Non-Corrigé
Uncorrected

CR 2008/27

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2008

Public sitting

held on Wednesday 10 September 2008, at 4.30 p.m., at the Peace Palace,

President Higgins presiding,

***in the case concerning* Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia *v.* Russian Federation)**

VERBATIM RECORD

ANNÉE 2008

Audience publique

tenue le mercredi 10 septembre 2008, à 16 h 30, au Palais de la Paix,

sous la présidence de Mme Higgins, président,

***en l'affaire relative à l'*Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie)**

COMPTE RENDU

Present:	President	Higgins
	Vice-President	Al-Khasawneh
	Judges	Ranjeva
		Shi
		Koroma
		Buergenthal
		Owada
		Simma
		Tomka
		Abraham
		Keith
		Sepúlveda-Amor
		Bennouna
		Skotnikov
	Judge *ad hoc*	Gaja
	Registrar	Couvreur

Présents : Mme Higgins, président
M. Al-Khasawneh, vice-président
MM. Ranjeva
Shi
Koroma
Buergenthal
Owada
Simma
Tomka
Abraham
Keith
Sepúlveda-Amor
Bennouna
Skotnikov, juges
M. Gaja, juge *ad hoc*

M. Couvreur, greffier

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Mr. Ekaterine Zguladze, First Deputy-Minister of the Interior,

Mr. Archil Giorgadze, Head of Human Rights Unit, Office of the Prosecutor-General,

Mr. Philippe Sands, Professor of Law, University College London, Member, Matrix Chambers,

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The PRESIDENT: Please be seated. The sitting is now open and the Court meets to hear the second round of oral observations of the Russian Federation on the Request for the indication of provisional measures filed by George and I believe it is Professor Zimmermann who is to open for the Russian Federation. You have the floor.

Mr. ZIMMERMANN: Thank you, Madam President.

I. APPLICATION OF ARTICLES 2 AND 5 OF CERD AND ISSUES OF ATTRIBUTION

1. Application of Articles 2 and 5 of CERD in the present case

1. Madam President, Members of the Court, allow me to begin by addressing the territorial scope of CERD. To this, Professor Crawford devoted very little time, merely referring to the *Ilascu* case[1]. After *some* argument on the scope of application in the first round, Georgia thus returns to its initial approach based on mere assumptions. But we believe the matter does deserve significant more consideration.

2. Madam President, when considering whether Article 22 of CERD may serve as a jurisdictional basis in situations of armed conflict occurring on the territory of a foreign State, it is particularly relevant to take into account the practice of States which have appeared as Applicants before this Court in cases involving allegations of inter-ethnic violence.

3. Thus, neither Bosnia and Herzegovina nor Croatia invoked Article 22 CERD in their respective cases brought against the FRY (see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)* and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia)*. The same applies, *mutatis mutandis*, to the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Burundi)*) despite strong underlying allegations of "ethnic cleansing" on their respective territory.

4. Similarly, in the *Wall* case, when you spelled out the legal rules applicable to the occupied territories, you referred to the ICCPR and the Rights of the Child Convention, but did not mention

[1]CR 2008/25, p. 20, para. 40 (Crawford).

CERD — and this despite the fact that written observations submitted by States had discussed the prohibition and elimination of racial discrimination under international law (see e.g., *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Written Observations of Syria, p. 5).

5. What I believe is even more important is your 2005 Judgment in the *Congo* v. *Uganda* case. Uganda had *inter alia* — I now quote from your Judgment — "incited ethnic conflicts and took no action to prevent such conflicts" (*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 240, para. 209) in Ituri. You then moved on to explicitly determining that a number of instruments in the field of human rights were both applicable and relevant to these Ugandan acts (*ibid.*, p. 243, para. 217). The list of treaties which, in your opinion, fulfilled these two criteria included the ICCPR. Yet, you in your Judgment did not list CERD, despite the fact that both the DRC as well as Uganda had been contracting parties of CERD at all relevant moments in time.

6. This survey indicates that both parties to disputes which Georgia would probably qualify as clear-cut CERD cases as well as this Court have apparently never considered CERD to apply with regard to inter-ethnic conflicts occurring abroad.

7. Madam President, I will not repeat here what I have said about the wording of Articles 2 and 5 of CERD[2] which supports a territorial scope of application. I may add, however, that the wording is supported by a comparison with Article 3 — the qualified prohibition of apartheid, which does refer to "territories under their jurisdiction".

8. Madam President, if there is one general obligation, Article 2, and one qualified prohibition specially condemned, Article 3, then why should the qualified prohibition have a more restrictive scope of application? The natural reading suggests that States would lay down more extensive obligations with respect to the qualified prohibition, that is Article 3. Georgia's argument cannot explain this.

9. That brings me to my next point, namely the issue of effective control.

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[2] See CR 2008/23, pp. 40-42, paras. 6 *et seq.*

10. Madam President, Honourable Members of the Court, we submit that the Respondent does not exercise effective control over South Ossetia, Abkhazia and/or adjacent regions of Georgia. This appears from the jurisprudence of this Court, to which I referred on Monday, as well as that of other courts and tribunals, such as the Strasbourg court, that have had to interpret "effective control tests" and to apply it to specific patterns of fact.

11. Let me stress again that this jurisprudence almost exclusively concerns cases based on treaties that — unlike CERD — contained a general provision envisaging at least *some* degree of extraterritorial application.

12. Madam President, Members of the Court, the one case the Applicant refers to is *Ilascu*[3]. This did not come as a surprise, because even by Strasbourg standards, *Ilascu* is a rather unusual case, difficult to square with subsequent cases such as *Issa*[4] or rulings by the Grand Chamber such as *Bankovic*[5].

13. But be that as it may. *Ilascu* is not, as Professor Crawford put it, an "instructive precedent"[6] for the Applicant. And, indeed, four observations are called for in that regard.

14. First, the case was not about "effective control". The Strasbourg court made it clear that it would apply a different test. It observed that the Convention would apply to cases where a foreign State exercised, not necessarily effective control, but — I quote the court —"at the very least . . . decisive influence"[7] over a separatist entity.

15. Second, the case was not about the effective control over a stretch of territory as such. Rather, it concerned a special case of extraterritorial jurisdiction, long recognized in the jurisprudence of courts and tribunals — that of the intensive control exercised by a State over individuals captured abroad. The *Ilascu* judgment makes this clear when stating that "the

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[3]European Court of Human Rights, Application No. 48787/99 (*Ilaşcu and Others* v. *Moldova and Russia*), judgment [GC] of 8 July 2004.

[4]European Court of Human Rights, Application No. 31821/96 (*Issa and Others* v. *Turkey*), judgment of 16 Nov. 2004.

[5]European Court of Human Rights, Application No. 52207/99 (*Banković and Others* v. *Belgium and Others*), judgment [GC] of 12 Dec. 2001.

[6]CR 2008/25, p. 20, para. 40 (Crawford).

[7]European Court of Human Rights, Application No. 48787/99 (*Ilaşcu and Others* v. *Moldova and Russia*), judgment [GC] of 8 July 2004, para. 392.

applicants were arrested in June 1992 with the participation of soldiers of the 14th Army"[8] and this was indeed a critical factor the court took into consideration.

16. Third, *Ilascu* underlines the importance of the very two factors I referred to on Monday: time and intensity of control. It concerned an area which had been under the "decisive influence" of the Russian army for more than a decade — a fact which the Court underlined at various times in its judgment[9].

17. Fourth and finally, as regards intensity, the court "attache[d] particular importance" to the fact that Russia had a formalized military co-operation with the separatist forces in the region, e.g., through an agreement on "joint work with a view to using armaments, military technology and ammunition"[10] — and there is no equivalent to such an agreement in our case.

18. Madam President, we submit that if ever there is an "instructive ECHR precedent" on effective control at all, then it is likely to be *Loizidou*[11]. That case — equally a Strasbourg decision — has been accepted and followed frequently.

19. Comparing the situation on the ground, one cannot however fail to see the major differences between an area of accepted effective control — namely Turkish control over northern Cyprus — and our case. For your convenience, some of the more striking features are set out in a table that you can find at tab 1 of the judges' folder.

20. These differences cannot be overestimated — in fact, the ratio of Turkish troops per square kilometre in northern Cyprus is approximately 20 times as high as that of Russian troops in Abkhazia. Not surprisingly, this difference has consequences on the places where troops are stationed. Turkish troops are stationed throughout the whole of northern Cyprus and constantly patrol all lines of communications.

21. Finally, Turkish troops have been in northern Cyprus since 1974, while Russian forces have been in Abkhazia and South Ossetia for a few weeks only, in a much more volatile

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[8]European Court of Human Rights, Application No. 48787/99 (*Ilaşcu and Others* v. *Moldova and Russia*), judgment [GC] of 8 July 2004, para. 383.

[9]European Court of Human Rights, Application No. 48787/99 (*Ilaşcu and Others* v. *Moldova and Russia*), judgment [GC] of 8 July 2004, paras. 387, 392, 393.

[10]European Court of Human Rights, Application No. 48787/99 (*Ilaşcu and Others* v. *Moldova and Russia*), judgment [GC] of 8 July 2004, para. 390.

[11]European Court of Human Rights, Application No. 15318/89 (*Loizidou* v. *Turkey*), judgment on preliminary objections of 23 March 1995, Series A No. 310.

environment. And while the number of Russian troops is decreasing, the number of Turkish troops in Cyprus, which are, incidentally, not peacekeepers, has, by and large, been stable ever since 1974.

22. These figures show that our case does not even begin to compare with *Loizidou*.

23. Madam President, let me now turn to one of the areas on which Georgia placed particular emphasis, the area to the south of South Ossetia, including the Gori district.

24. In their pleadings yesterday, the Applicant's Agent, as well as counsel, referred to human rights abuses[12] in what they called "Russia's self-proclaimed 'buffer zone'"[13]. To form a picture of the real situation in that zone, may I draw your attention to the map projected on the screen, which you can also find in tab 2 of your folder.

25. The Agent of the Russian Federation has authorized me to make a number of statements of fact about the situation — statements based on information by the Ministry of Defence of the Russian Federation.

26. First, Russian troops are situated in six observation posts on the southern border of the zone. You can identify those posts easily on the map. They are dispersed over a border zone of approximately 80 km, that is, there is a post every 10 to15 km only. Each observation post is manned by forces in platoon size. The total number of troops stationed amounting, as of today, to 195.

27. Second, over the last days, forces have been reduced considerably. On Monday, the Russian Agent gave their figure as 272[14]. Since then, there has been a major reduction and the number was decreased to the above-mentioned 195. I may add that Russia denies as untrue the allegation, made yesterday by the Agent for Georgia, that "while we were appearing before the Court, Russian military forces [had] opened a new checkpoint in the western Georgian village of Nazadi bringing yet another Georgian community under its control"[15]. This checkpoint had been set up on 16 August and will, in any event, be abolished in the next days under the agreement

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[12]See, e.g., CR 2008/25, p. 40, para. 4 (Burjaliani) and pp. 26-27, para. 15 (Akhavan).

[13]See, e.g., CR 2008/25, p. 38, para. 21 (Reichler).

[14]CR 2008/23, p. 24, para. 43 (Gevorgian).

[15]See, e.g., CR 2008/25, p. 40, para. 7 (Burjaliani).

recently reached between the Parties. The development occurring over the last days is therefore one of considerable reduction of troops, not of establishing new posts.

28. Third, while there are 195 Russian troops controlling the 80 km border, no forces are stationed *within* the zone. I repeat, there are no troops within the zone. It is therefore misleading, to say the least, to describe this as a zone of control.

29. Fourth, Russian forces are under instruction not to hinder the entry into the zone of Georgian police forces. As a matter of fact, according to the most recent information available to the Respondent from forces on the ground, Georgian police have entered the zone, carrying arms and have established their own checkpoints *within* the zone[16].

30. Madam President, this information is indicative of the real extent of Russian control in the so-called "buffer zone". It is misleading to characterize this zone as a control zone. One hundred and ninety-five Russian soldiers are patrolling its outer border. But these are 195 soldiers stretched along a line of 80 km. By their very number, they simply are unable to exercise effective control over the border, let alone the zone as such.

31. Madam President, much the same can be said for the Akhalgori region in South Ossetia, which received much attention yesterday. Information available to Russia is the following — and again, you can follow this on the map:

— there are two observation posts on the Akhalgori part of the southern border of the zone;

— the total number of Russian troops stationed there is approximately 100;

— no Russian troops are stationed in Akhalgori district outside the two posts;

— there are several Georgian police checkpoints on the border between Akhalgori district and the adjacent Georgian territory.

32. Let me conclude this point by also referring to the fact that five observation posts between Poti and Senaki, close to the Georgian-Abkhazian border are being withdrawn right now.

33. I will now turn to issues of attribution.

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[16]Georgian checkpoints have been established, *inter alia*, at the following locations: Citalubany; Alakhubany (near Didi-Giromi); Kvenakotsa; Zadiantcarkari.

Attribution

34. Madam President, Practice Direction XI states that during proceedings on provisional measures parties should not enter into the merits of the case *beyond what is strictly necessary for the purpose of dealing with the criteria for the indication of provisional measures*. Counsel for Georgia claimed that this line had been crossed, given that, as he then put it, "the only question at this stage is whether facts are credibly asserted"[17] and that, therefore, any consideration of issues of attribution or breach is misplaced.

35. Let me make two briefs points in that regard.

36. First, Georgia itself has, time and again, referred to facts that clearly raise issues of attribution and indeed has, to mention just two examples, claimed that Russia is responsible for acts of militias operating in the territories under consideration or that it can be held responsible for acts of persons who have previously been employed by the Respondent[18]. On the other hand, it claims that issues of attribution are beyond the reach of these proceedings[19]. Yet, Georgia cannot have it both ways.

37. Second, and more important, may I remind you of your Order on provisional measures in the *Great Belt* case (*I.C.J. Reports 1991*, p. 17, para. 22), where you indeed considered the very same question, and where you confirmed that the "purpose of provisional measures [is] to preserve 'rights which are the subject of dispute in judicial proceedings'" (*United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1979*, p. 19, para. 36; see also *Frontier Dispute, I.C.J. Reports 1986*, p. 8, para. 13). This implies, as Judge Shahabudeen put it, that the Court is — as is indeed also confirmed by parties appearing before it — (See, e.g., *I.C.J. Pleadings, Nuclear Tests*, Vol. 1, p. 1 89 (statement by Solicitor-General Ellicott, Q.C.); *I.C.J. Pleadings, Aegean Sea Continental Shelf*, pp. 89, 97 and 115 (statement by D.P. O'Connell), not bound by a mere assertion of rights (*Passage through the Great Belt (Finland* v. *Denmark), Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991*; separate opinion of Judge Shahabuddeen, p. 28). And Judge Shahabudeen then rightly continued that even for purposes of provisional measures,

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[17]CR 2008/25, p. 11, para. 6 (Crawford).

[18]CR 2008/22, pp. 43-44, para. 20 (Akhavan).

[19]CR 2008/25, p. 11, paras. 4 *et seq*. (Crawford).

> "the Court must be concerned with satisfying itself affirmatively of the possible existence of the rights claimed, the required degree of proof being dependent on the character and circumstances of the particular case" (*Passage through the Great Belt (Finland* v. *Denmark), Provisional Measures Order of 29 July 1991*; separate opinion of Judge Shahabuddeen, p. 28)[20].

38. It is, therefore, not sufficient that Georgia merely asserts that certain breaches have occurred or that they are attributable to the Respondent, even more so since you have recently confirmed your own strict view on attribution (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro*), Judgment of 26 February 2007, paras. 396 *et seq*.).

39. As to substance, let me now first turn to one instance where Georgia claimed that certain acts had been committed by organs of the Russian Federation, namely by some of its officers[21]. A witness claims that his "interrogation was mostly carried out by Russian officers" since, while he could not recall the stars on the uniform of the interrogators "Russia was written on their badges".

40. Yet, it must be noted that the Russian army, including the formations deployed in South Ossetia, ever since 2003, no longer uses badges which would either carry "Russia" or "Russian Federation".

41. That brings me to my next point relating to the allegation that, "senior military and intelligence officials in the *de facto* separatist governments are in fact officials of the Russian Federation"[22].

42. Let us start by having a look at tab 22 of Georgia's judges' folder, where the very first person, the Prime Minister of South Ossetia, is described as having been — prior to coming to South Ossetia — a director of a Russian energy company. One truly wonders how such an employment, which, in any case, has ended prior to becoming a member of the South Ossetian Government, can be of any relevance when it comes to attribution.

43. Besides, I can confirm that, according to information received from the Russian Ministry of Defence, Mr. Anatoly Zaitsev, the Chief-of-Staff of Abkhazia was dismissed from the Russian armed forces quite some time ago.

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[20]On the same point see Rosenne, *The Law and Practice of the International Court 1920-2005*, Vol. III, at p. 1410).

[21]CR 2008/25, p. 28, para. 20 (Akhavan).

[22]CR 2008/25, p. 22, para. 1 (Akhavan).

44. The same is true, *mutatis mutandis*, for Mr. Anatoly Barankevich, who, again, is no longer a member of the Russian armed forces.

45. Finally, as to Mr. Atoev, Georgia itself only claims that he has been in the past a Russian official.

46. These persons were, therefore, to apply the standard you used in the Bosnia *Genocide* case, "according to the internal law of the Respondent no longer, officers of the army of the Respondent" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro*), Judgment of 26 February 2007, para. 388) and can therefore not be considered its *de jure* organs. But even if they still were employed by Russia — they are not — this would still not enable the Court, for that reason alone, to treat them as organs of the Respondent or as being under its direct control. This is even more true, to again apply the standard you used in the Bosnia *Genocide* case, since those persons formed part of the South Ossetian authorities and exercised authority on *its* behalf, but not on behalf of the Respondent (cf. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro*), Judgment of 26 February 2007, para. 388).

47. Madam President, Members of the Court. Thank you very much for your kind attention and may I ask you now to give the floor to my colleague, Sam Wordsworth.

The PRESIDENT: Thank you, Professor Zimmermann. We now call Mr. Wordsworth.

Mr. WORDSWORTH:

II. THE CRITERIA FOR THE GRANT OF PROVISIONAL MEASURES ARE NOT MET

1. Madam President, Members of the Court, the case that Georgia put before you in opening, and again put yesterday by Mr. Reichler, is that there is a "risk of irreparable harm to the ethnic Georgians who still remain in the Akhlagori district of South Ossetia, the Gali district of Agkhazia, and the portion of the Gori district that Russian military forces still occupy as their so-called buffer zone".

2. It was said that there were no issues between the Parties as to the criteria to be applied. Briefly, that is not correct, as we say: (i) that the risk must be a serious risk, which is the test applied, for example, in *Cameroon* v. *Nigeria* (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Provisional Measures, Order of 15 March 1996, I.C.J. Reports 1996 (I),* pp. 21-23, paras. 35-42) or the *Congo* v. *Uganda* case (*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Provisional Measures, Order of 1 July 2000, I.C.J. Reports 2000*, para. 43.) and; (ii) that the irreparable prejudice must of course be to the rights claimed and opposable to Russia under Articles 2 and 5 of the CERD. On the so-called Russian occupation, you have already just heard Professor Zimmermann.

3. Before turning to the facts as they can reliably be ascertained in respect of ethnic Georgians in the three identified areas, I want to look at the underlying picture that Georgia put to you yesterday, which had three central elements:

— first, that this case is concerned with acts of ethnic cleansing that post-date the period of armed conflict and are in essence separable from that conflict;

— second, that those acts are ongoing, and the situation is becoming more precarious by the day — although that contention was notably made by reference to a document dated 13 August[23];

— third, that Russia is actively participating or complicit in those acts.

4. On the first point, much has been made of the maps at tab 21 of Georgia's judges' folder. Russia's Agent, Mr. Kolodkin, will return later to what was really happening in the conflict zones. I want to take the Court to just one piece of evidence, at paragraph 57 of the 8 September report of Mr. Hammarberg, which is at tab 28 of Georgia's judges' folder. He says:

> "A great number of the displaced with whom the Commissioner met originated from the Georgian villages north of Tskhinvali. Some of them told the Commissioner that locals had organized evacuation *already* on 4 and 5 August 2008. [The conflict, of course, started on 7 August.] Some elderly persons had opted to stay on, as they did not want to leave their homes. The evacuation buses or cars had gone either to Gori or Tbilisi. Those who stayed on had been forced to hide until 11-13 August 2008, before they could attempt to flee." (Emphasis added.)

[23]Mr. Reichler, referring to the Human Rights Watch bulletin of 13 August, Ann. 5 to Georgia's Observations.

5. So, some evacuations clearly even predated the conflict as there was evidently knowledge that the Georgian intervention was about to take place. As soon as the conflict commenced, vast numbers left, as could only be expected.

6. The second issue, the ongoing situation. What does the evidence show?

7. Georgia has now, as it were, sought to bring you up to date. And we heard a lot about that yesterday. But in fact, in terms of up-to-date documentation, it has added to its judges' folder just *one* UNHCR bulletin of 2 September and the Hammarberg report; both are clearly valuable additions, but that is it — apart from a short statement and a Fox news report going to the denial of access to the buffer zone to the Deputy-Minister for Foreign Affairs of Lithuania and the Ambassadors of Sweden, Latvia and Estonia.

8. At tabs 4 to 9 of our judges' folder we have included a series of the six USAID bulletins from 25 August to 5 September, so that the Court can track through for itself how matters have been developing in the past few weeks, including in terms of the return of refugees. The Agent for Georgia, Deputy-Minister Burjaliani, said yesterday that only approximately 30,000 IDPs from the town of Gori, not the Gori district, have started to return to areas that have returned to Georgian Government control. Well, the USAID figures, which are taken from OCHA and the UNHCR, show the following.

(a) As of 25 August, a total of 128,703 newly displaced persons in Georgia. In fact, the figure according to Mr. Hammarberg is 121,000[24], that is considerably less than the 158,000 that Georgia was claiming in opening[25].

(b) As of 26 and 27 August, 10,000 returnees are shown from parts of Georgia to Gori. These bulletins show increased total new IDP figures but with an asterisk that says that estimates have since declined.

(c) As of 3 September, the figure for returnees from parts of Georgia has increased markedly to 53,557.

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[24]At para. 53 of his report.

[25]CR 2008/22, p. 39, para. 2.

(d) As of 5 September — and again the figure is sourced from a United Nations agency, although here it is the UNHCR — the returnees to parts of Georgia is shown at 90,500. That is *three times* the figure that you were told yesterday.

9. I also note, since so much of this was made yesterday, that there is a passage in the 5 September USAID bulletin dealing with access to the South Ossetia security zone. This says:

> "Since the beginning of the crisis, international humanitarian agencies and donors have been supporting relief operations in South Ossetia through the ICRC; however access for other organizations continues to be limited, particularly for groups attempting to access the region from Georgia rather than Russia. According to relief agencies and USAID team members, access to villages in the buffer zones remains inconsistent."

But Mr. Hammarberg, of course, was also able to access the areas he wished to visit.

10. Sticking with that point, we have included two bulletins from ReliefWeb at tabs 10 and 11, dated 3 and 4 September. The second of these explains how Mercy Corps does have access into the buffer zone, and how they have "developed a rapport with Russian control posts that allow us to access and to move around in these areas".

11. At tabs 12 to 17 of our judges' folder, we have also included the UNHCR bulletins of 28 and 29 August and through to 9 September. You will recall that on Monday you were told that there had been approximately 10,000 new IDPs in the ten-day period up to 5 September[26]. Well, we could find *no trace* of that in the USAID figures, and the same goes for these UNHCR bulletins:

(a) On 28 August there is a reference to the earlier registration as IDPs as "a small number of persons who have fled from villages in the so-called buffer zone north of Gori within the past three days due to security conditions on the ground". But later the bulletin says: "Today, unlike the previous two days, no new arrivals from villages from the 'buffer zone' in Gori were registered." The report concludes: "The security situation in the field remains calm."

(b) On 29 August, it is recorded that tented camp of Gori received *ten,* not 10,000, *ten* new IDPs from the village of Beloti, close to the South Ossetian border. There is also a passage on Akhalgori — and Akhalgori is one of the three key areas identified by Georgia, of course. And this states as follows:

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[26]CR 2008/22, p. 18, para. 10.

> "The UNHCR assessment team met with the local commandant responsible for the security in the region, according to whom 40 per cent of the population, both ethnic Georgian and Ossetians, have fled the area. Other interlocutors among the local population estimated the displacement rate to be up to 80 per cent. He noted that some humanitarian assistance had been provided by EMERCOM" and that is the Russian Ministry of Emergency Situations "but shared UNHCR's concern over the fact that most medical staff of the local clinic had also left.
>
> According to the commander, some people are returning to the area and he invited *all* displaced former inhabitants to return. Civilian traffic, including buses, *was* allowed to pass checkpoints during the observations. Some return movement was observed by the team." (Emphasis added.)

(c) In the 9 September bulletin, there is a passage on the South Ossetian buffer zone, stating that: "Initial rapid assessments at village level within the eastern and north-eastern sectors of the buffer zone have revealed that most of the IDPs from that area have already returned."

(d) I also note that there is a reference to significant numbers of new arrivals to the refugee camp at Gori, but that is movement from Tbilisi, not elsewhere. So this is a more complete picture of the current situation and it is not supporting Georgia's contentions.

12. To complete the round-up, so far as we are aware there are no further Amnesty International bulletins since 22 August, which is an interesting fact in itself, but there are three further Human Rights Watch bulletins — and these are at tabs 19 to 21 of your judges' folder.

(a) First, there is "South Ossetia: Tskhinvali's Apocalypse" of 29 August, summarized on the Human Rights Watch website as follows:

> "With the fighting over, Tanya Lokshina hitches lifts between checkpoints around South Ossetia's wrecked capital Tskhinvali chronicling the grieving and burying, looting and burning, the unexploded bombs, disenchanted militias and Russian troops struggling to protect what remains of abandoned Georgian villages."

Tanya Lokshina is a source relied on by Georgia in the Human Rights watch report at tab 5 of its Observations. The text describes the following encounter:

> "We get into a jeep with two Ossetian militiamen, who promise to take us to our destination. But after five minutes, at the nearest checkpoint, federal soldiers [and these are Russian federal soldiers] refuse to let us through. Well, not us, but our escorts. The purpose of this checkpoint is specifically to stop the Ossetian militias from entering Georgian villages on the Tskhinvali road. Its commanding officer, a Russian lieutenant colonel, shrugs phlegmatically: 'We're trying to stop the looters.'."

(b) The two further Human Rights Watch bulletins — these are of 1 and 2 September — concern the use of cluster munitions. The bulletin of 1 September deals with Georgia's

acknowledgment that it did use cluster munitions during the armed conflict. The bulletin of 2 September corrects the Human Rights Watch bulletin at Annex 3 of Georgia's Observations, saying that it cannot in fact be determined that Russia used cluster bombs at Shindisi and Pkhvenisi.

13. None of this, none of this was brought to the Court's attention yesterday.

14. I turn to another recent development of such obvious importance so far as concerns the developing facts on the ground, and the question of urgency, that we cannot but remark on the failure of Georgia to mention it yesterday. This is of course the fact that — as was very widely reported — highlights of an updated ceasefire plan were announced on Monday following talks with Presidents Medvedev and Sarkozy in Moscow. These are as follows — and to save time I am going to quote from the Associated Press release which is at tab 18 of the judges' folder, along with the full text of the plan:

> "European Union Monitors: 200 European Union monitors to deploy to regions surrounding South Ossetia and Abkhazia by October 1.
>
> Russian Withdrawal: Russian peacekeeping forces to withdraw from posts outside the Black Sea port Poti and the area near the town of Senaki within seven days, on condition Georgia signs a pledge not to use force against the breakaway province of Abkhazia. Full withdrawal of Russian peacekeepers from regions surrounding South Ossetia and Abkhazia will take place within ten days of deployment of EU monitors.
>
> Georgian pullout: Georgian troops must return to their barracks by October 1.
>
> International talks: International talks to begin on October 15 in Geneva; agenda to include security and stability in South Caucusus and the question of return of refugees."

15. Madam President, there are four points to make in relation to this document.

First, Georgia may not see the displacement and refugee tragedy as one aspect of the armed conflict, but that is evidently not how others see it.

Second, the issue of monitoring, and security, in the South Ossetian buffer zone is being addressed. It is not just that IDPs are in fact returning, despite the picture painted yesterday; but Russia's positive démarches before the OSCE, as I described on Monday, and now with the European Union and President Sarkozy, are addressing precisely the problem that is being put before you as the basis for urgent provisional measures. I also ask the Court to note that it is not

just the South Ossetian security zone that under this plan is to be monitored by EU monitors, but the Abkhazian buffer zone also, right next to Gali. And the plan provides that the United Nations and OSCE observers will also continue to carry out their mandates.

Third, further security and stability issues are to be addressed in international talks, which are imminent and are obviously to be at a very high level.

Finally, the return of refugees is also to be addressed in international talks, and I quote from the text of the plan, "settling the issues of refugees and displaced persons on the basis of internationally recognized principles and post-conflict resolution practice".

All of these documents, statements and facts contradict Georgia's assertion of an ongoing worsening crisis. There has been a humanitarian crisis to be sure, but it is part of the recent armed conflict and is being addressed in that context at the highest levels.

16. I move onto the third general topic I wish to cover, which is the allegation of Russian participation or complicity in the acts of alleged ethnic cleansing. We were criticized yesterday by Professor Akhavan for "not having produced any evidence rebutting Georgia's voluminous evidence demonstrating that Russian forces are participating in such acts of ethnic cleansing" and it was said that the article in the *Guardian* "Russia's cruel intention" is "corroborated by numerous other sources in Georgia's Observations". Where? By the Amnesty International bulletin of 22 August? No. By the Human Rights Watch bulletins? No, to the contrary as is clear from the report of 29 August I just took you to. By the Hammarberg report? No. It is also not corroborated by the USAID or UNHCR or ReliefWeb bulletins that we have put in the folder today. This is a wholly unsustainable allegation, and it is such a serious allegation it is quite remarkable that it has been made with no support other than a few press articles and some witness statements that are internally inconsistent if the trouble is taken to read them carefully.

17. I just want to add a word or two about the two newspaper articles recording the views of Bernard Kouchner on 27 August, at tabs 16 and 17 of Georgia's Observations. He says: "I just want to say, here's the map of South Ossetia, and here's a town called Akhalgori, and I've been told that tonight Russian troops are sweeping through it pushing Georgians out and over the border. It's ethnic cleansing . . ." Well, what can one make of this? Bernard Kouchner was told something. That something evidently did not happen, or else if it did it was missed by Human

Rights Watch, UNHCR, USAID, Amnesty, the rest of the world's media, etc. The Court is asked to accept that Georgia's newspaper articles have value applying the test in the *Nicaragua* case. I think not.

18. Madam President, you will recall from the Human Rights Watch bulletin at Annex 5 of Georgia's "Observations" that it is Russia's position that there should be decisive and tough action against looters. We have obtained some figures overnight from Russia's Chief Military Prosecution Office. These are recorded in the letter which is now at tab 22 of the judges' folder. The figures: Russian military patrols have apprehended 140 looters and handed them over to the South Ossetian authorities. The South Ossetian authorities have themselves apprehended 245 looters.

19. This letter also notes that, in the villages of Karaleti and Variani that are directly visible from Russian observation posts, up to 70 per cent — up to 70 per cent — of the population has returned.

20. Madam President, before I turn specifically to the serious risk in respect of rights alleged so far as concerns the three identified areas — that is the South Ossetian buffer zone, Gali and Akhalgori — can I just pick up on a couple of points in rebuttal.

21. First, an awful lot was made by Professor Crawford of Mr. Kokoity's statements on right of return, and it was suggested that the all-controlling hand of Russia was behind a change in position. The focus was in particular on what Mr. Kokoity said to the United Nations High Commissioner for Refugees on 22 August. I do want to be sure that the Court recalls what the High Commissioner stated, which is why I took you to the document, and which was passed over by Professor Crawford yesterday. This is, that he was "reassured by [Mr. Kokoity's] commitment to prevent further displacement through the guarantee of safety for all members of the population, independently of their ethnic background"[27].

The PRESIDENT: Could you please go a little more slowly, Mr. Wordsworth.

Mr. WORDSWORTH: I do apologize, Madam President.

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[27]Http://www.unhcr.org/cgi-bin/texis/vtx/print?tbl=NEWS&id=48b0665c4.

Georgia no doubt thinks that the High Commissioner was duped, because approximately 10,000 further refugees later fled South Ossetia. But we cannot find any basis for that 10,000-refugee figure, as I said earlier.

22. Second, the 89 detainees. It was said that I told the Court on Monday, quoting a South Ossetian source, "that the authorities in Tskhinvali were holding 89 Georgian civilians who were taken into custody to save them from being lynched". It is said that I would have the Court believe that the Georgian civilians were being protected from harm. Now, what I in fact did was to refer to Annex 19 of Georgia's Observations, a BBC report, and I set out verbatim the words of a Red Cross spokesman there, not a representative of the South Ossetian authorities. The relevant passage reads as follows:

> "Meanwhile, a Red Cross spokesman in the South Ossetian capital Tskhinvali said the authorities there were holding 89 Georgian civilians who were taken into custody to save them from being lynched after the initial Georgian attack on the town earlier this month."

23. As to how these 89 detainees were treated, there is the implausible account of their being interrogated by Russian officers, there is a photo which shows nothing whatsoever about conditions of detention other than that certain detainees are at a particular time outdoors, and there is the actual fact that the 89 detainees received visits from the ICRC (Annex 11 to Georgia's Observations) and were subsequently released.

24. I move onto the case to be met — serious risk to the claimed rights under Articles 2 and 5 of the CERD opposable to Russia, and urgency — in relation the portion of the Gori district in the South Ossetian buffer zone, the Akhalgori district of South Ossetia, and the Gali district of Abkhazia. Those three identified areas.

25. The South Ossetian buffer zone. Two key points:

(a) The case is being put to you on an incorrect basis. It is said that IDPs are not returning to the buffer zone, when in fact they are. The Court knows this from the UNHCR bulletin of 9 September, as well as the chief military prosecution office letter that I have just referred to. Georgia should know this because these are the IDPs on *its* territory in respect of which *it* is claiming rights. It is wrong on its overall IDP returns figure of 30,000 — the real figure on UNHCR estimates is 90,000 — and it is wrong on returns to the buffer zone also.

(b) Georgia has elected not to grapple with the fact that time has moved on so far as concerns security in the buffer zone. It has not dealt with Russia's offers through the OSCE Permanent Council to have military monitoring officers of the OSCE and an OSCE European Union civil police operation in the buffer zone. It has simply ignored the further principles announced on Monday for 200 European Union monitors to be deployed into the South Ossetian and Abkhaz buffer zones, and for Russian peacekeeping troops to make a full withdrawal ten days later. We heard time and again yesterday that Russia was the problem in the buffer zone, and as soon as it moved out, the IDPs would return. Well, we think that is a complete misrepresentation of the true position, but the plan announced on Monday gives Georgia what it wants in this respect.

26. Second, the Akhalgori district of South Ossetia.

(a) Here, the difficulty for Georgia is that it has *no* evidence that ethnic Georgians are threatened. It has the *Guardian* article which, unexpectedly at least to me, has taken central stage in the supposed mass of evidence that the Court has been presented with. This is not a document that found its way into the Georgian judges' folder unlike the Bernard Kouchner article. And maybe that is because the claims made in that article actually undermine Georgia's case on Akhalgori. Georgia's case is that there are 9,000 Georgians in Akhalgori, and these need protection. The author of the *Guardian* article says that almost all of the ethnic Georgians have already fled from Akhalgori (Georgian Observations, Ann. 13).

(b) Of course, there is reliable evidence on Akhalgori in the form of UNHCR bulletin of 29 August. It is strongly inconsistent with Georgia's case because it shows some return movement being observed by the UNHCR. It is also strongly inconsistent in that the local commander is recorded as saying that both ethnic Georgians and Ossetians fled, and that the Russian EMERCOM is supplying aid.

27. Third, the residents of Gali, Abkhazia. Yesterday, Georgia strived to make a virtue out of silence. But this will not do. If there was a palpable risk of a humanitarian catastrophe unfolding in Abkhazia, the Court can be sure that it would have read about this in the bulletins of Amnesty International, Human Rights Watch, USAID, etc., maybe even in an article in the *Guardian*. We have heard nothing, despite the resources that were no doubt deployed by Georgia.

And this is not because there is nobody there in Abkhazia. The Court should know that the ICRC has an office in Sukhumi, Abkhazia, and I quote (this is from the ReliefWeb bulletin of 3 September), "it continues to keep a close eye on the situation of people in the area"[28]. And there is, of course, in addition in Abkhazia the presence of the UNIMOG observers.

28. There was reference yesterday to the declaration of Mr. Mishvelia, who is a local Georgian official. This is at Annex 36 to Georgia's Observations, and I can only invite the Court to read it in full to gauge the quality of the evidence. So far as the content, the Court will recall that he says that he is "not aware of any acts of murder or injury to civilians" and "they haven't burnt the houses". He also says — and I have to add that he has no direct knowledge of this whatsoever:

> "But the fact is that the population is not able to enter their houses and take care of their property, which naturally causes loss for them. It is the harvest time for nuts, which represents the main source of income for the population, but they are not able to start gathering the harvest, causing significant losses."

Now if that is true, and there is very little to go on, so far as concerns Georgia's positive case, it is serious. But it comes nowhere near serious risk of irreparable loss.

29. And I would add three further factors on Abkhazia:

First, it is not right that Gali is physically cut off. I am advised by the Russian Ministry of Defence that the bridge is open to the local population, who simply have to give 24 hours notice of wishing to cross. In addition, I have similarly been advised that there are six Georgian-manned checkpoints along the Inguri river, with 170 police stationed there.

Second, under the plan announced on Monday, there are to be European Union monitors in the buffer zone next to Gali. This is in addition to existing United Nations monitoring which covers the Gali zone.

Third, the Russian withdrawal of troops has already begun. I read from an AFP report of yesterday which I understand is now at the last tab of the judges' folder as follows:

> "Russian troops withdrew Tuesday from a Georgian village near the breakaway region of Abkhazia in the 'first sign' of a promised pull-out from the country, the Georgian [the Georgian] interior ministry said. Russian troops have left the village of Ganmukhuri [Ganmukhuri is where Mr. Mishvelia is from] in the Zugdidi district, near the administrative border with Abkhazia,' Ministry spokesman Shota Utiashvili told AFP. 'It is the first sign of the Russian pull-out from the so-called buffer zones as a result of the September 8 agreement, he said. A defence ministry official in Moscow

[28] ReliefWeb, 3 Sept, judges' folder, tab 11.

> confirmed the move, Russia's State's news agency RIA Novosti reported. 'In accordance with agreements reached and signed by the President of the Russian Federation, the defence ministry has begun the dismantling of checkpoints and zones near South Ossetia and Abkhazia'."

30. Madam President, the case on Abkhazia is smoke and mirrors, and it is anyway bypassed by events.

31. Madam President, I conclude on one further factor on urgency. This is the European Court of Human Rights interim measures order that I noted on Monday. Professor Crawford elected to deal with this, telling the Court that I appeared to suggest that the proceedings before this Court had been rendered moot by virtue of the order, and that the question was whether the order rendered Georgia's Request inadmissible.

Three brief points: first, Professor Crawford helpfully confirmed that there is indeed "overlap" between the rights being covered by that order and those claimed here; second, he did not challenge anything else I said, including in respect of what Russia has said about its compliance; third, he chose to address an argument I did not make. I put the order before you as a matter going to urgency, and so it remains.

32. Madam President, Members of the Court, I thank you again for your attention and ask you to call on Professor Pellet.

The PRESIDENT: Thank you, Mr. Wordsworth. We now call Professor Pellet.

M. PELLET : Merci, Madame la présidente.

III. L'ABSENCE MANIFESTE DE COMPÉTENCE DE LA COUR

1. Madame la présidente, Messieurs les juges, dans sa plaidoirie d'hier, le professeur Crawford s'est montré contrarié que je n'aie pas discuté les faits autant qu'il l'aurait souhaité ; il a qualifié mon intervention de lundi après-midi de «zone franche factuelle» («fact-free zone»[29]). Mais mon contradicteur et ami n'est pas très constant dans sa critique : juste avant il nous avait reproché de trop aborder les faits, et je lui rappelle que — la présentation qu'une partie fait à la Cour de son affaire est un tout — et doctement — mais à juste titre — il a rappelé que :

[29] CR 2008/25, p. 16, par. 23 (Crawford).

«The merits of the dispute are only relevant insofar as they relate to the factual basis for the provisional measures requested.»[30]

2. Au demeurant, Madame la présidente, loin de moi l'idée que le droit soit un jeu abstrait de l'esprit, surtout dans un contexte humain et politique si tragique. Mais pour dramatique qu'il soit, ce cadre ne peut faire oublier à la Cour de céans qu'elle est une instance juridictionnelle, qui ne peut qu'appliquer le droit tel qu'il est — quitte à manifester, comme il lui arrive de le faire, sa préoccupation au sujet des aspects humanitaires d'un différend dont elle ne peut connaître. Ceci étant, au stade de l'examen d'une demande en indication de mesures conservatoires, les considérations de fond sont, et doivent être, strictement limitées, et je trouve paradoxal que les conseils géorgiens nous mettent systématiquement au défi de prouver que la Fédération de Russie n'a pas causé les maux dont la Partie requérante l'accuse[31], alors qu'eux-mêmes conviennent que ce n'est pas le lieu de le faire et se retranchent souvent derrière cette position juridique (fondée je le répète) pour ne pas plaider le fait quand ceci ne les arrange pas[32] ; ou alors, ils confondent preuve du fait et fortes affirmations ou indignations.

3. La plaidoirie d'hier de James Crawford en donne un exemple topique. J'ai montré lundi, en me fondant sur la requête, sur les demandes successives en indication de mesures conservatoires, sur l'attitude passée constante de la Géorgie et sur les relations entre les deux pays durant les dix-huit ans qu'aurait duré le présent «différend», que celui-ci ne portait nullement, en réalité, sur l'interprétation et l'application de la convention sur la non-discrimination, mais sur toute autre chose : l'intervention que la Géorgie reproche à la Fédération de Russie en réponse à sa propre action à l'égard de l'Abkhazie et de l'Ossétie du Sud et les violations alléguées des règles du droit humanitaire à cette occasion. En réponse, mon habile contradicteur s'indigne (je paraphrase) : «comment est-il possible d'affirmer cela ? Notre requête indique bien que ce qui est en cause, ce sont des violations de la convention de 1965» ; d'ailleurs, et cette fois je cite : «I — professor Crawford is speaking — I opened my own presentation yesterday with the words : «This is a case about the ethnic cleansing of Georgians…»». Précisément, Madame la présidente,

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[30] *Ibid.,* p. 10, par. 3 (Crawford).

[31] *Ibid.,* p. 13-14, par. 12-14 (Crawford) ; p. 22, par. 3 (Akhavan).

[32] *Ibid.,* p. 11, par. 6 (Crawford).

il ne suffit pas que le professeur Crawford soi-même, ou le professeur Akhavan, ou M. Reichler, ou même Mme l'agent de la Géorgie affirme qu'il existe un différend concernant l'application de la convention de 1965 entre les Parties pour que ce différend existe…

4. Il ne suffit pas non plus que le demandeur établisse que des actes de discrimination raciale sont commis, en Ossétie du Sud ou en Abkhazie. Même s'il s'agit de l'hideuse épuration ethnique, il faut encore qu'il montre avec un degré raisonnable de certitude que ces actes sont imputables à la Russie — notre agent reviendra à son tour sur ce point dans un instant, qu'il en résulte un différend interétatique entre les deux Etats et que ce différend a fait l'objet de l'une des procédures envisagées à l'article 22 de la convention de 1965.

5. Or, en écoutant nos collègues de l'autre côté de la barre, avant-hier comme hier, je n'ai pu m'empêcher de penser à la définition des lignes parallèles, qui «ne se rencontrent jamais aussi loin qu'on les prolonge». C'est aussi le cas de l'argumentation géorgienne ; elle se déroule selon deux lignes de démonstration que, malgré leur indéniable talent, nos collègues de l'autre côté de la barre, n'arrivent pas à rassembler :

— d'un côté, ils nous expliquent longuement que l'Ossétie du Sud et l'Abkhazie sont le théâtre d'actes de discrimination raciale, et même d'épuration ethnique ;

— de l'autre, ils affirment que la Géorgie a été victime d'interventions armées illicites de la part de la Russie et que l'Ossétie du Sud est le théâtre de violations du droit humanitaire.

C'est, ce me semble, à une simple addition de ces deux propositions que se borne toute la démonstration de la Partie géorgienne ; mais leur juxtaposition ne suffit certainement pas à prouver, même *prima facie*, qu'existe un différend entre la Géorgie et la Russie *sur l'interprétation et l'application de la convention de 1965 sur la non-discrimination raciale*.

6. Pour qu'il existe un différend «sur ce point» et pour que la Cour puisse en connaître, il faut que deux conditions, *cumulatives*, pas alternatives, soient remplies :

— d'une part, que la Cour — car c'est à elle qu'il appartient de définir l'objet véritable du différend à partir de l'argumentation des Parties[33] — soit convaincue que la requête entre dans les prévisions de la convention[34] ;

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[33] CR 2008/23, p. 28, par. 8 (Pellet).

[34] *Ibid.,* p. 28-30, par. 9-12 (Pellet).

— d'autre part, que les procédures préalables auxquelles son article 22 subordonne la saisine de la Cour aient été suivies.

7. Ni l'une, ni l'autre de ces conditions ne sont remplies. Je l'ai montré lundi dernier — mais peut-être sans insister suffisamment sur le fait qu'elles sont très étroitement imbriquées l'une avec l'autre : c'est *parce qu'*il n'y a pas de différend entre la Géorgie et la Russie sur l'application de la convention que les deux pays n'ont pas négocié à ce sujet et que l'Etat demandeur n'a pas actionné les procédures expressément prévues par l'article 22. Et l'absence de telles négociations au sujet d'un différend dont la Partie géorgienne prétend qu'il remonte à plus de dix-huit ans est un élément — parmi d'autres d'ailleurs — qui établit l'absence de ce différend.

8. Au bénéfice de ces remarques, j'aborderai successivement trois points.

1. L'échec de négociations sur le différend supposé entre les Parties au sujet de l'application de la convention est une condition indispensable à l'exercice par la Cour de sa compétence

9. Madame et Messieurs de la Cour, contrairement à ce qu'a tenté de faire croire lundi le professeur Crawford[35], l'échec de négociations ou des modes conventionnels de règlement du différend supposé exister entre les Parties au sujet de l'application de la convention est, en vertu de l'article 22, une condition indispensable à l'exercice par la Cour de sa compétence.

10. Lorsqu'il s'agit d'interpréter la convention, et plus particulièrement les articles 16 et 22[36], je pense qu'il faut s'en tenir aux méthodes d'interprétation éprouvées, le texte, le contexte et, le cas échéant (car il n'y a pas de pratique subséquente), les travaux préparatoires. En style télégraphique, si vous le permettez, Madame la présidente — car je suis pris par le temps :

— article 16 : le texte est clair ; il signifie que *si* il existe un différend entre les parties en matière de discrimination, d'autres moyens convenus permettant de le régler, persistent — la Géorgie n'invoque aucun de ces autres moyens ; quant au contexte, il est essentiellement constitué par l'article 22 précisément ;

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[35] CR 2008/22, p. 32-35, par. 49-56 (Crawford).

[36] Voir N. Lerner, *The U.N. Convention on the Elimination of All Forms of Racial Discrimination : A Commentary,* Leiden, Sithoff, 1970, p. 99 et 104 (édition citée par M. Crawford ; la second édition (de1980) ne comporte pas de changements sur ces points — p. 92 et 97).

— article 22 : le texte est clair : la Cour peut connaître des différends entre les parties au sujet de l'interprétation et de l'application de la convention s'ils n'ont pas été réglés autrement (notamment par voie de négociations) — encore faut-il qu'il y ait eu négociations ou que celles-ci se soient révélées impossibles ; le contexte : ce sont les articles 11 à 13 — peut-être 14 — les procédures de règlement prévues par la convention elle-même ; les travaux préparatoires : ils confirment qu'il s'agit là d'une condition préalable et, faute toujours de temps, je me permets, Madame et Messieurs de la Cour, de vous renvoyer à la note de bas de page n° 25 de ma plaidoirie de lundi dernier[37].

11. Le professeur Crawford a, adroitement, tenté de «noyer le poisson» en se référant à une liste d'affaires[38], en apparence impressionnante — tout est relatif, il en a cité six — dans lesquelles la Cour a rejeté l'argumentation de défendeurs fondée sur ce que j'ai suggéré d'appeler le non-épuisement de «l'exercice effectif de moyens de règlement préalables»[39]. Mon contradicteur concède, à regret, qu'il y en a au moins une septième qui va dans le sens contraire. La chose mérite que l'on y regarde d'un peu plus près : certes, dans six des sept affaires qu'il mentionne la Cour a rejeté l'exception — mais jamais «par principe». Bien au contraire, elle s'est, dans chaque cas, fondée sur les circonstances particulières de l'espèce, c'est-à-dire moins sur le libellé de la clause compromissoire en question que sur le comportement des parties. Et il se déduit déjà de ceci, *a contrario*, que si une clause de juridiction doit être interprétée comme excluant la compétence de la Cour en l'absence du recours à d'autres modes de règlement, et surtout s'il apparaît que les parties n'ont pas recouru à ces modes de règlement, la Cour ne peut que se déclarer incompétente.

12. Mais, malgré le temps, je ne veux pas esquiver la question, et je vais être plus spécifique. Le tableau qui figure sous le n° 3 de votre dossier, Madame et Messieurs les juges, présente sous une forme compacte, et j'espère, commode, les sept affaires mentionnées par mon contradicteur en suivant l'ordre chronologique. Son analyse conduit aux constatations suivantes :

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[37] CR 2008/23, p. 35 (Pellet).

[38] CR 2008/22, p. 32-33, par. 49 (Crawford).

[39] CR 2008/23, p. 36, par. 29 (Pellet).

1) les clauses pertinentes connaissent des variations (assez mineures) non seulement les unes par rapport aux autres, mais aussi selon la manière dont elles ont été traduites en français ou en anglais ;
2) la formule de l'article 22 de la convention de 1965 ne se retrouve nulle part dans sa version française («n'aura pas été réglée») ; en revanche, la version anglaise («is not settled») est identique à la rédaction des dispositions correspondantes dans les affaires de l'*Obligation d'arbitrage* et des *Activités armées* ;
3) les deux formulations sont un peu différentes dans l'affaire du *Nicaragua* — plus particulièrement chère à M. Crawford[40], mais, je le reconnais volontiers, voisine dans son esprit pour ce qui est de l'anglais («not satisfactorily adjusted by diplomacy»), moins s'agissant du français (mais ce n'est pas un texte original) («qui ne pourrait être réglé de manière satisfaisante») ;
4) mais lorsque l'on passe de la deuxième colonne de mon tableau (qui reproduit les clauses compromissoires) aux deux suivantes, qui reflètent la position de la Cour, on s'aperçoit qu'en réalité, celle-ci ne s'est pas arrêtée à ces nuances dans la rédaction des dispositions pertinentes ; elle s'est exclusivement intéressée à la question de savoir si des négociations poussées sur la convention en question avaient eu lieu quel qu'en soit le cadre (comme dans les affaires *Mavrommatis*, *Sud-Ouest africain* ou *Activités armées*) ou étaient encore envisageables (comme dans celles de l'*Obligation d'arbitrage*, des *Otages*, du *Nicaragua*, ou de *Lockerbie*).

13. Le professeur Crawford n'a pas manifesté une grande sympathie pour la solution retenue par votre arrêt de 2006 dans l'affaire *République démocratique du Congo c. Rwanda*, sur laquelle il a ironisé — peut-être un peu facilement[41]. C'est pourtant celle qui est la plus proche de la nôtre :

— le point pertinent de la clause compromissoire est rédigé, en anglais, de la même manière («is not settled») — alors que la formulation française de l'article 22 de la «CERD» («n'aura pas été réglé») insiste plus nettement sur l'idée d'une obligation préalable ;
— dans les deux cas, il s'agit de conventions multilatérales relatives à la protection de droits humains fondamentaux ;

[40] Voir *ibid.*, p. 33-34, par. 50-51 ; et CR 2008/25, p. 17, par. 28 ; p. 18, par. 34 (Crawford).

[41] Voir CR 2008/22, p. 35-36, par. 55-56 (Crawford) ; voir aussi CR 2008/25, p. 18, par. 35 (Crawford).

— et c'est précisément dans *cette* affaire que vous avez refusé de considérer, dès le stade des mesures conservatoires, que votre compétence était établie faute de négociations préalables entre les parties (*Activités armées sur le territoire du Congo (nouvelle requête : 2002) (République démocratique du Congo c. Rwanda), mesures conservatoires, ordonnance du 10 juillet 2002, C.I.J. Recueil 2002*, p. 247, par. 79). Il en va de même dans notre espèce qui concerne — nous y insistons — non pas des pratiques discriminatoires mais une crise humanitaire résultant d'un conflit armé.

2. Il n'y a pas eu de négociations entre la Géorgie et la Russie sur un différend touchant l'application de la convention de 1965

14. Madame la présidente, s'il faut en croire la Géorgie — c'est mon deuxième point —, les négociations seraient allées bon train entre les Parties ! Et c'est vrai : la République de Géorgie et la Fédération de Russie ont beaucoup négocié — au plan bilatéral et dans des enceintes multilatérales (aux Nations Unies et à l'OSCE notamment), seule à seule ou en présence de tiers ; et elles continuent à le faire. Et la Russie ne s'est jamais dérobée à une demande de négociations qu'aurait pu formuler la Géorgie. Mais jamais au grand jamais les deux Etats n'ont négocié sur un différend qui les opposerait en tant que parties à la convention de 1965, et la Géorgie n'a jamais suggéré d'entamer de telles négociations — pas davantage d'ailleurs que, jusqu'au dépôt de la requête, elle n'a accusé la Russie d'une forme quelconque de discrimination raciale.

15. Certes, Madame la présidente, «parce qu'un Etat ne s'est pas expressément référé, dans des négociations avec un autre Etat, à un traité particulier qui aurait été violé par la conduite de celui-ci, il n'en découle pas nécessairement que le premier ne serait pas admis à invoquer la clause compromissoire dudit traité» comme vous l'avez dit dans *Nicaragua* (*Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique), compétence et recevabilité, arrêt, C.I.J. Recueil 1984*, p. 428-429, par. 83). Mais il faut tout de même que l'objet de la négociation soit bien un différend au sujet *de l'interprétation ou de l'application de la convention* et que les parties en soient conscientes. Ainsi que vous l'avez dit, dans l'affaire *Ambatielos*, «[i]l ne suffit pas que le gouvernement qui présente la réclamation établisse un rapport lointain entre les faits de la réclamation et le traité» qu'il invoque (*Ambatielos (Grèce c. Royaume-Uni), fond, arrêt, C.I.J. Recueil 1953*, p. 18. Voir aussi affaire du *Sud-Ouest africain*

(Ethiopie c. Afrique du Sud ; Libéria c. Afrique du Sud), exceptions préliminaires, arrêt, opinion dissidente conjointe de sir Percy Spender et sir Gerald Fitzmaurice, *C.I.J. Recueil 1962*, p. 562.) Or, je l'ai montré lundi[42], ni la Russie ni, à l'évidence, la Géorgie n'ont, à un moment quelconque, eu la moindre conscience qu'elles négociaient au sujet d'un différend touchant l'interprétation ou l'application de cette convention.

16. Il est d'ailleurs fort révélateur à cet égard que le professeur Crawford se garde de parler de négociations. Lorsqu'il essaie de faire naître cette idée, il utilise de prudentes périphrases : «there have also been extensive bilateral contacts between the parties»[43] or «Russia and Georgia had conducted bilateral meetings…»[44]. And he concludes: «For these reasons, even if Article 22 of the 1965 Convention were considered to lay down a condition precedent for seising the Court, that condition is satisfied here.»[45] Voici qui est bien catégorique et qui mériterait aussi que l'on y regarde d'un peu plus près…

17. Je l'ai fait, Madame la présidente, et je n'ai pas été convaincu ; je ne pense pas que vous puissiez l'être non plus. Je dois malheureusement passer rapidement. Mais, qu'il s'agisse

— du protocole de pourparlers du 9 avril 1993 ;

— de l'accord quadripartite sur le rapatriement librement consenti des réfugiés et des personnes déplacées du 4 avril 1994[46] ;

— du rapport du Secrétaire général des Nations Unies au Conseil de sécurité en date du 9 avril 2003[47] ;

— de la résolution 1494 du 30 juillet 2003 du Conseil de sécurité — autant de documents que j'ai épluchés avec soin — ; ou

— de l'échange de lettres des 23 juin et 1er juillet 2008 que la Partie géorgienne a cru bon de produire hier,

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[42] CR 2008/23, p. 34-38, par. 22-33 (Pellet).

[43] CR 2008/22, p. 35, par. 57 (Crawford).

[44] *Ibid.*, p. 35, par. 58 (Crawford).

[45] *Ibid.*, p. 36, par. 60 (Crawford).

[46] S/1994/397, annexe II.

[47] S/2003/412, par. 5.

aucun de ces documents, qui sont principalement relatifs au rôle facilitateur de la Russie, ne concerne, ni de près ni de loin, des mesures discriminatoires que la Géorgie imputerait à la Russie. Et si quelques-uns concernent le retour des personnes déplacées, aucun d'eux ne montre que la Géorgie impute la responsabilité de cette situation dramatique à la Russie. Au contraire, ils montrent que les deux pays coopèrent pour tenter de faire face à cette situation humanitaire préoccupante.

18. Dans le même esprit, je note que, bien que la Géorgie semble reconnaître qu'elle n'a jamais saisi le CERD du «différend» qui l'opposerait à la Russie, elle ne s'en emploie pas moins, par la voix de ses conseils, à essayer de faire naître l'impression que le Comité se serait prononcé sur ce point. Ainsi, le professeur Crawford a expliqué que «CERD has expressly recongnized that ethnic discrimination is a key aspect of conflicts in South Ossetia and Abhkazia»[48]. Mais, Madame la présidente, il ne suffit pas que le Comité ait constaté l'existence d'un conflit ethnique se traduisant par des actes discriminatoires en Ossétie du Sud et en Abkhazie pour que l'on puisse en déduire que le CERD reconnaît l'existence d'un différend à cet égard entre la Russie et la Géorgie ! Au surplus, il va de soi qu'une telle constatation dans un rapport du Comité ne remplirait pas la condition de procédure imposée par l'article 22.

19. Madame la présidente, Messieurs les juges, la vérité toute simple, évidente, c'est qu'il n'y a pas eu le moindre début de négociations (ni de recherche d'un autre mode de règlement) entre les Parties sur un différend :

1) qui ne les opposait pas entre elles mais qui pouvait opposer la Géorgie à ses entités sécessionnistes ;

2) qui ne portait pas sur l'application de la convention sur la non-discrimination mais bien sur les suites d'un conflit armé et l'application du droit humanitaire ; et

3) à la suite duquel la Russie a été impliquée comme facilitateur mais pas comme partie. Il va sans dire que ce n'est pas parce qu'elle a pris part à des négociations sur le retour des personnes qui se sont réfugiées sur son territoire (et qu'elle est prête à continuer d'en discuter) que la Fédération de Russie est responsable de cette situation.

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[48] CR 2008/22, p. 29-30, par. 41 (Crawford).

3. Les conditions de l'article 22 n'étant pas remplies, la Cour ne peut que constater son incompétence manifeste et rayer l'affaire de son rôle

20. Madame la présidente, Messieurs les juges, la compétence de la Cour est basée sur le principe du consensualisme ; vous le rappelez vous-même inlassablement aux plaideurs téméraires : «sa compétence repose sur le consentement des parties, *dans la seule mesure reconnue par celles-ci*» (*Activités armées sur le territoire du Congo (nouvelle requête : 2002) (République démocratique du Congo c. Rwanda),* arrêt du 3 février 2006, p. 39, par. 88. Voir aussi *Certaines questions concernant l'entraide judiciaire en matière pénale*, arrêt du 4 juin 2008, par. 48). Comme l'a précisé M. Kolodkin lundi dernier, la Russie étend, progressivement, son acceptation de la compétence de la Cour[49]. Elle l'a acceptée s'agissant de la convention sur la non-discrimination raciale, dans les limites fixées par l'article 22 de celle-ci.

21. Or, le différend *au sujet de la convention de 1965* dont la Géorgie vous a saisi n'existe pas (ce qui ne veut pas dire qu'il n'existe pas d'autres différends entre les Parties, bien sûr !). Mais dès lors, votre incompétence est manifeste. Et elle le serait tout autant si l'on admettait, pour les seuls besoins de la discussion, qu'un tel différend existât : il n'a, en tout état de cause, pas fait l'objet de la moindre tentative de règlement entre les Parties : avant que la Géorgie dépose sa requête à la Cour, le 12 août dernier, la Fédération de Russie n'en soupçonnait pas même l'existence. Pour cette raison également, l'incompétence de la Cour est manifeste du fait que les conditions préalables mises à votre saisine par l'article 22 ne sont pas remplies.

22. Face à cette double incompétence manifeste, la Cour, qui, «comme organe juridictionnel, a pour tâche de *résoudre* des différends existant entre Etats» (*Essais nucléaires (Australie c. France), arrêt, C.I.J. Recueil 1974*, p. 270-271, par. 55, et *Essais nucléaires (Nouvelle-Zélande c. France), arrêt, C.I.J. Recueil 1974*, p. 476, par. 58), a non seulement le pouvoir, mais aussi le devoir de rayer l'affaire de son rôle. Il ne lui appartient pas de se substituer au Conseil de sécurité ni d'obliger la Russie à revenir s'expliquer devant vous sur la compétence et la recevabilité dans le but, comme le professeur Crawford l'a suggéré, de convaincre un dirigeant ossète de respecter la convention de 1965…[50] «[D]ans un système de juridiction consensuelle, maintenir au rôle général une affaire sur laquelle il apparaît certain que la Cour ne pourra se prononcer au fond ne

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[49] CR 2008/23, p. 14, par. 20 (Kolodkin).

[50] CR 2008/24, p. 12, par. 10 (Vassylenko).

participerait assurément pas d'une bonne administration de la justice» (*Licéité de l'emploi de la force (Yougoslavie c. Espagne), mesures conservatoires, ordonnance du 2 juin 1999, C.I.J. Recueil 1999 (II)*, p. 773, par. 35 et *Licéité de l'emploi de la force (Yougoslavie c. Etats-Unis d'Amérique), mesures conservatoires, ordonnance du 2 juin 1999, C.I.J. Recueil 1999 (II)*, p. 925, par. 29). C'est en ce sens que la Fédération de Russie vous présentera ses conclusions maintenant par la voix de M. Roman Kolodkin auquel je vous prie, Madame la présidente, de bien vouloir donner la parole.

The PRESIDENT: Thank you, Professor Pellet. I now call Mr. Kolodkin, Agent of the Russian Federation.

Mr. KOLODKIN:

IV. CONCLUDING REMARKS

1. Madam President, Members of the Court, my colleagues have already mentioned the evidently wrongful statements of facts such as the quotation of Mr. Bernard Kouchner, references to old uniforms or the so-called "new checkpoint". Let me mention a couple of other examples.

2. According to Professor Akhavan yesterday, the Abkhaz leader said: "The Russian peacekeeping contingent will remain in the Republic and *[they]* will also be our border guards in Gali District." "They" in this context means Russians. And now allow me to provide you with the correct quotation that you may find in tab 24 of your folder: "The [Russian] peacekeeping contingent will remain in the republic and *there* will also be our border guards in Gali District."[51] It is Abkhaz border guards not Russian. By changing "there" into "they" Professor Akhavan simply misrepresents the facts.

3. Let me now turn to another important piece of evidence relied on by the Applicant.

4. Both yesterday and the day before, Professor Akhavan showed you a map depicting Georgian villages that have been allegedly destroyed — "the white circles map". The Agent said this map showed that the Georgian villages surrounding Tskhinvali had been "ethnically cleansed"

[51] "Abkhazia will be able to host brigade of RF troops — Bagapsh", 08.09.08, 11:57, www.itar-tass.com.

and that the Georgian villages in Gori district have been systematically destroyed[52]. But the Agent did not mention at least two things.

5. First, he forgot to say that this was the area of the most intensive combat during the conflict. I will use the same map, but this time showing military activities as they were registered in the logbooks of the two Russian battalions. One formed the basis of the Russian peacekeeping forces deployed in South Ossetia. The second battalion was sent for reinforcement. The logbook is an official document of an armed unit that reflects day-to-day events in chronological order.

6. In fact, the "white-circles" villages are situated in the area where intensive hostilities took place. Our map depicts two areas. The green one represents the zone of hostilities, which took place between 8 and 10 August 2008; the red one — that of the hostilities between 10 and 12 August.

7. The logbook attests that as early as 1 August, sporadic shelling took place from the following villages: Prisi, Sarabuk, Dmenis, Eredvi, Vanati, Achabeti, Tamarasheni, Nikozi, Avnevi. Similar incidents continued on the following days.

8. As Mr. Wordsworth has already cited today from the 8 September report of Mr. Hammarberg, on 4 and 5 August civilians from Georgian villages to the north of Tskhinval were evacuated by Georgian authorities.

9. On 7 August, heavy fire was located as originating from Prisi, Tamarasheni, Ergneti, Nikozi, Kere, Avnevi and other villages. At 23.36, massive shelling of the city of Tskhinval began first from Ditsi.

10. On 8 August at 06.25 Georgian troops attacked the Russian peacekeepers battalion and its southern base in Tskhinval. The peacekeepers were raked from the tanks, artillery, mortars and automatic guns, air bombing. In two days, while they were encircled, 15 peacekeepers were killed and dozens wounded.

11. The Georgian army attacked the town along three routes: the 4th infantry brigade — from the villages Dmenis, Tamarasheni, the 1st infantry brigade — from Karaleti and the 3rd infantry brigade — from Avnevi and Khetagurovo.

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[52]Tab 20 of Georgia's folder.

12. The attack on Tskhinval from the south was supported by special units of the Georgian Ministry of the Interior. These units had been in advance deployed in the Northern Georgian enclaves situated along the main road connecting Tskhinval to North Ossetia, namely Kekhvi, Kurta, Achabeti and Tamarasheni villages. The issue of the deployment of these Georgian armed units in civilian villages had been repeatedly raised by Russia at the meetings of the Joint Control Commission (negotiation mechanism for the settlement of the Georgian Ossetian conflict).

13. The Russian armed forces moved along this very road to unblock the Russian peacekeepers surrounded by the Georgian army. After the Russian reinforcement passed the town of Java, it was exposed to massive fire attack from the Georgian enclaves. It continued to fight its way through in order to get to Tskhinval and render assistance to our blocked peacekeeping battalion.

14. The above-mentioned areas, as you understand, were the theatre of war with a high intensity of fire from all sides. So, the real reason for the massive exodus of Georgian civilians and destruction of villages were the hostilities in this zone.

15. The second thing is that Georgia produced several maps from UNOSAT. But representatives of Georgia produced only some of the maps from this site. For example, they did not produce the map called "Village damage summary: Kekhvi to Tskhinvali". This map shows about 50 per cent of the houses of the Georgian village, standing on the road along which the Georgian military was moving, were destroyed. At the same time, the same map demonstrates undamaged Georgian villages located farther from the road. This map is dated 20 August 2008. It clearly supports the statement on the other map, called "Active fire locations for Tskhinvali, South Ossetia, Georgia". This is the map from the same site, saying "it is highly probable that such detected fires are directly or indirectly linked to the armed conflict". The said maps you can find in tab 27 of your folder.

16. Madam President, one may think these are just minor mistakes. To us, however, it is clear that we deal with something else. In fact, just like the pieces of evidence I have quoted, the whole case has been put on a premise of racial discrimination. It is not a case of racial discrimination, but a case of the use of force, international humanitarian law, or also a case of ethnic relations between Georgians, on one hand, and the Abkhaz and the Ossetians, on the other.

We could hear a lot about the matter if representatives of those nations were present in this room. But they are not!

17. Professor Akhavan in both of his speeches referred to testimonies of witnesses who had to flee their villages after their homes were burnt. There is no doubt that losing one's house, having to leave the place where you have lived all your life is a great grief. However, we must also remember that hundreds of South Ossetian civilians and Russian peacekeepers are simply not capable of giving testimonies any more.

18. Minister Burjaliani submitted yesterday that "Georgia has no conflict with Ossetians". We submitted a lot of witness testimonies in our written contribution. We could have spoken at length about suffering to which Ossetian and other civilians as well as Russian peacekeepers were subjected from 7 to 9 August, and indeed before that. We have not done this out of respect to the specific nature of this stage of proceedings, and actually due to the fact that so far we have been brought to this Court as Respondent.

19. Madam President, Mr. Reichler was keen to stress that it is not for the Court to discuss who fired the first shot. He suggests that such an unimportant detail could be left for the merits. Knowing the real story, his position is not surprising. Yet Georgia requests provisional measures directly related to the hostilities that took place in August. Could I dare to recall — it is common knowledge anyway — that the said hostilities were started by Georgia? It is our firm conviction that the history of those hostilities is absolutely indispensable for this Court to take an informed decision and it would remain a key factor going to discretion.

20. Yesterday the Respondent was accused of playing with figures. It is claimed that 2,000 killed civilians somehow shrank to 133. On that may I ask our Georgian colleagues: are 133 perished civilians too few? Yet the figure represented the number of bodies identified as of 20 August. As of now, 311 victims have been identified by South Ossetian law enforcement bodies[53], and that bearing in mind that quite a number of people had been buried before the investigation could begin, or their bodies have been rendered unidentifiable. According to today's statement of the Prosecutor-General of South Ossetia the number of identified victims rose to

[53]Available at www.ossetians.com.

700 dead[54] — *identified victims*. This is to be compared to the said figure of civilian deaths in Georgia itself: 109 civilians. Ethnic Georgians are, of course, not responsible for the acts of Georgia.

21. Let me stress again: the Russian State and the Russian people deeply regret the loss of lives, health and property of all those who became affected by the violence. Indeed, our sympathies are with ethnic Georgian victims as much as with Russian or Ossetian ones.

22. In this context, it is notable that in four-and-a-half hours of pleadings, the Applicant has *not* expressed anything similar to that. Even more so, it was hardly ever mentioned that there had been victims on the other side. We firmly believe that this is not a proper reflection of the feelings of the Georgian people.

23. What the Applicant *is* saying, however, is that Russia should now leave Abkhazia and South Ossetia altogether — apparently so to allow new attempts by the Georgian authorities to "restore the constitutional order".

24. On that, Mr. Wordsworth has today informed the Court of the arrangements reached on Monday between the Presidents of Russia and France. Those arrangements include a speedy withdrawal of all Russian forces from the zones adjoining South Ossetia and Abkhazia. But it will certainly take time for the confidence to be restored, and Russia will spare no effort to contribute to this aim.

25. Madam President, Professor Crawford in his pleading on Monday alluded to a parallel between Russia's alleged policy in the region and the practice of apartheid. I have just one remark to make with respect to this. Can anyone imagine that thousands of people would come to live in a country that discriminates against their ethnic group either in an apartheid-style or in any other way? Yet, according, for example, to the figures indicated five years ago, in 2003, by the Chairman of Russia's Governmental Commission on Migration, the number of Georgians residing in Russia increased from 130,000 in 1989, to 200,000 in 2002. *It is common knowledge that these figures have significantly increased during the last years.* What story do these figures tell? Racial discrimination of Georgians by Russia? Most definitely not.

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[54] Available at www.itar-tass.com.

26. The Russian Federation has always honoured and will honour its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination, be it in respect of Georgians or of any other people. The Committee on the Elimination of Racial Discrimination is an authoritative body of 18 independent experts with recognized knowledge and competence in the field. The Committee has continuously welcomed the open and frank dialogue with my country. As any other State party to the Convention, Russia has its issues. But the Committee has never found, *inter alia*, during the period outlined in the Application submitted by Georgia, any significant violation by Russia of its relevant obligations, no evidence of anything which would even remotely resemble an institutionalized or State-sponsored policy of racism as the Applicant is attempting to prove. You may find all the concluding observations of the Committee through this period in your folders at tab 26.

27. What is of particular relevance in our particular circumstances is that the latest periodic reports of Russia were discussed as recently as in August this year. The Committee was deliberating — I apologize, Madam President, that I was not able to complete my statement before 6 p.m.

The PRESIDENT: Please do not worry about that, and continue at your own speed, Mr. Kolodkin.

Mr. KOLODKIN: Thank you very much.

The Committee was deliberating on the concluding observations on Russia's latest reports at the time of the armed conflict in August 2008[55]. The observations were adopted on 15 August. According to the rules of the Committee, Russia did not participate in those deliberations. The members of the Committee, while considering the matter, were reading the same newspapers and the same NGO reports to which the Applicant refers in its written documents and oral pleadings. The members of the Committee were watching the news on TV. And yet they did not change their minds, and you find nothing in the concluding observations on a possible connection between the current or previous events in South Ossetia and Abkhazia and Russia's obligations under the

[55]CERD/CRUS/CO/19, 20 Aug. 2008.

Convention. Not a single word about possible breaches of Russia's obligations in the context of the situation in these territories.

28. What story does this tell? Is it that there is prima facie evidence that Russia is in breach of its obligations under the Convention with respect to Georgians in Abkhazia and South Ossetia? Or, is it about the prima facie absence of *any breach* of Russia's obligations? We believe the answer is absolutely clear, but of course it is up to this Honourable Court to decide.

29. Madam President, Members of the Court, you have now heard our first and second round pleadings. Let me briefly summarize them.

30. First: The dispute that the Applicant has tried to plead before this Court is evidently not a dispute under the 1965 Convention. If there were a dispute, it would relate to the use of force, humanitarian law, territorial integrity, but in any case *not* to racial discrimination.

31. Second: Even if this dispute were under the 1965 Convention, the alleged breaches of the Convention are not capable of falling under the provisions of the said Convention, not the least because Articles 2 and 5 of the Convention are not applicable extraterritorially.

32. Third: Even if such breaches occurred, they could not, even prima facie, be attributable to Russia that never did and does not now exercise, in the territories concerned, the extent of control required to overcome the set threshold.

33. Fourth: Even if the 1965 Convention could be applicable, which, I repeat, is not the case, the procedural requirements of Article 22 of the 1965 Convention have not been met. No evidence that the Applicant proposed to negotiate or employ the mechanisms of the Committee on Racial Discrimination prior to reference to this Court, has been nor could have been produced.

34. Fifth: With these arguments in mind, the Court manifestly lacks jurisdiction to entertain the case.

35. Sixth: Should the Court, against all odds, find itself prima facie competent over the dispute, we submit that the Applicant has failed to demonstrate the criteria essential for provisional measures to be indicated. No credible evidence has been produced to attest to the existence of an imminent risk of irreparable harm, and urgency. The circumstances of the case definitely do not require measures, in particular, in the light of the ongoing process of post-conflict settlement. And

the measures sought failed to take account of the key factor going to discretion: the fact that the events of August 2008 were born out of Georgia's use of force.

36. Finally: Provisional measures as they were formulated by the Applicant in the Requests cannot be granted since they would impose on Russia obligations that it is not able to fulfil. The Russian Federation is not exercising effective control vis-à-vis South Ossetia and Abkhazia or any adjacent parts of Georgia. Acts of organs of South Ossetia and Abkhazia or private groups and individuals are not attributable to the Russian Federation. These measures if granted would prejudge the outcome of the case.

37. Madam President, Members of the Court, I now have the honour to read out to you the final submission of the Russian Federation which, for the reasons set out in our oral pleadings, and in accordance with the conclusions set out by our counsel, are as follows:

38. The Russian Federation requests the Court to remove the case introduced by the Republic of Georgia on 12 September 2008 from the General List.

Madam President, Members of the Court, this concludes the pleadings of the Russian Federation. I would like to take this opportunity to express our thanks to the Registrar and his colleagues and the interpreters. And, of course, I thank you, Madam President, Honourable Members of the Court, very much for your attention.

The PRESIDENT: Thank you, Mr. Kolodkin. This brings to the end the present series of sittings. It remains for me to thank the representatives of both Parties for the assistance they have given to the Court by their oral observations in the course of these four hearings. In accordance with practice, I ask the Agents to remain at the Court's disposal.

The Court will render its order on the Request for the indication of provisional measures as soon as possible. The date on which this order will be delivered at a public sitting will be duly communicated to the Agents of the Parties.

Having no other business before it today, the Court now rises.

The Court rose at 6.10 p.m.