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*, para. 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.*, para. 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 Respon-

dent, 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:
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> *(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;
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> *(b)* 'sponsoring, defending and supporting racial discrimination' contrary to Article 2 (l) *(b)* of CERD;
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> *(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:
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> 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 a 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 a 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 "PCIJ") 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, para. 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 (Ethiopia* v. *South Africa; Liberia* v. *South 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, para. 31; emphasis added). By this approach, as will be discussed later in greater detail (see paragraphs 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 PCIJ 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 chronological determination of exactly when the dispute in question emerged. 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, para. 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" (*ibid.*, para. 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 Applicant was treated as facilitator and in which the Respondent 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 (para. 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." (*I.C.J. Reports 1984*, p. 428, para. 83.)

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, para. 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 in itself sufficiently demonstrated that the Applicant made a concrete claim relating to CERD and that a positive act of manifestation of opposition to the event in question by the Respondent does or does not exist.

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 (see Judgment, para. 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, para. 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 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.