SEPARATE OPINION OF JUDGE KOROMA

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

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

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

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

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

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

5. In considering Russia's second preliminary objection, the Court has applied the canons of interpretation embodied in Article 31 of the Vienna Convention on the Law of Treaties. Article 31 of the Vienna Convention sets out the well-known rule of treaty interpretation that a treaty must be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose". The wording of Article 31 suggests that the ordinary meaning of the treaty is the starting-point. First, the terms of the treaty are to be analysed along with the context in which they occur. If the ordinary meaning is unclear or would lead to an absurd result, the object and purpose of the treaty can then be considered to determine precisely what was intended. The Court endorsed this approach to treaty interpretation some 60 years ago in its Advisory Opinion on the *Competence of the General Assembly for the Admission of a State to the United Nations*:

> "the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter. If, on the other hand, the words in their natural and ordinary meaning are ambiguous or lead to an unreasonable result, then, and then only, must the Court, by resort to other methods of interpretation, seek to ascertain what the parties really did mean when they used these words.

. . . . . .

> When the Court can give effect to a provision of a treaty by giving to the words used in it their natural and ordinary meaning, it may not interpret the words by seeking to give them some other meaning. In the present case the Court finds no difficulty in ascertaining the natural and ordinary meaning of the words in question and no difficulty in giving effect to them. Some of the written statements submitted to the Court have invited it to investigate the *travaux préparatoires* of the Charter. Having regard, however, to the considerations above

> stated, the Court is of the opinion that it is not permissible, in this case, to resort to *travaux préparatoires*." (*Advisory Opinion, I.C.J. Reports 1950*, p. 8.)

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

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

7. Second, the dispute must be "with respect to the interpretation or application of" CERD. In other words, a link must exist between the substantive provisions of the treaty invoked and the dispute. This limitation is vital. Without it, States could use the compromissory clause as a vehicle for forcing an unrelated dispute with another State before the Court. This would contravene Article 36 of the Statute of the Court, under which the jurisdiction of the Court must be founded on consent as expressed, whether such consent be in a treaty or an optional clause declaration. Thus, any jurisdictional title founded on CERD's compromissory clause must relate to, and not fall outside, the substantive provisions of the Convention. In the case under consideration, this limitation means that there must be a bona fide dispute between the parties about the *interpretation* or *application* of CERD. Other types of disputes, including those relating to territorial integrity, armed conflict, etc., as such do not fall under this Article. Additionally, because the Convention is a legal instrument, this language implies that the differences between the parties must be legal in nature. Differences solely of a political nature, for example, not concerning legal aspects of racial discrimination, would not relate to the interpretation or application of CERD. On the other hand, many legal disputes do relate to politics or have political dimensions to them; these types of disputes would fall within the meaning of Article 22.

8. Furthermore, under the Convention, the parties must attempt to resolve the dispute by negotiation or by procedures set out in the Convention. The plain meaning of Article 22 does not permit any other conclusion. According to the principle of effectiveness, a treaty or statute must be read in a manner that gives effect to its provisions in accordance with

the intention of the parties. In the case under consideration, if the drafters of the Convention intended to enable any State to bring another State party before the Court without resorting to negotiation or other dispute resolution mechanism, they could have simply written,

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

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

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

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

During the negotiation of the Convention, Ghana, Mauritania and the Philippines introduced an amendment proposing the addition of the phrase "or by the procedures expressly provided for in this Convention". In explaining their amendment, the representatives of those States made clear that they believed the amendment required parties to use the dispute resolution mechanism in the Convention before resorting to the Court. The Representative of Ghana stated that "[p]rovision had been made in the draft Convention for machinery which should be *used* . . . before

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

recourse was had to the International Court of Justice . . .” (emphasis added). This amendment was adopted unanimously. Thus, it is clear that the drafters of the compromissory clause viewed its object and purpose to be to establish preconditions that must be fulfilled before the Court could be seised by a party to CERD.

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

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

(Signed) Abdul G. KOROMA.