative character of them — Substance of the condition requiring an attempt to settle the dispute by negotiation — Excessively formalistic approach taken by the Court — Condition met where there is no reasonable prospect of resolving the dispute through negotiations between the Parties — Account to be taken of the subject of the dispute and the Parties' respective positions — In the present case, in so far as the condition is required by Article 22 of CERD, fulfilment of this condition at the date of the Application under the circumstances of the case.

1. In the present Judgment the Court rules on two preliminary objections which the Russian Federation has raised to Georgia's Application. It rejects the first, based on the alleged non-existence at the date the Application was filed of a dispute between the two Parties concerning the interpretation or application of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). On the other hand, it sustains the second, based on the absence of any attempt to settle the dispute by negotiation or by recourse to the special procedures provided for in CERD before the Application was filed.

2. We have voted in favour of paragraph (1) *(a)* of the operative part because we believe that the Court has rightly rejected the first preliminary objection. We have however voted against paragraph (1) *(b)* because in our view the second preliminary objection should also have been rejected, and against paragraph (2) because we therefore think that the Court should have found that it had jurisdiction to entertain the Application.

3. Despite our votes in favour of rejecting the first preliminary objection, we disagree in significant ways with the Court's reasoning on this subject. Some of the reasons for that disagreement are expounded in our separate opinions.

In short, under the reasoning adopted by the Court, a dispute does not exist unless the applicant has given notice of its claims to the respondent before the application is filed and the respondent "has opposed" those claims. But, as shown in greater detail in the separate opinions of some of us, the Court, in making an objective determination as to whether a dispute exists, has never before required prior notice of the claim and rejection by the respondent. On the contrary, the Court has been flexible, by for example drawing inferences from the Parties' conduct and taking account of their positions as stated before the Court.

4. We also disagree with the way in which the facts put forward by Georgia are dealt with in the Judgment to support the Court's conclusion that there was no dispute corresponding to the subject of the Application before 9 August 2008. In our view, the record, when considered as a whole, shows that there was a dispute — that is to say, a "disagreement on a point of law or fact" — within the ambit of CERD that came into existence between the entry into force of that Convention — as between the Parties — and the filing of the Application, and that this occurred well before 9 August 2008. There is no need to ascertain the exact date on which the dispute arose, yet that is what the Court has applied itself to doing, scrutinizing each statement or document cited by Georgia and dismissing each (until the date which the Court ultimately chooses to use) on grounds such as, for instance, that the document contains an allegation of ethnic discrimination without expressly attributing it to Russia or that it asserts grievances against Russia but does not expressly link them to ethnic discrimination. We are fully mindful of the thorny questions of law and fact the Court would have to decide in determining — on the merits — whether Georgia has proved its allegations of CERD violations by Russia. But those were not the questions before the Court at this stage in the proceedings. The question raised by the first preliminary objection was solely whether a dispute existed between Georgia and Russia concerning the interpretation or application of CERD. And that question most certainly has to be answered in the affirmative.

5. The present opinion will be devoted for the most part to setting out our reasons for disagreeing with the Court's decision on the second preliminary objection, which follow here.

6. There is no argument that the only basis of jurisdiction invoked by Georgia — and consequently the only basis to be examined by the Court — is the compromissory clause in Article 22 of CERD. Nor is there any argument that both Parties were bound by this provision at the date the Application was filed.

7. Under Article 22 of CERD any party to the Convention may unilaterally refer to the Court "[a]ny dispute . . . with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention".

8. The "procedures expressly provided for" referred to in Article 22 are those described in Part II of the Convention, specifically in Articles 11 to 13. It is undisputed that Georgia did not attempt to put these procedures in motion to settle its dispute with Russia before it seised the Court on 12 August 2008.

9. According to the Russian Federation, the Court cannot find that it has jurisdiction to adjudicate a dispute unless the applicant State has first tried — without success — to settle the dispute through recourse, if necessary, to the two modes referred to in Article 22, namely "negotiation" and "the procedures expressly provided for" in the Convention. In the present case, Russia argues, the mere fact that Georgia did not initiate the special procedures established in Part II of the Convention before referring the case to the Court is sufficient to deprive the Court of jurisdiction. In any case, even if it were enough for the Applicant to have pursued only one of the two avenues referred to in Article 22, the conclusion would be the same, because, according to Russia, Georgia also failed to make any attempt to settle its dispute with Russia by negotiation. That in substance is the second preliminary objection on which the Court was asked to rule.

10. A thorough examination of that argument should require that the following four questions be answered: (1) Does Article 22 of CERD lay down "preconditions", the fulfilment of which must be ascertained by the Court for it to exercise jurisdiction? (2) If so, are these "preconditions" alternative or cumulative? (3) If they are alternative, what exactly does the condition requiring an attempt to "settle the dispute by negotiation" consist of? And (4) has this last condition been satisfied in the case?

11. The Court answers the first question in the affirmative (Judgment, paragraphs 141 and 147). In response to the third question, it takes a rather exacting view of what constitutes "negotiation" (Judgment, paragraphs 157 to 162). On the fourth question, it considers that Georgia has not satisfied the precondition of having attempted to settle the dispute by negotiation with Russia (Judgment, paragraph 182). Accordingly, the Court finds that it does not need to answer the second question, as neither of the procedural conditions laid down in Article 22 has, in the Court's view, been fulfilled (Judgment, paragraph 183).

12. Our opinion on the questions set out above is as follows.

We find that the Court's interpretation of Article 22 — that the provision establishes "preconditions" on which the Court's exercise of jurisdiction depends — is questionable and that the Court's analysis on this point ignores or gives short shrift to arguments which might have led to a different conclusion.

More importantly, however, we think that the preliminary objection should have been rejected even on the basis of the general proposition accepted by the Court in paragraph 141 of the Judgment, i.e., "the terms of Article 22 . . . establish preconditions to be fulfilled before the seisin of the Court".

In fact, the two "conditions" — if we agree to call them such — in Article 22 can only be alternative in nature, not cumulative.

The condition requiring an attempt to settle the dispute by negotiation must be understood and applied realistically and substantively, not in the unrealistic and formalistic manner applied by the Judgment.

Further to this last point, we take the view that any reasonable possibility of settling the dispute by negotiation had been exhausted by the date on which the proceedings were instituted, so that the conditions on the Court's exercise of its jurisdiction were satisfied in any event.

13. These various points will now be elaborated.

I. Does Article 22 of CERD lay down procedural "preconditions" to be satisfied prior to seisin of the Court?

14. The terms "conditions" and "preconditions" are not unambiguous. They are used here for convenience, as the Court has done in the past in connection with compromissory clauses akin to Article 22 of CERD, or with Article 22 itself, in affirming the existence or non-existence of any such "conditions" (*Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 39, para. 87); *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008*, p. 388, para. 114).

15. What is important is not deciding what terminology to use but clearly defining the terms of the debate between the Parties on the interpretation of Article 22 in this regard.

The Parties did not disagree on the fact that the Court, in order to exercise jurisdiction, must at a minimum verify that the dispute submitted to it "is not settled" by one means or the other. In fact, where a dispute is settled, there is no longer a dispute amenable to judicial settlement, as the diplomatic solution that by definition the parties in such a case have accepted is controlling as between them. In this respect, there is indeed a factual condition which the Court must assess in all cases and on the fulfilment of which its jurisdiction is dependent.

That is not the question which divided the Parties and which the Court was called upon to decide.

That question was the following: According to the Russian Federation, the Court can adjudicate a case submitted to it under Article 22 only if the applicant State establishes to the satisfaction of the Court not only that the dispute has not been settled, but also that the applicant has endeavoured to settle it by direct negotiation or, if that fails, by recourse to the special procedures in Part II of the Convention, and that the efforts were unsuccessful. According to Georgia, conversely, it is necessary and sufficient that the dispute is not settled. The applicant need show no more; specifically, it does not have to prove that it tried to settle the dispute by non-judicial means.

16. The Court decides clearly and unequivocally in favour of Russia's position — leaving aside the question whether the two modes contemplated in Article 22 are alternative or cumulative, on which the Court finds there to be no need for a decision.

Thus, according to the Judgment, an unsuccessful attempt to settle the dispute by diplomatic means is a "precondition" for the jurisdiction of the Court. The Judgment goes so far as to specify that this "precondition" must be fulfilled at the date the Court is seised, meaning that by this date, and no later, all possibility of negotiated settlement must have been exhausted because "there has been a failure of negotiations, or . . . negotiations have become futile or deadlocked" (Judgment, paragraph 159).

We think that the Court's interpretation on the first point is questionable and on the second is at variance with the Court's most recent jurisprudence.

17. In reaching the conclusion that Article 22 lays down "preconditions" for the jurisdiction of the Court, the Judgment relies on considerations under three headings.

First, it asserts that the ordinary meaning of the terms used, interpreted in their context in accordance with the rules of interpretation codified in Article 31 (1) of the Vienna Convention on the Law of Treaties, leads to this conclusion (Judgment, paragraph 141). Secondly, it maintains that this interpretation is supported by the Court's settled jurisprudence in cases in which the Court has had to apply clauses comparable to Article 22. Thirdly and finally, it draws on the *travaux préparatoires* of the text to be interpreted, analysing them in paragraphs 142 to 147.

18. In fact, the Court draws little of consequence from its examination of the *travaux préparatoires*. It confines itself to noting, in conclusion to this examination, that: "the *travaux préparatoires* do not suggest a different conclusion from that at which the Court has already arrived through the main method of ordinary meaning interpretation" (Judgment, paragraph 147). In other words, it does not find confirmation in the *travaux préparatoires* of the interpretation it has already arrived at based on the "ordinary meaning" of the terms of the clause; on a more cautious note, it observes only that it finds nothing decisive that suggests a conflicting interpretation.

19. Thus, the analysis of the "ordinary meaning" of the terms and the examination of the prior case law are the sole bases of the reasoning relied on by the Court to justify its interpretation. In these two regards the Court's reasoning strikes us as rather weak and raises serious questions.

20. Indisputably, a treaty must first be interpreted "in accordance with the ordinary meaning to be given to [its] terms . . . in their context and in the light of its object and purpose" (Vienna Convention on the Law of Treaties, Article 31 (1)). *Travaux préparatoires* are merely a "supplementary means of interpretation", to which resort may be had only if the "general rule of interpretation" laid down in Article 31 of the Vienna Convention leaves the meaning "ambiguous or obscure" or leads to a "manifestly absurd or unreasonable" result (Article 32 of that Convention). Thus, having determined that the "ordinary meaning" of the terms leads to an unambiguous conclusion that is neither absurd nor unreasonable, the Court observes (Judgment, paragraph 142) that it need not resort to the *travaux préparatoires*. It only does so, as an extra measure, "in order to confirm its reading" based on the ordinary meaning — a purpose which it ultimately fails to achieve.

21. It is however striking that the "general rule of interpretation", i.e., "the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose", is applied in the Judgment in a way that amounts to nothing more than applying the principle of "effectiveness". According to the Court: "By interpreting Article 22 of CERD to mean, as Georgia contends, that all that is needed is that, as a matter of fact, the dispute had not been resolved . . .,

[the passage to be interpreted] would become devoid of any effect" (Judgment, paragraph 133). It is this justification, and it alone, which supports the Court's conclusion, and the Court felt no need to pursue its analysis of the "ordinary meaning of the terms" any further. The additional argument in paragraph 135 based on the use of the future perfect ("différend . . . qui n'aura pas été réglé") in the French version of Article 22, whereas the present indicative ("dispute . . . which is not settled") is used in the English, is hardly a solid one, since the problem of interpretation remains the same whatever the tense employed.

22. We do not of course seek to deny the relevance, or underestimate the importance, of the principle that the interpreter of a treaty must normally seek to give its terms a meaning which leads them to have practical effect, instead of one which deprives them of any effect (the "principle of effectiveness"). But this technique of interpretation is never as all-determinative as the Court would appear to treat it in the present case; it does not suffice by itself.

The fact is that "effectiveness" is merely one argument which may point towards a particular interpretation, but it does not obviate the need to take into consideration other elements relevant to elucidating the meaning of the text. We believe that in the case before us the Court should at least have considered certain elements capable of counterbalancing the argument drawn from the principle of effectiveness, which, such as it is described by the Court in the present Judgment, undeniably weighed in favour of the interpretation propounded by the Respondent.

23. We are sorry to say that the Judgment refrains from even mentioning those elements, which are set out below.

First, the Court appears to attach no importance to the fact that its interpretation does not accord with the literal meaning of the text when the terms employed are given their most common meaning. By itself, the language "any dispute which is not settled by" neither suggests nor requires that an attempt at settlement must necessarily have been made before reference to the Court. In this connection, the Judgment appears to treat as synonymous the various forms of wording found in compromissory clauses making reference to negotiation, including, on the one hand, those like Article 22 of CERD referring to a dispute "which is not settled" or "which has not been settled" and, on the other hand, those referring to a dispute "which cannot be settled by negotiation" (for examples of this second type, see the compromissory clauses applicable in the cases concerning *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11; *South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 335; and *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 121, para. 17).

The Court notes these "variations" "in the language used" (Judgment, paragraph 136) but would appear to consider them unimportant because it draws no inferences from them.

This question, however, warranted fuller consideration. In 1965, when CERD was finalized and adopted, compromissory clauses in treaties in force referring to "negotiation" contained two

sorts of formulations, i.e., to simplify a bit, clauses referring to a dispute "which cannot be settled" by negotiation and those referring simply to a dispute "which is not settled" by negotiation. It may therefore be asked whether the wording adopted for Article 22 was not a deliberate, and therefore meaningful, choice, as opposed to an arbitrary selection of one form of wording out of a number of forms deemed equivalent. It is beyond doubt in any case that the CERD drafters chose, deliberately or not, the wording least capable of being interpreted literally as laying down a "precondition" requiring a prior attempt to negotiate a settlement.

24. The foregoing observation is buttressed by the status in international law of negotiations held prior to the initiation of judicial proceedings. In paragraph 131 the Court quotes the 1924 Judgment by the PCIJ in the case concerning *Mavrommatis Palestine Concessions*, stating "that before a dispute can be made the subject of an action at law, its subject-matter should have been clearly defined by means of diplomatic negotiations" (*Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 15). It omits to quote the dictum, in our view much more important, in the Judgment handed down by this Court in 1998 in the case concerning *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria)*: "Neither in the Charter nor otherwise in international law is any general rule to be found to the effect that the exhaustion of diplomatic negotiations constitutes a precondition for a matter to be referred to the Court." (*Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 303, para. 56.).

It is clear that while diplomatic negotiations concerning a dispute may be helpful before judicial proceedings are brought, particularly in clarifying the terms of the dispute and delimiting its subject-matter, they as a general rule are not a mandatory precondition to be satisfied in order for the Court to be able to exercise jurisdiction. There is such a requirement only if, and to the extent that, it is embodied in the clause or declaration on which the jurisdiction of the Court is founded. Thus, as noted in the above-cited Judgment in the case concerning *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria)*:

> "A precondition of this type may be embodied and is often included in compromissory clauses of treaties. It may also be included in a special agreement whose signatories then reserve the right to seise the Court only after a certain lapse of time . . . Finally, States remain free to insert into their optional declaration accepting the compulsory jurisdiction of the Court a reservation excluding from the latter those disputes for which the parties involved have agreed or subsequently agree to resort to an alternative method of peaceful settlement." (*Ibid.*).

25. The general rule set out above is unquestionably one of long standing; the Court has never conditioned its jurisdiction on the existence of prior negotiations between the parties, except on the basis of an express provision to that effect.

26. Accordingly, when the drafters of a compromissory clause wish to include such a precondition, they are aware that in doing so they will depart from the general rule, which includes no such condition. This affords yet another reason for them to make their intention unambiguously clear. In such a case, this should at least lead them to prefer the wording referring to a dispute "which cannot be settled" to that referring to a dispute "which is not settled" by negotiation. Yet a

great number of treaties, including some that had already been adopted as of the date when CERD was signed, spell out the condition even more clearly, thus avoiding any possible ambiguity. For example, the Single Convention on Narcotic Drugs, signed at New York on 30 March 1961, provides: "If there should arise between two or more Parties a dispute . . ., the said Parties shall consult together with a view to the settlement of the dispute by negotiation, investigation, mediation . . . or other peaceful means of their own choice" (Art. 48, para. 1). Only after these mandatory consultations may the dispute be referred to the Court for decision pursuant to Article 48, paragraph 2, of that Convention.

Formulations like these were available to the drafters of Article 22 and moreover were considered at a certain stage (Draft International Convention on the Elimination of All Forms of Racial Discrimination, Final Clauses, Working paper prepared by the Secretary-General, doc. E/CN.4/L.679, 17 February 1964). There is no denying that the Convention's drafters did not employ them, and this casts doubt on the correctness of the Court's interpretation, notwithstanding the undeniable relevance of the "effectiveness" argument.

27. We are just as unsatisfied with the description of the Court's prior jurisprudence found in paragraphs 136 to 140 of the Judgment. According to the Judgment, the jurisprudence is clear and consistent.

After quoting from two precedents (the case concerning *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), I.C.J. Reports* 2006, pp. 40-41, para. 91 and p. 43, para. 100; and the Advisory Opinion on the *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, I.C.J. Reports 1988*, p. 27, para. 34) in which it was called upon to interpret clauses more or less like Article 22 of CERD, the Court concludes: "in each of the above-mentioned cases where the compromissory clause was comparable to that included in CERD, the Court has interpreted the reference to negotiations as constituting a precondition to seisin" (Judgment, paragraph 140). Given that no other precedent is cited, the reader is led to believe that the Court has consistently interpreted such compromissory clauses in the same way whenever it has faced the issue that arises in the present case.

The real picture is much less uniform.

28. It is true that the Court has consistently interpreted compromissory clauses providing for the submission to the Court of disputes which "cannot be settled" (in French: "qui ne peuvent pas être réglés" or "qui ne sont pas susceptibles d'être réglés") by negotiation as meaning that the Court cannot exercise jurisdiction unless an attempt at negotiation has been made and has led to deadlock, that is to say that there is no reasonable hope — or no longer any — for a settlement of the dispute by diplomatic means. This line of case law dates back to the Judgment in the *Mavrommatis Palestine Concessions* case (cited in paragraph 23, above, of the present opinion).

29. On the other hand, in respect of clauses worded like Article 22 of CERD, applying to disputes "which are not settled" by negotiation, the jurisprudence of the Court would appear to fluctuate much more than the present Judgment suggests.

30. In addition to the two cases cited in paragraphs 137 to 139, relied on to support the Court's position in the present case, the relevant precedents include the *Oil Platforms (Islamic Republic of Iran* v. *United States of America)* case, in which the compromissory clause read as follows:

> "Any dispute . . . not satisfactorily adjusted [in French: "Tout différend . . . qui ne pourrait pas être réglé d'une manière satisfaisante"] by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties agree to settlement by some other pacific means." (*Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 809, para. 15.)

The Court applied this clause first in its Judgment on the preliminary objection raised by the United States, in ascertaining that it had jurisdiction to entertain Iran's Application, and then in its Judgment on the merits, in responding to an objection by Iran to a counter-claim of the United States.

In the first of these two Judgments the Court confines itself to observing:

> "It is not contested that several of the conditions laid down by this text have been met in the present case: a dispute has arisen between Iran and the United States; it has not been possible to adjust that dispute by diplomacy and the two States have not agreed 'to settlement by some other pacific means'" (*ibid.*, pp. 809-810, para. 16).

The Court does speak in this passage of a "condition" in respect of the absence of diplomatic settlement, but it is impossible to tell exactly what that "condition" consists of — no doubt because the parties did not argue the question.

The Judgment on the merits is much clearer on this point. In response to the objection raised by Iran to the United States counter-claim and based specifically on the assertion that the Court "cannot entertain the . . . claim of the United States because it was presented without any prior negotiation", the Judgment states:

> "It is established that a dispute has arisen between Iran and the United States over the issues raised in the counter-claim. The Court has to take note that the dispute has not been satisfactorily adjusted by diplomacy. Whether the fact that diplomatic negotiations have not been pursued is to be regarded as attributable to the conduct of the one Party or the other is irrelevant for present purposes, as is the question whether it is the Applicant or the Respondent that has asserted a *fin de non-recevoir* on this ground. As in previous cases involving virtually identical treaty provisions [the *United States Diplomatic and Consular Staff in Tehran* and *Military and Paramilitary Activities in and against Nicaragua* cases are cited here], it is sufficient for the Court to satisfy itself that the dispute was not satisfactorily adjusted by diplomacy before being submitted to the Court." (*Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment, I.C.J. Reports 2003*, pp. 210-211, para. 107.)

Surprisingly, this clear and fairly recent precedent is not even mentioned in the Judgment. Admittedly, that decision looks to two precedents which, on careful inspection, are not entirely consistent with the position the Court took in 2003. To our mind, all this shows one thing: contrary to the impression given by the Judgment in the present case, the Court's prior jurisprudence on compromissory clauses akin to Article 22 of CERD was not consistent, but was fluid and uncertain.

31. Finally, we find that the Court gives short shrift to the precedent in the form of the Order of 15 October 2008 on the request for provisional measures submitted in the present case. The Court cites that Order in paragraph 129 of the Judgment. It quotes its own statement in the Order that "the phrase 'any dispute . . . which is not settled by negotiation . . .' does not, in its plain meaning, suggest that formal negotiations in the framework of the Convention . . . constitute preconditions to be fulfilled before the seisin of the Court", even though it did at the time add, "Article 22 does suggest that some attempt should have been made by the claimant party to initiate, with the respondent party, discussions on issues that would fall under [the Convention]" (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008*, p. 388, para. 114). The Court then limits itself to observing that the conclusion above was strictly provisional, that it was solely for the purpose of determining whether the Court had prima facie jurisdiction over the case and that the Court is not bound by it in ruling definitively on the issue of jurisdiction after having considered all arguments of the Parties. This is how the Court justifies its change of position on the matter.

32. We take no issue with the validity of the Court's analysis in paragraph 129, where it merely points to a consistent jurisprudence: an order ruling on a request for provisional measures has no force as *res judicata*; it cannot prejudge any question to be decided by the Court in the subsequent proceedings, including the question of its jurisdiction to adjudicate the case on the merits.

33. But it is one thing to deny the Order any binding force on the issue of jurisdiction and yet another to disregard it completely as a germane precedent, that is to say one apt to shed light on how the Court has previously treated clauses identical or comparable to Article 22. The very least that can be said is that the 2008 Order undeniably shows that the prior case law was not as clearly settled — in favour of the existence of a "precondition" — as the present Judgment would suggest. Had it been, the Court in 2008 would not have been able to assert, even prima facie, that Article 22 "in its plain meaning" did not appear to make prior negotiations a condition to the seisin of the Court (which it now says is the case).

34. Thus, there is no unassailable argument supporting the interpretation of Article 22 of CERD upheld by the Court in the present Judgment — namely, that the clause establishes "preconditions", the fulfilment of which has to be determined by the Court, including whether there has been a failed attempt at a negotiated settlement. Neither textual analysis of the language, which is ambiguous, nor the prior jurisprudence, which appears to have fluctuated, nor an examination of the *travaux préparatoires*, which are inconclusive, necessarily leads to the position the Court has decided to adopt in this case — at variance with the position it took on a prima facie basis three years ago in the same case.

35. What is more, the Court adopts a particularly exacting position in requiring that the preconditions in question must be fulfilled "before the seisin of the Court" (Judgment, paragraph 141).

In our view, this position is out of step with the most recent jurisprudence of the Court in respect of the conditions for jurisdiction or admissibility. While it is true that in principle the Court, in determining whether the conditions governing its jurisdiction or the admissibility of an application are met, looks to the date on which it was seised, it has progressively relaxed this principle since the Judgment in the *Mavrommatis Palestine Concessions* case (cited in paragraph 23 of the present opinion) to address the situation in which a condition not met when the proceedings were begun comes to be fulfilled between then and the date on which the Court decides on its jurisdiction (or on the admissibility of the application). In such a case it would be pointlessly formalistic to refuse to take account of the fulfilment of the initially unmet condition after the filing of the application.

As the Court wrote in terms that could not be any clearer in its most recent Judgment concerning a situation of this kind:

> "What matters is that, at the latest by the date when the Court decides on its jurisdiction, the applicant must be entitled, if it so wishes, to bring fresh proceedings in which the initially unmet condition would be fulfilled. In such a situation, it is not in the interests of the sound administration of justice to compel the applicant to begin the proceedings anew — or to initiate fresh proceedings — and it is preferable, except in special circumstances, to conclude that the condition has, from that point on, been fulfilled." (*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. 441, para. 85.)

36. None of this is reflected in the present Judgment. Requiring fulfilment of the condition "before the seisin of the Court" means, for example, that in a case where negotiations were begun before the application was filed but came to an end only after that date, by virtue of the acknowledged impossibility of reaching agreement, the Court should decline jurisdiction and thereby require the applicant to bring fresh proceedings. In looking in the present case for any attempt by Georgia to negotiate, the Court thus confines itself to the period from 9 August 2008, when the Court believes the dispute came into existence, to 12 August 2008, when the Application was filed: "the Court is . . . assessing whether Georgia genuinely attempted to engage in negotiations with the Russian Federation, with a view to resolving their dispute . . . [and, if so,] the Court [will] ascertain whether the negotiations failed, became futile, or reached a deadlock *before Georgia submitted its claim to the Court*" (Judgment, paragraph 162; emphasis added).

37. No reason can be found for such a surprisingly narrow approach, one at odds with the thrust of the Court's most recent jurisprudence in respect of its consideration of the conditions for jurisdiction and, specifically, at odds with a Judgment as recent — and as clear on this point in its reasoning — as that which the Court handed down on the preliminary objections in the *Croatia* v. *Serbia* case. The language quoted above from paragraph 85 of that Judgment is obviously general in scope. In that case the condition not met until after the application had been filed was not a

condition requiring an attempt at negotiated settlement, but the Court expressed itself in terms precluding all doubt as to the fact that its reasoning applies to any initially unmet condition for jurisdiction or admissibility that is fulfilled between the date the proceedings were initiated and the date on which the Court decides on its jurisdiction. And it is hard to see any reason why it should be otherwise. It was this reasoning that allowed the Court to find jurisdiction to entertain Croatia's application. Hence, in the present case the Court has departed from its own most recent jurisprudence, without offering the slightest justification for doing so.

38. As questionable as may be the Court's especially strict interpretation of the compromissory clause in the present case — although we concede that it is not "manifestly absurd or unreasonable" as those terms are used in the Vienna Convention — we think that it nonetheless should not have led the Court to sustain the second preliminary objection.

This is because we believe that, assuming that Article 22 of CERD lays down "preconditions" for the jurisdiction of the Court, those "preconditions" were satisfied in this case. Our conclusion follows from our view that the two modes of settlement referred to in Article 22 are alternative, not cumulative (II, below); that the requirement of an attempt at negotiated settlement must be understood and applied realistically, not formalistically (III); and that it must be regarded as having been fulfilled in this case (IV).

II. Are the two modes referred to in Article 22 alternative or cumulative?

39. The Judgment takes no position on this point because the Court was of the view that neither of the two "conditions" laid down in Article 22 had been fulfilled by the Applicant; Georgia did not attempt to settle the dispute by direct negotiation with Russia, nor did it initiate the "procedures expressly provided for" in the Convention, since it did not refer the matter to the Committee on the Elimination of Racial Discrimination pursuant to Article 11 of the Convention.

40. We concur that, where a provision contains two conditions and neither is met, no useful purpose is served in deciding whether they are cumulative (both have to be fulfilled) or alternative (fulfilment of one suffices). It is equally pointless to decide that question when both conditions are in fact fulfilled.

However, for the reasons to be explained presently and on the assumption that Article 22 imposes conditions, our view is that one of those conditions (i.e., an unsuccessful attempt to negotiate) has been satisfied by Georgia, while the other clearly has not been. Thus, we must express our view on the matter.

41. Let us begin by clarifying the question. It is specifically whether the applicant State must have attempted, without success, to settle its dispute with the respondent by recourse, in turn or simultaneously, to the two modes of settlement ("negotiation" and "the procedures expressly provided for") referred to in Article 22, or whether having sought, without success, to use one of those two modes is sufficient to entitle the applicant to turn to the Court without further delay.

We think that the correct interpretation of Article 22 is necessarily the second one.

42. We are unimpressed by the literal or textual argument which Georgia stresses and bases on the use of the conjunction "or" in Article 22 ("by negotiation *or* by the procedures . . ."). This, it is claimed, means that the two terms linked by the conjunction represent an alternative.

The conjunction "or" is clearly different from the conjunction "and", and, generally speaking, "or" takes on great importance when a text containing it and requiring interpretation is stated in the affirmative. In such cases, there is no better means than the conjunction "or" of indicating that the conditions (situations, etc.) referred to in the text are alternative, meaning that either is sufficient to give rise to the effect in question. Matters become less clear however when "or" is used in a clause in the negative, as in the present case ("which is *not* settled by negotiation or by the procedures . . ."). In such a case, "or" need not mean something other than "and", but the latter word cannot be used because it would not make sense in the context of the sentence. In fact, here, "or" is the equivalent of "neither . . . nor": any dispute which is settled neither by negotiation nor by the procedures expressly provided . . . This reformulation does not however tell us any more about whether the two modes are alternative or cumulative.

43. In our opinion, the conclusive argument draws on the logic and purpose of the text under consideration. The point of this text cannot be to require a State to go through futile procedures solely for the purpose of delaying or impeding its access to the Court. The end sought is not purely one of form; if we look at it from the perspective taken by the Court, the rule has a reasonable aim, to reserve judicial settlement for those disputes which cannot be settled by an out-of-court means based on agreement between the parties. Still, for this condition to be met, the applicant must have made the necessary efforts to attempt to settle the dispute, if it seems reasonably possible, by recourse to means enabling the parties to reach agreement, leaving the Court to act as the last resort.

If the text is understood in these terms, it becomes illogical to consider the two modes referred to in Article 22 as necessarily cumulative. Each mode ultimately depends on an understanding between the parties and their desire to seek a negotiated solution. This is obvious in the case of "negotiation" and it is equally true for the "procedures expressly provided for" in Part II of CERD. The Committee established by the Convention has no power to impose a legally binding solution on the disputing States. It can only encourage the States to negotiate with each other (Art. 11); then, where there have been no negotiations or unsuccessful negotiations, it can appoint a conciliation commission to make recommendations (Art. 13) to be communicated to the parties, which then make known whether or not they accept them. Ultimately, a favourable outcome depends on the readiness of the parties to come to an agreement, in other words, on their willingness to negotiate.

Consequently, where a State has already tried, without success, to negotiate directly with another State against which it has grievances, it would be senseless to require it to follow the special procedures in Part II, unless a formalism inconsistent with the spirit of the text is to prevail. It would make even less sense to require a State which has unsuccessfully pursued the intricate procedure under Part II to undertake direct negotiations destined to fail before seising the Court.

44. In short, as direct negotiation and referral to the Committee are two different ways of doing the same thing, that is to say, seeking an agreement premised on the parties' ability to reconcile their positions, it is enough, even under the strict interpretation upheld in the Judgment, to entitle the applicant to come before the Court if one of these two modes has been pursued, for it would be highly unreasonable to require the applicant then to try the other.

45. This interpretation is also supported by the *travaux préparatoires* of Article 22, specifically that part dealing with the drafting of the final formulation — the language referring to two possible modes of non-judicial settlement.

Up until the 1367th meeting of the Third Committee of the General Assembly, on 7 December 1965, clause VIII of the draft prepared by the officers of the Committee, later to become Article 22 of the Convention, provided for the referral to the International Court of Justice of "[a]ny dispute . . . which is not settled by negotiation". That meeting debated and adopted the "three-Power amendment", jointly submitted by Ghana, the Philippines and Mauritania for the purpose of adding the phrase "or by the procedures expressly provided for in this Convention" after "negotiation". It was thus that a draft contemplating just one means of non-judicial settlement of the dispute (negotiation) became a final text referring to two modes (negotiation, on one hand, and resort to the special procedures under the Convention, on the other).

46. The representative of Ghana introduced the amendment in restrained terms; he confined himself to saying that "the three-Power amendment [is] self-explanatory" and it "simply refer[s] to the procedures provided for in the Convention" (United Nations, *Official Records of the General Assembly, Twentieth Session, Third Committee*, doc. A/C.3/SR.1367, p. 453, para. 29). The amendment was then debated and unanimously adopted. Most speakers approved of it as offering useful clarification of the text. According to the representative of Canada, the amendment "made a valuable addition to the clause"; in the view of France's representative, it "brought clause VIII into line with provisions already adopted in the matter of implementation"; according to Italy's delegate, it "was a useful addition"; and, in the view of Belgium's, it "introduced a useful clarification" (*ibid.*, paras. 26, 38-40).

47. None of these statements is fully illuminating. The clear impression nevertheless emerges that the three Powers' intent in proposing their amendment was not to impose a further condition resulting in more limited access to the Court than under the earlier text. There is nothing to indicate that the amendment was aimed at making resort to the special procedures under Part II mandatory where direct negotiations had failed. More likely, the amendment was intended to make clear that recourse to these special procedures figured among the possible avenues for negotiated settlement. That is why it was regarded by the delegates as merely a "useful addition or clarification" and was easily adopted, not as a change in the text to make it more restrictive but as a natural, and almost self-evident, clarification.

III. What exactly does the condition requiring an attempt to settle the dispute by negotiation consist of?

48. The second prong of the alternative set forth in Article 22, namely use of "the procedures expressly provided for in [the] Convention" hardly raises any difficulty of interpretation, as it is clear that this refers to the procedures established by Part II, and those procedures are described precisely by the Convention. Furthermore, the question does not arise in this case, since it is a fact that Georgia has never sought to make use of those procedures against Russia.

49. However, the scope of the condition — if it is accepted as such — of having attempted to settle the dispute by negotiation may be open to debate. Hence the Court has endeavoured to define what it calls "the concept of negotiations" in paragraphs 156 to 162.

50. In our view, the Court has adopted too formalistic an approach to "negotiations", which inevitably had implications for the Court's assessment of the circumstances of the case, leading it to conclude that Georgia had not seriously proposed to Russia that negotiations should take place regarding the dispute between them.

51. Paragraph 157 makes the point that "negotiations are distinct from mere protests or disputations". It is therefore not sufficient for one of the parties (the applicant) to have protested against the conduct of the other (the respondent); there must also have been "a genuine attempt . . . to engage in discussions with the other disputing party, with a view to resolving the dispute". In other words, the applicant must have made an offer — a serious offer — to negotiate with the respondent.

52. Naturally, paragraph 158 states that "evidence of such an attempt to negotiate — or of the conduct of negotiations — does not require the reaching of an actual agreement between the disputing parties". To have asserted otherwise would have been most surprising. But the Judgment then adds (paragraph 159), citing a number of precedents, that it is not enough for negotiations to have been attempted (i.e., proposed by the applicant); for the condition allowing referral to the Court to be regarded as fulfilled, those negotiations must also have failed or become futile or deadlocked.

53. The Court then recalls that, according to its jurisprudence, "negotiations" are not confined to direct contacts between two parties; account should also be taken of less formal exchanges and of "diplomacy by conference or parliamentary diplomacy" (paragraph 160). It also points out that negotiations do not necessarily have to refer expressly to the instrument that contains the compromissory clause; it is sufficient for them to relate to the subject-matter of that instrument, the crucial point being that they must concern the subject-matter of the dispute brought before the Court (Judgment, paragraph 161).

54. Even taking account of the elements of flexibility introduced by these last considerations, we believe that the Court's approach remains far too formalistic here, and, in truth, not very faithful to the general thrust of its jurisprudence in the past.

55. In our opinion, a firmly realistic, rather than formalistic, approach should be taken to the question of negotiations, the approach which hitherto the Court always has adopted.

56. There is no general criterion — nor can there be one — which makes it possible to determine at what point a State is regarded as having complied with the obligation to attempt to negotiate with respect to its claims against another State, and to pursue those attempts as far as possible, with a view to reaching an agreement.

Everything depends on the circumstances. The level of the Court's requirements is obviously bound to vary, according to the nature of the questions which form the subject-matter of the dispute, and the conduct of the State that is being implicated. Clearly some questions, by their nature, lend themselves more than others to negotiation, the reconciling of opinions and the search for a compromise. It is also clear that the State which is being implicated may have a range of responses to the claim made against it, from complete receptiveness to the most strenuous or indeed point-blank rejection.

57. The Court must therefore always make a case-by-case assessment.

In every case, however, the Court should address the question not from a formal or procedural point of view, but as a question of substance. If the Court finds that there was no longer, on the date when the proceedings were instituted — or, alternatively, that there is no longer, on the date when it decides on its jurisdiction — a reasonable prospect of the dispute, as presented to the Court, being settled by negotiations between the parties, it must find jurisdiction, without entering into a convoluted examination of every single action taken by the applicant, or those that it could have taken.

58. That is the essential purpose of the conditions established by a clause such as the one that the Court must apply in this case: not to erect needless and over-exacting procedural obstacles liable to delay or impede the applicant's access to international justice, but to allow the Court to satisfy itself, before dealing with the merits of the dispute brought before it, that a sufficient effort has been made to resolve that dispute by means other than judicial settlement.

59. It is in this spirit that the Court has always hitherto applied compromissory clauses that require that a negotiated settlement of the dispute must be attempted, including in cases where the applicable clause was more clear-cut than Article 22 of CERD as to the requirement of prior negotiation.

60. Two precedents, among others, are significant in this respect.

61. In the *South West Africa* case, the applicable clause (Article 7, paragraph 2, of the Mandate) referred to "any dispute . . . if it cannot be settled by negotiation". The Respondent maintained that the dispute brought before the Court was not one that "cannot be settled by negotiation", and that no negotiations had taken place with a view to its settlement.

The Court replied as follows:

> "The question to consider . . . is: What are the chances of success of further negotiations between the Parties in the present cases for reaching a settlement? . . . Even a cursory examination of the views, propositions and arguments consistently maintained by the two opposing sides, shows that an impasse was reached before 4 November 1960 when the Applications in the instant cases were filed, and that the impasse continues to exist . . .
>
> It is immaterial and unnecessary to enquire what the different and opposing views were which brought about the deadlock in the past negotiations in the United Nations, since the present phase calls for determination of only the question of jurisdiction . . .
>
> It is, however, further contended by the Respondent that the collective negotiations in the United Nations are one thing and direct negotiations between it and the Applicants are another, and that no such direct negotiations have ever been undertaken by them. But in this respect it is not so much the form of the negotiation that matters as the attitude and views of the Parties on the substantive issues of the question involved. So long as both sides remain adamant, and this is obvious even from their oral presentations before the Court, there is no reason to think that the dispute can be settled by further negotiations between the Parties." (*South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, pp. 344-346.)

62. In the *Aerial Incident at Lockerbie* cases, the applicable clause (Article 14, paragraph 1, of the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation) referred to "[a]ny dispute . . . which cannot be settled through negotiation". The Respondents maintained — one of them so maintaining when the request for provisional measures was considered and the other at both that stage and the preliminary objections stage — that, besides the fact that no dispute existed between themselves and the Applicant regarding the interpretation or application of the Montreal Convention, such a dispute, if it did exist, had not given rise to any attempt at a negotiated settlement.

In rejecting this objection, the Court took account of the following, among other determining factors:

> "The Court observes that in the present case, the Respondent has always maintained that the destruction of the Pan Am aircraft over Lockerbie did not give rise to any dispute between the Parties regarding the interpretation or application of the Montreal Convention and that, for that reason, in the Respondent's view, there was nothing to be settled by negotiation under the Convention . . .
>
> Consequently, in the opinion of the Court, the alleged dispute between the Parties could not be settled by negotiation." (*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 122, para. 20.)

63. The present case is the first in which the Court has found that it lacks jurisdiction solely on the basis that a condition of prior negotiation has not been fulfilled. We are convinced that this is not justified by the circumstances of the case. Instead, the Court has substituted a formalistic approach for the realistic, substantive approach that it has consistently taken in the past and that, had it been retained, should have led the Court to the opposite conclusion in the present case, given the facts. We are now going to explain why.

IV. Was a sufficient attempt made to settle the dispute through negotiation?

64. On the basis of the principles just set out, our approach in considering the facts with a view to determining whether the "negotiation" condition has been met is fundamentally different from that of the Court.

65. The approach to the question taken in the Judgment is essentially formalistic.

The Court begins by identifying a limited time period — no more than three days — which, in the Court's view, is the period as to which evidence of any attempt at negotiation by Georgia should be sought. The period is the few days between 9 August 2008, the date, according to the Judgment, that the dispute first materialized, and 12 August 2008, the date the Application was filed (paragraph 168).

It then seeks to ascertain whether, during that period, Georgia genuinely offered to negotiate with Russia to try to resolve the dispute — having already made a careful distinction (paragraph 157) between "protests or disputations", on the one hand, and "negotiations", on the other, and having stated that the latter "requires — at the very least — a genuine attempt by one of the disputing Parties to engage in discussions with the other".

It concludes that Georgia made no offer to negotiate (as thus defined) during the brief period under consideration (paragraphs 171 to 181).

That allows it to conclude that Georgia "did not attempt to negotiate CERD-related matters with the Russian Federation", and that, therefore, the Parties "did not engage in negotiations with respect to [Russia]'s compliance with its substantive obligations under CERD" (paragraph 182). Consequently, according to the Judgment, there is no need to ascertain whether "there has been a failure of negotiations, or [whether] negotiations have become futile or deadlocked", to quote paragraph 159, since no such negotiations ever even began — and that was because of the conduct of Georgia, which did not seek to resolve the dispute through negotiation.

66. In our view, this conclusion — to the effect that Georgia did not, through its own doing, exhaust the possibility of a negotiated settlement before submitting its dispute with Russia to the Court — is completely unrealistic and flies in the face of the obvious. Indeed, no one can seriously think it reasonable to have required Georgia to attempt to resolve its dispute with Russia through negotiations after 12 August 2008; it is unrealistic to believe that on that date there remained even the slightest chance of a negotiated settlement of the dispute, as defined before the Court.

67. The Court would not have reached a conclusion so far removed from reality had it considered the question of "negotiations" not from the formalistic perspective it chose to adopt, but from the realistic point of view we believe it should have taken, in keeping with its earlier jurisprudence.

It should have asked itself whether, on the date the proceedings were instituted, there was still a reasonable possibility of negotiating a settlement of the dispute between Georgia and Russia over the application of CERD, and — secondarily — if that were the case, whether such a possibility still exists now. We believe that the answer to the first question is indisputably no — and that, therefore, there is no need to consider the second. Nothing more is required to satisfy the requirements of Article 22 in this respect.

68. Reference must be had to Georgia's submissions to understand the exact substance of the dispute submitted to the Court (which is manifestly merely one of a number of disputes between Russia and Georgia, but the only one, whether or not the most significant, for which it has sought judicial settlement).

69. At the end of its Memorial, filed on 2 September 2009, Georgia contended — and this is the essence of its claims:

> "that the Russian Federation, through its State organs, State agents and other persons and entities exercising governmental authority, and through the *de facto* governmental authorities in South Ossetia and Abkhazia and militias operating in those areas, is responsible for violations of Articles 2 (1) *(a)*, 2 (1) *(b)*, 2 (1) *(d)*, 3 and 5 of the 1965 Convention by the following actions: (i) the ethnic cleansing of Georgians in South Ossetia; (ii) the frustration of the right of return of Georgians to their homes in South Ossetia and Abkhazia; and (iii) the destruction of Georgian culture and identity in South Ossetia and Abkhazia" (quoted in paragraph 17 of the Judgment).

Accordingly, Georgia asserted that the Russian Federation was "under an obligation to cease all actions" outlined above; that Russia should "re-establish the situation that existed before its violations", in particular "by taking prompt and effective measures to secure the return of the internally displaced Georgians to their homes in South Ossetia and Abkhazia"; and, finally, that Russia was under an obligation to provide compensation for the damage caused by its violations of the 1965 Convention.

70. Although Russia has not presented a defence on the merits, we know that it categorically rejects Georgia's accusations against it based on CERD, in particular because it denies that the conduct of the provincial authorities of South Ossetia and Abkhazia, and of the groups acting in those provinces, is attributable to it, and contends that it has always acted with a view to maintaining peace and facilitating the resolution of disputes between those provincial authorities and the Georgian Government, and that, consequently, its international responsibility is not engaged as a result of the actions of the authorities in question.

Such are the terms, and such is the precise subject, of the dispute referred to the Court.

71. What is required is obviously not a decision ruling in any way whatsoever on the validity of those arguments. Whether the accusations made by Georgia are entirely true, false, or somewhere in-between, has no bearing on the Court's jurisdiction to entertain them, nor in particular on the question whether the requirement of a prior attempt at negotiated settlement has or has not been satisfied.

72. On the other hand, due consideration must be given to the subject of the dispute in making a realistic assessment of the prospects for resolution through diplomatic negotiation.

In a case such as this, concerning the kind of dispute which rarely gives rise to a reconciliation of positions, the applicant should not be expected to make a formal offer to negotiate, or to suggest ways to a compromise. In our view, it is sufficient for the applicant clearly to make known the existence and tenor of its claims against the other party, thereby enabling the latter to express its position — in this connection, we dispute the stark distinction made in paragraph 157 of the Judgment between "protests" and attempts at "negotiation" — and for the other party to have made known unequivocally that it categorically rejects the essence of the asserted claims.

73. That is exactly what happened in this case.

Contrary to what is stated in the section of the Judgment relating to Russia's first preliminary objection, the dispute between the Parties did not first appear three days before the seisin of the Court, i.e., on 9 August 2008.

Georgia had long accused Russia of being responsible, by action or omission, for the ethnic cleansing it alleges was committed against Georgian citizens in Abkhazia and South Ossetia.

74. We can go at least as far back as the exchange of letters between President Saakashvili, of Georgia, and President Putin, of the Russian Federation, in July and August 2004. In his letter, the Georgian President plainly called into question the "impartiality of Russian peacekeeping forces" when carrying out their mission, in connection with armed attacks carried out by illegal units acting under the auspices of the *de facto* authorities of South Ossetia against villages with populations of Georgian origin. In his response, President Putin used the term "regrettable" to describe what he called "[t]he propaganda launched by Tbilisi[,] the main target of which in the beginning was the Russian Peacekeeping Force and then Russia itself" (documents annexed to Georgia's Memorial, Vol. V, Anns. 309 and 310).

75. At a meeting held by the United Nations Security Council on 26 January 2006, Georgia's accusations against Russia were made yet more explicit and more precise. Georgia's representative, the Special Envoy of the President of Georgia, criticized Russia for having "decided to disassociate itself from supporting the basic principle . . . of territorial integrity of Georgia within its internationally recognized borders", adding that: "[r]enouncement of the principle of determining the status of Abkhazia within the State of Georgia does mean . . . endorsement of ethnic cleansing of more than 300,000 citizens of Georgia" (this statement is quoted in paragraph 84 of the Judgment).

76. On 24 July 2006, the Permanent Representative of Georgia transmitted to the Security Council the text of a resolution adopted by the Georgian Parliament on the 18th of that month; in it the Parliament challenged the actions of Russian peacekeeping forces in the following terms:

> "Instead of demilitarization, the drastic increase of military potential of those armed forces [militia forces taking action against citizens of Georgian origin] under subordination of de facto authorities of Abkhazia and the former Autonomous District of South Ossetia . . ., permanent attempts to legalize the results of ethnic cleansing the fact of which had been repeatedly recognized by the international community, massive violation of fundamental human rights . . . — *this is a reality brought about as a result of peacekeeping operations*" (quoted in paragraph 86 of the Judgment; our emphasis).

77. Reacting to that document, the Permanent Representative of Russia to the United Nations by letter of 19 July 2006 transmitted to the Secretary-General a statement of the same date from his country's Ministry of Foreign Affairs, in which it is stated:

> "During the discussion of the draft decision [the draft resolution of the Georgian Parliament], some deputies went so far as to say that, unless those conditions were accepted, the Russian peacekeepers would be declared unlawful and treated as occupying forces. The decision falsely claims that the actions of the Russian peacekeepers in Abkhazia and South Ossetia present one of the main obstacles to peaceful settlement of the conflicts.
>
> The Russian Federation regards the decision as a provocative step . . . The accusations that the decision makes against the Russian Federation constitute a disgraceful attempt to shift the blame to others." (Documents annexed to Georgia's Written Statement, Vol. III, Ann. 81.)

78. Several other statements from official Georgian representatives, made between 2006 and 2008 and accusing Russia of complicity in ethnic cleansing, are cited in the section of the Judgment dealing with the first preliminary objection.

One illustration is a statement made by Georgia's Permanent Representative to the United Nations at a press conference held on 3 October 2006, according to which:

> "It is crystal clear, that the Russian peacekeeping force is not an impartial, nor international [contingent]. It failed to carry out the main responsibilities spelled out in its mandate — create [a] favorable security environment for the return of ethnically cleansed hundreds of thousands of Georgian citizens. It became the force that works to artificially alienate the sides from one another." (Paragraph 92.)

Another illustration is an address made by the President of Georgia to the United Nations General Assembly on 26 September 2007, in which he stated: "The story of Abkhazia . . . is . . . one of the more abhorrent, horrible and yet forgotten ethnic cleansings of the twentieth century. In the time since Russian peacekeepers were deployed there, more than 2,000 Georgians have perished and a climate of fear has persisted." (Paragraph 94.)

Similarly, a statement made in December 2006 by the Georgian Minister for Foreign Affairs expressly accuses Russia of offering "an open support and armaments to the separatist régimes widely known to have conducted an ethnic cleansing of Georgians" (this statement is mentioned in paragraph 93); a press release from the same Ministry, on 19 April 2008, refers to the "*de facto* annexation of Georgia's integral parts . . . and neglect of human rights of an absolute majority of the regions' population — victims of ethnic cleansing" (paragraph 97); and yet another press release from that Ministry, dated 17 July 2008, claims that Moscow's true design is "to legalize results of the ethnic cleansing . . . conducted through Russian citizens" (paragraph 104).

79. Those various documents and statements are not disregarded by the Judgment. They are considered in the section relating to the first preliminary objection, with a view to establishing whether a dispute existed between the Parties and, if so, from what date. Each one is dismissed as immaterial for the purposes of the case on one of the following grounds: although the document or statement in question makes charges against Russia, those charges do not relate to conduct falling *ratione materiae* under CERD; although the document alleges the commission of acts of ethnic discrimination, Russia is not expressly accused of them; or the claims relate to acts of ethnic cleansing committed in the early 1990s, before CERD entered into force between the Parties.

80. Despite the insistence with which the Court rejects each of those documents, we do not think that its reasoning withstands careful scrutiny.

It is true that the statements and documents in question do not make explicit reference to CERD. However, it is accepted, in reliance on the Court's jurisprudence, in the Judgment that "[c]oncerning the substance of negotiations, . . . the absence of an express reference to the treaty in question does not bar the invocation of the compromissory clause" (paragraph 161). Therefore, it is simply a question of establishing whether the documents in question refer in substance to racial discrimination or, more generally, to questions capable of being covered *ratione materiae* by CERD. In this respect, it is surprising to see the Court dismiss the numerous statements in which the Georgian authorities, well before 9 August 2008, accused Russia of encouraging ethnic cleansing or attempting to "legalize" the results of ethnic cleansing, on the grounds that those statements are unrelated to CERD, or that they do not contain any allegations of racial discrimination aimed at Russia.

81. Of particular significance in this respect is the way two statements from the Georgian Ministry of Foreign Affairs are treated in the Judgment.

The first is that of 22 December 2006, which, as stated above, accuses Russia of offering "an open support and armaments to the separatist régimes widely known to have conducted an ethnic cleansing of Georgians". Without quoting it, the Judgment refers to that statement (paragraph 93), but immediately states that, in the Court's opinion, it refers to events which took place in the early 1990s, thus prior to Georgia's accession to CERD. However, there is nothing in the statement from which it may be concluded that the conduct complained of, i.e., Russia's alleged support of authorities carrying out acts of ethnic cleansing, occurred before 1999. That is simply a consequence of the Court's very liberal interpretation.

The second statement is that of 17 July 2008, in the form of a press release, whereby the Georgian Ministry of Foreign Affairs asserted that Moscow's true design was to "to legalize results of the ethnic cleansing instigated by itself and conducted through Russian citizens in order to make easier annexation of the integral part of Georgia's internationally recognized territory".

Unlike the earlier statement, this one is quoted in the Judgment (paragraph 104). However, it is subject to a surprising interpretation by the Court, according to which: "the reference to ethnic cleansing may . . . be read as relating to the events of the early 1990s", and "the principal theme of the press release . . . is . . . the concern of Georgia in relation to the status of . . . [its] territorial integrity", so that, ultimately, that statement "raised the issue of the proper fulfilment of the mandate of the . . . peacekeeping force, and not the Russian Federation's compliance with its obligations under CERD".

Once again, we are struck by the Court's very loose treatment of the text that it is called upon to explain. There is nothing in the statement in question to justify limiting its subject to events which took place in the early 1990s. Supposing that the allegation of "ethnic cleansing" did relate to acts committed over 15 years before the statement was made — and there is no evidence to back up a firm conclusion to this effect — it is in any case indisputable that the charge of attempting "to legalize results of the ethnic cleansing" could only refer to Russia's (alleged) conduct at the very time when the statement was made. Moreover, the fact that the statement questions Russia's fulfilment of the mandate of the peacekeeping forces in no way precludes it from also addressing in substance the breach of obligations under CERD, and it clearly does so when it refers to the goal of "legaliz[ing] results of the ethnic cleansing instigated by itself and conducted through Russian citizens".

82. Faced with these repeated accusations, Russia has maintained an immutable position. It has always denied any responsibility for acts of ethnic cleansing, and has asserted that its armed forces acted with impartiality, as peacekeeping forces, in the interest of maintaining peace and security in the region. If there were any acts of ethnic cleansing and racial discrimination, they were carried out by the local authorities and certain groups in South Ossetia and Abkhazia, not by persons acting on behalf of the Russian Federation. The conflict in this respect is between Georgia and the two provinces, not Georgia and Russia.

83. That unwavering stance was amply confirmed by the oral statements of Russia's representatives before the Court. By denying the existence of a dispute between itself and Georgia concerning the interpretation or application of CERD, Russia sought in particular to stress that the acts of ethnic cleansing and racial discrimination, were they committed, had been carried out by individuals whose conduct was not attributable to it, whether directly or indirectly. This shows that Russia firmly rejects, and has always firmly rejected, Georgia's accusations.

84. Accordingly, our conclusion is simple: on the date the Application was filed, it was clearly established that there was no reasonable possibility of a negotiated settlement of the dispute as it was presented to the Court, and the condition in Article 22, if one exists, had been met.

85. Before concluding, we feel it necessary to reiterate that our analysis does not imply any position on the merits. At this stage, the question for the Court was not whether Georgia's grievances were valid, or whether Russia was justified in simply rejecting them, as it has done so categorically. It may be that Georgia's allegations against the Russian Federation are completely unfounded; it may therefore be that Russia is right in dismissing them wholesale and refusing to enter into negotiations over artificial claims which, in its opinion, do not warrant negotiations. But that involves the merits of the case. Justified or not, Russia's dismissal of Georgia's accusations created the necessary conditions for the Court to be able to entertain the dispute. To recall the Judgment in the *South West Africa* cases (see para. 61 above), "[s]o long as both sides remain adamant, . . . there is no reason to think that the dispute can be settled by . . . negotiations between the Parties" (*South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 346).

*

* *

General conclusion

86. By means of this Judgment, the Court declares that it has no jurisdiction to adjudicate a case in which, less than three years ago, it ordered the Parties to comply with a number of provisional measures, after finding prima facie that it had jurisdiction to entertain the dispute. Of course, after full argument on jurisdiction, the Court is perfectly entitled to reach a different conclusion from the one it reached prima facie, based on the more limited arguments of the parties, at the provisional measures stage. However, it is nonetheless regrettable whenever the Court renders a decision that is legally binding on the parties and, ultimately, it finds that it does not have jurisdiction to entertain the case; therefore, the Court may legitimately be expected to avoid placing itself in that awkward position except where, after the proceedings on the preliminary objections, it uncovers sound reasons, previously not taken into account, compelling it to decline jurisdiction. The least that can be said is that the Judgment has not convincingly shown the Court to have been in such a situation; far from it.

In addition, this is the first time that the Court has declined jurisdiction solely on the ground that the applicant, before coming to the Court, did not undertake sufficient efforts to resolve the dispute by means of negotiation with the respondent. Hitherto, in a wide range of cases involving factual circumstances different from one to the next, the Court has almost always rejected such an objection, and has never upheld such an objection on its own. Given the subject of this dispute and the circumstances of the case, it is difficult to understand why the Court has found this to be the occasion to be so exacting. In reality, the explanation is that the Court has not applied its usual criteria in this instance.

87. We believe that the second preliminary objection should have been rejected like the first. Further, Russia abandoned its third objection (the objection to the Court's jurisdiction *ratione loci*) as a preliminary objection during the oral proceedings, recognizing itself that the objection was not of an exclusively preliminary character and did not, therefore, need to be considered at that stage. Finally, the fourth preliminary objection (the objection to the Court's jurisdiction *ratione temporis*) was actually of no practical significance, since the Applicant's claims related to events occurring after 2 July 1999, when CERD entered into force between the Parties.

88. That is why, in our view, the Court should have affirmed its jurisdiction to entertain the case, and we regret that it decided to do otherwise.

(Signed) Hisashi OWADA.
(Signed) Bruno SIMMA.
(Signed) Ronny ABRAHAM.
(Signed) Joan DONOGHUE.
(Signed) Giorgio GAJA.

SEPARATE OPINION OF PRESIDENT OWADA

Task of the Court at the Preliminary Objections proceedings — Existence of a "dispute" for jurisdictional purposes — Existence of a Dispute relating to the interpretation or application of CERD at the time of filing — Essential nature of the dispute brought by Georgia.

General observations

1. I have voted against the final conclusion of the Judgment that it "*[f]inds* that it has no jurisdiction to entertain the Application filed by Georgia" (*dispositif*, paragraph 187 (2)). The Judgment has come to this conclusion on the basis of its findings that *(a)* it rejects the first preliminary objection raised by the Respondent, but that *(b)* it upholds the second preliminary objection of the Respondent (*ibid.*, paragraph 187 (1)).

2. While I concur with the Judgment on its conclusion on the first preliminary objection as stated in paragraph 187 (1) *(a)*, I do not agree with the Judgment on its conclusion on the second preliminary objection as stated in paragraph 187 (1) *(b)*, relating to the requirement of "negotiations" under the compromissory clause, Article 22, of the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter "CERD"). Consequently, I decided to write a joint dissenting opinion together with four other Judges who dissented for the same reason. The joint dissenting opinion states the common position of the five judges, myself included, on the Judgment with respect to the second preliminary objection advanced by the Respondent.

3. Apart from my disagreement with the Judgment on the second preliminary objection, I wish also to record my disagreement with some aspects of the reasoning of the Judgment on the first preliminary objection, especially in relation to its approach to the subject-matter of the dispute, including the issues of whether the alleged claim of the Applicant constitutes *a dispute relating to the interpretation and the application of the CERD* in the present case and, if so, whether such a dispute existed between the Parties at the time of the filing of the Application of the case.

4. For this reason, I have decided to attach this separate opinion, which focuses on my views on the task of the Court at the present stage of the proceedings on the preliminary objections raised by the Respondent, and on the essential nature of the case submitted by the Applicant in the instant case.

The task of the Court at the preliminary objections proceedings

5. In the proceedings on preliminary objections to the jurisdiction of the Court raised by the Respondent, what the Court has to do is to determine whether it has jurisdiction to deal with the case on the merits. At this stage of the proceedings, it is not the task of the Court to examine the well-foundedness *(bien-fondé)* of the contentions of the Parties on the merits of the case. The issue of whether the alleged claim of the Applicant that the Respondent has violated its obligations under CERD during the period preceding the Application is a matter to be substantiated by the Applicant both in law and in fact at the merits stage of the proceedings. The Court, at this phase of the proceedings, is to focus exclusively on the issue of whether or not the alleged claim relating to the interpretation or the application of CERD as advanced by the Applicant falls within the scope of jurisdiction accorded to the Court by the compromissory clause of CERD (Art. 22) as of the time of the filing of the Application.

6. In order to answer this limited question, it is important first to identify what the Applicant claims as its cause of action. In its Application in filing this case, Georgia defined its position in the following way:

> "The Republic of Georgia, on it own behalf and as *parens patriae* for its citizens, respectfully requests the Court to adjudge and declare that the Russian Federation, through its State organs, State agents, and other persons and entities exercising governmental authority, and through the South Ossetian and Abkhaz separatist forces and other agents acting on the instructions of or under the direction and control of the Russian Federation, has violated its obligations under CERD by:
>
> *(a)* engaging in acts and practices of 'racial discrimination against persons, groups of persons or institutions' and failing 'to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation' contrary to Article 2 (l) *(a)* of CERD;
>
> *(b)* 'sponsoring, defending and supporting racial discrimination' contrary to Article 2 (l) *(b)* of CERD;
>
> *(c)* failing to 'prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination' contrary to Article 2 (l) *(d)* of CERD;
>
> *(d)* failing to condemn 'racial segregation' and failing to 'eradicate all practices of this nature' in South Ossetia and Abkhazia, contrary to Article 3 of CERD;
>
> *(e)* failing to 'condemn all propaganda and all organizations . . . which attempt to justify or promote racial hatred and discrimination in any form' and failing 'to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination', contrary to Article 4 of CERD;
>
> *(f)* undermining the enjoyment of the enumerated fundamental human rights in Article 5 by the ethnic Georgian, Greek and Jewish populations in South Ossetia and Abkhazia, contrary to Article 5 of CERD;
>
> *(g)* failing to provide 'effective protection and remedies' against acts of racial discrimination, contrary to Article 6 of CERD." (Application of Georgia, para. 82.)

Georgia in the final submissions of its Memorial of 2 September 2009 specified its claim as follows:

> "On the basis of the evidence and legal argument presented in this *Memorial*, Georgia requests the Court to adjudge and declare:
>
> that the Russian Federation, *through its State organs, State agents and other persons and entities exercising governmental authority, and through the de facto governmental authorities in South Ossetia and Abkhazia and militias* operating in those areas, is responsible for violations of Articles 2 (1) *(a)*, 2 (1) *(b)*, 2 (1) *(d)*, 3 and 5 of the 1965 Convention by the following actions: (i) the ethnic cleansing of Georgians in South Ossetia; (ii) the frustration of the right of return of Georgians to their homes in South Ossetia and Abkhazia; and (iii) the destruction of Georgian culture and identity in South Ossetia and Abkhazia" (Memorial of Georgia, Vol. I, p. 407; emphasis added).

7. It is clear from this submission of Georgia that what it charges the Russian Federation with on the alleged violation of obligations under CERD is the behaviour of the Respondent in relation to its obligations under that Convention in the regions of South Ossetia and Abkhazia during the period after the entry into force of CERD between the Applicant and the Respondent until the filing of the Application in the present case. (It is true that Georgia also refers to events during the period before this date, but Georgia itself acknowledges that these events are legally irrelevant for the purposes of the present dispute brought within the jurisdictional limitation *ratione temporis* under Article 22, except for the purpose of demonstrating that the alleged dispute, having originated before the entry into force of CERD, continued to exist after 1999.)

8. Whether this contention of Georgia to hold the Russian Federation to account for internationally wrongful acts under CERD, including those acts or omissions that the Respondent allegedly committed as part of peacekeeping forces is justified in law and in fact is an issue to be determined by the Court when the Court reaches the stage of dealing with the merits of the dispute. In my view, at this preliminary stage of the proceedings the Court does not have to, and indeed cannot, pass a judgment on the merits *(bien-fondé)* of this claim by Georgia.

9. Thus the first question that the Court has to determine at this preliminary stage is whether the Court can identify in this claim of Georgia a *dispute between the Applicant and the Respondent* within the accepted notion of that term as defined under general international law as well as under the established jurisprudence of this Court, and if so whether such dispute qualifies as a dispute "with respect to the interpretation or application of [CERD]" (CERD, Art. 22; Application, para. 18). If the answer to this first question is in the affirmative, then the second point of enquiry will be whether such dispute existed between the Parties *at the time of filing of the Application by Georgia*.

Existence of a "dispute" for jurisdictional purposes

10. On the first question of whether there is a dispute between the Applicant and the Respondent with respect to CERD, the Judgment starts with an analysis of the question of what constitutes a dispute. It quotes a famous definition by the Permanent Court of International Justice (hereinafter "P.C.I.J.") in the *Mavrommatis Palestine Concessions* case (*Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*; hereinafter *"Mavrommatis"*), to the effect that "[a] dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons" (Judgment, paragraph 30). I accept that this all-inclusive and comprehensive definition can be a useful starting point for our enquiry in the present case.

This classical definition of a dispute was further elaborated in a dictum in the Judgments of the Court on the *South West Africa, Preliminary Objections* cases in 1962 (hereinafter *"South West Africa"*). After quoting the relevant passage in the *Mavrommatis* case, the 1962 Judgment states as follows:

> "it is not sufficient for one party to a contentious case to assert that a dispute exists with the other party. A mere assertion is not sufficient to prove the existence of a dispute any more than a mere denial of the existence of the dispute proves its non-existence. Nor is it adequate to show that the interests of the two parties to such a case are in conflict. *It must be shown that the claim of one party is positively opposed by the other. Tested by this criterion there can be no doubt about the existence of a dispute between the Parties before the Court [in this case], since it is clearly constituted by their opposing attitudes* relating to the performance of the obligations of the Mandate by the Respondent as Mandatory." (*I.C.J. Reports 1962*, p. 328; emphasis added.)

11. Based on the strength of this dictum, the present Judgment proceeds to examine the concrete evidence presented by the Applicant, stating that "[the Court] needs to determine whether Georgia made such a claim and *whether the Russian Federation positively opposed* it with the result that there is a dispute between them in terms of Article 22 of CERD" (Judgment, paragraph 31; emphasis added). By this approach, as will be discussed later in greater detail (see paras. 22-24 of this opinion), the Judgment scrutinizes each of the pieces of evidence presented by Georgia to see whether the latter was making allegations specific enough, with the Russian Federation having the opportunity to demonstrate a positive concrete reaction of opposition to what Georgia was claiming. Such an approach, in my view, amounts to suggesting that in order to establish the existence of a dispute between the parties the Applicant is required *to establish a positive act of manifestation of opposition* from the Respondent — a new stringent requirement, not contained in either of the two precedents quoted above, for the existence of a dispute between the parties. Such a high threshold would make it impossible to discern the existence of a dispute when the complaints are met, as explained later, by flat denial on the basis that the acts complained of did not concern the Respondent.

12. The fallacy of this logic of the Judgment will be apparent, if one reads the entire passage in the *South West Africa* cases in its entire context. The last sentence of the quote above from the *South West Africa* cases makes it clear that what the Court in these Judgments tries to introduce is nothing more than a clarification of what the Permanent Court of International Justice pronounced in the *Mavrommatis* case. In other words, the purport of that particular sentence, while not sufficiently well articulated, is to state that in cases where the conflict of interests is in issue between the parties, it is not enough for one party merely *to assert that the interests of the two parties involved are in conflict* but that that party *has to show that there exists in fact a situation in which the claim advanced by the Applicant party is positively met with an attitude of opposition*, on whatever ground, by the Respondent. This is not at all synonymous with a proposition that "a positive act of manifestation of opposition" by the Respondent party has to be established by the Applicant party.

13. In fact, in the *South West Africa* cases, the 1962 Judgments conclude that "[t]ested by this criterion there can be *no doubt about the existence of a dispute* between the Parties before the Court, since it is *clearly constituted by their opposing attitudes . . .*" (*I.C.J. Reports 1962*, p. 328; emphasis added). It is thus quite clear that what the Court in its 1962 Judgment intended to signify by the statement quoted earlier was not that any change in what the P.C.I.J. stated in the *Mavrommatis* case has to be expanded to include a stringent requirement to be placed upon the Applicant *to establish a positive act of manifestation of opposition* by the other party.

Existence of a dispute relating to the interpretation or application of CERD at the time of filing

14. Even if the existence of a dispute is identified, it has to be shown that that dispute is one "with respect to the interpretation or application of CERD", in order to satisfy the jurisdictional requirement under its Article 22 and that it existed at the time of filing of the case. The Judgment comes to the conclusion that such a dispute did exist at the time of filing of the case, but only in relation to the situation that developed since 9 August. I believe that this assessment of the situation is not accurate. I do not believe that for the purpose of constituting the jurisdiction of the Court, a precise determination of exactly when in chronological terms the dispute in question emerged is required. However, this question of whether the dispute arose only in relation to events after 9 August or much earlier has an important legal significance, as the issue relates to the question of the essential nature of the dispute, and consequently to the question of negotiations in the context of the second preliminary objection.

15. On this point, the Judgment acknowledges that "disputes undoubtedly did arise between June 1992 and August 2008 in relation to events in Abkhazia and South Ossetia", but points out that "[t]hose disputes involved a range of matters including the status of Abkhazia and South Ossetia, outbreaks of armed conflict and alleged breaches of international humanitarian law and of human rights, including the rights of minorities". In this situation the Judgment concludes, as its framework of enquiry, that "[i]t is *within that complex situation that the dispute* which Georgia alleges to exist and which the Russian Federation denies *is to be identified*" (Judgment, paragraph 32; emphasis added). On this basis, the Judgment traces the history of evolving conflicts in Abkhazia and South Ossetia from the early 1990s, including the Security Council resolutions relating to the restoration of peace in the region in the 1990s, and identifies this historical framework as "an important part of the context in which the statements which the Parties invoke were made" (Judgment, paragraph 39).

16. This approach, intended to set up the context for examining the concrete evidence for the existence of a dispute relating to CERD, seems highly problematical. As is clear from the overall review of the history of this tragic episode relating to Abkhazia and South Ossetia, the process of the emergence of the dispute has not been a static one but an evolving process extending over a period of years. An attempt to evaluate the entire history of the conflicts in Abkhazia and South Ossetia in the early 1990s and to assess this evolving process of the changing nature of the relationship between the Applicant and the Respondent in this monochromatic framework created by "the agreements reached in the 1990s and the Security Council resolutions adopted from the 1990s" could present a somewhat distorted picture of the situation relating to the dispute. This approach is typically demonstrated in the Judgment's acceptance of the status of the Russian Federation exclusively as "facilitator" throughout the entire process in which the situation created by the Parties went through a substantive transformation. (The Judgment makes reference to the debate in the Security Council in which the Respondent was treated as facilitator and in which the Applicant kept silent. It could at least be arguable, without taking a position on this matter, that in the multilateral forum of the Security Council, which was looking at the situation largely from the viewpoint of the restoration and maintenance of peace in the region, the silence of the Applicant in this situation on the subject-matter of that dispute could be explained in that context.)

17. In my view, it is easy to discern, in the bilateral relations between Georgia and the Russian Federation, a growing crystallization of the dispute relating to the issue of ethnic cleansing of the population in the region and of the treatment of refugees and internationally displaced persons (hereinafter "IDPs"), as years went by. This dispute came to be more clearly articulated especially in the period after the new President of Georgia came into office in 2004. The context of the whole dispute went through a major transformation as far as the public pronouncements are concerned. Some of the documents and statements submitted by the Applicant relating to the President's pronouncements clearly bear testimony to the existence of a dispute between the Applicant and the Respondent relating to those issues which are in substance clearly covered by CERD provisions.

18. It is true that in these pronouncements of the President, no specific reference to CERD by name was made, though express references to acts of ethnic cleansing and to the treatment of refugees and IDPs in the region were abundant in these documents and statements.

In this regard it is useful to recall, as the Judgment itself acknowledges (paragraph 30), that the Court has always taken the position that

> "because a State has not expressly referred in negotiations with another State to a particular treaty as having been violated by conduct of that other State [it does not follow that] it is debarred from invoking a compromissory clause in that treaty"

(*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 428, para. 83).

In this case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility* (hereinafter "*Military and Paramilitary Activities*"), the Court further pointed out in relation to the situation that was at issue that

> "The United States [the Respondent] was well aware that Nicaragua [the Applicant] alleged that its conduct was a breach of international obligations before the present case was instituted; and it is now aware that specific articles of the . . . Treaty [of which the compromissory clause is being invoked] are alleged to have been violated." *(Ibid.)*

The above reasoning of the Court in that case can be applied almost word for word to the present case, if one replaces the concrete names of the Applicant and the Respondent by those involved in the present case.

19. The present Judgment, while acknowledging this reasoning of the Court in the *Military and Paramilitary Activities* case, asserts that "the exchanges must refer to the subject-matter of the treaty with sufficient clarity to enable the State against which a claim is made to identify that there is, or may be, a dispute with regard to that subject-matter", and supplements this by suggesting that:

> "An express specification would remove any doubt about one State's understanding of the subject-matter in issue and put the other on notice. The Parties agree that that express specification does not appear in this case." (Judgment, paragraph 30.)

20. In my view, this suggestion of the Judgment is not only irrelevant to the extent that such "[a]n express specification" is not a legal requirement for the existence of the dispute; it can even be misleading to the extent that the passage could be seen as suggesting that the lack of "express specification" in this case were a point of some legal significance, contrary to what is clearly stated in the quoted passage in the *Military and Paramilitary Activities* case.

21. An indisputable fact is that the Applicant time and again made it abundantly clear that what was at issue in the mind of the Applicant in relation to the Respondent was the issue of "ethnic cleansing" and the issue of "return of refugees" — plainly important subject-matters of CERD — in the region, even if these issues were raised as part of the broader and more general problems of the territorial integrity of Georgia, the legal status of Abkhazia and South Ossetia, and the outbreak of armed conflicts in the area. The fact that the representations of Georgia in its diplomatic communications or at multilateral fora focused primarily on these broader issues does not necessarily exclude that the Applicant regarded the issues of ethnic cleansing and the status of refugees as important issues by themselves, subsumed as they may be in the representations of the Applicant of the broader picture in the overall context of these general problems, as an integral element of the claim addressed to the Respondent by the Applicant relating to the situation in Abkhazia and South Ossetia.

22. The above point has a particular significance in assessing the nature of the dispute in the present case, in view of the way in which the present Judgment tries to examine the probative value

of a number of public documents issued and statements presented by the Applicant as relating to the subject-matter of the dispute during the period between 1999 and 2008. The Judgment treats this mass of evidence largely by dissecting each of the evidence on a piecemeal basis. Through this methodological approach, the Judgment tries to determine whether each of these pieces of evidence was sufficient for establishing that the Applicant made a concrete claim relating to CERD and that a positive act of manifestation of opposition by the Respondent to the event referred to in the evidence in question did exist or not.

23. There is, however, one important issue of law that has to be raised. In the course of evaluating for their probative value various public documents and statements relating to the position of the Georgian authorities, the Judgment seems to take the position that these documents and statements may not have been brought to the notice of the Respondent by the Applicant or that no evidence has been presented by the Applicant, so that the Respondent was made aware of these documents and statements (for example, Judgment, paragraph 104).

24. It has to be pointed out that there is no such rule of international law as to make a prior notification of the claim of the claimant party to the opposing party a legal requirement for the existence of a dispute. It can no doubt be accepted that for a dispute to exist between two parties, the opposing party must be aware of the opposing position of the claimant party on the issue involved. In the present case, in my view, this element that "the opposing party must be aware of the opposing position of the claimant party" has been more than amply demonstrated by the attitude of the Respondent made so clearly in its flat rejection of the claim of the Applicant relating to the ethnic cleansing and the status of refugees and IDPs in the region. The Respondent based its rejection on the ostensible ground that this was a matter which did not legally concern the Respondent. The Respondent thus must have been amply aware of the opposing position of the Applicant, disagreeing on the legal validity of the claim as being one addressed to the Respondent by the Applicant. If the proposition that the opposing party must be aware of the opposing position of the claimant party is valid in itself, it does not justify an altogether different proposition that there is a legal obligation for the claimant party to bring the subject-matter to the notice of the opposing party as a dispute between the two parties, in order for the dispute to come into existence. As the Court has stated in the Advisory Opinion of this Court on the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion,* the existence of a dispute is a matter for *objective determination* by the Court (*I.C.J. Reports 1950,* p. 74).

The essential nature of the dispute brought by Georgia

25. As is clear from the Application and the Memorial of Georgia (see para. 6, above), Georgia contends that these violations of CERD obligations by the Russian Federation consist, *inter alia*, in "engaging in acts and practices of 'racial discrimination. . . ' and failing 'to ensure that all public authorities and public institutions . . . shall act in conformity with this obligation' contrary to Article 2 (1) *(a)* of CERD"; in "'sponsoring, defending and supporting racial discrimination' contrary to Article 2 (1) *(b)* of CERD"; and in "failing to 'prohibit and bring to an end . . . racial discrimination' contrary to Article 2 (1) *(d)* of CERD" (Application, para. 82). Georgia further elaborates these points by clarifying its position at the stage of oral proceedings that it was holding the Russian Federation to account not simply for its behaviour as a State party to CERD acting on its own, but also for its behaviour — acts or omissions — as a member of the peacekeeping forces of the Commonwealth of Independent States (hereinafter "CIS"), acting under the mandate authorized by the United Nations.

26. In other words, the position of Georgia is to hold the Russian Federation responsible for its act or omission which would in its view amount to the violation of obligations under CERD,

irrespective of whether the Respondent was acting in its own name or in its capacity as a member of the peacekeeping forces of the CIS. This claim of the Applicant stands on its argument that the Respondent is to be held accountable for whatever acts or omissions allegedly committed by the forces that involved the Russian Federation in South Ossetia and Abkhazia if they amount to violations of obligations under CERD, as long as the acts or omissions complained of are legally attributable to the authorities of the latter. The Respondent rejects this argument of the Applicant by claiming that the acts or omissions complained of are primarily attributable to the Separatist authorities of South Ossetia and Abkhazia and that this is a matter to be dealt with between Georgia and the Separatist authorities. The Respondent further contends that these matters have nothing to do with the Russian Federation as a party to CERD, inasmuch as the forces of the Russian Federation were acting within the mandates given to them as peacekeepers and as the Russian Federation was acting as facilitator under relevant Security Council resolutions.

27. It is accepted that the facts surrounding the situation may well have been perceived differently by the two Parties. However, it is important to note that these two opposing perceptions held by the Applicant and the Respondent reflect the difference in the conception on the nature of activities of the forces of the Russian Federation in South Ossetia and Abkhazia during the relevant period and therefore the difference in the conception on the essential nature of the dispute. This difference of legal views of the two Parties on what constitutes the dispute in the present case clearly amounts to "a disagreement on a point of law" and "a conflict of legal views" (*Mavrommatis*; Judgment, paragraph 30) between the Parties with respect to the interpretation and application of CERD.

28. Needless to say, these are issues which are totally open and have to be examined at the merits stage of the case, including in the context of the question of State responsibility for the alleged violations of obligations under CERD and their attributability to members of a peacekeeping mission acting within the confines of the mandate of the United Nations or of the CIS. The Court would have to examine them in arriving at its conclusion at the merits stage of the case, if it should get to that stage. However, this is an issue which belongs to the merits of the claim as advanced by the Applicant. It is true that in the present proceedings on preliminary objections to jurisdiction, both of the Parties respectively developed some substantive arguments on their position on this point, going into the merits of the principal claim as they thought necessary in order to argue their case on the issue of jurisdiction. However, the Court cannot and should not, for the fair administration of justice, go into this aspect of the claim at this stage, without hearing the full exposition of the Parties' positions with regard to the merits of the case. If the Court could not decide on the issue of jurisdiction without going into an examination of this aspect of the case, the proper course of action for the Court to take would have been to resort to an alternative open to the Court under Article 79, paragraph 9, of the Rules of Court and declare that "[this objection (i.e., the first preliminary objection in the instant case)] does not possess, in the circumstances of the case, an exclusively preliminary character". It is my considered view that the Court should not, and indeed cannot, get into this issue which clearly belongs to the merits of the case at this stage of the present proceedings, beyond confirming that there is a dispute between the Applicant and the Respondent with respect to the interpretation and application of CERD.

29. For all these reasons, I believe that the method of analysis of the Court on the first preliminary objection has resulted in a significant transformation of the nature of the dispute submitted by the Applicant and an undue limitation on the temporal scope of the existence of the

dispute. It is plain that this in turn had a parallel consequence on the time frame that was the subject of analysis for the second preliminary objection. For these reasons, I regret that I cannot associate myself with the approach taken by the Court with regard to the first preliminary objection.

(Signed) Hisashi OWADA.

DECLARATION OF VICE-PRESIDENT TOMKA

I am largely in agreement with the Court's Judgment and, accordingly, I have voted in favour of its overall conclusion that the Court lacks jurisdiction to entertain Georgia's Application. I also agree with the Court's conclusion that neither precondition for the seisin of the Court, contained in Article 22 of the Convention on the Elimination of All Forms of Racial Discrimination, has been met by Georgia. I also support the Court's detailed analysis showing that "no legal dispute arose between Georgia and the Russian Federation during [the] period [between 1999 and July 2008] with respect to the Russian Federation's compliance with its obligations under CERD" (Judgment, paragraph 105).

I part company with my distinguished colleagues in the majority on a particular point in the analysis of whether the dispute under CERD had arisen in August 2008, before Georgia filed its Application. They see the evidence that there was a dispute between the Parties about the Russian Federation's compliance with its obligations under CERD in various statements, namely: the statements made by Georgia's President during a press conference with foreign journalists and the interview granted to CNN, both held against the backdrop of serious military confrontation which ensued after "a sustained Georgian artillery attack" (Judgment, paragraph 106); the emotional exchanges between the representatives of the two States during the 10 August Security Council meeting, convened at Georgia's request because of the on-going military confrontation; and the response of the Russian Federation's Foreign Minister to a question posed at the joint press conference held after his meeting with the Minister for Foreign Affairs of Finland. In view of the circumstances in which these statements were made, I consider the majority's conclusion rather artificial.

In the *Certain Property* case, the Court also had to deal with an objection to the effect that there was no dispute between the Parties. It concluded that

> "Germany's position taken *in the course of bilateral consultations* and in *the letter by the Minister for Foreign Affairs* . . . has evidentiary value in support of the proposition that Liechtenstein's claims were positively opposed by Germany and that this was recognized by the latter" (*Certain Property (Liechtenstein* v. *Germany), Preliminary Objections, Judgment, I.C.J. Reports 2005,* p. 19, para. 25; emphasis added).

I agreed.

The late Judge Fleischhauer, sitting as judge *ad hoc*, in his last remarks from the Bench, disagreed and took the view "that these words would reveal themselves as introducing too low a standard into the determination of the existence of a dispute and therefore have negative effects on the readiness of States to engage in attempts at peaceful settlements of disputes" (*ibid.*, p. 69).

I am afraid that in the present case the majority has further lowered the standard. It satisfied itself with a rather formalistic juxtaposition of the words used by the representatives of the Parties during that short period of open military hostilities between the two countries. In my understanding, the references by them to "ethnic cleansing", in that context, were nothing more

than a part of the recent war-time rhetoric intending to put the blame and shame on the other side. In fact, no claim was presented to the Russian Federation with regard to its obligations under CERD, no negotiations or consultations held. Were they held, or at least attempted, this would have certainly assisted in properly articulating the dispute. I am therefore unable, to my regret, to concur with the majority on this point.

(Signed) Peter TOMKA.

SEPARATE OPINION OF JUDGE KOROMA

Compliance with terms and conditions in compromissory clause mandatory in order for Court to be able to exercise jurisdiction — Need for a link between dispute and substantive provisions of treaty invoked — Importance of the Convention Against Racial Discrimination — Inter-State dispute-resolution mechanism for alleged breach — Second preliminary objection by Respondent — Article 31 of Vienna Convention on the Law of Treaties — CERD compromissory clause lays down preconditions of negotiation and other specific procedures on submission of dispute to Court — Vote to respect plain meaning of Article 22 of CERD.

1. I have voted in favour of the second dispositive paragraph of the Judgment in view of the fact that, as the Court has held, for it to exercise its jurisdictional title, the Court must satisfy itself that the terms and conditions set out in the compromissory clause of the treaty invoked have been complied with. Moreover, a link must exist between a dispute and the treaty invoked when it is alleged that the legal obligations under that treaty have been violated. Given the importance of the Convention on the Elimination of All Forms of Racial Discrimination ("CERD" or "the Convention"), which is at issue, I consider it necessary to explain my vote in this case.

2. The object and purpose of the Convention, namely, the prohibition of racial discrimination and hatred, remains valid and the Convention continues to be an important instrument in the fight against racial discrimination and racial intolerance. Accordingly, any alleged breach by a State party of its legal obligations under the Convention deserves careful and objective scrutiny by the Court. However, the Court cannot undertake any such investigation if the Application seising the Court does not meet the requirements of the jurisdictional clause of the Convention, namely, that the dispute must be "with respect to the interpretation or application" of CERD.

3. The Convention contains an elaborate mechanism for inter-State dispute resolution in the case of an alleged breach of the obligations it lays down. Article 11 of the Convention allows a State party to seise the Committee on the Elimination of Racial Discrimination if that State considers that another State party is not giving effect to the provisions of the Convention. Articles 11 to 13 establish a detailed process for dispute resolution. In addition, the Convention contains a compromissory clause in Article 22 enabling any State party to seise the Court under certain conditions. The Article provides as follows:

> "Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement."

4. In its second preliminary objection, the Russian Federation contended that the preconditions set out in Article 22 of CERD had not been fulfilled by the Applicant, Georgia, before it filed its Application and hence that the Court lacked jurisdiction to entertain the Application.

5. In considering Russia's second preliminary objection, the Court has applied the canons of interpretation embodied in Article 31 of the Vienna Convention on the Law of Treaties. Article 31 of the Vienna Convention sets out the well-known rule of treaty interpretation that a treaty must be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the

treaty in their context and in light of its object and purpose". The wording of Article 31 suggests that the ordinary meaning of the treaty is the starting-point. First, the terms of the treaty are to be analysed along with the context in which they occur. If the ordinary meaning is unclear or would lead to an absurd result, the object and purpose of the treaty can then be considered to determine precisely what was intended. The Court endorsed this approach to treaty interpretation some 60 years ago in its Advisory Opinion on the *Competence of the General Assembly for the Admission of a State to the United Nations*:

> "the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter. If, on the other hand, the words in their natural and ordinary meaning are ambiguous or lead to an unreasonable result, then, and then only, must the Court, by resort to other methods of interpretation, seek to ascertain what the parties really did mean when they used these words.
>
> . . . . . .
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> When the Court can give effect to a provision of a treaty by giving to the words used in it their natural and ordinary meaning, it may not interpret the words by seeking to give them some other meaning. In the present case the Court finds no difficulty in ascertaining the natural and ordinary meaning of the words in question and no difficulty in giving effect to them. Some of the written statements submitted to the Court have invited it to investigate the *travaux préparatoires* of the Charter. Having regard, however, to the considerations above stated, the Court is of the opinion that it is not permissible, in this case, to resort to *travaux préparatoires*." (*I.C.J. Reports 1950*, p. 8.)

Thus, the object and purpose of a treaty cannot take precedence over its plain meaning. If it were allowed to do so, the result could be an erroneous interpretation of a treaty provision, as treaty drafters establish provisions on the assumption that the treaty will be interpreted in line with the ordinary meaning of its terms.

6. CERD's compromissory clause clearly provides a State party to the Convention with the right to refer a dispute with another State to the Court in certain circumstances, even absent the permission of the other State. But Article 22 also establishes clear conditions or limitations on this right. First, there must be a "dispute" between the parties. As stated in the Judgment (paragraph 30), a dispute requires a disagreement between the parties. For a dispute to exist, at the very least one party must have expressed a position and the other party must have disagreed with that position or expressed a different position.

7. Second, the dispute must be "with respect to the interpretation or application of" CERD. In other words, a link must exist between the substantive provisions of the treaty invoked and the dispute. This limitation is vital. Without it, States could use the compromissory clause as a vehicle for forcing an unrelated dispute with another State before the Court. This would contravene Article 36 of the Statute of the Court, under which the jurisdiction of the Court must be founded on consent as expressed, whether such consent be in a treaty or an optional clause declaration. Thus, any jurisdictional title founded on CERD's compromissory clause must relate to, and not fall outside, the substantive provisions of the Convention. In the case under consideration, this limitation means that there must be a bona fide dispute between the Parties about the *interpretation* or *application* of CERD. Other types of disputes, including those relating to territorial integrity, armed conflict, etc., as such do not fall under this article. Additionally, because the Convention is a

legal instrument, this language implies that the differences between the Parties must be legal in nature. Differences solely of a political nature, for example, not concerning legal aspects of racial discrimination, would not relate to the interpretation or application of CERD. On the other hand, many legal disputes do relate to politics or have political dimensions to them; these types of disputes would fall within the meaning of Article 22.

8. Furthermore, under the Convention, the Parties must attempt to resolve the dispute by negotiation or by procedures set out in the Convention. The plain meaning of Article 22 does not permit any other conclusion. According to the principle of effectiveness, a treaty or statute must be read in a manner that gives effect to its provisions in accordance with the intention of the parties. In the case under consideration, if the drafters of the Convention intended to enable any State to bring another State party before the Court without resorting to negotiation or other dispute resolution mechanism, they could have simply written,

> "Any dispute between two or more States Parties with respect to the interpretation or application of this Convention shall, at the request of any of the Parties to the dispute, be referred to the International Court of Justice for decision, unless the disputing parties agree to another mode of settlement."

But, by adding the phrase "which is not settled by negotiation or by the procedures expressly provided for in this Convention", the drafters clearly intended to place a precondition on the power of State parties to refer disputes to the Court: in other words, States must first attempt to settle a dispute by negotiation or the procedures provided for in the Convention. Article 22's ordinary meaning, accordingly, suggests that negotiation or use of the dispute resolution procedure provided for in the Convention is a precondition to seising the Court of a dispute under the Convention[1].

9. The object and purpose of Article 22 confirm and support the Article's ordinary meaning as explained above. At the time the Convention was drafted, considerable discussion arose as to how and under what circumstances the Court could be seised of a dispute. The original draft of Article 22 read:

> "Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation, shall at the request of any party to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement."

During the negotiation of the Convention, Ghana, Mauritania and the Philippines introduced an amendment proposing the addition of the phrase "or by the procedures expressly provided for in this Convention". In explaining their amendment, the representatives of those States made clear that they believed the amendment required parties to use the dispute resolution mechanism in the Convention before resorting to the Court. The Representative of Ghana stated that "[p]rovision had been made in the draft Convention for machinery which should be *used* . . . before recourse was had to the International Court of Justice . . ." (emphasis added). This amendment was adopted unanimously. Thus, it is clear that the drafters of the compromissory clause viewed its object and purpose to be to establish preconditions that must be fulfilled before the Court could be seised by a party to CERD.

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[1]If there were no requirement to resort to negotiations before referring the dispute to the Court, a respondent could be forced to appear before the Court without having had a chance to resolve the dispute amicably. Given the time and expense required to litigate before the Court, it also seems logical that the drafters of the Convention would first require the parties to attempt to resolve their dispute through less onerous bilateral negotiations.

10. The Judgment has correctly reflected this interpretation of the Article, in particular, that the parties must engage in negotiations or use the dispute settlement mechanisms provided for in the Convention before either of them can unilaterally seise the Court. In this case, since the requirements in Article 22 are not met, the Court therefore lacks jurisdiction to entertain the Application.

11. My vote in favour of the second paragraph of the *dispositif* should be seen, therefore, as my agreement with the interpretation reached by the Court of the meaning of the jurisdictional clause invoked. It should also be read as insisting that the integrity of the Convention must be preserved for the purpose that it was intended to address, namely, combating racial discrimination and racial hatred.

(Signed) Abdul G. KOROMA.

SEPARATE OPINION OF JUDGE SIMMA

The Court is wrong in concluding that the "dispute" between Georgia and the Russian Federation arose only between 9 and 12 August 2008, as a result of its rejection of all documentary evidence dated from 1992 to immediately before the filing of the Application in August 2008 — The Court assesses the documentary evidence before it in a methodologically questionable manner — The legal significance of documentary evidence ought to have been appreciated according to the degrees of probative value that this Court has long accepted in its jurisprudence — Alleged defects of documentary evidence as to formal designation, authorship, executive inaction, attribution, and notice have never been recognized in this Court's jurisprudence as factors diminishing legal significance or probative value — The Court's problematic identification of alleged defects in its assessment of documentary evidence adversely affects the future ability of parties to control and select the presentation of their evidence, as well as the future ability of the Court to discharge its fact-finding authority under the Statute — If the Court had made a proper assessment of the documentary evidence produced by Georgia, it would have had to reject not only the first but also the second of Russia's preliminary objections.

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A. THE REJECTION OF RUSSIA'S FIRST PRELIMINARY OBJECTION: THE RIGHT RESULT OBTAINED BY INCORRECT REASONING

1. I agree with the conclusion reached in paragraph 113 of the Judgment, according to which the first preliminary objection of the Russian Federation is to be dismissed. However, what I cannot agree with is the reasoning provided for this conclusion particularly in paragraphs 64, 105 and 113 of the Judgment, according to which the legal "dispute" in the sense of Article 22 of CERD between Georgia and the Russian Federation did not arise before 9 August 2008, that is, immediately before Georgia brought its Application.

2. In my opinion, the relevant dispute had been under way long before the guns of August 2008. It commenced years before CERD entered into force between the Parties, as early as 1992, and concerned matters that already then could have fallen under the Convention. From 1999 onwards it continued as a dispute on subject-matters now actually governed by CERD because existing between two parties to the Convention, even though Georgia framed its claims *expressis verbis* as claims under CERD only at the last moment — a circumstance which cannot negate the fact that the dispute had become a CERD-related dispute long before. This so because the decisive criterion in this regard is not invocation *eo nomine* of the Convention conferring jurisdiction but reliance on the subject-matter of the dispute.

3. The Judgment reaches a different result, that is, the result preferred by the majority, through a very specific way of reviewing the documentary evidence submitted by the Applicant: the Judgment regards as irrelevant a vast amount of material submitted by Georgia, and confers legal significance to only two exchanges between Georgia and the Russian Federation, and thus arrives at the conclusion that the dispute arose only between 9 and 12 August 2008. These documents are, first, the statements of the two Parties, that is, of the Permanent Representative of Georgia to the United Nations and of his Russian counterpart, in the Security Council debate on 10 August 2008, and, secondly, the statement of 11 August 2008 of the President of Georgia, Mikhail Saakashvili, in a CNN interview and the reply of 12 August 2008 of the Foreign Minister of the Russian Federation, Sergey Lavrov, in a Joint Press Conference with the Minister for Foreign Affairs of Finland in the latter's capacity as Chairman-in-Office of the OSCE.

4. All documentary evidence dated earlier than 9-12 August 2008 is characterized in the Judgment as not being "legally significant" for purposes of showing the existence of a dispute. The Judgment reaches this conclusion by finding specific faults or defects with each piece of documentary evidence which is then rejected. These faults or defects can be grouped as follows: 1. *Formal defects*, like missing literal designations in the documents of "racial discrimination", "ethnic cleansing", or the Russian Federation's specific CERD obligations, and in some instances, circulation of documents to the United Nations under agenda item headings other than "racial discrimination" (cf. paragraphs 53, 55, 56, 59, 60, 62, 70, 75, 76, 65-66, 67, 68, 78, 80-81, 82, 84, 85-87, 89, 91, 92, 93, 94, 95, 96-97, 98, 99-102, 103, 108); 2. *Defects relating to authorship*, such as where the document does not appear to show that the Georgian Executive authored, endorsed, or approved the document (cf. paragraphs 54, 55, 71-73, 76, 80-81); 3. *Defects due to inaction*, where the Judgment alleges that the Georgian Executive did not act after complaints were articulated against the conduct and impartiality of Russian peacekeepers (more specifically, that the Georgian Executive failed to order the withdrawal of Russian peacekeeping troops from Georgian territory, or to reject or react to the contemporaneous passage of Security Council resolutions that commended Russian peacekeepers) (cf. paragraphs 55, 74, 77, 79, 83, 84, 91); 4. *Defects relating to attribution*, like a lack of categorical attribution of violations to the Russian Federation, with documents instead referring to incidental claims or vague references of support for separatists in Abkhazia and South Ossetia (cf. paragraphs 51, 52, 53, 57, 58, 59, 60, 61, 81); and 5. *Defects*

relating to matters of notice, or the lack of proof that Russia received, could have received, or had the opportunity to receive or be informed of the allegations contained in certain documentary evidence (cf. paragraphs 61, 104). In this manner, the Judgment simply does not ascribe any degree of probative value amounting to "legal significance" to the entirety of the documentary evidence dated before 9 August 2008.

5. If one wondered why an operation of such kind, unprecedented in the practice of this Court, was necessary even though Russia's first preliminary objection was rejected, the answer is to be found in the Judgment's acceptance of the Respondent's second preliminary objection: by excluding the entire factual material submitted by Georgia to prove the existence of a CERD-related dispute long before August 2008 and limiting the focus of the exercise to a few exchanges between the Parties during the chaos of a few days in August, communications understandably limited to urgent concerns arising from the ongoing armed conflict, the majority of the Court arrives at the conclusion that these communications, in the fog of war, as it were, did not amount to an attempt on the part of Georgia at negotiating a dispute on CERD-related matters with Russia. As I will show in Part B of my opinion, if the Judgment had accepted pre-August 2008 facts as relevant (also) for the purposes of dealing with Russia's second preliminary objection, it could not have upheld this objection. These pre-August 2008 facts clearly prove that a dispute about CERD-related matters had arisen long before.

6. I fully share — and base my more empirical approach to the *problématique* raised by Russia's first preliminary objection on — the views expressed in the separate opinions of President Owada and Judges Abraham and Donoghue on the legal threshold used by the Court for determining the existence of a dispute, as settled in the Court's Judgments in *Mavrommatis*, *South West Africa*, *Nicaragua*, *Oil Platforms*, *Northern Cameroons*, and *Land and Maritime Boundary (Cameroon* v. *Nigeria)*. In addition, however, I find it necessary to scrutinize how the Court determined the "legal significance" of documentary evidence in this Judgment, and concomitantly, to subject to a critical review the fact-finding methodology which the Court employed in order to accept or reject the probative value of such evidence before it. What the Court appears to have done is to refer only to the tip of the iceberg, so to speak, of the bulk of documentary material submitted by Georgia, select a few examples and then dismiss these as "irrelevant" by the application of criteria that are very problematic, to put it mildly. I note that a recent study published by the British Institute of International and Comparative Law dealing with the treatment of evidence in the International Court of Justice reported that the Court "has not always expressly noted in its judgments what items it has eliminated because of their limited value as evidence" (A. Riddell and B. Plant, *Evidence Before the International Court of Justice*, 2009, p. 190). In the present case, the Court's assessment has led to the result that most of the evidence in the record before the Court has been eliminated from the process of deciding on the jurisdictional objections.

7. I share my colleagues' concern that the formalist approach adopted in the present Judgment straitjackets future cases, due to rigid requirements imposed now as to the existence of a dispute and the conduct of negotiations sufficient for the seisin of the Court. I find equally problematic the ways in which the Court discharged its fact-finding authority under the Statute. The Judgment does not clarify the concept of "legal significance", neither does it differentiate between degrees of significance or probative value (direct, indirect, corroborative, cumulative, supplementary) that could be attached to documentary evidence. The Judgment's assessment of the evidence thus fails to capture possible differences in the degrees of probative value that various documents may exemplify — some documentary evidence may indeed constitute the best, primary, and direct evidence, while other documents may still be taken into account as secondary, indirect, corroborative, or supplementary evidence. The Court has long acknowledged these differentiations when determining the weight of evidence (*Corfu Channel (United Kingdom* v. *Albania)*, *Merits, Judgment, I.C.J. Reports 1949,* p. 18; *Application of the Convention on the Prevention and*

Punishment of the Crime of Genocide (Bosnia and Herzegovina v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, pp. 128-137, paras. 204-230; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment of 11 September 1992, I.C.J. Reports 1992*, p. 455, para. 153, p. 550, para. 316; *Frontier Dispute, Judgment, I.C.J. Reports 1986*, p. 583, para. 56). Thus, in the *Nicaragua* case, the Court did not reject, but rather accepted, limited corroborative value even of press reports: "the Court regards them not as evidence capable of proving facts, but as material which can nevertheless contribute, in some circumstances, to corroborating the existence of a fact, i.e., as illustrative material additional to other sources of evidence" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 40, para. 62). The Court also held that "public knowledge of a fact may nevertheless be established by means of these sources of information, and the Court can attach a certain amount of weight to such public knowledge" (*ibid.*, para. 63). Similarly, in *Tehran Hostages*, the Court acknowledged the corroborative value of media reports to establish matters of public knowledge, particularly where the respondent had not participated in the proceedings (*United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Judgment, I.C.J. Reports 1980*, p. 10, paras. 12-13). In contrast to these carefully differentiated approaches to the probative weight of evidence, the present Judgment dismisses wholesale the entire corpus of years of documentary evidence before 9-12 August 2008 for being altogether devoid of any probative weight — and thus "legally insignificant" to establish the existence of a dispute.

8. More importantly, the factors which the Court considers to be determinative of the absence of "legal significance" of all pre-August 2008 documentary evidence, find no basis in the law. As I will show more extensively in Part B of my opinion, neither is their application justified considering the actual content of the documents themselves, read either singly or in relation to other documentary evidence in the record before the Court. In the Judgment before us, the presence of a single alleged defect — whether pertaining to formal designation, authorship, executive inaction, attribution, or notice — appears sufficient for the Court to deny any legal significance whatsoever to all documentary evidence dated long before 9 August 2008 and the filing of the instant Application before this Court.

1. Alleged formal defects

9. There is little that needs explanation or refutation concerning the alleged formal defects in various pieces of documentary evidence, such as the absence of literal reference in a document to "racial discrimination", "ethnic cleansing", the Russian Federation's specific CERD obligations, or even, in some circumstances, circulation of documents to the United Nations under agenda items other than "racial discrimination". I will not belabour this point further, other than to reaffirm, as did the joint dissenting opinion, that it is sufficient for purposes of determining the existence of a dispute in the present instance that the subject-matter of the dispute is capable of falling within the subject-matter of CERD, without need of invocation *eo nomine* of CERD or any of the specific provisions of this treaty. As I will show in Part B of my opinion, the documentary evidence considered in the Judgment did very well contain unambiguous references to subject-matters capable of falling within CERD, such as to alleged support, facilitation, or toleration by Russian Peacekeepers of ethnic cleansing being committed against Georgian civilians within these peacekeepers' areas of responsibility in Georgian territory; Russian conduct in relation to the right of return of refugees and IDPs to Georgian territory; and the failure of the Russian peacekeepers to prevent human rights violations being committed against Georgian civilians. However, for the reasons set out above, the Judgment makes use of only a miniscule part of such relevant material.

2. Alleged defects relating to authorship

10. In particular, the Judgment denies legal significance to documents such as resolutions and statements of the Parliament of Georgia, or statements of the Permanent Representative of Georgia to the United Nations, where these documents do not appear to show that the Georgian Executive authored, endorsed, or approved of the document. Such a stringent requirement of Executive approval, adoption, or endorsement of parliamentary resolutions has hitherto never been applied by the Court. In the *Genocide* case, while the Court acknowledged that the "significance" of official documents (such as the record of parliamentary bodies) which appear to have been produced "so that the Party may make use of its content" could thereby be "in doubt", the Court still did not summarily reject such documents by the mere fact of their provenance or authorship (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide, (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 134, para. 225). Rather, the Court was careful to stress that

> "[i]n some cases the account represents the speaker's own knowledge of the fact to be determined or evaluated. In other cases the account may set out the speaker's opinion or understanding of events after they have occurred and in some cases the account will not be based on direct observation but may be hearsay. In fact the Parties rarely disagreed about the authenticity of such material but rather about whether it was being accurately presented . . . and what weight or significance should be given to it." *(Ibid.*, p. 135, para. 226).

11. The statements of the Parliament of Georgia and the Permanent Representative of Georgia could have been admitted as "evidence of the intentions of a litigating State" (A. Riddell and B. Plant, *Evidence before the International Court of Justice*, *op. cit.*, p. 251). In the *Anglo-Iranian Oil Co.* case, the United Kingdom opposed the admissibility of Iranian legislation on the ground that this legislation was "a purely domestic instrument, unknown to other governments" (*Anglo-Iranian Oil Co. (United Kingdom* v. *Iran), Preliminary Objection, Judgment, I.C.J. Reports 1952*, p. 107). The Court rejected this view, stating that:

> "The Court is unable to see why it should be prevented from taking this piece of evidence into consideration. The law was published in the Corpus of Iranian laws voted and ratified during the period from January 15th, 1931, to January 15th, 1933. It has thus been available for the examination of other governments during a period of about twenty years. The law is not, and could not be, relied on as affording a basis for the jurisdiction of the Court. It was filed for the sole purpose of throwing light on a disputed question of fact, namely, the intention of the Government of Iran at the time when it signed the [optional clause] Declaration." *(Ibid.)*

12. In any case, as I will show in Part B of my opinion, the resolutions, decrees, and statements of the Parliament of Georgia were officially transmitted to the United Nations Security Council or the General Assembly by the Permanent Representative of Georgia. We cannot simply assume that the Permanent Representative of Georgia acted *ultra vires* or without the knowledge of the Georgian Executive. There being no showing in the record before the Court that the Permanent Representative of Georgia acted contrary to authority or in contravention of any instructions from the Georgian Executive, it cannot be inferred that his official transmittal of the resolutions and decrees of the Parliament of Georgia to the United Nations Security Council or General Assembly is not attributable to Georgia.

3. Alleged defects of inaction

13. The Judgment withholds legal significance from certain documentary evidence for the reason that the Georgian Executive did not act upon or follow up complaints expressed in the parliamentary material. Specifically, the Judgment declares documents (such as resolutions, decrees, and statements of the Parliament of Georgia; statements of the Permanent Representative of Georgia; and press statements of the Foreign Ministry of Georgia) to be legally insignificant because the Georgian Executive did not actually order the withdrawal of Russian peacekeeping forces from Georgian territory despite their alleged misconduct. Similarly, the Judgment determines legal insignificance because the Georgian Executive did not call for the rejection of, or opposition to, the adoption of Security Council resolutions that contained standard clauses commending Russian peacekeepers or acknowledging Russia's role as a facilitator or guarantor of security in the armed conflicts within Georgia.

14. These speculations in the Judgment reach directly into the merits of the dispute. Furthermore, these alleged defects of inaction cannot be accepted as "inferences of fact" in the sense discussed by the Court in the *Corfu Channel* Judgment, where it stated that: "proof may be drawn from inferences of fact, provided that they leave no room for reasonable doubt" (*Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 18, para. 44; emphasis in original). In the present Judgment, there does appear room for such reasonable doubt. As I will demonstrate in Part B of my opinion, some of the contested, respectively rejected, documentary evidence such as Resolutions of the Parliament of Georgia adopted in 2005 and 2006, appear on their face to have envisaged a process of negotiation on the conduct of Russian peacekeepers, and not their automatic withdrawal. In any event, the underlying circumstances of Security Council voting on the resolutions identified in the Judgment are not evidenced in the record before the Court at this stage of the proceedings.

15. In my view, ascribing the above defects to documentary evidence when such factual questions properly belong to the merits phase of the proceedings is an unreasonable basis for the denial of any legal significance to this evidence for the purposes of merely establishing the existence of a dispute. These speculations deprive either Party of the opportunity to meet factual questions and lead the Court to rely on somewhat tenuous inferences.

16. Neither can the Georgian Executive's alleged inaction be seen as an implicit admission against interest by high-ranking officials, of the nature discussed by the Court in the *Nicaragua* Judgment. In the present Judgment, there is no positive act of acknowledgment involved that might be constitutive of such admissions:

> "[S]tatements of this kind, emanating from the high-ranking official political figures, sometimes indeed of the highest rank, are of particular probative value when they *acknowledge* facts or conduct unfavourable to the State represented by the person who made them. They may then be construed as a form of admission." (*Military and Paramilitary Activities in and against Nicaragua, Merits, Judgment, I.C.J. Reports 1986*, p. 41, para. 64; italics added.)

17. Lacking a positive act, the mere silence or alleged inaction of the Georgian Executive is in itself equivocal in meaning. It is not for this Court to supply such meaning to deprive documentary evidence of legal significance.

4. Alleged defects relating to attribution

18. In its findings under consideration here, the Judgment holds that certain documentary evidence does not categorically attribute violations to the Russian Federation, but refers only to incidental claims or vague references of support for separatists in Abkhazia and South Ossetia. In Part B of my opinion I will show that relevant documentary evidence allows attribution to the Russian Federation through the conduct of Russian peacekeepers. The Russian peacekeepers were not troops placed at the disposal of an international organization (such as United Nations peacekeepers), whose conduct would then be attributable to this organization. In the present case, there is no such international organization involved in the deployment of Russian troops to Georgian territory, since those troops acted as the Joint Peacekeeping Forces (JPKF) and Law and Order Keeping Forces (LOKF) on the basis of an agreement between Georgia and the Russian Federation concluded in 1992. The conduct of these troops — particularly their failure to prevent, their support, toleration or facilitation of ethnic cleansing and other serious human rights violations against Georgian civilians — is undeniably the conduct of a State organ of the Russian Federation (see *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005,* p. 242, para. 213).

5. Alleged defects relating to matters of notice

19. Here I refer to the alleged lack of proof that Russia received, could have received, or had the opportunity to receive or be informed of the allegations contained in certain documentary evidence. I will not dwell on this point since our joint dissenting opinion already treats this issue of notice quite extensively, albeit in relation to the second preliminary objection. For purposes of determining the existence of a dispute, however, let me emphasize that this Court has never imposed a strict requirement of actual notice received by the respondent State in comparable circumstances. In the *Northern Cameroons* case, clearly no bilateral discussions were had between the Parties. Yet, and despite the United Kingdom's insistence that the Republic of Cameroon did not have a dispute with it but with the General Assembly, the Court relied upon unilateral statements by the United Kingdom and Cameroon in multilateral fora such as the United Nations Trusteeship Council, and reached the conclusion that a "dispute" existed (*Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963,* pp. 32-34; see also *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998,* p. 315, para. 89).

20. I am afraid that through its resort to an amorphous usage of "legal significance" in the present Judgment, the Court disregards its own settled jurisprudence on assessment of evidence. In *Armed Activities on the Territory of the Congo*, the Court held that in examining the facts "relevant to each of the component elements of the claims advanced by the Parties . . . it will identify the documents relied on and make its own clear assessment of their weight, reliability and value" (see *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 200, para. 59). In the same case, the Court held that it "will also give weight to evidence that has not, even before this litigation, been challenged by impartial persons for the correctness of what it contains" (*ibid.*, p. 201, para. 61). In the present case, none of the documentary evidence from 1992 up to immediately before 9 August 2008 appears to have been challenged by impartial persons for correctness. Neither is there the slightest indication that this copious record of documentary evidence was generated on purpose in anticipation of the filing of the present Application. The summary dismissal of pre-August 2008 documentary evidence does not cohere with the rigour ascribed to the Court in the recent British Institute study on the treatment of evidence, which summarizes the factors that the Court has long clarified in assessing the relevance and probative value of documentary evidence, as follows:

"*Sources:* The Court will consider the number of sources available, whether they are partisan or independent, and whether they are corroborated by other evidence;

Interest: The Court identifies whether the source of the evidence has an interest in the conduct of proceedings, or is neutral and indifferent, following which the Court assesses whether the evidence contains any admissions against the interest of the party submitting it.

Relation to events: The Court notes whether the evidence records direct observation or hearsay.

Method: Close examination is given to the means and methodology by which the information presented has been collected.

Verification: Evidence will be considered to be more valuable if it has been subject to cross-examination either during its compilation or subsequently. Again, the Court notes whether the evidence is corroborated by other sources.

Contemporaneity: The Court's evaluation is influenced by the timing of a document's preparation, or of a statement. Generally the Court attaches less weight to evidence which was not prepared or given at a time close to the facts it purports to prove. Equally, it is cautious of documents which were prepared specifically for the purposes of ICJ litigation.

Procedure: The Court assesses whether the evidence was correctly submitted in accordance with the procedural requirements embodied in the Rules." (A. Riddell and B. Plant, *Evidence Before the International Court of Justice,* 2009, p. 192.)

21. My discussion of the Court's treatment of the "legal significance" standard is by no means intended to convey mere sterile differences in the application of facts and the evaluation of evidence between the majority and the dissenting Judges. In my view, there are serious policy consequences to the evidentiary assessment conducted by the Court in the present Judgment. The Judgment expressly introduces factors/reasons of formality, authorship, inaction, attribution, and notice that could be invoked in future cases to deny legal significance or probative value to documentary evidence. These reasons could also adversely affect the future ability of States to control the presentation of their evidence at the threshold of proceedings, potentially leading them to self-censor the submission of evidence. More importantly, the factual inferences drawn by the Court in the present Judgment undermine the Court's responsibility to discharge its judicial function in a thorough manner by making full use of its fact-finding powers under Articles 49 to 51 of the Statute to avoid having to resort to such inferences in the first place. As the Court rightly observed in *Nicaragua*, the Statute "obliges the Court to employ whatever means and resources may enable it to satisfy itself whether the submissions of the applicant State are well-founded in fact and law, and simultaneously to safeguard the essential principles of the sound administration of justice" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 40, para. 59).

22. Turning now to the second half of my opinion (Part B), I will set out the facts which I consider relevant, and sufficient, in order to prove that the preconditions for recourse to the Court in accordance with Article 22 CERD, that is, both the presence of a dispute and attempts at negotiation undertaken by Georgia, were fulfilled well before August 2008. Most of the documentary evidence that I will adduce here has either been totally neglected or has only been referred to in an extremely superficial or in a selective way in the Judgment. I will take the

opportunity to intersperse, on occasion, broader quotes or amplifications from the actual documents that the Judgment rejects for allegedly lacking "legal significance".

B. EVIDENCE ESTABLISHING THE EXISTENCE OF A CERD-RELATED DISPUTE AND OF NEGOTIATIONS WELL BEFORE 2008

23. For purposes of an organized presentation, I will discuss the documentary evidence establishing the existence of a dispute involving subject-matters falling within CERD and of attempts at a negotiated settlement before 9 August 2008 according to the following categories: (1) bilateral exchanges between Georgia and the Russian Federation; (2) Georgian statements made before international organizations of which the Russian Federation is a member; and (3) public statements of Georgia on other occasions.

24. My intention is not to enumerate the documentary evidence in a manner similar to that used in the Judgment, but rather to let the texts of these documents speak for themselves. The documentary evidence, taken individually and as a whole, appears in my view sufficient to lend probative weight (whether in the direct, primary, indirect, secondary, or corroborative degrees of proof) to Georgia's submission that a dispute between Georgia and Russia on CERD-related subject matters existed long before 9 to 12 August 2008, specifically with respect to allegations on: support or facilitation by Russian peacekeepers of ethnic cleansing or failure to prevent such acts; Russia's conduct in relation to the right of return of refugees/IDPs; and the failure of Russian peacekeepers to prevent human rights violations being committed against Georgian civilians within these troops' areas of responsibility. In the present jurisdictional phase of the proceedings, the Court does not need to establish with ultimate certainty that the violations complained of by Georgia actually took place.

1. Bilateral exchanges between Georgia and the Russian Federation

25. Paragraph 78 of the Judgment does not give legal significance to the exchange of letters in July and August 2004 between the President of Georgia, Mikhail Saakashvili, and the President of the Russian Federation, Vladimir Putin, on the ground that "[t]he letters do not mention the return of refugees and IDPs". However, the relevant texts of both letters, when juxtaposed, show that the two Presidents did deal with complaints brought against the conduct of Russian peacekeepers in the face of attacks being committed against Georgian civilians. Thus, the Letter of 26 July 2004 of President Saakashvili stated, *inter alia*:

> "I would like to draw your kind attention Vladimer Vladimirovich to the fact that recently, from the beginning of the escalation of the situation in the region, *all cases of armed attacks were conducted by the illegal units of South-Ossetian side in the direction of villages settled with Georgian population*. Due to these gangster attacks, seven Georgian policemen were wounded. Neither international observers *nor Russian peacekeeping forces have reported any fact of attacks against villages or compact settlements of Ossetian population.* We are determined not to be a subject of provocations in order to avoid further escalation of tension in the region and transformation of crisis into armed conflict.
>
> I would like to inform you about the comments made by Commander of JPKF, the General Nabzdorov to a big number of journalists: 'There is no border of Russia and Georgia in the Roki tunnel' and 'very soon Georgia will asks for the acceptance in the composition of Russian Federation'. *It is not difficult after such statements to estimate the impartiality of Russian peacekeeping forces that are carrying out mission in the region*." (Memorial of Georgia, Vol. V, Ann. 309; italics added.)

In his Letter of 14 August 2004, President Putin replied:

> "The propaganda launched by Tbilisi the main target of which in the beginning was the Russian Peacekeeping Force and then Russia itself is regrettable. In February of the current year we said that overcoming of the prolonged crisis in our bilateral relations and their gradual normalization is only possible in terms of showing mutual restraint in public assessments.
>
> . . . . . .
>
> We believe that the following measures should be taken with the view of stabilization of the situation and creation of conditions for resumption of the political dialogue:
>
> *First*: immediate achievement of ceasefire;
>
> *Second*: Starting without delay the realization of the arrangements on the withdrawal of illegal armed formations from the conflict zone, reached within the framework of the Joint Control Commission in June-July of this year and also during the meeting between the ministers of Defense of Georgia and Russia in Moscow on 10-11 August of this year. In short, all the necessary measures should be taken to prevent this situation from growing into full-scale armed conflict.
>
> *Third*: Strict observance of the existing agreements on the conflict resolution principles; formation and operation of Joint Peacekeeping Forces; obligation of sides not to apply the measures of coercive pressure to solve any emerged problem; ensuring unhindered delivery of the humanitarian aid to the population of the region. Realization of the proposal on holding high-level meetings during the Joint Control Commission sessions would have positive reflection on the existing situation.
>
> . . . . . .
>
> I would like to emphasize that the most important aspect of the resolution of Georgian-Ossetian conflict should be the ensuring of protection of rights and interests of the population of South Ossetia the majority of which are Russian citizens. Taking into consideration the abovementioned we will continue purposeful mediatory work for a peaceful settlement of the conflict." (Memorial of Georgia, Vol. V, Ann. 310; italics added.)

26. Two years after this exchange, on 24 July 2006, the Permanent Representative of Georgia to the United Nations wrote to the Secretary-General, requesting the circulation to the General Assembly of a Resolution of 18 July 2006 adopted by the Parliament of Georgia (Judgment, paragraph 86). This Resolution stated:

> "Instead of demilitarization, the drastic increase of military potential of those armed forces under subordination of de facto Autonomous District of South Ossetia, drastic activation of terrorist and subversive actions, complete collapse of security guarantees for peaceful population, *permanent attempts to legalize the results of ethnic cleansing the fact of which had been repeatedly recognized by the international community, massive violation of fundamental human rights and ever-increasing international criminal threats so characteristic of uncontrolled territories — this is a reality brought about as a result of peacekeeping operations . . .*

Based on the above, *it is clear that actions undertaken by the Russian Federation's armed forces in Abkhazia and in the former Autonomous District of South Ossetia represent one of the major obstacles on the way to solving these conflicts peacefully*, which is a result of absence of political will on the part of the Russian Federation to foster conflict resolution and to change the current status quo." (Written Statement of Georgia, Vol. III, Ann. 82; italics added.)

27. The Russian Federation reacted to the Resolution of 18 July 2006 of the Parliament of Georgia even before the Permanent Representative of Georgia requested its circulation (Judgment, paragraph 87). In a Letter dated 19 July 2006 addressed to the United Nations Security Council, the Permanent Representative of the Russian Federation stated the following:

"*On 18 July 2006, the Parliament of Georgia adopted a decision on peacekeeping forces in conflict zones which obligates the Government to initiate steps to end peacekeeping operations in Abkhazia and South Ossetia as soon as possible, terminate the relevant agreements and arrangements and bring about the immediate withdrawal from Georgia of Russian peacekeeping contingents that are stationed there fully in accordance with international agreements currently in force. The decision provides for commencement of a process to change peacekeeping arrangements and deploy international police forces in Abkhazia and South Ossetia.*

During the discussion of the draft decision, some deputies went so far as to say that, unless those conditions were accepted, the Russian peacekeepers would be declared unlawful and treated as occupying forces. The decision falsely claims that the actions of the Russian peacekeepers in Abkhazia and South Ossetia present one of the main obstacles to peaceful settlement of the conflicts.

The Russian Federation regards the decision as a provocative step designed to aggravate tension, destroy the existing format of negotiations and shatter the framework of legal agreements for the peaceful settlement of the Georgian-Abkhaz and Georgian-Ossetian conflicts. The accusations that the decision makes against the Russian Federation constitute a disgraceful attempt to shift the blame to others.

We consider that the language of ultimatums that Georgia is using with respect to Russian peacekeepers is counterproductive. Unilateral decisions cannot be allowed to lead to abrogation of the relevant international agreements. Our position remains unchanged: the adoption of parliamentary decisions on the withdrawal of Russian peacekeepers can only entail a fresh crisis and a humanitarian catastrophe. In recent years, Russia, in cooperation with foreign partners and international organizations, has exerted considerable efforts to maintain a fragile balance that has now been shattered by the bellicose rhetoric of Georgian politicians and their attempts to use provocation and military force to resolve the problems of Abkhazia and South Ossetia. It is only through existing peacekeeping mechanisms that it has been possible to keep the situation under control.

It should not be forgotten that the format of the negotiation process, which, besides the Russian Federation, involves the United Nations, the Organization for Security and Cooperation in Europe and the member States of the Group of Friends of the Secretary-General on Georgia, was agreed upon by all parties to the conflicts. *The irresponsible actions of Tbilisi are capable of ruling out any possibility of peaceful settlement of the conflicts.*" (Written Statement of Georgia, Vol. III, Ann. 81; italics added.)

28. Notably, in the above-mentioned Letter of 19 July 2006, the Russian Federation acknowledged that the Resolution adopted by the Parliament of Georgia on 18 July 2006 called for the "commencement of a process to change peacekeeping arrangements", and not, as the Judgment indicates, procedures to "immediately suspend . . . peacekeeping operations and to have the armed forces of the Russian Federation withdrawn" (Judgment, paragraph 86). As I will show subsequently, the texts of the 2005 and 2006 Resolutions of the Parliament of Georgia directed the Georgian Executive to undertake negotiations with the Russian Federation on the conduct and responsibilities of Russian peacekeeping forces, and not necessarily to effect the immediate suspension, much less outright withdrawal, of such forces.

29. Finally, in 2008, President Saakashvili and the new President of the Russian Federation, Dmitry Anatolyevich Medvedev, continued exchanges on the conduct of Russian peacekeepers as well as the issue of the return of IDPs and refugees to Abkhazia (Judgment, paragraph 100). In his Letter of 24 June 2008 President Saakashvili stated:

> "*The essence of our proposals is the following*:
>
> . . . . . .
>
> The peacekeeping operation under the aegis of CIS will be continued with the reviewed mandate. The peacekeepers will be withdrawn from their current locations and will be stationed along the river Kodori.
>
> . . . . . .
>
> I propose drafting, signing and entering into force the agreements in which the above mentioned proposals are reflected. Along with the Russian Federation, other interested parties could also serve as guarantors of implementation of these agreements.
>
> Consequently, the parties to the conflict could also conclude a separate agreement about non-use of force *and return of IDPs and refugees to the entire territory of Abkhazia, Georgia*." (Memorial of Georgia, Vol. V, Ann. 308; italics added.)

In his Letter dated 1 July 2008, President Medvedev replied (Judgment, paragraph 101):

> "In this situation, frankly speaking it is difficult to imagine, for example, creation of joint Georgian-Abkhaz administration or law-enforcement organs in any district of Abkhazia. *It is also apparently untimely to put the question of return of refugees in such a categorical manner.* Abkhazs perceive this as a threat to their national survival in the current escalated situation and we have to understand them." (Memorial of Georgia, Vol. V, Ann. 311; italics added.)

30. The foregoing exchanges did not take place in a historical vacuum, but should be appreciated further in the context of the ongoing intergovernmental exchanges between Georgia and the Russian Federation concerning the issue of the return of refugees and IDPs. A series of meetings conducted since 1997 on the return of ethnic Georgians to their homes had culminated, on 7 June 2002, with the announcement of an Inter-State agreement entitled "Russian-Georgian Interstate Program on Return, Accommodation, Integration and Reintegration of Refugees, Internally Displaced Persons and Other Persons that Suffered as a Result of the Georgian-Ossetian Conflict" (Written Statement of Georgia, Vol. IV, Ann. 149). Although at this juncture the Russian

Federation was not directly accused of actively denying the return of the ethnic Georgians, it is significant that it was treated as a party in resolving the issue.

31. Moreover, Georgia and the Russian Federation had already been discussing the issue of the return of refugees for some time as parties. In a 1992 meeting held in Moscow, the President of the Russian Federation, Boris Yeltsin, and the Chairman of the State Council of Georgia, Eduard Shevardnadze, had agreed on "the conditions for the return of refugees to their places of permanent residence" (Memorial of Georgia, Vol. III, Ann. 102; Judgment, paragraph 40), and in October 1993 the Russian Federation had specifically "condemn[ed] the facts of genocide, rude violation of human rights . . . from the zone of the Georgian-Abkhazian conflict" (Memorial of Georgia, Vol. III, Ann. 107). This process continued with a 1993 Protocol of Negotiations (Memorial of Georgia, Vol. III, Ann. 105), culminating with the 1994 Quadripartite Agreement on the Voluntary Return of Refugees, signed by the Russian Federation, Georgia, South Ossetia and Abkhazia as parties (Memorial of Georgia, Vol. III, Ann. 110; Judgment, paragraph 46).

32. The Concluding Statement of the meetings between the President of the Russian Federation, Vladimir Putin, and the President of Georgia, Eduard Shevardnadze, on 6-7 March 2003, was reported in a newspaper account of *Svobodnaya Gruzia*, which indicates that "during the negotiations, the Presidents of the two countries addressed the issues of . . . comprehensive settlement of the conflict in Abkhazia, Georgia" (Memorial of Georgia, Vol. III, Ann. 136). Moreover, the two States emphasized "the importance of concrete steps to be taken aimed at the solution of the most burning problem dignified and safely return of refugees and internally displaced persons to their homes and economic rehabilitation of the conflict zone" *(ibid.)*. An Abkhaz representative was present at these meetings, but the text is clear that the agreement between the "Parties" was one between Georgia and the Russian Federation.

33. Georgia's treatment of the Russian Federation as a negotiating party on the issue of the return of refugees/IDPs persisted. For example, on 20-23 January 2003, the Speaker of the Parliament of Georgia, Ms N. Burjanadze, spoke before the State Duma of the Russian Federation, and mentioned "the hard situation of refugees and internally displaced people" (Written Statement of Georgia, Vol. IV, Ann. 153; Judgment, paragraph 76). In relation to the Russian peacekeeping forces, the Georgian side noted that "a certain distrust was also observed, which in most cases is conditioned by the actions of 'blue helmets' in the conflict zone" *(ibid.)*. Thereafter, a meeting that was to be held on the matter of the return of the IDPs/refugees on 30-31 October 2003 had to be cancelled due to the differences between the Parties on the mode of negotiations. Georgia insisted that it was necessary first to reach agreement between the Russian Federation and Georgia and that only after that could the Abkhaz side intervene, while the Russian Federation insisted on the presence of Abkhazia from the very beginning, since the solution of return of IDPs/refugees was to be based on the conditions presented by the Abkhaz side (Written Statement of Georgia, Vol. IV, Ann. 155).

2. Georgian statements made in international organizations of which the Russian Federation is a member

34. The foregoing exchanges between Georgia and the Russian Federation should be seen in connection with statements made by Georgia in international organizations of which the Russian Federation is a member. Thus, on 26 January 2005, the Permanent Representative of Georgia wrote a Letter to the President of the United Nations Security Council (Judgment, paragraph 79), stating, *inter alia*:

"I have the honour to write to you and, through you, to draw the attention of the Security Council to the recent developments in the conflict-resolution process in Abkhazia, Georgia.

. . . . . .

I still have to recall that there is a category of people whom we all have to keep in our minds. *These are refugees and IDP — victims of ethnic cleansing — who already for longer than a decade are waiting for their basic right — the right to live at home — to materialize. They still live in miserable conditions, totally insecure and vulnerable*. Events that took place in the Gali region this month have demonstrated once again the lawlessness that they face. I think that members of the Security Council are aware of abductions that happened on 'election' day. *Actually, these excesses were committed in front of CIS peacekeepers, who did nothing to protect peaceful civilian people — by the way, not for the first time. In fact, after the ceasefire in 1994, over 2,000 Georgians were killed in the Gali security zone, which falls under the responsibility of the CIS peacekeeping force. I have to state once more that the CIS peacekeeping force is rather far from being impartial and is often backing Abkhaz separatist paramilitary structures.* I think it is high time to start thinking of a new form of peacekeeping operation, *as the activities of a Russian military contingent — which the CIS peacekeeping force, in fact, is — could hardly be considered a 'peacekeeping operation'*." (Written Statement of Georgia, Vol. III, Ann. 71; italics added.)

35. On 27 October 2005, the Permanent Representative of Georgia again wrote to the President of the Security Council (Judgment, paragraph 81), as follows:

"It is impossible to avoid commenting on the behaviour of the facilitator — the Russian Federation, especially when several extremely alarming trends take place in Abkhazia, Georgia:

— The Russian Federation continues to maintain illegally its military base in Gudauta, which operates without the consent of Georgia and against international commitments undertaken by Russia;

— Positions in the separatist Governments are filled with people sent directly from public jobs in the Russian Federation, from as far away as Siberia;

— Legal entities of the Russian Federation acquire property and land in the secessionist regions;

— Military personnel of separatists are trained by the Russian military schools, without shying away from openly providing them quotas;

— Russian citizenship is granted to the 80 per cent of current population of those regions, as claimed by their leaders, who also vow to accomplish 100 per cent of such passportization of the residents in just a few months.

. . . . . .

Nevertheless, these Russian military forces are still referred to as peacekeepers or 'blue helmets', as the overall conflict-resolution in the region in structured as a United Nations-led peace process.

As a matter of fact, the report indicates that the number of internally displaced persons from Abkhazia has decreased from around 250,000 to little more than 200,000. This decrease happened, mostly because of the natural death of these people. Shall we suggest that this is a positive trend and just wait until they are all gone before the process of return starts?

What sort of 'peacekeeping' is the United Nations going to enhance? Whose rights will the Organization protect? Anybody but Georgian refugees and internally displaced persons?

In this regard *I have to inform the Security Council of the resolution of the parliament of Georgia, adopted on 11 October 2005, regarding the Russian peacekeepers in Georgia*, both in the Tskhinvali region/former South Ossetia and Abkhazia. The resolution calls for them to improve their performance and truly facilitate the peace process and sets a deadline for the reassessment of their functioning, which in the case of Abkhazia is 1 July 2006. The resolution also envisages that in case of negative reassessment, Georgia will oppose the peacekeeping operation and withdraw from all relevant agreements and bodies.

What this resolution is about, in fact, is that it calls upon the Russian leadership to review its approach. Unfortunately, the response of the Russian Foreign Ministry, calling the resolution of the Parliament of Georgia 'provocative' and 'counter-productive' indicates that there is no political will to 'defreeze' the conflict-resolution process. It seems that the Russian-led peacekeeping operation has, in fact, exhausted its potential and the only effective way is to have a full-scale international, I would underline — truly international — United Nations-led peacekeeping operation." (Written Statement of Georgia, Vol. III, Ann. 75; italics added.)

I have reproduced this document at such length because paragraph 81 of the Judgment does not show the full text of this communication made by the Permanent Representative of Georgia, before the Judgment concluded that "[t]he Court is unable to see in this letter any claim against the Russian Federation".

36. A similar problem can be observed in paragraph 82 of the Judgment, which this time does not refer to the actual text of the documentary evidence that it assesses. I refer to the Letter dated 9 November 2005, where the Permanent Representative of Georgia requested the United Nations Secretary-General to transmit and circulate to the General Assembly a Resolution adopted by the Parliament of Georgia on 11 October 2005. This Resolution states, *inter alia*, the following factual premises and calls for the following actions:

"Under the criminal and clan-based governments of these regions one can witness massive kidnapping of citizens — including children, killings, unmitigated criminal gang activity, raids and robbery of the civilian population, creation and backing of terrorist and subversive groups with the help of the Russian special services, currency counterfeiting, drug transit, trafficking of arms and people, smuggling, *appropriating of assets initially belonging to the refugees, denial of the right of instruction at schools in the native language as well as of the right of IDPs and refugees to return to their homes.* And all of the listed above is an incomplete record of consequences resulting from the activities of these regimes.

Furthermore, *the separatist regimes continue their attempts to legitimize the results of ethnic cleansing* affirmed by the Budapest, Lisbon and Istanbul Summits of

the OSCE — the latest illustration of which is the *en mass* appropriation of homes of forcibly exiled Georgian population.

Clearly, the aforementioned actions have nothing in common with the protection of the ethnic rights of the population residing today on the territories of Abkhazia and the former South Ossetian Autonomous District. The criminal dictatorships currently in place pose a threat to everyone, including those they allegedly try to protect. In this regard, it is enough to mention the repressive policy of the separatist governments against those Abkhaz and Ossetian citizens who have tried to move towards public diplomacy and confidence-building — among the punished and arrested are underage children, whose only 'guilt' was merely to get acquainted with Georgian kids.

Due to the existing information vacuum, repressions and anti-Georgian propaganda, the local population of both regions has no opportunity to receive and assess the information regarding the peace initiatives currently proposed by the central government of Georgia.

The fundamental rights and freedoms on the territory of Abkhazia and of the former South Ossetian Autonomous District are violated not only against internally displaced persons, but also against the remaining population. The separatist governments, manipulating issues of ethnic origins, attempt to monopolize the process of conflict regulation on behalf of their own clan-based interests, and against the fundamental interests of their population.

The question then arises — *with what or whose support do separatist regimes manage to ignore the position of respectful international organizations and violate the basic norms and principles of the international law*?

Regretfully, *the answer to this question unambiguously indicates the role of the Russian Federation in inspiring and maintaining these conflicts*, notwithstanding the fact that this country officially bears a heavy responsibility of facilitator for the conflict settlement.

. . . . . .

In view of the aforementioned, the Parliament of Georgia resolves:

. . . . . .

2. To instruct the Government of Georgia to intensify negotiations with the Russian Federation, international organizations and interested countries on issues regarding the fulfillment of obligations undertaken by the peacekeeping forces on the territory of the former South Ossetian Autonomous District and report to the Parliament on the situation by 10 February 2006;

3. *To instruct the Government of Georgia to intensify negotiations with the Russian Federation*, international organizations and interested countries *on issues regarding the fulfillment of obligations undertaken by peace-keeping forces* on the territory of Abkhazia and report to the Parliament on the situation by 1 July 2006 . . ." (Written Statement of Georgia, Vol. III, Ann. 76; italics added.)

37. Referring to this very Resolution, on 27 October 2005, the Permanent Representative of Georgia to the United Nations also wrote a Letter to the President of the Security Council

(Judgment, paragraph 81), confirming the Russian Federation's response and reaction to this act of the Georgian Parliament:

> "In this regard I have to inform the Security Council of the resolution of the parliament of Georgia, adopted on 11 October 2005, regarding the Russian peacekeepers in Georgia, both in the Tskhinvali region/former South Ossetia and Abkhazia. The resolution calls for them to improve their performance and truly facilitate the peace process and sets a deadline for the reassessment of their functioning, which in the case of Abkhazia is 1 July 2006 . . .
>
> What this resolution is about, in fact, is that it calls upon the Russian leadership to review its approach. *Unfortunately, the response of the Russian Foreign Ministry, calling the resolution of the Parliament of Georgia 'provocative' and 'counter-productive', indicates that there is no political will to 'defreeze' the conflict-resolution process . . .*" (Written Statement of Georgia, Vol. III, Ann. 75; italics added.)

38. On 26 January 2006, the Special Representative of the President of Georgia to the Security Council also referred to the Resolution of 11 October 2005 of the Parliament of Georgia, (Judgment, paragraph 84) and further set out Georgia's concerns about the conduct of Russian peacekeepers in relation to the endorsement of ethnic cleansing and inaction in the face of the killings of ethnic Georgians in the peacekeepers' zone of responsibility:

> "Today we are facing rather unexpected and worrisome development of this very important question. One of the members of the Security Council, member of the Group of friends and the facilitator of the peace process — namely the Russian Federation — suddenly has decided to disassociate itself from supporting the basic principle — principle of territorial integrity of Georgia within its internationally recognized borders. That disassociation extends also to the so-called Boden paper "Basic Principles for the Distribution of the Competences between Tbilisi and Sokhumi" — which is the key document for the political settlement of entire peace process. That is why for the first time in the history of Security Council deliberations we have no draft resolution prepared by the Group of Friends.
>
> Mr. President,
>
> *This change of position of the one of the prominent members of P5 is not just a slight shift or correction. Renouncement of the principle of determining the status of Abkhazia within the State of Georgia does mean the following*: support of the secessionism as a phenomenon; *endorsement of ethnic cleansing of more than 300,000 citizens of Georgia*; questioning the basic principle of the modern world architecture — the principle of territorial integrity and inviolability of internationally recognized borders.
>
> Mr. President,
>
> I am representing the people who were forcefully expelled from their homes and are not allowed to return. I am representing the people who count every day of their exile and who look with a hope to this Council for its work and resolutions. I am representing the community which follows very closely every move in the peace process in Abkhazia, Georgia.

How can I explain to my fellow citizens that the facilitator of the peace process, the conductor of the peace operation on the ground stands on this very dangerous position?

By the way, couple of words on the peacekeeping operation — so-called CIS peacekeeping operation — which is in fact conducted solely by the Russian Federation. In October 2005, the Parliament of Georgia issued the special statement which assessed the performance of CIS PKF rather negatively — and rightly so. Yes, it is a burden on the Russian Federation and its troops. But there is the other side of the coin: little less than 2000 Georgians have been killed in the zone of responsibility of CIS PKF since its deployment in 1994.

The mistrust of Georgian population towards the PKF is widening, especially in the region of their mandate. The population affected by the conflict does not see the peacekeepers as an impartial international force, but rather as a dividing wall between the two communities." (Written Statement of Georgia, Vol. IV, Ann. 163; italics added.)

39. The Permanent Mission of Georgia to the United Nations reflected similar views on the conduct and inaction of Russian peacekeepers, in identical letters dated 11 August 2006, addressed to the Secretary-General and the President of the Security Council (Judgment, paragraph 90):

"Additional armed troops, which were deployed by the Abkhazian side in the villages of the lower Gali district, force local Georgians to dig trenches for separatist armed formations, following the instructions of the Abkhazian administration in the Gali district.

It is a vivid example of forced labour banned unequivocally by all international human rights documents, including Article 8 of the Pact on Civil and Political Rights, Convention N 105 of the International Labour Organization and Article 4 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

All these international agreements represent an integral part of the Georgian legislation and are legally binding throughout the entire territory of Georgia, including Abkhazia. Besides, the Protocol under paragraph 4 of the Moscow Agreement of 14 May, 1994 stipulates that the CIS peacekeeping forces, while performing their functions, are obliged to comply with the requirements of Georgia's domestic laws and regulations.

However, Russian peacekeepers continue to act in defiance of their mandated obligations, turning a blind eye to gross violation of law and human rights taking place in their very presence.

We call upon the CIS peacekeeping forces and their leadership to employ all means at their disposal in order to put an immediate end to the use of forced labour on the territory of Abkhazia, Georgia." (Written Statement of Georgia, Vol. III, Ann. 83; italics added.)

40. The Permanent Representative of Georgia repeated the findings about the Russian peacekeeping forces in a statement on 3 October 2006 (Judgment, paragraph 92):

"It is crystal clear, *that the Russian peacekeeping force is not an impartial, nor international contingency. It failed to carry out the main responsibilities spelled out*

in its mandate — create favorable security environment for the return of ethnically cleansed hundreds of thousands of Georgian citizens. It became the force that works to artificially alienate the sides from one another." (Written Statement of Georgia, Vol. IV, Ann. 171; italics added.)

41. In its Third Periodic Report of 7 November 2006 to the Human Rights Committee on its implementation of the International Covenant on Civil and Political Rights, Georgia deplored the continuing occurrence of torture and other grave human rights violations in areas of Georgian territory that were within the Russian Federation's effective control:

"22. *The most flagrant human rights violations still take place in the territory of Abkhazia and the Tskhinvali region/South Ossetia, Georgia, which are de facto out of the control of the Government of Georgia and where the Russian Federation exercises effective control instead. Many citizens of Georgia living there are subjected to torture and other ill-treatment; they are victims of other numerous, grave human rights violations*. The Government of Georgia is doing its best to guarantee their rights, but Georgia is apparently in need of urgent and strong assistance from the international community, in order to have their rights protected. In the present report, within the framework of the respective provisions of the Covenant, broader information in this regard is provided." (Written Statement of Georgia, Vol. III, Ann. 85; italics added.)

In the light of this text, it escapes me how paragraph 68 of the Judgment is able to state that the document "directed no criticism regarding racial discrimination against the Russian Federation".

42. When President Saakashvili addressed the United Nations General Assembly on 26 September 2007 (Judgment, paragraph 94), he likewise commented on the conduct and inaction of the Russian Federation's peacekeepers:

"And, while *our most challenging relationship today remains with our neighbours in the Russian Federation*, my Government is committed to addressing this subject through diplomatic means, in partnership with the international community. I can say this with confidence, because Georgia is a nation that is rooted in justice, the rule of law and democracy. This is an irreversible choice made by the people of my country. For evidence of that, one merely has to look at *how Georgia has responded to the many provocations it has faced in the past year*, which range from missile attacks to full-scale embargoes and even *destructive pogroms* . . .

Today, I regret to say that signs of hope are few and far between. The story of Abkhazia, where up to 500,000 men, women, and children were forced to flee in the 1990s, is of particular relevance — one of the more abhorrent, horrible and yet forgotten ethnic cleansings of the twentieth century. *In the time since Russian peacekeepers were deployed there, more than 2,000 Georgians have perished and a climate of fear has persisted.*

. . . . . .

The continued ignorance of the ethnic cleansing in Abkhazia, Georgia is a stain on the moral account book of the international community. These disputes are no longer about ethnic grievances; they are about the manipulation of greed by a tiny minority of activists, militants, militias *and their foreign backers*, at the expense of the local population, the displaced and those who are deprived of their property and fundamental rights — even the right to speak and study in their own language . . .

> *As I speak before you today, elements from Russia are actively and illegally building a new, large military base* in the small town of Java, in South Ossetia, in the middle of Georgia, on the other side the Caucasian ridge, very far from Russian territory, hoping that arms and violence will triumph over the will of the people. And this dangerous escalation is taking place under the very noses of international monitors, whose job it is to demilitarize the territory." (Written Statement of Georgia, Vol. III, Ann. 88; italics added.)

It is interesting to note that while the Judgment refers to this document in paragraph 94, it only does so in a conspicuously selective manner. The same paragraph is silent on the legal significance of this document.

43. In a letter dated 3 October 2007 to the President of the Security Council (Judgment, paragraph 95), the Permanent Representative of Georgia stated as follows:

> "In reference to the attack on the Georgian Interior Ministry police units that occurred on 6 September 2007, we would like to inform you of the following.
>
> Georgian law enforcement agencies have acquired credible information on the identity of one of the militants who were killed. Until recently, Vice-Colonel Igor Muzavatkin, an officer assigned to the Maikop (Russian Federation) Brigade, was a commanding officer of the 558th special infantry battalion, a segment of the highly regarded and decorated 131st special infantry brigade. During the past few years the 558th battalion, under its commanding officer Muzavatkin, was fulfilling peacekeeping duties in Abkhazia, Georgia, particularly in the Gali district. After that assignment, Vice-Colonel Muzavatkin was transferred to the 19th brigade of the 58th Army, stationed in Vladikavkaz (Russian Federation).
>
> The Georgian side expresses its extreme concern about this fact, proving that separatist illegitimate armed forces are constantly receiving support from a party which is supposed to be a facilitator of the conflict resolution process. Regretfully, we have been witnessing such a pattern of behaviour for 14 years. *At the same time high-ranking Russian officials consider ordinary support and training to so-called anti-terrorist units, which in reality by nature are illegitimate military formations of the de facto Abkhaz regime, and are responsible for ethnic cleansing that took place in Abkhazia, Georgia.*" (Written Statement of Georgia, Vol. III, Ann. 89; italics added.).

Again, I cannot understand how paragraph 95 of the Judgment can say that this document does not "make any reference to racial discrimination or ethnic cleansing . . . or to the Russian Federation's responsibility for such actions", more particularly that, "the reference to ethnic cleansing is not stated as a claim against the Russian Federation regarding compliance with its obligations under CERD".

44. On 19 April 2008, the Ministry of Foreign Affairs of Georgia reacted to a statement of 18 April 2008 of the Ministry of Foreign Affairs of the Russian Federation (Judgment, paragraph 97):

> "*On 18 April 2008 the Ministry of Foreign Affairs of the Russian Federation* posted a press release on the approval by the President of the Russian Federation of a package of measures for the normalization of relations with Georgia. In this connection the Ministry of Foreign Affairs of Georgia states that given Moscow's recent destructive steps with respect to the separatist regions of Georgia, it cannot consider the removal of trade, economic and transport restrictions that were

unilaterally and out of political motivations imposed on Georgia by Russia itself as basis of any such cooperation.

Any reference by the Russian side to its intention of normalizing bilateral relations and to its readiness for cooperation, against the background of de facto annexation of Georgia's integral parts: Abkhazia and the Tskhinvali region and violations and neglect of human rights of an absolute majority of the regions' population —victims of ethnic cleansing, aims at creating an illusion of constructive cooperation with Georgia and is seen as an attempt to tone down the international community's sharp reaction concerning Russia's aggressive policy." (Written Statement of Georgia, Vol. IV, Ann. 177; italics added.)

This document is again not quoted in full in the Judgment, thus failing to show the actual position of the Ministry of Foreign Affairs of Georgia.

45. The above thread of consistent communications from Georgia to international organizations of which the Russian Federation is a member makes it hard to deny legal significance or probative weight (whether in the direct, primary, indirect, secondary, or corroborative degrees of such weight) to any of the foregoing documentary evidence for purposes of establishing the existence of a dispute between Georgia and the Russian Federation on CERD-related subject matter well before 9-12 August 2008.

3. Public statements of Georgia on other occasions

46. In its practice, the Court has not hesitated to consider unilateral (for instance, ministerial or parliamentary) statements as part of the documentary evidence before it, although it has attached different degrees of significance or probative weight to such material (see *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 269, para. 50; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 474, para. 52; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, pp. 249-252, para. 59; *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 454, para. 49). For this reason, I cannot disregard, for purposes of determining the existence of a dispute, various Georgian statements to the international press, as well as other official documents as part of the corpus of documentary evidence that could corroborate or supplement the existing material on bilateral exchanges and Georgian statements circulated to international organizations. From the contents of the following documents it is not clear whether they had been circulated to international organizations, but they may likewise be considered for their corroborative value. Most of this material is either not mentioned, or the actual texts are not reproduced, in the Judgment.

47. For example, in a Resolution adopted on 11 October 2001 (Judgment, paragraph 71), the Parliament of Georgia reflected concerns regarding the conduct or inaction of Russian peacekeepers in relation to ethnic cleansing being committed against Georgians as early as 1994:

"*Since the deployment of Russian Peacekeepers under the auspices of the CIS to the conflict zone in Abkhazia in July 1994, the policy of ethnic cleansing against Georgians has not stopped. It is confirmed that during this period more than 1,700 persons were killed in the security zone. Peacekeeping Forces committed numerous crimes against the peaceful population*. Abkhazia has become an uncontrolled territory, where terrorists, drug and weapon smugglers and others involved in organized crime may freely act.

> An absence of constructive approach from the side of Russia brought to the deadlock and blocked the adoption and discussion of the project on Abkhazia's status, worked out by the United Nations and the representatives of Georgia's friend countries.
>
> It has become a matter of concern that biased and aggressive anti-Georgian declarations are made in Russian official circles, clearly showing the policy of dual standards of leadership still continuing large-scale military operations in Chechnya with the view of restoring the territorial integrity of Russia.
>
> As a result of recent numerous instances of bombings and violations of Georgia's air space, it has become evident that *Russia appears as the party involved in the conflict*; that the function of Peacekeeping Forces is limited to drawing "the border" and instead of facilitating conflict settlement, they rather instigate it, which is confirmed by deployment of additional military contingent and armaments in Abkhazia without the agreement of Georgian Government." (Written Statement of Georgia, Vol. IV, Ann. 145; italics added.)

48. These concerns about the conduct or inaction of Russian peacekeepers were again expressed in a Resolution adopted on 20 March 2002 by the Parliament of Georgia (Judgment, paragraph 74), which stated, *inter alia*:

> "*The CIS Peacekeeping Forces, deployed on the territory of Abkhazia, in reality fulfill the functions of border guards between Abkhazia and the rest of Georgia and fail to perform the duties, envisaged by their mandate, namely, they cannot provide for the protection of population and creation of conditions for the secure return of internally displaced persons*;
>
> In Abkhazia, on the occupied Georgian territory, *major human rights and freedoms' violation on the ethnic basis has been carried on by the assistance of external military force*. Such as: arbitrary deprivation of freedom, terror, murders, taking of hostages, kidnapping for money extortion, violation of the official status of the Georgian language, destruction and misappropriation of state, refugees and IDPs' properties. The monuments of Georgian culture and scientific and academic institutions have been destroyed and similar activities have been going on. The world community has not been appropriately informed of these actions. The policy of the separatists' leaders have posed a genuine threat to the existence of Abkhaz ethnos itself and to its unique culture." (Written Statement of Georgia, Vol. IV, Ann. 146; italics added.)

49. Neither was President Saakashvili unaware of such concerns regarding the Russian peacekeepers when he was elected into office. In an interview conducted on 25 February 2004 by BBC News (Judgment, paragraph 77), he declared:

> "Well it is primarily the issue of our relations with Russia. The Russian generals are in command there [Abkhazia], they have military contingent there which played a very negative role in the years of the war. They basically stirred up the war there and the Abkhazia separatists have a huge lobby in Moscow because it was like the Riviera for the former Soviet Union. It was the favourite resort place for Russian nomenklatura, including Russian generals.
>
> So it was very painful for them not only to lose Georgia, because Georgia became independent of course in 1991, but also to lose Abkhazia together with

Georgia. But of course it is a Georgian territory, most of the population there is ethnically Georgian or was ethnically Georgian. *Those people were thrown out by Russian troops and local separatists and we need to change the situation*. Of course primarily the way to change that is peaceful talks, offering them better alternatives in terms of Georgian economic development, Georgia's integration into Europe. Basically that is a lawless place." (Written Statement of Georgia, Vol. IV, Ann. 198; italics added.)

50. On 5 November 2005, the Ministry of Foreign Affairs of Georgia issued a statement regarding the conduct or inaction of Russian peacekeepers in the face of ongoing human rights violations being perpetuated against the Georgian civilian populations within their areas of responsibility:

"*Human rights violations continue to be committed in Abkhazia, especially Gali District, in the zone controlled by CIS peacekeeping forces. These violations have recently become massive and are mainly committed against ethnic Georgian population.*

On 2 November of the current year, 21 years-old resident of village Gagida Daniel Tsurtsumia was arrested without any reason by the armed group of 60 Abkhazians and transferred to Sokhumi, where he was forced to join the so called Abkhazian army. He was brutally beaten as he did not make an oath. As a result, Daniel Tsurtsumia died on 4 November.

The abovementioned fact once again confirms that CIS *peacekeeping forces are unable to or do not fulfill their duties under the mandate, in order to ensure security of the local population, and show their inaction with respect to serious human rights violations that occur in front of their eyes*." (Written Statement of Georgia, Vol. IV, Ann. 159; italics added.)

51. On 14 November 2005, the Ministry of Foreign Affairs of Georgia issued a statement that reported another incident involving such conduct or inaction by Russian peacekeepers:

"With the syndrome of impunity, the separatist government of Abkhazia and its so-called law enforcement agencies are resorting to terror towards the ethnic Georgian population, *in order to expel them from the region and conclude and legitimize ethnic cleansing*.

This totally outrageous situation in the conflict zone takes place in front of the eyes of peacekeeping forces and often with their secret consent. On November 13, there was another incident in Gali District, that unfortunately ended with murder. Particularly, during the morning hours in Chuburkhindzhi unknown persons, allegedly Gali policemen, attacked the residents of this region, Kh. Arkania and G. Sichinava. Kh. Arkania was killed with firearms on spot. G. Sichinava was wounded and was later transferred to the Gali District Hospital." (Written Statement of Georgia, Vol. IV, Ann. 161; italics added.)

52. On 20 January 2006, the Ministry of Foreign Affairs of Georgia issued a statement to the press in reaction to statements of the Minister of Foreign Affairs of the Russian Federation (Judgment, paragraph 96):

"As for the conflicts on the Georgian territory and the activity of the Russian peacekeeping forces, it should be noted that we commend Mr. Lavrov for stating that it is necessary to comply fully with the reached agreements. This is exactly what we are aiming at. *However, what we often come across is in fact an absolutely reverse position*. A case in point is Mr. Lavrov's allegations that the Georgian side has several conflict settlement plans for the Tskhinvali region. It is a well-known fact that the plan drafted by the Georgian side on the basis of the President's initiatives was approved by the world community and supported by the OSCE Summit in Ljubljana, including the Russian Federation. *Regrettably, the Minister of Foreign Affairs of the Russian Federation seems oblivious to this fact when speaking of the meeting of the Joint Control Commission held in Moscow in December, where the negotiations reached an impasse due in large measure to the Russian side's rigid position. It is a worrisome fact that the Russian high-ranking officials constantly keep us warning of the expected provocations, military escalation and possible armed confrontations.* Keeping this issue in the foreground of attention indicates on the one hand that the threat of provocations does really exist, on the other — it shows that the scenario for such development of events may be suiting the interests of certain forces. These very forces stand behind the incidents in the Tskhinvali region in summer of 2004, including deployment from the Russian Federation of sizeable armed groups and concentration of Russian military formations near the Roki tunnel, which took place with the end of carrying out the abovementioned scenario.

. . . . . .

The culpable inaction of the peacekeeping forces and in many cases their overt support for separatists is what can be held responsible for the militarization of the conflict zones, uncontrolled raids of armed formations, every day occurrence of grave crimes and gross violation of human rights. It is the unrestrained actions and attacks of criminals that come in the way of the realization of economic projects, including Enguri power station rehabilitation works." (Written Statement of Georgia, Vol. IV, Ann. 162; italics added.)

53. On 19 June 2006, the Deputy Minister of Foreign Affairs of Georgia responded through the press to statements that had, on their part, been circulated to the press by the Minister of Foreign Affairs of the Russian Federation (Judgment, paragraph 96):

"Question**:** *In his interview granted to the media outlets on 16 June 2006, Minister of Foreign Affairs of the Russian Federation Sergey Lavrov shifted the whole blame for deterioration of Georgian-Russian relations to the Georgian side, citing in particular the Georgian side's statements and threats against Russian peacekeepers during the last year* and a half. He also noted that Russian peacekeepers are faced with groundless claims concerning their visas, which are not provided for by the respective agreements. What will be your comments?

Answer**:** *Notwithstanding my deep sense of respect for Mr. Minister, I can not share his opinions and feel compelled to differ with him on his assessments*. I will try to be coherent in giving my explanations of the issues and groundless accusations voiced in his interview and register once again the position we have stated earlier on more than one occasion.

To start with, let me underline that the Russian peacekeepers' activity in the conflict zone lasting for years has laid bare their inability to fulfill their mandated obligations, and in particular, their failure to contribute to peaceful resolution of the conflict and to provide the necessary conditions for the safe return of internally

displaced persons. They are no longer in a position to act with impartiality to which attest clearly the Russian side's official statements that the major goal of Russian peacekeepers is to protect rights and interests of the so-called Russian citizens in the conflict regions; Also causing concern is their active participation in the military parade to mark the so called independence day of the Tskhinvali region/South Ossetia. *Furthermore, secretly from them and in many cases through their immediate involvement, one of the parties to the conflict carries out illegal and criminal acts against the ethically Georgian peaceful population,* bringing in personnel and military equipment and concentrating them in the region through the illegal checkpoints, of which international observers report systematically. These are the acts that can be described as totally unacceptable and provocative.

Against such background, it is increasingly clear that the peace operations of this style, rather than leading to a full-scale settlement of conflicts, aim definitely at preserving the existing situation. Peacekeepers have in fact assumed the role as protectors of separatists and border guards between the conflict regions and the rest of Georgia.

. . . . . .

To the Russian side we suggest close cooperation, with the participation of representatives of the South Ossetian side as well, which envisages extension of the negotiation format and involvement of OSCE member states and other international organizations in the peace process. *However, all efforts of the Russian side, trying to hold on to its exclusive right of mediator, are concentrated on maintaining those outmoded mechanisms and agreements, which have not moved the peace process forward an inch. It gives us sufficient grounds to call into question the 'sincerity' of the Russian side's claims that its goal is to achieve the settlement of conflicts.* The Georgian side holds out hope that the Russian colleagues will assume a more constructive position.

With respect to the signing of a document on the non-use of force, our position is unequivocal. This obligation should become one of the key elements of the process, which should advance the goal of a full-scale and comprehensive settlement of the existing conflicts. It means granting the European model of broad autonomy to the Tskhinvali and Abkhazian regions within the internationally recognized borders Besides, there have to be firm international guarantees to insure safety of the population and protection of their rights. In other case, the consequences that may follow will be harsh. *Georgia remembers vividly the bitter experience when the analogous agreement signed only under the guarantee of Russia remained on paper and the terrible tragedy that struck Gagra and Sukhumi ended in dislodgement of hundreds of thousands of people from their places of residence and was later appraised by OSCE as ethnic cleansing*." (Written Statement of Georgia, Vol. IV, Ann. 164; italics added.)

54. President Saakashvili again demonstrated his awareness of the problems regarding the right of return of refugees/IDPs and the continuing problems faced by victims of ethnic cleansing, when he addressed the (EU) European Parliament in 14 November 2006 (Judgment, paragraph 93):

"Unfortunately, there are many who continue to suffer from these conflicts.

Over 300,000 Georgians were ethnically cleansed from Abkhazia in the early 1990s as a result of war and violent separatism — along with hundreds of thousands of other nationalities who today cannot return to their homes.

Even now, we witness how the property of those expelled peoples is inhabited by others and in many cases sold illegally.

Indeed, just recently, one of the most famous Georgian-French film directors, Mr. Otar Ioseliani, while commenting on the current anti-Georgian campaign in Russia remarked that *history seems to be repeating itself — targeting the same victims for a second time — had this to say, and I quote*:

> 'The Russian administration first undertook ethnic cleansing in Abkhazia, from where 500,000 people became refugees. Those who could not escape by walking through the high mountains of Svaneti, Georgia were massacred by the hands of mercenaries. They devastated and destroyed the country. And by the way, then everybody was silent too.'

This is the painful legacy we have inherited. And this is the lawlessness and injustice that we confront.

And this time, let us not be silent." (Written Statement of Georgia, Vol. IV, Ann. 172; italics added.)

55. On 2 March 2007, the Georgian State Minister on Conflict Regulation Issues released a statement (Judgment, paragraph 96) that reported actual incidents of conduct or inaction of Russian peacekeeping forces:

"On 1 March of the current year, the so-called law enforcement authorities of Abkhazia opened a fire at the local group of young people of Georgian and Abkhazian nationality, in the zone controlled by Russian peacekeeping forces between the posts No. 202 and No. 306 of Collective Peacekeeping Forces.

The young people publicly expressed their personal opinions regarding the nonlegitimate elections of *de-facto* parliament appointed on 4 March and violent politics of the separatist regime. As a result of this attack three peaceful citizens were kidnapped: Ghachava, Rogava and Korshia, that are kept in the illegal imprisonment and according to the statement of Abkhazian side, will not be released.

The above mentioned acts are directed against the right of peaceful assembly and freedom of expression and puts obstacles to approachment and restoration of confidence between Abkhazian and Georgian societies. The mentioned incident poses direct threat to the peacekeeping initiative proposed by the Georgian side and once again reveals explicitly destructive approach towards the peacekeeping process.

The Office of State Minister on Conflict Regulation Issues expressed its deep concern over the mentioned provocations. The incident that occurred in the lower zone of Gali District on March 1, by the de facto administration, once again underlines *the policy of intimidation of the local population that is established on the practice of gross human rights violation. It is mostly done against the background of criminal inaction of Russian peacekeepers*. The above described fact confirms the accuracy of our position with respect to the contingent of the Russian peacekeepers." (Written Statement of Georgia, Vol. IV, Ann. 174; italics added.)

56. The Ministry of Foreign Affairs of Georgia again confirmed its assessment of the conduct or inaction of Russian peacekeepers on 20 September 2007 (Judgment, paragraph 96), in a statement calling upon the Russian Federation for action:

> "As a country whose efforts are directed at the restoration, through peaceful settlement of the conflicts, of its territorial integrity, Georgia wants to see Russia as a partner focused on the establishment of peace and stability in the Caucasus region. We believe that should be in Russia's interests.
>
> Regrettably, such position of Georgia has not found understanding from the Russian side. The efforts of the Georgian authorities to build a democratic state based on the rule of law, which is to become a full-fledged democratic member of the international community, *are viewed by Russia's governing circles* as an action directed against the national interests of Russia. *The separatist regimes on the territory of Georgia continue to be at the receiving end of the Russia's evident and undisguised backing — political, economic and what is most alarming — military support*.
>
> Of particular concern, against such background, are continuous "warnings", voiced by the Ministry of Foreign Affairs and senior officials of the Russian Federation, concerning the allegedly high likelihood of provocations by the Georgian side, escalation of the situation and armed confrontation. It deserves to be noted that the contents of the statements and the time of their publication seem to synchronize perfectly with the analogous statements of the separatist regimes. It points to the real threat of provocations. *But this threat emanates from the separatists and their patrons*.
>
> . . . . . .
>
> *At the same time, militarisation of the conflict zones, raids of armed gangs, violations of fundamental human rights, gross infringement on the property right of IDPs/refugees — victims of ethnic cleansing, in particular seizure and illegal sale of their assets that has already acquired a mass character, daily incidence of grave offences involving peacekeepers take place amid the culpable inactivity of the peacekeeping forces and in many cases their open support of the separatists*.
>
> Armed confrontation is avoided mainly because of the Georgian Government's strong and principled position on peaceful resolution of the conflicts. At the same time, the Georgian side considers it necessary that the international community adopt a clear and unequivocal position on Russia's destructive actions against Georgia that will be an important deterrent factor for the aggressively disposed forces.
>
> *The Ministry of Foreign Affairs of Georgia calls on the Russian side to discontinue its actions aimed at escalation of the tension in the conflict zone and undertake the functions of a truly unbiased facilitator*. On our part we would like to underline once again our readiness for constructive cooperation with Russia in this direction." (Written Statement of Georgia, Vol. IV, Ann. 175; italics added.)

57. In the face of apparent Russian silence or lack of an adequate or sufficient response to its public statements, the Ministry of Foreign Affairs of Georgia concluded on 22 November 2007 (Judgment, paragraph 96):

"It should be noted that the activity of the Russian peacekeepers in Georgia's conflict zones is absolutely destructive and negative. *It is further attested by the fact that up to two thousand local residents have been killed in the area controlled by the so-called peacekeepers*. Russian peacekeepers do not comply with their mandated commitments and act as protectors of the separatist regimes . . ." (Written Statement of Georgia, Vol. IV, Ann. 176; italics added.)

C. CONCLUDING REMARKS

58. I would like to emphasize that with this separate opinion, I do not intend to contradict in any way the joint dissenting opinion of which I am a co-author. Rather, the purpose of the preceding pages has been to present an account of the facts allowing a more informed conclusion on Russia's first preliminary objection, but also extending into the realm of the second preliminary objection and broadening the factual basis for our joint dissent. In my view, the way in which the present Judgment handles the issue of the relevance and legal significance of facts is unacceptable. The Judgment thus adds another chapter to the story of the Court's unsatisfactory handling of evidence. It embodies serious deficiencies in this regard.

(Signed) Bruno SIMMA.

OPINION INDIVIDUELLE DE M. LE JUGE ABRAHAM

Accord avec le dispositif de l'arrêt en tant qu'il rejette la première exception préliminaire — Désaccord avec le raisonnement suivi par la Cour pour conclure à l'existence d'un différend entre les Parties — Conception du «différend» éloignée de celle retenue par la jurisprudence antérieure de la Cour — Absence erronée de tout réalisme dans la recherche du différend — Défaut d'apprécier l'existence du différend à la date à laquelle la Cour se prononce — Inutilité de rechercher la date à laquelle le différend est né — Exigence erronée d'une notification préalable de griefs par le demandeur comme condition de l'existence d'un différend — En l'espèce, existence d'un différend sur des questions relevant de la CIEDR bien avant août 2008.

1. J'ai voté en faveur du rejet, qu'exprime le point 1) *a)* du dispositif, de la première exception préliminaire soulevée par la Russie, tirée de la prétendue absence, à la date d'introduction de la requête de la Géorgie, d'un différend entre ces deux Etats relativement à l'interprétation ou à l'application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (CIEDR).

En revanche, j'ai voté contre le point 1) *b)* du dispositif, par lequel l'arrêt accueille la deuxième exception préliminaire, tirée de ce que la requête n'a pas été précédée par la tentative de régler le différend par la voie de négociations, pas plus que par la mise en œuvre des procédures spéciales prévues par la CIEDR.

2. Les raisons pour lesquelles j'estime que la Cour aurait dû rejeter aussi la deuxième exception préliminaire, et finalement retenir sa compétence pour connaître de l'affaire, sont exposées en détail dans l'opinion dissidente commune que j'ai l'honneur de signer avec plusieurs de mes collègues, et qui est jointe au présent arrêt.

Dans la présente opinion individuelle, je souhaite expliquer pourquoi, tout en étant d'accord avec le rejet de la première exception, j'ai de grandes réserves à l'égard du raisonnement suivi par la Cour pour parvenir à cette conclusion.

3. Je suis d'abord frappé par le fait que l'arrêt consacre la plus grande partie de ses développements, sur près de trente-cinq pages (soit de la page 13, paragraphe 23, à la page 47, paragraphe 114), à la première exception préliminaire, alors que la seconde est traitée en moins de vingt pages (de la page 47, paragraphe 115, à la page 65, paragraphe 184).

4. Bien que ce ne soit là qu'un indice, ce constat suggère, à première vue, qu'il s'est sans doute introduit un biais dans l'approche de la Cour.

En effet, des quatre exceptions préliminaires soulevées par la Fédération de Russie afin de convaincre la Cour qu'elle n'avait pas compétence pour connaître au fond de la requête de la Géorgie, seule la deuxième, à mes yeux, soulevait une — et même plusieurs — difficulté(s). Il s'agit de l'exception tirée de ce que les conditions procédurales énoncées à l'article 22 de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (la CIEDR) n'étaient pas satisfaites à la date de la saisine de la Cour, ce qui rendait cette clause, seule base de compétence invoquée par la Géorgie, inapplicable en l'espèce. Que cette exception ait justifié une discussion approfondie de la part de la Cour, je le comprends parfaitement — même si, au terme de cette discussion, je ne suis pas parvenu à la même conclusion que celle de la majorité.

5. En revanche, aucune des trois autres exceptions présentées (initialement) à la Cour ne méritait de donner lieu à de longs développements dans l'arrêt, car, pour des raisons différentes, aucune des trois n'aurait dû retenir longtemps l'attention de la Cour.

6. Cela est évident en ce qui concerne les troisième et quatrième exceptions préliminaires.

L'arrêt constate sobrement (par. 185) qu'il n'y a pas lieu pour la Cour de les aborder, puisqu'elle retient comme fondée la seconde exception, ce qui est logique et n'appelle en soi aucun commentaire.

Mais même si la Cour avait rejeté les deux premières exceptions (et pas seulement la première), ce qu'à mon avis elle aurait dû faire, elle n'aurait pas eu besoin de se pencher longuement sur les troisième et quatrième exceptions. En effet, la Russie a abandonné lors de la procédure orale sa troisième exception (exception d'incompétence *ratione loci*) en tant qu'exception préliminaire, puisqu'elle a elle-même soutenu qu'elle ne présentait pas un caractère exclusivement préliminaire et n'avait donc pas à être examinée à ce stade, et la quatrième exception (exception d'incompétence *ratione temporis*) n'avait pas réellement d'objet, les griefs adressés à la défenderesse par la Géorgie étant relatifs à des faits survenus après le 2 juillet 1999, date d'entrée en vigueur de la CIEDR entre les Parties.

7. Je pense que la Cour aurait dû aussi faire justice de la première exception préliminaire sans avoir à s'y étendre longuement, car cette exception, tirée de la prétendue absence de différend entre les Parties concernant l'interprétation ou l'application de la CIEDR, ne résistait pas au moindre examen, même sommaire. La Cour est finalement parvenue à la conclusion que cette exception n'était pas fondée et devait être rejetée, conclusion dans le sens de laquelle je ne peux qu'abonder, mais au terme d'un raisonnement long et laborieux qui n'emporte que très partiellement mon adhésion. Ce n'est pas seulement que ce raisonnement est inutilement long, alors que la réponse à donner était simple. Dire avec trop de mots ce que l'on pourrait exprimer de manière plus concise est un péché véniel, que l'auteur de ces lignes se garderait bien de traiter avec sévérité de crainte que cette sévérité se retourne contre lui. Mais il y a plus grave à mes yeux : la démarche de l'arrêt dans la démonstration qui couvre les pages 13 à 47 est substantiellement critiquable à plusieurs égards, et surtout en ce qu'elle traduit — de manière plus ou moins implicite — une conception du «différend» qui s'éloigne par trop de celle qui ressort de l'examen de la jurisprudence de la Cour à ce jour, et que je crois plus exacte.

8. J'observe d'abord que jusqu'à la présente affaire, chaque fois que la Cour a eu à répondre à une exception préliminaire tirée, par la partie défenderesse, de l'absence de différend, elle l'a fait — pour rejeter l'exception — en quelques brefs paragraphes, en se plaçant à la date où elle statuait, et en relevant qu'à cette date les vues des parties étaient nettement opposées sur les questions formant l'objet de la requête, de sorte qu'il existait un différend entre elles.

9. Significatifs, à cet égard, sont trois précédents relativement récents : celui de l'affaire relative à l'*Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Yougoslavie)* ; celui de l'affaire de la *Frontière terrestre et maritime entre le Cameroun et le Nigéria (Cameroun c. Nigéria)* ; celui, enfin, de l'affaire relative à *Certains biens (Liechtenstein c. Allemagne)*.

10. Dans la première affaire citée, la Cour a répondu à l'exception du défendeur tirée de l'absence de différend entre les Parties aux paragraphes 27 à 29 de son arrêt du 11 juillet 1996 relatif aux exceptions préliminaires. Après avoir résumé les conclusions, telles que formulées dans

le dernier état de la procédure, de la Bosnie-Herzégovine, à savoir, en substance, que la Cour juge que la Yougoslavie avait violé de diverses façons la convention sur le génocide et ordonne à la défenderesse de réparer les conséquences des violations commises, la Cour poursuit en ces termes :

> «Si la Yougoslavie s'est abstenue de déposer un contre-mémoire au fond et a soulevé des exceptions préliminaires, elle n'en a pas moins globalement rejeté toutes les allégations de la Bosnie-Herzégovine, que ce soit au stade des procédures afférentes aux demandes en indication de mesures conservatoires, ou au stade de la présente procédure relative auxdites exceptions.» (*Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Yougoslavie), exceptions préliminaires, arrêt, C.I.J. Recueil 1996 (II),* p. 614, par. 28.)

L'arrêt ajoute aussitôt que

> «[c]onformément à une jurisprudence bien établie, la Cour constate en conséquence qu'il persiste «une situation dans laquelle les points de vue des deux parties … sont nettement opposés» … et que, du fait du rejet, par la Yougoslavie, des griefs formulés à son encontre par la Bosnie-Herzégovine, «il existe un différend d'ordre juridique» entre elles» (*ibid.*, p. 614-615, par. 29).

11. Dans la deuxième affaire, la Cour a répondu à une exception semblable soulevée par le Nigéria, aux paragraphes 87 à 93 de son arrêt du 11 juin 1998 relatif aux exceptions préliminaires.

Après avoir rappelé les critères du différend définis par l'arrêt relatif aux *Concessions Mavrommatis en Palestine* et par l'arrêt rendu sur les exceptions préliminaires dans l'affaire du *Sud-Ouest africain*, comme le fait le présent arrêt dans son paragraphe 30, la Cour relève qu'il existe «bel et bien des différends» entre les Parties en ce qui concerne une partie du tracé de leur frontière terrestre, en apportant à cette occasion la précision suivante :

> «un désaccord sur un point de droit ou de fait, un conflit, une opposition de thèses juridiques … ne doivent pas nécessairement être énoncés *expressis verbis*. Pour déterminer l'existence d'un différend, il est possible, comme en d'autres domaines, d'établir par inférence quelle est en réalité la position ou l'attitude d'une partie.» (*Frontière terrestre et maritime entre le Cameroun et le Nigéria (Cameroun c. Nigéria), exceptions préliminaires, arrêt, C.I.J. Recueil 1998*, p. 315, par. 89.)

La Cour relève ensuite que le Nigéria, tout en soutenant qu'il n'existait pas de différend entre lui et le Cameroun concernant la délimitation de la frontière «en tant que telle», «s'est constamment montré réservé dans la manière de présenter sa propre position» (*ibid.*, par. 91), mais qu'en tout cas il «n'a … pas marqué son accord avec le Cameroun sur le tracé de cette frontière … et il n'a pas fait connaître à la Cour la position qu'il adoptera ultérieurement sur les revendications du Cameroun» (*ibid.*, p. 317, par. 93). Elle conclut son raisonnement en ces termes :

> «Le Nigéria est en droit de ne pas avancer, au présent stade de la procédure, des arguments qu'il considère comme relevant du fond, mais en pareille circonstance la Cour se trouve dans une situation telle qu'elle ne saurait se refuser à examiner les conclusions du Cameroun par le motif qu'il n'existerait pas de différend entre les deux Etats.» *(Ibid.)*

12. Dans la troisième affaire, la Cour a examiné l'exception tirée par l'Allemagne de l'absence de différend aux paragraphes 24 à 27 de son arrêt du 10 février 2005 relatif aux exceptions préliminaires. Elle ne s'y est guère attardée. Elle a d'abord rappelé les énoncés

classiques de *Mavrommatis* et du *Sud-Ouest africain* (*Certains biens (Liechtenstein c. Allemagne), exceptions préliminaires, arrêt, C.I.J. Recueil 2005*, p. 16, par. 24). Elle a ensuite relevé que «[l']Allemagne … nie purement et simplement l'existence d'un différend qui l'opposerait au Liechtenstein» (*ibid.*, p. 18, par. 25). Mais elle a constaté aussi que «l'Allemagne estime … que ses tribunaux ont, dans le cas du Liechtenstein, simplement appliqué leur jurisprudence constante à des biens considérés comme des avoirs allemands à l'étranger au sens de la convention sur le règlement» (de questions issues de la guerre et de l'occupation, signée en 1952 à Bonn) (*ibid.*, p. 19, par. 25). Cela lui a suffi pour en déduire que «dans la présente instance, les griefs formulés en fait et en droit par le Liechtenstein contre l'Allemagne sont rejetés par cette dernière» et que «[c]onformément à sa jurisprudence bien établie … du fait de ce rejet, il existe un différend d'ordre juridique … entre le Liechtenstein et l'Allemagne» *(ibid.)*.

13. De ces précédents, dont la convergence est frappante (et l'on pourrait citer dans le même sens l'affaire relative au *Timor oriental (Portugal c. Australie)* (*arrêt, C.I.J. Recueil 1995*, p. 99-100, par. 21-22) et l'affaire du *Cameroun septentrional (Cameroun c. Royaume-Uni)* (*exceptions préliminaires, arrêt, C.I.J. Recueil 1963*, p. 27), l'on peut déduire trois traits caractéristiques de la démarche de la Cour lorsqu'elle a à répondre à une exception tirée de l'absence de différend entre les Parties.

14. En premier lieu, la recherche par la Cour du «différend» est purement réaliste et concrète, elle ne comporte pas la moindre dose de formalisme. Il suffit à la Cour de constater que les deux parties ont des vues opposées sur les questions à propos desquelles elle a été saisie, cette opposition pouvant être révélée par tout moyen. Des échanges formels peuvent avoir eu lieu entre les parties avant l'introduction de l'instance, sous la forme d'une protestation ou d'une réclamation formulée par l'une des parties, et du rejet de ladite protestation ou réclamation par l'autre : cela peut contribuer à établir l'existence du différend et à en circonscrire l'objet, mais ce n'est jamais une condition nécessaire aux yeux de la Cour. C'est ainsi que dans l'affaire *Liechtenstein c. Allemagne* la Cour fait mention de consultations bilatérales qui s'étaient déroulées entre les Parties avant la saisine de la Cour, et au cours desquelles l'Allemagne avait fait savoir qu'elle ne partageait pas le point de vue du Liechtenstein, mais elle n'en fait pas un élément décisif : ces consultations, dit la Cour, «confortent» la conclusion à laquelle est parvenue par ailleurs, à savoir qu'il existe un différend entre les Parties (*Certains biens (Liechtenstein c. Allemagne), exceptions préliminaires, arrêt, C.I.J. Recueil 2005*, p. 19, par. 25). On peut déduire la position d'un Etat sur une question déterminée d'un simple comportement, même si ladite position n'a pas été formulée *expressis verbis* (*Cameroun c. Nigéria* précité). La seule chose qui importe, c'est que la Cour soit convaincue que les thèses des parties sont opposées sur les questions qui forment l'objet de la requête — constatation purement substantielle et non formelle — et que ces questions entrent bien *ratione materiae* dans le champ de la clause compromissoire, ou de tout autre disposition sur laquelle le demandeur fonde la compétence de la Cour.

15. En deuxième lieu, la Cour se place à la date à laquelle elle statue (c'est-à-dire, en général, à la date de son arrêt sur les exceptions préliminaires) pour apprécier l'existence du différend. Sans doute ce différend porte-t-il, par hypothèse, sur des faits et des situations antérieures à la saisine de la Cour, si bien que l'on peut affirmer qu'il est de règle que le différend préexiste à l'introduction de l'instance. Mais ce qui doit importer à la Cour, c'est que le différend existe à la date à laquelle elle vérifie sa compétence, et, surtout, pour procéder à cette vérification, la Cour tient compte de tout élément de nature à démontrer l'existence et la persistance du différend, même intervenu postérieurement à l'introduction de l'instance. C'est ainsi que dans les précédents cités, la Cour tient le plus grand compte des positions exprimées sur le fond de l'affaire

par le défendeur au cours de la procédure judiciaire, y compris dans le cadre du débat relatif aux exceptions préliminaires. Ce sont ces prises de position qui permettent souvent de conclure à l'existence d'un différend. Même la prudence ou l'ambiguïté, observée par un défendeur, au stade de l'examen des exceptions préliminaires, quant à ses positions finales, ne suffisent pas à convaincre la Cour de l'absence de différend (*Cameroun c. Nigéria* précité).

16. En troisième lieu, la Cour ne s'est jamais préoccupée, dans tous les précédents examinés, d'établir précisément la date de naissance du différend. Cela s'explique aisément : en règle générale, il importe peu que le différend soit apparu pour la première fois entre les parties peu de temps ou longtemps avant l'introduction de l'instance. Il faut et il suffit que le différend existe lorsque le juge est saisi (ce qui peut aussi être révélé par des faits postérieurs) et qu'il subsiste à la date à laquelle la Cour vérifie que les conditions sont remplies pour qu'elle exerce sa compétence.

17. On trouve, il est vrai, une hypothèse dans laquelle la Cour se préoccupe de déterminer la date exacte à laquelle le différend entre les parties s'est cristallisé, c'est celle des différends territoriaux. Mais cela s'explique par le fait que dans une telle hypothèse cette date entraîne d'importants effets dans l'examen judiciaire des arguments en présence : la date de cristallisation du différend constitue la «date critique» postérieurement à laquelle les actes accomplis par un Etat partie au différend ne seront généralement pas regardés comme pertinents aux fins d'établir ou de prouver la souveraineté territoriale qu'il revendique (par exemple, *Différend territorial et maritime entre le Nicaragua et le Honduras dans la mer des Caraïbes (Nicaragua c. Honduras), arrêt, C.I.J. Recueil 2007 (II)*, p. 697-698, par. 117).

En dehors de cette hypothèse, la notion de «cristallisation du différend» est sans portée, et il n'y a donc pas lieu d'en déterminer la date, puisque aussi bien — cela va sans dire — un raisonnement judiciaire n'est pas un exercice de recherche historique. On ne doit trancher que les questions qui sont juridiquement pertinentes.

18. On pourrait croire que la Cour a dérogé à la règle qui précède dans l'affaire *Liechtenstein c. Allemagne* : dans l'arrêt précité du 10 février 2005, la Cour affirme que le différend ne trouve pas son origine, ou sa cause réelle, dans les décisions rendues par les tribunaux allemands dans les années 1990, mais dans des actes juridiques plus éloignés dans le temps, et plus précisément antérieurs à 1980 (*Certains biens (Liechtenstein c. Allemagne), exceptions préliminaires, arrêt, C.I.J. Recueil 2005*, p. 26, par. 51-52).

Mais ce faisant, la Cour n'a pas entendu déterminer la date de naissance du différend, ou de sa «cristallisation», ce qui n'eût été d'aucune utilité ; elle a cherché à définir la date des «faits» ou «situations» ayant constitué la cause du différend, aux fins de l'application de l'alinéa *a)* de l'article 27 de la convention européenne pour le règlement des différends, base de compétence invoquée, qui exclut de la compétence de la Cour les «différends concernant des faits ou situations antérieurs à l'entrée en vigueur de la présente convention entre les parties au différend», soit en l'espèce 1980. Ce n'est donc pas la date de naissance du différend que la Cour devait rechercher, mais la date des faits ou situations que ce différend «concernait». Elle a pris soin de distinguer les deux questions (*ibid.*, p. 25, par. 48) avant de trancher exclusivement la seconde, dans un sens favorable à l'exception d'incompétence *ratione temporis* soulevée par la défenderesse.

19. Le présent arrêt, dans sa partie qui répond à la première exception préliminaire, contraste singulièrement avec les précédents précités, qui dessinaient une jurisprudence claire, cohérente, continue et, à mes yeux, convaincante.

20. La longueur inhabituelle des développements consacrés à la question de l'existence du différend n'est que le symptôme visible d'un double écart par rapport à la jurisprudence antérieure.

21. En premier lieu, si la Cour a eu besoin de tant de pages pour conclure qu'il existe un différend entre la Géorgie et la Russie concernant l'application de la CIEDR, c'est parce qu'elle a absolument tenu à déterminer la date à laquelle un tel différend est apparu pour la première fois. En réalité, l'arrêt consacre beaucoup plus de place à démontrer — de manière, d'ailleurs, non convaincante à mes yeux — qu'aucun différend de ce genre n'était apparu avant le mois d'août 2008 (c'est l'objet des paragraphes 23 à 105), qu'à établir qu'il est apparu en août 2008, immédiatement avant la saisine de la Cour (cela est réglé en huit paragraphes seulement (arrêt, par. 106 à 113)).

22. Je cherche encore les motifs juridiques qui ont pu conduire la Cour à consacrer tant de place à trancher une question inutile, à l'encontre de tous les précédents. L'arrêt, en effet, ne tire aucune conséquence — et ne pouvait en tirer aucune — de la conclusion intermédiaire qu'il énonce au paragraphe 105, à savoir qu'entre 1999 et juillet 2008 aucun différend ne s'est élevé entre les Parties au sujet du respect par la Fédération de Russie de ses obligations en vertu de la CIEDR. Il suffit qu'un tel différend se soit élevé par la suite, soit au plus tard en août 2008, pour que la Cour se trouve saisie dans des conditions lui permettant d'exercer sa compétence — pourvu que les autres conditions de cet exercice se trouvent réunies, ce qui renvoie aux autres exceptions préliminaires soulevées par la défenderesse. A strictement parler, le paragraphe 105 est donc sans portée juridique, et les dizaines de paragraphes qui le précèdent (au moins à partir du paragraphe 50) sont tout aussi dépourvus de portée. J'ajoute que même si l'on admettait que le différend n'est apparu — c'est-à-dire ne s'est manifesté — qu'en août 2008, ce qui n'est pas mon avis, il n'en résulterait nullement que la Géorgie serait empêchée, pour cette seule raison, de soumettre à la Cour des griefs relatifs à des faits imputables à la Russie antérieurs à août 2008 : la date de naissance d'un différend est une chose, l'objet du différend, c'est-à-dire les faits et situations que ce différend concerne, en est une autre, comme le rappelle l'arrêt précité en l'affaire *Liechtenstein c. Allemagne* (voir paragraphe 18 ci-dessus). Par conséquent, les développements qui précèdent le paragraphe 105 de l'arrêt, dépourvus d'effet quant à la question de l'existence d'un différend, sont également dépourvus d'utilité pour en circonscrire l'objet *ratione temporis*.

23. Le seul intérêt, en l'espèce, de la démarche inhabituelle suivie par la Cour pour l'examen de la première exception préliminaire est d'ordre purement pratique et concerne exclusivement la deuxième exception préliminaire. Puisque la Cour va conclure, beaucoup plus loin (arrêt, par. 147), que l'article 22 de la CIEDR énonce des conditions dont l'une au moins doit être satisfaite pour qu'elle puisse exercer sa compétence, et que cela la conduira à se demander si la Géorgie a eu recours, avant de la saisir, à une tentative de régler son différend avec la Russie par le moyen de négociations diplomatiques, la conclusion intermédiaire du paragraphe 105 l'aidera à gagner du temps dans l'examen de cette question, en circonscrivant sa recherche aux démarches qui ont pu être tentées par la demanderesse en août 2008.

En somme, la deuxième partie de l'arrêt se trouvera raccourcie à proportion des longueurs inutiles que l'on aura mises dans la première. En admettant que le pragmatisme y trouve son compte, on ne saurait en dire autant de la rigueur juridique, ni de la nécessaire clarté qui interdit de mélanger des questions distinctes.

24. Précisément, c'est cette confusion que, dans une certaine mesure, l'arrêt établit entre les deux exceptions préliminaires qu'il examine, qui est la cause du second écart par rapport aux précédents jurisprudentiels que je déplore dans la partie de l'arrêt qui répond à la première exception.

Ainsi que je l'ai dit plus haut, la démarche de la Cour, lorsqu'elle est appelée à se prononcer sur l'existence d'un différend, a toujours été strictement réaliste et nullement formaliste. Des échanges préalables entre les parties, des consultations, des réclamations et protestations, peuvent être utiles pour établir dans certains cas ou pour confirmer l'existence d'un différend ; ils n'ont jamais été considérés comme nécessaires. Il y a un différend si, au moment où elles viennent devant la Cour, les parties soutiennent des points de vue opposés sur les questions que le demandeur (qu'il ait raison ou non) prétend soumettre à la décision judiciaire. Cela suffit. Peu importe que les deux parties en aient débattu avant ou non. Cette dernière question est évidemment pertinente s'il s'agit de rechercher si la condition de négociations préalables — à la supposer applicable — a été satisfaite. Elle ne l'est pas s'il s'agit seulement de constater l'existence d'un différend. Par exemple, si un Etat accomplit un certain acte, et qu'un autre Etat estime que cet acte viole les obligations internationales de celui qui l'a accompli et qu'il est par ailleurs de nature à léser ses propres droits et intérêts, on est en présence d'un différend. Il n'est pas nécessaire, selon moi, que l'Etat qui se prétend lésé ait formellement protesté auprès de celui qu'il tient pour l'auteur d'un acte illicite. La protestation peut être la première étape d'un processus de règlement du différend par la voie diplomatique ; elle n'est pas une condition de l'existence même du différend. Lorsqu'un Etat agit d'une certaine manière, il est présumé considérer que son action est conforme à ses obligations juridiques internationales. Si un autre Etat est d'un avis opposé, on est donc bien immédiatement en présence d'un «désaccord sur un point de droit ou de fait, une contradiction, une opposition de thèses juridiques» dont parle le fameux *dictum* de l'arrêt *Mavrommatis* (*Concessions Mavrommatis en Palestine, arrêt n° 2, 1924, C.P.J.I. série A n° 2*, p. 11). L'Etat qui s'estime lésé peut donc saisir la Cour sans être tenu, en règle générale, de notifier préalablement ses griefs à celui qui a agi d'une manière que le premier dénonce comme illicite.

25. Or, de façon plus ou moins claire, l'arrêt se départit de cette approche que j'appellerais «substantielle» du différend pour lui substituer une approche plus «formelle», laquelle paraît impliquer que l'Etat demandeur ait, préalablement à l'introduction de son action en justice, fait savoir au défendeur qu'il tient telle de ses actions pour illicite, en lui en donnant les raisons. Sans doute l'arrêt n'exige-t-il pas que cette notification préalable des griefs emprunte une forme particulière. Sans doute aussi admet-il (au paragraphe 30) que l'Etat qui formule le grief puisse ne pas mentionner expressément le traité que l'Etat défendeur est accusé d'avoir méconnu, pourvu qu'il expose, en substance, l'objet de la règle dont il dénonce la violation. Il n'en reste pas moins que les paragraphes 30 et 31 paraissent bien subordonner l'existence même d'un différend à la double condition qu'un Etat ait formulé une réclamation à l'égard d'un autre, et que ce dernier ait rejeté ladite réclamation. Même si ni la réclamation ni son rejet ne sont assujettis à des formes obligatoires particulières, il me semble qu'il y a là une regrettable confusion entre la question de l'existence du différend, à laquelle la Cour doit toujours répondre par l'affirmative pour pouvoir exercer sa fonction judiciaire contentieuse, et la question des négociations préalables, qui ne sont une condition de l'exercice par la Cour de sa compétence qu'exceptionnellement, lorsque la clause de compétence applicable le prévoit.

Dans la présente affaire, je crains que la Cour n'ait quelque peu mélangé les deux questions, peut-être, en partie, parce qu'elle a tenu à déterminer la date exacte de naissance du différend en en cherchant la manifestation dans les échanges entre les Parties, et en préparant, tout en répondant à la première exception, sa réponse à la seconde.

26. J'ajouterai, *last but not least*, que si l'on accepte de faire l'effort (à mes yeux inutile) de déterminer le moment où le différend est apparu pour la première fois, et quelle que soit la définition, plus ou moins large, du «différend» que l'on retient, l'on est conduit de toute façon vers une date bien antérieure à août 2008.

La lettre du 26 juillet 2004 adressée par le président géorgien à son homologue russe contenait déjà la claire allégation que les forces militaires russes de maintien de la paix en Ossétie du Sud manquaient d'impartialité et n'agissaient pas (de propos délibéré) pour protéger la population géorgienne de souche victime d'attaques conduites par des unités armées illégales ossétiennes. Dans sa réponse du 14 août 2004, le président de la Fédération de Russie rejetait ces accusations, en qualifiant de «propagande» les accusations de Tbilissi contre les forces russes de maintien de la paix.

La déclaration de l'envoyé spécial du président de la Géorgie devant le Conseil de sécurité des Nations Unies, le 26 janvier 2006, que cite l'arrêt dans son paragraphe 84, est bien plus nette encore. Après avoir explicitement mis en cause la Russie pour avoir, selon lui, cessé de soutenir le principe de l'intégrité territoriale de la Géorgie, le représentant spécial ajoutait qu'un tel «changement de position» équivalait «à cautionner le nettoyage ethnique de plus de trois cent mille citoyens géorgiens». Après avoir cité cette déclaration, la Cour observe «qu'il n'est pas allégué, dans la référence au «nettoyage ethnique», que la Fédération de Russie a participé à cette action ou l'a facilitée». Certes, mais il n'est pas besoin d'être doué d'une grande perspicacité pour comprendre que l'allégation selon laquelle la Russie «cautionne» le nettoyage ethnique de «plus de trois cent mille citoyens géorgiens» constitue une accusation susceptible de se rattacher à l'article 2 de la CIEDR, lequel ne se borne pas à interdire aux Etats de se livrer à la discrimination raciale ou de l'encourager, mais leur impartit aussi l'obligation d'«interdire» la discrimination pratiquée par des groupes et organisations et d'«y mettre fin» (art. 2, par. 1 *d)*).

De même, la déclaration du représentant permanent de la Géorgie auprès des Nations Unies, lors d'une conférence de presse du 3 octobre 2006, citée au paragraphe 92, met en cause le manque d'impartialité de la force russe de maintien de la paix, et met directement ce manque d'impartialité en relation avec l'impossibilité pour les «centaines de milliers de ressortissants géorgiens victimes du nettoyage ethnique» de retourner dans leurs foyers. L'arrêt n'en tire aucune conséquence, semblant n'y voir encore aucune allégation qui soit en rapport avec la CIEDR.

Il en va de même de l'allocution du président de la Géorgie prononcée le 26 septembre 2007 devant l'Assemblée générale des Nations Unies, au cours de laquelle l'orateur a affirmé que l'Abkhazie a été victime de «l'un des nettoyages ethniques les plus terrifiants du XX^{e} siècle», et a aussitôt ajouté que «[d]epuis que les soldats de la paix russes ont été déployés, plus de 2000 Géorgiens ont péri, et c'est un climat de peur qui y règne» (voir le paragraphe 94 de l'arrêt).

Il est tout aussi surprenant que l'arrêt n'attache aucune importance à une déclaration officielle du ministère géorgien des affaires étrangères du 22 décembre 2006 qu'il mentionne, sans la citer, dans son paragraphe 93, dans laquelle la Russie est accusée de fournir «un soutien sans restriction et des armements aux régimes séparatistes [qui] … ont procédé à un nettoyage ethnique des Géorgiens» et de soumettre au «harcèlement ethnique» les Géorgiens vivant sur son territoire. Le commentaire qui accompagne cette mention ne peut manquer de laisser perplexe. Il en ressort que la référence à un «nettoyage ethnique perpétré par la Fédération de Russie [a] trait à des événements qui s'étaient déroulés au début des années 1990». Mais rien dans le texte de la déclaration en cause ne vient soutenir une telle interprétation.

On ne peut qu'éprouver le même étonnement devant la manière dont l'arrêt traite deux communiqués de presse du ministère géorgien des affaires étrangères en date, respectivement, du 19 avril 2008 et du 17 juillet 2008, cités aux paragraphes 97 et 104 de l'arrêt. Le premier met en cause la politique de la Russie dans des régions présentées comme «annexées *de facto*», politique caractérisée, selon la Géorgie, par «le mépris des droits de l'homme d'une grande majorité de la population de ces régions, victimes d'un nettoyage ethnique». Le second accuse la Russie de chercher à «consacrer juridiquement les conséquences du nettoyage ethnique perpétré par des

citoyens russes … afin de faciliter l'annexion d'une partie intégrante du territoire … de la Géorgie». Dans les deux cas, la Cour estime que les documents cités ne contiennent «aucune allégation» de violation par la Russie de ses obligations en matière d'élimination de la discrimination raciale. Il est difficile de comprendre comment les déclarations citées peuvent être considérées comme sans rapport avec les obligations de l'Etat mis en cause au titre de la CIEDR, à moins de considérer que «consacrer» le nettoyage ethnique, c'est-à-dire faire en sorte que les conséquences en soient maintenues, n'entre pas dans le champ d'une convention dont l'objet est de combattre la discrimination raciale. Tel n'est pas mon avis.

27. Il n'est pas besoin de préciser que dès le début de cette série d'accusations d'intensité croissante, c'est-à-dire dès la réponse du président Poutine au président Saakachvili le 14 août 2004, la Russie n'a cessé de rejeter ces allégations, et qu'elle les rejette aujourd'hui plus que jamais. La thèse de la Russie, confirmée devant la Cour à l'audience par l'agent de la défenderesse, notamment le 13 septembre 2010, est qu'elle a joué pendant une quinzaine d'années dans la région un rôle de facilitateur des négociations et de maintien de la paix entre la Géorgie, d'une part, et les provinces séparatistes d'Abkhazie et d'Ossétie du Sud, d'autre part, qu'elle l'a fait de la manière la plus impartiale et sans prêter la main, ni directement ni indirectement, à des actes de «nettoyage ethnique» à l'encontre de la population géorgienne, et que si tel avait été le cas, d'ailleurs, la Géorgie aurait demandé le départ des forces russes bien avant le 1er septembre 2008.

28. Il ne s'agit aucunement, au stade de la procédure consacré à l'examen de la compétence de la Cour, de déterminer, si peu que ce soit, la part de vérité et d'erreur que recèlent les thèses en présence. Mais l'existence du différend est flagrante, et celui-ci est sans aucun doute relatif à «l'interprétation ou à l'application» de la CIEDR, car l'on peut soutenir, de manière plus que plausible, que le «nettoyage ethnique» fait partie des comportements prohibés par cette convention, et que l'obligation des Etats parties n'est pas seulement de s'abstenir de tels comportements, mais de tout faire pour y mettre fin. S'il fallait dater la naissance du différend — ce que je considère comme parfaitement inutile en droit — on pourrait le faire remonter peut-être à 2004, sans doute à 2006.

29. Je ne peux cependant qu'approuver la conclusion finale de la Cour, à savoir qu'il existait bien, à la date d'introduction de la requête, un différend entre les Parties relatif à l'interprétation ou à l'application de la CIEDR, et c'est pourquoi, malgré toutes les réserves qui précèdent, j'ai voté sur ce point en faveur du dispositif de l'arrêt.

(Signé) Ronny ABRAHAM.

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DECLARATION OF JUDGE SKOTNIKOV

I have voted in favour of the Court's overall conclusion that it has no jurisdiction to entertain the Application filed by Georgia on 12 August 2008. I fully concur with the Court's decision to uphold the second preliminary objection raised by the Russian Federation. However, for the reasons given below, I am unable to support the Court's decision to reject the first preliminary objection raised by Russia.

1. I agree with the Court's conclusion that "Georgia has not . . . cited any document or statement made before it became party to CERD in July 1999 which provides support for its contention that 'the dispute with Russia over ethnic cleansing is long-standing and legitimate and not of recent invention'" (Judgment, paragraph 64). I equally support the Court's determination that "no legal dispute arose between Georgia and the Russian Federation during [the] period [between 1999 and July 2008] with respect to the Russian Federation's compliance with its obligations under CERD" (Judgment, paragraph 105).

2. The Court has arrived at the above conclusions after painstakingly considering all the relevant facts within their proper context.

3. Regrettably, the Court has not applied the same yardstick of rigorous contextual examination in forming the conclusion that a dispute with respect to the interpretation and application of CERD emerged on 9 August 2008 in the course of the armed conflict which started on the night of 7 to 8 August 2008 and that, consequently, there was a legal dispute between Georgia and the Russian Federation about the latter's compliance with its obligations under CERD at the date on which Georgia filed its Application, 12 August 2008 (see Judgment, paragraph 113).

4. As the Court has stated on many occasions "[o]ne situation may contain disputes which relate to more than one body of law and which are subject to different dispute settlement procedures" (Judgment, paragraph 32). The Court observes throughout the Judgment that in the situation which preceded the outbreak of hostilities on 7/8 August 2008 there were disputes involving a range of different matters, but not the question of the interpretation or application of CERD.

5. The Court is under a duty to determine whether or not the August 2008 dispute was about compliance with CERD, rather than with the provisions of the United Nations Charter relating to the non-use of force or with the rules of international humanitarian law. This task is admittedly not an easy one. Indeed, some acts prohibited by international humanitarian law may also be capable of contravening rights provided by CERD. In order to determine the existence of a dispute under CERD, the Court must nevertheless satisfy itself that an alleged dispute relates to establishing a "distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin" (Art. 1, CERD).

6. Given this difficulty, it may not always be possible for the Court to make a determination as to the existence of a CERD dispute in a situation of armed conflict at the preliminary stage of the proceedings. However, the Court always has the option of declaring that the objection as to the existence of a dispute does not possess, in the circumstances of the case, an exclusively preliminary character (Art. 79, para. 9, of the Rules of Court). Had the Court resorted to that option in the present case, it would have found itself on much safer ground.

7. It is striking that the Court's decision to reject the first preliminary objection in so far as the period starting on 9 August 2008 is concerned is based solely on various pronouncements by the Parties.

A contextual analysis would have shown that those pronouncements do not constitute sufficient evidence of the existence of a dispute with respect to the interpretation or application of CERD.

8. The Court begins its consideration of that period of August 2008 by quoting the Report of the Independent International Fact-Finding Mission on the Conflict in Georgia, established by the Council of the European Union, to the effect that on the night of 7 to 8 August:

> "a sustained Georgian artillery attack struck the town of Tskhinvali. Other movements of the Georgian armed forces targeting Tskhinvali and the surrounding areas were under way, and soon the fighting involved Russian, South Ossetian and Abkhaz military units and armed elements. It did not take long, however, before the Georgian advance into South Ossetia was stopped. In a counter-movement, Russian armed forces, covered by air strikes and by elements of its Black Sea fleet, penetrated deep into Georgia, cutting across the country's main east-west road, reaching the port of Poti and stopping short of Georgia's capital city, Tbilisi. The confrontation developed into a combined inter-state and intra-state conflict, opposing Georgian and Russian forces at one level of confrontation as well as South Ossetians together with Abkhaz fighters and the Georgians at another." (Report, Vol. 1, para. 2; Preliminary Objections of the Russian Federation, Vol. II, Ann. 75; see Judgment, paragraph 106.)

I think it would have been useful to consider at least two more observations contained in the Mission's Report:

> "There is the question of whether the use of force by Georgia in South Ossetia, beginning with the shelling of Tskhinvali during the night of 7/8 August 2008, was justifiable under international law. It was not." (Report, Vol. I, para. 19.)

> "At least as far as the initial phase of the conflict is concerned, an additional legal question is whether the Georgian use of force against Russian peacekeeping forces on Georgian territory, i.e. in South Ossetia, might have been justified. Again the answer is in the negative . . . There is . . . no evidence to support any claims that Russian peacekeeping units in South Ossetia were in flagrant breach of their obligations under relevant international agreements such as the Sochi Agreement and thus may have forfeited their international legal status. Consequently, the use of force by Georgia against Russian peacekeeping forces in Tskhinvali in the night of 7/8 August 2008 was contrary to international law." (*Ibid.*, para. 20.)

9. The factual context emerging from the Report is quite clear: it appears highly unlikely, to say the least, that the Russian response to Georgia's attack was in contravention of CERD. The majority which voted to reject the first preliminary objection unfortunately lost sight of this rather obvious proposition.

10. The Court, in addressing the exchange of accusations by the Parties, should have assessed them within the context of the armed conflict in progress when those accusations were made. Whenever the Court deals with a situation of armed conflict and the issue of compliance with CERD, it has to distinguish between wartime propaganda, on the one hand, and statements

which may indeed point to the emergence and crystallization of a dispute under CERD, on the other. This may not be easy, but the Court is perceptive enough to handle this task. For example, one could have concluded without any difficulty that Georgia's claim that Russia's intention was "to erase Georgian statehood and to exterminate the Georgian people" (Judgment, paragraph 109) belongs in the category of war rhetoric and thus is of no probative value as to the existence of a dispute under CERD. The same is true of Georgia's claims that "there is an ethnic cleansing of whole ethnic Georgian population of Abkhazia taking place by Russian troops" (Judgment, paragraph 111) or that "Russian troops . . . expelled the whole ethnically Georgian population of South Ossetia" (Judgment, paragraph 109). Incidentally, it is quite clear from the Report of the Fact-Finding Mission that all the above accusations were manifestly unfounded.

11. The Court puts much emphasis on what it terms "the response on 12 August by the Russian Foreign Minister" to "the claims made by the Georgian President on 9 and 11 August" (Judgment, paragraph 113). However, the remark of the Russian Minister for Foreign Affairs quoted in paragraph 112 of the Judgment is not at all a response to the claims made by Mr. Saakashvili. Mr. Lavrov said at a press conference:

> "A couple of days after [US Secretary of State] Rice had urgently asked me not to use such expressions, Mr. Saakashvili . . . claimed hysterically that the Russian side wanted to annex the whole of Georgia and, in general, he did not feel shy of using the term ethnic cleansings, although, true, it was Russia that he accused of carrying out those ethnic cleansings." (Judgment, paragraph 112.)

Then he adds (this sentence is omitted from the above quotation): "I assume that Rice, having spoken to me, didn't have time to address the same request to Mr. Saakashvili." (Written Statement of Georgia on Preliminary Objections, Vol. IV, Ann. 187.) It is clear that Mr. Lavrov is addressing Secretary Rice, rather than the Georgian President, expressing his view that she should perhaps have asked *both* sides to tone down their language.

12. Georgia made no credible claim which could have been positively opposed by the Russian Federation in the sense of the Court's established jurisprudence (see most recently *Certain Property (Liechtenstein* v. *Germany), Preliminary Objections, Judgment, I.C.J. Reports 2005*, p. 19, para. 25). The exchange of accusations by the Parties, given the context of the armed conflict, simply cannot be sufficient in determining the existence of a legal dispute with respect to the interpretation or application of CERD.

(Signed) Leonid SKOTNIKOV.

DISSENTING OPINION OF JUDGE CANÇADO TRINDADE

Table of Contents:

I. Prolegomena

1. I regret not to be able to follow the Court's majority in the decision which the Court has just adopted in the present Judgment on preliminary objections in the case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia *versus* Russian Federation). My dissenting position encompasses the whole of the Court's reasoning, and its conclusions on the second preliminary objection and on jurisdiction, as well as its treatment of issues of substance and procedure raised before the Court. This being so, I care to leave on the records the foundations of my dissenting position, given the considerable importance that I attach to the issues raised by both Georgia and the Russian Federation in the *cas d'espèce*, bearing in mind the settlement of the dispute at issue ineluctably linked to the imperative of the *realization of justice* under a United Nations human rights treaty of the historical importance of the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter the CERD Convention).

2. I thus present with all care the foundations of my entirely dissenting position on the whole matter dealt with by the Court in the Judgment which it has just adopted, out of respect for, and zeal in, the exercise of the international judicial function, guided above all by the ultimate goal precisely of the *realization of justice*. To that effect, I shall dwell upon all the aspects concerning the dispute brought before the Court which forms the object of the present Judgment of the Court, in the hope of thus contributing to the clarification of the issues raised and to the progressive development of international law, in particular in the international adjudication by this Court of cases on the basis of universal human rights treaties.

3. My first line of considerations concerns the genesis of the compulsory jurisdiction of the Hague Court (PCIJ and ICJ), which in my view cannot pass unnoticed in the consideration of compromissory clauses such as the one of the CERD Convention (Article 22). I shall next turn to the legislative history and development of the optional clause of compulsory jurisdiction of the Hague Court (PCIJ and ICJ). This will lead me into the consideration of the relationship between the optional clause/compromissory clauses and the nature and substance of the corresponding treaties wherein they are enshrined.

4. Attention will thus be drawn to the principle *ut res magis valeat quam pereat*, before I turn to the elements for the proper interpretation and application of the compromissory clause (Article 22) of the CERD Convention (encompassing its ordinary meaning, its *travaux préparatoires*, and the previous pronouncement of the Court itself on it). In considering, next, the ineluctable relationship between peaceful settlement and the realization of justice, particularly under human rights treaties, I shall dwell in particular, upon the question of the verification of prior attempts or efforts of negotiation, in the light of the relevant case-law of the Hague Court (PCIJ and ICJ)

5. In sequence, I shall single out the concern of contemporary *jus gentium* with the sufferings and needs of protection of the population, an issue which, in my view, assumes a central position in the consideration of the present case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*. This will lead me to a review of the evolutive interpretation of human rights treaties, - such as the CERD Convention, - regarded constantly in international case-law and international legal doctrine as *living* instruments, so as to respond to new needs of protection of the human person, even in the most adverse circumstances. The path will then be paved for, last but not least, the presentation of my concluding observations, and my final reflections on an old dilemma that we keep on facing nowadays, in the light of contemporary *jus gentium*.

II. Permanent Court of International Justice and International Court of Justice: Compulsory Jurisdiction Revisited

1. The Work on the PCIJ Statute of the Advisory Committee of Jurists (1920)

6. In June-July 1920, the Advisory Committee of Jurists appointed by the Council of the League of Nations to draft the Statute of the Permanent Court of International Justice (PCIJ), discussed at length the possibility of providing the PCIJ with compulsory jurisdiction[1], so as to bring about a development in the system of international adjudication. The Committee considered a precise text on the compromissory clause, and soon reached consensus on the introduction of a rule whereby the PCIJ would be competent to hear certain disputes *without the need* of a previous (*ad hoc* or conventional) agreement between the contending parties.

7. Under the draft Statute, such compulsory jurisdiction virtually extended over all disputes of a "legal" nature, whereas consent would have still been required to bring other kinds of matters before the PCIJ. It was seemingly intended that the introduction of such system of compulsory jurisdiction in disputes of a "legal nature", would also extend to other cases in so far as they were covered by general or specific conventions between the (contending) parties. The discussion of drafts of a jurisdictional clause, since the 10th meeting of the Committee, kept in mind particularly Article 14 of Covenant of the League of Nations, which expressly referred to disputes "submitted" by the parties to the PCIJ[2].

8. A proposal was advanced to the effect that the (PCIJ) Statute itself was to be used as a general instrument whereby States would provide their consent to jurisdiction; in a working draft proposed by Baron Descamps, a last paragraph was added to the effect that: - "Any State subscribing to the present Act is considered as having agreed to settle by legal means all disputes [of a legal nature]"[3]. Already at the 14th meeting of the Committee (held on 02.07.1920), compulsory jurisdiction had been generally accepted[4]. Moving on to the applicable law, the Committee then considered the inclusion of general principles in the list of legal sources applicable by the PCIJ.

9. Pursuant to Article 34 of the Draft Statute, the PCIJ was to have jurisdiction (even without any special convention conferring it upon the Court) to hear and determine cases of a "legal nature" - between member States of the League of Nations - concerning: a) the interpretation of a treaty; b) any question of international law; c) the existence of any fact which, if established, would constitute a breach of an international obligation; d) the nature or extent of reparation to be made for the breach of an international obligation; e) the interpretation of a sentence passed by the Court. This latter was also to take cognizance of all disputes of any kind which may be submitted

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[1]. Cf., on the proposed basis for discussion, CPJI/Comité Consultatif de Juristes, *Procès-Verbaux des Séances du Comité* (16 juin – 24 juillet 1920), La Haye, Van Langenhuysen Frères, 1920, p. 218. On a subsequent proposal (by Lord Phillimore) and amendment (by Mr. Hagerup), Annexes 2-3, pp. 252-253.

[2]. Article 14 of the Covenant read: - "The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly".

[3]. CPJI/Comité Consultatif de Juristes, *Procès-Verbaux des Séances du Comité*…, *op. cit. supra* n. (1), Annex 1, p. 272, and cf. amendment, in ibid., Annex 5, pp. 277-278.

[4]. Despite the concern – as to the applicable law – expressed by a couple of members; cf. *ibid*., pp. 308-309 and 311.

to it on the basis of a general or particular convention between the parties. And, in the event of a dispute as to whether a certain case came within any of the aforementioned categories, the matter was to be settled by the decision of the Court[5].

10. In the substantial debates of the Advisory Committee, of 02 July 1920, one of its members (E. Root), trying to restrain the prevailing view, stated that "the world was prepared to accept the compulsory jurisdiction of a Court which applied the universally recognized rules of International Law"; however, he did not think that it was disposed to accept "the compulsory jurisdiction of a Court which would apply principles, differently understood in different countries"[6]. Accordingly, in his view, "the beginning must be modest", with a "relatively limited jurisdiction"[7]. The President of the Advisory Committee (Baron Descamps) promptly retorted that Mr. E. Root's statement that "principles of justice" allegedly varied from country to country

> "might be partly true as to certain rules of secondary importance. But it is no longer true when it concerns the fundamental law of justice and injustice deeply engraved on the heart of every human being and which is given its highest and most authoritative expression in the legal conscience of civilized nations. That was the law which could not be disregarded by a judge, a law which in practice, whether it is wished to or not, a judge never would disregard"[8].

11. Baron Descamps added that it would be incumbent upon the Judges of the PCIJ "to consider whether the dictates of their conscience were in agreement with the conception of justice of civilized nations"[9]. Another member of the Committee (B.C.J. Loder) also retorted to Mr. Root's view, arguing that it had incurred into a "confusion" with "compulsory arbitration", that "did not come within the competence of the Committee", which was "concerned with the rules to be applied by the Court" (the PCIJ); B.C.J. Loder repeated that "all possible confusion between the question of compulsory arbitration and that of the rules to be applied by the Court must be avoided"[10].

12. The Advisory Committee ended up by propounding the compulsory jurisdiction of the Hague Court (PCIJ). Its final *Report* stated that:

> "the Committee did not intend to enable a party to avoid the jurisdiction of the Court by alleging that there was still some hope of settlement by diplomatic means. (…) The Court, after satisfying itself *in limine litis* that an attempt has been made to settle the case by diplomatic means, (…) shall deliver judgment under certain conditions. Article 34 consequently lays down that the Court may hear and determine, without any special convention, disputes between States which are members of the League of Nations if such disputes are of a legal nature (…)"[11].

13. The Advisory Committee itself, commenting on this provision of the Draft, noted that:

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[5]. Cf. *ibid*., p. 729, the final Report, whereby the Committee finalized the draft Articles and appended a commentary thereto; and cf. also the preliminary version, *in ibid*., p. 566.

[6]. *Ibid*., p. 308.

[7]. *Ibid*., p. 309.

[8]. *Ibid*., pp. 310-311.

[9]. *Ibid*., p. 311.

[10]. *Ibid*., p. 311.

[11]. *Ibid*., pp. 726-727.

> "in the opinion of the majority of the Committee, the grant of such powers, though perhaps not strictly in accordance with the letter of the Covenant, follows its spirit so exactly that it would seem a great pity, now that the Court is being definitely organized, not to complete the progress made by this last provision.
>
> (…) [T]he majority [of the Committee] recognized that the States forming the League of Nations, in constituting the Court, must give it a competence in cases of a legal nature, without any convention other than the constituent Statute of the Court"[12].

Such was the position espoused by the Advisory Committee of Jurists, entrusted [by the Council of the League of Nations] with the historical task of drafting the Statute of the Hague Court in 1920. The Council itself, however, was to take a different position, opposed to the proposed compulsory jurisdiction of the PCIJ. The matter was then referred to the Assembly of the League of Nations.

2. The Debates of the Assembly of the League of Nations and Subsidiary Organs (1920)

14. At the I Assembly, in 1920, the question of the compulsory jurisdiction of the PCIJ was object of a careful debate; some of the members of the Advisory Committee of Jurists were present therein, in their capacities of Delegates of their countries. By and large, in the Assembly debates that followed[13], the proposed clause of compulsory jurisdiction of the PCIJ did not meet much enthusiasm on the part of most member States of the League, although some States endorsed it (cf. *infra*).

15. In particular, the originally proposed Article 34, then Article 36 in the final numbering of the Draft Statute of the PCIJ, was doubted to be in conflict with the Covenant of the League; hence a Sub-Committee was established to study the issue, and to consider whether the Statute could serve as an instrument whereby States could express their consent to the PCIJ's jurisdiction[14]. The Sub-Committee acknowledged the controversy on the interpretation of the Covenant, but decided not to propose any amendment the relevant Articles of the Draft Statute[15].

16. The negotiation deadlock was overcome thanks to a proposal by the Brazilian Delegate[16] (Raul Fernandes), who devised an alternate version of the jurisdictional clause, whereby parties to the Statute were free to adhere or not[17]; he then submitted a revised proposal focused on the possibility that States, which desired to extend the scope of compulsory jurisdiction of the Court,

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[12]. Cf. *ibid*., pp. 727-728. Cf. also the commentary, on this provision, by J. Brown Scott, *in The Project of a Permanent Court of International Justice and Resolutions of the Advisory Committee of Jurists - Report and Commentary*, Washington, 1920, p. 98: - " (…) It would seem to follow that one of the parties could, in the absence of a separate and special convention or of special consent, lay the case before the Court, which is competent to receive it, and that the Court, being competent, could not only entertain the case, but could, at the request of the complaining State, proceed to decide it in the absence of the defendant State invited to appear before the Court".

[13]. Extensively reported in the League of Nations´ document: PCIJ, *Documents Concerning the Action Taken by the Council of the League of Nations under Article 14 of the Covenant*, Geneva, PCIJ, 1921, pp. 1 *et seq*.

[14]. Cf. *ibid*., pp. 91-92.

[15] Cf. *ibid*., pp. 210-211, and cf. also p. 107, on relevant discussion in the Assembly.

[16]. Cf. *ibid*., Annex 49, at 222.

[17]. Cf. *ibid*., p. 107, and Annex 11, p. 168.

were permitted to do so by means of a declaration. This proposal setting forth the optional clause was then approved in the Assembly (8th Meeting), together with the whole Draft Statute[18].

17. The Norwegian Delegate (F. Hagerup), who – like R. Fernandes - had worked on the topic in the Advisory Committee, though noting with some regret that the *momentum* built by the Committee had been lost, in the debates of the Assembly welcomed the Brazilian amendment; he reminded the Assembly, however, that compulsory jurisdiction was in his view still into force even without recourse to the optional clause declaration, at least for "all matters specifically provided for in treaties and conventions in force", as acknowledged by the amended jurisdictional clause[19].

18. The main points made during the debates were reported in the minutes (*procès-verbaux*) of the Assembly's III Committee, in charge of the Draft Statute of the PCIJ. In the debates of 24.11.1920 on compulsory jurisdiction, the Delegate of Argentina (H. Pueyrredon) stated that if the PCIJ's "jurisdiction was not obligatory, the Court of Justice would (...) be merely an arbitration tribunal"[20]. The Delegate of Brazil (R. Fernandes) strongly criticized the modifications made by the League's Council of the conclusions of the Advisory Committee of Jurists, and held that "[f]or legal questions the Court should have jurisdiction because the decisions of the Court are the application of law, and make law"[21].

19. Likewise, the Delegate of Panama (H. Arias) thought that "the compulsory jurisdiction could well be maintained", and "the parties should be obliged to bring the case before the Court if they had not agreed to submit it to arbitration or to enquiry by the Council"[22]. In the same line of thinking, the Delegate of Portugal (A. Costa) endorsed the Advisory Committee's support of compulsory jurisdiction; he argued that:

> "the Covenant imposed recourse to the Court as an obligation, being inspired by the principle, contrary to that held by Bismarck, that 'right goes before might'. The League of Nations had undertaken the task of preventing war. The only means of effecting this was obligatory recourse to justice. If a Court with obligatory jurisdiction could not be established, the League was dead. (…) The League of Nations would gain strength by admitting the principle of the adaptation of the Covenant to the needs of humanity. Moreover, a Permanent Court without compulsory jurisdiction would not only contradict the great treaties of peace which conferred this jurisdiction upon it in special cases; it would also constitute a mere repetition of the Hague Court of Arbitration"[23].

20. The Delegate of South Africa (Lord Robert Cecil), however, introduced doubts into that debate, by arguing that the will or consent of the parties should prevail (rather than compulsory jurisdiction), as the Court's judgments "would not be enforced" if they "concerned vital interests" of the States[24]. The Norwegian Delegate (F. Hagerup) sharply disagreed with Lord Robert Cecil's

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[18]. *Ibid*., p. 110.

[19]. *Ibid*., pp. 249-250.

[20]. Société des Nations/League of Nations, *Actes de la I Assemblée/Records of the I Assembly – Séances de la III Commission/Meetings of the III Committee (CPJI/PCIJ)*, Genève, 1920, p. 285.

[21]. *Ibid*., p. 285.

[22]. *Ibid*., p. 286.

[23]. *Ibid*., pp. 287-288.

[24]. *Ibid*., p. 287.

"reservation of vital interests", and "regretted that the Council had not been able to adopt the point of view of the Jurists's Committee"[25]. The Delegate of The Netherlands (B.C.J. Loder) also regretted the "misunderstanding between the Jurist's Committee and the Council", and held that "the establishment of compulsory jurisdiction was exactly the step forward which should be made, and the step desired by the Covenant"[26]; yet, to keep on insisting to take this step further would run "the risk of bringing about disagreement between different Powers and thus of failing to achieve any result" at all[27].

21. In the continuing debates, of 26.11.1920, the strong criticism came this time from the Delegate of Belgium (H. Lafontaine), to whom the principle of compulsory jurisdiction was, by then (in 1920),

> "considered as the only means of emerging from the situation created by the war. The resistance to the application of the principle was due to the two fetiches of unanimity and sovereignty. (…) The only admissible sovereignty was that of justice. (…) The Covenant bore the imprint of the fact that its authors were inspired by the fetiches of vital interests and honour, but at least these two expressions were not to be found in the Covenant, and this in itself constituted an element of progress"[28].

22. Insisting on his criticism, the Delegate of Belgium (H. Lafontaine) saw "a contradiction in Article 14 of the Covenant, in that it provided for a real Court of Justice to which, however, the parties would have recourse only if they both agreed to do so"[29]. The Delegate of the British Empire (Sir Cecil Hurst), however, did not think that the draftsmen of the Covenant had the intention to establish a Court with compulsory jurisdiction; he beheld as the "true solution", if arbitration did not succeed, "to induce States to conclude mutual treaties" foreseeing recourse to a Court[30]. This was the way, in his view, to overcome "the hesitation of some States to accept universal compulsory jurisdiction"[31]. H. Lafontaine expressed some skepticism, in reply to the proposal of Sir Cecil Hurst[32].

23. In the remaining debates on the matter, of 01 and 13.12.1920, the Delegate of Greece (N. Politis) remarked that, since it seemed "impossible to accept the idea of compulsion", which "could not be imposed upon minds which had not spontaneously accepted it", the solution appeared to be "to establish a network of separate conventions extending the jurisdiction of the Court"[33]. For his part, the Delegate of Switzerland (Max Huber) suggested the possibility of adoption of a convention for compulsory arbitration[34]. The Delegate of Colombia (F.J. Urrutia) stated that:

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[25]. *Ibid*., p. 289.

[26]. *Ibid*., p. 288.

[27]. *Ibid*., p. 288.

[28]. *Ibid*., p. 292.

[29]. *Ibid*., p. 293.

[30]. *Ibid*., pp. 293-294.

[31]. *Ibid*., p. 294.

[32]. *Ibid*., p. 294.

[33]. Société des Nations/CPJI, *Documents au sujet de Mesures prises par le Conseil de la Société des Nations aux termes de l´article 14 du Pacte et de l´adoption par l´Assemblée du Statut de la Cour Permanente*, Genève, SdN/CPJI, 1920, p. 142.

[34]. *Ibid*., p. 142.

> "The principle of compulsory arbitration is not only a principle of international justice; it is a democratic principle, since it is the logical result of the legal equality of States. It is deeply rooted in the history, traditions and institutions of the American peoples"[35].

24. In the same line of thinking, the Peruvian Delegate (M.H. Cornejo) stated that "Peru has always defended compulsory arbitration", and remarked that "Latin America, by a very great majority, perhaps unanimously, desires compulsory jurisdiction and the reign of peace"[36]. Likewise, the Delegate of Cuba (Mr. de Aguero) observed that:

> "although the principle of compulsory jurisdiction is not included in the resolution of the III Committee, we will vote for that resolution. We understand the saying of the Latin philosopher: *natura non fecit saltus*. Perfection cannot be attained in a moment from that which does not as yet exist. The laws of evolution govern all things. We must begin by building a little chapel, and in the course of time the League of Nations will be able to build a cathedral"[37].

To the same effect, the Delegate of Switzerland (Mr. Motta) added that the setting up of a tribunal with compulsory jurisdiction "would have been the ideal, but the present state of human society is still unfavourable to its realization. (…) Article 36, however imperfect it may be, will be the starting-point of a great movement towards freedom, out of which will arise universal compulsory jurisdiction"[38].

25. For his part, the Delegate of Bolivia (Mr. Tamayo), expressed support for "the just, humane and truthful principle of compulsory arbitration"; anything short of that, he added, amounted to "promising us justice for tomorrow", and "not giving it us today"[39]. And the Delegate of Portugal (A. Costa) insisted on his view that Articles 12-15 of the Covenant "implied the principle of compulsory jurisdiction for the International Court of Justice", and he added, with a premonitory tone:

> "When we realize the necessity of remaining faithful to the declarations of the preamble to the Covenant and of declaring ourselves on the question of compulsory jurisdiction, we shall be forced to accept compulsion. The tribunal we are going to found will then be provided with compulsory jurisdiction, which will be admitted by all the Members of the League of Nations. Such is my wish. I accept the institution of a Permanent Court of International Justice because I have confidence in the future. If we are not to reach the end of which I have spoken, we are deceiving ourselves. The tribunal will disappear, and with it the League of Nations, if, to settle their disputes, the Members of the League are still at liberty to resort to war"[40].

26. The compromise solution was the optional clause, proposed by the Brazilian Delegate (Raul Fernandes), as pointed out by the *rapporteur* of the III Committee (F. Hagerup), in his *Report* on the discussions of the Committee, in respect of what was to become Article 36 the Statute of the

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[35]. *Ibid*., pp. 241-242.

[36]. *Ibid*., p. 244.

[37]. *Ibid*., pp. 246-247.

[38]. *Ibid*., p. 249.

[39]. *Ibid*., p. 248.

[40]. *Ibid*., p. 246.

PCIJ[41]. Furthermore, the Norwegian Delegate (F. Hagerup), in the concluding discussions of 13.12.1920, deemed it fit to state, in support of compulsory jurisdiction, that:

> "There are already in existence a large number of conventions which provide for compulsory jurisdiction. I am happy to pay tribute here to the important part played by the States of South America in this movement. They deserve a large share of the credit for the extension of the idea. (…) [T]he States of Europe have also not been behindhand. Several of them, including some great powers, have concluded a number of treaties which set up compulsory jurisdiction. (…) I wish to emphasize here how highly desirable it would be for all States, which are bound by treaties providing for compulsory jurisdiction in a general way, to modify them so that this jurisdiction shall henceforth devolve upon the Court which we are about to set up. Such an attitude will greatly help to extend the Court's jurisdiction. I have already in my first speech pointed out the importance of the motion of the Brazilian Delegation, (…) according to which States which desire to extend the scope of compulsory jurisdiction are permitted to do so by means of a simple declaration. (…) I have been, from the outset, a champion of the principle of compulsory jurisdiction. I can accept wholeheartedly the proposal now presented"[42].

3. The Debates on the ICJ Statute of the United Nations Conference on International Organization and Subsidiary Organs (1945)

27. In the new era inaugurated with the creation of the United Nations, on the occasion of the U.N. Conference on International Organization, a Committee of Jurists was appointed in 1945 to review the PCIJ Statute in view of the adoption of the Statute of the new International Court of Justice (ICJ). The Committee of Jurists entrusted a Subcommittee to draft the text of, in particular, Article 36 (on compulsory jurisdiction). On 14.04.1945 the Subcommittee reported:

> "The Subcommittee, having given careful consideration to the various proposals that had been presented as well as to the views previously expressed by the different Delegates before the Committee of Jurists, unanimously agreed upon the following:
>
> 'The Court, being the principal judicial organ of the United Nations, should possess definite jurisdiction, if not in all cases, at least in those cases which are peculiarly susceptible of judicial settlement, namely, legal disputes.
>
> It may be recalled that as far back as 1920 compulsory jurisdiction was proposed by the Committee of Jurists which drafted the existing Statute. The Governments were not prepared at that time to accept the proposal and the result was the adoption of what is known as the optional clause.
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> The exercise of compulsory jurisdiction by the Court will promote the rule of law among nations. Public opinion throughout the world is strongly in favor of conferring on the Court compulsory jurisdiction'"[43].

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[41]. Cf. *ibid*., p. 222.

[42]. *Ibid*., p. 250.

[43]. U.N., *Documents of the United Nations Conference on International Organization* (UNCIO), vol. XIV (U.N. Committee of Jurists), San Francisco, 1945, doc. Jurist-43, G/33, of 14.04.1945, pp. 286-287.

28. Moreover, the Subcommittee recalled that consensus among jurists was in place at least since the 1920 negotiations, and that 45 out of 51 States had already accepted the optional clause. Shortly afterwards, on 19.04.1945, the Subcommittee further reported on the matter that:

> "The question of compulsory jurisdiction was debated at the time of the initial preparation of the Statute of the Court. Admitted by the Advisory Committee of Jurists, in 1920, compulsory jurisdiction was rejected in the course of the examination of the Draft Statute by the League of Nations to yield place, on the successful initiative of a Brazilian jurist, to an optional clause permitting the States to accept in advance the compulsory jurisdiction of the Court in a domain delimited by Article 36. This debate has been resumed and very many Delegations have made known their desire to see the compulsory jurisdiction of the Court affirmed by a clause inserted in the revised Statute so that, as the latter is to become an integral part of the United Nations Charter, the compulsory jurisdiction of the Court would be an element of the International Organization which it is proposed to institute at the San Francisco Conference. Judging from the preferences thus indicated, it does not seem doubtful that the majority of the Committee was in favour of compulsory jurisdiction, but it has been noted that, in spite of this predominant sentiment, it did not seem certain, nor even probable, that all the nations whose participation in the proposed International Organization appears as necessary, were now in a position to accept the rule of compulsory jurisdiction, and that the Dumbarton Oaks Proposals did not seem to affirm it; some, while retaining their preferences in this respect, thought that the counsel of prudence was not to go beyond the procedure of the optional clause inserted in Article 36, which has opened the way to the progressive adoption, in less than 10 years, of compulsory jurisdiction by many States which in 1920 refused to subscribe to it. Placed on this basis, the problem was found to assume a political character, and the Committee thought that it should defer it to the San Francisco Conference.
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> The suggestion was made by the Egyptian Delegation to seek a provisional solution in a system which, while adopting compulsory jurisdiction as the compulsory rule, would permit each State to escape it by a reservation. Rather than accept this view, the Committee has preferred to facilitate the consideration of the question by submitting two texts as suggestions rather than as a recommendation.
>
> One is submitted in case the Conference should not intend to affirm in the Statute the compulsory jurisdiction of the Court, but only to open the way for it by offering the States, if they did not think it apropos, acceptance of an optional clause on this subject. This text reproduces Article 36 of the Statute with an addition in case the United Nations Charter should make some provision for compulsory jurisdiction.
>
> The second text, also based on Article 36 of the Statute, establishes compulsory jurisdiction directly without passing through the channel of an option which each State would be free to take or not take. Thus it is simpler than the preceding one. It has even been pointed out that it would be too simple. The Committee, however, thought that the moment has not yet come to elaborate it further and see whether the compulsory jurisdiction thus established should be accompanied by some reservations, such as one concerning differences belonging to the past, one concerning disputes which have arisen in the present war, or those authorized by the General Arbitration Act of 1928. If the principle enunciated by this second text were accepted, it could serve as a basis for working out such provisions applying the principle which it enunciates with such modifications as might be deemed opportune.
>
> Some Delegations desired to see inserted in Article 36(1) the specific statement that the jurisdiction of the Court extends to 'justiciable' matters or those 'of a legal nature'

which the parties might submit to it. Objections were made to the insertion of such a specific statement in a provision covering the case in which the jurisdiction of the Court depends on the agreement of the parties. Some refused to restrict in this way the jurisdiction of the Court. Fears were also expressed regarding difficulties in interpretation which such a provision might cause, whereas practice has not shown any serious difficulties in the application of Article 36(1). So it was not changed as indicated"[44].

29. In the light of the aforementioned, the Subcommittee proposed, on the occasion, a revision of the aforementioned Article 36, to be read as follows:

"1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters especially provided for in the Charter of the United Nations and in treaties and conventions in force.

2. The members of the United Nations and States Parties to the Statute recognize as among themselves the jurisdiction of the Court as compulsory *ipso facto* and without special agreement in all or any of the classes of legal disputes concerning:

(a) the interpretation of a treaty;

(b) any question of international law;

(c) the existence of any fact which, if established, would constitute a breach of an international obligation;

(d) the nature or extent of the reparation to be made for the breach of an international obligation.

3. In the event of a dispute as to whether the Court has jurisdiction, the matter is settled by decision of the Court"[45].

30. After further consideration, the Committee of Jurists acknowledged that this solution could prove unpalatable in the Assembly, and then provided this latter with two alternative texts for Article 36 of the Statute: one set forth the clause on compulsory jurisdiction, whereas the other retained the mechanism of the optional clause[46]. The two alternative texts were submitted to the IV Committee, which came to the conclusion that the mechanism of the optional clause declaration was more likely to meet the general agreement of the States Parties; accordingly, it discarded the alternate text, though acknowledging that the willingness to establish the ICJ's compulsory jurisdiction had prevailed within the Committee of Jurists[47].

31. The support expressed, on distinct occasions, - at the beginning of the eras of both the League of Nations (1920) and of the United Nations (1945), just reviewed, - for the compulsory jurisdiction of the Hague Court, should not pass unnoticed, or be forgotten, in our days, at this beginning of the second decade of the XXIst. Century. In this respect, the debates of the U.N.

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[44]. U.N., *UNCIO*, vol. XIV (U.N. Committee of Jurists), doc. Jurist 61 (rev.), of 19.04.1945, pp. 667-668.

[45]. U.N., *UNCIO*, 1945, vol. XIV (Committee of Jurists), doc. Jurist-43, G/33, of 14.04.1945, p. 287.

[46]. Cf. *UNCIO, Report on Draft of Statute of an International Court of Justice referred to in Chapter VII of the Dumbarton Oaks Proposals* (*rapporteur*, Jules Basdevant), vol. XIV, 1945, pp. 821 and 839-842.

[47]. Cf. *UNCIO*, *Compte-rendu du Sous-Comité IV/1 sur l'article 36 du Statut de la Cour Internationale de Justice*, vol. XIII, 1945, pp. 562-565.

Committee of Jurists, of 12-13 April 1945, were particularly illuminating. On the occasion, the Delegate of Brazil (A. Camillo de Oliveira) began the discussions on Draft Article 36 by stating that:

> "the time is right to make and amendment to this Article so that the jurisdiction of the Court be obligatory for all categories of disputes enumerated in the Article"[48].

He added that, since 1920, when the optional clause was inserted, "the idea of making the Court's jurisdiction obligatory had greatly advanced"[49].

32. In the same sense, the Delegate of China (Wang Chung-hui), stated that "the exercise of compulsory jurisdiction by the Court would promote the rule of law in international society"[50]. On his turn, the Delegate of Turkey (C. Bilsel) declared that he "supported the thesis of the Brazilian and Chinese Delegates with regard to the revision of Article 36", which he regarded as "one of the most important Articles in the Statute"[51]. And the Delegate of Turkey added that:

> "the time had come to accept the idea of compulsory international justice. The idea of international justice (…) has clearly progressed (…). The Committee of Jurists had proposed compulsory jurisdiction of the Court but (…) the Council of the League had not agreed, and (…) the Assembly had compromised through the optional clause. (…) The establishment of compulsory jurisdiction of the Court would represent a great step forward in international justice"[52].

33. Further support to the Court's compulsory jurisdiction came from the Delegate of Uruguay (J.A. Mora Otero), who stated that, having "heard with satisfaction the different points of view endorsing compulsory jurisdiction", he thought that "the Court of International Justice should be competent to have jurisdiction in any international dispute that has not been resolved by any other pacific means"[53]. Yet, like what had happened in 1920 (cf. *supra*), also in 1945 compulsory jurisdiction had its opponents. The Delegate of the [then] Soviet Union (USSR, N.V. Novikov) declared that "such compulsory jurisdiction was absolutely unacceptable to his Government"[54].

34. And, for his part, the Delegate of the United States (G.H. Hackworth) pondered, as Chairman, that he "should not like to see this group so sharply divided"; he then warned that "if the signature of the Statute should involve *ipso facto* the acceptance of the compulsory jurisdiction of the Court, some States would find it difficult to become a party to the Statute"[55]. The IV Commission (Judicial Organization) of the 1945 San Francisco Conference was duly informed of this "sharp division of opinion" among participating States on the question of the compulsory

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[48]. U.N., *UNCIO*, 1945, vol. XIV (Committee of Jurists), doc. Jurist-34, G/25, of 12.04.1945, p. 146.

[49]. Ibid., p. 147.

[50]. *Ibid*., p. 147.

[51]. *Ibid*., p. 148.

[52]. *Ibid*., p. 149.

[53]. U.N., *UNCIO*, 1945, vol. XIV (Committee of Jurists), doc. Jurist-66(34), G/53, of 19.04.1945 (*corrigendum*), p. 161.

[54]. U.N., *UNCIO*, 1945, vol. XIV (Committee of Jurists), doc. Jurist-40, G/30, of 13.04.1945, p. 166.

[55]. *Ibid*. p. 164.

jurisdiction of the Court, and the I Committee then decided to retain the optional clause by 31 votes to 14[56].

35. Despite the support expressed for compulsory jurisdiction, "[l]a crainte s'est toutefois manifestée qu'en poursuivant la réalisation de cet idéal on compromettrait les possibilités de rallier l'accord général tant au Statut de la Cour qu'à la Charte elle-même"[57]. Accordingly, as reported on 31.05.1945, "le système de juridiction facultative semble actuellement plus susceptible de réunir l'adhésion générale"[58]. It had become clear that the collegiality of participating States was not yet prepared in 1945, like a quarter of a century earlier (1920), to accept compulsory jurisdiction for the Hague Court. Once again, in this particular, inertia prevailed, to the detriment of the full realization of justice.

36. Shortly before the 1945 San Francisco Conference, M.O. Hudson had recalled that Article 36 of the Statute of the PCIJ had, in 1920, been "the result of the greatest contest waged in the creation of the Court", given that, at least within the 1920 Committee of Jurists, the view prevailed, in succeeding preliminary projects, to confer on the PCIJ "a broad compulsory jurisdiction"[59]. The compromise subsequently found was the optional clause proposed by Raul Fernandes (Brazil), drafted later[60]. And, one and a half decade after the 1945 San Francisco Conference, R.P. Anand pointed out that by then it had become clear that "[t]he most common method of accepting the compulsory jurisdiction of the Court [was] through the acceptance of jurisdictional clauses in multilateral or bilateral treaties"[61]. Yet, "commentators on the Court and governmental experts" remained "reluctant to acknowledge" the relevance of such compromissory clauses as "a basis for the Court's compulsory jurisdiction"[62]. The emphasis continued to be laid on the optional clause of Article 36(2) of the Statute (even in the Court's *Yearbooks*), despite the fact that "the greater part of the Court's compulsory jurisdiction" was derived from the compromissory clauses themselves[63].

III. The Optional Clause of Compulsory Jurisdiction: From the Professed Ideal to a Distorted Practice

37. As a result of those prolonged debates of 1920, the ingenuous formula of Article 36(2) of the Statute – of the PCIJ, and, later on, also the ICJ, - was adopted, overcoming the difference between those who supported the prompt recognition of the compulsory jurisdiction of the future PCIJ, and those - the representatives of the more powerful States – who opposed that, objecting that one had gradually to come to trust the international tribunal to be created, before conferring upon it

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[56]. U.N., *UNCIO*, 1945, vol. XIII (Commission IV – Judicial Organization), 1945, pp. 390-392.

[57]. U.N. *UNCIO*, 1945, vol. XIII (Commission IV – Judicial Organization), 1945, doc. 702-IV/1/55, of 31.05.1945, p. 564.

[58]. *Ibid*., p. 563.

[59]. M.O. Hudson, *The Permanent Court of International Justice, 1920-1942 - A Treatise*, N.Y., MacMillan Co., 1943, p. 190.

[60]. *Ibid*., pp. 192-193.

[61]. R.P. Anand, *Compulsory Jurisdiction of the International Court of Justice*, New Delhi/Bombay, Asia Publishing House, 1961, p. 134.

[62]. *Ibid*., p. 139.

[63]. *Ibid*., pp. 139-140.

compulsory jurisdiction *tout court*. The Statute, approved on 13.12.1920, entered into force on 01.09.1921[64].

38. At that time, the decision that was taken constituted the initial step that, during the period of 1921-1940, contributed to attract the acceptance of the compulsory jurisdiction - under the optional clause - of the PCIJ by a total of 45 States[65]. The formula of Raul Fernandes[66], firmly supported by the Latin-American States[67], was incorporated into the Statute of the PCIJ; it was intended to pave the way for further development towards compulsory jurisdiction, and served its purpose in the following two decades.

39. Subsequently, at the San Francisco Conference of 1945, the possibility was contemplated to take a step forward, with an eventual automatic acceptance of the compulsory jurisdiction of the new ICJ. Nevertheless, the great powers - in particular the Soviet Union and the United States - were opposed to this evolution, sustaining the retention, in the Statute of the new ICJ, of the same "optional clause of compulsory jurisdiction" of the Statute of 1920 of the predecessor PCIJ. The *rapporteur* of the Commission of Jurists of 1945, Jules Basdevant, pointed out that, although the majority of the members of the Commission favoured the automatic acceptance of the compulsory jurisdiction, there was no political will at the Conference (and nor in the Dumbarton Oaks proposals) to take this step forward[68].

40. Consequently, the same formulation of 1920, which corresponded to a conception of International Law of the beginning of the XXth century, was maintained in the present Statute of the ICJ. Due to the intransigent position of the more powerful States, a unique oportunity was lost to overcome the lack of automatism of the international jurisdiction and to foster a greater development of the compulsory jurisdiction of the international tribunal. It may be singled out that all this took place at the level of purely inter-State relations. The formula of the optional clause of compulsory jurisdiction (of the ICJ) which exists today, is nothing more than a scheme of the

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[64]. For an account of the approval of the Statute, cf., *inter alia*, J.C. Witenberg, *L'organisation judiciaire, la procédure et la sentence internationales - Traité pratique*, Paris, Pédone, 1937, pp. 22-23; L. Gross, "Compulsory Jurisdiction under the Optional Clause: History and Practice", *The International Court of Justice at a Crossroads* (ed. L.F. Damrosch), Dobbs Ferry/N.Y., ASIL/Transnational Publs., 1987, pp. 20-21.

[65]. Cf. the account of a Judge of the old PCIJ, M.O. Hudson, *International Tribunals - Past and Future*, Washington, Carnegie Endowment for International Peace/Brookings Institution, 1944, pp. 76-78. - That total of 45 States represented, en reality, a high proportion, at that epoch, considering that, at the end of the thirties, 52 States were members of the League of Nations (of which the old PCIJ was not part, distinctly from the ICJ, which is the main judicial organ of the United Nations, and whose Statute forms an organic whole with the U.N. Charter itself).

[66]. In his book of memories published in 1967, Raul Fernandes revealed that the Committee of Jurists of 1920 was faced with the challenge of establishing the basis of the jurisdiction of the PCIJ and, at the same time, of safeguarding and reaffirming the principle of the juridical equality of the States; cf. R. Fernandes, *Nonagésimo Aniversário - Conferências e Trabalhos Esparsos*, vol. I, Rio de Janeiro, M.R.E., 1967, pp. 174-175.

[67]. J.-M. Yepes, "La contribution de l'Amérique Latine au développement du Droit international public et privé", 32 *Recueil des Cours de l´Académie de Droit International de La Haye* (1930) p. 712; F.-J. Urrutia, "La Codification du Droit International en Amérique", 22 *Recueil des Cours de l´Académie de Droit International de La Haye* (1928) pp. 148-149; and cf., more recently, S.A. Alexandrov, *Reservations in Unilateral Declarations Accepting the Compulsory Jurisdiction of the International Court of Justice*, Dordrecht, Nijhoff, 1995, pp. 7-8.

[68]. Cf. the account of R.P. Anand, *Compulsory Jurisdiction..., op. cit. supra* n. (...), pp. 38-46; and cf. also, on the issue, S. Rosenne, *The Law and Practice of the International Court*, vol. I, Leyden, Sijthoff, 1965, pp. 32-36; Ian Brownlie, *Principles of Public International Law*, 6th. ed., Oxford, University Press, 2003, pp. 677-678; O.J. Lissitzyn, *The International Court of Justice*, N.Y., Carnegie Endowment for International Peace, 1951, pp. 61-64.

twenties, stratified in time[69], and which, rigorously speaking, no longer corresponds to the needs of the international *contentieux* not even of a purely inter-State dimension[70].

41. And several of the States which have utilized it, have made a distorted use of it, denaturalizing it, in introducing restrictions which militate against its *rationale* and deprive it of all efficacy. In reality, almost two-thirds of the declarations of acceptance of the aforementioned clause have been accompanied by limitations and restrictions which have rendered them "practically meaningless"[71]. One may, thus, seriously question whether the optional clause keeps on serving the same purpose which inspired it at the epoch of the PCIJ. Curiously enough, not until more recently the compromissory clauses, pertaining to the compulsory jurisdiction of the ICJ, began to attract greater attention in expert writing.

42. The rate of acceptance of the optional clause in the era of the ICJ is proportionally inferior to that of the epoch of its predecessor, the PCIJ. Furthermore, throughout the years, the possibility opened by the optional clause of acceptance of the jurisdiction of the international tribunal became, in fact, object of excesses on the part of some States, which only accepted the compulsory jurisdiction of the ICJ in their own terms, with all kinds of limitations[72]. Thus, it is not at all surprising that, already by the mid-fifties, one began to speak openly of a *decline* of the optional clause[73].

43. In their classic studies on the basis of the international jurisdiction, C.W. Jenks and C.H.M. Waldock warned, already in the decades of the fifties and the sixties, as to the grave problem presented by the insertion, by the States, of all kinds of limitations and restrictions in their instruments of acceptance of the optional clause of compulsory jurisdiction (of the ICJ)[74]. Although those limitations had never been foreseen in the formulation of the optional clause, States, in the face of such legal vacuum, have felt, nevertheless, "free" to insert them. Such excesses have undermined, in a contradictory way, the basis itself of the system of international compulsory jurisdiction.

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[69]. For expressions of pessimism as to the practice of States under that optional clause, at the end of the seventies, cf. J.G. Merrills, "The Optional Clause Today", 50 *British Year Book of International Law* (1979) pp. 90-91, 108, 113 and 116.

[70]. Regretting (as former President of the ICJ) that this outdated position has insulated the Hague Court from the great *corpus* of contemporary International Law, cf. R.Y. Jennings, "The International Court of Justice after Fifty Years", 89 *American Journal of International Law* (1995) p. 504.

[71]. G. Weissberg, "The Role of the International Court of Justice in the United Nations System: The First Quarter Century", *The Future of the International Court of Justice* (ed. L. Gross), vol. I, Dobbs Ferry N.Y., Oceana Publs., 1976, p. 163; and, on the feeeling of frustration that this generated, cf. *ibid*., pp. 186-190. Cf. also *Report on the Connally Amendment - Views of Law School Deans, Law School Professors, International Law Professors* (compiled under the auspices of the Committee for Effective Use of the International Court by Repealing the Self-Judging Reservation), New York, [1961], pp. 1-154.

[72]. Some of them gave the impression that they thus accepted that aforementioned optional clause in order to sue other States before the ICJ, trying, however, to avoid themselves to be sued by other States; J. Soubeyrol, "Validité dans le temps de la déclaration d'acceptation de la juridiction obligatoire", 5 *Annuaire français de Droit international* (1959) pp. 232-257, esp. p. 233.

[73]. C.H.M. Waldock, "Decline of the Optional Clause", 32 *British Year Book of International Law* (1955-1956) pp. 244-287. And, on the origins of this decline, cf. the Dissenting Opinion of Judge Guerrero in the *Norwegian Loans* case (Judgment of 06.07.1857), *ICJ Reports* (1957) pp. 69-70.

[74]. Examples of such excesses have been the objections of domestic jurisdiction (*domestic jurisdiction/compétence nationale exclusive*) of States, the foreseeing of withdrawal at any moment of the acceptance of the optional clause, the foreseeing of subsequent modification of the terms of acceptance of the clause, and the foreseeing of insertion of new reservations in the future; cf. C.W. Jenks, *The Prospects of International Adjudication*, London, Stevens, 1964, p. 108, and cf. pp. 113, 118 and 760-761; C.H.M. Waldock, "Decline of the Optional Clause", *op. cit. supra* n. (20), p. 270; and for criticisms of those excesses, cf. A.A. Cançado Trindade, "The Domestic Jurisdiction of States in the Practice of the United Nations and Regional Organisations", 25 *International and Comparative Law Quarterly* (1976) pp. 744-751.

44. Those excesses occurred precisely because, in elaborating the Statute of the new ICJ, one failed to follow the evolution of the international community. One abandoned the very basis of the compulsory jurisdiction of the ICJ to an outdated voluntarist conception of International Law, which had prevailed at the beginning of the last century, despite the warnings of lucid jurists of succeeding generations as to its harmful consequences to the conduction of international relations. Yet, a considerable part of the legal profession continued to stress the overall importance of individual State *consent*, regrettably putting it well above the imperatives of the realization of justice at international level.

IV. The Old Ideal of Automatism of Compulsory Jurisdiction of the Hague Court

45. As well pointed out in a classic study on the matter, the instruments of acceptance of the contentious jurisdiction of an international tribunal should be undertaken "on terms which ensure a reasonable measure of stability in the acceptance of the jurisdiction of the Court"[75], - that is, in the terms expressly provided for in the corresponding treaties themselves, necessarily bearing in mind their nature and substance. As pointed out by C.W. Jenks almost half a century ago, the foundation of compulsory jurisdiction is, ultimately, the confidence in the rule of law at international level[76]. While full confidence is still lacking, not much progress is bound to be achieved in the present domain of international jurisdiction. In the last 90 years, the advances in this particular domain could have been much greater if State practice would not have undermined the purpose which inspired the creation of mechanisms of compulsory jurisdiction (optional clause and compromissory clauses) for the PCIJ and the ICJ, so as to achieve the submission to Law of State strategic interests underlying international disputes, and so as to secure the development in the realization of justice at international level.

46. The time has come to overcome definitively the regrettable lack of automatism of the international jurisdiction, after decades of operation of the Hague Court. With the distortions of State practice on the matter, States face today a dilemma which should have been overcome a long time ago: either they return to the voluntarist conception of International Law, abandoning for good the hope in the primacy of Law over what they regard as their own strategic interests[77], or else they retake and achieve with determination the ideal of construction of an international community with greater cohesion and institutionalization in the light of Law and in search of Justice.

47. The plea for compulsory jurisdiction has been duly expressed in expert writing along the last nine decades, since the adoption of the PCIJ Statute. Shortly after the completion in 1920 of the work of the League's Advisory Committee of Jurists, B.C.J. Loder published an essay in which he commented that :

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[75]. C.W. Jenks, *The Prospects of International Adjudication, op. cit. supra* n. (74), pp. 760-761.

[76]. *Ibid*., pp. 101, 117, 757, 762 and 770.

[77]. Cf. a warning of Ch. de Visscher, *Aspects récents du droit procédural de la Cour Internationale de Justice*, Paris, Pédone, 1966, p. 204; and cf. also L. Delbez, *Les principes généraux du contentieux international*, Paris, LGDJ, 1962, pp. 68, 74 and 76-77. - For subsequent criticisms by two former Presidents of the ICJ of the unsatisfactory and bad use made by the States of the mechanism of the optional clause (of the compulsory jurisdiction of the ICJ) of the Statute of the Court, cf. R.Y. Jennings, "The International Court of Justice...", *op. cit. supra* n. (71), p. 495; and E. Jiménez de Aréchaga, "International Law in the Past Third of a Century", 159 *Recueil des Cours de l´Académie de Droit International de La Haye* (1978) pp. 154-155, And cf. further criticisms by H.W. Briggs, "Reservations to the Acceptance of Compulsory Jurisdiction of the International Court of Justice", 93 *Recueil des Cours de l´Académie de Droit International de La Haye* (1958) p. 273. And cf., in general, J. Sicault, "Du caractère obligatoire des engagements unilatéraux en Droit international public", 83 *Revue générale de Droit international public* (1979) pp. 633-688.

"(...) There was a desire in the world that justice should be obtainable, and for that reason the organ [the PCIJ] was created. Its members are *judges*, not amiable *compositeurs*. The words 'compulsory jurisdiction' mean that the plaintiff can summon the defending party without previous agreement between the two, even *against* the latter's will, and the Court is, therefore, competent and even bound to adjudicate, whether the offending party puts in an appearance or not.

The answer to *that* question is given in the very name 'Court of Justice'. The peculiar characteristic of a Court of Justice, in contrast with one of arbitration, is that the competency of the judges is not derived from the voluntary agreement of the disputing parties, but from elsewhere. (...) [I]t is from the very nature of the Court itself that the compulsory jurisdiction is derived"[78].

48. B.C.J. Loder, who was promptly to become - by mid-February 1922 – the first President of the PCIJ, expanded on the point he made in his account:

"(...) Although on the one hand it was perceived that the opposition of the Council to the proposal of the Committee of Jurists should be respected, on the other hand it would not do to overlook the wishes of the great majority, for they saw in compulsory jurisdiction the only guarantee of enforcing justice. The condition for a satisfactory solution was to find a compromise between these two views.

The honour of having found this is due to the Delegate from Brazil, Senhor Fernandes, one of the ten jurists, a man as sagacious as he is energetic. To cast this solution into a form acceptable to everybody was the task of the Sub-Commission of the III Committee.

Everything is now embodied in a new Article 36 (...)"[79].

49. Shortly afterwards, in a monograph published in 1924, Nicolas Politis, in recalling the historical development from private justice to public justice, advocated the evolution, at international level, from optional justice to compulsory justice[80]. Two decades later, in another monograph, N. Politis again pondered that the "règles du droit des gens peuvent, moyennant certaines conditions, faire l'objet d'un contrôle juridictionnel"[81]. At the time of the adoption of the ICJ Statute in 1945, - like at that of the adoption of the Statute of its predecessor the PCIJ in 1920, - a key issue remained that of compulsory jurisdiction. To that end, both Courts, the PCIJ and the ICJ, had a wide horizon before themselves, and beheld the optional clause as well as compromissory clauses as basis for compulsory jurisdiction.

50. Shortly after the adoption of the ICJ Statute, E. Hambro suggested that compromissory clauses in multilateral and bilateral treaties were "probably" the "most common way" for

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[78]. B.C.J. Loder, "The Permanent Court of International Justice and Compulsory Jurisdiction", 2 *British Year Book of International Law* (1921-1922) pp. 11-12.

[79]. *Ibid*., p. 24.

[80]. Cf. N. Politis, *La justice internationale*, Paris, Libr. Hachette, 1924, pp. 7-255, esp. pp. 193-194 and 249-250.

[81]. N. Politis, *La morale internationale*, N.Y., Brentano´s, 1944, p. 67. And he added: "À la différence des profits de l´injustice et de l´illegalité, qui, s´ils peuvent être rapides, ne sont pas assurés de durer, ceux de la justice et de la légalité, sans doute plus lents, sont certainement plus durables"; *ibid*., pp. 161-162.

acceptance of the compulsory jurisdiction of the ICJ[82]. A couple of years later, in the early fifties, the point was made that one could envisage a "voluntary" acceptance of such compulsory jurisdiction in so far as the ICJ Statute itself had been "voluntarily accepted"; that was the moment of expression of consent, and the Court retained the power and duty to address *motu proprio* the issue of jurisdiction, and interpretation ought to await the jurisprudential construction of the Court[83].

51. Throughout the fifties, for half a decade (1954-1959) the issue of the compulsory jurisdiction of the ICJ was examined by the *Institut the Droit International*. In its Aix-en-Provence (1954) and Granada (1956) sessions, the discussions (*rapporteur*, P. Guggenheim) centred on the elaboration of a model clause of compulsory jurisdiction of the ICJ[84]. At the end of that exercise, in 1956 the *Institut* adopted a recommendation to States and international organizations to adopt, in the elaboration of multilateral or bilateral treaties, a clause conferring jurisdiction (along the lines it indicated) upon the ICJ in any dispute relating to the interpretation or application of those treaties[85].

52. In its Amsterdam (1957) and Neuchâtel (1959) sessions, the debates at the *Institut* (*rapporteur*, C.W. Jenks) focused attention on the larger topic of compulsory jurisdiction of international courts and tribunals (encompassing judicial and arbitral instances)[86]. At the end of that new exercise, in 1959 the *Institut* adopted a resolution in support of the compulsory jurisdiction of international courts and tribunals. In its preamble, noting with concern that the evolution of compulsory jurisdiction was already lagging behind the needs of international justice, the resolution pondered that "submission to law" ("*respect du droit*") through acceptance of compulsory jurisdiction was "an essential complement to the renunciation of recourse to force in international relations"[87].

53. In order to overcome such unsatisfactory situation, the resolution *inter alia* called for the development of the practice of insertion into general treaties or conventions, of a clause, binding on all States Parties, of submission of disputes, relating to the interpretation or application of such treaties or conventions, to international courts and tribunals, thus fostering greater acceptance of compulsory jurisdiction, in particular of the ICJ[88]. In its operative part, the 1959 resolution of the *Institut* provided that:

> "Afin d'assurer l'application effective et l'unité d'interprétation des conventions générales, il importe de maintenir et de développer la pratique consistant à insérer dans ces conventions une clause, obligatoire pour toutes les parties, qui permette de saisir la Cour Internationale de Justice par voie de requête unilatérale ou de soumettre

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[82]. E. Hambro, "Some Observations on the Compulsory Jurisdiction of the International Court of Justice", 25 *British Year Book of International Law* (1948) p. 153.

[83]. R.C. Lawson, "The Problem of the Compulsory Jurisdiction of the World Court", 46 *American Journal of International Law* (1952) pp. 234 and 238, and cf. pp. 219, 224 and 227.

[84]. Cf. reports and following debates *in*: 45 *Annuaire de l´Institut de Droit International* (1954)-I, pp. 310-406; and 46 *Annuaire de l´Institut de Droit International* (1956) pp. 178-264.

[85]. Cf. 46 *Annuaire de l´Institut de Droit International* (1956) pp. 360-361.

[86]. Cf. reports and following observations and debates *in*: 47 *Annuaire de l´Institut de Droit International* (1957)-I, pp. 34-322; and 48 *Annuaire de l´Institut de Droit International* (1959)-II, pp. 55-177.

[87]. "(…) un complément essentiel à la renonciation au recours à la force dans les relations internationales"; *cit. in*: 48 *Annuaire de l'Institut de Droit International* (1959)-II, p. 358.

[88]. Cf. *ibid.*, pp. 358-359.

> à une autre instance judiciaire ou arbitrale les différends relatifs à l'interprétation ou à l'application de la convention (...)"[89].

54. The *Institut*'s resolution was thinking of the future, in the light – above all - of the imperatives of international justice. his remained a concern, in the years to follow, of those devoted to the study of the matter at issue. n a monograph published the following year (1960), for example, B.V.A. Röling observed that "[i]nternational courts and tribunals consummated the incorporation of the standard of civilization in international law by holding that non-compliance with it involved international responsibility"[90].

55. Subsequently, by the end of the sixties, despite the alleged "decline" of the optional clause of the ICJ Statute (cf. *supra*), one decade after the adoption by the *Institut de Droit International* (in 1959) of the aforementioned resolution, C.W. Jenks wrote that :

> "The problem of compulsory jurisdiction (...) remains one of the central problems of world organization. (...) A larger measure of compulsory jurisdiction remains a fundamental element in the progress of the rule of law among nations. (...) The progress of compulsory jurisdiction presupposes a parallel progress of the substantive law in adjusting itself to the changing needs of a changing society"[91].

56. Contemporary international law counts on multilateral conventions - as aptly pointed out by Kéba Mbaye in the late eighties - that safeguard the "vital interests" not of States, but of humankind; this being so, and given their importance,

> "il est parfaitement justifiée qu'il soit permis aux États membres d'une collectivité déterminée, et auxquels les prescriptions de ladite convention sont applicables, d'agir dans le but d'une sorte de contrôle objectif ayant pour finalité de sauvegarder les intérêts en question"[92].

The "intérêt pour agir" would then develop in the rhythm of evolution of the organised international society itself, which has general interests of its own, generating duties on the part of States *vis-à-vis* itself[93]. This would amount to going beyond individual State consent, when fundamental human rights – of concern to the international community as a whole - are at stake.

57. Compromissory clauses (existing for many years, in both the PCIJ and ICJ eras)[94], inserted into numerous treaties, by conferring jurisdiction on international tribunals such as the Hague Court to settle disputes concerning their interpretation and application, have contributed (whenever properly interpreted and applied) to a broader acceptance of compulsory jurisdiction. From the

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[89]. Paragraph 4 of the aforementioned resolution; *cit. in*: 48 *Annuaire de l'Institut de Droit International* (1959)-II, pp. 360-361.

[90]. B.V.A. Röling, *International Law in an Expanded World*, Amsterdam, Djambatan N.V., 1960, p. 39.

[91]. C.W. Jenks, *The World beyond the Charter*, London, G. Allen and Unwin, 1969, p. 166.

[92]. Kéba Mbaye, "L´intérêt pour agir devant la Cour Internationale de Justice", 209 *Recueil des Cours de l´Académie de Droit International de La Haye* (1988) p. 271.

[93]. *Ibid*., pp. 340-341.

[94]. Cf., on such compromissory clauses, e.g., H.M. Cory, *Compulsory Arbitration of International Disputes*, N.Y., Columbia University Press, 1932 [reprint 1972], ch. VI, pp. 160-191.

start, compromissory clauses were in fact regarded as a means towards attaining compulsory jurisdiction.

58. As they were inserted, e.g., already in the inter-war period in the first half of the XXth century, in the minorities and the mandates treaties for their interpretation and application, the PCIJ soon had the occasion to pronounce upon them (cf. *infra*), having pursued a teleological approach. The ICJ, likewise, has not interpreted compromissory clauses strictly, so as to achieve the peaceful settlement of the disputes at issue[95]. The fact is that, although consent could be expressed in distinct ways (*ante hoc*, *ad hoc*, or *post hoc*), States came to accept treaties containing compromissory clauses, with the underlying hope to count on compulsory jurisdiction[96], thus enhancing the rule of law also at international level.

59. Despite the initial high expectations, State practice was to disclose incongruities as well, and hesitations at times to accept unqualified compulsory jurisdiction in inter-State disputes, though there seems to be an increasing awareness of the need to have recourse to judicial settlement of disputes[97]. A more systematic inclusion in treaties and invocation of such jurisdictional clauses would contribute much further to widen the scope of compulsory jurisdiction, on a world-wide basis[98], providing that such clauses are appropriately interpreted and applied. Such expansion is bound to occur to the extent that States realize that it is ultimately in their own interest, and in the common or general interest, to have their disputes normally settled by judicial means. This latter is the most perfected way of peaceful settlement, for all that it affords: preexisting rules, rigour and juridical security.

60. Compulsory jurisdiction is, ultimately, an expression of the rule of law at international level, conducive to a more cohesive international legal order inspired and guided by the imperative of the realization of justice. Despite all the attention that the matter at issue attracted from jurists of succeeding generations, and advances achieved, it seems, however, that there is still a long way to go to attain the ideal of automatism of compulsory jurisdiction in the inter-State *contentieux*, at least when fundamental human rights are at stake. This old ideal should not be despised or minimized by the static partisans of State sovereignty: there is nothing more invincible than an ideal that has not been attained, it passes from one generation to another, it is always present in the minds of lucid jurists, - even if forming a minority, - waiting for the conjunction of stars for it to be attained. Compulsory jurisdiction is, in fact, no longer an academic dream, it has already become a reality in a few legal regimes.

61. International jurisdiction is becoming, in our days, an imperative of the contemporary international legal order itself, and compulsory jurisdiction responds to a need of the international community in our days; although this latter has not yet been fully achieved, some advances have

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[95]. L.B. Sohn, "Settlement of Disputes Relating to the Interpretation and Application of Treaties", 150 *Recueil des Cours de l´Académie de Droit International de La Haye* (1976) pp. 234, 245-249 and 256. Of more than 4.800 treaties registered with the League of Nations (period 1920-1946) and 12.500 treaties registered with the United Nations in its first three decades (period 1946-1976), some 4.000 included compromissory clauses, so as to avoid the need to resort to and reach a special *compromis* after a dispute had arisen; *ibid*., pp. 259 and 268.

[96]. R. Szafarz, *The Compulsory Jurisdiction of the International Court of Justice*, Dordrecht, Nijhoff, 1993, pp. 4, 31-32, 83 and 86, and cf. pp. 25 and 94.

[97]. Cf. R.P. Anand, "Enhancing the Acceptability of Compulsory Procedures of International Dispute Settlement", 5 *Max Planck Yearbook of United Nations Law* (2001) pp. 5-7, 11, 15 and 19.

[98]. C.W. Jenks, *The Prospects...*, *op. cit. supra* n. (74), p. 761, and cf. pp. 109 and 111.

been made in the last decades[99]. The Court of Justice of the European Communities provides one example of supranational compulsory jurisdiction, though limited to community law or the law of integration. The European Convention of Human Rights, after the entry into force of Protocol n. 11 on 01.11.1998, affords another conspicuous example of automatic compulsory jurisdiction. The International Criminal Court is the most recent example in this regard; although other means were contemplated throughout the *travaux préparatoires* of the 1998 Rome Statute (such as cumbersome "opting in" and "opting out" procedures), at the end compulsory jurisdiction prevailed, with no need for further expression of consent on the part of States Parties to the Rome Statute. This was a significant decision, enhancing international jurisdiction.

62. The system of the 1982 U.N. Convention on the Law of the Sea, in its own way, moves beyond the traditional regime of the optional clause of the ICJ Statute. It allows States Parties to the Convention the option between the International Tribunal for the Law of the Sea, or the ICJ, or else arbitration (Article 287); despite the exclusion of certain matters, the Convention succeeds in establishing a compulsory procedure containing coercitive elements; the specified choice of procedures at least secures law-abiding settlement of disputes under the U.N. Law of the Sea Convention[100]. In addition to the advances already achieved to this effect, reference could also be made to recent endeavours in the same sense[101].

63. These illustrations suffice to disclose that compulsory jurisdiction is already a reality, - at least in some circumscribed domains of International Law, as indicated above. International compulsory jurisdiction is, by all means, a juridical possibility. If it has not yet been attained on a world-wide level, in the inter-State *contentieux*, this cannot be attributed to an absence of juridical viability, but rather to misperceptions of its role, or simply to a lack of conscience as to the need to widen its scope. Compulsory jurisdiction is a manifestation of the recognition that International Law, more than voluntary, is indeed *necessary*.

V. The Relationship of the Optional Clause/Compromissory Clauses with the Nature and Substance of the Corresponding Treaties

64. Neither the optional clause, nor compromissory clauses, can be properly considered outside the framework of compulsory jurisdiction. This latter is what is aimed at. Hence the attention that I devote to the matter in this Dissenting Opinion, in the present case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*. Moreover, compromissory clauses are to be further considered, in their ordinary meaning, also *in their relationship with the nature and substance of the corresponding treaties* wherein they are enshrined. The acknowledgement of the special nature of human rights treaties has much

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[99]. H. Steiger, "Plaidoyer pour une juridiction internationale obligatoire", *in Theory of International Law at the Threshold of the 21st Century - Essays in Honour of K. Skubiszewski* (ed. J. Makarczyk), The Hague, Kluwer, 1996, pp. 818, 821-822 and 832. And cf. R.St.J. MacDonald, "The New Canadian Declaration of Acceptance of the Compulsory Jurisdiction of the International Court of Justice", 8 *Canadian Yearbook of International Law* (1970) pp. 21, 33 and 37. In support of the need for "a system of general compulsory and binding dispute settlement procedures", cf. further M.M.T.A. Brus, *Third Party Dispute Settlement in an Interdependent World*, Dordrecht, Nijhoff, 1995, p. 182.

[100]. L. Caflisch, "Cent ans de règlement pacifique des différends interétatiques", 288 *Recueil des Cours de l´Académie de Droit International de La Haye* (2001) pp. 365-366 and 448-449; J. Allain, "The Continued Evolution....", *op. cit. supra* n. (3), pp. 61-62.

[101]. One such example is found in the Proposals for a Draft Protocol to the American Convention on Human Rights, which I prepared as *rapporteur* of the IACtHR, which *inter alia* advocates an amendment to Article 62 of the American Convention so as to render the jurisdiction of the IACtHR in contentious matters automatically compulsory upon ratification of the Convention. Cf. A.A. Cançado Trindade, *Informe: Bases para un Proyecto de Protocolo a la Convención Americana sobre Derechos Humanos, para Fortalecer Su Mecanismo de Protección*, vol. II, 2nd. ed., San José of Costa Rica, Inter-American Court of Human Rights, 2003, pp. 1-64.

contributed to this hermeneutic exercise. Advances, to the benefit of human beings, have here been achieved due to the impact of the International Law of Human Rights upon Public International Law.

65. Despite the undeniable advances experienced or attained by the ideal of compulsory jurisdiction in the domain of the International Law of Human Rights, the picture appears somewhat distinct in the sphere of purely inter-State relations: it is hard to escape the assessment that, herein, compulsory jurisdiction has made a rather modest progress in recent decades. Contemporary International Law itself has slowly, but gradually evolved, at least putting limits to the manifestations of a State voluntarism, which revealed itself as belonging to another era[102]. The point cannot pass unnoticed here, as the present case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*, opposing Georgia to the Russian Federation before this Court, concerns the compromissory clause enshrined in a human rights treaty.

66. The methodology of interpretation of human rights treaties[103], which will be addressed to in the following paragraphs, bears in mind, and is guided by, the rules of treaty interpretation enunciated in Articles 31-33 of the two Vienna Conventions on the Law of Treaties (of 1969 and 1986). The general rule of treaty interpretation (Article 31(1)) comprises the elements of good faith, the text, the context, and the object and purpose of the treaty at issue. Whenever the interpretation - pursuant to Article 31 - leads to a manifestly unreasonable result, leaving the meaning ambiguous or obscure, Article 32 provides that resort can be made to supplementary means of interpretation, such as recourse to the *travaux préparatoires*.[104]

67. In addressing the interpretation of human rights treaties, in my Separate Opinion in the Judgment (of 31.01.2006) of the Inter-American Court of Human Rights (IACtHR) in the case of the *Massacre of Pueblo Bello*, concerning Colombia, I deemed it fit to ponder that:

> "The organs of international supervision of human rights, without departing from the canons of the general rule of interpretation of treaties (Article 31(1) of the two Vienna Conventions on the Law of Treaties, 1969 and 1986), have developed a teleological interpretation, with emphasis on the fulfillment of the object and purpose of human rights treaties, as the most appropriate to secure an effective protection of those rights. Ultimately, underlying the aforementioned general rule of interpretation set forth in the two Vienna Conventions (Article 31(1)), is the principle, which counts on wide jurisprudential support, whereby one ought to secure to the conventional provisions their appropriate effects (the so-called *effet utile*). This principle - *ut res magis valeat quam pereat*, - whereby the interpretation is to secure appropriate effects

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[102]. When this outlook still prevailed to some extent, in a classic book published in 1934, Georges Scelle, questioning it, pointed out that the self-attribution of discretionary competence to the rulers, and the exercise of functions according to the criteria of the power-holders themselves, were characteristics of a not much evolved, imperfect, and still almost anarchical international society; G. Scelle, *Précis de droit des gens - Principes et systématique*, part II, Paris, Rec. Sirey, 1934 (reed. 1984), pp. 547-548. And cf., earlier on, to the same effect, L. Duguit, *L'État, le Droit objectif et la loi positive*, vol. I, Paris, A. Fontemoing Ed., 1901, pp. 122-131 and 614.

[103]. As can be inferred from the vast international case-law in this respect, analysed in detail *in*: A.A. Cançado Trindade, *El Derecho Internacional de los Derechos Humanos en el Siglo XXI*, 2nd. rev. ed., Santiago/Mexico/Buenos Aires/Barcelona, Editorial Jurídica de Chile, 2006, pp. 17-60.

[104]. Article 33 adds directives as to the interpretation of treaties concluded in two or more idioms.

to a treaty, has, in the domain of human rights, assumed particular importance in the determination of the wide scope of the conventional obligations of protection[105].

Such interpretation is, in effect, that which most faithfully reflects the special nature of human rights treaties, the objective character of the obligations which they stipulate, and the autonomous meaning of the concepts enshrined therein (distinct from the corresponding concepts in the framework of the national legal systems). As human rights treaties incorporate concepts with an autonomous meaning, ensuing from jurisprudential evolution, and as the object and purpose of human rights treaties are distinct from the classic treaties (as they pertain to the relations between the State and the persons under its jurisdiction), the classic postulates of interpretation of treaties in general adjust themselves to this new reality[106]" (paras. 50-51).

68. Accordingly, the interpretation of human rights treaties, - *victim-oriented* as such treaties are, - tends, quite understandably and correctly in my perception, to place greater weight on the realization of their object and purpose, so as to secure protection to human beings (cf. *infra*), the ostensibly weaker party. Significantly, and in the same line of reasoning, the methodology of interpretation of human rights treaties encompasses, in my understanding, all the provisions of those treaties, taken as a whole, comprising not only the *substantive ones* (on the protected rights) but *also the procedural ones*, those that *regulate the mechanisms of international protection*, including - in historical perspective - the compromissory clauses conferring jurisdiction upon international human rights tribunals.

69. Thus, to refer to notorious examples, the original optional clauses of acceptance of the contentious jurisdiction of both the European Court of Human Rights (prior to Protocol n. 11 to the European Convention)[107] and the Inter-American Court of Human Rights in contentious matters, found inspiration initially in the model of the old optional clause of compulsory jurisdiction of the Statute of the Hague Court (PCIJ and ICJ, Article 36(2)). Despite the common origin, in search of the realization of the ideal of international justice, the *rationale* of the application of the optional clause has been interpreted in distinct ways, on the one hand in inter-State litigation, and on the other hand in that of human rights, at intra-State level.

70. In the former, considerations of contractual equilibrium between the Parties, of reciprocity, of procedural balance in the light of the juridical equality of the sovereign States have prevailed to date; in the latter, there has been a primacy of considerations of *ordre public*, of the collective guarantee exercised by all the States Parties, of the accomplishment of a common goal, superior to

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[105]. A.A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, vol. II, Porto Alegre/Brazil, S.A. Fabris Ed., 1999, pp. 32-33 and 192.

[106]. *Ibid*., pp. 32-34; and cf. also R. Bernhardt, "Thoughts on the Interpretation of Human Rights Treaties", *in Protecting Human Rights: The European Dimension - Studies in Honour of G.J. Wiarda* (eds. F. Matscher and H. Petzold), Köln, C. Heymanns, 1988, pp. 66-67 and 70-71; Erik Suy, "Droit des traités et droits de l'homme", *in Völkerrecht als Rechtsordnung Internationale Gerichtsbarkeit Menschenrechte - Festschrift für H. Mosler* (eds. R. Bernhardt *et alii*), Berlin, Springer-Verlag, 1983, pp. 935-947; J. Velu and R. Ergec, *La Convention européenne des droits de l'homme*, Bruxelles, Bruylant, 1990, p. 51.

[107]. Protocol n. 11 to the European Convention of Human Rights entered into force on 01.11.1998. On the original optional clause (Article 46) of the European Convention, cf. Council of Europe/Conseil de l'Europe, *Collected Edition of the `Travaux Préparatoires' of the European Convention on Human Rights/Recueil des Travaux Préparatoires de la Convention Européenne des Droits de l'Homme*, vol. IV, The Hague, Nijhoff, 1977, pp. 200-201 and 266-267; and vol. V, The Hague, Nijhoff, 1979, pp. 58-59.

the individual interests of each Contracting Party[108]. One can hardly make abstraction of the nature and substance of a treaty when considering the optional clause, or else the compromissory clause, enshrined therein.

71. The present case before this Court concerns the A*pplication of the International Convention on the Elimination of All Forms of Racial Discrimination*, one of the pioneering general human rights treaties of the United Nations era, which preceded in time even the two U.N. Covenants on Human Rights of 1966. Adopted on 21.12.1965 and opened for signature on 07.03.1966, the CERD Convention promptly entered into force on 04.01.1969. The *punctum pruriens judicii*, at this stage of the present case, is the proper understanding of the compromissory clause (Article 22) of the CERD Convention. I thus deem it fit to recall that, in my Separate Opinion in the recent *A.S. Diallo* case (Guinea *versus* D.R. Congo, Judgment of 30.11.2010), I had the occasion to dwell upon the hermeneutics of human rights treaties (paras. 82-92), given that the parties had invoked two other treaties of the kind, namely, the 1996 U.N. Covenant on Civil and Political Rights and the 1981 African Charter on Human and Peoples' Rights.

72. My reflections developed therein are likewise pertinent for the consideration of the point at issue in the present case. In my Separate Opinion in the *A.S. Diallo* case, I pondered in that respect that human rights treaties:

> "go beyond the realm of purely inter-State relations. When one comes to the interpretation of treaties, one is inclined to resort, at first, to the general provisions enshrined in Articles 31-33 of the two Vienna Conventions on the Law of Treaties (of 1969 and 1986, respectively), and in particular to the combination under Article 31 of the elements of the ordinary meaning of the terms, the context, and the object and purpose of the treaties at issue.
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> One then promptly finds that, in practice, while in traditional International Law there has been a marked tendency to pursue a rather restrictive interpretation which gives as much precision as possible to the obligations of States Parties, in the International Law of Human Rights, somewhat distinctly, there has been a clear and special emphasis on the element of the object and purpose of the treaty, so as to ensure an effective protection (*effet utile*) of the guaranteed rights, without detracting from the general rule of Article 31 of the two Vienna Conventions on the Law of Treaties. In effect, whilst in general International Law the elements for the interpretation of treaties evolved primarily as guidelines for the process of interpretation by States Parties themselves, human rights treaties, in their turn, have called for an interpretation of their provisions bearing in mind the essentially *objective* character of the obligations entered into by States Parties: such obligations aim at the protection of human rights and not at the establishment of subjective and reciprocal rights for the States Parties.
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> (…) The interpretation and application of human rights treaties have indeed been guided by considerations of a superior general interest or *ordre public* which transcend the individual interests of Contracting Parties. (…) [T]hose treaties are distinct from treaties of the classic type which incorporate restrictively reciprocal concessions and

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[108]. The two aforementioned international human rights Tribunals have found themselves under the duty to preserve the integrity of the regional conventional systems of protection of human rights as a whole. In their common understanding, it would be inadmissible to subordinate the operation of the respective conventional mechanisms of protection to restrictions not expressly authorized by the European and American Conventions, interposed by the States Parties in their instruments of acceptance of the optional clauses of compulsory jurisdiction of the two Courts (Article 62 of the American Convention, and Article 46 of the European Convention before Protocol n. 11). This would not only immediately affect the efficacy of the operation of the conventional mechanism of protection at issue, but, furthermore, it would fatally impede its possibilities of future development.

compromises; human rights treaties, in turn, prescribe obligations of an essentially objective character, implemented collectively, and are endowed with mechanisms of supervision of their own. (...)

The converging case-law [of the ECtHR and the IACtHR] to this effect has generated the common understanding (…) that human rights treaties, moreover, are endowed with a special nature (as distinguished from multilateral treaties of the traditional type); that human rights treaties have a normative character and that their terms are to be autonomously interpreted; that in their application one ought to ensure an effective protection (*effet utile*) of the guaranteed rights; and that permissible restrictions (limitations and derogations) to the exercise of guaranteed rights are to be restrictively interpreted. (…)

Furthermore, [it has] propounded the *autonomous* interpretation of provisions of human rights treaties, by reference to the respective domestic legal systems. (…) Moreover, the dynamic or *evolutive* interpretation of the respective human rights Conventions (the temporal dimension) has been followed by both the European and the Inter-American Courts, so as to fulfill the evolving needs of protection of the human being.

(…) There is (…) a converging case-law of the Inter-American and European Courts of Human Rights - and indeed of other human rights international supervisory organs - on the fundamental issue of the proper interpretation of human rights treaties, naturally ensuing from the overriding identity of the object and purpose of those treaties.

General international law itself bears witness of the principle (subsumed under the general rule of interpretation of Article 31 of the two Vienna Conventions on the Law of Treaties) whereby the interpretation is to enable a treaty to have appropriate effects. In the present domain of protection, International Law has been made use of in order to improve and strengthen - and never to weaken or undermine - the safeguard of recognized human rights (in pursuance of the *principle pro persona humana*, *pro victima*). The specificity of the International Law of Human Rights finds expression not only in the interpretation of human rights treaties in general but also in the interpretation of specific provisions of those treaties.

Both the European and the Inter-American Courts of Human Rights have rightly set limits to State voluntarism, have safeguarded the integrity of the respective human rights Conventions and the primacy of considerations of *ordre public* over the 'will' of individual States, have set higher standards of State behaviour and established some degree of control over the interposition of undue restrictions by States, and have reassuringly enhanced the position of individuals as subjects of the International Law of Human Rights, with full procedural capacity. In so far as the basis of their jurisdiction in contentious matters is concerned, eloquent illustrations can be found of their firm stand in support of the integrity of the mechanisms of protection of the two respective regional Conventions" (paras. 82-86 and 88-90).

73. The relationship between the *nature* of human rights treaties such as the CERD Convention and the interpretation and application of corresponding compromissory clauses (such as that of Article 22 of the CERD Convention) were object of attention in the course of the proceedings in the present case concerning the the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*, opposing Georgia to Russia before this Court. Thus, at the end of the public sitting held on 17 September 2010, I deemed it fit to put to the two contending parties the following question:

"À votre avis, la nature des traités relatifs aux droits de l'homme tels que la Convention CERD (régissant des relations au niveau *intra*-étatique) a-t-elle des conséquences ou une incidence sur l'interprétation et l'application des clauses compromissoires qu'ils contiennent?

Pour préserver l'équilibre linguistique de la Cour, je pose ma question aux deux Parties aussi en anglais, l'autre langue officielle de la Cour.

In your understanding, does the nature of human rights treaties such as the CERD Convention (regulating relations at *intra*-State level) have a bearing or incidence on the interpretation and application of a compromissory clause contained therein?"[109].

74. The contending parties, in a commendable spirit of procedural cooperation, promptly provided the Court with their respective answers to my question. The claimant State, Georgia, presented the following written response to my question:

"Georgia recognizes that – like many international human rights instruments – the CERD Convention regulates relations between the State and the citizen at the intra-State level, *i.e.*, the relations between a State and its own citizens, as with *apartheid*. (It also regulates actions taken by a State with respect to those located in other States.) In this respect, the international human rights movement from the Universal Declaration on Human Rights onwards reflected a genuinely new development in international law, and one that has since taken root. The purpose of multilateral treaties of this kind, of which the CERD was the first, was to build upon earlier declarations and make human rights scrutiny and enforcement effective at the international level, including by means of dispute settlement.

As the Court has recognized, this new development was capable of affecting the interpretation of a compromissory clause. In its 1996 judgment on Preliminary Objections in the *Bosnia Genocide* case the Court referred no less than three times to the special nature of the Genocide Convention as a universal human rights instrument in order to found its jurisdiction *ratione personae, ratione materiae, ratione temporis* under Article IX of that Convention. More recently, in relation to other cases, it has been noted that the Court has 'looked beyond the strictly inter-State dimension', indicating – correctly in Georgia's view – an expansive approach to jurisdictional matters in order to safeguard the underlying values of the treaty at issue. Thus, because human rights treaties regulate the relations between the State and its own citizens, a compromissory clause should not be limited to matters covered by traditional international law, *e.g.*., in the field of diplomatic protection. It would likewise be incorrect to treat the interpretation and application of a human rights treaty as a matter confined exclusively to the advisory function of the supervisory body in question – as the Court in *South West Africa, Second Phase*, made clear in relation to the Mandate and the role of the Permanent Mandates Commission. Relatedly, human rights-type protections may survive change of sovereignty or change of supervisory regime which merely bilateral interstate provisions may not survive.

Georgia's approach to the interpretation of Article 22 is further reinforced by the Court's established jurisprudence on *erga omnes* rights and obligations, in the *Barcelona Traction* case. It is noteworthy that the Court gave as an example of *erga omnes* norms the basic rights of the human person, including explicitly the protection against racial discrimination, along with the prohibition of slavery and genocide. The legal consequences of breaches of *erga omnes* norms has since been further clarified

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[109]. CIJ, *Compte rendu* CR.2010/11, of 17.09.2010, pp. 35-36.

by the Court and incorporated by the International Law Commission in its Articles on the Responsibility of States for Internationally Wrongful Acts, particularly in Articles 48 and 54, acknowledging the standing of all members of the international community to invoke the responsibility of the State for breach of *erga omnes* norms.

The character of human rights treaties - in particular their non-synallagmatic character - provides a reason for the broad interpretation of compromissory clauses, and not for their narrow or restrictive interpretation. In the present case this provides a further reason for rejecting the Russian Federation's view that Article 22 is subordinated to Article 11"[110].

75. For its part, the respondent State, the Russian Federation, presented the following written response to my question:

"As a multi-ethnic State, the Russian Federation acknowledges and values the specific character of the CERD Convention as a treaty imposing upon member States obligations primarily to be performed at the intra-State level.

This specific character is, in many respects, reflected in the CERD's unique implementation and enforcement mechanism to which Article 22 specifically makes reference. This mechanism provides for reporting obligations on the part of the States Parties, which allows the Committee to supervise the domestic practices of the Contracting Parties.

It equally establishes, through the Articles 11 to 13 procedure, a form of collective guarantee of respect for the Convention by the States Parties, to be ensured by an inter-State complaint and conciliation procedure under the auspices of the Committee. No special acceptance of this procedure is needed; the ratification by a State of the Convention makes this procedure automatically applicable, and the procedure is mandatory so far as concerns any respondent State. Thus the Contracting Parties, alongside the Committee, become guarantors of the enforcement of the Convention.

Most notably, the Individual Complaint Procedure of Article 14 of CERD (which the Russian Federation has accepted since 1st October 1991) underlines the intra-State character of the CERD Convention in that it enables individuals themselves to take action *vis-à-vis* Contracting Parties when the individual believes that there has been a violation of rights protected by CERD.

The specific importance of individual intra-State rights guaranteed by CERD is also reflected in the practice of the CERD Committee, *i.e.*, in its development of an urgent procedure to provide for the protection of individual rights guaranteed by CERD when these are most endangered.

The Convention also contains implementation procedures of a more traditional character (when compared with general international law) in the form of inter-State dispute settlement before the International Court of Justice under Article 22 CERD, which necessarily falls to be interpreted and applied in the context of CERD's other implementation procedures. Hence, and as also follows from the express language used in the provision, the rights under Article 22 only come into play once a matter arising under CERD has crystallized into an inter-State dispute and when, moreover, the disputant parties have not been able to settle the dispute by inter-state negotiations and by the procedures provided for in Articles 11-13 CERD.

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[110]. ICJ, document GR.2010/19, of 24.09.2010, pp. 3-4.

Further, as follows from the combination of the subject-matter, as well as the intra- and inter-State features of CERD, the obligations under the Convention are of an *erga omnes* nature. This also has a bearing on the interpretation and application of Article 22 of the Convention and of the procedures expressly provided for in this Convention to which Article 22 refers. As the Russian Federation stated in its Preliminary Objections, '[t]he *erga omnes* character of the obligations instituted therein [in CERD] is reflected in the procedures established by the Convention to deal with the inter-State complaints, which involve the other Parties to the Convention'.

This interpretation of Article 22 CERD takes full account of the specific intra-State character of the CERD convention aimed at protecting human rights of individuals"[111].

76. These responses were followed by another round of written comments by the two contending parties. Thus, in its comments on the Russian Federation's written response to my question, Georgia stated:

"Georgia notes that Russia's Written Response does not directly address the question raised by Judge Cançado Trindade. Georgia observes that there is nothing in Russia's response to contradict or undermine Georgia's response to the question put, namely, that '[t]he character of human rights treaties - in particular their non-synallagmatic character – provides a reason for the broad interpretation of compromissory clauses, and not for their narrow or restrictive interpretation'.

To the contrary, Russia's response recognizes that the obligations under the Convention are not to be performed exclusively at the intra-State level; that the Convention adopts 'a form of collective guarantee of respect' for its provisions; and that 'the obligations under the Convention are of an *erga omnes* nature'. These statements by Russia acknowledge that the Convention was intended to serve as an effective instrument for eliminating the scourge of racial (including ethnic) discrimination in all its forms. In that regard, they support Georgia's position on the interpretation of Article 22. Recourse to the Court under that Article is a principle means by which States may enforce the Convention's provisions against other States, and thereby make the Convention more effective. To read *preconditions* on the seisin of the Court into Article 22, in a manner that contradicts the plain meaning of the text, as Russia proposes, would frustrate the object and purpose of the Convention: it would render access to the Court impossible for all practical purposes, and diminish the Court's role as a means for timely enforcement of the Convention's *erga omnes* obligations"[112].

77. For its part, the Russian Federation presented the following comment on Georgia's written response to my question:

"As sat out in further detail in its own answer to the question asked by Judge Cançado Trindade, the Russian Federation fully accepts the *erga omnes* nature of the rights protected by human rights treaties, including CERD.

With respect to the interpretation of compromissory clauses contained in such treaties, the Russian Federation likewise accepts that these are special in nature in that any State Party thereto may bring a dispute concerning a breach of those obligations by

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[111]. ICJ, document GR.2010/20, of 24.09.2010, pp. 4-5.

[112]. ICJ, document GR.2010/21, of 01.10.2010, pp. 2-3.

another State Party before the Court. However, that does not mean that the specific pre-conditions to jurisdiction in the given compromissory clause may be bypassed, or that the compromissory clause should be interpreted entirely in isolation from the relevant context, which may (and, in this case, does) comprise inter-related dispute settlement mechanisms within the treaty itself.

> As the Court has already had occasion to emphasize,
>
> ''(…) 'the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things' (*East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995*, p. 102, para. 29), and (…) 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 same applies to the relationship between peremptory norms of general international law *(jus cogens)* and the establishment of the Court's jurisdiction: the fact that a dispute relates to compliance with a norm having such a character, which is assuredly the case with regard to the prohibition of genocide, cannot of itself provide a basis for the jurisdiction of the Court to entertain that dispute. Under the Court's Statute that jurisdiction is always based on the consent of the parties.
>
> As it recalled in its Order of 10 July 2002, the Court has jurisdiction in respect of States only to the extent that they have consented thereto *(Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Provisional Measures, Order of 10 July 2002, I.C.J. Reports 2002*, p. 241, para. 57). When a compromissory clause in a treaty provides for the Court's jurisdiction, that jurisdiction exists only in respect of the parties to the treaty who are bound by that clause and within the limits set out therein (*ibid.*, p. 245, para. 71)''.

This is also true in respect of CERD. And neither the interest in the protection of the rights protected by CERD nor, more generally, the interests of international justice would be served by violation of this fundamental principle.

In the present case, Article 22 of CERD strikes a deliberate and fair balance between the (compulsory) jurisdiction of the Court on the one hand and the (preliminary) mandatory inter-State conciliation by the CERD Committee deliberately instituted by the Convention on the other. This in turn reflects the balance to be achieved between the breadth of the category of potential claimant States under Article 22 (given the *erga omnes* nature of obligations under CERD) and the interests of respondent States in only appearing before the Court once disputes have been crystallised and the requisite attempts at settlement have failed.

The CERD Committee has the primary role as to the implementation and supervision of CERD including through the settlement of eventual disputes between States Parties. The fact that the Convention provides for a possibility of seizing the Court should not be interpreted to the detriment of the Committee's vital functions.

Lessening the role of the CERD Committee would certainly neither be in line with the intentions of the drafters of CERD, nor would it contribute to preserving the special nature of human rights treaties in general, nor that of CERD in particular"[113].

78. As can be seen from the above, in the present case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*, the contending parties themselves have duly taken into account the nature of the human rights treaty at issue, the CERD Convention, though deriving distinct consequences from their respective arguments. One can simply not make abstraction of the nature and substance of a human rights treaty in addressing a compromissory clause contained therein. The general rule of interpretation of treaties (Article 31 of the two Vienna Conventions on the Law of Treaties, of 1969 and 1986) contains elements that are to be taken into account by the Court (cf. *infra*), giving proper weight to the one - that of the object and purpose of the treaty - which will secure the *proper effects* to the treaty at issue, i.e., that will render it truly effective (cf. *infra*), keeping in mind that superior values and fundamental human rights are at stake.

VI. The Principle Ut Res Magis Valeat Quam Pereat

79. Underlying the aforementioned general rule of treaty interpretation (cf. para. 66, *supra*), contained in Article 31(1) of the two Vienna Conventions on the Law of Treaties (of 1969 and 1986), is the principle *ut res magis valeat quam pereat*, which corresponds to the so-called *effet utile* (sometimes called the principle of effectiveness). By virtue of this principle, widely supported by case-law, States Parties to human rights treaties ought to secure to the conventional provisions *the appropriate effects* at the level of their respective domestic legal orders. Such principle, as I have already pointed out (para. 68, *supra*), applies not only in relation to *substantive* norms of human rights treaties (that is, those which provide for the protected rights), but also in relation to *procedural* norms, in particular those relating to the right of individual petition and to the acceptance of the compulsory jurisdiction in contentious matters of the international judicial organs of protection. Such conventional norms, essential to the efficacy of the system of international protection, ought to be interpreted and applied in such a way as to render their safeguards truly practical and effective, bearing in mind the special character or nature of the human rights treaties and their collective implementation. Such has been, as I have already indicated (para. 72, *supra*), the approach pursued in practice by the ECtHR and the IACtHR.

80. May I, at this stage, recall a couple of examples of concrete cases wherein both the ECtHR and the IACtHR had the occasion to pronounce themselves to this effect. In its Judgment on Preliminary Objections (of 23.03.1995) in the case of *Loizidou versus Turkey*, for example, the ECtHR warned that, in the light of the letter and the spirit of the European Convention the possibility cannot be inferred of restrictions to the optional clause relating to the recognition of the contentious jurisdiction of the ECtHR[114]. In the domain of the international protection of human rights, there are no "implicit" limitations to the exercise of the protected rights; and the limitations set forth in the treaties of protection ought to be restrictively interpreted. The optional clause of compulsory jurisdiction of the international tribunals of human rights does not admit limitations

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[113]. ICJ, document GR.2010/22, of 01.10.2010, pp. 3-4.

[114]. Article 46 of the European Convention, prior to the entry into force, on 01.11.1998, of Protocol n. 11 to the European Convention. Moreover, the ECtHR referred to the fundamentally distinct context in which international tribunals operate, the ICJ being "a free-standing international tribunal which has no links to a standard-setting treaty such as the Convention"; cf. European Court of Human Rights (ECtHR), *Case of Loizidou versus Turkey* (Preliminary Objections), Strasbourg, C.E., Judgment of 23.03.1995, p. 25, par. 82, and cf. p. 22, par. 68. On the prevalence of the conventional obligations of the States Parties, cf. also the Court's *obiter dicta* in its previous decision, in the *Belilos versus Switzerland* case (1988).

other than those expressly contained in the human rights treaties at issue. And, as the IACtHR has also stated, it could not be at the mercy of limitations not foreseen therein and invoked by the States Parties for reasons or vicissitudes of domestic order[115].

81. The clause pertaining to the compulsory jurisdiction of international human rights tribunals constitutes, in my view, a fundamental clause (*cláusula pétrea*) of the international protection of the human being, which does not admit any restrictions other than those expressly provided for in the human rights treaties at issue. This has been so established by the IACtHR in its Judgments on Competence in the cases of the *Constitutional Tribunal* and *Ivcher Bronstein versus Peru* (of 24.09.1999)[116]. The permissiveness of the insertion of limitations, not foreseen in the human rights treaties, in an instrument of acceptance of an optional clause of compulsory jurisdiction[117], represents a regrettable historical distortion of the original conception of such clause, in my view unacceptable in the field of the international protection of the rights of the human person.

82. Any understanding to the contrary would fail to ensure that the human rights treaty at issue has the appropiate effects (*effet utile*) in the domestic law of each State Party. The IACtHR's decision in the case of *Hilaire versus Trinidad and Tobago* (Preliminary Objections, Judgment of 01.09.2001) was clear: the modalities of acceptance, by a State Party to the American Convention on Human Rights, of the contentious jurisdiction of the IACtHR, are expressly stipulated in Article 62(1) and (2)[118], and are not simply illustrative, but quite *precise*[119], not authorizing States Parties to interpose any other conditions or restrictions (*numerus clausus*).

83. In my Concurring Opinion in the aforementioned *Hilaire versus Trinidad and Tobago* case, I saw it fit to ponder that:

> "(...) In this matter, it cannot be sustained that what is not prohibited, is permitted. This posture would amount to the traditional - and surpassed - attitude of the *laisser-faire, laisser-passer*, proper to an international legal order fragmented by the voluntarist State subjectivism, which in the history of Law has ineluctably favoured the more powerful ones. *Ubi societas, ibi jus*... At this beginning of the

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[115]. Cf. IACtHR, case of *Castillo Petruzzi and Others versus Peru* (Preliminary Objections), Judgment of 04.09.1998, Series C, n. 41, Concurring Opinion of Judge A.A. Cançado Trindade, pars. 36 and 38.

[116]. IACtHR, case of the *Constitutional Tribunal* (Competence), Judgment of 24.09.1999, Series C, n. 55, p. 44, par. 35; CtIADH, case of *Ivcher Bronstein* (Competence), Judgment of 24.09.1999, Series C, n. 54, p. 39, par. 36.

[117]. Exemplified by State practice under Article 36(2) of the ICJ Statute (*supra*).

[118]. Article 62(1) and (2) of the American Convention on Human Rights provides that:

"A State Party may, upon depositing its instrument of ratification or adherence to this Convention, or at any subsequent time, declare that it recognizes as binding, *ipso facto*, and not requiring special agreement, the jurisdiction of the Court on all matters relating to the interpretation or application of this Convention.

Such declaration may be made unconditionally, on the condition of reciprocity, for a specified period, or for specific cases. It shall be presented to the Secretary General of the Organization, who shall transmit copies thereof to the other member States of the Organization and to the Secretary of the Court".

Thus, according to According to Article 62(2) of the Convention, the acceptance, by a State Party, of the contentious jurisdiction of the IACtHR, can be made in four modalities, namely: a) unconditionally; b) on the condition of reciprocity; c) for a specified period; and d) for specific cases. Those, and only those, are the modalities of acceptance of the contentious jurisdiction of the IACtHR foreseen and authorized by Article 62(2) of the Convention.

[119]. According to Article 62(2) of the Convention, the acceptance, by a State Party, of the contentious jurisdiction of the IACtHR, can be made in four modalities, namely: a) unconditionally; b) on the condition of reciprocity; c) for a specified period; and d) for specific cases. Those, and only those, are the modalities of acceptance of the contentious jurisdiction of the IACtHR foreseen and authorized by Article 62(2) of the Convention, which does not authorize the States Parties to interpose any other conditions or restrictions (*numerus clausus*).

> XXIst century, in an international legal order wherein one seeks to affirm superior common values, among considerations of international *ordre public*, as in the domain of the International Law of Human Rights, it is precisely the opposite logic which ought to apply: *what is not permitted, is prohibited*.
>
> If we are really prepared to extract the lessons of the evolution of International Law in a turbulent world throughout the XXth century, (...) we cannot abide by an international practice which has been subservient to State voluntarism, which has betrayed the spirit and purpose of the optional clause of compulsory jurisdiction, - to the point of entirely denaturalizing it, - and which has led to the perpetuation of a world fragmented into State units which regard themselves as final arbiters of the extent of the contracted international obligations, at the same time that they do not seem truly to believe in what they have accepted: the international justice" (paras. 24-25).

84. To bear in mind the three component elements of the general rule of interpretation *bona fides* of treaties - text in the current meaning, context, and object and purpose of the treaty - set forth in Article 31(1) of the two Vienna Conventions on the Law of Treaties (of 1969 and 1986), requires also to keep in mind the *nature* of the treaty wherein that clause (optional or compromissory) for compulsory jurisdicttion appears. This corresponds to the "context", precisely the second component element of the general rule of interpretation of treaties set forth in Article 31 of the two Vienna Conventions on the Law of Treaties[120].

85. The IACtHR, by means of the Judgments on Preliminary Objections in the cases of *Hilaire*, *Benjamin*, and *Constantine*, as well as its earlier Judgments on Competence in the cases of the *Constitutional Tribunal* and *Ivcher Bronstein*, safeguarded the integrity of the American Convention on Human Rights, remained master of its own jurisdiction and acted in accordance with the high responsibilities accorded to it by the American Convention on Human Rights[121]. The same can be said of the ECtHR, by means of its aforementioned Judgment on Preliminary

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[120]. In the *Hilaire versus Trinidad and Tobago* case (*supra*), the IACtHR had duly done so, in stressing the special character of the human rights treaties (paras. 94-97). Likewise, the IACtHR has kept constantly in mind the third component element of that general rule of interpretation, namely, the "object and purpose" of the treaty at issue, the American Convention on Human Rights (paras. 82-83 and 88). As I saw it fit to point out, in this respect, in my Separate Opinion in the case *Blake versus Guatemala* (Reparations, 1999) before the IACtHR :

"(...) In so far as human rights treaties are concerned, one is to bear always in mind the objective character of the obligations enshrined therein, the autonomous meaning (in relation to the domestic law of the States) of the terms of such treaties, the collective guarantee underlying them, the wide scope of the obligations of protection and the restrictive interpretation of permissible restrictions. These elements converge in sustaining the integrity of human rights treaties, in seeking the fulfillment of their object and purpose, and, accordingly, in establishing limits to State voluntarism" (paras. 32-33).

[121]. In its Judgment in the case of *Hilaire versus Trinidad and Tobago*, the IACtHR rightly observed that, if restrictions interposed in the instrument of acceptance of its contentious jurisdiction were accepted, in the terms proposed by the respondent State in the *cas d'espèce*, not expressly foreseen in Article 62 of the American Convention, this would lead to a situation in which it would have "as first parameter of reference the Constitution of the State and only subsidiarily the American Convention", a situation which would "bring about a fragmentation of the international legal order of protection of human rights and would render illusory the object and purpose of the American Convention" (para. 93).

And as I concluded in my own Concurring Opinion in the *Hilaire versus Trinidad and Tobago* before the IACtHR, "The time has come to consider, in particular, in a future Protocol of amendments to the procedural part of the American Convention on Human Rights, aiming at strengthening its mechanism of protection, the possibility of an amendment to Article 62 of the American Convention, in order to render such clause also *mandatory*, in conformity with its character of fundamental clause (*cláusula pétrea*), thus establishing the *automatism* of the jurisdiction of the Inter-American Court of Human Rights. There is pressing need for the old ideal of the permanent international compulsory jurisdiction to become reality also in the American continent, in the present domain of protection, with the necessary adjustments in order to face its reality of human rights and to fulfil the growing needs of effective protection of the human being" (para. 39).

Objections in the case *Loizidou versus Turkey*, in so far as the European Convention on Human Rights is concerned. Thus, those two Tribunals, in their converging case-law on the question at issue, have given a worthy contribution to the strengthening of the international jurisdiction and to the realization of the old ideal of international justice[122]. Moreover, they have contributed to the creation of an international *ordre public* based upon the respect for human rights in all circumstances.

86. The two aforementioned international human rights Tribunals, by correctly resolving basic jurisdictional issues raised in the cases referred to above, have aptly made use of the techniques of Public International Law in order to strengthen their respective jurisdictions of protection of the rights of the human person. They have decisively safeguarded the integrity of the mechanisms of protection of the American and European Conventions on Human Rights. The two Tribunals at issue have helped to develop and achieve the aptitude of International Law to regulate efficiently relations which have specificity of their own - at *intra-State*, rather than *inter-State*, level. The unity and effectiveness of Public International Law itself can be measured precisely by its aptitude to regulate legal relations in distinct contexts with equal adequacy.

87. When one comes to human rights treaties, the required attention to the observance of the principle *ut res magis valeat quam pereat*, appears particularly compelling, so as to secure the effective protection of the guaranteed rights enshrined in the treaty at issue. This applies to the CERD Convention, as in the *cas d'espèce* before the ICJ, and to all other human rights treaties. If it were not so, their object and purpose would not be fulfilled, with harmful consequences in the present domain of protection of the human person, where considerations of a superior order (international *ordre public*) have primacy over State voluntarism. When we enter into the *terra nova* of the settlement of human rights disputes in the framework of the classic inter-State *contentieux*, we cannot lose sight of the fact that we are here also moving resolutely from *jus dispositivum* to *jus cogens*[123].

VII. The Compromissory Clause (Article 22) of the U.N. Convention on the Elimination of All Forms of Racial Discrimination (CERD): Elements for Its Proper Interpretation and Application

88. Keeping the above considerations in mind, the way is paved for turning attention now to the compromissory clause of the CERD Convention. Article 22 of that Convention provides that:

> "Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement".

89. The view advanced by the Court's majority in the present Judgment (para. 140), whereby Article 22 of the CERD Convention would subordinate the jurisdiction of this Court to the procedures set out in the CERD Convention itself (Part II, Articles 11-12), in addition to

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[122]. A.A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, vol. III, Porto Alegre/Brazil, S.A. Fabris Ed., 2003, ch. XV-XVI, pp. 60-83 and 147-168.

[123]. Cf., to this effect, my intervention in the debates of 12.03.1986 of the Vienna Conference on the Law of Treaties between States and International Organizations or between International Organizations: U.N., *United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 1986) - Official Records*, volume I, N.Y., U.N., 1995, pp. 187-188 (intervention by A.A. Cançado Trindade).

engagement in prior negotiations, as "preconditions" to be fulfilled by a State Party before it may have recourse to this Court, - is a particularly strict and rigorous one. It purports to establish rigid "preconditions", rendering access to this Court particularly difficult. This view, contrary to what the Court's majority tries to argue, in my understanding finds no support in the Court's own *jurisprudence constante*, nor in the legislative history of the CERD Convention, and is in conflict with the approach recently espoused by the Court itself in its Order of 15 October 2008 in the present case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (cf. *infra*).

90. Six decades ago, in its Advisory Opinion on the *Competence of the General Assembly for the Admission of a State to the United Nations* (of 03.03.1950), this Court deemed it necessary to recall that :

> "the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is *to endeavour to give effect to them* in their natural and ordinary meaning in the context in which they occur"[124].

Only when the words, in their natural and ordinary meaning, were "ambiguous" or were to "lead to an unreasonable result", - the ICJ added, - *only then* the Court was to resort to "other methods of interpretation", seeking to ascertaining "what the parties really did mean when they used these words"[125].

91. Although the circumstances of the present case do not in my view require such an exercise, given the importance of the principle *ut res magis valeat quam pereat* (section VI, *supra*) as well as the relationship of the compromissory clause of Article 22 with the nature and substance of the CERD Convention (section V, *supra*), I shall in any case undertake it, in order to substantiate further my dissenting position, as, in my understanding, neither the ordinary meaning of Article 22 nor its *travaux préparatoires* support the Court's majority position in the present Judgment.

1. Ordinary Meaning of Article 22 of the CERD Convention

92. The Court's majority position as to the ordinary meaning of Article 22 of the CERD Convention, advanced in the earlier Order of 15.10.2008 in the present case, and relied upon in this respect on the general rule of interpretation of Article 31(1) of the 1969 Vienna Convention on the Law of the Treaties, was quite clear. The Court then stated that:

> "The phrase 'any dispute (…) which is not settled by negotiation of by the procedure expressly provided for in this Convention' does not, on its plain meaning, suggest that formal negotiations in the framework of the Convention or recourse to the procedure referred to in Article 22 thereof constitute preconditions to be fulfilled before the seisin of the Court" (para. 114).

Such plain meaning of the text of Article 22 of the CERD Convention, as acknowledged by the Court itself, is further confirmed by the context, as well as the object and purpose of the CERD Convention. It is, furthermore, in harmony with the Court's *jurisprudence constante* on the matter.

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[124]. *ICJ Reports* (1950) p. 8 (emphasis added).

[125]. *Ibid*., p. 8.

For reasons which escape my comprehension, the Court's majority reverted its position in the present Judgment, into a diametrically opposed one (cf. item 3 *infra*, paras. 110-118).

93. In effect, Article 22 is located in Part III of the CERD Convention, dealing with the settlement of disputes concerning the interpretation and application of the Convention as a whole. Article 11, located in Part II of the CERD Convention, establishes a special complaints procedure, which is not mandatory. The location of Article 22 in a part of the Convention distinct from that which governs the functioning of the Committee (Part II) is thus not without relevance, and should not pass unnoticed. A brief analysis of the special complaints procedure contained in Article 11 of the CERD Convention indicates that Article 22 of the CERD Conventionis not to be read as requiring prior "exhaustion" of the procedures set forth in Articles 11 and 12 of the CERD Convention, as an alleged "precondition" to the Court's jurisdiction.

94. It may be recalled that Article 11(1) of the CERD Convention establishes a distinct procedure that allows a State Party to bring to the attention of the CERD Committee its concerns as to acts or omissions of another State Party. The language provides that a State Party "may" (not "shall") invoke this procedure if it wishes to do so; this makes it clear that it is not required to refer to this procedure for any further purpose. The language is clearly not mandatory, and this is not the only indication to this effect.

95. It is noteworthy, moreover, that Article 11(2) of the CERD Convention, which deals with the right to return to the CERD Committee "if the matter is not adjusted", is subject to two procedural conditions, namely: a) the right must be exercised within six months from the receipt by the receiving State of the initial communication to the Committee; and (b) the Committee must have determined that the matter has not been adjusted to the satisfaction of both Parties, either by bilateral negotiations or by any other procedure open to them. In case these two conditions were not met, the State concerned could not go back to the CERD Committee.

96. This confirms that, when the draftsmen of the CERD Convention considered it necessary to establish a procedural condition, they clearly did so, leaving no margin or room for further interpretation or doubts. If no such condition was clearly set forth, it could not at all be simply inferred, as that would not be in conformity with the nature and substance of the CERD Convention, a *victim-oriented* human rights treaty, and would clearly militate against the fulfillment of its object and purpose. This discloses the ordinary meaning of Article 22 of the CERD Convention.

2. *Travaux Préparatoires* of Article 22 of the CERD Convention

97. The drafting of the CERD Convention was accomplished, in a relatively short time (1964-1965), as a result of the collaboration between the [former] Sub-Commission on Prevention of Discrimination and Protection of Minorities, the [former] Commission on Human Rights, and the III Committee of the General Assembly. At an early stage of the debates in the Sub-Commission, the key issue of implementation was the provision for a reporting mechanism by the Draft Convention, as the main measure envisaged by the draftsmen. As a supplementary choice for States Parties, the Draft Convention contemplated the establishment of a Fact-Finding and Conciliation Committee to assist interested States Parties in seeking friendly settlement of disputes

concerning the interpretation or application of the Convention[126]. These other means for States Parties to reach friendly settlement were additional measures of implementation which would help to render the Draft Convention "more effective"[127].

98. No discussion took place on measures of implementation at the Commission on Human Rights[128]. In turn, discussions were held at the III Committee of the General Assembly**,** focusing on the innovative measures of implementation, and more particularly on the right of individual petition, one of the most debated issues of the entire CERD Convention. No reference to the conditions of exercise of jurisdiction by the ICJ or the eventual relationship between the latter and the CERD Convention's special procedures can be inferred from the records of the III Committee. Solely the question of whether States could access unilaterally to the ICJ (Philippine proposal[129], as well as interventions by the Canadian[130], Italian[131] and Belgian[132] Delegates) or whether common consent of the relevant States was needed to bring disputes arising out of the CERD Convention (Ghana's proposal[133], and Polish amendment[134] supported by Ukrania[135], URSS[136] and Tanzania[137]) was discussed.

99. The Officers of the III Committee submitted a draft clause VIII on settlement of disputes (among the final clauses of the Draft Convention) on 15.10.1965[138], and, at last, the III Committee also considered a "three-power amendment" submitted by Ghana, Mauritania and the Philippines, pertaining to the procedures referred to in the Draft Convention[139] (as presented by Ghana[140]). The

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[126]. This resulted from the proposal of the Delegate of the Philippines (Mr. Inglés), at the 427th meeting of the Sub-Commission. He considered that the settlement of disputes involving human rights did not always lend itself to strictly judicial procedure (reporting mechanism), and, aiming at the facilitation of the implementation of the Convention, the possibility of friendly settlement of disputes was proposed (Conciliation Committee), as an alternative means of implementation; cf. U.N. doc. E/CN.4/Sub.2/SR.427, pp. 11-17; U.N. Economic and Social Council [ECOSOC], *Draft International Convention on the Elimination of All Forms of Racial Discrimination - Proposed Measures of Implementation* (Mr. Inglés), U.N. doc. E/CN.4/Sub.2/L.321. of 17.01.1964, p. 1.

[127]. U.N./Commission on Human Rights, *Report on the 20th Session* (17.02-18.03.1964), *ECOSOC Official Records - 37th session*, Supplement n. 8, doc. E/3873, p. 10, para. 18; U.N./Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Report of the 16th Session* (13-31.01.1964), U.N. doc. E/CN.4/873, pp. 51-57.

[128] Cf. U.N./Commission on Human Rights, *Report on the 20th Session*, (17.02-18.03.1964), *ECOSOC Official Records - 37th Session*, Supplement n. 8, doc. E/3873, pp. 66-67.

[129]. U.N./G.A., *Proposal by the Philippines: Proposed Articles Relating to Measures of Implementation*, U.N. doc. A/C.3/L.1221, of 11.10.1965, pp. 1ss.

[130]. U.N./G.A. III Committee, *Summary Record of the 1367th Meeting*, p. 453, para. 25.

[131]. *Ibid*., p. 454, para. 39.

[132]. *Ibid*., p. 454, para. 40.

[133]. U.N./G.A., *Proposal by Ghana: Revised Amendments to document A/C.3/L. 1221*, of 12.11.1965, pp. 1ss.

[134]. U.N./G.A., *Poland: Amendments to the Suggestions for Final Clauses Submitted by the Officers of the III Committee*, U.N. doc. A/C.3/L.1237, of 01.11.1965, pp. 1ss..

[135]. U.N./G.A. III Committee, *Summary Record of the 1367th Meeting*, p. 453, para. 27.

[136]. *Ibid*., p. 454, para. 33.

[137]. *Ibid*., p. 454, para. 36.

[138]. U.N./G.A., *Suggestions for Final Clauses Submitted by the Officers of the III Committee*, U.N. doc. A/C.3/L.1237, of 15.10.1965, pp. 1ss..

[139]. U.N. doc A/C.3/L.1313, *in* U.N./G.A., *XXth Session - Official Records*, Annexes: *Report of the III Committee*, U.N. doc. A/6181, of 18.12.1965, pp. 1ss..

[140]. U.N./G.A. III Committee, *Summary Record of the 1367th Meeting*, U.N. doc. A/C.3/SR.1367, p. 453, para. 29.

focus of the Delegates and draftsmen seemed to be on the implementation measures already contained in the Draft Convention, rather than on the role of the ICJ and the circumstances of its seizure. Those last proposals were adopted without in-depth discussions on this subject.

100. States did not devote to these last proposals the attention they required (in so far as the issue of the seizure of the ICJ is concerned), before they became Article 22 of the CERD Convention, as it stands now. The Court's majority itself concedes, in the present Judgment (para. 142) in the case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*,, that there was very little and unsatisfactory discussion of what was to become Article 22 of the CERD Convention. Its recorded legislative history contains no indication of a *mens legis* to the effect of subordinating the ICJ jurisdiction to the satisfaction of mandatory "preconditions".

101. I find it surprising, if not extraordinary, that the Court's majority, having admitted this, then moved on to its "conclusion" (para. 142), - looking rather like a *prêt-à-porter*, - that Article 22 of the CERD Convention "imposes preconditions" to be complied with (para. 148), before a State could refer a dispute to the ICJ thereunder. The fact is that there is no conclusive indication to that effect in the *travaux préparatoires* of the CERD Convention, nor is there any statement as to the existence of a resolutory obligation incumbent upon States Parties, to do all they can to settle their disputes previously by negotiation, before they can seize the ICJ. Resort to negotiation was generally referred to as a factual *effort* or *attempt* only, rather than as an resolutory obligation.

102. The very fact that proceedings were instituted before the ICJ militates strongly against the assumption or conclusion that the dispute could have been resolved by prior negotiations between the contending parties. In the aforementioned discussions of the III Committee on the last proposals for the draft final clause VIII of the Draft Convention (which led to Article 22 of CERD Convention), the Delegate of Canada (R.St. Macdonald), for example, stated that :

> "Any party to a dispute over the interpretation or application of the Convention should be able to bring the matter before the Court, for the Convention was being prepared under United Nations auspices and the Court was the Organization's principal juridical organ. Moreover, clause VIII allowed parties to a dispute considerable latitude"[141].

Drawing attention to "the flexibility of the Article's terms", he added that his Delegation "hoped" that :

> "it would be possible to to confer in advance on the Court a measure of jurisdiction in regard to matters connected with the Convention"[142].

103. On his turn, the Representative of Italy (F. Capotorti) began by observing that international law allowed for consent to be given for submission of a dispute to the Court either "by any or by all the parties", and either "upon ratification of the Convention" or "when a particular dispute arose". He warned that "[c]onsent of States would be much more difficult to obtain when a dispute already existed than when the Convention was opened for signature". His position was, thus, that :

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[141]. *Ibid*., p. 453, para. 25.

[142]. *Ibid*., p. 453, paras. 25 and 28.

> "The Committee should adopt a practical approach and decide which method was more in accord with the spirit of the Convention and would ensure the most satisfactory settlement of disputes relating to the Convention"[143].

104. The issue of State consent, in sum, could be raised, in his view, at the appropriate moment, namely, upon ratification of the Convention, and not subsequently, when a particular dispute arose. In the same discussions, the Delegate of Trinidad and Tobago (Mr. Ince) remarked, in respect of the draft final clause VIII, that the Draft CERD Convention was "being drawn in a spirit of goodwill", and one should thus "facilitate reference of cases to the Court"[144]. To the same effect, the Delegate of Belgium (Mr. Cochaux) stated that :

> "The Court was an important international organ whose role in settling disputes connected with the present Draft Convention - an instrument created by the United Nations - should not be belittled"[145].

105. The (amended) draft final clause VIII, which was to become Article 22 of the CERD Convention, was then adopted, as a whole, by the III Committee, by 70 votes to 9, with 8 abstentions[146]. The language used by some Delegates, in the debates preceding its adoption, does not at all imply or suggest that recourse to this Court was regarded as subordinated to the other settlement procedures of the CERD Convention, or to any "preconditions". Shortly after that voting took place, the Delegate of Ghana (Mr. Lamptey), further to his previous statement (which the Court's majority saw it fit to single out in the present Judgment, para. 142), added an interpretative declaration as to his position, to the effect that his Delegation had "accepted the compulsory jurisdiction of the Court in the case of certain specific Conventions", and that it attached "much importance" to the CERD Convention[147].

106. I cannot thus detect on what basis did the Court's majority, in the present Judgment in the case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*, reached its decision as to the ordinary meaning and scope of Article 22 of the CERD Convention. The view of the Court's majority that the *travaux préparatoires* of the CERD Convention "do not suggest a different conclusion from that at which the Court has already arrived through the main method of ordinary meaning interpretation" (para. 147, *in fine*) simply begs the question, and does not resist closer examination.

107. Moreover, as we have just seen, there were clearly those, in the drafting history of the CERD Convention, who were sensitive to the regulation of social relations under the CERD Convention, and who favoured possible recourse to the ICJ[148] without "preconditions". In my perception, in the

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[143]. *Ibid*., p. 454, para. 39.

[144]. *Ibid*. pp. 454-455, para. 41.

[145]. *Ibid*., p. 454, para. 40.

[146]. *Ibid*., p. 455, para. 41.

[147]. *Ibid*., p. 455, para. 42.

[148]. Suffice it to recall here the positions taken by two learned jurists, Ronald St. Macdonald and Francesco Capotorti (cf. *supra*). Years later, the former drew attention to the evolving teleological interpretation of the U.N. Charter itself, whilst the latter singled out judicial settlement (including recourse to the ICJ) as the best means to resolve disputes pertaining to the safeguard of human rights. Cf., respectively: R.St.J. Macdonald, "A Short Note on the Interpretation of the Charter of the United Nations by the International Court of Justice", *in Liber Amicorum Judge S. Oda* (eds. N. Ando *et alii*), The Hague, Kluwer, 2002, p. 182; F. Capotorti, "Cours général de Droit international public", 248 *Recueil des Cours de l´Académie de Droit International de La Haye* (1994) p. 107.

present Judgment on Preliminary Objections, the position of the Court's majority as to Article 22 of the CERD Convention does not stand.

108. The "conclusion" drawn by the Court's majority is not, in my perception, supported or "confirmed" by an attentive analysis of the *travaux préparatoires* of the CERD Convention. The so-called "preconditions" in Article 22, allegedly to be fulfilled prior to the recourse to the ICJ, are rather, in my perception, newly-proposed - if not imposed - obstacles to the fulfillment of the object and purpose of the CERD Convention, which, furthermore, fail to take in due account the nature and substance of the CERD Convention, a core human rights treaty of considerable importance in the history of the United Nations itself. In my understanding they are, in sum, unwarranted obstacles to access to justice at international level.

109. The whole construction of the present Judgment of the Court in respect of the second preliminary objection does not seem to rest on a sound reasoning, and appears to me without foundation. Article 22 does not use any conditional language ("if") in its wording. It limits itself to stating that a dispute which is not settled by negotiation or by the procedures expressly provided for in CERD, *shall* be referred to the ICJ for decision. It is a statement of pure verification of facts, and nowhere is there a "precondition" implied or suggested in its wording, and certainly not in its spirit.

3. The Previous Pronouncement by the Court on Article 22 of the CERD Convention: *Venire Contra Factum/Dictum Proprium Non Valet*

110. We have seen that Article 22 of the CERD Convention stipulates that a State Party may unilaterally refer a dispute to the Court if that dispute "is not settled by negotiation", but this does not establish any express obligation, in the form of a "precondition", to engage in such negotiation. As already noted *by the ICJ itself*, in its recent Order on Povisional measures (of 15.10.2008), these words describe a state of fact, so that the function of the Court is limited to determining whether the dispute is not settled. In the same paragraph where the Court stated that no precondition was needed, the Court added that "Article 22 does suggest that some attempt should have been made by the claimant party to initiate, with the respondent party, discussions on issues that would fall under CERD" (para. 114).

111. However, these negotiations do not constitute a formal requirement for the Court to exercise its jurisdiction. This approach can also be inferred from the Court's longstanding practice, and there is no reason to depart from it, as that would create juridical uncertainty, in the understanding of States, as to the circumstances in which the Court would exercise its jurisdiction. Of particular importance is the Court's judgment in the case of *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua *versus* United States, Judgment of jurisdiction and admissibility, of 26.11.1984), where the Court ruled that since there had in fact been no settlement of the dispute between the parties, the requirements of the compromissory clause (Article XXXIV(2) of the 1956 Treaty of Friendship, Commerce and Navigation) were satisfied, since the dispute was clearly one which was not satisfactorily adjusted by diplomatic means (cf. *infra*).

112. In sum, and as the Court held in its Order on Provisional Measures of 15.10.2008 in the present case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*, Article 22 of the CERD Convention does not, on its plain meaning, suggest that formal negotiations in the framework of the CERD Convention or recourse to the procedure referred to in Article 22 thereof constitute "preconditions" to be fulfilled before the

seisin of the Court (para. 114). This was the timely clarification made by the Court in its Order of 15.10.2008, which now, in the present Judgment, was incomprehensibly made dead letter by the Court itself (para. 129), which thus ran against and deconstructed its own *res interpretata*.

113. It is widely known that, in international legal procedure, once a contending party has asserted a position as to a given issue before an international tribunal, it can no longer attempt to avail itself of an orientation to the opposite sense (as warned by international case-law itself[149]): *allegans contraria non audiendus est*. This basic principle of procedural law is valid for countries of *droit civil* (by virtue of the doctrine going back to classic Roman law, *venire contra factum proprium non valet*, developed on the basis of considerations of equity, *aequitas*) as well as for countries of *common law* (by virtue of the institution of *estoppel*,[150] proper of the Anglo-Saxon juridical tradition). In any case, it could not be otherwise, so as to preserve the confidence and the principle of *bona fides* which ought always to prevail in the international legal procedure.

114. With all the more reason, the same reasoning would apply as to positions already taken by an international tribunal *as to the Law*, - quite a distinct issue from its *prima facie* findings *as to the facts*. Positions *as to the law* cannot be simply changed at the tribunal's free will, shortly afterwards, to the diametrically opposite direction! This would generate a sense of juridical insecurity, that would surely undermine the credibility of the work of an international tribunal, and even more so when its jurisdiction is exercised on the basis of a human rights treaty. *Venire contra factum proprium non valet*, and, perhaps even more forcefully, *venire contra dictum proprium non valet*. In my perception, the Court's considerations in paragraph 129 of the present Judgment do not at all stand: they clash with a basic principle of international procedural law, deeply rooted in legal thinking.

115. There is no *requirement* that the negotiations between Georgia and the Russian Federation include an *express reference* to the CERD Convention. It is sufficient for the subject-matter of the dispute at issue to have been discussed, brought to the attention of each other. In light of the evidence put to the Court, Georgia has sought to discuss with Russia matters falling within the scope of the CERD Convention, in the conflicts affecting ethnic Georgians in South Ossetia and Abkhazia.

116. Finally, with regard to the question whether the previous engagement in negotiations and recourse to the procedures expressly provided for in the CERD Convention (referred to in Article 22) are cumulative or alternative, the conjunction "or" indicates that the draftsmen of the CERD Convention clearly considered "negotiation" or "the procedures expressly provided for in this Convention" as *alternatives*. The Court could well - and should - have discarded any doubts that could persist on this point; instead, it deliberately preferred to abstain from pronouncing (para. 183) on this aspect of the controversy raised before it. Instead of clarifying the point, of saying what the law is (*juris dictio*), it felt there was "no need" to do so.

117. The purpose of multilateral treaties like the CERD Convention, of human rights treaties, is to render human rights scrutiny and enforcement effective at the international level, including by means of dispute settlement. In its *jurisprudence constante*, for example, the ECtHR has stressed

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[149]. Cf., e.g., Ch. de Visscher, *De l'équité dans le règlement arbitral ou judiciaire des litiges de Droit international public*, Paris, Pédone, 1972, pp. 49-52.

[150]. Cf., *inter alia*, e.g., Ian Sinclair, "Estoppel and Acquiescence", *in Fifty Years of the International Court of Justice - Essays in Honour of R.T. Jennings* (eds. V. Lowe and M. Fitzmaurice), Cambridge, University Press, 1996, pp. 104-120; Ch. Vallée, "Quelques observations sur l´*estoppel* en droit des gens", 77 Revue générale de Droit international public (1973) pp. 949-999.

that the object and purpose of human rights treaties (such as the European Convention) requires that their provisions be interpreted and applied so as to make their safeguards "practical and effective"[151]. The same applies to the CERD Convention, as a core human rights treaty of the United Nations.

118. In the present case, due weight should have been given to the consideration, in the preamble of the CERD Convention (para. 1), that all Member States of the United Nations have pledged themselves to take action, in cooperation with the Organization, for the achievement of one of the purposes of the United Nations, which is "to promote and encourage universal respect for and observance of human rights" for all, without distinction of any kind, keeping in mind the proclamation, by the 1948 Universal Declaration of Human Rights, that all human beings are born free and equal in dignity and rights (Article 1).

VIII. Towards Peaceful Settlement and Realization of Justice: Verification of Prior Attempts or Efforts of Negotiation

1. Permanent Court of International Justice

119. The Permanent Court of International Justice (PCIJ), in its *jurisprudence constante*, approached prior attempts or efforts of negotiation as a factual element to be taken into account in the process of judicial settlement of disputes submitted to its cognizance. It has never ascribed to this factual element the character of a "precondition" that would have to be fully satisfied, for the exercise of its jurisdiction. Thus, in a celebrated passage of its Judgment (of 30.08.1924), in the case of the *Mavrommatis Concessions in Palestine* case (Judgment n. 2), the PCIJ stated that:

> "Une négociation ne suppose pas toujours et nécessairement une série plus ou moins longue de notes et de dépêches; ce peut être assez qu'une conversation ait été entamée; cette conversation a pu être très courte: tel est le cas si elle a rencontré un point mort, si elle s'est heurtée finalement à un *non possumus* ou à un *non volumus* péremptoire de l'une des Parties et qu'ainsi il est apparu avec évidence que *le différend n'est pas susceptible d'être réglé par une négociation diplomatique*" (p. 13)[152].

120. The PCIJ added, in the same *Mavrommatis Concessions in Palestine* case (1924), that "it would be incompatible with the flexibility which should characterize international relations to require the two Governments to reopen a discussion which has in fact already taken place" (p. 15). In case of an eventual objection *in limine litis* to its jurisdiction, the PCIJ further stated that the Court:

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[151]. Cf., to this effect, e.g., ECtHR, case *Artico versus Italy* , Judgment of 13.05.1980, para. 33; ECtHR, case *Soering versus United Kingdom*, Judgment of 07.07.1989, para. 87; ECtHR, case *Rantsev versus Cyprus and Russia*, Judgment of 07.01.2010, para. 275.

[152]. Or, as stated by the PCIJ in the other official language of the Court,

"Negotiations do not of necessity always presuppose a more or less lengthy series of notes and despatches; it may suffice that a discussion should have been commenced, and this discussion may have been very short; this will be the case if a dead lock is reached, or if finally a point is reached at which one of the Parties definitely declares himself unable, or refuses, to give way, and there can therefore be no doubt that *the dispute cannot be settled by diplomatic negotiation*" (p. 13).

> "is at liberty to adopt the principle which it considers best calculated to ensure the administration of justice, most suited to procedure before an international tribunal and most in conformity with the fundamental principles of international law" (p. 16).

121. Shortly afterwards, in its Judgment (of 25.08.1925), in the case concerning *Certain German Interests in Polish Upper Silesia* (Judgment n. 6), the PCIJ again rejected any formalistic approach, in pointing out that: "the Court cannot allow itself to be hampered by a mere defect of form, the removal of which depends solely on the Party concerned" (p. 14).

The PCIJ added, in the same case, that "the Court's jurisdiction cannot depend solely on the wording of the Application" (p. 15).

122. In the same line of thinking, in its Judgment (of 26.07.1927), in the *Chorzów Factory* case (Jurisdiction, Judgment n. 9), the PCIJ again dismissed a self-restrained outlook of the compromissory clause, which would unduly reduce its scope. The PCIJ warned:

> "To say (…) that the *clause compromissoire* (…) must now be restrictively interpreted (…), would be contrary to the fundamental conceptions by which the movement in favour of general arbitration has been characterized" (p. 22).

The PCIJ refused to infer "a contrary intention" of the parties limiting its jurisdiction; such a reliance on "a difference of opinion" between the parties as to "the interpretation or application of a Convention, - it concluded, - "instead of settling a dispute once and for all, would leave open the possibility of further disputes" (p. 25).

123. The position taken by the PCIJ, to the effect that recourse to negotiations has never been a "precondition" to seize it, had prompt repercussions in the juridical circles of those days. Shortly after the aforementioned decisions of the PCIJ, even those who kept on favouring prior negotiations and beholding judicial settlement as an *ultimum remedium*, were led to agree that by "negotiations" one had in mind, more specifically, "attempts" of friendly settlement by diplomatic negotiations[153] as a matter of *courtoisie internationale*[154]. By no means was it meant to be a "precondition"; it sufficed that one party had attempted – unsuccessfully – to negotiate. They were led to concede that the PCIJ was master of its own jurisdiction, and was entitled to decide the way it did (above the thesis sustained by the contending parties), "nullifying" that "precondition", despite the fact that international jurisdiction was "subsidiary"[155].

124. To the nostalgics of the past, who kept on privileging diplomatic negotiations and resisted the advent of judicialization, Maurice Bourquin lucidly retorted that Article 36 of the Hague Court's Statute has never subordinated a legal action to a prior attempt of diplomatic settlement. How to prove that negotiations were "sufficiently utilized"? This notion was imprecise and relative, and any rigid formula would be "unacceptable", as each case had its own circumstances.

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[153]. "[...] une *tentative* de solution amiable para la voie diplomatique"; or else, "les moyens de règlement amiables ont été *tentés*"; and still, "un moyen préalable qui doit être *tenté*..."; *cit. in*

N. Kaasik, *op. cit. infra* n. (108), pp. 67 and 69 (emphasis added).

[154]. N. Kaasik, "La clause de négotiations diplomatiques dans le droit international positif et dans la jurisprudence de la Cour Permanente de Justice Internationale", 14 *Revue de Droit international et de législation comparée* (1933) p. 94.

[155]. Cf. *ibid*., pp. 90-92 and 94-95.

In his view, diplomatic negotiations may be useful, but it is wiser to have a "nuancée" approach to them; the "negative attitude" of one of the parties would suffice to allow the other to lodge the case with the Hague Court, even if the exchange of views had a very short duration. It so happened, - pondered M. Bourquin, - that: "des controverses diplomatiques se situent en dehors du droit; (…) les pretentions qui s'y font jour s'inspirent uniquement de considérations d'opportunité"[156].

2. International Court of Justice

125. For its part, the International Court of Justice (ICJ), in its Judgment on Preliminary Objections (of 21.12.1962) in the *South West Africa* cases (Ethiopia and Liberia vs. South Africa), in dismissing the [third] preliminary objection, drew attention to the importance of "the well-being and development of the inhabitants of the mandated territory" (p. 344), and dismissed the argument that "any broad interpretation of the compulsory jurisdiction in question would be incompatible with Article 22 of the Covenant" (p. 343). The ICJ added that:

> "It is immaterial and unnecessary to enquire what the different and opposing views were which brought about the deadlock in the past negotiations in the United Nations, since the present phase calls for determination of only the question of jurisdiction. The fact that a deadlock was reached in the collective negotiations in the past and the further fact that both the written pleadings and oral arguments of the parties in the present proceedings have clearly confirmed the continuance of this deadlock, compel a conclusion that no reasonable probability exists that further negotiations would lead to a settlement" (p. 345).

126. And the ICJ, having invoked the *obiter dictum* of the PCIJ in the *Mavrommatis Palestine Concessions* case (*supra*), concluded likewise, on this particular issue, that "there is no reason" why each of the parties "should go through the formality and pretence of direct negotiation with the common adversary State after they have already fully participated in the collective negotiations with the same State in opposition" (p. 346). In the Court's view,

> "it is not so much the form of negotiation that matters as the attitude and views of the Parties on the substantive issues of the question involved. So long as both sides remain adamant, (...) there is no reason to think that the dispute can be settled by further negotiations between the Parties" (p. 346).

127. One decade later, in the case of the *Appeal Relating to the Jurisdiction of the ICAO Council* (India *versus* Pakistan, Judgment of 18.08.1972), the ICJ, faced with the question of lawful action, yet "prejudicial", causing "injustice or hardship" to another party under the treaties at issue (para. 20), found that the various objections raised to its own competence could not be sustained (paras. 25-26). Subsequently, in the *Fisheries Jurisdiction* case (F.R. Germany *versus* Iceland, Judgment of 02.02.1973), the ICJ pondered that:

> "in the present case, the object and purpose of the 1961 Exchange of Notes, and therefore the circumstances which constituted an essential basis of the consent of both parties to be bound by the agreement embodied therein, had a much wider scope. That object and purpose was not merely to decide upon the Icelandic claim to fisheries

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[156]. M. Bourquin, "Dans quelle mesure le recours à des négotiations diplomatiques est-il nécessaire avant qu´un différend puísse être soumis à la juridiction internationale*?", in Hommage d´une génération de juristes au Président Basdevant*, Paris, Pédone, 1960, p. 52, and cf. pp. 45, 47-48, 52 and 54-55.

jurisdiction up to 12 miles, but also to provide a means whereby the parties might resolve the question of the validity of any further claims" (para. 32).

128. The ICJ then found that the jurisdictional obligation imposed in the 1961 Exchange of Notes remained applicable, and concluded that:

> "The compromissory clause enabled either of the parties to submit to the Court any dispute between them relating to an extension of Icelandic fisheries jurisdiction in the waters above its continental shelf beyond the 12-mile limit. The present dispute is exactly of the character anticipated in the compromissory clause of the Exchange of Notes. Not only has the jurisdictional obligation not been radically transformed in its extent; it has remained precisely what it was in 1961" (para. 43).

129. Over a decade later, in the case of the *U.S. Diplomatic and Consular Staff in Tehran* (Judgment of 24.05.1980), the ICJ pointed out that:

> "when the United States filed its Application on 29 November 1979, its attempts to negotiate with Iran in regard to the overrunning of its Embassy and detention of its nationals as hostages had reached a deadlock, owing to the refusal of the Iranian Government to enter into any discussion of the matter. In consequence, there existed at that date not only a dispute but, beyond any doubt, a 'dispute (…) not satisfactorily adjusted by diplomacy' within the meaning of Article XXI, paragraph 2, of the 1955 Treaty; and this dispute comprised, *inter alia*, the matters that are the subject of the United States' claims under that Treaty" (para. 51).

130. Shortly afterwards, in its Judgment on Jurisdiction and Admissibility (of 26.11.1984) in the case of *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua *versus* United States), the ICJ upheld the view that it did "not necessarily follow that, because a State has not expressly referred in negotiations with another State to a particular treaty as having been violated by conduct of that other State, it is debarred from invoking a compromissory clause in that treaty", namely, the 1956 Treaty of Friendship, Commerce and Navigation between Nicaragua and the United States (para. 83). Having invoked the aforementioned *obiter dictum* of the PCIJ in the case of *Certain German Interests in Polish Upper Silesia*, the ICJ concluded on this particular issue that:

> "Accordingly, the Court finds that, to the extent that the claims in Nicaragua's Application constitute a dispute as to the interpretation or the application of the Articles of the Treaty of 1956 (…), the Court has jurisdiction under that Treaty to entertain such claims" (para. 83).

131. In the same 1984 Judgment in the *Nicaragua versus United States* case, the ICJ, in asserting its own jurisdiction, discarded any pretence of erecting a "rule" of "prior exhaustion of international remedies" (in the form of regional negotiations), by an inadequate and groundless analogy with the rule of exhaustion of local or domestic remedies[157]. In the Court's words,

> "the Court is unable to accept either that there is any requirement of prior exhaustion of regional negotiating processes as a precondition to seizing the Court; or that the existence of the Contadora process constitutes in this case an obstacle to the

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[157]. For a criticism of that pretence of unwarranted analogy, in support of the Court´s decision on jurisdiction and admissibility in that case, cf. A.A. Cançado Trindade, "Nicarágua *versus* Estados Unidos (1984): Os Limites da Jurisdição `Obrigatória´ da Corte Internacional de Justiça e as Perspectivas de Solução Judicial de Controvérsias Internacionais", 37-38 *Boletim da Sociedade Brasileira de Direito Internacional* (1983-1986) pp. 71-96.

examination by the Court of the Nicaraguan Application and judicial determination in due course of the submissions of the Parties in the case. The Court is therefore unable to declare the Application inadmissible, as requested by the United States, on any of the grounds it has advanced as requiring such a finding" (para. 108).

132. In thus determining the existence of a dispute between Nicaragua and the United States as to the interpretation and application of specific Articles of the 1956 Treaty, and that it had jurisdiction to entertain the dispute at issue under Article XXIV, paragraph 2, of the Treaty, the Court kept in mind the frequency of compromissory clauses in bilateral treaties of the kind, and the fact that those clauses were intended to enable the parties to resort unilaterally to the Court if they failed to agree on another peaceful means of settlement. Two years later, in its Judgment as to the Merits (of 27.06.1986) in the same *Nicaragua versus United States* case, the ICJ, reiterating its position, added that "it would therefore be excessively formalistic to require Nicaragua first to exhaust the procedure of Article XXIV, paragraph 1, before bringing the matter to the Court" (para. 274).

133. Over a decade later, in its Judgment on Preliminary Objections (of 11.06.1998) in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria*, the ICJ categorically stated that:

"Neither in the Charter [of the United Nations] nor otherwise in international law is any general rule to be found to the effect that the exhaustion of diplomatic negotiations constitutes a precondition for a matter to be referred to the Court. No such precondition was embodied in the Statute of the Permanent Court of International Justice (…). Nor is it to be found in Article 36 of the Statute of this Court" (para. 56).

134. More recently, the point at issue again came to the fore in the *Oil Platforms* case (Iran *versus* United States, Judgment of 06.11.2003). The Court held that it had

"to take note that the dispute has not been satisfactorily adjusted by diplomacy. Whether the fact that diplomatic negotiations have not been pursued is to be regarded as attributable to the conduct of the one Party or the other is irrelevant for present purposes, as is the question whether it is the Applicant or the Respondent that has asserted a *fin de non-recevoir* on this ground. As in previous cases involving virtually identical treaty provisions [cf. *U.S. Diplomatic and Consular Staff in Tehran* (United States vs. Iran), *ICJ Reports* 1980, pp. 26-28; *Nicaragua versus United States, ICJ Reports* 1984, pp. 427-429], it is sufficient for the Court to satisfy itself that the dispute was not satisfactorily adjusted by diplomacy before being submitted to the Court" (para. 107).

135. Nowhere, from the survey above, can an inclination be inferred, on the part either of the PCIJ or the ICJ, to set up an excessive prerequisite of prior negotiations for the exercise of jurisdiction. Quite on the contrary, both the PCIJ and the ICJ have been quite clear in holding that an *attempt* of negotiation is sufficient, there being no mandatory "precondition" at all of *resolutory* negotiations for either of them to exercise jurisdiction in a case they had been seized of. The Hague Court has, in effect, throughout its history, refrained from any excessive requirement as to prior negotiations between the contending parties.

IX. Towards Peaceful Settlement with the Realization of Justice under Human Rights Treaties

136. In the present case of the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*, the Court's majority seems to overlook this *jurisprudence constante* of the Court itself, in order to set up a strict "precondition" of prior negotiation (paras. 157-159), with a very high threshold, for the exercise of jurisdiction on the basis of that human rights treaty, the CERD Convention. In trying to find support for its position, the Court's majority recalls an *obiter dictum* (p. 116) of the PCIJ in the Advisory Opinion on the *Railway Traffic between Lithuania and Poland* (1931). But, a *contrario sensu*, the *jurisprudence constante* of the Hague Court, on the point at issue, contented itself with noting that the parties had been unable to find common ground before the application was filed with it.

137. Throughout the last decades, studies undertaken on the position of the Hague Court (PCIJ and ICJ), on the verification of attempts or efforts of negotiation prior to recourse to the Court itself, have come to the conclusion that the established case-law (*jurisprudence constante*) of the Court does *not* at all lend support to the view that those prior attempts or efforts of negotiation amount to a mandatory "precondition" to the exercise of the Court's jurisdiction[158]. Quite on the contrary, compromissory clauses have been a relevant source of the Court's jurisdiction[159], and even more cogently so under some human rights treaties containing them (cf. *infra*), and pointing towards the goal of the realization of justice.

138. Notwithstanding the Court's *jurisprudence constante* (*supra*), the Court's majority regrettably set a very high threshold in the present case as to the requirement of prior negotiations. In my perception, the position of this Court along its history, on this particular issue, has favoured the access to justice *lato sensu* (i.e., including the realization of justice); the change of approach of the Court's majority in the present case opposing Georgia to the Russian Federation, not only operates to the contrary, but, furthermore, can generate a sense of judicial insecurity and can have an adverse impact on the future acceptance of the Court's compulsory jurisdiction under international treaties.

139. This is even more regrettable bearing in mind the *nature* of the treaty at issue, one of the core U.N. Conventions on human rights, the CERD Convention. One cannot lose sight of the rights and values that are at stake. Reliance on formalistic formulas, focus on State "interests" or intentions, or its "will", or other related notions, or State strategies of negotiations, should not make one lose sight of the fact that claimants of justice, and their beneficiaries, are, ultimately, human beings[160], - as disclosed by the present case brought to the cognizance of the Court.

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[158]. Cf., e.g., G. Abi-Saab, *Les exceptions préliminaires dans la procédure de la Cour internationale*, Paris, Pédone, 1967, pp. 124-125; J.I. Charney, "Compromissory Clauses and the Jurisdiction of the International Court of Justice", 81 *American Journal of International Law* (1987) pp. 870-883, and cf. pp. 859-864; S. Torres Bernárdez, "Are Prior Negotiations a General Condition for Judicial Settlement by the International Court of Justice?", *in Liber Amicorum in Memoriam of Judge J.M. Ruda* (eds. C.A. Armas Barea, J.A. Barderis *et alii*), The Hague, Kluwer, 2000, pp. 507-525.

[159]. Cf., e.g., C.J. Tams, "The Continued Relevance of Compromissory Clauses as a Source of ICJ Jurisdiction", *in A Wiser Century? Judicial Dispute Settlement, Disarmament and the Laws of War 100 Years after the II Hague Peace Conference* (eds. Th. Giegerich and U.E. Heinz), Berlin, Duncker & Humblot, 2009, pp. 471, 476, 480-481, 487-489 and 492.

[160]. Cf., to this effect, e.g., Julius Stone, *Approaches to the Notion of International Justice*, Princeton, University Press, 1970, p. 55.

140. There seems to be general awareness at present that the expansion of international jurisdiction, - illustrated, e.g., by the concomitant operation, with this Court, of international human rights tribunals, - responds and corresponds to a need of the international community nowadays, going beyond the framework of methods of peaceful settlement of international disputes (used in inter-State disputes), and giving expression to the idea of a *préeminence* of International Law[161]. This Court has to remain attentive to that, it cannot overlook the *rationale* of human rights treaties. A mechanical and reiterated search for State consent, placed above the fundamental values underlying those treaties, will lead it nowhere.

141. This Court has, on occasions, expressly acknowledged that the idea of an international *rule of law* has indeed gained ground in recent years. Suffice it here to evoke, for example, the contribution of its Advisory Opinions on *Namibia* (of 21.06.1971 - cf. *infra*), and on the *Obligation to Arbitrate by Virtue of Section 21 of the 1947 U.N. Headquarters Agreement* (of 26.04.1988). This *idée-force* has fostered the search for the realization of justice under the *rule of law* at international level, and is to be kept in mind whenever this Court is called upon to adjudicate a case on the basis of a human rights treaty.

142. May it be recalled that, in the late eighties (1988-1989), e.g., the then Soviet Union (succeeded by the Russian Federation), and some other Eastern European States, withdrew declarations they had previously made to exclude compulsory settlement of disputes in some human rights conventions celebrated during the cold-war period. This was a reassurring initiative to foster the compulsory jurisdiction of the ICJ in respect of six core human rights treaties (including the CERD Convention). In his address to the U.N. General Assembly, of 07.12.1988, the President of the (then) Presidium of the Supreme Soviet of the USSR (Mr. Mikhail Gorbachev), after invoking "the primacy of universal human values", stated that :

> "We believe that the jurisdiction of the International Court of Justice at The Hague as regards the interpretation and implementation of agreements on human rights should be binding on all States"[162].

143. Shortly afterwards, on 10.02.1989, the (then) Presidium of the Supreme Soviet of the USSR adopted, upon the suggestion of the Council of Ministers of the USSR, a decree (*ukaz*), whereby it withdrew the reservations the USSR had previously made in relevant provisions of six human rights treaties, namely: Article 22 of the CERD Convention (of central importance in the present case), Article 29(1) of the 1979 Convention on the Elimination of All Forms of Discrimination against Women (the CEDAW Convention), Article 30(1) of the 1984 U.N. Convention against Torture (the CAT Convention), Article IX of the 1948 Convention against Genocide, Article IX of the 1953

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[161]. J.-Y. Morin, "L'état de Droit: émergence d'un principe du Droit international", 254 *Recueil des Cours de l'Académie de Droit International de La Haye [RCADI]* (1995) pp. 199, 451 and 462.

[162]. U.N., doc. A/43/PV.72, of 08.12.1988, p. 26, and cf. p. 8. Shortly afterwards, a USSR memorandum, of 29.09.1989, on "Enhancing the Role of International Law", circulated in the U.N. General Assembly on 02.10.1989 (in the framework of the United Nations Decade of International Law), referred to the strenghening of the role of the ICJ as the principal judicial organ of the United Nations. Cf. U.N. doc. A/44/585, of 02.10.1989, p. 5. - On this new outlook of the primacy of the rule of law in international relations, cf. comments in, e.g., A. Gorin and P. Mishchenko, "New Political Thinking as a Philosophy and a Tool of Soviet Foreign Policy", 17 *Journal of Legislation* (1990) pp. 17-18. On the professed "priority of universal human values" in this new outlook, cf. comments in, e.g., V.S. Vereshchetin and R.A. Mullerson, "International Law in and Interdependent World", 28 *Columbia Journal of Transnational Law* (1990) pp. 292-293 and 300.

Convention on the Political Rights of Women, and Article 22 of the 1950 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others[163].

144. Moreover, the realization of justice under human rights treaties (such as the CERD Convention) can hardly be attained by a valuation of the evidence produced before the Court pursuant to a strictly inter-State outlook, singling out the strategies of international litigation of the contending parties, and overlooking the *basic rationale* of those treaties of protection of the rights of the human person. Under those treaties, peaceful settlement is coupled with the realization of justice, and this latter can hardly be achieved in a case, such as the present one, without turning attention to the sufferings and needs of protection of the population.

X. The Law and the Sufferings and Needs of Protection of the Population: *Summum Jus, Summa Injuria*

145. Regrettably, this was not done by the Court in the present case. The Court could, and should, have been particularly attentive to the sufferings and needs of protection of the population, on the basis of an assessment of the whole evidence produced before it by the contending parties themselves. Thus, in its consideration of the first and second preliminary objections in the present Judgment, the Court referred to several pieces of the vast documentation submitted to its cognizance by the Russian Federation and Georgia. Yet, it did so in the course of a reasoning which pursued an essentially inter-State, and mostly bilateral, outlook, centred on the (diplomatic) relations between the two States concerned.

146. Accordingly, one does not find, in the reasoning of the Court's majority, an in-depth examination of the pieces of the aforementioned documentation which disclose an aspect of the utmost importance to me: that of the vulnerability, if not defencelessness, of the victimized population, directly affected by the long-standing dispute[164], aggravated into an armed conflict in early August 2008, between Georgia and the Russian Federation. The present Judgment contains only *in passim* references to the sufferings endured by the victimized population, such as the reference to an agreement concluded by Georgia and the Russian Federation, as early as on 24.06.1992, which stated in the preamble that the Parties were striving for "the immediate cessation of the bloodshed" (para. 38).

147. It is beyond the purpose of my Dissenting Opinion to embark on an exhaustive analysis of that extensive documentation, as a whole, produced before the Court. Suffice it here to refer to those documents, submitted to this Court, in a commendable way, either by the Russian Federation or by Georgia, which are clearly illustrative of the aspect I single out herein, namely, that of the pain and sufferings, and the pressing needs of protection, of the silent victims of the dispute and armed conflict between Georgia and the Russian Federation. The point I here wish to make is that this aspect of the present case could not have been overlooked, especially in a case lodging with this Court on the basis of a human rights treaty like the CERD Convention.

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[163]. Cf. comments in, e.g., T. Schweisfurth, "The Acceptance by the Soviet Union of the Compulsory Jurisdiction of the ICJ for Six Human Rights Conventions", 2 *European Journal of International Law* (1990) pp. 110-117.

[164]. As it ensues from, e.g., the resolutions of the Georgian Parliament of 20.03.2002 (concerning the situation in Abkhazia), and of 11.10.2005 (concerning alleged "ethnic cleansing by third parties" in Abkhazia and South Ossetia); Georgia´s letters of 27.10.2005 to the U.N. Security Council (U.N. doc. S/2005/678), and of 10.11.2005 to the U.N. Secretary General (U.N. doc. A/60/552-S/2005/718); Georgia´s statement at the U.N. Security Council of 26.01.2006, and address at the U.N. General Assembly of 23.09.2206, followed by other manifestations of the kind, ranging from September-November 2006 to August 2008.

148. In the documentation presented to the Court by the Russian Federation, appended to its Preliminary Objections of 01.12.2009[165], are the *Concluding Observations* of the CERD Committee in respect of reports lodged with it by Russia as well as by Georgia. Thus, already in its *Concluding Observations*, of 22.03.2001, on the initial report of Georgia under the CERD Convention, the Committee *inter alia* found that:

> "Georgia has been confronted with ethnic and political conflicts in Abkhazia and South Ossetia since independence. (...) [T]he conflicts in South Ossetia and Abkhazia have resulted in discrimination against people of different ethnic origins, including a large number of internally displaced persons and refugees"[166].

149. The point was reiterated by the CERD Committee in its *Concluding Observations*, of 15.08.2005, on the second to third periodic reports of Georgia under the CERD Convention[167]. And, in its more recent *Concluding Observations*, of 13.08.2008, on the 18th and 19th periodic reports of the Russian Federation, the Committee recommended *inter alia* that:

> "the State Party undertake a thorough investigation, through an independent body, into all allegations of unlawful police conduct against Georgian nationals and ethnic Georgians in 2006 and adopt measures to prevent the recurrence of such acts in the future"[168].

150. In the documentation presented by Georgia to the Court, appended to its Memorial of 02.09.2009, and to its Written Statement (on Preliminary Objections) of 01.04.2010, there are several reports of international organizations (United Nations, Council of Europe, Organization of Security and Cooperation in Europe [OSCE], European Union)[169], as well as non-governmental organizations (Human Rights Watch, Amnesty International)[170]. The latter provide accounts of the occurrence, in the armed conflict that broke out on 07 August 2008, of deliberate and indiscriminate use of force and violence against civilians, ethnic attacks, intentional burning of homes and villages, forced displacement of persons, and other human rights and humanitarian law violations. But it is the former, - particularly the successive reports of the Monitoring Commission[171] of the Parliamentary Assembly of the Council of Europe - that provide an over-all account of the features and the pattern of violence that generated the sufferings of the population in the regions affected by the armed conflict, and the pressing needs of protection of the numerous victims.

151. Even if this particular aspect of the *cas d'espèce* goes beyond the framework of bilateral (diplomatic) inter-State relations, this Court, in my view, could not have overlooked it, at the present stage of Preliminary Objections, - even more so after its recent decision to indicate provisional measures of protection (Order of 15.10.2008) in the present case, having found that it had jurisdiction *prima facie* over the dispute at issue (para. 117). And, above all, one has to go

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[165]. Annexes 50, 63 and 70.

[166]. U.N. doc. CERD/C/304/Add.120, of 27.04.2001, paras. 3-4. It added that, "[o]n repeated occasions, attention has been drawn to the obstruction by the Abkhaz authorities of the voluntary returno f displaced populations" (*ibid*., para. 4).

[167]. Cf. U.N. doc. CERD/C/GEO/CO/3, of 27.03.2007, paras. 4-5.

[168]. U.N. doc. CERD/C/RUS/CO/19, of 20.08.2008, para. 13.

[169]. Annexes (to the Memorial) 56, 59, 60 , 62 , 71.

[170]. Annexes (to the Memorial) 150, 152, 156, 158.

[171]. I.e., the Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe.

beyond the strict inter-State (diplomatic) outlook of traditional international law, for it is generally recognized that contemporary *jus gentium* is not at all insensitive to the fate of the populations.

152. Thus, it should not pass unnoticed that the aforementioned reports of the Monitoring Commission of the Parliamentary Assembly of the Council of Europe took the care to draw attention to the living conditions of the population affected. One of them, of late April 2009, asserted :

> "the rule of customary international law that the well-being of the population in occupied areas has to be a basic concern for those involved in a conflict. (...) [T]he well-being of the population in occupied areas has to be a basic concern for those involved in a conflict (...)"[172]..

This was of great importance, - the report added, - in the light of the claims of "violations of human rights and international humanitarian Law" in the course of the war and during its aftermath[173].

153. In a previous report, of late January 2009, the Monitoring Commission reiterated this warning (paras. 1, 46, 49, 50), in face of the originally recorded - by the UNHCR[174] - 133.000 internally displaced persons in Georgia[175]. Looking back in time, to the early nineties (the conflict of 1992, which also generated forced displacement), the estimated total of displaced persons in the area, throughout the nineties, raises to 222.000 persons, according to another report, of early October 2008, of the Monitoring Committee; this report estimates that, out of the war of August 2008 in particular, of the more than 30.000 diplaced persons, 25.000 from South Ossetia and 6.000 from Abkhazia "are considered to be 'permanently' unable to return to their original place of residence"[176].

154. This report, furthermore, deplores "the human suffering" caused by the war between Georgia and Russia, and resulting in particular from alleged "patterns of ethnic cleansing" in South Ossetia[177], and other "human rights and humanitarian law violations committed by both sides in the context of the war, such as the intentional or avoidable killing or wounding of civilians, as well as destruction of property"[178]. In the course of 2009, two Committees of the Parliamentary Assembly of the Council of Europe issued reports, also focusing on the suffering of the population, ensuing from the humanitarian *consequences* of the war between Russia and Georgia.

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[172]. C.E./Parliamentary Assembly, *Follow-up Given by Georgia and Russia to Resolution 1647(2009)*, doc. 11.876, of 28.04.2009, p. 7, paras. 29-30.

[173]. *Ibib*., p. 6, para. 23.

[174]. That is, the United Nations High Commissioner for Refugees. In addition to the UNHCR, also the International Committee of the Red Cross (ICRC) received requests members of families of those displaced or missing.

[175]. C.E./Parliamentary Assembly, *Implementation of Resolution 1633 (2008) on the Consequences of the War between Georgia and Russia*, doc. 11.800, of 26.01.2009, p. 15, para. 58, and cf. pp. 2, 14-15 and 22, paras. 1, 46, 49-50 and 104.

[176]. C.E./Parliamentary Assembly, *The Consequences of the War between Georgia and Russia*, doc. 11.724, of 01.10.2008, p. 3, para. 15, and cf. also p. 13, para. 36.

[177]. *Ibid*., pp. 1 (summary) and 14-15, para. 42 and 54. In this respect, the Monitoring Committee´s report refers to "credible reports of acts of ethnic cleansing committed in Georgian villages in South Ossetia and the `buffer zone´ by irregular militia and gangs which the Russian troops failed to stop"; *ibid*., p. 1 (summary).

[178]. *Ibid*., p. 3, para. 11, and cf. also p. 16, para. 60.

155. The Monitoring Committee, in a new report, of mid-September 2009, regretted that "little tangible progress" had been achieved to address the consequences of that "tragic war": there had not been a serious investigation of the alleged "ethnic cleansing of ethnic Georgians" and perpetrators had not been brought to justice[179]. The tensions in the whole region had not been reduced, - the report added, - negatively affecting its stability and "the security of all its inhabitants"; a pressing need remained of "urgent protection of human rights and humanitarian security"[180].

156. For its part, the Committee on Migration, Refugees and Population, of the Parliamentary Assembly of the Council of Europe, in its report of early April 2009, also addressed the continuation of problems that kept on inflicting suffering on the population concerned, and its "ongoing fear" of a "renewal of hostilities" (para. 95), namely: a) detained and missing persons (paras. 39-46); b) forced displacement (para. 2); c) family reunification (paras. 25 and 45); and d) destruction of property and looting (para. 30)[181].

157. These reports were accompanied by resolutions (related to the fact-finding work of the Monitoring Committee) of the Parliamentary Assembly of the Council of Europe[182], which also referred to the sufferings of the victimized population. One of those resolutions (namely, resolution 1683 (2009), of 29.09.2009), after referring to the "tragic war" at issue (para. 1), made a cross-reference to the *Report* of the "Independent International Fact-Finding Mission on the Conflict in Georgia" (of September 2009), established by the European Union, into the origins and course of the conflict at issue (para. 2).

158. The aforementioned *Report* was also included in the documentation which Georgia presented to this Court in the course of the proceedings on the consideration of the preliminary objections interposed by the Russian Federation[183]. The *Report* began by stressing that, as a result of a decision taken by the Council of the European Union, this was "the first time in its history that the European Union has decided to intervene actively in a serious armed conflict", setting up a Fact-Finding Mission as a follow-up to the conflict (p. 2). And it went on:

> "(...) [M]ost people directly involved in the conflict remember human fates and human suffering first and foremost. The August 2008 armed conflict unfortunately saw many crimes committed in violation of International Humanitarian Law and Human Rights Law. (...)

As for the conflict in South Ossetia and adjacent parts of the territory of Georgia, the Mission established that all sides to the conflict - Georgian forces, Russian forces and South Ossetian forces - committed violations of International Humanitarian Law and Human Rights Law. (...)" (paras. 25-26).

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[179]. C.E./Parliamentary Assembly, *The War between Georgia and Russia: One Year After*, doc. 12.010, of 14.09.2009, pp. 3 and 5, paras. 1 and 9-10, and cf. also p. 2, para. 6.

[180]. *Ibid*., pp. 9 and 12, paras. 27 and 49. The report added that there was "a serious risk of a new exodus of ethnic Georgians from the Gali and Akhalgori districts"; *ibid*., p. 14, para. 64.

[181]. C.E./Parliamentary Assembly, *Humanitarian Consequences of the War between Georgia and Russia: Follow-Up Given to Resolution 1648(2009)*, doc. 11.859, of 09.04.2009, pp. 2, 8-11 and 16, paras. 2, 25, 30, 39-46 and 95.

[182]. E.g., resolution 1647 of 28.01.2009; resolution 1633 of 02.10.2008 (forced displacement, paras. 15 and 24(3)); resolution 1683 of 29.09.2009 (alleged "ethnic cleansing", para. 9).

[183]. Cf. Annexes (to Georgia´s Written Statement on Preliminary Objections, of 01.04.2010) 120 and 121.

159. The *Report* added that the Mission had found "patterns of forced displacements of ethnic Georgians who had remained in their homes after the onset of hostilities" (para. 27). The violations of the rights of the human person mainly concerned "indiscriminate attacks" and "ill-treatment of persons", forced displacement and destruction of property. As a result,

> "Adding to the severity of the situation, there was a considerable flow of internally displaced persons (IDPs) and refugees. Reportedly about 135.000 persons fled their homes, most of them from regions in and near South Ossetia. While most persons fled to other parts of Georgia, a significant number also sought refuge in Russia. The majority fled because of the dangers and the insecurity connected to the conflict situation. But also numerous cases of forced displacements in violation of International Humanitarian and Human Rights Law were noted" (para. 28).

160. As we have seen, the fact-finding reports reviewed above characterized the armed conflict of 2008 between Georgia and Russia as a "tragic war", marked, by all those who can remember it, by "human fates and human suffering" (cf. *supra*). Even earlier occurrences, well before the 2008 armed conflict, have been characterized as "tragic". Very brief references to such characterization, by Georgia, can be found in the present Judgment, in paragraph 51 ("tragic events" of 1993), paragraph 57 ("tragic events" of 1998), and paragraph 65 ("tragic results" of occurrences of 2001). Yet, this dimension - the human factor - is not at all reflected in the present Judgment of the Court, in its own assessment of the facts for the consideration of the preliminary objections raised before it.

161. As to the first preliminary objection, for example, the Court spent 92 paragraphs to concede that, in its view, a legal dispute at last crystallized, on 10 August 2008 (para. 93), only *after* the outbreak of an open and declared war between Georgia and Russia! I find that truly extraordinary: the emergence of a legal dispute only *after* the outbreak of widespread violence and war! Are there disputes which are quintessentially and onthologically *legal*, devoid of any political ingredients or considerations? I do not think so. The same formalistic reasoning leads the Court, in 70 paragraphs, to uphold the second preliminary objection, on the basis of alleged (unfulfilled) "preconditions" of its own construction, - in my view at variance with its own *jurisprudence constante* and with the more lucid international legal doctrine.

162. Under human rights treaties, the individuals concerned, in situations of great vulnerability or adversity, need a higher standard of protection; the ICJ, in the *cas d'espèce*, lodged with it on the basis of the CERD Convention, applied, contrariwise, a higher standard of State consent for the exercise of its jurisdiction. The result was the remittance by the Court of the present dispute back to the contending parties. The cries of suffering of the victims (from all sides) of the conflict between the Russian Federation and Georgia of August 2008 seemed to have echoed in the *Palais des Droits de l'Homme* in Strasbourg, on the occasion of the decision on the admissibility of the case *Georgia versus Russia*[184]: not so in the Peace Palace here at The Hague.

163. This point can be added, in my perception, to the characterization of the present case as indeed a tragic one, above all from the perspective of the victimized families and individuals. Tragedy accompanies human existence; no one can be sure to be free from it, till passing the final threshold of his or her own life secure from pain and injustice, as Sophocles (497-405 b.C.) warned in one of his plays. It is not at all surprising that his masterpieces, like those of Aeschylus (525-

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[184]. Cf. ECtHR (Fifth Section), case *Georgia versus Russia* (application n. 13255/07, decision of 30.06.2009, paras. 1-51: the ECtHR, by a majority, declared the application admissible (without prejudging the merits of the case), and joined to the merits the [quite distinct] preliminary objections raised before it.

456 b.C.) shortly before him, and of his contemporary Euripides (484-406 b.C.), keep on being represented throughout the centuries, time and time again, from the Vth. century b.C. until our days, in distinct parts of the world, and in several idioms. Their messages are endowed with contemporaneity, - duly grasped by succeeding generations along the centuries everywhere, - as they touch on the unhappiness and sufferings proper of the human condition.

164. Amidst the violence portrayed in the representations of the perennial Greek tragedies of the Vth. century b.C., there emerged a timely warning as to destiny (as in Sophocles' *Oedipus Rex*, on in his *Ajax*), as to the unforeseeable along human existence, up to its end. Rationalism and so-called "realism" attempted to put an end to tragedy, and did not succeed at all, as human existence has been accompanied, since time immemorial, by irrationality and brutality. It is not surprising to find that, from the tragedies of ancient Greece, there also emerged a yearning and search for justice (as in Euripides' *Hecuba*, or in Aeschylus' *Oresteian* Trilogy, particularly *The Eumenides*), never abandoned until our days. Ever since, attention has been turned to the dictates of human conscience, even when they clashed with the rules of the law of the *polis* (as in Sophocles' *Antigone*); this tension led, in a language gradually crystallized throughout the subsequent centuries, to the opposition of natural law - emanating from the *recta ratio* - to positive law (*jus positum*), in the longing for justice.

165. The reckoned need for justice emanates, e.g., from the rituals of tribute to the dead and the victimized. Tragedy has, furthermore, evoked the process of learning through suffering (as, once again, in Aeschylus' *Oresteian* Trilogy, particularly *Agamemnon*). Tragedy has survived rationalism and so-called "realism", and, in regretting cruel, inhuman and degrading treatment (by all means unnecessary and abominable), - unfortunately inflicted until our days, - remains endowed with manifest contemporaneity. The victims of the "tragic war" of 2008 opposing Georgia to the Russian Federation, the fatal ones and their surviving relatives, and those forcefully displaced from their homes and incapable to return freely thereto ever since, have not yet found justice... As a Member of the International Court *of Justice* (seized of the case of their concern), I cannot but deeply regret this. *Summum jus, summa injuria*.

166. In this connection, may I further recall, also in temporal perspective, that, in the tragic inter-war period of the first half of the XXth. century, one of the forerunners of the international protection of human rights (almost forgotten in our hectic days), the Russian jurist André Nicolayévitch Mandelstam, deeply regretted that the international legal order of his time accorded "une complète impunité à l'État violant les droits les plus sacrés de l'individu", and longed for a new legal order which "obligerait l'État à reconnaître" to each human being a certain "minimum of rights". In his somehow premonitory warning of 1931, he further stated:

> "L'horrible expérience de notre temps a démontré que les abus éventuels, qui pourraient naître de cette imprécision et de l'absence de sanctions, sont beaucoup moins à redouter que ceux qui résultent de la reconnaissance à l'État d'un pouvoir illimité sur la vie et la liberté de ses sujets"[185].

XI. Human Rights Treaties as Living Instruments

167. In the present Judgment on preliminary objections, the Court upholds the second preliminary objection relying upon its own strictly textual or grammatical reasoning relating to the compromissory clause (Article 22) of the CERD Convention (para. 135). Nowhere does one find considerations of a contextual nature, or else a reasoning that at least attempts to link such

[185]. A.N. Mandelstam, *Les droits internationaux de l´homme*, Paris, Éds. Internationales, 1931, p. 138.

compromissory clause to the object and purpose of the CERD Convention, taking into account the substance and nature of the Convention *as a whole*. Nowhere does the Court consider the historical importance of the CERD Convention as a pioneering human rights treaty, and its continuing contemporaneity for responding to new challenges that are of legitimate concern of humankind, for the purpose of interpreting the compromissory clause contained therein.

168. Moreover, the reasoning of the Court appears to me as a static one, attempting to project into our days what the Court's majority *imagines* were the intentions of the draftsmen of the Convention (or of some of them) almost half a century ago, on the basis of a textual or grammatical argument. The Court notes that, "at the time" when the CERD Convention "was being elaborated, the idea of submitting to the compulsory settlement of disputes by the Court was not readily acceptable to a number of States" (para. 147). The Court then attempts to extract consequences therefrom, so as to advance today, in 2011, a reasoning that freezes or ossifies international law in the present domain of protection of the human person, that hinders its progressive development, and - ununderstandably - that limits its own jurisdiction!

169. Nowhere does the Court refer to the actual application that the CERD Convention has had in practice, throughout the last decades, so as to fulfill its object and purpose to the benefit of millions of human beings. Nowhere does the Court recognize that the CERD Convention, - like other human rights treaties, - is a *living* instrument, which has acquired a life of its own, independently from the assumed "intentions" of its draftsmen almost half a century ago. Even within the static outlook of the Court, already at the time the CERD Convention was being elaborated, there were those - as I have already indicated (cf. *supra*) - who supported the compulsory settlement of disputes by this Court, and even more so today, in 2011, in respect of obligations under the CERD Convention, and other human rights treaties.

170. May I here recall that, one and a half decades before the adoption of the CERD Convention, in his Dissenting Opinion in the *Anglo-Iranian Oil Company* case before the ICJ (Preliminary Objections, Judgment of 22.07.1952), Judge Alejandro Álvarez criticized traditional methods of treaty interpretation based on strict adherence to the letter of treaties (seen with an assumed "everlasting and fixed character") and too much reliance on "rules of grammar" without regard to the convention "as a whole" (p. 125). In his view,

> "it is necessary to avoid slavish adherence to the literal meaning of legal or conventional texts (...). The important point is (...) to have regard above all to the *spirit* of such documents, to the intention of the parties in the case of a treaty, as they emerge from the institution or convention as a whole, and indeed from the new requirements of international life. (...) [A] convention, once established, acquires a life of its own and evolves not in accordance with the ideas or the will of those who drafted its provisions, but in accordance with the changing conditions of the life of peoples" (p. 126).

171. In addition, Judge A. Álvarez warned that, in his view, it was also:

> "necessary to have recourse to the *spirit* of the Charter of the United Nations, of which the Statute of the Court forms an integral part (...), and to the general principles of the law of nations. (...)
>
> (...) [T]he present Court is, according to its Statute, a Court of *justice* and, as such, and by virtue of the dynamism of international life, it has a double task: to *declare* the law and to *develop* the law" (pp. 131-132).

172. This applies even more forcefully in respect of human rights treaties, which are living instruments, and accompany the evolution of times and of the social *milieu* wherein are exercised the protected rights, so as to respond to new needs of protection of the human person. Their dynamic or evolutive interpretation finds expression in international case-law. A *locus classicus* in this respect can be found in the Advisory Opinion of the ICJ on *Namibia* (1971), wherein it is asserted that the mandates system (territories under mandate), and in particular the concepts incorporated into Article 22 of the Covenant of the League of Nations, "were not static, but were by definition evolutionary". And the ICJ significantly added that :

> "its interpretation cannot remain unaffeccted by the subsequent development of the law, through the Charter of the United Nations and by way of customary law. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation. In this domain, as elsewhere, the *corpus juris gentium* has been considerably enriched, and this the Court, if it is faithfully to discharge its functions, may not ignore" (para. 53).

173. In the same line of reasoning, in the domain of the international protection of human rights, in the case *Tyrer versus United Kingdom* (Judgment of 25.04.1978), the ECtHR asserted that the European Convention of Human Rights is “a living instrument” to be interpreted in the light of current living conditions (para. 31). The ECtHR pursued the same approach in other Judgments in leading cases, such as those of *Airey versus Irlanda* (of 09.10.1979), of *Marckx versus Belgium* (of 13.06.1979), of *Dudgeon versus United Kingdom* (of 22.10.1981).

174. The ECtHR has been pursuing this approach until the present time. Such evolutive interpretation bears witness of the incidence of the *temporal dimension* in the work of legal interpretation. In its Judgment of 28.07.1999, in the *Selmouni versus France* case, - to evoke another example, - after reiterating that the Convention is “a living instrument”, that ought to be interpreted “in the light of present-day conditions”, the European Court added that :

> “the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies” (para. 101).

175. More recently, to the same effect, the ECtHR has reiterated its approach, *ipsis literis*, in its Judgment of 07.01.2010 in the case of *Rantsev versus Cyprus and Russia* (para. 277). Already years earlier, the ECtHR duly clarified that its evolutive interpretation is not limited to the substantive norms of the Convention, but that it extends likewise to operational provisions such as the optional clauses (as existing prior to the entry into force of Protocol n. 11 to the Convention, on 01.11.1998).

176. Thus, in the case *célèbre* of *Loizidou versus Turkey* (Preliminary Objections, 1995), the ECtHR again pointed out that the European Convention, as “a constitutional instrument of European public order” (para. 75), is "a living instrument” to be interpreted in the light of contemporary conditions. It added that not even the (then) optional clauses - on the acceptance of the right of individual petition (Article 25) and the Court’s compulsory jurisdiction (Article 46) -

could be interpreted only in the light of what could have been the intentions of their draftsmen more than forty years earlier[186].

177. The same understanding has been advanced, in the American continent, by the IACtHR, which espoused, likewise, this evolutive interpretation, of the American Convention on Human Rights, in, e.g., its Judgment (of 18.08.2000) in the case of *Cantoral Benavides versus Peru* (para. 99). And, in its pioneering Advisory Opinion n. 16, on *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* (of 01.10.1999), after evoking (para. 113) the Advisory Opinion of the ICJ on *Namibia* of 1971, as well as the relevant case-law of the ECtHR, the IACtHR stated that :

> "(...) human rights treaties are living instruments whose interpretation ought to accompany the evolution of times and the current living conditions.
>
> The *corpus juris* of international human rights law comprises a set of international instruments of varied contents and juridical effects (treaties, conventions, resolutions and declarations). Its dynamic evolution has exercised a positive impact on international law, in the sense of affirming and developing the aptitude of this latter to regulate the relations between States and the human beings under their respective jurisdictions. Accordingly, this Court ought to adopt an adequate approach to consider the question under examination in the framework of the evolution of the fundamental rights of the human person in contemporary international law" (paras. 114-115).

178. Earlier on, in its Advisory Opinion n. 10 (of 14.07.1989), the IACtHR pointed out that it would proceed to interpret the 1948 American Declaration on the Rights and Duties of Man not in the light of what was thought of it in 1948, at the time of its adoption, but "in the present moment, in face of what is today the inter-American system" of protection, taking into account the "evolution experienced since the adoption of the Declaration" (para. 37). Thus, the interpretation pursued by the ECtHR and the IACtHR of the respective human rights treaties is not a static one, clinging to State consent expressed at the time of their adoption, but rather evolutive, taking into consideration the advances achieved in the *corpus* of human society in the protection of human rights throughout the years.

179. The present case before the ICJ concerns the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*. The CERD Convention is, likewise, a living instrument. I t is a truly pioneering human rights treaty, having preceded in time the two 1966 U.N. Covenants on Human Rights. Historical accounts give notice of the "enthusiasm" and high expectations with which the CERD Convention's coming into being "was greeted"[187]. Its draftsmen kept in mind, *inter alia*, the ground-breaking provisions of the 1948 Universal Declaration of Human Rights, to the point of making them part of the law of the CERD Convention

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[186]. The ECtHR pondered that even if their intentions had been in the sense of permitting restrictions (other than those *ratione temporis*) under those optional clauses - what in the case was not demonstrated, - this element would not have been decisive (para. 71); on the contrary, the practice of the States Parties along the years pointed in the sense of the acceptance without restrictions of the aforementioned optional clauses of the Convention.

[187]. Egon Schwelb, "The International Convention on the Elimination of All Forms of Racial Discrimination", 15 *International and Comparative Law Quarterly* (1966) p. 997.

itself, thus conceived as a "maximalist" human rights treaty[188]. The CERD Convention, endowed with universality[189], was soon to occupy a prominent place in the *law of the United Nations* itself.

180. Ever since its adoption, the CERD Convention faced and opposed a grave violation of an obligation of *jus cogens* (the absolute prohibition of racial discrimination), generating obligations *erga omnes*, and it exerted influence on subsequent international instruments at universal (U.N.) level[190]. Throughout the years, its international supervisory organ, the CERD Committee, has given its contribution to the contemporary *corpus juris gentium* on equality and non-discrimination[191]. The fundamental principle of equality and non-discrimination was propounded, in one of the rare moments or glimpses of lucidity of the XXth. century, by the 1948 Universal Declaration of Human Rights, and echoed in all quarters of the world:

> "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood" (Article 1).

This principle lies in the foundations, is one of the pillars, not only of the CERD Convention, but of the whole International Law of Human Rights[192]; it belongs, in my view, to the realm of international *jus cogens*.[193]

181. As a result of the present Judgment of the Court in the case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*, wherein it upheld the second preliminary objection, the Court deprived itself of the determination whether the present dispute, - which has victimized so many people, - falls or not under the CERD Convention. I firmly disagree with the whole reasoning of the Court, and its conclusions as to the second preliminary objection, and as to its jurisdiction, on the basis of the arguments and elements set forth in the present Dissenting Opinion. The unfortunate outcome of the present case discloses that, despite all the advances achieved for human dignity under the CERD Convention, there is still a long way to go: the struggle for the prevalence of human rights is never-ending, like in the myth of Sisyphus.

182. This, in turn, endows the CERD Convention, as a living instrument, adopted four and a half decades ago, with an all-enduring contemporaneity. Ever since the adoption of the CERD Convention on 21.12.1965, and its opening to signature on 07.03.1966, two World Conferences to Combat Racism and Racial Discrimination were held, in Geneva, in 1978 and 1983. One decade later, the final documents of the II World Conference on Human Rights (1993), - the Vienna Declaration and Programme of Action, - stated that:

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[188]. *Ibid*., pp. 1024 and 1057, and cf. pp. 998, 1003, 1025-1026 and 1028.

[189]. N. Lerner, *The U.N. Convention on the Elimination of All Forms of Racial Discrimination*, Alphen aan den Rijn, Sijthoff & Noordhoff, 1980, pp. IX and 11.

[190]. Cf. N. Lerner, *Group Rights and Discrimination in International Law*, 2nd. ed., The Hague, Nijhoff, 2003, pp. 59, 71 and 177.

[191]. Cf., *inter alia*, e.g., W. Vandenhole, *Non-Discrimination and Equality in the View of the U.N. Human Rights Treaty Bodies*, Antwerpen, Intersentia, 2005, pp. 1-293; and, as to the normative level, cf., e.g., J. Symonides (ed.), *The Struggle against Discrimination*, Paris, UNESCO, 1996, pp. 3-313.

[192]. Cf., to this effect, *inter alia*, T. Opsahl, *Law and Equality*, Oslo, Ad Notam Gyldendal, 1996, pp. 167-176.

[193]. IACtHR, Advisory Opinion n. 18 (of 17.09.2003), on the *Juridical Condition and Rights of Undocumented Migrants*, paras. 97-101, and Concurring Opinion of Judge A.A. Cançado Trindade, paras. 65-89.

" (…) The speedy and comprehensive elimination of all forms of racism and racial discrimination, xenophobia and related intolerance is a priority tast for the international community. (…)

(…) The World Conference on Human Rights emphasizes the importance of giving special attention, including through intergovernmental and humanitarian organizations, and finding lasting solutions, to questions related to internally displaced persons including their voluntary and safe return and rehabilitation. (…)

(…) The World Conference on Human Rights calls on all States to take immediate measures, individually and collectively, to combat the practice of ethnic cleansing to bring it quickly to an end. Victims of the abhorrent practice of ethnic cleansing are entitled to appropriate and effective remedies"[194].

183. The CERD Convention seems to grow in importance if we consider that it applies to distinct kinds of relations, not only to those of individuals *vis-à-vis* the public power of the State, but also to inter-individual or inter-group relations. Also significant is the fact that it addresses situations affecting individuals or groups living – or surviving – in considerable vulnerability or adversity. In any case, the relations it purports to regulate go well beyond the strictly inter-State dimension, - a point which this Court appears to experience much difficulty to grasp. This Court has to accompany the evolving international law in this domain of protection, when called upon to adjudicate cases under human rights treaties, like the present one.

184. Eight years after the adoption of the 1993 Vienna Declaration and Programme of Action by the II U.N. World Conference on Human Rights (so present in my personal memories), it was then the turn of the 2001 World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (Durban, 2001) to urge States, in its adopted Declaration, to accede to the CERD Convention "as a matter of urgency, with a view to universal ratification by the year 2005" (para. 75)[195]. This call promptly repercuted in the U.N. General Assembly itself[196], and in the work of the CERD Committee[197].

185. The Durban Declaration and Programme of Action underlined the urgency of "addressing the root causes of displacement" and of finding durable solutions to it (para. 54), and called for access to justice – on a basis of equality – for "victims of discrimination" and "the most vulnerable groups" (paras. 42 and 164(f)). Furthermore, it reiteratedly evoked the human "tragedies of the past" (paras. 98-101 and 106), and some "appalling tragedies in the history of humanity" (para. 13), so as to extract lessons therefrom in order "to avert future tragedies" (para. 57). The work of the 2001 U.N. World Conference seems to have been undertaken under the shadows and fears of the everlasting human tragedy, proper of the human condition itself.

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[194]. Paras. I.15, I.23 and II.24, respectively, and cf. also para. I.28 (part I corresponds to the Vienna Declaration, and part II to the Programme of Action).

[195]. May it be recalled that the Russian Federation [then the USSR] became Party to the CERD Convention on 04.02.1969, whilst Georgia did so three decades later, on 02.06.1999.

[196]. Cf., e.g., General Assembly resolutions 61/149, of 19.12.2006, and 62/220, of 22.12.2007, on the comprehensive implementation of, and follow-up to, the Durban Declaration and Programme of Action, in the endeavours towards the elimination of all (including new) forms of racial discrimination and related intolerance, including *de facto* segregation.

[197]. The CERD Committee´s "general recommendation" XXVIII, of 19.03.2002, for example, pointed out that the Durban Declaration and Programme of Action reaffirmed the "fundamental values" underlying the CERD Convention, and was directly related to the implementation of this latter.

XII. A Recapitulation: Concluding Observations

186. From all the preceding considerations, it is crystal clear that my own position, in respect of all the points which form the object of the present Judgment on the case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*, stands in clear opposition to the view espoused by the Court's majority. And it does not squarely fit into the conceptual framework of the dissenting minority group either, it goes beyond it. My dissenting position is grounded not only on the assessment of the evidence produced before the Court, to which I of course attribute importance, but above all on issues of principle, to which I attach even greater importance. I have thus felt obliged, in the faithful exercise of the international judicial function, to lay the foundations of my dissenting position in the *cas d'espèce* in the present Dissenting Opinion. I deem it fit, at this stage, to recapitulate all the points of my dissenting position, expressed herein, for the sake of clarity, and in order to stress their interrelatedness.

187. *Primus*: Consideration of compromissory clauses, such as the one of Article 22 of the CERD Convention, cannot be dissociated from the larger framework of the compulsory jurisdiction of the Hague Court (PCIJ and ICJ). *Secundus*: As to the genesis of the matter, the 1920 Advisory Committee of Jurists was clearly in favour of compulsory jurisdiction, which found an obstacle in the distinct position taken by the political organs of the League of Nations: hence the amended jurisdictional clause, and the following co-existence of the optional clause and the compromissory clauses of various kinds as basis for the exercise of compulsory jurisdiction by the Hague Court.

188. *Tertius*: Such co-existence of compromissory clauses with the mechanism of the optional clause was maintained by the 1945 San Francisco Conference, despite the acknowledgement of the 1945 Commission of Jurists's preference for the establishment of the ICJ's compulsory jurisdiction; the force of inertia then prevailed. *Quartus*: The ensuing State practice disclosed the dissatisfaction of international legal doctrine with the States' reliance on their own terms of consent in approaching the optional clause, accompanied by greater hope that compromissory clauses would contribute more effectively to the realization of international justice.

189. *Quintus*: From the fifties to the eighties international legal doctrine endeavoured to overcome the vicissitudes of the "will" of States and to secure broader acceptance of the World Court's compulsory jurisdiction, on the basis of compromissory clauses. *Sextus*: Subsequently (from the late eigthies onwards), a more lucid trend of international legal doctrine continued to pursue the same old ideal, relating the compromissory clauses at issue to the *nature* and *substance* of the corresponding treaties; such legal thinking benefitted from the gradual accumulation of experience in the interpretation and application of human rights treaties, such as the CERD Convention in the present case.

190. *Septimus*: The advent of human rights treaties contributed to enrich the contemporary *jus gentium*, in enlarging its aptitude to regulate relations not only at inter-State level, but also at *intra*-State level, as acknowledged in the present case by the contending parties themselves (Georgia and the Russian Federation), in the responses they provided to a question I deemed it fit to put to both of them at the end of the public sitting before this Court of 17 September 2010. *Octavus*: In the present case, the contending parties themselves have thus duly taken into account the *nature* of the human rights treaty at issue, the CERD Convention; only the Court has not.

191. *Nonus*: The hermeneutics of human rights treaties, faithful to the general rule of interpretation *bona fides* of treaties (Article 31(1) of the two Vienna Conventions on the Law of

Treaties, of 1969 and 1986), bears in mind the three component elements of the text in the current meaning, the context, and the object and purpose of the treaty at issue, *as well as* the *nature* of the treaty wherein that clause (optional or compromissory) for compulsory jurisdiction appears. *Decimus*: Underlying the general rule of treaty interpretation is the principle *ut res magis valeat quam pereat* (the so-called *effet utile*) whereby States Parties to human rights treaties ought to secure to the conventional provisions *the appropriate effects* at domestic law level; this principle applies not only in relation to *substantive* norms of those treaties, but also in relation to *procedural* norms, such as the one pertaining to the acceptance of the compulsory jurisdiction in contentious matters of the international judicial organs of protection.

192. *Undecimus*: International human rights case-law has constantly stressed that provisions of human rights treaties be interpreted in a way to render the safeguard of those rights *effective*; in this connection, Article 22 of the CERD Convention does not set forth any mandatory "preconditions" for recourse to the ICJ. *Duodecimus*: To set forth such "preconditions" where they do not exist, amounts to erecting an undue and groundless obstacle to access to justice under a human rights treaty. *Tertius decimus*: In its own *jurisprudence constante* (of both the PCIJ and the ICJ), the Court has clarified that prior negotiations are not a mandatory precondition for the exercise of its jurisdiction.

193. *Quartus decimus*: In the present case, the Court diverted from its own *jurisprudence constante*, in erecting a precondition of the kind, unduly limiting its own jurisdiction. *Quintus decimus*: Moreover, in the present case, in its earlier Order on Provisional Measures of 15.10.2008, the ICJ had reiterated its prior understanding to the effect that previous negotiations did not amount to a mandatory precondition for the exercise of its jurisdiction; it could not thus proceed now to review entirely its own *res interpretata* (keeping in mind the principle *venire contra factum/dictum proprium non valet*).

194. *Sextus decimus*: The Court has to remain attentive to the *basic rationale* of human rights treaties, since to place State consent above the fundamental values those treaties embody will lead it nowhere. *Septimus decimus*: The realization of justice under a human rights treaty, in a case like the present one, can only be achieved taking due account and valuing the sufferings and needs of protection of the population. *Duodevicesimus*: State consent plays its role when a State becomes a party to a treaty; it is not, however, an element of treaty interpretation.

195. *Undevicesimus*: Human rights treaties are *living* instruments to be interpreted in the light of current living conditions, so as to respond to new needs of protection of human beings. *Vicesimus*: This applies even more forcefully in respect of a treaty like the CERD Convention, centered on the fundamental principle of equality and non-discrimination, which belongs, in my view, to the realm of international *jus cogens*. *Vicesimus primus*: In contemporary *jus gentium*, the conditions of living of the population has become a matter of legitimate concern of the international community as a whole, and contemporary *jus gentium* is not indifferent to the sufferings of the population. *Vicesimus secundus*: Given the truly irreparable damages inflicted upon human beings by means of grave violations of human rights and of International Humanitarian Law, judicial recognition of their victimization is an imperative of justice, which comes at least to *alleviate* their sufferings.

196. This is not the end of the matter. All this brings to the fore an old dilemma, with a direct bearing on the present and future of international justice. This old dilemma cannot here be revisited on the basis of old dogmas, erected in times past which no longer exist, on the basis of notions of the "will" of the State, or its "interests" or intentions. To insist on such dogmas would present no dilemma, as it would lead to the freezing or ossification of International Law. There is

nothing more alien or antithetical to human rights protection than such dogmas. The dilemma we still face today can only be revisited, in my perception, in the framework of contemporary *jus gentium*.

XIII. Epilogue: An Old Dilemma Revisited, in the Framework of Contemporary *Jus Gentium*

197. As a result of the present Judgment on Preliminary Objections in the *cas d'espèce*, the Court ends up by remitting the present dispute back to the contending parties, for its settlement by whatever other means, political or otherwise, they may wish to take or use. The Court has thereby deprived itself, *inter alia*[198], of the determination, at a possible subsequent merits stage, of whether or not the occurrences referred to in the complaint lodged with it, which caused so many victims, fall or not under the provisions of the relevant provisions of the CERD Convention. The present decision undermines the appropriate effects of the CERD Convention (including its compromissory clause in Article 22) and the compulsory jurisdiction of the Court itself thereunder.

198. The Court cannot remain hostage of State consent. It cannot keep displaying an instinctive and continuing search for State consent, - as it so ostensibly did in its decisions, e.g., in the *East Timor* case (Portugal *versus* Australia, Judgment of 30.06.1995), and in the case of *Armed Activities on the Territory of the Congo* (Congo *versus* Rwanda, Judgment of 03.02.2006), - to the point of losing sight of the imperative of realization of justice. The moment State consent is manifested is when the State concerned decides to become a party to a treaty, - such as the human rights treaty in the present case, the CERD Convention. The hermeneutics and proper application of that treaty cannot be continuously subjected to a recurring search for State consent. This would unduly render the letter of the treaty dead, and human rights treaties are meant to be living instruments, let alone their spirit.

199. It is widely known that the founding fathers of the law of nations (the *droit des gens*) never visualized the individual consent of the emerging States as the *ultimate* source of their legal obligations. This point was aptly grasped, e.g., by James L. Brierly, in his thematic course delivered at The Hague Academy of International Law in 1928. He recalled, in his sharp criticism of positivist dogmas, that Hugo Grotius, for example, acknowledged that mere consent could never be the *ultimate* source of legal obligations; a contract or a treaty (at domestic or international law levels), had binding effects on the parties by virtue of the underlying general rule of law of *pacta sunt servanda*[199].

200. Three decades later his course was republished, in book form, of the kind of "collected papers", wherein J.-L. Brierly's view appeared reiterated. He first reviewed the understanding of the basis of obligation in international law in the distinct theories of some of his main predecessors and contemporaries (e.g., L. Duguit's *notion of solidarity*, H. Krabbe's *sense of right*, H. Kelsen's (hypothetical) *fundamental norm*, A. Verdross's idea of *objective justice*), before expounding his own. To J.-L. Brierly, more fundamental than the distinction between law and ethics is their interrelationship: obligation in general belongs to the realm of ethics, it has to do with an objective legal order, and the search for its basis takes us onto a metajuridical plane. He ended up by

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[198]. The Court further deprived itself, as a result of its decision in the *cas d´espèce*, of addressing the relevant question, also raised before it (in another preliminary objection), of the extra-territorial application of human rights treaties, on which there is already a growing and significant international case-law, proper of our times, heralding the advent of the new *jus gentium*, centered on the protection of the human person.

[199]. J.-L. Brierly, "Le fondement du caractère obligatoire du Droit international", 23 *Recueil des Cours de l´Académie de Droit International de La Haye* (1928) pp. 478-479.

expressing his belief that the "resurgence" of natural law thinking "seems to open a vista full of hope for legal science"[200].

201. James Brierly and his predecessors and contemporaries (such as L. Duguit, H. Krabbe, H. Kelsen, A. Verdross, among others**)** lived in a time when a respectful segment of international legal doctrine was still attentive to the issue of the *foundations* of our discipline and the *validity* of international legal obligations. International legal scholars in those days had more time to devote themselves to the fulfillment of the needs of the spirit; their energies were not yet diverted to, or consumed by, the distractions of the ages of television and internet. Modernity and post-modernity, with their characteristic pragmatism, seem to have obscured the goal of fulfillment of those needs, and to have left most people today apparently looking far too busy all the time, doing nothing substantial, certainly not thinking.

202. The outcome of the present case before the ICJ, concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*, is the ineluctable consequence of inaptly and wrongfully giving pride of place to State consent, even above the fundamental values at stake, underlying the CERD Convention, which call for the realization of justice. In effect, the faith in the realization of international justice has been restated time and time again, along the history of this Court. In concluding this Dissenting Opinion, I allow myself to recall, in this connection, statements made, in the Hague Court, on three historical occasions. At the inaugural sitting of the PCIJ, on 15.02.1922, the Court's President, Judge B.C.J. Loder, declared that the Hague Court just established:

> "occupe dans la Société des Nations une place analogue à celle du pouvoir judiciaire dans beaucoup d'États. (...)
>
> (...) La création de la Cour Permanente marque, en effet, l'avènement d'une ère nouvelle dans la civilisation mondiale. Il est de première importance de se rendre parfaitement compte de la valeur de ce fait. (...)
>
> (...) L'égalité des États devant le droit et la justice est maintenant reconnue et franchement enregistrée dans le Pacte de la Société des Nations. (...) Le premier acte de cette Société a été de créer une Cour de Justice, une Cour appelée à faire droit, droit entre des États"[201].

203. Over two decades later, at the inaugural sitting of the ICJ, on 18.04.1946, the Court's President, Judge J.G. Guerrero, recalling the period of the II world war, declared:

> " (...) I shall never forget that day - July 16th, 1940 - when, in the early hours of a morning veiled with a mist of sadness and grief, we slowly left the station of this martyred city, with tears in our eyes and our hearts full of anguish. (...)
>
> (...) The place of this Permanent Court of International Justice, which left The Hague in 1940, is now taken by the International Court of Justice. But between the old and the new Courts the bonds have remained so close that it is hard to believe that there has really been a change. (...)

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[200]. J.-L. Brierly, *The Basis of Obligation in International Law and Other Papers*, Oxford, Clarendon Press, 1958, p. 67, and cf. pp. 10, 16, 18, and 64.

[201]. CPJI, *Discours présidentiel prononcé à l´occasion de l´ouverture solonelle de la Cour Permanente de Justice Internationale par M. le Dr. B.C.J. Loder, Président de la CPJI* , La Haye, 15.02.1922, pp. 7, 16 and 18 (from the ICJ archives).

> For this reason, though the International Court of Justice is one of the principal organs of the United Nations Organization, its Statute is based on that of the Permanent Court of International Justice. (...) We shall preserve its continuity (...). The activities of the Court (...) will be dependent on the readiness of governments to refer to the international jurisdiction disputes capable of judicial settlement (...)"[202].

204. On the occasion of the 50th anniversary of the inauguration of the international judicial system, over two and a half decades later, at a special sitting of the ICJ, on 27.04.1972, the Court's President, Judge M. Zafrulla Khan, observed that the optional clause of acceptance of compulsory jurisdiction had

> "achieved a reconciliation between the desires of those who sought to achieve a full system of compulsory jurisdiction at the international level, and the scruples and hesitations of those who were afraid that compulsory submission to the Tribunal might involve infringement of sovereignty or injury to the vital interests of a State. (...)
>
> (...) [T]he conditions of international life today render indispensable the existence and operation of an international tribunal or tribunals for the maintenance of peace. (...)
>
> (...) The Court must apply the law and cannot change it; but in applying the law the Court must interpret it and also take note of changes and developments in the law. This process is a powerful factor of progress. (...)
>
> (...) The lesson to be drawn from 50 years experience of the international judicial system is that at the present stage of development of the international community, recourse to a tribunal for the settlement of international disputes is essential (...). The International Court of Justice lays no claim to a monopoly of international judicial settlement; Article 95 of the United Nations Charter expressly preserves the right of Members of the United Nations to entrust a solution of their differences to other tribunals.
>
> (...) The Court is the judge for and over sovereign States only in so far as they choose; but States which choose not to submit to its jurisdiction must face the judgment none of us can avoid: the judgment of history"[203].

205. It is high time for the World Court to give concrete expression, - keeping in mind those statements of faith in the realization of international justice, - of commitment to its mission, as I perceive it, when resolving cases, like the present one concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*, in the exercise of its jurisdiction on the basis of human rights treaties, bearing in mind the *rationale*, the nature and substance of those treaties, with all the juridical consequences that ensue therefrom. This Court cannot keep on privileging State consent above everything, time and time again, even after such consent has already been given by States at the time of ratification of those treaties.

206. The Court cannot keep on embarking on a literal or grammatical and static interpretation of the terms of compromissory clauses enshrined in those treaties, drawing "preconditions" therefrom

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[202]. ICJ, *Inaugural Sitting of the International Court of Justice* (Speech by H.E. Mr. J.G. Guerrero, President of the Court), The Hague, 18.04.1946, pp. 16-17 (from the ICJ archives).

[203]. ICJ, *Address by the President of the International Court of Justice [, Judge M. Zafrulla Khan,] at a Special Sitting of the Court to Mark the 50th Anniversary of the Inauguration of the International Judicial System*, The Hague, 27.04.1972, pp. 5, 7, 10 and 12-13 (from the ICJ archives).

for the exercise of its jurisdiction, in an attitude remindful of traditional international arbitral practice. When human rights treaties are at stake, there is need, in my perception, to overcome the force of inertia, and to assert and develop the compulsory jurisdiction of the ICJ on the basis of the compromissory clauses contained in those treaties.

207. After all, it is human beings who are ultimately being protected thereunder, and such compromissory clauses are to be approached in their ineluctable relationship with the *nature* and *substance* of the human rights treaties at issue, in their entirety. From the standpoint of the *justiciables*, the subjects (*titulaires*) of the protected rights, compromissory clauses such as that of Article 22 of the CERD Convention are directly related to their *access to justice*, even if the complaints thereunder are lodged with the ICJ by States Parties to those human rights treaties.

208. The *justiciables* are, ultimately, the human beings concerned. From this humanist optics, which is well in keeping with the creation itself of the Hague Court (PCIJ and ICJ), to erect a mandatory "precondition" of prior negotiations for the exercise of the Court's jurisdiction amounts to erecting, in my view, a groundless and most regrettable obstacle to justice. I have already pointed out, in respect of the victims of the "tragic war" of 2008 opposing Georgia to the Russian Federation - the fatal victims and their close relatives as well as those forcefully displaced from their homes and incapable of freely and safely returning thereto, - that tragedy has kept its contemporaneity throughout the centuries (paras. 160-162).

209. Despite the extraordinary advances in scientific knowledge, no antidote has yet been discovered to protect man against himself, against his limitless capacity to inflict injustice and suffering upon his fellow human beings. The ICJ cannot remain indifferent to such injustice of "human fates", and to human suffering. It cannot keep on overlooking tragedy. As this latter persists, being seemingly proper to the human condition, the need also persists to *alleviate* human suffering, by means of the *realization of justice*. This latter is an imperative which the World Court is to keep in mind. This goal - the realization of justice - can hardly be attained from a strict State-centered voluntarist perspective, and a recurring search for State consent. This Court cannot, in my view, keep on paying lip service to what it assumes as representing the State's "intentions" or "will".

210. The position and the thesis I sustain in the present Dissenting Opinion is that, when the ICJ is called upon to settle an inter-State dispute on the basis of a human rights treaty, it is bound to secure a proper interpretation and application of that treaty, bearing in mind its special nature and its substance, in its entirety, and the fact that it is intended to protect rights of the human person at *intra*-State level. The proper interpretation of human rights treaties (in the light of the canons of treaty interpretation of Articles 31-33 of the two Vienna Conventions on the Law of Treaties, of 1969 and 1986) covers, in my understanding, their *substantive as well as procedural provisions*, thus including a provision of the kind of the compromissory clause set forth in Article 22 of the CERD Convention. This is to the ultimate benefit of human beings, for whose protection human rights treaties have been celebrated, and adopted, by States. The *raison d'humanité* prevails over the old *raison d'État*.

211. In the present Judgment, the Court entirely missed this point: it rather embarked on the usual exaltation of State consent, labelled, in paragraph 110, as "the fundamental principle of consent". I do not at all subscribe to its view, as, in my understanding, consent is not "fundamental", it is not even a "principle". What is "fundamental", i.e., what lays in the *foundations* of this Court, since its creation, is the imperative of the *realization of justice*, by means of compulsory jurisdiction. State consent is but a rule to be observed in the exercise of compulsory jurisdiction for the realization of

justice . It is a means, not an end, it is a procedural requirement, not an element of treaty interpretation; it surely does not belong to the domain of the *prima principia*. This is what I have been endeavouring to demonstrate in the present Dissenting Opinion.

212. Fundamental principles are those of *pacta sunt servanda*, of equality and non-discrimination (at substantive law level), of equality of arms (*égalité des armes* – at procedural law level). Fundamental principle is, furthermore, that of humanity (permeating the whole *corpus juris* of International Human Rights Law, International Humanitarian Law, and International Refugee Law). Fundamental principle is, moreover, that of the dignity of the human person (laying a foundation of International Human Rights Law). Fundamental principles of international law are, in addition, those laid down in Article 2 in the Charter of the United Nations[204].

213. These are some of the true *prima principia*, which confer to the international legal order its ineluctable axiological dimension. These are some of the true *prima principia*, which reveal the values which inspire the *corpus juris* of the international legal order, and which, ultimately, provide its foundations themselves. *Prima principia* conform the *substratum* of the international legal order, conveying the idea of an *objective* justice (proper of natural law). In turn, State consent does not belong to the realm of the *prima principia*; recourse to it is a concession of the *jus gentium* to States, is a rule to be observed (no one would deny it) so as to render judicial settlement of international disputes viable.

214. Such rule or procedural requirement will be reduced to its proper dimension the day one realizes that *conscience stands above the will*. This sums up an old dilemma (faced by the Court as well as by States appearing before it), revisited herein, in the framework of contemporary *jus gentium*. To this Court, conceived as an International Court of *Justice*, the *realization of justice* remains an ideal which, in the adjudication of human rights cases brought into its cognizance, has not yet been achieved, - as sadly disclosed by the present Judgment. The formalism and rituals of inter-State litigation (which in 2011 seem to keep on fascinating the legal profession) should definitively yield to the ascertainment of the imperative of the *realization of justice* at international level. After all, there is nothing so invincible as an ideal, - such as that of the realization of justice, - which has not yet been realized: it keeps on banging human conscience until it blossoms and sees the light of the day.

(Signed) Antônio Augusto CANÇADO TRINDADE.

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[204]. And restated in the U.N. General Assembly resolution 2625(XXV) of 24.10.1970, containing the U.N. Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations.

SEPARATE OPINION OF JUDGE GREENWOOD

Jurisdiction of the Court — Treatment of jurisdictional issues at the provisional measures stage — Effect on the Court's approach at later stages of the proceedings — Issue before the Court specific to Article 22 CERD — Requirements of Article 22 CERD a matter of substance not form — Meaning of dispute — Relationship between dispute with respect to the interpretation or application of CERD and wider dispute between the Parties — Whether Article 22 CERD imposing precondition which must be satisfied before the Court can be seised

1. I have voted in favour of the operative paragraphs of the Judgment and agree, for the most part, with the Court's reasoning. In this separate opinion, I wish merely to add a few further observations.

2. First, I do not consider that the Court's 2008 Order regarding provisional measures of protection operates to constrain the approach which the Court should take in the present phase of the proceedings. In accordance with its long-established practice, when Georgia requested the indication of provisional measures of protection, the Court examined whether "the provisions invoked by the Applicant appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded" (Order, paragraph 85). It concluded (*ibid.*, paragraph 117) that this test was satisfied but, as the Judgment points out in paragraph 129, the Court went on to state that this decision "in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case" (*ibid.*, paragraph 148). Requests for the indication of provisional measures of protection are considered as a matter of urgency, as required by Article 74 of the Rules of Court, without the opportunity for the consideration of extensive evidence or the detailed analysis of legal issues which can be undertaken in later phases of the proceedings. The jurisdictional threshold which the applicant has to cross is, accordingly, set quite low and any ruling — whether as to law or fact — which the Court makes at the provisional measures stage of a case is necessarily provisional.

3. It is for that reason that the Court has had occasion in the past to hold, on a full examination of jurisdictional objections, that it lacked jurisdiction, notwithstanding that it had found, at the provisional measures stage of the same case, that there appeared prima facie to be a basis on which the jurisdiction of the Court might be founded. The Court reached just such a conclusion in the first case in which it indicated provisional measures of protection (*Anglo-Iranian Oil Co. (United Kingdom* v. *Iran), Preliminary Objection, Judgment, I.C.J. Reports 1952*, p. 93, which may be compared with the earlier Order of 5 July 1951, *I.C.J. Reports 1951*, p. 89) and, more recently, in *Request for the Interpretation of the Judgment of 31 March 2004 in the case concerning* Avena and Other Mexican Nationals (Mexico *v.* United States of America), *I.C.J. Reports 2009*, p. 3, in which it took a different view, after full argument, from that which it had reached prima facie in its Order of 16 July 2008 in the same case (*I.C.J. Reports, 2008*, p. 311).

4. The strictly limited effects of a jurisdictional finding at the provisional measures stage are even more apparent when one considers that an applicant which has failed to satisfy the Court that the jurisdictional grounds on which it relies might, even prima facie, furnish a basis for jurisdiction is still entitled to contend, in the later stages of the case, that those same jurisdictional grounds do in fact provide a basis for jurisdiction. That was the course followed, for example, by the Democratic Republic of the Congo in *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 6, notwithstanding the earlier dismissal of its argument that those jurisdictional grounds met the prima facie test (see *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda),*

Provisional Measures, Order of 10 July 2002, I.C.J. Reports 2002, p. 219). Although the Court rejected the submissions of the DRC in its 2006 Judgment, it examined afresh such questions as whether Rwanda's reservation to Article IX of the Genocide Convention was contrary to the object and purpose of the Convention (Judgment, pp. 29-33, paras. 56-70) with no suggestion that it was constrained by its earlier, prima facie, analysis of the same questions (Order, pp. 245-246, paras. 69-72).

5. In my opinion, the fact that the Court considered in 2008, on the basis of the limited evidence and legal argument which could then be put before it, that Article 22 of the Convention on the Elimination of all Forms of Racial Discrimination ("CERD") *might* afford a basis for jurisdiction, should have no effect on its approach, after full examination of the evidence and legal argument, to the question whether that provision *does* definitively confer jurisdiction upon it.

6. Secondly, it is important to understand precisely what is the jurisdictional issue in the present case. It has nothing to do with whether there is a general requirement that States attempt negotiation before commencing proceedings in the Court but only with whether or not the specific requirements of CERD Article 22 have been met. The distinction was succinctly explained in *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria)*, where the Court stated that:

> "Neither in the Charter nor otherwise in international law is any general rule to be found to the effect that the exhaustion of diplomatic negotiations constitutes a precondition for a matter to be referred to the Court. No such precondition was embodied in the Statute of the Permanent Court of International Justice, contrary to a proposa1 by the Advisory Committee of Jurists in 1920 (Advisory Committee of Jurists, *Procès-verbaux of the Proceedings of the Committee (16 June-24 July 1920) with Annexes*, pp. 679, 725-726). Nor is it to be found in Article 36 of the Statute of this Court." (*Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 303, para. 56.)

The Court, however, went on to add that "[a] precondition of this type may be embodied and is often included in compromissory clauses of treaties" (*ibid*., para. 56). The issue in the present case is precisely whether Article 22, the only compromissory clause on which Georgia relies, contains such a requirement and, if so, whether it had been satisfied at the time that Georgia lodged its Application.

7. That issue is one of substance, not of form. As the Court has repeatedly emphasized, in the present state of international law its jurisdiction is dependent upon the consent of the parties and when that consent is contained in the compromissory clause of a treaty, the Court is given jurisdiction only within the limits set out in that clause (see, for example, *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Provisional Measures, Order of 10 July 2002, I.C.J. Reports 2002*, p. 245, para. 71). Accordingly, what those limits are, and whether the Application falls within them, are matters of fundamental importance.

8. Thirdly, Article 22 plainly confers jurisdiction only over a certain type of dispute, namely one with respect to the interpretation or application of CERD. What constitutes a dispute has, as paragraph 30 of the Judgment makes clear, been the subject of a long line of decisions by this Court and its predecessor: there must be "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons" (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11); "[i]t must be shown that the claim of one party is

positively opposed by the other" (*South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328). Where, as here, the compromissory clause limits jurisdiction to a dispute with respect to the interpretation or application of a particular Convention, the "claim" must relate to the interpretation or application of that Convention.

9. The fact that there is another, wider dispute between the Parties, which may be of more importance to one or both of them, does not prevent the emergence between them of a dispute respecting the interpretation or application of the Convention. The Convention dispute may exist within the framework of the wider dispute, or in parallel with it; the point is that the two may co-exist and the existence of the wider dispute does not prevent the Court from exercising jurisdiction over the narrower Convention dispute (*United States Diplomatic and Consular Staff in Tehra (United States of America* v. *Iran), Judgment, I.C.J. Reports 1980*, p. 20, para. 37). The existence of the other, wider dispute is not, however, devoid of significance. Although the Judgment, in accordance with the Court's case law, rightly sets the bar for the existence of a dispute quite low (rejecting, for example, the suggestion that there must be express reference to the provisions of the Convention or even to the Convention as a whole), the statements relied upon by the Applicant to demonstrate the existence of a Convention dispute must be sufficiently clear to enable the other Party to appreciate that a claim is being made against it regarding the interpretation or application of the Convention. Where those statements are made in the context of a wider dispute, and especially where the statements deal with the issues of that wider dispute, the need for clarity is particularly marked. In such a case, it must have been possible for the other Party to discern that, whatever other matters were also being raised and whatever other allegations were being made, the statements in question were making a claim regarding the interpretation or application of the Convention even if they did not mention the Convention by name[1]. That is far from being an exacting requirement but it is an important one, especially in the context of a provision like CERD Article 22, which refers to more than one method of dispute settlement. A State cannot be expected to attempt to negotiate a dispute if no steps have been taken to make it aware that it might be a party to such a dispute.

10. Applying the test formulated by the Court to the evidence of the exchanges between the Parties and the unilateral statements made by Georgia but of which the Russian Federation can reasonably be considered to have been aware, the Judgment concludes that Georgia did make such claims between 9 and 12 August 2008 and that a dispute relating to whether or not the Russian Federation was complying with its obligations under the Convention came into existence at that time but not earlier. I agree with that conclusion. In my opinion, Georgia's earlier statements were such that a contemporary observer would not have been able to discern that a claim was being made against the Russian Federation regarding the latter's compliance with its obligations under CERD, even if that had been Georgia's intention at the time those statements were made.

11. Lastly, I agree with the conclusion in paragraphs 132 to 141 of the Judgment that the reference in Article 22 to a dispute "which is not settled by negotiation or by the procedures expressly provided for in this Convention" imposes a precondition which must be satisfied if the Court is to have jurisdiction. It is not enough that a dispute *has not been* settled by negotiations or the Convention procedures; an attempt must have been made to settle the dispute by those means. To read the provision otherwise would make this clause completely superfluous and thus offend against a basic tenet of treaty interpretation. I therefore agree with the Judgment that it is a

[1]That does not mean that a State which wishes to seise the Court of a case under the Convention must first send a formal "letter before action" to the proposed respondent but it must, in the words of paragraph 30 of the Judgment, "refer to the subject-matter of the treaty with sufficient clarity to enable the State against which a claim is made to identify that there is, or may be, a dispute with regard to that subject-matter". While the Judgment states that an express reference to the Convention would remove any doubt and place the other State on notice, it does not make that a requirement.

precondition to the jurisdiction of the Court under Article 22 that there must have been a good faith attempt to settle the dispute by negotiation or by the Convention procedures. That was the conclusion which the Court reached in the most recent case in which it had to consider a clause similar to Article 22. In *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006,* p. 39, para. 87), the Court had to consider Article 29 of the Convention on the Elimination of Discrimination against Women, which provides that:

> "Any dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court."

While this provision differs from Article 22 of CERD in that it contains a precondition that an attempt must first be made to arrange an arbitration, the Court was clear that the reference to negotiations, which is identical to that in Article 22, created a condition which had to be met before the case could be referred to the Court.

12. The existence of this condition is not a licence for a putative respondent to frustrate any prospect of seising the Court by rebuffing or refusing to respond to offers of negotiation. As the Court has made plain on other occasions, a State cannot be required to persist in the face of such a reaction (*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), I.C.J. Reports 1998,* p. 122, para. 20). For the same reason, a respondent which seeks artificially to prolong negotiations while declining to negotiate in good faith cannot hide behind the requirement in CERD Article 22 to prevent the exercise of jurisdiction by the Court.

13. In determining whether this requirement has been met, the existence of a wider dispute between the Parties must again be borne in mind. The fact that a State is making proposals regarding negotiations on that wider dispute does not preclude the possibility that it may also (perhaps even in the same document) be offering to negotiate on the narrower Convention dispute. If that is the case, however, it must be sufficiently clear from the statements made that this is its intention. In making an attempt to settle the dispute by negotiation a precondition, Article 22 gives the State against which a claim is being made a choice of accepting an offer to negotiate regarding that dispute, rather than submitting itself to immediate recourse to the Court. For that choice to be meaningful, the offer to negotiate must be sufficiently clear that it can be seen for what it is. Where the two States are simultaneously engaged in a wider dispute, that means that it must be clear that there is an offer to negotiate regarding the Convention dispute and not simply about the wider dispute between the Parties. In a case such as the present, it is an essential feature of the applicant State's case regarding jurisdiction that the dispute which it seeks to bring before the Court can be separated from the wider dispute over which it is accepted that no jurisdiction exists. By the same logic, the offer of negotiation regarding the narrower dispute must be capable of being discerned amidst the exchanges about the wider dispute. If that cannot be done, then an essential requirement of Article 22 has not been met.

14. In the present case, I do not believe that Georgia has satisfied that requirement. Since I agree that Georgia has failed to demonstrate that a dispute falling within Article 22 existed before the period 9-12 August 2008, it is necessary only to consider any statements said to constitute an offer to negotiate made during that period. I agree with the analysis of those statements in the

Judgment. However, I must add that, even if I had been convinced that a dispute regarding the interpretation or application of CERD had come into existence between Georgia and the Russian Federation before that date, I would not have found that the earlier statements on which Georgia relied met the requirement of attempting to negotiate regarding *that* dispute and would, therefore, still have voted in favour of the second operative paragraph.

(Signed) Christopher GREENWOOD.

SEPARATE OPINION OF JUDGE DONOGHUE

Agreement with rejection of First Preliminary Objection but disagreement with Court's reasoning and methodology — Dispute involving the subject-matter of CERD pre-dated 9 August 2008 — Imposition of prior notice and prior opposition requirements contravenes Court's established jurisprudence — Mischaracterization of the requirement in South West Africa *cases — Disagreement with Court's methodology giving no weight to opposing views in Parties' submissions.*

Disagreement with dismissal by Court of a document if it does not contain all elements necessary to prove a breach of CERD — Evidence taken as a whole demonstrates dispute existed before 9 August 2008.

Joint dissent addresses Second Preliminary Objection — Conclusion that dispute did not arise until 9 August 2008 has profound impact on Court's analysis of Second Preliminary Objection.

1. I have joined President Owada, Judges Simma and Abraham, and Judge *ad hoc* Gaja to express the reasons for my dissent with respect to the Court's decision to uphold the Second Preliminary Objection of the Russian Federation. I agree with the decision in the Judgment to reject the First Preliminary Objection. I write separately, however, because I disagree in significant ways with the approach taken in the Judgment to the question whether there is a "dispute" and because I believe that the dispute between Georgia and Russia with respect to interpretation or application of the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter "CERD") arose prior to 9 August 2008, the date set by the Judgment.

I. FIRST PRELIMINARY OBJECTION

2. I agree with the Court's decision to reject the First Preliminary Objection. I also agree with the portion of the legal test that is set forth at paragraph 31 of the Judgment:

> "The Court needs to determine (1) whether the record shows a disagreement on a point of law or fact between the two States; (2) whether that disagreement is with respect to 'the interpretation or application' of CERD, as required by Article 22 of CERD; and (3) whether that disagreement existed as of the date of the Application."

As the Judgment indicates, the question whether there is a dispute is a matter for "objective determination" by the Court (paragraph 30, citing *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74).

3. I disagree with the Judgment, however, in so far as it goes beyond these observations to impose new requirements on an applicant. In particular, the Judgment goes on to state that the Court "needs to determine whether Georgia made such a claim and whether the Russian Federation positively opposed it with the result that there is a dispute between them in terms of Article 22 of CERD" (paragraph 31). By adding a notice requirement, the Judgment disregards established jurisprudence. The Judgment also mischaracterizes the statement in the *South West Africa* cases ((*Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328) that a claim must be one that "is positively opposed", by treating it as a requirement that the respondent state its disagreement with the views of the applicant prior to the filing of the application.

4. I also disagree with the methodology of the Court which, in deciding whether there is a "dispute", gives no weight to the opposing views of the Parties reflected in their submissions to the Court in this case, an approach that is at odds with recent jurisprudence. Taking into account those views, as well as the evidence of the Parties' opposing views from the period prior to the Application, I conclude that there is a dispute between the Parties with respect to interpretation and application of the CERD and that such dispute extends to the period prior to 9 August 2008.

A. No notice of a claim is required before the filing of an application

5. The Court's jurisprudence (and that of the Permanent Court of International Justice) has been consistent in stating that an applicant need not give the respondent notice of an application. One year after the *Mavrommatis Palestine Concessions* case, in which the Permanent Court defined a "dispute" as "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons" (*Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11), the Permanent Court was directly presented with the question of prior notice in the case concerning *Certain German Interests in Polish Upper Silesia*. Germany relied on a compromissory clause that specified that "[s]hould differences of opinion respecting the construction and application of [the subject agreement] arise . . . they shall be submitted to the Permanent Court of International Justice" (*Judgment No. 6, 1925, P.C.I.J., Series A, No. 6*, p. 13). Poland objected to the jurisdiction of the Permanent Court on the ground that "the existence of a difference of opinion . . . had not been established before the filing of the Application" (*ibid.*). The Permanent Court rejected this argument. Noting that there was no stipulation in the compromissory clause that diplomatic negotiation or other procedures precede the filing of a case, the Permanent Court held that recourse could be had to it "as soon as one of the Parties considers that a difference of opinion arising out of the construction and application" of the relevant provisions exists (*ibid*., p. 14).

6. The conclusion in *Upper Silesia* remains correct. There is no general requirement of prior notice of claims or of an intention to submit those claims to the Court. This principle has since been expressly affirmed on more than one occasion[1] (see *Right of Passage over Indian Territory (Portugal* v. *India), Preliminary Objections, Judgment, I.C.J. Reports 1957*, p. 146; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 297, para. 39; see also Shabtai Rosenne, *The Law and Practice of the International Court (1920-2005)*, Vol. III, Sect. 288, p. 1153).

B. There is no requirement that a respondent have an opportunity to "oppose" a claim prior to the filing of an application

7. The Court's test in this case considers not only whether the applicant gave the would-be respondent notice of a claim (and thus an opportunity to respond to it), but also whether and how the would-be respondent "opposed" a claim. In past cases, however, the Court has considered and rejected the notion that a respondent's failure to oppose the claims against it or to acknowledge or accept the existence of a dispute vitiates jurisdiction (see, e.g., *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Judgment, I.C.J. Reports 1980*, p. 25, para. 47; *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, I.C.J. Reports 1988*, p. 28, para. 38; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the*

[1] I note one case that lies in apparent contradiction with this principle. In the *Electricity Company of Sofia and Bulgaria* case, the Permanent Court upheld a preliminary objection raised by Bulgaria with respect to one of several claims asserted by Belgium (*Judgment, 1939, P.C.I.J., Series A/B, No. 77*, p. 83). According to Bulgaria, Belgium had failed to establish that the special tax at issue had formed "the subject of a dispute between the two Governments prior to the filing of the Belgian Application" *(ibid.)*, in contrast to other claims that had been the subject of prior diplomatic correspondence. On that basis, the Permanent Court found that the claim could not be entertained.

Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 123, paras. 22-24 and p. 129, para. 38). Such a test would permit the respondent, simply by remaining silent or asserting the absence of a dispute, to defeat jurisdiction.

8. In the case concerning *Land and Maritime Boundary between Cameroon and Nigeria*, the Court made clear that an express statement setting forth the respondent's opposition to an applicant's claims or protests is not required:

> "However, a disagreement on a point of law or fact, a conflict of legal views or interests, or the positive opposition of the claim of one party by the other need not necessarily be stated *expressis verbis.* In the determination of the existence of a dispute, as in other matters, the position or the attitude of a party can be established by inference, whatever the professed view of that party." (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 315, para. 89.)

9. The present Judgment acknowledges (paragraph 30) that the Court may infer opposition from silence, but does not otherwise make use of the flexibility embraced by the Court in *Cameroon* v. *Nigeria*. Rather than imposing an artificial limitation on itself, the Court should draw on all information that has been put to it to determine whether, at the time that it decides on its jurisdiction, a legal dispute exists between the parties. For example, in making its determination, the Court may consider a party's course of conduct and may take into account the opposing views of the parties as set forth in the course of judicial proceedings.

10. By insisting not only on notice by Georgia but also on contemporaneous statements of "opposition" by Russia, the Judgment mischaracterizes the oft-cited phrase that a dispute requires that the claim of one party "is positively opposed" by the other. An examination of the case in which the Court first used the phrase, and of the subsequent jurisprudence, makes clear that the requirement that a claim "is positively opposed" does not comprise a requirement that the respondent indicate such opposition prior to an application, or even that it have an opportunity to do so. In the *South West Africa* cases, the applicable compromissory clause provided for jurisdiction over "any dispute whatever" brought by another Member of the League of Nations (*(Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 335). After citing the definition of a "dispute" from the *Mavrommatis Palestine Concessions* case, the Court stated:

> "[I]t is not sufficient for one party to a contentious case to assert that a dispute exists with the other party. A mere assertion is not sufficient to prove the existence of a dispute any more than a mere denial of the existence of the dispute proves its non-existence. Nor is it adequate to show that the interests of the two parties to such a case are in conflict. *It must be shown that the claim of one party is positively opposed by the other.*" (*Ibid.*, p. 328; emphasis added.)

The Court's central focus was whether the two applicants had standing *(locus standi)* and whether they had a "material interest" that was capable of giving rise to a dispute under the title of jurisdiction relied upon (*ibid.*, pp. 335, 342-343). The Court rejected South Africa's preliminary objections, noting that the existence of a dispute "is clearly constituted by their opposing attitudes relating to the performance of the obligations of the Mandate by the Respondent as Mandatory" (*ibid.*, p. 328). Importantly for present purposes, the Court made no suggestion that jurisdiction was wanting because Ethiopia and Liberia had failed to put South Africa on *notice* of their contentions prior to filing their applications (or that such failure would have precluded a finding of

jurisdiction). To the contrary, the precise language of this frequently-cited sentence from the *South West Africa* cases makes clear that the Court did not require evidence of "opposition" *prior* to the filing of an application, because the Court used the present tense to frame the question whether the claim of one party "*is* positively opposed" (emphasis added) by the other.

11. Thus, the question of prior notice or of opportunity to respond was simply not presented in the *South West Africa* cases. The Court's requirement that a claim "is positively opposed" by the respondent was not aimed at creating a formal requirement that the parties engage in an exchange of views prior to the seisin of the Court. On the contrary, the cited passage is part and parcel of the Court's obligation to make an "objective determination" that a dispute exists. In a contentious case, there must be an actual, ongoing dispute between the parties, and the Court must make its objective determination of the existence of such a dispute based on the totality of the information before it.

12. Certainly, the information assessed by the Court in making an "objective determination" that a dispute exists or does not exist normally derives from the period prior to the filing of an application. Such information frequently includes statements by one or both parties in the course of bilateral exchanges, or in other contexts, for example, in multilateral settings or in public statements (see, e.g., *Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, pp. 24-25 and p. 27; *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, pp. 99-100, para. 22; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 122, para. 20; *Certain Property (Liechtenstein* v. *Germany), Preliminary Objections, Judgment, I.C.J. Reports 2005*, pp. 17-18, paras. 22-23). The fact that the Court routinely has relied on such pre-application statements or bilateral exchanges to identify or confirm the existence of a dispute does not mean, however, that a dispute exists only where such statements or exchanges have taken place.

C. To determine whether there was a dispute as of the date of application, the Court may consider information that it received after the application

13. I agree with the Judgment that a disagreement of law or fact generally must exist as of the date of an application (see Judgment, paragraph 31), but I take that to mean only that the situation or circumstances over which the parties disagree must have arisen prior to the application. This requirement does not mean that the Court must artificially limit itself only to statements made by the parties prior to the filing of an application in deciding whether this criterion is met. Thus, the Court relied on statements made during the proceedings before it — and therefore after the filing of an application — in 1996 when it rejected the respondent's contention that jurisdiction was lacking because there was no dispute:

> "While Yugoslavia has refrained from filing a Counter-Memorial on the merits and has raised preliminary objections, it has nevertheless wholly denied all of Bosnia and Herzegovina's allegations, *whether at the stage of proceedings relating to the requests for the indication of provisional measures, or at the stage of the present proceedings relating to those objections.*
>
> In conformity with well-established jurisprudence, the Court accordingly notes that there persists 'a situation in which the two sides hold clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations' . . . and that, by reason of the rejection by Yugoslavia of the complaints formulated against it by Bosnia and Herzegovina, 'there is a legal dispute' between

them." (*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)*, pp. 614-615, paras. 28-29; emphasis added.)

14. In the present case, the two Parties have a dispute about the interpretation and application of the CERD that relates to events occurring between the entry into force of the CERD in 1999 (as between Georgia and Russia) and the date of the Application. That is evident from the submissions to this Court in these proceedings, including the legal arguments briefed in the current stage of these proceedings (for example, as to the question of territorial scope) and the characterization of the facts to which the Parties directed their attention in these proceedings, especially at the provisional measures phase. It is also clear from the evidence deriving from the period prior to the Application, to which I now turn.

D. There is substantial evidence of a dispute between the Parties with respect to interpretation or application of the CERD

15. Looking beyond the submissions in this case to evidence deriving from the period prior to the Application, I conclude, in contrast to the Judgment, that there is sufficient evidence that a dispute relating to the subject-matter of the CERD existed not only during the period of 9-12 August 2008, but also before that. Taken as a whole, the factual record demonstrates that between 1999 and August 2008, Georgia raised concerns — either directly with Russia or in multilateral settings — regarding conduct related to ethnic discrimination, some of which it attributed, in one way or another, to Russia.

16. I highlight here some of the documents that, taken together, support the conclusion that there is a dispute over which this Court has jurisdiction. For example, some documents establish that Georgia accused the separatist authorities in Abkhazia of engaging in conduct amounting to unlawful ethnic discrimination. (See, e.g., United Nations Security Council, Letter dated 27 October 2005 from the Permanent Representative of Georgia to the United Nations addressed to the President of the Security Council, United Nations doc. S/2005/678 (27 October 2005), Written Statement of Georgia, Annex 75; United Nations Security Council, Letter dated 18 November 2005 from the Permanent Representative of Georgia to the United Nations addressed to the President of the Security Council, Annex, United Nations doc. S/2005/735 (23 November 2005), Written Statement of Georgia, Annex 77.) Other documents establish that Georgia viewed Russia as protecting and exercising control over the separatist authorities in Abkhazia and South Ossetia and/or that Georgia viewed Russia as having failed to meet a legal obligation to intervene to prevent unlawful discriminatory conduct by those authorities. (See, e.g., United Nations Security Council, Letter dated 26 January 2005 from the Permanent Representative of Georgia to the United Nations addressed to the President of the Security Council, United Nations doc. S/2005/45 (26 January 2005), Written Statement of Georgia, Annex 71; United Nations Human Rights Committee, *Third periodic report of State parties due in 2006*, United Nations doc. CCPR/C/GEO/3 (7 November 2006), Written Statement of Georgia, Annex 85; Transcript, "Ask Georgia's President", *BBC News* (25 February 2004), Written Statement of Georgia, Annex 198.)

17. Furthermore, some documents allege conduct amounting to ethnic discrimination *and* attribute responsibility for that conduct to Russia. (See, e.g., United Nations General Assembly, Security Council, Letter dated 9 November 2005 from the Permanent Representative of Georgia to the United Nations addressed to the Secretary-General, Annex, United Nations doc. A/60/552 (10 November 2005), Written Statement of Georgia, Annex 76; United Nations Committee Against Torture, *Summary Record of the 699th Meeting*, United Nations doc. CAT/C/SR.699

(10 May 2006), Written Statement of Georgia, Annex 79; United Nations Security Council, Letter dated 4 September 2006 from the Permanent Representative of Georgia to the United Nations addressed to the President of the Security Council, Annex, United Nations doc. S/2006/709 (5 September 2006), Written Statement of Georgia, Annex 84.) Taken together, and when reviewed in light of the entire record, these documents reinforce the conclusion that is apparent from the assertions about law and fact made in the written and oral submissions: namely, that a dispute between the Parties relating to the subject-matter of the CERD predated the period of hostilities in August 2008.

18. A critical distinction between my approach and that reflected in the Judgment is that I weigh the evidence as a whole in order to determine whether there is a "dispute". By contrast, the Judgment assigns no probative value to an individual document if it finds that document lacking in one respect or another. Thus, for example:

— Georgia's Permanent Representative to the United Nations transmitted to the General Assembly a 2006 resolution of the Georgian Parliament describing "attempts to legalize the results of ethnic cleansing" as part of the "reality brought about as a result of peacekeeping operations" (paragraph 86), but the Judgment dismisses the value of the transmitted resolution because Georgia failed to refer in its transmittal letter to agenda items covering ethnic discrimination (paragraph 89).

— The Judgment "cannot give any legal significance" to a 2006 statement by Georgia's Permanent Representative to the United Nations that the Russian peacekeeping force "failed to carry out" its mandate to "create [a] favorable security environment for the return of ethnically cleansed . . . Georgian citizens" because the Georgian Permanent Representative also said that "what we are dealing with is not a fundamentally ethnic conflict, but rather one stemming from Russia's territorial ambitions" (paragraph 92).

— In September 2006, the Foreign Ministry of Georgia alleged that "[t]he so-called government of Abkhazia . . . remains relentless in its pursuit of its inhuman discriminatory policy and acts against the ethnic Georgian population" while also asserting that "Russian peacekeeping forces . . . do nothing to suppress flagrant and mass violations of human rights" (United Nations Security Council, Letter dated 4 September 2006 from the Permanent Representative of Georgia to the United Nations addressed to the President of the Security Council, Annex, United Nations doc. S/2006/709 (5 September 2006), Written Statement of Georgia, Annex 84), but the Judgment dismisses these statements, saying they are not "direct claims against the Russian Federation of racial discrimination" (paragraph 90).

19. If the Court were considering the merits, Georgia would have the burden of establishing the full range of legal and factual elements of a breach by a CERD party. For example, for an alleged incident in which Georgia claims that conduct by entities other than the Russian Government amounts to ethnic discrimination, assuming that the Court concluded that it had jurisdiction *ratione loci* and *ratione temporis*, Georgia would also have to establish, *inter alia*, that Russia bore responsibility for any such discrimination. Today, however, the Court is not asked to decide whether the CERD applies to Russia with respect to incidents outside of its territory (a question of interpretation about which the Parties disagree), or whether a particular incident gave rise to a breach by Russia of its CERD obligations, but only whether there is a disagreement between the Parties about such questions and other aspects of the interpretation or application of the CERD. Disavowing a particular document in which Georgia alleges conduct that may violate the CERD — but in which, for example, Georgia does not contemporaneously attribute that conduct to Russia — does not help to determine whether the factual record as a whole demonstrates the existence of a legal dispute between the Parties. The evidence shows that Georgia claims that Russia bears international responsibility for ethnic discrimination in violation of the CERD and that

Russia disagrees with that claim, on multiple grounds. That is all that is needed to establish the existence of a dispute with respect to interpretation or application of the CERD.

20. In sum, I agree with the Judgment's conclusion that a dispute exists between the Parties, but I do not agree that the dispute began only on 9 August 2008. By requiring an applicant to give the respondent notice of its claim prior to filing its application, the Court today does nothing to help clarify whether there is a "dispute", but instead imposes a new procedural obstacle that, as the Permanent Court noted in *Upper Silesia*, "could at any time be fulfilled by means of unilateral action on the part of the applicant Party. And the Court cannot allow itself to be hampered by a mere defect of form, the removal of which depends solely on the Party concerned." (*Certain German Interests in Polish Upper Silesia, Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6*, p. 14; see also *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)*, pp. 613-614, para. 26 (discussing cases in which the Court rejected objections asserting the absence of a dispute where such objections were based on "a defect in a procedural act which the applicant could easily remedy").) Instead of following the Judgment's approach, I conclude that, taken as a whole, the assertions and the factual submissions of the Parties demonstrate that there is a dispute between the Parties relating to the subject-matter of the CERD, and that the dispute predated 9 August 2008.

II. SECOND PRELIMINARY OBJECTION

21. With other colleagues, I have submitted a joint dissenting opinion with respect to the Second Preliminary Objection of the Russian Federation. I do not repeat here the reasons that I dissent. I note only that the decision of the Court that the dispute began only on 9 August 2008 has a profound impact on its analysis of the Second Preliminary Objection, because the Judgment declines to give weight to any engagement between Georgia and Russia prior to that date.

III. CONCLUSION

22. The Judgment's test for determining whether there is a dispute and its conclusion regarding the meaning and effect of this particular compromissory clause have implications that could go beyond this case. In particular, while I am confident that this is not the intention of those who voted in favour of the Judgment, I am concerned that the Judgment will work to the disadvantage of States with limited resources and those that have little or no experience before this Court.

23. The question whether this Court has jurisdiction under a particular treaty is independent of the obligation of treaty parties to comply with that treaty. Equally, the fact that a particular treaty may be relevant to only one aspect of a larger dispute (as in the present case) does not absolve the parties from complying with that treaty. In general, State A need not remind State B of a particular treaty in order to trigger State B's obligations under that treaty. Moreover, when a dispute arises under a treaty as to which both States have accepted the Court's jurisdiction *ante hoc*, State B has every reason to consider the prospect that State A may seek relief in this Court. Nonetheless, the Court today has created new hurdles of notice, opposition and a formalistic "negotiation" requirement before State A may file an application alleging that State B has breached its obligations.

24. In the vast majority of cases, these requirements will not defeat jurisdiction. Normally, State A can be expected to raise its legal concerns with State B and to seek to resolve those

concerns through some form of diplomacy. Less commonly, however, a State may choose instead to proceed directly to this Court. For example, if State B disclaims any responsibility — in law or in fact — for the conduct about which State A is concerned, State A may conclude that negotiations would be futile.

25. For States with the resources to follow the decisions of this Court closely, counsel will read today's Judgment and will caution clients about the requirements that it imposes. The same cannot be said, however, of States with limited resources and those that lack experience before this Court. Under the Court's decision today, even if such a State considers that it is the victim of a clear violation by another State, and even if the "precondition" in a compromissory clause is hidden, as in the CERD, the State's access to this Court could be barred unless it follows new procedural requirements that it will not find in the text of the treaty, the Statute or the Rules of Court.

(Signed) Joan E. DONOGHUE.