SEPARATE OPINION OF JUDGE DONOGHUE

Agreement with rejection of first preliminary objection but disagreement with Court's reasoning and methodology — Dispute involving the subject-matter of CERD pre-dated 9 August 2008 — Imposition of prior notice and prior opposition requirements contravenes Court's established jurisprudence — Mischaracterization of the requirement in South West Africa *cases — Disagreement with Court's methodology giving no weight to opposing views in Parties' submissions.*

Disagreement with dismissal by Court of a document if it does not contain all elements necessary to prove a breach of CERD — Evidence taken as a whole demonstrates dispute existed before 9 August 2008.

Joint dissent addresses second preliminary objection — Conclusion that dispute did not arise until 9 August 2008 has profound impact on Court's analysis of second preliminary objection.

1. I have joined President Owada, Judges Simma and Abraham, and Judge *ad hoc* Gaja to express the reasons for my dissent with respect to the Court's decision to uphold the second preliminary objection of the Russian Federation. I agree with the decision in the Judgment to reject the first preliminary objection. I write separately, however, because I disagree in significant ways with the approach taken in the Judgment to the question whether there is a "dispute" and because I believe that the dispute between Georgia and Russia with respect to interpretation or application of the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter "CERD") arose prior to 9 August 2008, the date set by the Judgment.

I. First Preliminary Objection

2. I agree with the Court's decision to reject the first preliminary objection. I also agree with the portion of the legal test that is set forth at paragraph 31 of the Judgment:

> "The Court needs to determine (1) whether the record shows a disagreement on a point of law or fact between the two States; (2) whether that disagreement is with respect to 'the interpretation or application' of CERD, as required by Article 22 of CERD; and (3) whether that disagreement existed as of the date of the Application."

As the Judgment indicates, the question whether there is a dispute is a matter for "objective determination" by the Court (paragraph 30, citing

Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950, p. 74).

3. I disagree with the Judgment, however, in so far as it goes beyond these observations to impose new requirements on an applicant. In particular, the Judgment goes on to state that the Court "needs to determine whether Georgia made such a claim and whether the Russian Federation positively opposed it with the result that there is a dispute between them in terms of Article 22 of CERD" (para. 31). By adding a notice requirement, the Judgment disregards established jurisprudence. The Judgment also mischaracterizes the statement in the *South West Africa* cases *(Ethiopia* v. *South Africa; Liberia* v. *South Africa)* (*Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328) that a claim must be one that "is positively opposed", by treating it as a requirement that the respondent state its disagreement with the views of the applicant prior to the filing of the Application.

4. I also disagree with the methodology of the Court which, in deciding whether there is a "dispute", gives no weight to the opposing views of the Parties reflected in their submissions to the Court in this case, an approach that is at odds with recent jurisprudence. Taking into account those views, as well as the evidence of the Parties' opposing views from the period prior to the Application, I conclude that there is a dispute between the Parties with respect to interpretation and application of the CERD and that such dispute extends to the period prior to 9 August 2008.

A. No Notice of a Claim Is Required before the Filing of an Application

5. The Court's jurisprudence (and that of the Permanent Court of International Justice) has been consistent in stating that an applicant need not give the respondent notice of an Application. One year after the *Mavrommatis Palestine Concessions* case, in which the Permanent Court defined a "dispute" as "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons" (*Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11), the Permanent Court was directly presented with the question of prior notice in the case concerning *Certain German Interests in Polish Upper Silesia*. Germany relied on a compromissory clause that specified that "[s]hould differences of opinion respecting the construction and application of [the subject agreement] arise . . . they shall be submitted to the Permanent Court of International Justice" (*Judgment No. 6, 1925, P.C.I.J., Series A, No. 6*, p. 13). Poland objected to the jurisdiction of the Permanent Court on the ground that "the existence of a difference of opinion . . . had not been established before the filing of the Application" *(ibid.)*. The Permanent Court rejected this argument. Noting that there was no stipulation in the com-

promissory clause that diplomatic negotiation or other procedures precede the filing of a case, the Permanent Court held that recourse could be had to it "as soon as one of the Parties considers that a difference of opinion arising out of the construction and application" of the relevant provisions exists (*Judgment No. 6, 1925, P.C.I.J., Series A, No. 6*, p. 14).

6. The conclusion in *Upper Silesia* remains correct. There is no general requirement of prior notice of claims or of an intention to submit those claims to the Court. This principle has since been expressly affirmed on more than one occasion[2] (see *Right of Passage over Indian Territory (Portugal* v. *India), Preliminary Objections, Judgment, I.C.J. Reports 1957*, p. 146; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 297, para. 39; see also Shabtai Rosenne, *The Law and Practice of the International Court (1920-2005)*, Vol. III, Sect. 288, p. 1153).

B. There Is No Requirement that a Respondent Have an Opportunity to "Oppose" a Claim Prior to the Filing of an Application

7. The Court's test in this case considers not only whether the applicant gave the would-be respondent notice of a claim (and thus an opportunity to respond to it), but also whether and how the would-be respondent "opposed" a claim. In past cases, however, the Court has considered and rejected the notion that a respondent's failure to oppose the claims against it or to acknowledge or accept the existence of a dispute vitiates jurisdiction (see, e.g., *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Judgment, I.C.J. Reports 1980*, p. 25, para. 47; *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, I.C.J. Reports 1988*, p. 28, para. 38; *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. 123, paras. 22-24 and p. 129, para. 38). Such a test would permit the respondent, simply by remaining silent or asserting the absence of a dispute, to defeat jurisdiction.

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[2] I note one case that lies in apparent contradiction with this principle. In the *Electricity Company of Sofia and Bulgaria* case, the Permanent Court upheld a preliminary objection raised by Bulgaria with respect to one of several claims asserted by Belgium (*Judgment, 1939, P.C.I.J., Series A/B, No. 77*, p. 83). According to Bulgaria, Belgium had failed to establish that the special tax at issue had formed "the subject of a dispute between the two Governments prior to the filing of the Belgian Application" *(ibid.)*, in contrast to other claims that had been the subject of prior diplomatic correspondence. On that basis, the Permanent Court found that the claim could not be entertained.

8. In the case concerning *Land and Maritime Boundary between Cameroon and Nigeria*, the Court made clear that an express statement setting forth the respondent's opposition to an applicant's claims or protests is not required:

> "However, a disagreement on a point of law or fact, a conflict of legal views or interests, or the positive opposition of the claim of one party by the other need not necessarily be stated *expressis verbis.* In the determination of the existence of a dispute, as in other matters, the position or the attitude of a party can be established by inference, whatever the professed view of that party." (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 315, para. 89.)

9. The present Judgment acknowledges (para. 30) that the Court may infer opposition from silence, but does not otherwise make use of the flexibility embraced by the Court in *Cameroon* v. *Nigeria*. Rather than imposing an artificial limitation on itself, the Court should draw on all information that has been put to it to determine whether, at the time that it decides on its jurisdiction, a legal dispute exists between the parties. For example, in making its determination, the Court may consider a party's course of conduct and may take into account the opposing views of the parties as set forth in the course of judicial proceedings.

10. By insisting not only on notice by Georgia but also on contemporaneous statements of "opposition" by Russia, the Judgment mischaracterizes the oft-cited phrase that a dispute requires that the claim of one party "is positively opposed" by the other. An examination of the case in which the Court first used the phrase, and of the subsequent jurisprudence, makes clear that the requirement that a claim "is positively opposed" does not comprise a requirement that the respondent indicate such opposition prior to an Application, or even that it have an opportunity to do so. In the *South West Africa* cases, the applicable compromissory clause provided for jurisdiction over "any dispute whatever" brought by another Member of the League of Nations (*(Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 335). After citing the definition of a "dispute" from the *Mavrommatis Palestine Concessions* case, the Court stated:

> "[I]t is not sufficient for one party to a contentious case to assert that a dispute exists with the other party. A mere assertion is not sufficient to prove the existence of a dispute any more than a mere denial of the existence of the dispute proves its non-existence. Nor is it adequate to show that the interests of the two parties to such a case

> are in conflict. *It must be shown that the claim of one party is positively opposed by the other.*" (*I.C.J. Reports 1962*, p. 328; emphasis added.)

The Court's central focus was whether the two Applicants had standing *(locus standi)* and whether they had a "material interest" that was capable of giving rise to a dispute under the title of jurisdiction relied upon (*ibid.*, pp. 335, 342-343). The Court rejected South Africa's preliminary objections, noting that the existence of a dispute "is clearly constituted by their opposing attitudes relating to the performance of the obligations of the Mandate by the Respondent as Mandatory" (*ibid.*, p. 328). Importantly for present purposes, the Court made no suggestion that jurisdiction was wanting because Ethiopia and Liberia had failed to put South Africa on *notice* of their contentions prior to filing their Applications (or that such failure would have precluded a finding of jurisdiction). To the contrary, the precise language of this frequently-cited sentence from the *South West Africa* cases makes clear that the Court did not require evidence of "opposition" *prior* to the filing of an Application, because the Court used the present tense to frame the question whether the claim of one party "*is* positively opposed" (emphasis added) by the other.

11. Thus, the question of prior notice or of opportunity to respond was simply not presented in the *South West Africa* cases. The Court's requirement that a claim "is positively opposed" by the respondent was not aimed at creating a formal requirement that the parties engage in an exchange of views prior to the seisin of the Court. On the contrary, the cited passage is part and parcel of the Court's obligation to make an "objective determination" that a dispute exists. In a contentious case, there must be an actual, ongoing dispute between the parties, and the Court must make its objective determination of the existence of such a dispute based on the totality of the information before it.

12. Certainly, the information assessed by the Court in making an "objective determination" that a dispute exists or does not exist normally derives from the period prior to the filing of an Application. Such information frequently includes statements by one or both parties in the course of bilateral exchanges, or in other contexts, for example, in multilateral settings or in public statements (see, e.g., *Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, pp. 24-25 and 27; *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, pp. 99-100, para. 22; *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; *Certain Property (Liechtenstein* v. *Germany), Preliminary Objections, Judgment, I.C.J. Reports 2005*, pp. 17-18, paras. 22-23). The fact that the

Court routinely has relied on such pre-application statements or bilateral exchanges to identify or confirm the existence of a dispute does not mean, however, that a dispute exists only where such statements or exchanges have taken place.

C. To Determine whether There Was a Dispute as of the Date of Application, the Court May Consider Information that It Received after the Application

13. I agree with the Judgment that a disagreement of law or fact generally must exist as of the date of an Application (see Judgment, paragraph 31), but I take that to mean only that the situation or circumstances over which the parties disagree must have arisen prior to the Application. This requirement does not mean that the Court must artificially limit itself only to statements made by the parties prior to the filing of an Application in deciding whether this criterion is met. Thus, the Court relied on statements made during the proceedings before it — and therefore after the filing of an Application — in 1996 when it rejected the respondent's contention that jurisdiction was lacking because there was no dispute:

> "While Yugoslavia has refrained from filing a Counter-Memorial on the merits and has raised preliminary objections, it has nevertheless wholly denied all of Bosnia and Herzegovina's allegations, *whether at the stage of proceedings relating to the requests for the indication of provisional measures, or at the stage of the present proceedings relating to those objections.*
>
> In conformity with well-established jurisprudence, the Court accordingly notes that there persists 'a situation in which the two sides hold clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations' . . . and that, by reason of the rejection by Yugoslavia of the complaints formulated against it by Bosnia and Herzegovina, 'there is a legal dispute' between them." (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, pp. 614-615, paras. 28-29; emphasis added.)

14. In the present case, the two Parties have a dispute about the interpretation and application of the CERD that relates to events occurring between the entry into force of the CERD in 1999 (as between Georgia and Russia) and the date of the Application. That is evident from the submissions to this Court in these proceedings, including the legal arguments briefed in the current stage of these proceedings (for example, as to the question of territorial scope) and the characterization of the facts to which the Parties directed their attention in these proceedings, especially at the provisional measures phase. It is also clear from the evi-

dence deriving from the period prior to the Application, to which I now turn.

D. There Is Substantial Evidence of a Dispute between the Parties with respect to Interpretation or Application of the CERD

15. Looking beyond the submissions in this case to evidence deriving from the period prior to the Application, I conclude, in contrast to the Judgment, that there is sufficient evidence that a dispute relating to the subject-matter of the CERD existed not only during the period of 9-12 August 2008, but also before that. Taken as a whole, the factual record demonstrates that, between 1999 and August 2008, Georgia raised concerns — either directly with Russia or in multilateral settings — regarding conduct related to ethnic discrimination, some of which it attributed, in one way or another, to Russia.

16. I highlight here some of the documents that, taken together, support the conclusion that there is a dispute over which this Court has jurisdiction. For example, some documents establish that Georgia accused the separatist authorities in Abkhazia of engaging in conduct amounting to unlawful ethnic discrimination. (See, e.g., United Nations Security Council, Letter dated 27 October 2005 from the Permanent Representative of Georgia to the United Nations addressed to the President of the Security Council, United Nations doc. S/2005/678 (27 October 2005), Written Statement of Georgia, Annex 75; United Nations Security Council, Letter dated 18 November 2005 from the Permanent Representative of Georgia to the United Nations addressed to the President of the Security Council, Annex, United Nations doc. S/2005/735 (23 November 2005), Written Statement of Georgia, Annex 77.) Other documents establish that Georgia viewed Russia as protecting and exercising control over the separatist authorities in Abkhazia and South Ossetia and/or that Georgia viewed Russia as having failed to meet a legal obligation to intervene to prevent unlawful discriminatory conduct by those authorities. (See, e.g., United Nations Security Council, Letter dated 26 January 2005 from the Permanent Representative of Georgia to the United Nations addressed to the President of the Security Council, United Nations doc. S/2005/45 (26 January 2005), Written Statement of Georgia, Annex 71; United Nations Human Rights Committee, *Third Periodic Report of State Parties Due in 2006*, United Nations doc. CCPR/C/GEO/3 (7 November 2006), Written Statement of Georgia, Annex 85; Transcript, "Ask Georgia's President", *BBC News* (25 February 2004), Written Statement of Georgia, Annex 198.)

17. Furthermore, some documents allege conduct amounting to ethnic discrimination *and* attribute responsibility for that conduct to Russia. (See, e.g., United Nations General Assembly, Security Council, Letter dated 9 November 2005 from the Permanent Representative of Georgia to the United Nations addressed to the Secretary-General, Annex, United Nations doc. A/60/552 (10 November 2005), Written Statement of Georgia, Annex 76; United Nations Committee against Torture, *Summary Record of the 699th Meeting*, United Nations doc. CAT/C/SR.699 (10 May 2006), Written Statement of Georgia, Annex 79; United Nations Security Council, Letter dated 4 September 2006 from the Permanent Representative of Georgia to the United Nations addressed to the President of the Security Council, Annex, United Nations doc. S/2006/709 (5 September 2006), Written Statement of Georgia, Annex 84.) Taken together, and when reviewed in light of the entire record, these documents reinforce the conclusion that is apparent from the assertions about law and fact made in the written and oral submissions: namely, that a dispute between the Parties relating to the subject-matter of the CERD predated the period of hostilities in August 2008.

18. A critical distinction between my approach and that reflected in the Judgment is that I weigh the evidence as a whole in order to determine whether there is a "dispute". By contrast, the Judgment assigns no probative value to an individual document if it finds that document lacking in one respect or another. Thus, for example:

— Georgia's Permanent Representative to the United Nations transmitted to the General Assembly a 2006 resolution of the Georgian Parliament describing "attempts to legalize the results of ethnic cleansing" as part of the "reality brought about as a result of peacekeeping operations" (para. 86), but the Judgment dismisses the value of the transmitted resolution because Georgia failed to refer in its transmittal letter to agenda items covering ethnic discrimination (para. 89).

— The Judgment "cannot give any legal significance" to a 2006 statement by Georgia's Permanent Representative to the United Nations that the Russian peacekeeping force "failed to carry out" its mandate to "create [a] favorable security environment for the return of ethnically cleansed . . . Georgian citizens" because the Georgian Permanent Representative also said that "what we are dealing with is not a fundamentally ethnic conflict, but rather one stemming from Russia's territorial ambitions" (para. 92).

— In September 2006, the Foreign Ministry of Georgia alleged that "[t]he so-called government of Abkhazia . . . remains relentless in its pursuit of its inhuman discriminatory policy and acts against the

ethnic Georgian population" while also asserting that "Russian peacekeeping forces . . . do nothing to suppress flagrant and mass violations of human rights" (United Nations Security Council, Letter dated 4 September 2006 from the Permanent Representative of Georgia to the United Nations addressed to the President of the Security Council, Annex, United Nations doc. S/2006/709 (5 September 2006), Written Statement of Georgia, Annex 84), but the Judgment dismisses these statements, saying they are not "direct claims against the Russian Federation of racial discrimination" (para. 90).

19. If the Court were considering the merits, Georgia would have the burden of establishing the full range of legal and factual elements of a breach by a CERD party. For example, for an alleged incident in which Georgia claims that conduct by entities other than the Russian Government amounts to ethnic discrimination, assuming that the Court concluded that it had jurisdiction *ratione loci* and *ratione temporis*, Georgia would also have to establish, *inter alia*, that Russia bore responsibility for any such discrimination. Today, however, the Court is not asked to decide whether the CERD applies to Russia with respect to incidents outside of its territory (a question of interpretation about which the Parties disagree), or whether a particular incident gave rise to a breach by Russia of its CERD obligations, but only whether there is a disagreement between the Parties about such questions and other aspects of the interpretation or application of the CERD. Disavowing a particular document in which Georgia alleges conduct that may violate the CERD — but in which, for example, Georgia does not contemporaneously attribute that conduct to Russia — does not help to determine whether the factual record as a whole demonstrates the existence of a legal dispute between the Parties. The evidence shows that Georgia claims that Russia bears international responsibility for ethnic discrimination in violation of the CERD and that Russia disagrees with that claim, on multiple grounds. That is all that is needed to establish the existence of a dispute with respect to interpretation or application of the CERD.

20. In sum, I agree with the Judgment's conclusion that a dispute exists between the Parties, but I do not agree that the dispute began only on 9 August 2008. By requiring an applicant to give the respondent notice of its claim prior to filing its Application, the Court today does nothing to help clarify whether there is a "dispute", but instead imposes a new procedural obstacle that, as the Permanent Court noted in *Upper Silesia*, "could at any time be fulfilled by means of unilateral action on the part of the applicant Party. And the Court cannot allow itself to be hampered by a mere defect of form, the removal of which depends solely on the

Party concerned." (*Certain German Interests in Polish Upper Silesia, Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6*, p. 14; see also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, pp. 613-614, para. 26 (discussing cases in which the Court rejected objections asserting the absence of a dispute where such objections were based on "a defect in a procedural act which the applicant could easily remedy").) Instead of following the Judgment's approach, I conclude that, taken as a whole, the assertions and the factual submissions of the Parties demonstrate that there is a dispute between the Parties relating to the subject-matter of the CERD, and that the dispute predated 9 August 2008.

II. Second Preliminary Objection

21. With other colleagues, I have submitted a joint dissenting opinion with respect to the second preliminary objection of the Russian Federation. I do not repeat here the reasons that I dissent. I note only that the decision of the Court that the dispute began only on 9 August 2008 has a profound impact on its analysis of the second preliminary objection, because the Judgment declines to give weight to any engagement between Georgia and Russia prior to that date.

III. Conclusion

22. The Judgment's test for determining whether there is a dispute and its conclusion regarding the meaning and effect of this particular compromissory clause have implications that could go beyond this case. In particular, while I am confident that this is not the intention of those who voted in favour of the Judgment, I am concerned that the Judgment will work to the disadvantage of States with limited resources and those that have little or no experience before this Court.

23. The question whether this Court has jurisdiction under a particular treaty is independent of the obligation of treaty parties to comply with that treaty. Equally, the fact that a particular treaty may be relevant to only one aspect of a larger dispute (as in the present case) does not absolve the parties from complying with that treaty. In general, State A need not remind State B of a particular treaty in order to trigger State B's obligations under that treaty. Moreover, when a dispute arises under a treaty as to which both States have accepted the Court's jurisdiction *ante hoc*, State B has every reason to consider the prospect that State A

may seek relief in this Court. Nonetheless, the Court today has created new hurdles of notice, opposition and a formalistic "negotiation" requirement before State A may file an Application alleging that State B has breached its obligations.

24. In the vast majority of cases, these requirements will not defeat jurisdiction. Normally, State A can be expected to raise its legal concerns with State B and to seek to resolve those concerns through some form of diplomacy. Less commonly, however, a State may choose instead to proceed directly to this Court. For example, if State B disclaims any responsibility — in law or in fact — for the conduct about which State A is concerned, State A may conclude that negotiations would be futile.

25. For States with the resources to follow the decisions of this Court closely, counsel will read today's Judgment and will caution clients about the requirements that it imposes. The same cannot be said, however, of States with limited resources and those that lack experience before this Court. Under the Court's decision today, even if such a State considers that it is the victim of a clear violation by another State, and even if the "precondition" in a compromissory clause is hidden, as in the CERD, the State's access to this Court could be barred unless it follows new procedural requirements that it will not find in the text of the treaty, the Statute or the Rules of Court.

(Signed) Joan E. DONOGHUE.