

## DISSENTING OPINION OF JUDGE *AD HOC* KOROMA

1. I am constrained to dissent, with all due respect, from the conclusions reached by the majority at this stage of the proceedings. In my view, the Court should not have allowed this case to proceed beyond the preliminary objections phase, the main objective of which is to preclude a decision on the merits when there is a lack of jurisdiction and/or the claim is inadmissible. The object of the present phase of the proceedings is to determine whether the Court is authorized to consider the Application before it (that is to say, its jurisdiction) and whether the Application is admissible.

2. The Application instituting proceedings in this case concerns alleged violations of the International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965 (hereinafter the “CERD” or the “Convention”). The Applicant and Respondent are parties to the CERD.

3. The Applicant based the Court’s jurisdiction on Article 36, paragraph 1, of its Statute and invoked Article 22 of the CERD, whose object and purpose is the elimination of racial discrimination. In paragraph 32 of the Judgment, the Court acknowledges that the Parties have had competing claims over the territory of Nagorno-Karabakh/Garabagh for decades, which has resulted in armed hostilities since the 1990s. Further armed hostilities between the Parties erupted in September 2020, the week of 12 September 2022, and September 2023.

4. Armenia instituted the proceedings under the CERD on 16 September 2021, following the armed hostilities between the two Parties in 2020, alleging that Azerbaijan has breached several provisions of the CERD by virtue of a decades-long State policy of *racial discrimination* (my emphasis). As stated earlier, Armenia invoked Article 36 (1) of the Statute in conjunction with Article 22 of the CERD as the jurisdictional foundation for its Application. Azerbaijan raised two preliminary objections to the jurisdiction of the Court, contending, *inter alia*, that some of Armenia’s claims do not fall within the scope and objective of the CERD so as to justify use of its Article 22 as a jurisdictional basis. According to Azerbaijan, the conduct Armenia complains of reflects, if anything, violations of international humanitarian law and general hostility between the nationals of two States involved in an armed conflict rather than an animus based on racial discrimination or the ethnic origins of the victims that could be capable of falling within the CERD. The Respondent further has contended that “the mere fact that the peoples of two States at war often are primarily of different ethnic origins does not, without more, transform every act of war into a distinction ‘based on’ ethnic origin” and that the alleged violation of the CERD requires specific evidence of racial discrimination and not discrimination based on current nationality, which falls outside the scope of the Convention. The Respondent, therefore, requests the Court to rule that, based on the foregoing, it lacks jurisdiction and to find the Application inadmissible.

5. Nevertheless, the Court concludes that it has jurisdiction to entertain the Applicant’s claims against the Respondent under the CERD (paragraph 104). However, in reaching such a conclusion, the Court appears to depart from its previous jurisprudence. In the *Nuclear Tests* case, the Court stated that a dispute must concern the subject-matter of the relevant convention<sup>1</sup>. It went on to say that the Court’s first duty is to “ascertain the true subject of the dispute, the object and purpose of the claim” and that “the dispute brought before the Court cannot be separated from the situation in which it has arisen, and from further developments which may have affected it”<sup>2</sup>.

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<sup>1</sup> *Nuclear Tests (New Zealand v. France), Judgment, I.C.J. Reports 1974*, p. 467, para. 31.

<sup>2</sup> *Ibid.*

6. As the majority of the Court acknowledges, the real dispute underlying this Application concerns the status of the territory of Nagorno-Karabakh/Garabagh, but the jurisdictional clause invoked is that under the International Convention on the Elimination of Racial Discrimination. Invoking the compromissory clause under the CERD does not transform a dispute about the status of the territory of Nagorno-Karabakh/Garabagh into a dispute about racial discrimination. Further, as follows from an earlier decision of the Court, a dispute about the alleged use of force and the territorial integrity of a State is not transformed into a dispute about racial discrimination merely because the compromissory clause under the CERD is asserted as the basis for jurisdiction. The Court, correctly, in my view, found it lacked jurisdiction in that case, though on the basis that prior negotiation had not been fulfilled<sup>3</sup>. Nor did the Convention article envisage an armed conflict situation; its aim is to eliminate racial discrimination following decolonization.

7. It is worth underscoring in this regard that a State's actions can only be judged on the basis of its consent and in accordance with the terms and conditions of the relevant treaty to which it is a party. Article 22 of the CERD confers jurisdiction on the Court only to interpret and apply the Convention to disputes arising under its rules. Article 22 is not to be interpreted and applied as a universal compromissory clause to resolve all disputes under general international law but is intended to protect the object and purpose of the treaty itself of which it forms part. In the case under consideration, the jurisdiction the treaty confers is for the elimination of racial discrimination. There is no equivalent in international law of the old common-law concept of *forms of action*, providing general templates for claims. And Article 22 of the Convention is clearly not intended for this purpose.

8. In the case between *Georgia v. Russian Federation* in which Article 22 of the CERD was invoked as the jurisdictional basis, the Court found it lacked jurisdiction solely on the basis "that neither requirement contained in Article 22 has been satisfied", i.e. the failure to fulfil a procedural precondition, and thus it was not justified in the circumstances of the case to exercise its jurisdiction. Nor does that precondition appear to have been fulfilled in the present case. Not only must a dispute based on Article 22 of the CERD concern the subject-matter of the Convention — the substantive precondition — but a judicial assessment of the procedural condition of prior negotiation assumes a judicial imperative, that is, it is necessary to consider whether the attempts at negotiation were intended to reach an agreement regarding the dispute or a formality to enable the Court to be seised of the dispute. In making such an assessment, the situation giving rise to the Application in the first place and the developments which may have affected it should have been duly considered. This is especially so given the fact that the Parties had not engaged diplomatically for more than 30 years, as well as the periodic eruptions of armed hostilities between them. The period of negotiations should have been considered against that background.

9. In addition, the purpose of preliminary objections, which challenge the Court's jurisdiction/competence to adjudicate on the Application, as well as questioning the admissibility of the Application, should have been respected throughout the preliminary proceedings so as to avoid not only a decision touching on the merits but also discussion of the merits, in order to further the interest of justice, not to draw premature conclusions.

10. Moreover, the Court's function in the preliminary objections phase of a dispute is to decide on the objective questions of its jurisdiction and the Application's admissibility. The Court's decision cannot be predicated mainly on the language/terms in which the dispute is framed by the applicant (the narrative), which is a matter for the merits. Rather, the Court must determine whether the

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<sup>3</sup> *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 140, para. 184.

jurisdictional link to the convention invoked has been established. As the Court has repeatedly stated, a compromissory clause exists only within the limits set out therein<sup>4</sup>.

11. Finally, it appears to me, if a less eristic approach had been taken, notwithstanding the allegations of “discriminatory” murder, “torture” and other similar alleged conduct, the Court could have reached a different conclusion on the exercise of its jurisdiction in this case and, even if it had found it had jurisdiction, it should have found the Application inadmissible on grounds of propriety on the basis of the pleadings — both written and oral — which are before the Court.

*(Signed)* Abdul G. KOROMA.

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<sup>4</sup> *Ibid.*, p. 124, para. 131.