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

[English Original Text]

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

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

2. We have voted in favour of paragraph (1) *(a)* of the operative part because we believe that the Court has rightly rejected the first preliminary objection. We have however voted against paragraph (1) *(b)* because in our view the second preliminary objection should also have been rejected,

and against paragraph (2) because we therefore think that the Court should have found that it had jurisdiction to entertain the Application.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13. These various points will now be elaborated.

I. Does Article 22 of CERD Lay Down Procedural "Preconditions" to Be Satisfied Prior to Seisin of the Court?

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

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

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

factual condition which the Court must assess in all cases and on the fulfilment of which its jurisdiction is dependent.

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

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

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

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

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

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

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

18. In fact, the Court draws little of consequence from its examination of the *travaux préparatoires*. It confines itself to noting, in conclusion to this examination, that: "the *travaux préparatoires* do not suggest a different conclusion from that at which the Court has already arrived through the main method of ordinary meaning interpretation" (*ibid.*, para. 147). In other words, it does not find confirmation in the *travaux préparatoires* of the interpretation it has already arrived at based on the "ordinary meaning" of the terms of the clause; on a more cautious note, it

observes only that it finds nothing decisive that suggests a conflicting interpretation.

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

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

21. It is however striking that the "general rule of interpretation", i.e., "the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose", is applied in the Judgment in a way that amounts to nothing more than applying the principle of "effectiveness". According to the Court: "By interpreting Article 22 of CERD to mean, as Georgia contends, that all that is needed is that, as a matter of fact, the dispute had not been resolved . . ., [the passage to be interpreted] would become devoid of any effect" (*ibid.*, para. 133). It is this justification, and it alone, which supports the Court's conclusion, and the Court felt no need to pursue its analysis of the "ordinary meaning of the terms" any further. The additional argument in paragraph 135 based on the use of the future perfect ("différend . . . qui n'aura pas été réglé") in the French version of Article 22, whereas the present indicative ("dispute . . . which is not settled") is used in the English, is hardly a solid one, since the problem of interpretation remains the same whatever the tense employed.

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

The fact is that "effectiveness" is merely one argument which may point towards a particular interpretation, but it does not obviate the need to

take into consideration other elements relevant to elucidating the meaning of the text. We believe that in the case before us the Court should at least have considered certain elements capable of counterbalancing the argument drawn from the principle of effectiveness, which, such as it is described by the Court in the present Judgment, undeniably weighed in favour of the interpretation propounded by the Respondent.

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

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

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

This question, however, warranted fuller consideration. In 1965, when CERD was finalized and adopted, compromissory clauses in treaties in force referring to "negotiation" contained two sorts of formulations, i.e., to simplify a bit, clauses referring to a dispute "which cannot be settled" by negotiation and those referring simply to a dispute "which is not settled" by negotiation. It may therefore be asked whether the wording adopted for Article 22 was not a deliberate, and therefore meaningful, choice, as opposed to an arbitrary selection of one form of wording out of a number of forms deemed equivalent. It is beyond doubt in any case that the CERD drafters chose, deliberately or not, the wording least capable of being interpreted literally as laying down a "precondition" requiring a prior attempt to negotiate a settlement.

24. The foregoing observation is buttressed by the status in international law of negotiations held prior to the initiation of judicial proceed-

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

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

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

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

26. Accordingly, when the drafters of a compromissory clause wish to include such a precondition, they are aware that in doing so they will depart from the general rule, which includes no such condition. This affords yet another reason for them to make their intention unambiguously clear. In such a case, this should at least lead them to prefer the wording referring to a dispute "which cannot be settled" to that referring to a dispute "which is not settled" by negotiation. Yet a great number of treaties, including some that had already been adopted as of the date when CERD was signed, spell out the condition even more clearly, thus avoiding any possible ambiguity. For example, the Single Convention on

Narcotic Drugs, signed at New York on 30 March 1961, provides: "If there should arise between two or more Parties a dispute . . ., the said Parties shall consult together with a view to the settlement of the dispute by negotiation, investigation, mediation . . . or other peaceful means of their own choice." (Art. 48, para. 1.) Only after these mandatory consultations may the dispute be referred to the Court for decision pursuant to Article 48, paragraph 2, of that Convention.

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

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

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

The real picture is much less uniform.

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

29. On the other hand, in respect of clauses worded like Article 22 of

CERD, applying to disputes "which are not settled" by negotiation, the jurisprudence of the Court would appear to fluctuate much more than the present Judgment suggests.

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

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

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

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

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

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

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

> "It is established that a dispute has arisen between Iran and the United States over the issues raised in the counter-claim. The Court has to take note that the dispute has not been satisfactorily adjusted by diplomacy. Whether the fact that diplomatic negotiations have not been pursued is to be regarded as attributable to the conduct of the one Party or the other is irrelevant for present purposes, as is the question whether it is the Applicant or the Respondent that has asserted a *fin de non-recevoir* on this ground. As in previous cases involving virtually identical treaty provisions [the *United States Diplomatic and Consular Staff in Tehran* and *Military and Paramilitary*

> *Activities in and against Nicaragua* cases are cited here], it is sufficient for the Court to satisfy itself that the dispute was not satisfactorily adjusted by diplomacy before being submitted to the Court." (*Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment, I.C.J. Reports 2003*, pp. 210-211, para. 107.)

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

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

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

33. But it is one thing to deny the Order any binding force on the issue of jurisdiction and yet another to disregard it completely as a germane precedent, that is to say one apt to shed light on how the Court has

previously treated clauses identical or comparable to Article 22. The very least that can be said is that the 2008 Order undeniably shows that the prior case law was not as clearly settled — in favour of the existence of a "precondition" — as the present Judgment would suggest. Had it been, the Court in 2008 would not have been able to assert, even prima facie, that Article 22 "in its plain meaning" did not appear to make prior negotiations a condition to the seisin of the Court (which it now says is the case).

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

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

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

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

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

from that point on, been fulfilled." (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 441, para. 85.)

36. None of this is reflected in the present Judgment. Requiring fulfilment of the condition "before the seisin of the Court" means, for example, that in a case where negotiations were begun before the application was filed but came to an end only after that date, by virtue of the acknowledged impossibility of reaching agreement, the Court should decline jurisdiction and thereby require the applicant to bring fresh proceedings. In looking in the present case for any attempt by Georgia to negotiate, the Court thus confines itself to the period from 9 August 2008, when the Court believes the dispute came into existence, to 12 August 2008, when the Application was filed:

> "the Court is . . . assessing whether Georgia genuinely attempted to engage in negotiations with the Russian Federation, with a view to resolving their dispute . . . [and, if so,] the Court [will] ascertain whether the negotiations failed, became futile, or reached a deadlock *before Georgia submitted its claim to the Court*" (Judgment, para. 162; emphasis added).

37. No reason can be found for such a surprisingly narrow approach, one at odds with the thrust of the Court's most recent jurisprudence in respect of its consideration of the conditions for jurisdiction and, specifically, at odds with a Judgment as recent — and as clear on this point in its reasoning — as that which the Court handed down on the preliminary objections in the *Croatia* v. *Serbia* case. The language quoted above from paragraph 85 of that Judgment is obviously general in scope. In that case the condition not met until after the application had been filed was not a condition requiring an attempt at negotiated settlement, but the Court expressed itself in terms precluding all doubt as to the fact that its reasoning applies to any initially unmet condition for jurisdiction or admissibility that is fulfilled between the date the proceedings were initiated and the date on which the Court decides on its jurisdiction. And it is hard to see any reason why it should be otherwise. It was this reasoning that allowed the Court to find jurisdiction to entertain Croatia's application. Hence, in the present case the Court has departed from its own most recent jurisprudence, without offering the slightest justification for doing so.

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

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

II. Are the Two Modes Referred to in Article 22 Alternative or Cumulative?

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

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

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

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

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

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

The conjunction "or" is clearly different from the conjunction "and", and, generally speaking, "or" takes on great importance when a text con-

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

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

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

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

44. In short, as direct negotiation and referral to the Committee are two different ways of doing the same thing, that is to say, seeking an

agreement premised on the parties' ability to reconcile their positions, it is enough, even under the strict interpretation upheld in the Judgment, to entitle the applicant to come before the Court if one of these two modes has been pursued, for it would be highly unreasonable to require the applicant then to try the other.

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

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

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

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

III. What Exactly Does the Condition Requiring an Attempt to Settle the Dispute by Negotiation Consist of?

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

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

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

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

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

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

54. Even taking account of the elements of flexibility introduced by these last considerations, we believe that the Court's approach remains

far too formalistic here, and, in truth, not very faithful to the general thrust of its jurisprudence in the past.

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

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

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

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

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

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

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

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

61. In the *South West Africa* case, the applicable clause (Article 7, paragraph 2, of the Mandate) referred to "any dispute . . . if it cannot be settled by negotiation". The Respondent maintained that the dispute brought before the Court was not one that "cannot be settled by negotia-

tion", and that no negotiations had taken place with a view to its settlement.

The Court replied as follows:

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

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

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

> "The Court observes that in the present case, the Respondent has always maintained that the destruction of the Pan Am aircraft over

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

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

IV. Was a Sufficient Attempt Made to Settle the Dispute through Negotiation?

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

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

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

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

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

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

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

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

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

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

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

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

> Georgians to their homes in South Ossetia and Abkhazia; and (iii) the destruction of Georgian culture and identity in South Ossetia and Abkhazia" (quoted in paragraph 17 of the Judgment).

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

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

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

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

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

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

73. That is exactly what happened in this case.

Contrary to what is stated in the section of the Judgment relating to Russia's first preliminary objection, the dispute between the Parties

did not first appear three days before the seisin of the Court, i.e., on 9 August 2008.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The second statement is that of 17 July 2008, in the form of a press release, whereby the Georgian Ministry of Foreign Affairs asserted that Moscow's true design was to "to legalize results of the ethnic cleansing

instigated by itself and conducted through Russian citizens in order to make easier annexation of the integral part of Georgia's internationally recognized territory".

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

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

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

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

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

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

General Conclusion

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

In addition, this is the first time that the Court has declined jurisdiction solely on the ground that the applicant, before coming to the Court, did not undertake sufficient efforts to resolve the dispute by means of negotiation with the respondent. Hitherto, in a wide range of cases involving

factual circumstances different from one to the next, the Court has almost always rejected such an objection, and has never upheld such an objection on its own. Given the subject of this dispute and the circumstances of the case, it is difficult to understand why the Court has found this to be the occasion to be so exacting. In reality, the explanation is that the Court has not applied its usual criteria in this instance.

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

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

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