SEPARATE OPINION OF JUDGE GREENWOOD

Jurisdiction of the Court — Treatment of jurisdictional issues at the provisional measures stage — Effect on the Court's approach at later stages of the proceedings — Issue before the Court specific to Article 22 of CERD — Requirements of Article 22 of CERD a matter of substance not form — Meaning of dispute — Relationship between dispute with respect to the interpretation or application of CERD and wider dispute between the Parties — Whether Article 22 of CERD imposing precondition which must be satisfied before the Court can be seised

1. I have voted in favour of the operative paragraphs of the Judgment and agree, for the most part, with the Court's reasoning. In this separate opinion, I wish merely to add a few further observations.

2. First, I do not consider that the Court's 2008 Order regarding provisional measures of protection operates to constrain the approach which the Court should take in the present phase of the proceedings. In accordance with its long-established practice, when Georgia requested the indication of provisional measures of protection, the Court examined whether "the provisions invoked by the Applicant appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded" (*I.C.J. Reports 2008*, p. 377, para. 85). It concluded (*ibid.*, p. 388, para. 117) that this test was satisfied but, as the Judgment points out in paragraph 129, the Court went on to state that this decision "in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case" (*ibid.*, p. 397, para. 148). Requests for the indication of provisional measures of protection are considered as a matter of urgency, as required by Article 74 of the Rules of Court, without the opportunity for the consideration of extensive evidence or the detailed analysis of legal issues which can be undertaken in later phases of the proceedings. The jurisdictional threshold which the applicant has to cross is, accordingly, set quite low and any ruling — whether as to law or fact — which the Court makes at the provisional measures stage of a case is necessarily provisional.

3. It is for that reason that the Court has had occasion in the past to hold, on a full examination of jurisdictional objections, that it lacked jurisdiction, notwithstanding that it had found, at the provisional measures stage of the same case, that there appeared prima facie to be a basis on which the jurisdiction of the Court might be founded. The Court reached just such a conclusion in the first case in which it indicated provisional measures of protection (*Anglo-Iranian Oil Co. (United Kingdom* v. *Iran), Preliminary Objection, Judgment, I.C.J. Reports 1952*, p. 93,

which may be compared with the earlier Order of 5 July 1951, *I.C.J. Reports 1951*, p. 89) and, more recently, in *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning* Avena and Other Mexican Nationals (Mexico *v.* United States of America) *(Mexico* v. *United States of America)* (*Judgment, I.C.J. Reports 2009*, p. 3), in which it took a different view, after full argument, from that which it had reached prima facie in its Order of 16 July 2008 in the same case (*I.C.J. Reports 2008*, p. 311).

4. The strictly limited effects of a jurisdictional finding at the provisional measures stage are even more apparent when one considers that an applicant which has failed to satisfy the Court that the jurisdictional grounds on which it relies might, even prima facie, furnish a basis for jurisdiction is still entitled to contend, in the later stages of the case, that those same jurisdictional grounds do in fact provide a basis for jurisdiction. That was the course followed, for example, by the Democratic Republic of the Congo in *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. 6), notwithstanding the earlier dismissal of its argument that those jurisdictional grounds met the prima facie test (see *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Provisional Measures, Order of 10 July 2002, I.C.J. Reports 2002*, p. 219). Although the Court rejected the submissions of the DRC in its 2006 Judgment, it examined afresh such questions as whether Rwanda's reservation to Article IX of the Genocide Convention was contrary to the object and purpose of the Convention (Judgment, pp. 29-33, paras. 56-70) with no suggestion that it was constrained by its earlier, prima facie, analysis of the same questions (Order, pp. 245-246, paras. 69-72).

5. In my opinion, the fact that the Court considered in 2008, on the basis of the limited evidence and legal argument which could then be put before it, that Article 22 of the Convention on the Elimination of All Forms of Racial Discrimination ("CERD") *might* afford a basis for jurisdiction, should have no effect on its approach, after full examination of the evidence and legal argument, to the question whether that provision *does* definitively confer jurisdiction upon it.

6. Secondly, it is important to understand precisely what is the jurisdictional issue in the present case. It has nothing to do with whether there is a general requirement that States attempt negotiation before commencing proceedings in the Court but only with whether or not the specific requirements of Article 22 of CERD have been met. The distinction was succinctly explained in *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria)*, where the Court stated that:

> "[n]either 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. No such precondition was embodied in the Statute of the Permanent Court of International Justice, contrary to a proposal by the Advisory Committee of Jurists in 1920 (Advisory Committee of Jurists, *Procès-verbaux of the Proceedings of the Committee (16 June-24 July 1920) with Annexes*, pp. 679, 725-726). Nor is it to be found in Article 36 of the Statute of this Court." (*Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 303, para. 56.)

The Court, however, went on to add that "[a] precondition of this type may be embodied and is often included in compromissory clauses of treaties" *(ibid.)*. The issue in the present case is precisely whether Article 22, the only compromissory clause on which Georgia relies, contains such a requirement and, if so, whether it had been satisfied at the time that Georgia lodged its Application.

7. That issue is one of substance, not of form. As the Court has repeatedly emphasized, in the present state of international law its jurisdiction is dependent upon the consent of the parties and when that consent is contained in the compromissory clause of a treaty, the Court is given jurisdiction only within the limits set out in that clause (see, for example, *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Provisional Measures, Order of 10 July 2002, I.C.J. Reports 2002*, p. 245, para. 71). Accordingly, what those limits are, and whether the Application falls within them, are matters of fundamental importance.

8. Thirdly, Article 22 plainly confers jurisdiction only over a certain type of dispute, namely one with respect to the interpretation or application of CERD. What constitutes a dispute has, as paragraph 30 of the Judgment makes clear, been the subject of a long line of decisions by this Court and its predecessor: there must be "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons" (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11); "[i]t must be shown that the claim of one party is positively opposed by the other" (*South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328). Where, as here, the compromissory clause limits jurisdiction to a dispute with respect to the interpretation or application of a particular Convention, the "claim" must relate to the interpretation or application of that Convention.

9. The fact that there is another, wider dispute between the Parties, which may be of more importance to one or both of them, does not prevent the emergence between them of a dispute respecting the interpreta-

tion or application of the Convention. The Convention dispute may exist within the framework of the wider dispute, or in parallel with it; the point is that the two may co-exist and the existence of the wider dispute does not prevent the Court from exercising jurisdiction over the narrower Convention dispute (*United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Judgment, I.C.J. Reports 1980*, p. 20, para. 37). The existence of the other, wider dispute is not, however, devoid of significance. Although the Judgment, in accordance with the Court's case law, rightly sets the bar for the existence of a dispute quite low (rejecting, for example, the suggestion that there must be express reference to the provisions of the Convention or even to the Convention as a whole), the statements relied upon by the Applicant to demonstrate the existence of a Convention dispute must be sufficiently clear to enable the other Party to appreciate that a claim is being made against it regarding the interpretation or application of the Convention. Where those statements are made in the context of a wider dispute, and especially where the statements deal with the issues of that wider dispute, the need for clarity is particularly marked. In such a case, it must have been possible for the other Party to discern that, whatever other matters were also being raised and whatever other allegations were being made, the statements in question were making a claim regarding the interpretation or application of the Convention even if they did not mention the Convention by name[1]. That is far from being an exacting requirement but it is an important one, especially in the context of a provision like Article 22 of CERD, which refers to more than one method of dispute settlement. A State cannot be expected to attempt to negotiate a dispute if no steps have been taken to make it aware that it might be a party to such a dispute.

10. Applying the test formulated by the Court to the evidence of the exchanges between the Parties and the unilateral statements made by Georgia but of which the Russian Federation can reasonably be considered to have been aware, the Judgment concludes that Georgia did make such claims between 9 and 12 August 2008 and that a dispute relating to whether or not the Russian Federation was complying with its obligations under the Convention came into existence at that time but not earlier. I agree with that conclusion. In my opinion, Georgia's earlier statements were such that a contemporary observer would not have been

[1] That does not mean that a State which wishes to seise the Court of a case under the Convention must first send a formal "letter before action" to the proposed respondent but it must, in the words of paragraph 30 of the Judgment, "refer to the subject-matter of the treaty with sufficient clarity to enable the State against which a claim is made to identify that there is, or may be, a dispute with regard to that subject-matter". While the Judgment states that an express reference to the Convention would remove any doubt and place the other State on notice, it does not make that a requirement.

able to discern that a claim was being made against the Russian Federation regarding the latter's compliance with its obligations under CERD, even if that had been Georgia's intention at the time those statements were made.

11. Lastly, I agree with the conclusion in paragraphs 132 to 141 of the Judgment that the reference in Article 22 to a dispute "which is not settled by negotiation or by the procedures expressly provided for in this Convention" imposes a precondition which must be satisfied if the Court is to have jurisdiction. It is not enough that a dispute *has not been* settled by negotiations or the Convention procedures; an attempt must have been made to settle the dispute by those means. To read the provision otherwise would make this clause completely superfluous and thus offend against a basic tenet of treaty interpretation. I therefore agree with the Judgment that it is a precondition to the jurisdiction of the Court under Article 22 that there must have been a good faith attempt to settle the dispute by negotiation or by the Convention procedures. That was the conclusion which the Court reached in the most recent case in which it had to consider a clause similar to Article 22. In *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), the Court had to consider Article 29 of the Convention on the Elimination of Discrimination against Women, which provides that:

> "[A]ny dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court."

While this provision differs from Article 22 of CERD in that it contains a precondition that an attempt must first be made to arrange an arbitration, the Court was clear that the reference to negotiations, which is identical to that in Article 22, created a condition which had to be met before the case could be referred to the Court.

12. The existence of this condition is not a licence for a putative respondent to frustrate any prospect of seising the Court by rebuffing or refusing to respond to offers of negotiation. As the Court has made plain on other occasions, a State cannot be required to persist in the face of such a reaction (*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). For the same reason, a respondent which seeks artificially to prolong negotiations while declining to negotiate in good faith cannot hide behind the requirement in Article 22 of CERD to prevent the exercise of jurisdiction by the Court.

13. In determining whether this requirement has been met, the existence of a wider dispute between the Parties must again be borne in mind. The fact that a State is making proposals regarding negotiations on that wider dispute does not preclude the possibility that it may also (perhaps even in the same document) be offering to negotiate on the narrower Convention dispute. If that is the case, however, it must be sufficiently clear from the statements made that this is its intention. In making an attempt to settle the dispute by negotiation a precondition, Article 22 gives the State against which a claim is being made a choice of accepting an offer to negotiate regarding that dispute, rather than submitting itself to immediate recourse to the Court. For that choice to be meaningful, the offer to negotiate must be sufficiently clear that it can be seen for what it is. Where the two States are simultaneously engaged in a wider dispute, that means that it must be clear that there is an offer to negotiate regarding the Convention dispute and not simply about the wider dispute between the Parties. In a case such as the present, it is an essential feature of the applicant State's case regarding jurisdiction that the dispute which it seeks to bring before the Court can be separated from the wider dispute over which it is accepted that no jurisdiction exists. By the same logic, the offer of negotiation regarding the narrower dispute must be capable of being discerned amidst the exchanges about the wider dispute. If that cannot be done, then an essential requirement of Article 22 has not been met.

14. In the present case, I do not believe that Georgia has satisfied that requirement. Since I agree that Georgia has failed to demonstrate that a dispute falling within Article 22 existed before the period 9-12 August 2008, it is necessary only to consider any statements said to constitute an offer to negotiate made during that period. I agree with the analysis of those statements in the Judgment. However, I must add that, even if I had been convinced that a dispute regarding the interpretation or application of CERD had come into existence between Georgia and the Russian Federation before that date, I would not have found that the earlier statements on which Georgia relied met the requirement of attempting to negotiate regarding *that* dispute and would, therefore, still have voted in favour of the second operative paragraph.

(*Signed*) Christopher GREENWOOD.