

JOINT DISSENTING OPINION OF VICE-PRESIDENT
AL-KHASAWNEH AND JUDGES RANJEVA,
SHI, KOROMA, TOMKA,
BENNOUNA AND SKOTNIKOV

[English Original Text]

1. We have regretfully been obliged to vote against the Order granting provisional measures, persuaded as we are that the conditions for the adoption of such measures laid down in Article 41 of the Statute and by the jurisprudence of the Court are not met in the present case. Needless to say, our vote should not be construed as support for exonerating the Parties from their obligations either under the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) or under international law more generally. On the contrary, we consider that the Parties are under a continuing duty to conduct themselves in conformity with their international obligations.

2. The power of the Court to indicate provisional measures is inherent in its judicial function, as it enables the Court to ensure, in accordance with the circumstances, that the very subject of the dispute submitted to it be preserved before the Court renders its judgment. It is for this reason that the Court has full scope to indicate provisional measures exceeding those requested or to decide *proprio motu*. As these measures are binding on both Parties (*LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001*, p. 506, para. 109), the Court must be all the more vigilant in assessing whether the conditions required for their indication have been met.

3. In the present case, as has been highlighted by the Court, the rights for which Georgia claims protection, by way of a request for provisional measures, are “rights . . . that Georgia submits have been . . . violated by Russia” during what it describes as the “Third Phase of Russia’s intervention in South Ossetia and Abkhazia” (Order, para. 93) and which, according to it, dates back to the month of August 2008 (that is, beginning on 7-8 August, when armed conflict erupted between the two Parties).

It is curious, to say the least, that Georgia, which has cited acts of racial discrimination allegedly committed by the Russian Federation since the early 1990s in violation of CERD, has awaited the armed conflict with Russia (and South Ossetian forces) to which it is a party immediately to seize the Court of a dispute relating to the interpretation and the application of that Convention.

4. Be that as it may, and even when facing a request arising under such conditions, the Court is bound to ascertain whether the conditions necessary for the indication of provisional measures here obtain.

5. Georgia invokes Article 22 of CERD as the basis for the jurisdiction of the Court; that Article provides:

“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.” (Order, para. 2.)

6. It is not disputed that both Georgia and the Russian Federation are parties to the said Convention without reservations and are bound by Article 22 thereof. However, regarding jurisdiction under Article 22 of the Convention, the Parties differ on two questions:

- (1) whether there is a dispute between them “with respect to the interpretation or application of this Convention”;
- (2) whether the precondition that the dispute “is not settled by negotiation or the procedures expressly provided for in this Convention” has been met in the present case.

7. We shall turn to the first point of disagreement between the Parties as regards the jurisdiction of the Court in the present case, namely, the existence of a dispute concerning the interpretation or application of CERD.

8. Such a dispute must exist prior to the seisin of the Court. It is for this reason that the Court must consider whether the two Parties have opposing views with regard to the interpretation or application of the Convention. Admittedly, it is established that no such opposition was ever manifested before 8 August; but was it manifested after 7-8 August and the outbreak of hostilities between the two States? In other words, are the violent acts which Georgia imputes to Russia likely to “com[e] within the provisions” of CERD, to reprise the terminology which the Court employed to decline jurisdiction *prima facie* in its Order of 2 June 1999 on the *Legality of Use of Force (Yugoslavia v. Belgium) (Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (I), p. 138, para. 41)*? The Court there considered that “the threat or use of force against a State cannot in itself constitute an act of genocide within the meaning of Article II of the Genocide Convention” (*ibid.*, para. 40).

9. The same could be said of the case at hand; Russia’s armed activities after 8 August cannot, in and of themselves, constitute acts of racial discrimination in the sense of Article 1 of CERD unless it is proven that they were aimed at establishing a “distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin”. However, the circumstances of the armed confrontation triggered in the

night of 7 to 8 August were such that this cannot be the case. Admittedly, the ensuing armed conflict concerned a region in which serious ethnic tensions could lead to violations of humanitarian law, but it is difficult to consider that the armed acts in question, in and of themselves and whether committed by Russia or Georgia, fall within the provisions of CERD.

10. Moreover, the majority, unable to find any evidence that the acts alleged by Georgia fall within the provisions of CERD, has been content to observe merely that a dispute appears to exist as to the interpretation and application of CERD because the two Parties have manifested their disagreement over the applicability of Articles 2 and 5 of the Convention. In other words, an argument expounded during oral proceedings has mutated into evidence of the existence of a dispute between the Parties (Order, para. 112)! Further, to conclude on this point, the majority has affirmed peremptorily that “the acts alleged by Georgia appear to be capable of contravening rights provided for by CERD, even if certain of these alleged acts might also be covered by other rules of international law, including humanitarian law” (*ibid.*, par. 112).

11. Even if one accepts, for the sake of argument, that a dispute likely to fall within the provisions of CERD existed between Georgia and Russia before the seisin of the Court, it must be asked whether this constitutes a dispute, in the express terms used in Article 22 of CERD, “which is not settled by negotiation or by the procedures expressly provided for in this Convention”.

12. With regard to negotiations, the Court begins by seeking the literal meaning of Article 22, which “does not, on its plain meaning, suggest that formal negotiations . . . or recourse to the procedure referred to in Article 22 thereof constitute preconditions to be fulfilled before the seisin of the Court” (*ibid.*, paras. 114 and 115); this would amount to denying any legal effect and useful scope to the mention thereof. The Court then admits that the questions concerning CERD should have been raised between the Parties, referring specifically in this regard to the bilateral contacts between the Parties and certain representations made to the Security Council, even though nowhere in these has Georgia accused Russia of racial discrimination. Thus, in our opinion, the very substance of CERD was never debated between the Parties before the filing of a claim before the Court.

13. It is very surprising that the Court has chosen to disregard this precondition to any judicial action when Georgia itself has recognized that “even where an obligation to negotiate prior to seising the Court does exist, it is well established that it does not require the parties to continue with negotiations which show every sign of being unproductive” (CR 2008/25, p. 19 (Crawford)). Indeed, this is what emerges from the jurisprudence of the Court and its predecessor, the Permanent Court of

International Justice. For the condition of prior negotiation to be fulfilled, it suffices for an attempt to have been made and for it to have become clear at some point that there was no chance of success. In any event, it is clear that when negotiation is expressly provided for by a treaty, the Court cannot ignore this prior condition without explanation; nor can the Court dispose of this condition merely by observing that the question has not been resolved by negotiation. The Judgment in *Mavrommatis Palestine Concessions* has often been quoted on this point in later decisions:

“The true value of this objection will readily be seen if it be remembered that the question of the importance and chances of success of diplomatic negotiations is essentially a relative one. Negotiations do not of necessity always presuppose a more or less lengthy series of notes and despatches; it may suffice that a discussion should have been commenced, and this discussion may have been very short; this will be the case if a dead lock is reached, or if finally a point is reached at which one of the Parties definitely declares himself unable, or refuses, to give way, and there can therefore be no doubt that *the dispute cannot be settled by negotiation.*” (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, p. 3; emphasis in the original.*)

14. In the case concerning *Armed Activities on the Territory of the Congo (New Application: 2002)* (*Democratic Republic of the Congo v. Rwanda*), the present Court issued an Order on 10 July 2002, in which it recalled that:

“the Congo further claims to found the jurisdiction of the Court on Article 29 of the Convention on Discrimination against Women, providing:

‘Any 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.’” (*Provisional Measures, Order of 10 July 2002, I.C.J. Reports 2002, pp. 246-247, para. 76.*)

The Court considered that “at this stage in the proceedings the Congo has not shown that its attempts to enter into negotiations or undertake arbitration proceedings with Rwanda . . . concerned the application of Article 29 of the Convention” (*ibid.*, para. 79).

15. Thus, it is not sufficient that there have been contacts between the Parties (see paragraph 12 above); these contacts must have been regard-

ing the subject of the dispute, either the interpretation or application of the Convention. Even so, this precedent may not be dismissed in the present case, given that the two compromissory clauses are different, in that Article 29 of the Convention on Discrimination against Women requires arbitration after negotiation and before filing suit in the Court. In fact, when it rendered its judgment on 3 February 2006 on jurisdiction, the Court concluded that Article 29 established cumulative conditions and that it “must therefore consider whether the preconditions on its seisin . . . have been satisfied in this case” (*Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction of the Court and Admissibility of the Application, Judgment, I.C.J. Reports 2006*, p. 39, para. 87).

16. The very least that the Court should have done was to ask itself whether negotiations had been opened and whether they were likely to lead to a certain result, but it did not do so. Thus, it is understandable why a State party to CERD, in this case Russia, finds it unacceptable for an action to be brought against it before the Court without having been first advised of Georgia’s grievances with regard to this Convention.

17. We now come to the alternative precondition stipulated in Article 22 of CERD, namely, that the dispute has not been settled by “the procedures expressly provided for in this Convention”.

18. As was the case for negotiation, the Court is content here to observe that “neither Party claims that the issues in dispute have been brought to the attention of the Committee” (Article 11 of the Convention) (Order, para. 116), and to conclude from this that the dispute has not been resolved by way of the procedures provided for in the Convention. One cannot but be puzzled by this interpretation, which confirms neither the ordinary meaning of Article 22 nor its object and purpose which is to encourage the maximum number of countries to submit to the jurisdiction of the Court, with the assurance that the procedures provided for in the Convention will first be exhausted; nor does it refer to the *travaux préparatoires* for this Article when it was drafted by the Third Committee of the General Assembly of the United Nations.

The Court could have considered that the seriousness of the situation when armed conflict broke out on 7-8 August did not allow recourse to these procedures, but this would set little store by the procedure for urgency and rapid alert established by the Committee for the Elimination of Racial Discrimination in 1993 to allow it to intervene more effectively in cases of possible violations of the Convention (Report of the Committee for the Elimination of Racial Discrimination, doc. A/48/18, Ann. III).

19. Therefore, we consider that the majority has wrongly decided that the Court has jurisdiction *prima facie* to hear this case under Article 22 of CERD, in so far as it has neither succeeded in establishing the existence of a dispute over the interpretation or application of that Convention nor

demonstrated that the precondition for the seisin of the Court has been satisfied.

20. Even if jurisdiction *prima facie* were established, according to the jurisprudence of the Court two further conditions, namely the existence of a risk of irreparable harm to the rights in dispute and urgency, have to be met.

21. In our opinion, the Order nowhere demonstrates the existence of any risk of irreparable harm to Georgia's rights under CERD. The Court confines itself to a *petitio principii* when it states that "the rights in question in these proceedings . . . are of such a nature that prejudice to them could be irreparable" (Order, para. 142), defining neither the precise manner in which they are threatened nor the irreparable harm which they might suffer. The Court thus appears to suggest that certain rights may automatically fulfil the irreparable harm criterion, without analysing the real facts on the ground or the actual threat against the said rights. With regard to the expulsions alleged by Georgia and attributed by it to Russia, they cannot in and of themselves be considered to constitute irreparable harm, since the Court, if it arrives at the merits stage in this case, can always order that the expelled individuals be allowed to return to their homes and be granted appropriate compensation. It is even more difficult to claim irreparable harm to the rights in dispute when the appropriate organs of the United Nations have reported that thousands of persons have, since the cessation of hostilities, returned to their homes in Abkhazia and South Ossetia, and when the ceasefire agreement of 12 August 2008 provides that negotiations will soon open in Geneva, on 15 October 2008, between all the parties, concerning, *inter alia*, the progressive return of the displaced persons.

22. With regard to urgency, there simply is none, since after conclusion of the ceasefire agreement, European Union observers have now been deployed to monitor the ceasefire and the return of troops of both countries to their positions before 7 August 2008, and the observers from the United Nations Mission in Georgia and those from the Organization for Security and Co-operation in Europe will continue their missions in Abkhazia and South Ossetia respectively.

23. Therefore, one has no choice but to observe not only that the Court does not have jurisdiction *prima facie* to pronounce on the merits in this case, but that the conditions established in the jurisprudence for the indication of provisional measures are obviously not met.

24. This weakness in the Order has not completely escaped the attention of the majority and is echoed in the operative clause, which ultimately asks both Parties to respect the Convention, which they are in any event obliged to do, with or without provisional measures.

25. Thus, even though we are in agreement with this obvious conclusion, we have had to vote against this Order of the Court which is not well founded in law.

(Signed) Awn Shawkat AL-KHASAWNEH.

(Signed) Raymond RANJEVA.

(Signed) SHI Jiuyong.

(Signed) Abdul G. KOROMA.

(Signed) Peter TOMKA.

(Signed) Mohamed BENNOUNA.

(Signed) Leonid SKOTNIKOV.
