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Summary
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1 April 2011

Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)

Preliminary Objections

Summary of the Judgment of 1 April 2011

Chronology of the Procedure (paras. 1-19)

The Court begins by recalling that, 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 order to found the jurisdiction of the Court, the Application relied on Article 22 of CERD, which entered into force as between the Parties on 2 July 1999.

A complete history of the proceedings follows, in which the Court refers, inter alia, to the Request for the indication of provisional measures filed by the Applicant on 14 August 2008, to the "Amended Request for the Indication of Provisional Measures of Protection" filed by Georgia on 25 August 2008, and to the Order of 15 October 2008, by which the Court, after hearing the Parties, indicated certain provisional measures to both Parties.

The Court also recalls that, on 1 December 2009, the Russian Federation raised preliminary objections to the jurisdiction of the Court, and that, consequently, by an Order of 11 December 2009, the Court, noting that 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. 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 both Parties.

In its 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."

The Court further recalls that 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."

Reasoning of the Court

I. INTRODUCTION (paras. 20-22)

It is recalled that in its Application, Georgia relied on Article 22 of CERD to found the jurisdiction of the Court. 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".

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 (paras. 23-114)

The Court begins by considering the Russian Federation's first preliminary objection 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.

The Court notes that 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.

1. The meaning of "dispute" (paras. 26-30)

The Court points out that, 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".

The Court also notes that 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.

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.

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." The International Court of Justice has indicated that whether there is a dispute in a given case is a matter for "objective determination" by the Court, and that "[i]t must be shown that the claim of one party is positively opposed by the other". 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 in its case law, 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; 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, 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 (paras. 31-39)

The Court then 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.

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; the Parties accepted that proposition.

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 limits itself to official documents and statements.

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 also makes a distinction between documents issued and statements made before and after Georgia became party to CERD.

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.

The Parties gave their main attention to the contents of the documents and statements and the Court does likewise. 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. 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. Accordingly, primary attention is given to statements made or endorsed by the Executives of the two Parties.

The Russian Federation states that the primary dispute that existed between it and Georgia 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 takes account of those matters as it reviews the legal significance of the documents and statements to which the Parties gave their principal attention.

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 (paras. 40-49)

The Court recalls, inter alia, that 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). 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 joint control commission was to be established, consisting of representatives of all parties involved in the conflict. The Court gives an account of the meetings and decisions of the Joint Control Commission (JCC).

So far as Abkhazia is concerned, the Court recalls that 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". 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. The Court reviews other relevant agreements and Security Council resolutions (including resolutions 876 (1993), 934 (1994), 901 (1994), 937 (1994) and 1036 (1996)) as well as the 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 — known as the "Geneva process". The Court recalls that this Geneva process was assisted by the Group of Friends of the Secretary-General (France, Germany, the Russian Federation, the United Kingdom and the United States). The Court recalls that it was only after the armed conflict of August 2008 that Georgia requested, on 1 September 2008, that the operation of the collective peacekeeping forces be discontinued.

4. Documents and statements from the period before CERD entered into force between the Parties on 2 July 1999 (paras. 50-64)

The Court reviews the documents and statements issued before 2 July 1999 and invoked by Georgia 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. In that regard, the Court recalls that 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.

The Court concludes that none of the documents or statements provides any basis for a finding that there was a dispute about racial discrimination 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.

It follows from this general finding of the Court and the specific findings made with regard to each document and statement, 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". 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 (paras. 65-105)

The Court finds it 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).

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.

Turning to the documents and statements in the case file from the period after CERD entered into force between the Parties and before August 2008, the Court refers, inter alia, to 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.

The Court notes that, in assessing the October 2001 Parliamentary resolution, as with the other documents and statements invoked by the Parties, it 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 Georgian Parliamentary resolution of October 2001 had not been endorsed by the Georgian Government, the Court cannot give it any legal significance for the purposes of the present case.

The Court continues its analysis of the documents and statements from the period under review, among which Security Council resolution 1393 (2002), documents relating to the outcome of high-level meetings between representatives of the Parties, various exchanges between the Parties as well as a number of resolutions adopted by the Georgian Parliament and forwarded to the Secretary-General by the Georgian Permanent Representative, including a resolution dated

11 October 2005. With regard to this latter Parliamentary resolution, the Court notes that it 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 Court finds that it is unable to see in this letter any claim against the Russian Federation by the Georgian Government of breaches of obligations under CERD.

The Court recalls Georgia's emphasis on the Parliamentary resolutions which were transmitted to the United Nations, 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. Similarly the Court finds that statements about the conflict zones emanating from the Georgian Government and transmitted by the Georgian Permanent Representative to the Secretary-General and President of the Security Council in August and September 2006, in September and October 2007 and in March and April 2008 do not, except in one case, make any reference to the Russian Federation as being responsible for acts of racial discrimination.

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 (paras. 106-114)

Turning to the events that unfolded in early August 2008, in particular the armed hostilities in South Ossetia that began during the night of 7 to 8 August 2009, the Court observes that, while the claims levelled against the Russian Federation by Georgia between 9 and 12 August 2008 (the day on which Georgia submitted its Application) were primarily claims about the unlawful use of force, they also expressly referred to ethnic cleansing by Russian forces.

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 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.

The Court then considers a press conference with foreign journalists held on 9 August 2008, during which 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 the Russian troops had "committed the ethnic cleansing in all areas they control in South Ossetia" and that they were also "trying to set up the ethnic cleansing of ethnic Georgians from upper Abkhazia". 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, when he referred to the high number of refugees fleeing to the Russian Federation from South Ossetia as a result of the "ethnic cleansing" being carried out by the Georgian leadership. 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". 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". 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.

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."

On that same day, 11 August, President Saakashvili in a CNN interview made further allegations of "ethnic cleansing" by Russian troops of the ethnic Georgian population of Abkhazia and South Ossetia.

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."

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.

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

III. SECOND PRELIMINARY OBJECTION — PROCEDURAL CONDITIONS IN ARTICLE 22 OF CERD (paras. 115-184)

1. Introduction (paras. 115-121)

The Court next examines the second preliminary objection according to which the Russian Federation asserts that Georgia is precluded from having recourse to the Court as it has failed to satisfy two procedural preconditions contained in Article 22 of CERD, namely, negotiations and referral to procedures expressly provided for in the Convention. For its part, Georgia 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 CERD before the seisin of the Court.

2. Whether Article 22 of CERD establishes procedural conditions for the seisin of the Court (paras. 122-147)

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 (paras. 123-141)

The Court begins by recalling the positions of the Parties. The Court then states that before providing its interpretation of Article 22 of CERD, it wishes, as a preliminary matter, to make three observations.

First, the Court recalls that in paragraph 114 of 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". 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".

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.

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.

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".

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 then proceeds to the determination of the ordinary meaning of the terms used in Article 22 of CERD with a view to ascertaining whether this Article contains preconditions to be met before the seisin of the Court. 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. 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.

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.

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.

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 then considers 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. The Court observes that in each of these earlier cases, it has interpreted the reference to negotiations as constituting a precondition to seisin.

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 (paras. 142-147)

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, the Court considers that in this case a presentation of the Parties' positions and an examination of the travaux préparatoires is warranted.

After reviewing the Parties' arguments on the question, 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." The Court adds that 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.

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 (paras. 148-184)

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. 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 (paras. 150-162)

After reviewing the Parties' arguments on the concept of negotiations, the Court first addresses 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.

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.

The Court further notes that, 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. The Court adds that, 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.

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". 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".

Concerning the substance of negotiations, the Court recalls that it 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. 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.

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 needs to 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 (paras. 163-184)

Against the background of these criteria, the Court then 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.

After considering the Parties' arguments on the question, 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.

The Court finds that 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.

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.

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.

The Court examines the evidence presented to it by the Parties. In particular, the Court takes note of certain significant elements of the content of 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. First, the Court observes that 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]."

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.

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". 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."

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.

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.

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.

The Court has already observed 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.

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 (para. 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.

Lapse of the Court's Order of 15 October 2008 (para. 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.

Operative clause (para. 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."

Composition of the Court

The Court was composed as follows: 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.

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.

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Joint dissenting opinion of President Owada, Judges Simma, Abraham and Donoghue and Judge ad hoc Gaja

President Owada, Judges Simma, Abraham and Donoghue and Judge ad hoc Gaja disagree with the Court's decision to uphold the Second Preliminary Objection of the Russian Federation and have submitted a joint dissenting opinion. The Court concludes that it lacks jurisdiction under Article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) because, in the Court's view, Georgia was required, but failed to, enter into negotiations with Russia with respect to its claims under the CERD prior to the filing of its Application. The authors of the joint dissenting opinion disagree.

The joint dissenters question the Judgment's conclusion that Article 22 of the CERD sets forth a requirement of prior negotiations and maintain that the Judgment fails to consider arguments that could lead to a different interpretation of that clause. They also consider that even if Article 22 establishes preconditions to the seisin of the Court, those preconditions — prior negotiations or recourse to the procedures set forth in the CERD — must be read as alternative, rather than cumulative, requirements.

The authors of the joint dissenting opinion also take issue with the application of the requirement of prior negotiations that the Judgment applies under Article 22, which they consider to be formalistic and at odds with the Court's recent jurisprudence. They point out that, in the Judgment, the Court concludes for the first time that it lacks jurisdiction on the sole basis that the Applicant has failed to satisfy a prior negotiation requirement — despite the fact that when Georgia filed its Application, any attempt by Georgia to resolve the dispute through negotiations had no chance of success.

Does Article 22 of the CERD set forth procedural "preconditions" that must be satisfied prior to seisin of the Court?

The Judgment considers that the "ordinary meaning" of Article 22 establishes preconditions that must be fulfilled before the seisin of the Court. The Court concludes that its jurisprudence supports this interpretation and that the travaux préparatoires "do not suggest a different conclusion". The dissenting judges believe that this interpretation is subject to serious question and that, in certain regards, it departs from the Court's most recent jurisprudence.

The joint dissenting opinion notes that although the Judgment states that the Court has consulted the travaux préparatoires in order to "confirm" its interpretation of the text, in fact the Court only goes so far as to conclude that the travaux préparatoires "do not suggest a different conclusion". In addition, the joint dissenting opinion is critical of the Judgment's approach to the question of the "ordinary meaning" of Article 22, noting in particular the Court's sole reliance on its application of the principle of effectiveness as a means of interpreting the text.

The authors of the joint dissenting opinion then set forth several factors that cast doubt on the Judgment's conclusion that Article 22 imposes a precondition of negotiation. First, the Judgment does not grapple with the literal meaning of the text, which, on its face, neither requires nor suggests an attempt at settlement prior to the seisin of the Court. Second, the authors of the joint dissenting opinion point out that there is no general requirement that a State pursue diplomatic negotiations prior to seising the Court and that, as a consequence, a compromissory clause departing from that general rule should be formulated in a sufficiently clear manner. They further explain that, although at the time of the drafting of the CERD other formulations existed in treaties in force and were considered by the CERD's drafters, including compromissory clauses that set forth express preconditions to the Court's jurisdiction, the drafters of the CERD chose the formulation least likely to be interpreted literally as requiring prior attempts to settle the dispute.

The authors of the joint dissenting opinion are also critical of the Judgment's treatment of the Court's prior jurisprudence. After citing two cases in which the Court previously interpreted compromissory clauses with wording similar to Article 22 of the CERD, the Judgment states that "in each of the above-mentioned cases . . . the Court has interpreted the reference to negotiations as imposing a precondition to the seisin". According to the authors of the joint dissenting opinion, this leaves the reader with the incorrect impression that the Court's prior jurisprudence on the issue is clear and consistent, when, in fact, it has not been.

In addition, while agreeing that the Court is not bound by the finding of prima facie jurisdiction in its Order of 15 October 2008 on provisional measures in this case, according to which Article 22 "does not, in its plain meaning, suggest that formal negotiations . . . or recourse to the [CERD Committee] procedure . . . constitute preconditions to be fulfilled before the seisin of the Court", the dissenting judges note that this 2008 finding further demonstrates that there is no well-settled practice of treating clauses referring to negotiations as imposing a precondition.

In sum, the authors of the joint dissenting opinion emphasize that all of the factors leading to the Judgment's conclusion that Article 22 imposes preconditions are subject to serious flaws: neither the literal analysis of the text, which is ambiguous, nor the Court's prior jurisprudence, which has fluctuated, nor an examination of the travaux préparatoires, which are inconclusive, necessarily leads to the position adopted by the Court.

Moreover, the authors of the joint dissenting opinion reject the Judgment's adoption of a strict requirement that any preconditions must be fulfilled "before the seisin of the Court", as opposed to at any point up until the Court decides on its jurisdiction. The joint dissenters view this approach as out of step with the Court's recent decision in Croatia v. Serbia (in 2008), which allowed a condition not met when the proceedings were instituted to be fulfilled after that date, but before the Court ruled on its jurisdiction. The dissenters criticize the Judgment for discarding its most recent jurisprudence — which would allow for a more flexible approach — without providing the least justification.

Are the two means of settlement set forth in Article 22 alternative or cumulative?

Because the authors of the joint dissenting opinion also conclude (as summarized below) that Georgia has satisfied any precondition of negotiation, they also evaluate whether the two means of settlement referred to in Article 22 — negotiations or the use of the CERD Committee procedures — would be alternative or cumulative preconditions. For the authors of the joint dissenting opinion, the decisive argument is drawn from logic: the text of Article 22 cannot impose on a State cumulative procedures that serve no purpose other than delaying access to the Court. Thus, pointing out that direct negotiations and the CERD Committee procedures are two different ways to allow the parties to a dispute to state their views and attempt to come to an agreement outside of the Court, the authors of the joint dissenting opinion conclude that the conditions in Article 22 cannot have been intended to operate as cumulative requirements.

What would be the requirements of the precondition of negotiation?

Turning next to the substance of the requirement that the Parties engage in negotiations prior to seising the Court, the authors of the joint dissenting opinion conclude that the Judgment has applied the requirement in an overly formalistic and unrealistic way. The dissenting judges take the view that there is no —and there can be no —general criterion for determining at what point a State will be regarded as having fulfilled an obligation to negotiate. Instead, in their view, the Court must make that assessment on a case-by-case basis and should approach the issue not in formal or procedural terms, but as a matter of substance. The dissenting judges note that the purpose of negotiations is not to erect unnecessary procedural barriers that are likely to delay or

impede the applicant's access to international justice, but to allow the Court to ensure, before turning to the merits, that a sufficient effort was made to settle the dispute by the requisite non-judicial means. If the Court finds that there is no reasonable prospect that the dispute can be settled by such means, the Court should accept its jurisdiction. As the joint dissenting opinion points out, this has been the Court's approach to the question of negotiations in its past cases.

Was there a sufficient effort to resolve the dispute by negotiations?

Finally, assuming that Article 22 does impose a precondition of negotiation, the authors of the joint dissenting opinion address the question whether Georgia has satisfied such a precondition in this case. They answer in the affirmative and contend that the Judgment finds otherwise by adopting an overly formalistic and unrealistic approach to a requirement of negotiations. They criticize the fact that the Judgment considers only the period of 9-12 August 2008, which is a consequence of the Judgment's conclusion that there was no dispute before that date.

In light of the circumstances of this case, the dissenting judges find completely unrealistic the Judgment's conclusion that Georgia has not exhausted the possibilities of a negotiated settlement with Russia. In the dissenters' view, no one could seriously believe that, as of the date of the filing of the Application, there remained a reasonable prospect of settling the dispute that Georgia submitted to the Court. The authors of the joint dissenting opinion discuss various documents and statements demonstrating that, over the years, Georgia reproached Russia for being responsible, by action or omission, for ethnic cleansing committed, according to Georgia, against ethnic Georgians in Abkhazia and South Ossetia. The authors of the joint dissenting opinion take the view that one cannot expect the Applicant to make a formal offer to negotiate under such circumstances; rather, it is sufficient that Georgia has clearly made known the existence and nature of its claims and that Russia has made known unequivocally that it categorically rejects the complaints as formulated (including, for that matter, that a dispute even exists between it and Georgia). The authors of the joint dissenting opinion conclude that on the date of the filing of the Application, it was clearly established that there was no reasonable prospect of a negotiated settlement and, therefore, that any condition imposed by Article 22 had been satisfied.

For these reasons, the authors of the joint dissenting opinion conclude that the Court should have rejected the Second Preliminary Objection of the Russian Federation and found that it has jurisdiction to proceed to the merits in this case.

Separate opinion of President Owada

In a separate opinion, President OWADA explains that although he concurs with the Judgment's conclusion to reject Russia's First Preliminary Objection, he disagrees with certain aspects of the Judgment's treatment of the question whether there is a "dispute" between Georgia and Russia relating to the interpretation or application of the Convention on the Elimination of All Forms of Racial Discrimination (CERD). Specifically, President Owada disagrees with the Judgment's introduction of a higher threshold of the existence of positive opposition by the opposing party, going beyond the established jurisprudence of the Court on the existence of a dispute. He also takes issue with the Judgment's treatment of the evidence and, in particular, the Judgment's suggestion that the Applicant need to have given the Respondent prior notice of its claims. The President suggests that the Court could not have come to its stated conclusion on jurisdiction without going into the merits of the Parties' contentions and that, if that were the case, the Court should have declared that Russia's First Preliminary Objection does not possess an exclusively preliminary character under Article 79 of the Rules of Court.

President Owada begins by noting that, at the preliminary jurisdiction phase of the proceedings, the Court does not have to, and indeed cannot, pass judgment on whether Georgia's

claims against Russia on the merits were well-founded. The Court need only to determine whether a dispute existed between the Parties; whether that dispute relates to the interpretation or application of the CERD; and whether that dispute existed at the time Georgia filed its Application.

On the issue of whether a dispute existed between the Parties, the President considers that the Judgment applies a stringent requirement unsupported in the Court's jurisprudence as established by the Mavrommatis Judgment of the Permanent Court of International Justice and by the South West Africa cases of the International Court of Justice.

Next, President Owada takes issue with several aspects of the Judgment's approach to the question whether a dispute existed between the Parties relating to the interpretation or application of the CERD. In his view the Judgment, which concludes that a dispute under the CERD existed between the Parties only as from 9 August 2008, is not correct in light of the evidence. President Owada notes that, while it is not necessary to pinpoint a precise date on which the dispute emerged, the Judgment's conclusion that a dispute under the CERD did not emerge until 9 August 2008 is too restrictive and has significant ramifications for the Judgment's treatment of the evidence relating to the Second Preliminary Objection. The President points out that Georgia time and again made abundantly clear to Russia that its concerns related to "ethnic cleansing" and the "return of refugees" — issues clearly falling within the subject-matter of the CERD.

President Owada also criticizes the methodology employed by the Judgment in its evaluation of the evidence in the case. He observes that the Judgment dissects each document in evidence "on a piecemeal basis" in an attempt to determine whether each piece of evidence — in itself — contains a claim by Georgia under CERD and a positive act of opposition to that claim by Russia.

Lastly, the President notes that the contention of Georgia is that Russia is responsible for acts or omissions that would amount to violations of obligations under the CERD, whereas Russia has categorically rejected these claims, on the ground that the acts or omissions complained of are primarily attributable to the separatist authorities in Abkhazia and South Ossetia and have nothing to do with Russia. In the President's view, "these two opposing perceptions" of the dispute reflect a difference between the Parties as to the essential nature of the dispute. Without going into a substantive examination of the merits of these opposing contentions, it could be said that this amounts to a "conflict of legal views" and a "disagreement on a point of law" relating to the interpretation or application of the CERD. The President reiterates that the Court cannot and should not, at this preliminary stage of jurisdiction, evaluate the arguments of the Parties relating to the merits without hearing the full exposition of the Parties' positions. If the Court were of the view that it could not decide the issue of jurisdiction without examining some of these aspects relating to the merits of the case, it should have declared, pursuant to Article 79, paragraph 9, of the Rules of Court, that Russia's First Preliminary Objection "does not possess, in the circumstances of the case, an exclusively preliminary character", thus joining in effect this objection to its consideration of the case on the merits.

Declaration of Vice-President Tomka

The Vice-President has voted in favour of the majority's overall conclusion that the Court lacks jurisdiction over Georgia's Application. He also agrees with the majority's conclusions that neither precondition of Article 22 has been met and that no legal dispute arose between Georgia and the Russian Federation in the period between 1999 and July 2008.

However, the Vice-President does not share the majority's view on the evidence it finds in support of the existence of a dispute arising in August 2008. The majority identifies statements made by Georgia's President and the Russian Federation's Foreign Minister in separate press conferences and statements made by representatives of both States during an emotionally-charged

Security Council meeting. In relying on these statements, the majority has satisfied itself with a rather formalistic juxtaposition of the words used by the representatives of the Parties during the short period of open military hostilities between the two countries. In this context, references to "ethnic cleansing" should be considered merely a feature of war-time rhetoric. Georgia presented no claim to the Russian Federation with regard to its obligations under CERD, and neither held nor attempted to hold negotiations or consultations. This would have assisted in properly articulating the dispute. Nonetheless, in finding a dispute to have arisen in August 2008, the Court has lowered the standard in the determination of the existence of a dispute.

Separate opinion of Judge Koroma

In his separate opinion, Judge Koroma states that he has voted in favour of the second dispositive paragraph of the Judgment in view of the fact that the Court must ensure that the terms and conditions set out in the compromissory clause of the treaty invoked have been complied with before it can exercise jurisdiction. Judge Koroma adds that there must also exist a link between a dispute and the treaty involved. Given the importance of the Convention on the Elimination of All Forms of Racial Discrimination ("CERD"), however, Judge Koroma considered it necessary to explain his vote.

Judge Koroma notes CERD's continuing importance in the fight against racial discrimination and racial intolerance. Accordingly, he states that any alleged breach by a State party of its legal obligations under CERD deserves careful and objective scrutiny by the Court. Judge Koroma emphasizes, however, that the Court cannot undertake any such investigation if the Application seising the Court does not meet the requirements of CERD's jurisdictional clause, namely, that the dispute must be "with respect to the interpretation or application" of CERD.

Judge Koroma notes that, in considering Russia's second preliminary objection, the Court applied the canons of interpretation embodied in Article 31 of the Vienna Convention on the Law of Treaties. He states that, under Article 31, the ordinary meaning of the treaty is the starting-point. He adds that 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. Thus, Judge Koroma emphasizes that the object and purpose of a treaty cannot take precedence over its plain meaning.

Judge Koroma asserts that CERD's compromissory clause establishes clear conditions or limitations on the right of a State party to refer a dispute with another State to the Court. First, in his view, there must be a "dispute" between the parties, meaning that, 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. Second, a link must exist between the substantive provisions of the treaty invoked and the dispute. In this case, Judge Koroma emphasizes that the dispute must be a bona fide dispute between the parties about the interpretation or application of CERD. He points out that this limitation is vital, because without it, States could use the compromissory clause as a vehicle for forcing an unrelated dispute with another State before the Court. Other types of disputes, in his view, including those relating to territorial integrity, armed conflict, etc., do not fall under CERD's compromissory clause.

Judge Koroma adds that CERD's compromissory clause imposes the additional requirement that parties attempt to resolve the dispute by negotiation or by procedures set out in the Convention. He emphasizes that the plain meaning of the compromissory clause does not permit any other conclusion. Judge Koroma states that, 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. He believes that, by inserting the phrase "which is not settled by negotiation or by the procedures expressly provided for in this Convention" into the

compromissory clause, the drafters clearly intended to place a precondition on the power of State parties to refer disputes to the Court.

Judge Koroma finds that the object and purpose of the compromissory clause confirm and support the clause's ordinary meaning. He notes that during the negotiation of the Convention, Ghana, Mauritania and the Philippines introduced an amendment adding the phrase "or by the procedures expressly provided for in this Convention" to the language of the compromissory clause. Judge Koroma notes that, 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. He adds that the amendment was adopted unanimously. He accordingly is of the opinion 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. Judge Koroma affirms that the Judgment has correctly reflected this interpretation.

Judge Koroma concludes by stating that his vote in favour of the second paragraph of the dispositif should be seen as in conformity with the meaning of the jurisdictional clause invoked. He emphasizes that his vote in no way diminishes the importance of CERD as an important legal instrument in combating racial discrimination and racial hatred.

Separate opinion of Judge Simma

Judge Simma partly concurs in the Judgment's rejection of the first preliminary objection of the Russian Federation. However, he disagrees with the Judgment's conclusion that the dispute between Georgia and the Russian Federation only arose between 9 and 12 August 2008. Based on this determination of the relevant time span, and with Russia's second preliminary objection in mind, the Court wholly ignores all pre-August 2008 documentary evidence, limits its analysis to only four pieces of such evidence stemming from the period 9 to 12 August 2008, thus, manages to find no traces of negotiations between the Parties — and arrives at the result that the preconditions for its jurisdiction in the case according to Article 22 of CERD are not fulfilled. This is a matter on which Judge Simma has expressed his disagreement by participating in the joint dissenting opinion, together with his colleagues Owada, Abraham, Donoghue and Gaja. The present separate opinion is devoted to the problematic ways of the Court with Russia's First Preliminary Objection, which Judge Simma then sets out to expose in detail.

Judge Simma finds that the relevant dispute had been under way long before the armed hostilities between Georgia and the Russian Federation broke out in August 2008. In his view, the dispute commenced as early as 1992 on subject-matters that already then could have fallen under CERD, and continued after 1999 when both Georgia and the Russian Federation became parties to the Convention. Had the bulk of pre-August 2008 documentary evidence on the existence of a dispute and Georgian attempts at settling it been admitted, the Court could not have accepted the Russian Federation's Second Preliminary Objection.

Judge Simma then analyses the Judgment's method of dismissing all pre-August 2008 documentary evidence for lack of "legal significance". He identifies five alleged faults or defects that the Judgment adduces and invokes, singly or collectively, for rejecting each piece of documentary evidence dated before August 2008. He shows that the Judgment dismissed evidence on the basis of alleged defects relating to formal designation, authorship, inaction, attribution, and matters of notice. According to Judge Simma, in this process the Judgment failed to accept possible differences in the degree of probative value — whether best, primary, direct, secondary, indirect, corroborative, or supplementary — that have long been acknowledged in the settled jurisprudence of the Court on the determination of the weight of evidence.

Judge Simma then demonstrates the incompatibility of each of these alleged defects with the rules of international law and the Court's settled practices on the assessment of evidence. First, he shows that alleged formal defects — such as missing literal designations in the documentary evidence of phrases such as "racial discrimination", or "ethnic cleansing", explicit allusions to the Russian Federation's specific CERD obligations, or the circulation of documents in the United Nations under agenda item headings other than "racial discrimination" — do not render documentary evidence legally insignificant. For purposes of determining the existence of a dispute, it is sufficient that the documentary evidence refer to CERD-related subject-matter (such as alleged support, facilitation, or toleration by Russian peacekeepers of ethnic cleansing being committed against Georgian civilians within their areas of responsibility; alleged Russian conduct in relation to the right of return of refugees and IDPs to Georgian territory; and the alleged failure of Russian peacekeepers to prevent human rights violations being committed against Georgian civilians).

Secondly, Judge Simma critically assesses the Judgment's invocation of alleged authorship defects — such as the lack of authorship, endorsement, or approval by the Georgian Executive of specific documentary evidence, in particular, resolutions of the Parliament of Georgia — to justify discarding parliamentary material. In its earlier case law the Court never hesitated to admit national legislation as evidence. In any event, the resolutions, decrees, and statements of the Parliament of Georgia were officially transmitted to the Security Council or the General Assembly by the Permanent Representative of Georgia to the United Nations — an official who cannot be assumed to have acted ultra vires or without the knowledge of the Georgian Executive.

Thirdly, Judge Simma scrutinizes the Judgment's claim of alleged defects of inaction, that is, instances where the Judgment rejects documentary evidence such as parliamentary resolutions, because their contents do not indicate that the Georgian Executive acted upon or followed up complaints expressed in these resolutions. This mode of rejection of documentary evidence appears particularly improper at the jurisdictional stage because in so doing the Court ends up reaching directly into the merits of the dispute. More importantly, the actual texts of the documentary evidence and the circumstances surrounding it do not bear out the Judgment's speculations that the Georgian Executive could have called for the outright withdrawal of Russian troops from Georgian territory.

Fourthly, Judge Simma refutes the Judgment's findings of alleged defects due to the failure of documentary evidence to categorically attribute violations to the Russian Federation. In Part B of his opinion, he shows that the documentary evidence clearly establishes the attributability of the conduct of Russian peacekeepers to the Russian Federation. Lastly, Judge Simma rejects the Judgment's dismissal of documentary evidence due to alleged defects relating to matters of notice, such as 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. Judge Simma notes that the Court has hitherto never imposed a requirement of actual notice of complaints by an applicant State against a respondent State in order to determine the existence of a dispute.

According to Judge Simma, the Court's amorphous usage of the concept of "legal significance" in the present Judgment represents a distinct departure from the Court's settled practice of admitting differentiations in the assessment of the probative weight of evidence, demonstrated in Armed Activities on the Territory of the Congo, the Genocide case, Corfu Channel, Frontier Dispute, Nicaragua, and Tehran Hostages. Judge Simma fears that the Court could in future cases deny probative weight to evidence for similarly flawed reasons of formality, authorship, inaction, attribution, and notice. He cautions that this problematic methodology could inhibit States in their selection and control of the presentation of evidence to the Court. More importantly, Judge Simma finds that in the present case the Court did not discharge its judicial function in a thorough manner. Rather, the present Judgment engages in unwarranted factual inferences instead of making full use of its fact-finding powers under Articles 49 to 51 of the Statute in order to avoid having to resort to such inferences in the first place.

Part B of Judge Simma's opinion then proceeds to set out the impressive amount of documentary evidence in the record that establishes the existence of a dispute well before August 2008. In categorizing these texts, Judge Simma distinguishes between bilateral exchanges between Georgia and the Russian Federation; Georgian statements made before international organizations of which the Russian Federation is a member; and public statements of Georgia on other occasions.

Finally, Judge Simma emphasizes that his separate opinion does not intend to contradict in any way the joint dissenting opinion that he co-authored. The intention he pursues in his separate opinion is to give an account of the facts which not only allows a more informed conclusion on Russia's First Preliminary Objection, but also extends into the realm of the Second Preliminary Objection by broadening the factual basis for the joint dissent. Judge Simma concludes that the way in which the present Judgment handled the issues of relevance and legal significance of facts is unacceptable — allowing serious deficiencies to serve as blinders, as it were, in the examination of facts.

Separate opinion of Judge Abraham

In addition to being one of the co-signatories of the joint dissenting opinion which focuses on the second preliminary objection raised by the Russian Federation, Judge Abraham has set out in a separate opinion the reasons why, despite voting in favour of the decision reached on the first preliminary objection raised by Russia, he does not agree with the reasoning which led the Court to conclude that a dispute between the Parties arose in August 2008.

Judge Abraham believes that the Court's Judgment is open to criticism, in particular because its concept of a "dispute" is too far removed from that which emerges from a study of the Court's earlier jurisprudence, and which he considers to be more accurate.

Judge Abraham contends that an examination of the Court's jurisprudence reveals three characteristic features of the approach taken by the Court when it has to respond to an objection based on the absence of a dispute between the Parties. Firstly, Judge Abraham points out that identifying the dispute is a purely realistic and practical task: the Court does not need to establish whether formal exchanges took place between the Parties before the institution of the proceedings; all that matters is that it should be persuaded that the Parties hold conflicting views on the questions which form the object of the Application, and that those questions fall under the compromissory clause ratione materiae. Secondly, Judge Abraham notes that when determining the existence of a dispute between the Parties, the Court assesses the situation at the time of its decision and can therefore take account of the Parties' arguments on the merits of the case during the judicial process. Finally, Judge Abraham recalls that, except in certain specific circumstances, the Court does not determine when the dispute arose; it is sufficient for the dispute to be established when the Court is seised (which can be demonstrated by the subsequent facts) and for it still to be ongoing when the Court considers its jurisdiction.

In Judge Abraham's view, the Court's Judgment moves away from the concept of a dispute previously used in its jurisprudence in two respects. First, the Judgment needlessly endeavours to determine exactly when the dispute arose between the Parties, by conducting a long and drawn-out study of the documents produced by them. Moreover, the Judgment breaks with the Court's past jurisprudence by adopting a formalistic approach in identifying the dispute; that approach appears to require the Applicant, before bringing legal proceedings, to have transmitted a complaint to the Respondent, stating why it believes the latter's actions to be unlawful, and the Respondent to have rejected such a complaint. In Judge Abraham's eyes, this reflects a confusion between the question of the existence of the dispute and that of prior negotiation.

In conclusion, Judge Abraham believes that there is clearly a dispute in this case, and that that dispute undoubtedly concerns the interpretation and application of CERD, since it can be more than plausibly argued that ethnic cleansing is one of the activities prohibited by that Convention, and that the States parties to it are under an obligation not only to abstain from such activities, but also to do their best to put an end to them. Finally, Judge Abraham points out that, were it necessary to establish when the dispute arose — an exercise which he considers to be entirely without legal purpose — it could perhaps be dated back to 2004, and certainly to 2006.

Declaration of Judge Skotnikov

Judge Skotnikov supports the Court's overall conclusion that it has no jurisdiction to entertain the Application filed by Georgia. However, he is unable to concur with the Court's findings that a dispute with respect to the interpretation and application of CERD between Georgia and Russia emerged on 9 August 2008 in the course of the armed conflict which broke out on the night of 7 to 8 August 2008.

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 settlement procedures". The Court observes throughout the Judgment that in the situation prevailing at the outbreak of hostilities on 7/8 August 2008 there were disputes involving a range of different matters, but not the question of interpreting or applying CERD.

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 "discrimination, exclusion, restriction or preference based on race, colour, descent or national or ethnical origin" (Art. 1, CERD).

Given this difficulty, it may not always be possible for the Court to determine at the preliminary stage of the proceedings whether a CERD dispute exists in a situation of armed conflict. 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. Had the Court resorted to that option in the present case, it would have found itself on much safer ground.

The Court begins its consideration of that period in 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 Abkhas fighters and the Georgians at another." (Report, Vol. 1, para. 2 [PORF, Ann. 75]; see Judgment, paragraph 106)

It would have been useful to consider at least two other observations 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." (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 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." (Vol. I, para. 20.)

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 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. It should have concluded that the claims made by Georgia between 10 and 12 August 2008 belong in the category of war rhetoric and thus are of no probative value on the issue of the existence of a dispute under CERD.

Judge Skotnikov concludes that Georgia made no credible claim which could have been positively opposed by the Russian Federation within the meaning of the Court's settled jurisprudence. The exchange of accusations by the Parties, given the context of the armed conflict, simply cannot suffice in determining the existence of a legal dispute with respect to the interpretation or application of CERD.

Dissenting opinion of Judge Cançado Trindade

1. In his Dissenting Opinion, composed of 13 parts, Judge Cançado Trindade presents the foundations of his personal position on the matters dealt with in the present Judgment of the Court. He dissents in respect of 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. He begins his Dissenting Opinion by identifying (part I) the wider framework of 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 (CERD Convention).

2. In his understanding, compromissory clauses such as the one of the CERD Convention (Article 22) can only be properly considered in the ambit of the endeavours to achieve compulsory jurisdiction of the Court. To that end, Judge Cançado Trindade undertakes an examination (part II) of the genesis of the Court's compulsory jurisdiction, in the work on the PCIJ Statute of the Advisory Committee of Jurists (in 1920), which supported compulsory jurisdiction. That position of the Committee of Jurists found an obstacle in the distinct posture taken by the political organs of the League of Nations. A compromise was reached in the debates of the Assembly of the League of

Nations and subsidiary organs (also in 1920), resulting in the amended jurisdictional clause (the optional 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.

3. Judge Cançado Trindade then considers the following debates on the ICJ Statute of the United Nations Conference on International Organization and subsidiary organs (in 1945). Having examined the legislative history, he proceeds to a critical review of the practice concerning the optional clause of compulsory jurisdiction of the Hague Court (PCIJ and ICJ). Judge Cançado Trindade regrets the importance that a distorted practice came to ascribe to individual State consent, placing it even above the imperatives of the realization of justice at international level (part III), and making abstraction of the old ideal of automatism of compulsory jurisdiction of the Hague Court (part IV).

4. 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, in turn, contribute more effectively to the realization of international justice. To Judge Cançado Trindade, neither the optional clause, nor compromissory clauses, can be properly considered outside the framework of compulsory jurisdiction; this latter is what is aimed at.

5. He recalls that, 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 Court's compulsory jurisdiction, on the basis of compromissory clauses. Subsequently (from the late eighties 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.

6. Judge Cançado Trindade proceeds (part V) to the consideration of the relationship between the optional clause/compromissory clauses and the nature and substance of the corresponding treaties wherein they are enshrined. He sustains that human rights treaties (such as the CERD Convention) are ineluctably victim-oriented, and that the acknowledgement of the special nature of those treaties has much contributed to their hermeneutics, which has led to their implementation to the ultimate benefit of human beings, in need of protection.

7. Judge Cançado Trindade argues that despite the undeniable advances 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, wherein 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.

8. This is a point which cannot pass unnoticed in the present case, — he adds, — as it concerns the Application of the International Convention on the Elimination of All Forms of Racial Discrimination, and, in particular, the compromissory clause enshrined into a U.N. human rights treaty. Judge Cançado Trindade then addresses the methodology of interpretation of human rights treaties.

9. Judge Cançado Trindade advances the view that the methodology of interpretation of human rights treaties (as from the rules of treaty interpretation enunciated in Articles 31-33 of the two Vienna Conventions on the Law of Treaties, of 1969 and 1986), first, places greater weight, understandably and necessarily, on the realization of their object and purpose, so as to secure protection to human beings, the ostensibly weaker party; and secondly, it encompasses, in his 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 the compromissory clauses conferring jurisdiction upon international human rights tribunals.

10. 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. In the interpretation of human rights treaties, — he proceeds, — there is 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 the individual interests of each Contracting Party.

11. 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. The advent of human rights treaties — Judge Cançado Trindade adds — thus 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. In the present case concerning the Application of the International Convention on the Elimination of All Forms of Racial Discrimination, the punctum pruriens judicii is the proper understanding of the compromissory clause (Article 22) of the CERD Convention.

12. Judge Cançado Trindade points out that, in the course of the proceedings in the present case concerning the Application of the International Convention on the Elimination of All Forms of Racial Discrimination, the two contending Parties, Georgia and the Russian Federation, in their responses to a question he deemed it fit to put to them in the public sitting of 17.09.2010, 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); only the Court has not taken into account this important point.

13. Attention is then drawn to the principle ut res magis valeat quam pereat (part VI), widely supported by case-law. Underlying the general rule of treaty interpretation is the aforementioned 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 the level of their respective domestic legal orders. This principle applies — in his view — 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.

14. Accordingly, considerations of a superior order (international ordre public) have primacy over State voluntarism. In part VII of his Dissenting Opinion, Judge Cançado Trindade proceeds to an examination of 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). On the basis of his

analysis, he concludes that the Court's view in the present case that Article 22 of the CERD Convention establishes "preconditions" to be fulfilled by a State Party before it may have recourse to this Court, thus rendering access to the ICJ particularly difficult, in his 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 15.10.2008 in the present case.

15. He argues, as to this last point, that the Court could not have deconstructed its own res interpretata: positions as to the law (distinct from assessment of evidence) already upheld by the Court cannot, in his view, be simply changed at the Court's free will, shortly afterwards, to the diametrically opposite direction. This would generate a sense of juridical insecurity, and would clash with a basic principle of international procedural law, deeply rooted in legal thinking: venire contra factum/dictum proprium non valet.

16. Judge Cançado Trindade further argues that, in the present case, due weight should have been given to the consideration, in the preamble of the CERD Convention (para. 1), that all U.N. Member States have pledged themselves to take action (in co-operation 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, echoed in all quarters of the world, by the 1948 Universal Declaration of Human Rights (in one of the rare moments or glimpses of lucidity of the XXth century), that all human beings are born free and equal in dignity and rights, being endowed with reason and conscience (Article 1).

17. Part VIII of his Dissenting Opinion is devoted to an examination of the case-law of the Hague Court (PCIJ and ICJ), as to the verification of prior attempts or efforts of negotiation, in the process of judicial settlement of disputes submitted to its cognizance. Judge Cançado Trindade finds that the jurisprudence constante of the Court itself 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. 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 seised of.

18. Quite on the contrary, — he proceeds, — compromissory clauses have been a relevant source of the Court's jurisdiction, and even more cogently so under some human rights treaties containing them (cf. infra), and pointing towards the goal of the realization of justice (part IX). He regrets this change of approach in the present case, setting a very high threshold (as to the requirement of prior negotiations) for the exercise of jurisdiction on the basis of that human rights treaty, the CERD Convention, and losing sight of the nature of this important U.N. human rights treaty.

19. Judge Cançado Trindade argues that 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, — as disclosed by the present case brought to the cognizance of the Court. In his view, the Court 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.

20. This brings him to part X of his Dissenting Opinion, wherein he sustains that 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. These latter assume, in his view, 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. Most regrettably, this was not the outlook of the Court in the present case.

21. He stresses that the realization of justice under a human rights treaty (such as the CERD Convention), in a case of numerous victimized persons like the present one, can only be achieved taking due account and valuing the sufferings and needs of protection of the population. Instead of being 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, the Court unfortunately pursued an essentially inter-State, and mostly bilateral, outlook, centred on the (diplomatic) relations between the two States concerned.

22. The present Judgment contains only in passim references to the sufferings endured by the victimized population, despite the fact that there are documents, submitted to the Court by the two contending Parties themselves, which are clearly illustrative of the human aspect 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. In Judge Cançado Trindade's perception, one has to go 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. In his view, judicial recognition of the victimization of human beings is an imperative of justice, which comes at least to alleviate their sufferings.

23. He observes that the Court has spent 92 paragraphs to concede that a legal dispute at last crystallized, on 10 August 2008, only after the outbreak of an open and declared war between Georgia and Russia. The same formalistic reasoning has led the Court, in 70 paragraphs, to uphold the second preliminary objection, on the basis of allegedly unfulfilled "preconditions" of its own construction, at variance with its own jurisprudence constante and with the more lucid international legal doctrine. He warns that under human rights treaties, the individuals concerned, in situations of great vulnerability or adversity, need a higher standard of protection; yet the Court applied, contrariwise, a higher standard of State consent for the exercise of its jurisdiction. The result has been the remittance by the Court of the present dispute back to the contending Parties.

24. In part XI of his Dissenting Opinion, Judge Cançado Trindade sustains that 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. 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 lies in the foundations not only of the CERD Convention, but of the whole International Law of Human Rights, and which belongs, in his view, to the realm of international jus cogens. The CERD Convention, endowed with universality, occupies a prominent place in the law of the United Nations itself. 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.

25. He regrets that 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 or imagined "intentions" of its draftsmen almost half a century ago. Even within the static outlook of the Court, already at the time that the CERD Convention was being elaborated there were those — pointed out by him — who supported the compulsory settlement of disputes by the Court.

26. With the evolution of contemporary international law, this applies even more forcefully today, in 2011, in respect of obligations under the CERD Convention, and other human rights treaties. Yet, in the present Judgment, the Court, from an entirely different outlook, upheld the second preliminary objection, relying upon its own strictly textual or grammatical reasoning relating to the compromissory clause (Article 22) of the CERD Convention. Nowhere does one find considerations of a contextual nature, or any attempt to link such compromissory clause to the object and purpose of the CERD Convention, taking into account the substance and nature of the Convention as a whole.

27. 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. As a result of its own decision, the Court deprived itself of the determination whether the present dispute (which has victimized so many people) falls or not under the CERD Convention. 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, — he adds, — is never-ending, like in the myth of Sisyphus.

28. In part XII of his Dissenting Opinion, Judge Cançado Trindade stresses that, on the basis of all the preceding considerations, his own position, in respect of all the points which form the object of the present Judgment, stands in clear opposition to the view espoused by the Court. In addition, it does not squarely fit into the conceptual framework of the dissenting minority group either, it goes beyond it. His dissenting position is grounded not only on the assessment of the evidence produced before the Court, to which he attributes importance, but above all on issues of principle, to which he attaches even greater importance.

29. He adds that 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. 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. The Court has to remain attentive to the basic rationale of human rights treaties.

30. Last but not least, in part XIII of his Dissenting Opinion, Judge Cançado Trindade revisits an old dilemma, — faced by the Court as well as by the States appearing before it, — in the framework of contemporary jus gentium. Such old dilemma, with a direct bearing on the present and future of international justice, cannot, in his view, be here 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.

31. 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, 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 relevant provisions of the CERD Convention. In his view, 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.

32. Given the circumstances, — he adds, — the Court cannot remain hostage of State consent. It cannot keep displaying an instinctive and continuing search for State consent, 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. State consent is not an element of treaty interpretation; this would unduly render the letter of the treaty dead, and human rights treaties are meant to be living instruments, let alone their spirit.

33. Judge Cançado Trindade recalls 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. The sad outcome of the present case before the Court 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.

34. In his view, it is high time for the Court to give concrete expression of commitment to its mission, — as he perceives it, — when resolving cases, like the present one, 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.

35. 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 for the exercise of its jurisdiction, in an attitude remindful of traditional international arbitral practice. When human rights treaties are at stake, — he proceeds, — there is need, in his 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. 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.

36. From the standpoint of the justiciables, — Judge Cançado Trindade contends, — 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. 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 his view, a groundless and most regrettable obstacle to justice.

37. The realization of justice is an imperative which the Court is to keep constantly in mind. It can hardly be attained from a strict State-centered voluntarist perspective, and a recurring search for State consent. The Court cannot, in his perception, keep on paying lip service to what it assumes as representing the State's "intentions" or "will". The proper interpretation of human rights treaties (cf. supra) 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.

38. Much to his regret, 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". Judge Cançado Trindade challenges this view, as, in his understanding, consent is not "fundamental", it is not even a "principle". What is "fundamental", i.e., what lays in the foundations of the 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.

39. To Judge Cançado Trindade, 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 (and restated 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, adopted in 1970 by the U.N. General Assembly).

40. To Judge Cançado Trindade, 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).

41. In turn, — he adds, — State consent does not belong to the realm of the prima principia; recourse to it is a concession of the jus gentium to States. It is a rule to be observed (no one would deny it) so as to render judicial settlement of international disputes viable. 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, given the undue pride of place it has given to State consent. Such rule or procedural requirement — Judge Cançado Trindade concludes — 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 in his Dissenting Opinion, in the framework of contemporary jus gentium.

Separate Opinion of Judge Greenwood

Judge Greenwood considers that a decision by the Court, on a request for provisional measures of protection, that there appears prima facie to be a basis for the jurisdiction of the Court

does not in any way constrain the Court in later stages of the proceedings. The decision in 2008 that there might be a basis for the jurisdiction of the Court was in no sense inconsistent with the decision in today's Judgment that jurisdiction had not been established. The reason why there was no jurisdiction was that Article 22 of CERD imposed a precondition which had not been satisfied as Georgia had not made a sufficient attempt to negotiate the specific dispute regarding the interpretation or application of CERD before it seised the Court.

Separate opinion of Judge Donoghue

In a separate opinion, Judge Donoghue notes that she joins President Owada, Judges Simma and Abraham, and Judge ad hoc Gaja in dissenting as to Russia's Second Preliminary Objection. She then explains that although she voted in favour of the decision in the Judgment to reject Russia's First Preliminary Objection, she disagrees with the Judgment's approach to the question whether there is a "dispute" between Georgia and Russia with respect to the interpretation or application of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). Specifically, she rejects the Judgment's embrace of the notion that a "dispute" can exist only where the defendant has made statements of opposition prior to the filing of the application. She also rejects the Court's method of examining the documents and statements in the record.

First, Judge Donoghue recalls that the question whether a dispute existed between the Parties concerning the CERD as of the date of the Application is a matter for "objective determination" by the Court. In making that determination, the Court is not limited to considering whether Georgia provided notice of its claims to Russia, or whether Russia responded to those claims, prior to the date on which Georgia filed its Application. Previously, the Court has made clear that, in determining the existence of a dispute, the position or the attitude of a party can be established by inference. The Court has also relied on statements made in the course of the proceedings before it to confirm the existence of opposing views and, therefore, a legal dispute. In addition, Judge Donoghue points out that there is no general requirement of prior notice of claims or of an intention to submit those claims to the Court.

For these reasons, Judge Donoghue rejects the Judgment's characterization of the oft-cited phrase from the South West Africa cases ((Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections) — that for a dispute to exist, it must be shown that the claim of one party "is positively opposed" by the other party — as establishing a formal requirement that the parties engage in an exchange of views prior to the seisin of the Court. On the contrary, the question whether a claim "is positively opposed" is part and parcel of the Court's "objective determination", based on the totality of the information before it, whether there is an actual, ongoing dispute between the parties to a contentious case.

Second, Judge Donoghue concludes that, even accepting the view of the law embraced by the Judgment, there is sufficient evidence to demonstrate that a dispute relating to the interpretation or application of the CERD existed prior to 9 August 2008, the date on which the Judgment sets the commencement of a dispute for purposes of Article 22 of the CERD. In her view, the record, taken as a whole, establishes that Georgia alleged conduct amounting to ethnic discrimination and alleged that Russia was responsible for that conduct, and that Russia opposed these allegations. By contrast, the Judgment assigns no probative value to any individual document if the document fails both to allege conduct that could be actionable under the CERD and to attribute responsibility for that conduct to Russia. Whether Georgia could meet its burden to establish the full range of legal and factual elements of a breach of the CERD by Russia would be relevant if the Court were considering the merits, but that is not the required showing here, where the Court is tasked only with identifying whether a dispute with respect to the CERD exists. In Judge Donoghue's view, the factual record before the Court is sufficient to confirm that the Parties hold opposing views on

matters falling within the subject-matter of the CERD, and that a dispute therefore existed prior to the period of armed conflict in August 2008.

Judge Donoghue also notes that the decision of the Court that the dispute between Georgia and Russia began only on 9 August 2008 has significant consequences for its analysis of the Second Preliminary Objection, which disregards any engagement between Georgia and Russia prior to that date.

In conclusion, Judge Donoghue expresses her concern that the Court's Judgment has unnecessarily created new procedural obstacles that may serve to defeat jurisdiction in future cases, perhaps to the particular detriment of States with limited resources or those that lack experience before the Court.