Non Corrigé
Uncorrected

CR 2010/8

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2010

Public sitting

held on Monday 13 September 2010, at 10.20 a.m., at the Peace Palace,

President Owada 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 2010

Audience publique

tenue le lundi 13 septembre 2010, à 10 h 20, au Palais de la Paix,

sous la présidence de M. Owada, 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	Owada
	Vice-President	Tomka
	Judges	Koroma
		Al-Khasawneh
		Simma
		Abraham
		Keith
		Sepúlveda-Amor
		Bennouna
		Skotnikov
		Cançado Trindade
		Yusuf
		Greenwood
		Xue
		Donoghue
	Judge *ad hoc*	Gaja
	Registrar	Couvreur

Présents : M. Owada, président
M. Tomka, vice-président
MM. Koroma
Al-Khasawneh
Simma
Abraham
Keith
Sepúlveda-Amor
Bennouna
Skotnikov
Cançado Trindade
Yusuf
Greenwood
Mmes Xue
Donoghue, juges
M. Gaja, juge *ad hoc*

M. Couvreur, greffier

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Mr. Giorgi Mikeladze, Consul, Embassy of Georgia in the Kingdom of the Netherlands,

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Ms Nino Tsereteli, Deputy Head of the Department of State Representation to International Human Rights Courts, Ministry of Justice,

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The PRESIDENT: Please be seated. The sitting is open.

The Court meets today, pursuant to Article 79, paragraph 6, of the Rules of Court, to hear the oral arguments of the Parties on the Preliminary Objections raised by the Respondent in the case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation)*.

Since the Court included upon the Bench no judge of Georgian nationality, Georgia availed itself of its right under Article 31, paragraph 2, of the Statute and chose Mr. Giorgio Gaja to sit as judge *ad hoc* in the case. Judge Gaja was installed as judge *ad hoc* in 2008, during the phase of the present case that was devoted to the request for the indication of provisional measures.

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I shall now briefly recall the procedure so far followed in this case. On 12 August 2008, the Government of Georgia filed in the Registry of the Court an Application instituting proceedings against the Russian Federation in respect of a dispute concerning "actions on and around the territory of Georgia" in breach of the International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965. In its Application, Georgia invoked Article 22 of the said Convention to found the jurisdiction of the Court.

On 14 August 2008, Georgia, referring to Article 41 of the Statute, filed in the Registry of the Court a Request for the indication of provisional measures in order "to preserve [its] rights under the International Convention on the Elimination of All Forms of Racial Discrimination to protect its citizens against violent discriminatory acts by Russian armed forces, acting in concert with separatist militia and foreign mercenaries".

By an Order of 15 October 2008, the Court, after hearing the Parties, indicated certain provisional measures to both sides.

By an Order of 2 December 2008, the President of the Court, taking account of the agreement of the Parties, fixed 2 September 2009 as the time-limit for the filing of a Memorial by Georgia and 2 July 2010 as the time-limit for the filing of a Counter-Memorial by the Russian Federation. Georgia's Memorial was filed within the time-limit thus prescribed.

On 1 December 2009, within the time-limit set by Article 79, paragraph 1, of the Rules of Court, the Russian Federation raised preliminary objections to the jurisdiction of the Court. Consequently, by an Order dated 11 December 2009, the Court, noting that by virtue of Article 79, paragraph 5, of the Rules of Court, the proceedings on the merits were suspended, fixed 1 April 2010 as the time-limit for the presentation by Georgia of a written statement of its observations and submissions on the preliminary objections made by the Russian Federation. Georgia filed such a statement within the time-limit so prescribed, and the case thus became ready for hearing in respect of the preliminary objections.

The Court has decided, in accordance with Article 53, paragraph 2, of the Rules of Court, and having consulted the Parties, that copies of the pleadings in the case and documents annexed will be made accessible to the public on the opening of the oral proceeding. Furthermore, in accordance with the Court's practice, these pleadings without their annexes will from today be put on the Court's internet site.

I note the presence at the hearing of the Agents, counsel and advocates of both Parties. In accordance with the arrangements on the organization of the procedure decided by the Court, the hearings will comprise a first and a second round of oral argument. Each Party will have one full session of three hours for the first round and a session of two hours for the second round.

The Russian Federation will present its first round of oral arguments on its preliminary objections this morning. In this first sitting of the first round of oral arguments, the Russian Federation may, if so required, avail itself of a short extension of time beyond 1 p.m., in view of the time taken up by the earlier public session today.

Georgia will present its first round of oral argument on the preliminary objections of the Russian Federation on Tuesday 14 September, at 10 a.m.

The Russian Federation will then present its oral reply on Wednesday 15 September at 4 p.m., for a speaking time of two hours. Georgia will then present its oral reply on Friday 17 September at 10 a.m., for a speaking time of two hours.

Thus, I shall now give the floor to Mr. Kirill G. Gevorgian, Agent of the Russian Federation.

Mr. GEVORGIAN: Mr. President, Distinguished Members of the Court, it is an honour to appear again before you. Let me start by congratulating Their Excellencies Xue Hanqin and Joan Donoghue upon election as judges of this Court. I could not express more eloquently the complimentary awards that you, Mr. President, just said in their regard.

1. This case originates in conflicts between Georgians, Abkhaz and Ossetians that go deep into the history. The more modern phase of those conflicts started in the late 1980s, when the authorities of Georgia openly stood for a "Georgia for Georgians", taking no account of the autonomous status that had been enjoyed by the regions of Abkhazia and South Ossetia[1]. Not surprisingly, this led to protests in those regions. In response, Georgia abolished their autonomy. The tensions led to full-fledged armed conflicts between Georgia and South Ossetia in 1991-1992, and between Georgia and Abkhazia in 1992-1993, resulting in thousands of victims and in the displacement of tens of thousands of persons of various ethnicities[2].

2. Then came years of relative stability, not least due to Russian mediation and peacekeeping within the framework of broader international efforts. But starting from 2004, the new authorities of Georgia led by President Saakashvili embarked on a new approach which involved repeated attempts to solve the problems with South Ossetia and Abkhazia by armed force. Those attempts culminated in August 2008, with Georgia unleashing a massive armed attack against the population of South Ossetia and against Russian peacekeeping units, in breach of Georgia's obligations under international law and, in particular, under the relevant agreements pertaining to the settlement of the Georgian-Ossetian conflict.

3. As evidenced by the Independent International Fact-Finding Mission, which was established by the European Union in December 2008 with the aim of investigating the origins and the course of the armed conflict: "Open hostilities began with a large-scale Georgian military operation against the town of Tskhinvali and the surrounding areas, launched in the night of 7 to

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[1]Preliminary Objections of the Russian Federation (POR), Ann. 25, Human Rights Watch/Helsinki, "Bloodshed in the Caucasus: Violations of Humanitarian Law and Human Rights in Georgia-South Ossetia Conflict" (1992), p. 8.

[2]See, e.g., *ibid*., p. 17; also Memorial of Georgia (MG), Ann. 40, Report of the Representative of the Secretary-General on the human rights of internally displaced persons, Addendum, Mission to Georgia, Walter Kälin, 24 March 2006, para. 8.

8 August 2008. Operations started with a massive Georgian artillery attack"[3]. The Georgian offensive deliberately targeted the peacekeeping units stationed in South Ossetia, though, as the Fact-Finding Mission Report rightly emphasizes[4], there is no evidence to support any claims that the Russian soldiers had forfeited their international legal status.

4. In such circumstances, the Russian Federation had no other choice but to exercise its inherent right to self-defence and protect its peacekeepers[5].

5. As you recall, it was that armed conflict that led to the initiation of proceedings in this Court. It must be emphasized that the Application was only lodged when it became clear that Georgia's military venture had failed. The obvious objective of the applicant State was to portray itself as a victim of the conflict that it itself had started. To seise the Court, Georgia needed to construct at least some jurisdictional basis. Hence the sudden appearance onto the scene of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). And this is an entirely artificial jurisdictional basis, given that Georgia had never before mentioned that Convention or notified Russia of a claim of racial discrimination in Abkhazia and South Ossetia. Georgia unscrupulously turned the facts upside down and presented its long-standing conflicts with South Ossetia and Abkhazia as a dispute with Russia regarding the interpretation and application of CERD.

6. Mr. President, the context brings to the fore the two exceptional features of this case.

7. The first is that the applicant State has — quite unlawfully — sought to impose by the use of brutal military force its own solution to the highly complex regional problems opposing Georgia, Abkhazia and South Ossetia. In doing so, Georgia has attacked the internationally recognized peacekeeping units, acting in gross violation of international humanitarian law, and in complete disregard for the established principle of peaceful settlement of disputes. Russia is convinced that in such circumstances, the applicant State must not be allowed to benefit from the privilege of having its fabricated claims considered by the Court on the merits. One immediate question to be

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[3]POR, Ann. 75, Independent International Fact-Finding Mission on the Conflict in Georgia, Report (Sep. 2009), Vol. I, p. 19, para. 14.

[4]*Ibid*, p. 23, para. 20.

[5]United Nations Security Council, Letter dated 11 Aug. 2008 from the Permanent Representative of the Russian Federation to the United Nations addressed to the President of the Security Council, UN doc. S/2008/545.

asked in this respect is, would the Court have ever been seised of this case if Georgia had succeeded in its military operation?

8. Mr. President, the second exceptional feature of the current proceedings is that the claims are brought to the Court against the State that for more than 15 years had been acting as a facilitator and peacekeeper. The true parties to the conflicts were Georgia, on the one hand, and South Ossetia and Abkhazia, on the other.

9. Russia undertook those functions at the request of the conflicting parties, and was recognized in that capacity by the United Nations, the OSCE, the Commonwealth of Independent States — as well as by Georgia itself. Thus, the United Nations Security Council in a number of resolutions acknowledged that the Russian peacekeeping forces in Abkhazia were a stabilizing factor in the conflict zone[6]. The OSCE was continuously taking a similar position with regard to the role of Russia in the Georgian-Ossetian conflict[7]. Similar assessments were made by Georgian Government representatives throughout the period of the alleged "dispute". Not only did Georgia explicitly request the deployment of the peacekeeping troops[8], but it was constantly recognizing Russia as "an active participant in the process designed to find a peaceful solution to the Abkhazian conflict" which had "taken on a great responsibility with regard to this peace process"[9] — as it was put by the Georgian Foreign Minister at the United Nations General Assembly in 1994, or else as "the guarantor of long-term peace in the Caucasus"[10] — to use words of the Prime Minister of Georgia spoken in 2005.

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[6]Security Council resolution 1187 (1998). Similar acknowledgements can be found in resolutions 1255 (1999), 1287 (2000), 1311 (2000), 1393 (2002), 1427 (2002), 1462 (2003), 1494 (2003), 1524 (2004), 1554 (2004), 1582 (2005), 1615 (2005).

[7]Written Statement of Georgia (WSG), Vol. III, Ann. 104, CSCE, Budapest Document 1994: Towards a genuine partnership in a new era, p. 8; MG, Vol. II, Ann. 69, OSCE, Lisbon Document 1996, p. 8, para. 20.

[8]POR, Ann. 34, United Nations Security Council, Letter dated 4 February 1994 from the Representatives of Georgia and the Russian Federation addressed to the Secretary-General, UN doc. S/1994/125 (7 Feb. 1994);

POR, Ann. 36, Declaration on measures for a political settlement of the Georgian/Abkhaz conflict signed on 4 Apr. 1994;

POR, Ann. 40, Commonwealth of Independent States, Council of the Heads of State, Decision on the use of the Collective Forces for the Maintenance of Peace in the area of the Georgian-Abkhaz conflict (22 Aug. 1994), p. 1.

[9]*Ibid.*

[10]POR, Ann. 57, Press conference of the Prime Minister of Georgia, Zurab Noghaideli, 13 Dec. 2005, circulated at the meeting of the Joint Control Commission of 27-28 Dec. 2005.

10. It was in its capacity of a mediator that Russia concluded with Georgia the 1992 Agreement on the Principles of Settlement of the Georgian-Ossetian Conflict[11]. It was in that very capacity that Russia was recognized by the OSCE that had been dealing with the South Ossetian conflict since 1994. It was in that same capacity that Russia assisted negotiations between the Georgian and the South Ossetian sides within the framework of the Joint Control Commission[12]. It was in reflection of that capacity that a Russian officer was chosen to lead the Joint Peacekeeping Forces comprising Russian, Georgian and Ossetian peacekeepers. The presence of those Forces and the work of the Joint Control Commission helped to prevent major violent incidents on the ground until August 2008.

11. As regards the Georgian-Abkhaz conflict, the conflicting parties sought Russian mediation that helped achieve several cease-fire agreements during the violent phase of the conflict in 1992 and 1993. Russia and Georgia repeatedly called for the United Nations Security Council to deploy an international peacekeeping force in Abkhazia[13].

12. In the framework of the "Geneva process", the main negotiation forum between Georgia and Abkhazia, Russia served as a facilitator alongside the United Nations[14]. The mediating efforts resulted in the adoption, in the spring of 1994, of a series of agreements between Georgia and Abkhazia, including the Moscow Agreement on a Cease-Fire and Separation of Forces[15]. Pursuant to this, Russia provided its military contingents to the peacekeeping force deployed under the

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[11]MG, Vol. III, Ann. 102, Agreement on Principles of the Settlement of the Georgian-Ossetian Conflict between the Republic of Georgia and the Russian Federation (the "Sochi Agreement") (24 Jun. 1992).

[12]POR, para. 2.13 *et seq.*

[13]United Nations Security Council, Report of the Secretary-General concerning the situation in Abkhazia, Republic of Georgia, UN doc. S/26023 (1 Jul. 1993), paras. 6 and 10;

POR, Vol. II, Ann. 34, United Nations Security Council, Letter dated 4 Feb. 1994 from the Permanent Representatives of Georgia and the Russian Federation addressed to the Secretary-General, UN doc. S/1994/125 (7 Feb. 1994).

[14]United Nations Security Council, Report of the Secretary-General concerning the situation in Abkhazia, Georgia, UN doc. S/1994/253, para. 7.

[15]POR, Ann. 37, Agreement on a cease-fire and separation of forces, signed in Moscow on 14 May 1994 (United Nations Security Council, Letter dated 17 May 1994 from the Permanent Representative of Georgia to the United Nations addressed to the President of the Security Council, UN Doc. S/1994/583, 17 May 1994).

auspices of the Commonwealth of Independent States[16], as endorsed by the United Nations Security Council.[17]

13. Russia was also a member of the United Nations Secretary-General Group of Friends acting as the contact group of the international community on the Abkhaz issue[18]. In this capacity, Russia participated, together with other members of this Group, in the work of the Coordinating Council of the Georgian and the Abkhaz sides established in 1997[19]. In early 2003, in order to give a fresh impetus to the conflict resolution, Russia initiated the establishment of a tripartite working group, consisting of Georgian, Abkhaz and Russian representatives[20], a proposal warmly welcomed by the two conflicting parties.

14. Mr. President, as I have already noted, Georgia's attitude changed drastically soon after President Saakashvili came to power in late 2003. The new authorities opted for use of force that ultimately derailed the negotiation processes. In the course of the following years, armed force was used by Georgia against both Abkhazia and South Ossetia; the negotiations came to a complete deadlock; and Georgia's military preparations were now proceeding at full speed. So disturbing was Georgia's militaristic attitude that the United Nations Security Council repeatedly "urge[d] the Georgian side to address seriously legitimate Abkhaz security concerns, to avoid steps which could be seen as threatening and to refrain from militant rhetoric"[21].

15. Addressing this problem, the Russian Federation, through the channels open to it as a mediator, repeatedly proposed to the Georgian, Abkhaz and South Ossetian sides to sign formal non-use-of-force agreements[22]. Russian mediating efforts continued up to the very last day before

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[16]POR, Vol. II, Ann. 40, Commonwealth of Independent States, Council of the Heads of State, Decision on the Use of the Collective Forces for the Maintenance of Peace in the Area of the Georgian-Abkhaz Conflict (22 Aug. 1994).

[17]POR, Ann. 38, United Nations Security Council, resolution 934 (1994), UN doc. S/RES/934 (30 Jun. 1994).

[18]The Repertoire of the Practice of the Security Council, 1993-1995, Chapter VIII, item 18: the situation in Georgia.

[19]MG, Vol. III, Ann. 125, Final statement on the outcome of the resumed meeting held between the Georgian and Abkhaz parties held in Georgia (17-19 November 1997).

[20]United Nations Security Council, Report of the Secretary-General on the Situation in Abkhazia, Georgia, UN doc. S/2003/751, p. 2, para. 4.

[21]United Nations Security Council, resolution 1666 (2006), (31 Mar 2006); POR, Ann. 60, United Nations Security Council, resolution 1716 (2006), (13 Oct. 2006); United Nations Security Council, resolution 1752 (2007), (13 Apr. 2007).

[22]E.g., OSCE, Permanent Council, statements by the Permanent Representative of the Russian Federation: PC.DEL/181/06, 2 March 2006; PC.DEL/457/06, 18 May 2006; PC.DEL/841/06, 8 September 2006; PC.DEL/225/07, 16 March 2007.

Georgia's attack on South Ossetia in August 2008. On 3 August, the Russian Deputy Foreign Minister alerted the head of Georgian diplomacy of the danger of a critical escalation of the conflict[23]. On 7 August, a Russian special diplomatic representative who arrived in the region, desperately tried to bring the parties to the negotiation table[24]. Even in the late hours of 7 August when the attack became imminent, the Commander of the Joint Peacekeeping Forces, General Kulakhmetov, was trying to persuade the highest Georgian officials to refrain from military action. Yet, shortly before midnight, Georgia's armed forces started the indiscriminate bombardment, including by multiple-launch rocket systems of the city of Tskhinval and Russian peacekeepers[25].

16. Mr. President, Russia's mediating role and the sequence of events, in particular over the several years prior to August 2008, are critical factors when it comes to determining whether or not the Court has jurisdiction in this case.

17. The fact is that most of the communications that Georgia now portrays as racial discrimination claims were made in the context of Russian peacekeeping and mediating efforts. And on this, several remarks are in order.

18. First, Russia was criticized, at various junctures, either by Georgia, or by Abkhazia, or by South Ossetia[26]. That is, no doubt, an incidental part of being a mediator and a peacekeeper. Equally, Russia itself frequently criticized one party or the other. Russia has always strived to take a principled stance on the negotiations and to give principled assessments of the parties' positions and behaviour. Indeed, when Georgia violated its obligations and started to replace negotiations with use of force, Russia spoke resolutely against this. But equally, when it was South Ossetia or Abkhazia who acted contrary to their commitments, Russia took a position of principle as well[27].

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[23]Ministry of Foreign Affairs of the Russian Federation, press release No. 1131-04-08-2008, 4 August 2008, available at http://www.mid.ru/brp_4.nsf/0/A3646BAD2A05EDA4C325749B002BF378.

[24]Independent International Fact-Finding Mission on the Conflict in Georgia, Report (Sep. 2009), Vol. 2, p. 208 (available at www.ceiig.ch).

[25]POR, Ann. 75, Independent International Fact-Finding Mission on the Conflict in Georgia, Report (Sep. 2009), Vol. I, p. 19, para. 14.

[26]See, for example, POR, Vol. 2, Ann. 24, "Russia and Georgia have agreed that South Ossetia does not exist", Liana Minasian, Nezavisimaya Gazeta (30 June 1992).

[27]MG, Ann. 12, United Nations Security Council, Provisional Verbatim Record of the 3295th Meeting, 19 October 1993 (S/PV.3295), p. 7.

This only attests to the good faith and the commitment with which my country exercised its mandate.

19. Second, Georgia had the right at any time to terminate the peacekeeping operations. Georgia made no such decision until 1 September 2008. Could this really be the case if Georgia had indeed believed that over almost two decades, Russian peacekeepers were committing acts of racial discrimination against the Georgian population? The answer is obvious.

20. Third, Russian peacekeepers were neither supposed, nor fit to ensure civil administration and police functions. Law enforcement responsibilities were fulfilled by local police units, including Georgian police in ethnic Georgian villages of South Ossetia[28], and including Abkhaz police advised by the police component of the United Nations Observer Mission in the area of the Georgian-Abkhaz conflict[29].

21. Fourth, obviously, Georgia did discuss with Russia issues related to Abkhazia and South Ossetia — just like Georgia discussed them with other facilitators, such as other members of the Group of Friends or the OSCE. Such discussions of course cannot constitute either a dispute or negotiations concerning that dispute, unless the interested party notifies its claims and their addressee in an unambiguous manner.

22. Mr. President, we are deeply convinced that, seen in the light of all these elements, the allegations that Georgia is now relying on cannot be qualified as evidence of a dispute under CERD.

23. Monsieur le Président, permettez moi de faire un bref résumé de mon intervention — dans l'autre langue officielle de la Cour.

24. Avant l'attaque armée du 8 août 2008, la Russie était investie de fonctions de maintien de la paix et de médiation dans les conflits qui affectaient la Géorgie, l'Abkhazie et l'Ossétie du Sud. Et ce n'est que quand l'échec de cette aventure militaire est devenu patent, que le demandeur a saisi la Cour. Ce sont là les caractéristiques essentielles de cette affaire, qui lui confèrent un caractère exceptionnel. Si on les considère dans leur ensemble, les faits de l'espèce établissent

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[28]Independent International Fact-Finding Mission on the Conflict in Georgia, Report, Vol. II, p. 14 (September 2009) (available at www.ceiig.ch).

[29]United Nations Security Council, Report of the Secretary-General on the Situation in Abkhazia, Georgia, UN Doc. S/2008/480, p. 1, para. 2.

clairement que l'État demandeur utilise la Cour pour se poser en victime du conflit qu'il a lui-même déclenché. Les exceptions préliminaires de la Russie doivent être envisagées par la Cour dans ce contexte très particulier.

25. Monsieur le président, Mesdames et Messieurs les juges, je vous remercie de votre attention et je vous prie, Monsieur le président, de bien vouloir appeler à cette barre mon collègue, Monsieur l'ambassadeur Roman Kolodkin.

The PRESIDENT: I thank His Excellency Ambassador Gevorgian for his statement. I now call upon His Excellency Ambassador Roman Kolodkin to make his observations as Agent to the Russian Federation.

Mr. KOLODKIN: Mr. President, distinguished Members of the Court, it is my privilege to appear once more before this Court.

1. Two years ago the Court took a difficult decision when faced with the Request to introduce provisional measures regarding the Application of Georgia amid uncertainties as to the situation on the ground and in light of the claims by the Applicant of alleged urgency. That decision, of course, only related to the Court's *prima facie* jurisdiction. We respectfully submit that a careful analysis during the current stage of proceedings will demonstrate that the Court does lack jurisdiction to consider the Application on the merits. Let me therefore introduce the Preliminary Objections of the Russian Federation.

2. The only jurisdictional basis invoked by the applicant State is Article 22 of CERD which 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".

3. The *first preliminary objection* voiced by Russia is that, as of the date when the Application was filed, there was no dispute between Georgia and Russia over racial discrimination against the ethnic Georgian population of Abkhazia and South Ossetia.

4. It must immediately be noted that Georgia is claiming that the parties were in dispute in so far as concerns the interpretation or application of CERD for 17 or more years[30]. In this alleged "dispute" it is said that Russia is responsible for the killing of thousands of civilians and the forced displacement of over 300,000 people[31]. It is said that "Russia's conduct constitutes ethnic cleansing on a massive scale"[32]. Yet, this is a "dispute" that the Government of Georgia never communicated to Russia until the very date of Georgia's Application to this Court. The undisputed fact that I want to draw your attention to is that the alleged violations of CERD were never raised by Georgia vis-à-vis Russia during the 17 or more years of this so-called "dispute" — not a single time!

5. Of course, Georgia has put before you volumes of documentation in an attempt to show that such a dispute existed. However, this is a case where quantity does not pass into quality. The documents on which Georgia relies either do not relate to racial discrimination, or do not mention Russia as a responsible party, or reveal an agreement rather than a dispute, or else were never communicated by the Government of Georgia to that of Russia.

6. By contrast, when Georgia really thought that it had a claim against Russia, it expressed it in a most straightforward manner. The documents submitted by the Applicant are full of such direct accusations. But these concern totally different issues such as economic co-operation with the breakaway regions, the slow pace of the withdrawal of Russian military bases, alleged violations of Georgian airspace, and the like.

7. On the basis of Georgia's Written Statement, the Applicant would want the Court to believe that, on average, it made a racial discrimination claim against Russia once every three months or so. One of the most active periods in this regard was the summer of 2006, when such

[30]MG, Vol. I, p. 32, para. 2.34; MG, Vol. I, p. 341, para. 9.17.

[31]MG, Vol. I, p. 5, para. 1.3.

[32]MG, Vol. I, p. 6, para. 1.4.

claims were allegedly voiced at least on five occasions[33]. The diplomatic exchanges of that period serve as a good example of the contrast between the real issues of concern for Georgia and the lack of claims on racial discrimination.

8. Those five instances comprise four press statements by Georgian Ministries and one parliamentary resolution. Yet, an analysis of the Russian diplomatic archives shows that over the same period, there were active *direct* diplomatic contacts between the two Parties. These included one meeting and at least one telephone conversation between the Heads of States, one meeting of the Russian Ambassador in Tbilisi with the Georgian President, at least 11 meetings of the Russian Ambassador with the Georgian Foreign Minister or his Deputies, and at least four notes of protest by the Georgian Foreign Ministry to the Russian Embassy. During none of these diplomatic exchanges did Georgia make any claim against Russia in relation to racial discrimination in Abkhazia or South Ossetia.

9. Let me move on to the summer of 2008, and to an exchange of letters between President Saakashvili and President Medvedev, that Georgia relied on at the hearing on provisional measures, and that it has now deployed in both its Memorial and its Written Statement[34]. Let me turn first to the letter of President Saakashvili to President Medvedev, dated 24 June 2008, which you will find at tab 6 of the judges' folder. If I can ask you to turn to this and look at the first paragraph: no hint there of an allegation of racial discrimination; rather, by contrast, the language is of Georgia communicating to a mediator in the long-standing Georgian-Abkhaz conflict, a mediator with whom Georgia wishes to continue a "trustful dialogue". Precisely the same applies so far as concerns the second paragraph, where the Georgian President speaks of his commitment to "tak[e] the legitimate interests of the Russian Federation into account"; the eighth and the

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[33]WSG, Vol. IV, Ann. 164, Ministry of Foreign Affairs of Georgia, Comments of Deputy Minister of Foreign Affairs of Georgia Merab Antadze concerning the Answers of Minister of Foreign Affairs of the Russian Federation Sergey Lavrov to Journalists' Questions (19 June 2006); WSG, Vol. IV, Ann. 165, Ministry of Foreign Affairs of Georgia, Statement of the Ministry of Foreign Affairs of Georgia on the Situation in Tskhinvali district/South Ossetia (14 July 2006); WSG, Vol. IV, Ann. 166, Ministry of Foreign Affairs of Georgia, Comments of the Department of the Press and Information on the statement by the Ministry of Foreign Affairs of the Russian Federation over the situation in the Kodori Gorge (1 Aug. 2006); WSG, Vol. IV, Ann. 167, Ministry of Foreign Affairs of Georgia, Comment of the Department of the Press and Information on the visit of Secretary of State and Deputy Minister for Foreign Affairs of the Russian Federation G. Karasin to Abkhazia, Georgia (10 Aug. 2006); WSG, Vol. III, Ann. 82, United Nations General Assembly, Letter dated 24 July 2006 from the Permanent Representative of Georgia to the United Nations addressed to the Secretary-General, Ann., UN doc. A/60/954 (25 July 2006).

[34]MG, Anns. 308 and 311.

thirteenth paragraphs where he proposes to establish joint Russian-Georgian commissions on certain issues; the fourteenth paragraph where Mr. Saakashvili expresses readiness to assist in the preparation of the 2014 Olympic Games.

10. Most importantly, in his letter, the Georgian President proposes to continue the CIS peacekeeping operation and suggests that Russia could serve as one of the "guarantors" of the implementation of the relevant agreements. As is clear from the eleventh and the twelfth paragraphs, those agreements were of course to be concluded between "the parties to the conflict", that is, Georgia and Abkhazia, and not Russia. Mr. President, is this how one communicates with a perpetrator of ethnic cleansing? Is this a language that could be understood to convey a claim under CERD?

11. President Medvedev's response of 1 July 2008 appears at tab 7, where the English translation provided by Georgia corrected by us to mark the most evident inaccuracies which might hinder the understanding of this exchange. According to Georgia's Written Statement, this letter contains a categorical rejection of the return of ethnic Georgian IDPs to Abkhazia[35]. Mr. President, it is a relatively short letter; if there is a categorical rejection of anything, it should be easy enough to find — yet we have tried, and failed. This is a reply by a mediator advising his Georgian counterpart as to which measures, in his view, would be most suitable for negotiations between the parties to the conflict in that particular situation.

12. Certainly we do not say that these letters are insignificant. They are important — after all, the exchange takes place only a matter of weeks before Georgia's unlawful use of force in August 2008; but the significance of these letters surely lies in the complete absence of any relevant allegations by Georgia, and the complete absence of any dispute over racial discrimination.

13. This is characteristic of the whole period since the Georgian-Abkhaz and Georgian-Ossetian conflicts started. Active diplomatic intercourse was always ongoing between Georgia and Russia, covering the whole range of bi- and multilateral issues. Among those, quite naturally, were the problems related to Abkhazia and South Ossetia. Russia was serving as a

[35]WSG, Vol. I, p. 73, para. 2.100.

facilitator of negotiations and, as the peacekeeper, helping the sides directly involved to solve the conflicts peacefully. It was in that capacity that Russia discussed the Abkhaz and South Ossetian issues with Georgia. But never was the issue of Russia's responsibility for discrimination against ethnic Georgians in Abkhazia and South Ossetia raised by the Applicant in such diplomatic contacts.

14. Mr. President, the artificial nature of the so-called dispute is further illustrated by the fact that, as Ambassador Gevorgian has noted, the Application was only lodged when it became clear that Georgia's unlawful armed attack had failed. To paraphrase Clausewitz, Georgia is trying to use judicial procedures as the continuation of war by other means.

15. In contrast, Russia submits that this Court, the highest judicial body of the international system, should be resorted to in accordance with its purposes, and not misused for the political advantage of those who gravely violate international law.

16. Mr. President, apart from the general considerations, let us not forget that CERD establishes its own criteria as to what a dispute is. The term "dispute" is used in the Convention with respect to particular situations, namely, those that have already been brought to the attention of the Committee on the Elimination of Racial Discrimination — the CERD Committee, considered by this Committee and not resolved to the satisfaction of the parties[36].

17. Our counsel will return to this later, and they will also elaborate on Russia's *second preliminary objection* that concerns the non-compliance by Georgia with the further procedural requirements set forth in Article 22 of CERD. According to that Article, an applicant State, prior to seising the Court, must proceed with attempts to settle a dispute by negotiations and through the procedures established by the Convention.

18. CERD was the first United Nations human rights convention to establish a specialized independent expert committee to monitor its implementation and interpret its provisions. An analysis of the *travaux préparatoires* of the Convention demonstrates that the formulation of Article 22 was the result of lengthy negotiations where States held competing views as to the respective roles of the Court and of the CERD Committee. Ultimately, the balanced position

[36]CERD, Arts. 11, 12.

prevailed: the Court could only be seised after negotiations and the Committee procedures had been tried and had proved unsuccessful. This solution helped to ensure, first, a proper role for the Committee, and, second, a wide acceptance of the Convention.

19. Currently, as many as 149 States accept the Court's jurisdiction under CERD. Obviously, like Russia, many of them accepted such jurisdiction on the understanding that before a dispute may be brought before the Court, the matter would be considered by the CERD Committee. In fact, otherwise the Committee would lose a significant element of its competence, contrary to the understanding of the negotiators of the Convention.

20. The Committee offers a wide range of procedures available to the States Parties and to interested individuals or groups, including the mandatory inter-State communication procedure[37], which is unique for universal human rights treaties. Apart from inter-State communications, the Committee examines periodic reports of States Parties[38], as well as communications from individuals and groups of individuals[39], and, finally, adopts and disseminates general recommendations[40]. The Committee has also elaborated preventive measures that include, early warning, aimed at preventing existing situations escalating into conflicts and urgent procedures to respond to problems requiring immediate attention to prevent or limit the scale or number of serious violations of the Convention[41].

21. The Russian Federation, as a multi-ethnic State, fully supports the principles and the purposes of the Convention. It not only accepts this Court's jurisdiction under Article 22 of CERD, but also recognizes the mandate of the Committee vis-à-vis individual communications under Article 14.

22. Therefore, if Georgia was so concerned about the proper application of CERD by Russia and genuinely interested in bringing a CERD claim, ever since it acceded to CERD in 1999, it had

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[37]CERD, Arts. 11, 12 and 13.

[38]CERD, Art. 9, para. 1.

[39]CERD, Art. 14.

[40]CERD, Art. 9, para. 2.

[41]Report of the Committee on the Elimination of Racial Discrimination, UN General Assembly, Official Records, Forty-eighth session, Supplement No. 18 (A/48/18), Ann. 3, pp. 126-130;

Report of the Committee on the Elimination of Racial Discrimination, UN General Assembly, Official Records, Sixty-second session, Supplement No. 18 (A/62/18), Ann. 3, pp. 115-120.

every opportunity to make that claim and, further, when it came to any racial discrimination claim in the context of the armed conflict in August 2008, it could have had recourse to the Committee's urgent procedures. This is all the more obvious, in particular, as at the time when the Application was submitted to the Court, the CERD Committee was in session and, moreover, was in the process of finalizing the Concluding Observations on the eighteenth and nineteenth periodic reports of the Russian Federation[42].

23. Georgia did not go along that path. Rather, it deliberately bypassed the Committee procedures. In doing this, Georgia not only misapplied the provisions of Article 22 on recourse to the Court, but also demonstrated a complete lack of respect to the CERD Committee.

24. Georgia has equally ignored the other means of dispute settlement established by Article 22 of the Convention, namely, negotiations. Just as with the existence of a dispute, the Applicant has provided the Court with voluminous documentation in an attempt to demonstrate that it has negotiated with Russia on the issue of the latter's responsibility for racial discrimination in Abkhazia and South Ossetia. And, here again, those documents only prove that negotiations on the non-existent dispute have never taken place.

25. Mr. President, this Court is at the summit of the international dispute settlement system. As such, it is dependent upon the balance and integrity of other elements of that system, namely, in this case, the required existence of a dispute, negotiations, and recourse to the CERD Committee. It is the responsibility of the Court to maintain and strengthen the integrity of each of those elements. A finding on jurisdiction as Georgia now seeks would undermine that system and have multiple negative repercussions.

26. For one, it would be detrimental to the CERD Committee. The elaborate procedures that I have just touched upon would become obsolete if any interested State were allowed to bypass them. Legitimizing such bypassing would affect the authority of other human rights treaty bodies as well.

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[42]POR, Ann. 70, Committee on the Elimination of Racial Discrimination, 73rd session, Consideration of reports submitted by States Parties under Article 9 of the Convention, Concluding Observations of the Committee on the Elimination of Racial Discrimination: Russian Federation, UN doc. CERD/C/RUS/CO/19 (20 Aug. 2008).

27. Further, accepting jurisdiction in this case may result in States reviewing their positions as far as concerns the acceptance of the jurisdiction of the Court under human rights treaties that provide for the Court as a mode of dispute settlement.

28. Finally, as noted by Ambassador Gevorgian, it would mean that from now on, it will be accepted that a State may first use unlawful force to address its problems and, upon failure, disguise its breach of international law by seising the Court and pretending that it has always sought to solve those problems by peaceful means.

29. For all these reasons, the second preliminary objection, like the first one, has, as its essence, the upholding of the principles of peaceful settlement of disputes and respect for the modern United Nations human rights protection system. And both objections are fully supported by an analysis of the plain meaning of Article 22 of CERD, of the *travaux préparatoires*, and indeed of this Court's case law.

30. Mr. President, Russia's third and fourth preliminary objections concern the applicability of the CERD beyond the national territory of a given State Party, and the Court's jurisdiction *ratione temporis*.

31. As regards the jurisdiction *ratione loci*, it is Russia's position that, in addition to the first two preliminary objections, the Court has no jurisdiction over Georgia's Application, for the reason that the jurisdictional reach of Article 22 of CERD does not extend to acts or omissions by Russia allegedly having taken place on the territory of either Abkhazia or South Ossetia. In the alternative, such jurisdictional reach is limited to very special circumstances, while Georgia has not been able to demonstrate that the criteria for establishing such circumstances have been fulfilled. However, upon further reflection, we find that this objection is not necessarily of an exclusively preliminary nature.

32. On the fourth objection, Russia submits that the Court's jurisdiction, provided it exists at all, *quod non*, is limited *ratione temporis* in that it does not relate to conduct or facts preceding 2 July 1999 — the day on which Georgia acceded to CERD. And indeed, Georgia in its Written Statement itself recognizes that "the 1965 Convention . . . has no retrospective effect"[43]. Given

[43]WSG, Vol. I, p. 211, para. 5.11.

this, I will not take your time on this matter and would respectfully refer you to the relevant reasoning in our written Preliminary Objections[44].

33. In any event, we are convinced that the Court will not need to reach those issues, since it evidently lacks jurisdiction on the grounds expressed in the first two preliminary objections.

34. Mr. President, Members of the Court, this concludes the Agents' statements on behalf of the Russian Federation. Our counsel will provide you with more details as regards the legal reasoning of the Preliminary Objections. Mr. Samuel Wordsworth will develop the first preliminary objection, namely, the absence of a dispute between Georgia and Russia. Professor Alain Pellet will speak on the second objection, that is, the failure by Georgia to fulfil the further preconditions of Article 22 of CERD. This presentation will be continued by Professor Andreas Zimmermann, who will demonstrate that Georgia has in any event never tried to settle the alleged dispute by negotiations.

35. Mr. President, I thank you for your attention. May I now ask you to call upon Mr. Samuel Wordsworth.

The PRESIDENT: I thank His Excellency, Ambassador Roman Kolodkin for his statement. Now I shall give the floor to Mr. Samuel Wordsworth.

Mr. WORDSWORTH:

THE ABSENCE OF A DISPUTE

1. Mr. President, Members of the Court, it is an honour to appear before you to develop Russia's case that Georgia has not satisfied what the Court called in the *Nuclear Tests* cases "the primary condition for the Court to exercise its judicial function" (*Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 476, para. 58; *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 270, para. 55)[45], that is, Georgia has not established the existence of a dispute.

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[44]POR, Chap. VI, pp. 231-238.

[45] See also the Separate Opinion of Judge Gros, p. 277, para. 2, referring to "the principle that examination of the question of the reality of the dispute is necessarily a matter which takes priority".

2. Georgia has put its case on the existence of a dispute with an attractive, but deceptive, simplicity. All it takes, it says, is that: "Georgia says 'yes'", by which it means, and asserts, that it has made "repeated complaints of ethnic discrimination by Russia" and, then, that "Russia says 'no'", and here Georgia says that "Russia has always denied its responsibility for these acts of ethnic discrimination"[46].

3. As a shorthand statement of the *general* legal principles, there is little to object to here, in particular, as Georgia then goes on to accept that the existence of the dispute must predate the filing of the Application[47]. But, it follows that, in the normal course, to demonstrate the existence of a dispute, all that is required is two documents, — (i) an assertion of breach of a given treaty, and (ii) an assertion of positive opposition to that breach. A "yes", and a "no". How striking, then, that Georgia goes on to deploy 80 or more documents in Chapter 2 of its Written Statement in seeking to demonstrate the existence of a dispute — for what should really be a straightforward matter. The point is — and this is something that I will come back to in more detail — that Georgia is seeking to smother the Court in documentation for one reason, which is the absence on the record of the straightforward "yes" and "no".

4. But no less important, Georgia's leap to the *general* legal principles assumes, quite wrongly, that there is nothing in CERD that establishes a specific meaning for the term "dispute" in Article 22. However, it is, of course, the precise choice of words in Article 22 and other relevant provisions of CERD, that must be the Court's starting point in considering this first jurisdictional objection. And so I will be addressing three issues:

— first, the meaning of the term "dispute" in Article 22, before turning,

— secondly, to the general legal principles, as to which there is, as one might hope, relatively little debate, and

— finally, and in so far as I am able in the short time available, I will then turn to the issue of what the extensive documentation that Georgia relies on does, or rather does not, show.

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[46]Georgia's Written Statement, para. 2.2.

[47]*Ibid*. See also Russia's Preliminary Objections, paras. 3.23-3.35.

a. The meaning of "dispute" under CERD

5. As to the first of these issues, there are three separate terms used in CERD for what might, consistent with this Court's jurisprudence, constitute a "dispute" as a matter of general international law. Article 11 uses the term "matter"; Article 16 refers to "complaints" as well as "disputes"; while Article 22 uses the term "dispute" alone.

6. Looking at these in more detail, pursuant to Article 11, paragraph 1, of CERD (and we put that in tab 1 of the judges' folder for your convenience; it is at the bottom of the second page of tab 1):

> "If a State Party considers that another State Party is not giving effect to the provisions of this Convention, it may bring the *matter* to the attention of the Committee." (Emphasis added.)

7. The remainder of Article 11, paragraph 1, then describes the procedure by which this "matter" is communicated to the other State party concerned, which must in turn submit to the Committee written explanations or statements clarifying the matter — within a 3-month period. Article 11, paragraph 2, then establishes a 6-month period for the satisfactory adjustment of the "matter" through bilateral negotiations or any other procedure, failing which either State party has the right to refer the "matter" again to the Committee. There is no reference to the word "dispute" anywhere in Article 11 and, as follows from the different terminology used in Article 12, the States parties are not considered to be involved in a "dispute" until the 5-stage process that I have just outlined is completed, that is, (i) reference of the matter to the Committee, (ii) communication of the matter to the receiving State by the Committee, (iii) written explanations or statements by the receiving State, (iv) attempts to achieve the satisfactory adjustment of the matter, and finally (v) after expiry of a 6-month period, reference of the matter back to the Committee.

8. Thus, by contrast to Article 11, it is only in Article 12, paragraph 1, and only in the context of the next stage, that is, the appointment of an *ad hoc* Conciliation Commission, that the States parties concerned are considered by the Convention as: "States parties to the dispute". In contrast to Article 11, where the term "dispute" is carefully avoided, there are some six references to "States parties to the dispute" in Article 12. This cannot be inadvertent — the parties evidently wished to distinguish between the communication and adjustment of a non-crystallized matter, and

the point at which that matter had been escalated via a 5-stage process such that it could then, but only then, be properly characterized as a dispute.

9. This same distinction between the non-crystallized matter and the dispute is reflected in the relevant parts of the Committee's Rules of Procedure, Parts XVI and XVII, which we have placed in the judges' folder at tab 2. If I can draw your attention in particular to Rule 72 — and you will find that on the fourth page of tab 2. Rule 72 makes it clear that the dispute only arises under Article 11, paragraph 2, i.e., only once the 5-stage process has been completed and the matter has come back to the Committee for the second time, as is foreseen in Article 11, paragraph 2[48].

10. Article 16 then embraces two terms — "complaint" and "dispute" — and establishes that the provisions of CERD "concerning the settlement of disputes or complaints shall be applied without prejudice to other procedures for settling disputes or complaints in the field of discrimination laid down in" other instruments or conventions. There is no real mystery as to what was meant by the term "complaint" — as the *travaux* establish, this was the term originally used in Article 11 for the communication of the "matter"[49], and Article 16 simply reflects the initial terminology. So Article 16 is again reflecting a distinction between a "complaint", that is, the communication of a "matter", on the one hand, and a "dispute" on the other, but saying that *both* can be resolved by other means.

11. But, in contrast, of course, Article 22 refers only to the term "dispute", and it is only a "dispute", not a "complaint" or a "matter" that can be referred to this Court. Article 22 must then be interpreted and applied in accordance with the CERD parties' intention to distinguish between what they saw as two juridically distinct concepts. This is a point that Georgia has ignored as it is seeking to bring a non-communicated and non-crystallized "matter" before the Court in a way that is not permitted by Article 22[50].

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[48]Rules of Procedure of the Committee on the Elimination of Racial Discrimination, CERD/C/35/Rev.3.

[49]See, e.g., United Nations General Assembly Official Records, UN doc. A/6181, p. 27, para. 120 (Georgia's Written Statement, Ann. 40). See also the discussion in the Third Committee at UN doc. A/C.3/SR.1353, p. 370 *et seq.* (Georgia's Written Statement, Ann. 32).

[50]See Russia's Preliminary Objections, paras. 3.19-3.22.

12. The point is confirmed by the *travaux*, and in particular, the first iteration of what became Article 22, then draft Article 17, which is on the first page of tab 4 of the judges' folder. Draft Article 17 provided:

> "The States Parties to this Convention agree that any State Party complained of or lodging a complaint may, if no solution has been reached within the terms of article 14, paragraph 1, bring the case before the International Court of Justice, after the report provided for in article 14, paragraph 3, has been drawn up."[51]

13. The Court will immediately note that the term "complaint" is used. That of itself supports the point that where the drafters meant "complaint", that was the term they used. But the more important point is that it was only a specific form of "complaint" that could be referred to the Court — that is, only one that had gone through the conciliation procedures which, as then drafted, were contained in draft Articles 11-14, hence the reference back to Article 14. Although the wording of the provisions on conciliation and seisin of the Court then went through various iterations, the basic position that States parties were not entitled to refer a non-crystallized "complaint" or "matter" to the Court remained the same.

14. Professor Pellet will be returning shortly to the inter-relationship between Articles 11-13 and Article 22, and to the relevant passages of the *travaux*, to make the point that the seisin of the Court under Article 22 is indeed dependent on prior recourse to the procedures of Articles 11-13. My point is slightly different, although it does go hand-in-hand with Professor Pellet's analysis. It is that, as a matter of the interpretation of the word "dispute" in Article 22 in its relevant context, a specific degree of crystallization is required for there to be a "dispute" at all. And, even on Georgia's case on the relevant facts, that degree of crystallization is manifestly absent. Georgia has not even got to stage 1 of the required 5-stage procedure, and so the primary condition for the Court to exercise its judicial function cannot be considered satisfied.

b. Generally applicable principles

15. I move on to the issues under generally applicable principles, in so far as these apply at all; and the question of whether or not there is a dispute in any given case — the question of whether there is the "yes" and the "no" — is of course one for objective determination, as the Court

[51] UN doc. E.CN.4/Sub.2/L.321, p. 6 (Georgia's Written Statement, Ann. 1).

has repeatedly held (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74; see also *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006,* p. 40, para. 90, and the various cases cited there). There are then two facets of this general rule that call for further comment.

16. First, the "yes", and the issue of whether or not it matters that, in the 17 or 18 years of the alleged dispute, Georgia never once said to Russia that it was in breach of CERD. Georgia's position is that this is a non-point — and it relies on the Court's dicta in the *Nicaragua* case — that "it does not necessarily follow that, because a State has not expressly referred in negotiations with another State to a particular treaty as having been violated by conduct of that other State, it is debarred from invoking a compromissory clause in that treaty" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 428, para. 83)[52].

17. There are important differences between this case and *Nicaragua*, including that the Court's jurisdiction was already established in *Nicaragua* by virtue of the optional clause while, here, jurisdiction is either established under CERD or not at all; but, consistent with the test of objective determination, which is what the *Nicaragua* case reflects in this passage, there is naturally no absolute requirement that a State must have specified that a given treaty has been violated in order later to invoke that treaty before the Court. The door remains part open. But there is then an inevitable question as to the existence of a relevant dispute; and the absence of a specific claim on the record will often be a very important indicator that there is no such dispute.

(a) On the facts of this case, that absence is telling precisely because of the extended opportunity that Georgia has had to state a claim under CERD. Here I am not just talking about having 17 or 18 years to formulate a CERD claim, but failing to do so; in a sense, the bigger point is that Georgia has submitted three periodic reports to the CERD Committee[53], and has appeared

[52]Cited by Russia in its Preliminary Objections (see paras. 3.18 and 4.29) and also in the course of its oral submissions at the provisional measures stage (CR 2008/27, 10 Sep. 2008, para. 15 (Pellet)). Cited by Georgia in its Written Statement at para. 2.24.

[53]Committee on the Elimination of Racial Discrimination, Reports submitted by States parties under Art. 9 of the Convention, Initial report of States parties due in 2000, Add.: Georgia, 24 May 2000, UN doc. CERD/C/369/Add. 1 (1 Feb. 2001) (POR, Ann. 48; WSG, Ann. 64). See also Committee on the Elimination of Racial Discrimination, Third Periodic Report of States due in 2004, Add., Georgia, UN doc. CERD/C/461/Add. 1 of 21 Jul. 2004 (WSG, Ann. 70).

before the Committee on various occasions[54], yet has never once suggested that Russia was violating CERD so far as concerns its current claims.

(b) By contrast, in these reports and in its appearances before the CERD Committee, Georgia has accused "the authorities of the self-proclaimed Republic of Abkhazia" of pursuing a policy of "cleansing" founded on racial hatred in Abkhazia[55]. That is an accusation of ethnic cleansing, reiterated by Georgia on various occasions before the CERD Committee; but this is not, and cannot be, a relevant "yes" for the purposes of this case: it is not an allegation that is in any way directed at Russia.

(c) By contrast, there has been one issue before the Committee concerning Russian conduct; but this concerned the treatment of certain Georgian nationals in Russia in 2006, a matter wholly unrelated to the situation in South Ossetia and Abkhazia[56]. Georgia was of course capable of formulating claims before the Committee. The obvious question is, if Georgia was indeed making the multiple and serious claims against Russia that it now asserts, why was it silent before the very Committee that had the direct interest in the matter?

18. The obvious inference is that Georgia did not, in fact, have a CERD claim against Russia and to draw that inference is entirely consistent with the Court's dicta in the *Nicaragua* case.

19. The same obvious inference can be drawn from the fact that — as just explained by Ambassador Gevorgian — the presence of Russian troops as part of a peacekeeping force was warmly welcomed by Georgia in the 1990s, and importantly remained the subject of Georgia's agreement until September 2008. And, when I use the phrase "warmly welcomed", I am thinking of documents like the Decision of the Joint Control Commission of March 1999, signed by Georgia, Russia, and the North Ossetian and South Ossetian sides, recording that the

[54]Summary records, see: CERD/C/SR.1453 of 15 Mar. 2001 (WSG, Ann. 65), CERD/C/SR.1454 of 16 Mar. 2001 (WSG, Ann. 67), and CERD/C/SR.1706 of 4 Aug. 2005 (WSG, Ann. 72). See POR, para. 3.52

[55]Committee on the Elimination of Racial Discrimination, Reports submitted by States parties under Art. 9 of the Convention, Initial report of States parties due in 2000, Add., Georgia, 24 May 2000, UN doc. CERD/C/369/Add.1 (1 Feb. 2001), para. 55 (POR, Ann. 48; WSG, Ann. 64).

[56]Committee on the Elimination of Racial Discrimination, 73rd session, Consideration of reports submitted by States parties under Art. 9 of the Convention, Concluding Observations of the Committee on the Elimination of Racial Discrimination: Russian Federation, UN doc. CERD/C/RUS/CO/19 (20 Aug. 2008), para. 13, (POR, Ann. 70).

"peacekeeping forces keep on being a major sponsor of the peace and calm life"[57]. Is this to be interpreted as the required "yes"? We say that cannot be.

20. I move on to the "no", and the issue of whether or not it matters that when it comes to showing a positive opposition by Russia (*South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328; see also *Certain Property (Liechtenstein v. Germany), Preliminary Objections, Judgment, I.C.J. Reports 2005*, p. 18)[58], that opposition is time and again merely asserted by Georgia in its Written Statement, with no footnote references to documents in support[59]. And Georgia's difficulty in locating documents that show Russia's positive opposition to a claim under CERD is reflected in its developed legal case that opposition can be inferred from conduct, or indeed silence[60].

21. As the existence of a dispute is a matter for objective determination, conduct may indeed be sufficient. It all depends.

(a) Georgia relies on the Opinion of this Court in the *United Nations Headquarters Agreement* case. But, there, the United Nations Secretary-General had expressly sought confirmation that the arrangements for the PLO Observer Mission would not be curtailed. He had stated that "without such assurance, a dispute between the United Nations and the United States concerning the interpretation and application of the Headquarters Agreement would exist" (*Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, I.C.J. Reports 1988*, p. 19, para. 16). That confirmation was not forthcoming. In such circumstances, the existence of a dispute could of course be inferred from the silence of the United States.

(b) The approach of the Court in *Cameroon* v. *Nigeria*, which Georgia also relies on, was to similar effect. Again, the existence of a claim was most clearly placed on the table, and the effective refusal to respond was in itself of significance (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J.*

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[57]POR, paras. 2.16-2.17, and Ann. 47. In respect of the peacekeeping forces in Abkhazia, see *ibid*, paras. 2.21-2.30.

[58]POR, para. 3.17; cf. WSG at footnote 55.

[59]See, e.g., WSG at para. 2.78 "Russia, of course, has always opposed Georgia's position" (an assertion with no supporting document); or at para. 2.81 "Russia, as would be expected, disagreed" (same point).

[60]See, e.g., WSG at paras. 2.26-2.30.

Reports 1998, pp. 313-317, paras. 85-93). By contrast, in the present case, there was no wilful deafness on Russia's part. It did not understand there to be claims under CERD asserted against it by Georgia, and the significance of the silence of Russia is solely to reflect the absence of these claims.

(c) The remaining cases that Georgia refers to on this point either turn on their very particular facts, like the *Hostages* case, or in fact show the Court finding the requisite positive denial on the record, as with the *East Timor* (*East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 100, para. 22) and *Certain Property* cases (*Certain Property (Liechtenstein v. Germany), Preliminary Objections, Judgment, I.C.J. Reports 2005*, pp. 18-19, para. 25). I do, however, note in passing the late Judge Fleischhauer's words of warning in the *Certain Property* case: "too low a standard [in] the determination of the existence of a dispute", he said, would "have negative effects on the readiness of States to engage in attempts at peaceful settlement of disputes" (*Certain Property (Liechtenstein v. Germany), Preliminary Objections, Judgment, I.C.J. Reports 2005*, p. 69, Declaration of Judge *ad hoc* Freischhauer). Precisely right — why bother to await the crystallization of a dispute, States may ask, if the threshold applied in practice allows them to go straight to the Court — or, as happened in this case, straight to the Court, but via an unsuccessful and unlawful recourse to the use of force.

22. And there is a further point on conduct: the exercise of objective determination requires that the Court look across the entirety of the relevant conduct of the Parties. Just as, when it comes to the requisite "yes", the Court must give full weight to factors such as Georgia's failure ever to articulate a CERD claim, its failure to state or even suggest a claim in communications with the CERD Committee, and its continued approval of the presence of Russian peacekeeping forces, so, when it comes to the requisite "no", Russia's conduct must be examined more broadly. For example, Russia has condemned in the most forthright of terms the Abkhaz authorities' "flouting of human rights and its massive 'ethnic cleansing'" in the early 1990s[61], and Russia has since reiterated and reaffirmed as fundamentally important the right of return for all refugees and IDPs to Abkhazia, including by way of statements to the Security Council and in various Security Council

[61]Provisional Verbatim Record of the 3295th Meeting of 19 October 1993 (S/PV.3295), p. 7 (Georgia's Memorial, Ann. 12).

resolutions that Russia has actively supported (including in 2008)[62]. Is this to be interpreted as the required "no"? Again, we say that cannot be.

c. The documents that Georgia relies on

23. I move on to the documentation that Georgia relies on and, as Judge Higgins put it in her separate opinion in *Cameroon* v. *Nigeria*, the legal requirements on the question of the existence of a dispute must be "systematically tested", (*Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I.C.J. Reports* 1998, p. 47, Separate Opinion of Judge Higgins). And, for each document that Georgia relies on there is a critically important who, what, when question to be asked — that is, for each document, the Court must consider to whom the document and any assertion of a claim that it contains is addressed and to whom it was communicated, as well as the questions of what and when, i.e., what the substance of the claim is, and to which period it relates.

24. As to the "who" question, a good part of the documentation relied on concerns claims that Georgia has asserted against the authorities of Abkhazia or South Ossetia[63]. Those documents, and those claims, are irrelevant. Georgia cannot say — we have in the past asserted a claim against a body or bodies purporting to exercise authority within our State, and now, as a matter of State responsibility, you, Russia, are responsible for the acts of that body or those bodies, and therefore we have a dispute with you. For there to be a dispute with Russia, that dispute can only crystallize from a claim asserted against Russia, and communicated to Russia, that Russia could then positively oppose.

25. And the issue of communication is an important facet of this. It is one thing to contend that it is enough for an assertion of racial discrimination to be made without any mention of CERD; but Georgia expects a further indulgence, that it be enough, for example, that the assertion be made in an interview on Georgian radio or television[64], or in a governmental press release to the

[62]Russia's Preliminary Objections, paras. 2.19-2.20; see also Security Council Resolution 1808 of 15 April 2008 at para. 9 (Russia's Preliminary Objections, Ann. 67).

[63]See, e.g., WSG, e.g., Anns. 64-67, 72; MG, Ann. 36.

[64]See, e.g., WSG, Ann. 164.

Georgian News Agency[65]. In fact, around a quarter of the documents in the post-1999 period that Georgia relies on were not on their face communicated to Russia, whether in bilateral or multilateral exchanges[66]. But it must be for Georgia to make and communicate a claim, not for Russia to go out to seek it by watching Georgian television.

26. And this matters because the existence of any dispute concerning racial discrimination must be determined against a background where there were multiple claims being made by Georgia, in particular, against the South Ossetian and Abkhaz authorities, that principally concerned Georgia's territorial sovereignty, and as to which Russia, of course, had an accepted status as facilitator[67]. There was, to put it colloquially, a very high level of background noise against which Russia would have had to discern the existence of the alleged CERD dispute with Georgia.

27. This background noise is all the more of an issue in circumstances where Georgian institutions have different functions and may speak with different voices. Many of the documents that Georgia relies on emanated from its Parliament, but the Georgian Parliament does not implement Georgia's foreign policy. To take a concrete example, Georgia relies on a resolution of the Georgian Parliament on 27 May 1998, which, it says, "formally and publicly accused Russia of carrying out ethnic cleansing"[68]. In fact, the Parliament had asserted that "CIS peacekeeping forces are to a large extent responsible for the tragedy in Gali district, as they in fact facilitated raids against the peaceful population and destruction of villages in their entirety". But, on the *previous_day*, and with respect to the very same incident, Georgia's Permanent Representative before the Security Council had stated that "the interference of the CIS peacekeepers averted the massacre of the Georgian population"[69]. On this basis, Russia could not conceivably understand

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[65]See, e.g., WSG, Ann. 173.

[66]WSG, Anns. 145-146, 155, 158-162, 164-170, 173, 175-182.

[67]See, e.g., the following docs., all of which are relied on in WS: United Nations Security Council res. 876 (1993) (MG, Ann. 11); OSCE, Budapest Doc. 1994: Toward a genuine Partnership in a New Era (1994) (WSG, Ann. 104); OSCE, Lisbon Summit, Lisbon Doc., para. 20 of the Summit Declaration (1996) (MG, Ann. 69); Security Council res. 1124 (1997) (MG, Ann. 23); OSCE, Seventh Meeting of the Ministerial Council, Decision on Georgia, MC(7).DEC (1998) (WSG, Ann. 105); Security Council res. 1524 (2004) (MG, Ann. 36).

[68]WSG, para. 2.80, and Ann. 136.

[69]WSG, Ann. 55.

that Georgia was asserting that it was responsible for ethnic cleansing, and was bringing a claim against Russia in this respect.

28. I turn to the "what" question, where, again, the issue of background noise is very important. It would not, of course, be enough for Georgia to demonstrate the existence of some other dispute with Russia — for example, a dispute over the use of force or the alleged "annexation" of Georgian territory — to use a term that appears frequently in the documents that Georgia relies on[70]. Georgia accepts, as it must, the existence of other disputes: on its characterization, there are disputes as to "Russia's illegal use of force against Georgia since 1992, including the armed invasion of Georgian territory by Russian military forces in August 2008; Russia's repeated and ongoing violations of Georgia's sovereignty, territorial integrity and political independence; and the violations of the laws of war during periods of armed conflict"[71]. But all this, it is said, is "beside the point".

29. Mr. President, Russia's case is not, as Georgia would have the Court believe, that the existence of a dispute as to the use of force or compliance with the laws of war excludes the possibility that there is a separate and justiciable dispute under CERD[72]. The point is that it is the real dispute, or I should say disputes — that are between Georgia on the one hand and Abkhazia and South Ossetia on the other, in relation to the legal status of Abkhazia and South Ossetia[73] — it is these disputes that are reflected time and again in the documents on which Georgia now relies, and also in those documents to which Georgia notably does not refer. I am thinking, for example, of Security Council resolution 1808 of 18 April 2008, which refers to the assistance provided by the Russian Federation in its capacity as facilitator, and to the "important stabilizing role" played by the CIS peacekeeping force in the Abkhazian conflict zone[74], and which also refers on multiple occasions to the "Georgian and Abkhazian sides" to the conflict[75]. Notably, this resolution called

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[70]E.g. Letter, 16 February, of Georgia's representative to the United Nations Secretary-General, UN doc. A/60/685 (WSG, Ann. 78); statement of the Ministry of Foreign Affairs of Georgia, 19 April 2008 (WSG, Ann. 177).

[71]WSG, para. 2.33.

[72]Cf., e.g., WSG, paras. 2.9, 2.35-2.36.

[73]POR, para. 2.3.

[74]POR, Ann. 67, at preambular paras. (4) and (7).

[75]*Ibid*., at preambular paras. (4) and (5), and at paras. 3, 7 and 9.

on "both sides [in context, this is unquestionably the Georgian and Abkhazian sides] to finalize without delay the document on the return of refugees and internally displaced persons"[76]: so, a very serious refugee issue, yes; but a dispute between Georgia and Russia about racial discrimination, no.

30. Finally, a few words on the "when" question. Around a quarter of the 80 or more documents on which Georgia relies are dated prior to the date of Georgia's ratification of CERD in 1999, so by definition they cannot evidence a claim then being asserted under CERD. That follows from any plain reading of Article 22, which requires that there be a dispute between two parties to a convention.

31. The same basic point applies where Georgia relies on documents further down the chronological trail that simply refer back to the events of the 1990s. For example, Georgia asserts in its Written Statement that: "On 21 April 2008, President Saakashvili issued a public statement in which he assigned responsibility to Russia for the 'ethnic cleansing of territory in Abkhazia'"[77]. The alleged acts, it is said, all come within the coverage of CERD. But the relevant passage of the President's statement starts with the words, "We all remember well that in 1992-1993 . . .", and then continuing, and it is in that context alone that the President speaks of ethnic cleansing[78]. The Court can have no jurisdiction over such alleged acts of 1992 and 1993. And by contrast, as to the events of April 2008, the President's statement was directed at recent Russian legislation and what he described as the "de facto annexation of [a] very important part of Georgia"[79]. That is not, of course, a matter that falls within CERD.

32. So what is left at the end of this vital who, what, when process?

33. Tellingly, in its Written Statement[80], Georgia has elected to place up front the various Georgian statements made in the period 9-12 August 2008, including a statement made by President Saakashvili in an interview on CNN on 11 August, in which he directly accused Russia

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[76] *Ibid*., at para. 7.

[77] WSG, para. 2.92.

[78] WSG, Ann. 178.

[79] Cf., e.g., also, WSG, para. 2.87 and Ann. 198.

[80] *Ibid.*, paras. 1.7 and 2.59-2.73.

of ethnic cleansing in Abkhazia[81]. For one, those statements were made in the context of Georgia's unsuccessful and unlawful recourse to the use of force on the night of 7 August 2008; the principal focus of Georgia's complaints is in fact, and I quote Georgia's representative at the Security Council meeting of 10 August 2008, "the ongoing Russian aggression and occupation"[82]; self-evidently, such statements do not constitute an attempt to identify and achieve the peaceful settlement of an alleged long-standing dispute over racial discrimination. No less important, Georgia once again falls back on press briefings, at a time when it was in fact engaged in negotiations with Russia, and was not in fact alleging in those negotiations breach of CERD or, indeed, racial discrimination more broadly. And there is, of course, no suggestion of a dispute concerning racial discrimination in the six-point principles agreed by Georgia and Russia on 12 August 2008.

34. Mr. President, less than 24 hours after President Saakashvili's televised accusation of ethnic cleansing in Abkhazia, Georgia lodged its Application of 12 August 2008. In these circumstances, and in particular in the absence of the crystallized dispute as required by Article 22, we say that the primary condition for the Court to exercise its judicial function — the existence of a dispute — has not been met in this case.

35. Mr. President, that concludes my remarks. May I ask you to hand the floor to Professor Pellet?

The PRESIDENT: I thank Mr. Wordsworth for his statement. Before giving the floor to the next speaker, Professor Alain Pellet on behalf of the Russian Federation, the Court proposes to have a short break of ten minutes and then will follow with the presentations by Professor Alain Pellet and Professor Andreas Zimmermann, before we conclude the morning session, if that is agreed?

The Court is adjourned for this short break of ten minutes.

The Court adjourned from 11.45 a.m. to noon

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[81] *Ibid*., Ann. 205 (at 6pm EST).

[82] See Georgia's representative at the meeting of the Security Council on 10 Aug. 2008, UN doc. S/PV.5953, at pp. 4-5 (Georgia's Written Statement, Ann. 96).

The PRESIDENT: Please be seated. I shall now give the floor to Professor Alain Pellet.

M. PELLET : Monsieur le président, Mesdames les juges — voilà un féminin-pluriel longtemps attendu et bien plaisant ! Mesdames et Messieurs les juges, donc,

1. L'article 22 de la convention CERD, impose des conditions procédurales, à la fois préalables et cumulatives, à la saisine de la Cour, dont aucune n'est remplie. C'est ce qu'il m'incombe de montrer.

[Projection n° 1-1]

2. Il n'est sans doute pas inutile de relire à nouveau le texte de l'article 22 en guise d'introduction (il se trouve aussi sous l'onglet n° 1 du dossier des juges) :

> «Tout différend entre deux ou plusieurs Etats parties touchant l'interprétation ou l'application de la présente convention, qui n'aura pas été réglé par voie de négociation ou au moyen des procédures expressément prévues par ladite convention, sera porté, à la requête de toute partie au différend, devant la Cour internationale de Justice pour qu'elle statue à son sujet, à moins que les parties au différend ne conviennent d'un autre mode de règlement.»

3. Une première constatation (de simple bon sens d'ailleurs) s'impose : pour que la Cour puisse être saisie, il faut qu'existe un différend «entre deux ou plusieurs Etats parties touchant l'interprétation ou l'application de la présente convention». Il n'y a pas de différend de ce type entre la Géorgie et la Russie comme M^e^ Wordsworth l'a montré. Et ceci suffit à disposer de la question. Du reste, l'indifférence totale qu'a manifestée la Géorgie pour les mécanismes de règlement offerts par cette disposition apporte la confirmation de cette évidence factuelle. Au surplus, cette indifférence constituerait, de toute manière, un obstacle dirimant et insurmontable à la compétence de la Cour si l'on devait admettre, contre toute raison, qu'un tel différend existe.

4. Jusqu'à la fin des négociations de la convention, l'article 22 a été l'objet d'âpres débats. Il reflète un compromis global entre ceux qui voulaient laisser l'application de la convention complètement entre les mains des Etats et ceux qui avaient une approche plus institutionnelle. Mais parmi ceux-ci, les uns entendaient en confier la surveillance constante à un organe permanent, dans le cadre d'un mécanisme novateur, pionnier du genre — qui est du reste demeuré le modèle, jamais égalé, des organes de surveillance des traités de droits de l'homme qui ont bourgeonné par la suite ; les autres voulaient donner un rôle quasi exclusif à la Cour en cas de différend entre les Parties.

5. L'article 22 pose donc une condition fondamentale, mais qui se décline en deux moyens, pour qu'une partie puisse saisir la Cour d'un différend qui l'oppose à une autre partie : avoir essayé, avant la saisine de la Cour, de régler le différend — c'est l'obligation ; et ces tentatives de règlement doivent avoir eu lieu au plan diplomatique par la voie de négociations et par le biais du mécanisme CERD expressément prévu à cet effet — ce sont les moyens. En d'autres termes, Mesdames et Messieurs les juges, l'article 22 donne aux Etats parties la possibilité de vous soumettre unilatéralement un différend sur l'application de la convention ; mais, en même temps, il garantit aux parties qu'elles auront l'occasion, *préalablement à votre saisine*, de régler leur différend par la voie diplomatique *et* — et j'insiste sur ce «et»… — et de concilier leurs points de vue sous l'égide du Comité. «Préalablement…», ce sera mon premier point ; «et…» ce sera mon second point.

I. L'EXIGENCE DES TENTATIVES DE RÈGLEMENT PRÉALABLES

[Projection n° 1-2]

6. Monsieur le président, selon la Géorgie, *«Article 22 does not include any conditions that are preconditions to the seisin of the Court.»*[83] Nos contradicteurs lisent donc l'article 22 de la manière suivante — je le lis de nouveau, mais à leur manière :

> «Tout différend entre deux ou plusieurs Etats parties touchant l'interprétation ou l'application de la présente convention, … sera porté, à la requête de toute partie au différend, devant la Cour internationale de Justice pour qu'elle statue à son sujet, à moins que les parties au différend ne conviennent d'un autre mode de règlement.»

Alors que le texte subordonne expressément la saisine de la Cour à une condition — unique quant à son résultat, mais double pour ce qui est des moyens de sa réalisation —, la Géorgie n'en voit aucune. Cette position n'est pas tenable si l'on fait une lecture de bonne foi de l'article 22 en son entier.

[Projection n° 1-3]

7. Si l'on reprend les célèbres canons de l'interprétation des traités codifiés dans les articles 31 et 32 de la convention de Vienne, il est clair que la lecture géorgienne de l'article 22 de la convention CERD n'est pas compatible avec le sens ordinaire à attribuer à ses termes dans leur

[83] Observations écrites de la Géorgie (OEG), p. 99, par. 3.10.

contexte et à la lumière de l'objet et du but de cette disposition et, en particulier, que cette lecture la prive de tout effet utile (A) ; les travaux préparatoires confirment d'ailleurs pleinement cette interprétation (B), qui est en outre en accord avec la jurisprudence constante de la Cour s'agissant de clauses similaires (C).

A. Le texte de l'article 22 dans son contexte et le principe de l'«effet utile»

[Projection n° 1-4]

a) ***L'utilisation du futur antérieur dans le texte français***

8. Monsieur le président, le texte de l'article 22 est «clair comme de l'eau de roche» — *crystal clear* comme disent les anglophones. Mais le problème avec les textes clairs, c'est qu'il n'y a pas grand-chose à en dire ; il suffit de les lire… Lisons donc à nouveau : «Tout différend … *qui n'aura pas été réglé* par voie de négociation ou au moyen des procédures expressément prévues par ladite convention...». «[Q]ui n'aura pas été réglé…», c'est un futur antérieur et, quoi qu'en dise la Géorgie[84], cela importe.

9. L'utilisation de ce temps verbal suggère clairement, comme son nom même l'indique, qu'une action antérieure (ici la tentative de règlement) doit avoir été conclue avant qu'une autre action (ici, la saisine de la Cour) puisse être déclenchée. Comme l'explique le fameux *Bon usage* de Grévisse — une bible de la langue française : «Le futur antérieur exprime un fait futur considéré comme accompli … par rapport à un autre fait futur…, ex : *Chacun récoltera ce qu'il aura semé.*»[85] De même que l'on ne peut récolter si l'on n'a pas semé, de même un Etat ne peut porter un différend relatif à l'application de la convention CERD s'il n'a pas, préalablement, tenté de le régler autrement (je laisse, pour l'instant, de côté la question de savoir comment). Je sais bien que l'argument ne vaut que pour la version française mais autant que je sache, le futur antérieur n'existe pas en russe et n'est jamais utilisé dans les autres langues officielles dans lesquelles la convention a été rédigée — c'est en tout cas vrai en anglais et en espagnol.

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[84] Voir OEG, p. 122, par. 3.52.

[85] M. Grevisse et A. Gosse, *Le bon usage*, 14e éd., De Boeck, Duculot, 2008, p. 1098.

b) ***L'effet utile***

10. Monsieur le président, dans le contexte de l'article 22 et dans celui plus vaste de la convention, on ne peut interpréter «qui n'aura pas été réglé» comme une simple constatation factuelle : cela rendrait l'expression parfaitement superflue et, au-delà, cela priverait le Comité d'une de ses fonctions essentielles.

[Projection n° 1-5]

11. Inutile, je pense, de m'appesantir sur le principe de l'effet utile, tant il est solidement établi et répond à un impératif logique :

> «Il serait en effet contraire [avez-vous dit, dans l'affaire du *Détroit de Corfou*] aux règles d'interprétation généralement reconnues de considérer qu'une disposition de ce genre, insérée dans un compromis [ou, comme ici, dans une clause compromissoire], soit une disposition sans portée et sans effet.» (*Détroit de Corfou (Royaume-Uni c. Albanie), fond, arrêt, C.I.J. Recueil 1949*, p. 24.)[86]

12. Or c'est inévitablement ce à quoi aboutit l'interprétation proposée par la Géorgie : l'article 22 conserve précisément le même sens — que l'incidente qui gêne la Géorgie y figure ou pas. Que des tentatives de règlement préalables aient eu lieu ou non, la Cour serait de toute façon compétente dès lors qu'un différend opposerait deux Etats au sujet de l'interprétation ou de l'application de la convention. Pour reprendre l'image de Grévisse : la Géorgie entend récolter, mais sans avoir semé. Cela ne se peut : une telle interprétation laisse sans effet et sans portée l'expression «*qui n'aura pas été réglé* par voie de négociation ou au moyen des procédures expressément prévues par ladite convention…».

[Fin de la projection n° 1]

13. La Géorgie insiste sur le fait que, lorsque les rédacteurs de la convention ont voulu introduire des conditions à la compétence de la Cour, ils l'ont fait d'une manière expresse[87]. Mais, Monsieur le président, quoi de plus exprès que les moyens explicitement énoncés dans l'article 22 ? En renvoyant aux procédures *expressément* prévues par la convention, l'article 22 montre que l'on ne saurait s'en remettre aux seuls mécanismes de règlement du droit international général, qu'il s'agisse de la négociation ou du règlement juridictionnel par la Cour de céans. Mais ce renvoi

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[86] Voir aussi, par exemple : le rapport de l'organe d'appel de l'OMC sur l'affaire *Argentine — Mesures de sauvegarde à l'importation de chaussures*, WT/DS121/AB/R, distribué le 14 décembre 1999, paragraphe 81, *États-Unis — Essence* et la jurisprudence citée dans les exceptions préliminaires de la Russie (EPR), p. 85-86, note 180.

[87] Voir OEG, p. 101, par. 3.16, p. 111, par. 3.33 ou p. 101, par. 3.16.

exprès à l'absence de règlement par ces procédures n'a de sens que si celles-ci ont été («auront été»…) utilisées sans succès auparavant. Sinon, encore une fois, cette condition — pourtant expresse — serait une «non-condition» et n'aurait aucun sens utile.

c) ***Les relations entre l'article 22 et les articles 11 et 16***

14. C'est du reste contre les procédures propres à la convention que la Géorgie concentre ses attaques. Outre les arguments généraux que je viens de discuter, elle invoque à l'encontre de leur caractère nécessairement préalable deux arguments contextuels dont il me faut dire quelques mots. Ils reposent sur l'articulation de l'article 22 avec l'article 11 d'une part ; avec l'article 16 d'autre part.

15. Commençons par ce dernier, l'article 16, dont le texte est également reproduit à l'onglet n° 1 du dossier des juges. Il s'agit d'une clause sans préjudice, à laquelle le dernier membre de phrase de l'article 22 fait écho lorsqu'il précise que les parties à un différend concernant l'application de la convention peuvent saisir la Cour à moins qu'elles «ne conviennent d'un autre mode de règlement». Curieusement, la Géorgie tente de tirer argument de ces dispositions — ou plutôt de *cette* disposition car elle isole l'article 16, alors que la fin de l'article 22 que je viens de citer dit exactement la même chose. Mais cette «isolation» est nécessaire à la Géorgie car sa thèse est entièrement fondée sur le fait que l'article 16 figure dans la deuxième partie de la convention — ce qui tiendrait en échec «the Russian Federation's claim that reference to negotiation and/or the Article 11 complaint procedure are *necessary* preconditions to the exercise of rights under Article 22»[88]. Pourquoi c'est nécessaire ? J'avoue, Monsieur le président, que ceci demeure un mystère pour moi :

— L'article 16 est, certes, situé dans la partie II de la convention, mais l'article 22 redit la même chose plus succinctement.

— Quant à dire que le recours à la procédure de l'article 11 n'est pas une précondition «nécessaire» à la saisine de la Cour au prétexte qu'il est toujours possible de recourir à un autre mode de règlement, c'est jouer sur les mots. Bien sûr qu'il est toujours loisible à des parties à un différend de le résoudre par les moyens de leur choix, principe que les articles 16 et 22 se

[88] OEG, p. 105, par. 3.21.

bornent à refléter. Et bien sûr donc que les Parties pourraient recourir à tout autre moyen susceptible de permettre de régler le différend et, en ce sens, ni la procédure de l'article 11, ni le recours à la négociation, ne sont «nécessaires». En revanche, contrairement à la négociation ou aux procédures expressément prévues par la convention, le recours à ces autres moyens n'est pas une condition préalable à la saisine de la Cour. En d'autres termes, celle-ci n'est intéressée par ces autres modes de règlement que dans la mesure où ils auraient permis de régler le différend (au titre de la «phase Wordsworth» si j'ose dire en référence au partage des tâches entre nous) ; par contre, dans le cadre de la «phase Pellet» — celle des préconditions à la saisine de la Cour —, celle-ci n'a plus à se préoccuper de la question de savoir si les parties en litige ont ou non recouru à ces autres modes : dès lors qu'elle estime qu'il existe un différend, elle exercera sa compétence si elle constate que les conditions de l'article 22 sont remplies ; elle s'y refusera dans le cas contraire — comme c'est le cas dans notre affaire ; l'article 16 n'a rien à voir avec ceci.

— Du reste, le fait que cette disposition (l'article 16) parle «des *autres procédures* de règlement des différends...» et la phrase terminale de l'article 22 «d'un *autre mode* de règlement», suffit à exclure qu'il pût s'agir des «procédures expressément prévues» par la convention. Il s'agit à l'évidence de tout autre chose.

16. La Partie géorgienne ne me paraît pas mieux inspirée lorsqu'elle s'appuie — toujours à titre «contextuel» — sur la rédaction de l'article 11 pour contester que la procédure prévue par cette disposition pût constituer l'une de celles auxquelles l'article 22 subordonne la saisine de la Cour[89].

17. Le premier argument avancé par la Géorgie semble consister à dire que puisque l'article 11 parle de «question» ou d'«affaire» — les deux termes étant traduits en anglais par «matter» — et non de différend — «dispute» —, la procédure des articles 11 à 13 ne pourrait constituer un préalable à la soumission d'un différend à la Cour au sens de l'article 22. Comme l'a montré Sam Wordsworth, c'est le contraire qui est vrai : au sens de la convention de 1965 une «question» ne devient un «différend» que si elle a fait l'objet de la procédure de l'article 11 — et,

[89] Voir OEG, p. 100-104, par. 3.14-3.19, et p. 106, par. 3.23.

d'ailleurs, les deux articles suivants, 12 et 13, qui fixent la suite de la procédure, parlent, eux, expressément de «différend».

18. En deuxième lieu, on se demande en quoi le fait que l'article 11, paragraphe 2, subordonne la seconde saisine du Comité à la réalisation préalable de deux conditions, empêcherait qu'il en soit de même pour la saisine de la Cour au titre de l'article 22.

19. Selon un troisième argument fondé toujours sur l'article 11 — qui, décidément, pique l'imagination des conseils de la Géorgie, le paragraphe 3 de cette disposition ferait obligation aux parties d'épuiser les recours préalables avant de pouvoir saisir le Comité, apparemment dans toutes les circonstances, ce qui serait absurde[90]. Et ce le serait en effet si l'on devait tirer cette conséquence de la formule de l'article 11, paragraphe 3. Mais il n'en est rien.

20. La Géorgie oublie en effet que l'article 11 renvoie au principe de l'épuisement des recours internes «conformément aux principes de droit international généralement reconnus». Or, en droit international général, la règle de l'épuisement des recours internes joue dans le cadre de la protection diplomatique, mais non pour les différends entre Etats, comme le confirme par exemple le commentaire de l'article 14 *c)* du projet de la CDI sur la protection diplomatique[91]. La conclusion s'impose d'elle-même : avant de saisir la Cour, un Etat doit «épuiser» les procédures préalables ouvertes par les articles 11 à 13 de la convention, mais il n'en résulte pas qu'il devrait, du même coup, épuiser les recours internes.

B. Les travaux préparatoires de l'article 22

21. Monsieur le président, interprété de bonne foi, dans son contexte, le texte de l'article 22 est clair : avant qu'un Etat partie à la convention puisse saisir la Cour d'un différend qui l'oppose à un autre Etat partie au sujet de son application, il doit avoir recours, préalablement, aux moyens de règlement indiqués dans cette disposition. Les travaux préparatoires à la convention le confirment sans aucune ambiguïté.

22. Le texte actuel de l'article 22 trouve son origine dans une proposition faite par M. Inglès, le membre philippin de la Sous-Commission des droits de l'homme. Dans une déclaration, que la

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[90] OEG, p. 106, par. 3.23.

[91] CDI, projet d'articles sur la protection diplomatique et commentaires y relatifs, A/61/10, p. 76, paragraphe 9, du commentaire de l'article 14.

Géorgie cite de manière partielle et donc biaisée[92], celui-ci avait d'ailleurs expliqué devant le comité dont il proposait la création,

> «comme son nom l'indique, [ce comité] procéderait à une vérification des faits avant d'essayer d'arriver à une solution amiable du différend… *Faute pour le comité de parvenir à une solution dans le délai imparti*, l'une ou l'autre partie pourrait porter l'affaire devant la Cour internationale de Justice.»[93]

23. L'idée a été reprise dans un amendement tardivement présenté à la Troisième Commission de l'Assemblée générale[94]. Je reviendrai sur cet «amendement des trois puissances» à un autre point de vue dans quelques instants. Dans l'immédiat, je relève que l'un de ses promoteurs, M. Lamptey, délégué du Ghana, a indiqué : «que l'amendement des trois puissances s'explique de lui-même. Le projet de convention prévoit certains dispositifs qu'*il convient d'utiliser* pour le règlement des différends *avant de saisir la Cour internationale de Justice*.»[95] «*Avant* de saisir la Cour internationale de Justice…», Monsieur le président, «*il convient* d'utiliser…» la négociation (qui était déjà mentionnée dans le texte qui avait été proposé par le Bureau) et les «procédures prévues par la convention». On peut difficilement être plus clair.

24. Emanant des auteurs de l'amendement, ces déclarations dépourvues de toute ambiguïté, présentent un intérêt tout particulier. Et je relève en outre que plusieurs autres délégations ont abondé dans le même sens, par exemple celles des Pays-Bas[96], de la France[97],

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[92] OEG, p. 256, appendice, par. ix ; comp. : EPR, p. 120-121, par. 4.65.

[93] Nations Unies, Conseil économique et social, projet de convention internationale sur l'élimination de toutes les formes de discrimination raciale, compte rendu analytique de la 427e séance, Nations Unies, doc. E/CN.4/Sub.2/SR.427, p. 13 — les italiques sont de nous ; voir aussi la déclaration des délégués philippins à la Commission des droits de l'homme, M. Quiambao (Nations Unies, Conseil économique et social, Commission des droits de l'homme, compte rendu analytique de la 810e séance, 15 mai 1964, Nations Unies, doc. E/CN.4/SR.810, p.7-8 (pour le texte anglais de la déclaration de M. Quiambao, voir OEG, vol. II, annexe 15, p. 7)) et à la Troisième Commission, M. Garcia (Nations Unies, *Documents officiels de la Troisième Commission de l'Assemblée générale, vingtième session*, doc. A/C.3/SR.1344 (16 novembre 1965), p. 338, par. 16 (pour le texte anglais de cette déclaration, voir OEG, vol. II, annexe 24, p. 314, par. 16)).

[94] Nations Unies, Conseil économique et social, projet de convention internationale sur l'élimination de toutes les formes de discrimination raciale ; M. Inglés, *Mesures de mise en œuvre proposées*, Nations Unies, doc. E/CN.4/Sub.2/L.321), 17 janvier 1964 (pour le texte anglais, voir OEG, vol. II, annexe 1).

[95] Nations Unies, *Documents officiels de la Troisième Commission de l'Assemblée générale, vingtième session*, Nations Unies, doc. A/C.3/SR.1367, p. 485, par. 29 (pour le texte anglais de la déclaration, voir OEG, vol. II, annexe 38, p. 453, par. 29) ; les italiques sont de nous.

[96] M. Mommersteeg, Nations Unies, *Documents officiels de la Troisième Commission de l'Assemblée générale, vingtième session*, doc. A/C.3/SR.1344 (16 novembre 1965), p. 343-344, par. 63 (pour le texte anglais de cette déclaration, voir OEG, vol. II, annexe 24, p. 319, par. 63).

[97] M. Boullet, Nations Unies, *Documents officiels de la Troisième Commission de l'Assemblée générale, vingtième session*, doc. A/C.3/SR.1367 (7 décembre 1965), p. 386, par. 38 (pour le texte anglais de cette déclaration, voir OEG, vol. II, annexe 24, p. 454, par. 38).

de l'Italie[98], ou de la Belgique[99], sans que cette interprétation fût jamais contredite. (Le texte de ces déclarations est reproduit dans le dossier des juges sous l'onglet n° 3). Ceci confirme qu'il entrait bien dans les intentions des auteurs de la convention de 1965 que la Cour ne puisse être saisie qu'une fois acquis l'échec des procédures prévues par cet instrument — ainsi que celui des négociations, bien que les négociations eussent moins polarisé l'attention des auteurs de la convention.

25. Et j'ajoute que le soin mis par les négociateurs à régler ce problème suffit à établir que l'obligation de saisir le comité ne pouvait être et n'est pas une clause de style sans portée mais bien une condition, juridiquement indispensable et soigneusement pesée.

C. L'interprétation constante par la Cour de clauses similaires

26. Monsieur le président, j'en viens aux comparaisons parfois déroutantes effectuées par nos contradicteurs avec d'autres clauses rédigées différemment, contenues dans d'autres traités, et à l'analyse qu'en aurait selon eux donné la Cour.

27. La Géorgie invoque en effet «the Court's longstanding practice, which has been to reject preliminary objections raised by Respondents on the grounds of an alleged deficiency of negotiations preceding the institution of judicial proceedings»[100]. C'est confondre beaucoup de choses, Monsieur le président :

— d'abord, nous n'en sommes pas là : à ce stade, la question n'est pas de savoir si ces négociations ont effectivement eu lieu — mon collègue Andreas Zimmermann montrera dans quelques instants qu'il n'en est rien, mais de se demander si elles doivent avoir eu lieu avant que la Cour soit saisie ;

— ensuite, on ne saurait réduire cette question (purement juridique) à la négociation : l'article 22 ne s'y limite pas (à la négociation) mais se réfère également aux «procédures prévues par [la] convention» ; et je dirais même qu'il se réfère *surtout* à ces procédures expressément prévues :

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[98] M. Capotorti, Nations Unies, *Documents officiels de la Troisième Commission de l'Assemblée générale, vingtième session*, doc. A/C.3/SR.1367 (7 décembre 1965), p. 386, par. 39 (pour le texte anglais de cette déclaration, voir OEG, vol. II, annexe 24, p. 454, par. 39).

[99] M. Cochaux, Nations Unies, *Documents officiels de la Troisième Commission de l'Assemblée générale, vingtième session*, doc. A/C.3/SR.1367, p. 487, par. 40 (pour le texte anglais de la déclaration, voir OEG, vol. II, annexe 38, p. 454, par. 40).

[100] OEG, p. 117, par. 3.43.

ce sont elles que les pères de la convention avaient à l'esprit lorsqu'ils ont entendu subordonner la saisine de la Cour à des conditions préalables à titre de compromis entre ceux qui ne voulaient faire confiance qu'aux procédures diplomatiques ou à la conciliation institutionnalisée par le traité, et ceux qui se prononçaient en faveur de la possibilité de saisir directement votre haute juridiction[101] ;

— enfin, *last but not least*, il apparaît que la jurisprudence invoquée par nos contradicteurs n'a nullement la portée qu'ils leur prêtent.

28. Je ne peux entrer dans les détails, et je me permets de vous renvoyer, Mesdames et Messieurs les juges, au tableau de la jurisprudence pertinente, qui est annexé au chapitre IV de nos exceptions. Je souhaiterais seulement souligner que, lorsqu'elle présente cette jurisprudence, la Géorgie déforme soit le sens de la clause énonçant les conditions de la saisine de la Cour, soit le sens de l'analyse que la haute juridiction en a faite.

[Projection n° 2]

29. Il en va ainsi, s'agissant de l'affaire des *Activités militaires et paramilitaires*, dont la Partie géorgienne prétend que la Russie n'a pas expliqué ce qui la distinguait de la nôtre[102] — ce qui est assez troublant car nous avons consacré cinq pages de nos exceptions à cela[103]. Et ceci me dispense d'ailleurs d'insister sinon pour rappeler rapidement

1) que les termes des clauses compromissoires en cause dans les deux affaires (*Nicaragua* et la nôtre) sont bien différents : contrairement à l'article 22 de la convention CERD — l'article XXIV du traité d'amitié entre le Nicaragua et les Etats-Unis laissait une large place à l'appréciation subjective des Parties en parlant de «[t]out différend … qui ne pourrait pas être réglé *d'une manière satisfaisante* par la voie diplomatique» (*Personnel diplomatique et consulaire des Etats-Unis à Téhéran (Etats-Unis d'Amérique c. Iran), arrêt, C.I.J. Recueil 1980*, p. 27, par. 51 ; les italiques sont de nous); il n'est pas sans intérêt de relever que contrairement à l'article 22, l'article 11, paragraphe 2, de la convention CERD utilise à peu près les mêmes termes «Si ... la question n'est pas réglée à la satisfaction des deux Etats.»

[101] Voir EPR, p. 87-91, par. 4.14-4.19.

[102] OEG, p. 118, par. 3.45.

[103] EPR, p. 96-101, par. 4.29-4.35.

2) dès lors, avec tout le respect dû à la mémoire du grand juge, l'opinion de sir Robert Jennings dont la Géorgie fait tant de cas ne lui est pas d'un grand secours, puisque c'est l'appréciation *que faisaient les parties* de la situation que la Cour devait apprécier alors que, dans notre affaire vous êtes, Mesdames et Messieurs les juges, appelés à vous prononcer sur la question — objective — de savoir si la négociation ou les procédures prévues par la convention CERD ont permis aux parties de régler leur prétendu différend à son sujet ; car,

3) contrairement à l'article XXIV du traité d'amitié, de commerce et de navigation de 1956 entre les Etats-Unis et le Nicaragua, qui se bornait à une allusion générale à la voie diplomatique, l'article 22 de la convention CERD précise les moyens qui doivent être utilisés pour tenter de parvenir à un règlement.

[Projection n° 3]

30. Monsieur le président, la seconde affaire sur laquelle je souhaite attirer plus particulièrement l'attention est celle des *Activités armées* entre la RDC et le Rwanda, dont la Géorgie prétend que la Russie[104] aurait avancé une interprétation erronée[105]. Cette affaire est importante notamment du fait de la similarité des deux clauses compromissoires contenues, d'une part, dans l'article 22 de la convention CERD et, d'autre part, dans l'article 75 de la Constitution de l'Organisation mondiale de la Santé («qui n'aura pas été réglé par voie de négociation ou par l'Assemblée de la santé») : l'une et l'autre utilisent le futur antérieur en français ; toutes deux prévoient deux moyens de règlement préalables, celui de droit commun en droit international général, la négociation, l'autre spécifique à la convention sur la base de laquelle la Cour est saisie (dans un cas le mécanisme CERD, dans l'autre l'intervention de l'Assemblée générale de la santé). Et les deux dispositions lient les deux modes de règlement par la conjonction «ou». La Cour a donc, très récemment, eu l'occasion de donner son interprétation d'une clause très similaire à l'article 22 ; elle n'a aucune raison de s'en départir.

31. Certes, comme la Géorgie le relève, la Cour avait, au paragraphe 99 de son arrêt de 2006, vérifié s'il y avait un différend au sujet de l'interprétation ou de l'application de la Constitution de l'OMS et avait conclu par la négative. Mais elle ne s'est pas arrêtée là (et la Géorgie se garde bien

[104] Voir EPR, p. 94-95, par. 4.25.

[105] OEG, p. 121, par. 3.50.

de le préciser alors que c'est essentiel) : elle s'est ensuite assurée que les conditions *préalables* fixées par la clause compromissoire n'étaient pas remplies :

> «[L]a RDC n'a en tout état de cause pas apporté la preuve que les autres conditions préalables à la saisine de la Cour, fixées par cette disposition, aient été remplies, à savoir qu'elle ait tenté de régler ladite question ou ledit différend par voie de négociation avec le Rwanda ou que l'Assemblée mondiale de la santé n'ait pu résoudre cette question ou ce différend.» (*Activités armées sur le territoire du Congo (nouvelle requête 2002) (République démocratique du Congo c. Rwanda), compétence et recevabilité, arrêt, C.I.J. Recueil 2006*, p. 43, par. 100.)

En d'autres termes la Cour s'est d'abord demandé s'il existait un différend entre la RDC et le Rwanda sur l'application de la Constitution de l'OMS, puis elle a fait remarquer que, quand bien même c'eût été le cas, les «autres conditions préalables» à sa saisine n'étaient, de toute manière, pas remplies. De même, dans l'affaire des *Plates-formes pétrolières*, et alors que les Parties étaient d'accord sur l'existence de négociations préalables, la Cour n'en a pas moins estimé nécessaire de mentionner, d'une manière brève et objective, que les conditions procédurales prévues par la clause compromissoire étaient dans ce cas également remplies[106].

[Fin de la projection n° 3]

32. Monsieur le président, c'est très exactement cette démarche que la Fédération de Russie prie la Cour de bien vouloir suivre en la présente espèce :

— d'abord, constater qu'il n'existe pas de différend entre les Parties en ce qui concerne l'interprétation ou l'application de la convention — et c'est le cas comme l'a montré Sam Wordsworth ;

— ensuite — et même dans le cas où, sur ce premier point, vous suivriez la Partie géorgienne sur le terrain du différend qu'elle a forgé de toutes pièces pour tenter d'établir votre compétence — ensuite donc, que vous devriez de toute manière décliner son exercice car — et c'est une très fidèle paraphrase de l'arrêt que vous avez rendu dans l'affaire *RDC /Rwanda* — «la [Géorgie] n'a en tout état de cause pas apporté la preuve que les autres conditions préalables à la saisine de la Cour, fixées par [l'article 22 de la convention de 1965], aient été remplies, à savoir

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[106] *Plates-formes pétrolières (République islamique d'Iran c. Etats-Unis d'Amérique), exception préliminaire, arrêt, C.I.J. Recueil 1996 (II)*, p. 809, par. 16 ; voir aussi *Elettronica Sicula S.p.A. (ELSI) (Etats-Unis d'Amérique c. Italie), arrêt, C.I.J. Recueil 1989*, p. 40-41, par. 46.

qu'elle ait tenté de régler ladite question ou ledit différend par voie de négociation» ou par les procédures expressément prévues par la convention CERD.

33. Et je remarque, Monsieur le président, que, dans cet arrêt de 2006, la Cour a relevé très expressément que l'article 75 de la Constitution de l'OMS fixait *deux* conditions *préalables* et elle s'est assurée que ni l'une, ni l'autre n'étaient remplies en utilisant la conjonction «ou» pour signifier clairement qu'il s'agissait de conditions cumulatives : «qu'elle ait tenté de régler ladite question ou ledit différend par voie de négociation avec le Rwanda *ou* que l'Assemblée mondiale de la santé n'ait pu résoudre cette question ou ce différend». C'est à ce «ou», qui figure aussi dans l'article 22 de la convention de 1965, auquel j'en arrive maintenant, Mesdames et Messieurs de la Cour.

II. LES RECOURS PRÉALABLES PRÉVUS PAR L'ARTICLE 22 SONT CUMULATIFS

[Projection n° 4-1]

A. Le texte de l'article 22 dans son contexte

34. Monsieur le président, notre affaire n'est pas la première cause célèbre dans laquelle les Parties s'opposent sur la question de savoir si «ou = et». Je laisse de côté le célèbre jugement du comte Almaviva dans le *Mariage de Figaro*[107], mais, je relève que, dans l'affaire de la *Haute-Silésie polonaise*, la Cour permanente a reconnu le rôle interchangeable de «et» et de «ou» dans certaines situations particulières, et relevé que le mot «et» «dans le langage ordinaire comme dans le langage juridique, peut, selon les circonstances, être aussi bien alternatif que cumulatif»[108] (*Certains intérêts allemands en Haute-Silésie polonaise, compétence, arrêt n° 6, 1925, C.P.J.I. série A n° 6*, p. 14).

[Projection n° 4-2]

35. Cette polysémie vaut tout autant pour «ou» et, du reste, la Cour de Justice des Communautés européennes et les juridictions internes n'hésitent pas, lorsque le contexte le justifie,

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[107] Pierre Caron de Beaumarchais, *Le mariage de Figaro*, acte III, scène 15 ; voir aussi : Lorenzo Da Ponte, *Le nozze di Figaro* (livret pour l'opéra de Mozart), Atto Terzo, Scena quinta.

[108] Dans le même sens, voir aussi, sentence arbitrale, 17 juillet 1965, *Interprétation de l'accord aérien du 6 février 1948 (Etats-Unis c. Italie), RSA*, vol. XVI, p. 94-95 (pour le texte français, voir *RGDIP* 1968, p. 478.

à donner un sens «cumulatif» à «ou»[109]. Il doit en aller ainsi du «ou» de l'article 22 si l'on prend la peine de lire sérieusement cette disposition, sans se borner à la lecture paresseuse qu'en fait la Géorgie[110]. Cette lecture n'a vraiment rien d'une évidence dès lors que l'on réfléchit au contexte et aux conséquences du «ou». Utiliser la conjonction «et» ici aurait rendu la phrase dépourvue de sens : il est évident qu'il n'y a aucun besoin de tenter à nouveau de régler par la conciliation un différend qui l'a déjà été par la négociation. L'introduction d'un «et» aurait conduit à l'absurdité qui est projetée maintenant : «Tout différend entre deux ou plusieurs Etats parties touchant l'interprétation ou l'application de la présente Convention qui n'aura pas été réglé par voie de négociation *et* au moyen des procédures expressément prévues par ladite Convention, sera porté … devant la Cour internationale de Justice.»

Cela n'a aucun sens : on ne peut régler un différend par deux moyens : il l'est par l'un ou l'autre ; en revanche on peut essayer successivement l'un *ou* l'autre — et, ici, on le doit dès lors que, comme je l'ai montré, leur utilisation *préalable* conditionne la compétence de la Cour.

[Projection n° 4-3]

36. Du reste, il est admis que, dans une phrase négative («qui *n'aura pas* été réglé…»), la conjonction «ou» a, en général, un sens coordinateur ; elle est alors synonyme de «ni». Comme *Le bon usage* de Grévisse que j'ai déjà cité, le constate : «*[o]u* s'introduit de plus en plus à la place de *ni*» ; le célèbre traité de grammaire renvoie d'ailleurs à «et» dans ce cadre[111]. Et de donner un exemple tiré de Chateaubriand : «Je n'ai pas daigné ôter mon chapeau à leur cercueil, *ou* consacrer un mot à leur mémoire»[112] — ni ôter mon chapeau, ni consacrer un mot… — ni par la voie de négociation, ni par les procédures expressément prévues par la convention. Il en va de même en anglais, langue dans laquelle le *Cambridge Advanced Learners Dictionary* précise : «*Or : Used after a negative verb to mean not one thing and also not the other (e.g. The child never smiles or*

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[109] Voir CJCE, Grande Chambre, *Commission des Communautés européennes (contrôle des activités en matière de pêcheries)* (aff. C-304/02), 12 juillet 2005, *Rec.* p. I-06263, par. 83; High Court, Queen's Bench Division, Commercial Court, *Nakanishi Kikai Kogyosho Limited* v. *Intermare Transport GMBH* [2009] EWHC 994 (Comm), par. 12; Chambre des Lords, *Federal Steam Navigation* (1974) 1 WLR 505; High Court, Queen's Bench Division, *R* v. *Oakes* (1959) 2 QB 350.

[110] OEG, p. 107, par. 3.25.

[111] *Le bon usage*, préc., p. 1399.

[112] François-René de Chateaubriand, *Mémoires d'outre-tombe*, IV, xi, 4.

laughs)»[113] — «*the child never smiles nor laughs*» *or «and also never laughs*»; «*which is not settled by negotiation [nor] by the procedures expressly provided for in this Convention*» *or* «*which is not settled by negotiation [and also not] by the procedures expressly provided for in this Convention*». Et c'est, bien sûr, la même chose en espagnol et, me dit-on, aussi en russe et en géorgien — je ne vais pas m'aventurer sur le terrain du chinois ou de l'arabe…

37. Du reste, le commentaire de Lerner — qui se borne à une paraphrase de l'article 22, ne conclut nullement, comme le prétend la Géorgie, «that there is no support for a restrictive interpretation of Article 22, of the kind now urged by Russia»[114] ; il ne dit à vrai dire rien d'autre que ce que dit l'article lui-même. Mais je note que le compte rendu de la première édition de l'ouvrage de Lerner dans l'*American Journal* ne tire pas les mêmes conclusions de cette glose que la Géorgie : «A procedure of conciliation is foreseen in cases of such complaints. *Should in such a case no solution be reached by conciliation*, the way to the International Court of Justice is provided for by Article 22.»[115]

38. Seule cette interprétation de bon sens donne à l'article 22 un sens utile dont la Géorgie la prive. Elle est confirmée par les travaux préparatoires de cette disposition.

[Fin de la projection n° 4.3]

B. Les travaux préparatoires de l'article 22

39. J'ai déjà, Monsieur le président, assez largement défloré la présentation de ceux-ci lorsque j'ai montré qu'ils confirmaient que la négociation «ou» le recours aux procédures prévues par la convention étaient des *préalables* indispensables à la saisine de la Cour.

40. Aux très nombreuses déclarations extraites des travaux préparatoires[116], qui *toutes* démontrent la volonté des rédacteurs de conditionner la compétence de la Cour en application de l'article 22 à la saisine préalable du Comité CERD en cas d'échec des négociations, l'Etat demandeur oppose un seul argument : l'article 22 serait issu d'un processus distinct de celui ayant

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[113] *Cambridge Advanced Learners Dictionary*, 3e éd., Cambridge University Press, 2008, p. 1001.

[114] OEG, p. 107, par. 3.41.

[115] Jacob Robinson, *Review: N Lerner, The UN Convention on the Elimination of All Forms of Racial* Discrimination. *A Commentary*, *AJIL*, 1972, vol. 66, n° 1, p. 230 ; les italiques sont de nous.

[116] Voir exceptions préliminaires de la Russie (EPR), par. 4.46-4.49.

abouti à la rédaction des articles 11 et 12[117]. A vrai dire, et comme la Géorgie en convient, la sous-commission, la Commission des droits de l'homme et même, dans un premier temps, la Troisième Commission, ont discuté conjointement du mécanisme CERD et de la saisine de la CIJ et, comme je l'ai montré tout à l'heure, tous les avant-projets de clause compromissoire subordonnaient la compétence de la Cour à l'échec de la phase de conciliation ; je me permets de vous renvoyer, Mesdames et Messieurs les juges, au document figurant à l'onglet n° 4 de votre dossier, dans lequel figure le texte de ces projets.

41. Il est vrai que, pour des raisons d'efficacité des travaux, la Troisième Commission a demandé à son Bureau de préparer un avant-projet de clauses finales[118]. Mais le Bureau n'était pas le forum approprié pour décider de la question fondamentale de la compétence de la Cour, qui était l'un des points d'achoppement des négociations. Très naturellement, la Troisième Commission est donc «convenue que les clauses qui sont indépendantes et qui renvoient à des articles faisant partie du même groupe seraient revisées compte tenu du texte final de la convention»[119]. Fidèle à l'un de ses procédés favoris, la Géorgie ne cite qu'une petite partie de cette phrase — la première[120], mais en se gardant bien d'évoquer la seconde dont il ressort pourtant que les négociateurs n'entendaient pas ériger une barrière autour des dispositions finales mais, qu'ils prévoyaient, au contraire, de les reviser en fonction du texte des autres dispositions substantielles concernant la mise en œuvre de la convention, qui seraient finalement adoptées.

42. Il apparaît donc, Monsieur le président, que la clause compromissoire a d'abord, et longtemps, fait l'objet des discussions relatives aux mesures de mise en œuvre. Ce n'est que tardivement — quinze jours avant l'adoption du texte final de la clause compromissoire, qu'elle en a été détachée et renvoyée aux clauses finales[121]. Du reste, l'avant-projet du Bureau a bel et bien été revisé à la lumière du texte final des dispositions sur la mise en œuvre.

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[117] OEG, appendice, p. 253, par. ii.

[118] Nations Unies, *Documents officiels de la Troisième Commission de l'Assemblée générale, vingtième session,* déclaration du président, doc. A/C.3/SR.1299 (11 octobre 1965), p. 57, par. 2.

[119] Nations Unies, *Rapport de la Troisième Commission de l'Assemblée générale,* doc. A/6181, 18 décembre 1965, p. 36, par. 174 (pour le texte anglais du rapport, voir OEG, vol. II, annexe 40, p. 35, par. 174).

[120] OEG, appendice, p. 263, par. xxvii.

[121] Déclaration de M. Lamptey (Ghana), Nations Unies, *Documents officiels de la Troisième Commission de l'Assemblée générale, vingtième session*, doc. A/C.3/SR.1349 (19 novembre 1965), p. 373, par. 29 (pour le texte anglais de cette déclaration, voir OEG, vol. II, annexe 28, p. 348, par. 29).

[Projection n° 5-1]

43. Le texte proposé par le Bureau — qui est projeté en ce moment et qui, comme les documents dont je vais parler ensuite, se trouve sous l'onglet n° 5 du dossier des juges — se bornait à mentionner les négociations comme seule condition préalable à la saisine de la Cour[122].

[Projection n° 5-2]

44. L'amendement de la Pologne[123] avait pour objet — comme l'a précisé le délégué de ce pays — de faire échec à la possibilité de saisine unilatérale de la Cour :

> «Le texte suggéré par le Bureau de la Troisième Commission rend obligatoire la juridiction de la Cour pour tous les Etats parties à la convention, alors que le Statut de la Cour prévoit que cette juridiction est en principe facultative et n'a qu'exceptionnellement, en vertu de l'article 36, un caractère obligatoire.»[124]

[Projection n° 5-3]

45. Monsieur le président, c'est pour «sauver» la compétence de la Cour tout en préservant celle du Comité que le Ghana, la Mauritanie et les Philippines présentèrent l'amendement qu'il est convenu d'appeler «des trois puissances», dont j'ai déjà dit quelques mots, qui tend «à supprimer la virgule après le mot «négociation» et à insérer les mots «ou par les procédures expressément prévues par ladite convention» entre les mots «négociation» et «sera»»[125]. Il s'agissait donc clairement d'ajouter à la condition des négociations préalables celle du recours au Comité, avec le double objectif de rallier les Etats réticents à la saisine de la Cour et de préserver la compétence du Comité à laquelle les auteurs de l'amendement étaient particulièrement attachés. Et cela a été tout à fait efficace puisque la proposition reçut un large soutien (comme le montrent, entre autres, les extraits d'interventions à la Troisième Commission reproduites à l'onglet n° 3 du dossier des juges)

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[122] Nations Unies, *Projet de convention internationale sur l'élimination de toutes les formes de discrimination raciale, Suggestions relatives aux clauses finales présentées par le Bureau de la Troisième Commission de l'Assemblée générale*, doc. A/C.3/L.1237, 15 octobre 1965, clause viii (pour le texte anglais de la proposition, voir OEG, vol. II, annexe 17).

[123] Nations Unies, *Projet de convention internationale sur l'élimination de toutes les formes de discrimination raciale* Pologne : amendements aux suggestions de clauses finales proposées par le Bureau de la Troisième Commission, Nations Unies, doc. A/C.3/L.1272 (1er novembre 1965), p. 2 (pour le texte anglais de cet amendement, voir OEG, vol. II, annexe 18).

[124] M. Dabrowa (Pologne), Nations Unies, *Documents officiels de la Troisième Commission de l'Assemblée générale*, doc. A/C.3/SR. 1358, p. 426, par. 20 (pour le texte anglais de la déclaration, voir OEG, vol. II, annexe 35, p. 399, par. 20).

[125] Nations Unies, *Rapport de la Troisième Commission de l'Assemblée générale*, doc. A/6181, 18 décembre 1965, p. 36, par. 197, p. 38.

et fut adoptée à l'unanimité[126]. Le *quid pro quo* ainsi réalisé permit de préserver le rôle du Comité et la saisine unilatérale — mais conditionnée — de la Cour.

[Fin de la projection n° 5-3]

C. L'interprétation constante par la Cour de clauses similaires

46. Monsieur le président, dans les cas de clauses compromissoires de ce genre, y compris celles dans lesquelles les conditions préalables à sa saisine sont introduites par la conjonction «ou», la Cour, je l'ai déjà signalé[127], a méthodiquement vérifié la réalisation *des deux* conditions. Elle mentionne d'ailleurs systématiquement qu'il s'agit bien de conditions au pluriel.

47. Tel a été le cas dans l'affaire *RDC c. Rwanda* dans laquelle la Cour a constaté qu'aucune des conditions procédurales prévues par l'article 75 de la Constitution de l'OMS n'était remplie. Il en va de même de l'avis consultatif de 1988 relatif à l'*Obligation d'arbitrage*, dans lequel, malgré ce qu'en dit la Géorgie[128], la Cour a vérifié si, à côté des négociations infructueuses, d'autres modes de règlement des différends avaient été tentés[129], confirmant ainsi le caractère successif des modes de règlement prévus par la section 21 de l'accord de siège entre les Etats-Unis et les Nations Unies : c'est en effet parce qu'il y avait eu des négociations entre le Secrétariat de l'ONU et les Etats-Unis et qu'elles avaient clairement échoué, que la Cour a vérifié si les autres modes de règlement avaient été actionnés.

48. Il en va de même dans le cas dont la Cour est saisie aujourd'hui. Et c'est d'ailleurs bien ainsi que vous l'avez entendu, *prima facie*, Mesdames et Messieurs les juges, dans votre ordonnance de 2008. Dans un premier temps, vous avez constaté que les questions invoquées par la Géorgie n'avaient «manifestement pas été résolues par voie de négociation avant le dépôt de la requête» (*Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie)*, mesures conservatoires, ordonnance du

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[126] Nations Unies, *Rapport de la Troisième Commission de l'Assemblée générale*, doc. A/6181, 18 décembre 1965, p. 39, par. 200 (pour le texte anglais du rapport, voir OEG, vol. II, annexe 40, p. 38, par. 200).

[127] Voir *supra*, par. 30 et 33.

[128] OEG, p. 109-110, par. 3.30.

[129] *Applicabilité de l'obligation d'arbitrage en vertu de la section 21 de l'accord du 26 juin 1947 relatif au siège de l'Organisation des Nations Unies, avis consultatif, C.I.J. Recueil 1988*, p. 34, par. 56.

15 octobre 2008, par. 115). Puis vous avez estimé nécessaire, dans un second temps, de mentionner que le mécanisme CERD n'avait pas été déclenché (*ibid.*, par. 116).

49. Certes, vous n'aviez pas estimé, dans le cadre de cette procédure d'urgence, que «la tenue de négociations formelles au titre de la convention ou le recours aux procédures visées à l'article 22 constituent des conditions préalables auxquelles il doit être satisfait avant toute saisine de la Cour» (*ibid.*, par. 114). Mais, dans le même mouvement, vous avez considéré «que l'article 22 donne en revanche à penser que la Partie demanderesse doit avoir tenté d'engager, avec la Partie défenderesse, des discussions sur des questions pouvant relever de la CIEDR» *(ibid.)*.

50. J'avoue avoir quelque difficulté à comprendre pourquoi il devrait y avoir deux poids, deux mesures : la négociation et les procédures expressément prévues par la convention sont placées sur un pied de stricte égalité par l'article 22 et il me semble que, quel que soit le degré de formalisme qui est requis pour la première, si la Géorgie «doit avoir tenté d'engager» avec la Russie, des discussions sur les questions qu'elle prétend relever de la convention, il doit en aller de même des procédures prévues par la convention : la Géorgie doit avoir tenté d'enclencher le mécanisme de conciliation. Il est clair qu'elle ne l'a pas fait. Cela suffit à établir l'incompétence de la Cour dans cette affaire.

51. Toutefois, avant d'en terminer, Monsieur le président, je souhaite faire une dernière remarque.

52. La présente affaire vous donne, Mesdames et Messieurs les juges, l'occasion de mettre les choses au point en ce qui concerne la relation qui existe entre les différents organes de mise en œuvre, relation qui est soigneusement établie par les rédacteurs de la convention. La Russie ne récuse aucunement *in abstracto* votre compétence de principe, voulue par les rédacteurs de cet instrument et qu'elle a expressément acceptée en retirant sa réserve à l'article 22. Mais il vous appartient de préserver l'intégrité du mécanisme voulu aussi par les négociateurs et accepté par les Parties, et de sauvegarder la place du Comité, en tant que gardien «de première ligne» de la convention. Le système de protection des droits de l'homme, tel qu'il est bâti depuis presque un demi-siècle, plus qu'un demi-siècle, et qui repose largement sur les organes de surveillance, est certainement améliorable. Mais la violation des règles conventionnelles et procédurales n'est pas

la voie de cette amélioration ; et contourner le Comité n'est assurément pas le moyen de renforcer le système.

Mesdames et Messieurs les juges, je vous remercie vivement de votre attention. Je vous prie, Monsieur le président, de bien vouloir donner la parole au professeur Zimmermann.

The PRESIDENT: I thank you, Professor Alain Pellet, for your presentation. Now I give the floor to Professor Andreas Zimmermann.

Mr. ZIMMERMANN: Mr. President, Members of the Court, it is once again an honour to appear before the Court.

LACK OF NEGOTIATIONS REQUIRED BY ARTICLE 22 OF CERD

I. Introduction

1. Members of the Court, Georgia has not even argued that it has ever tried to settle the alleged dispute under CERD by any of the procedures expressly provided for, for that very purpose in the Convention. If it were a dispute, it is for that reason alone that, as my friend and colleague Alain Pellet has just shown, Georgia's reliance on Article 22 of CERD must fail anyhow.

2. But even if one were now to assume, *arguendo*, not only that there had been a dispute under CERD at the time the Court was seised, but also that an Applicant could decide to effectively circumvent the CERD procedures, Georgia's reliance on Article 22 of CERD must still fail since, as I will now demonstrate, Georgia has never attempted to settle the alleged dispute by way of negotiations, as also required by Article 22 of CERD.

II. The notion of "negotiations" under Article 22 of CERD

3. Let me start with some general remarks:

4. As the Court underlined *inter alia* in the *Armed Activities* (2002) case (*Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006,* pp. 40-41, para. 91)[130], negotiations have to be more than mere protests. Rather, an attempt must have been made to

[130]Cf. POR, para. 4.40.

engage the other side so as to provide for a discussion of the specific concerns[131] — concerns which, in the case at hand, must have been based on alleged violations of CERD.

5. Moreover, Article 22 of CERD considers negotiations and the Convention procedures as two equivalent avenues to settle a matter arising under CERD before a case is brought before the Court. Yet, under Article 11, paragraph 1, of CERD the receiving State has what is both, an obligation and an opportunity, to provide the Committee with written explanations or statements clarifying the matter and the action, if any, that may have been taken by that State after a complaint had been brought before the Committee. In the same way negotiations have to provide the State allegedly having violated CERD with the same underlying opportunity of explaining and defending its position.

6. As Article 22 of CERD makes clear, negotiations must specifically relate to a dispute with respect to the interpretation or application "of this Convention". This seems to have been ignored by Georgia which refers to a large number of alleged "contacts" between itself and Russia bearing no relation to racial discrimination and even less to CERD. Such "contacts" cannot therefore amount to negotiations within the meaning of Article 22 of CERD — even more so since, as demonstrated by my friend and colleague Sam Wordsworth, no dispute under CERD existed at the time the case was brought.

7. Moreover, the fact that the negotiations under Article 22 must, by definition, be with respect to disputes under "this Convention" necessarily means that discussions preceding 2 July 1999 — the date of Georgia's accession to the Convention and, accordingly, the entry into force of the Convention as between the parties — could not constitute negotiations within the meaning of Article 22 of CERD. Indeed, Georgia itself acknowledges that CERD does not possess retroactive effect[132].

8. In line with general rules on the representation of States[133], negotiations must also be conducted by organs entitled to represent the State in its external relations. Accordingly,

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[131]International Tribunal for the Law of the Sea (ITLOS), Order of 8 October 2003, Provisional measures, case concerning *Land reclamation by Singapore in and around the Straits of Johor (Malaysia* v. *Singapore), Reports 2003*, Vol. 7, p. 19, paras. 39-40; cf. POR, para. 4.40.

[132]Written Observations of Georgia, para. 5.11.

[133]Cf. Art. 7 of the Vienna Convention on the Law of Treaties.

communications originating from the Georgian parliament cannot be considered relevant for the purpose of Article 22 of CERD[134] either; still less so contacts between Georgian and Russian parliamentarians[135].

9. Georgia is now trying to convince the Court that it and Russia were involved in a broad negotiation process as to the application and implementation of CERD in South Ossetia and Abkhazia ever since 1991/1992. Yet, in view of the obvious jurisdictional hurdle of Article 22 of CERD requiring not only the existence of a dispute, but also negotiations as to this alleged dispute Georgia must attempt to rewrite diplomatic history — an attempt which does not, however, stand to scrutiny.

10. *Inter alia*, Georgia claims that allegations of shipments of arms[136] or allegations of Russia having committed violations of international humanitarian law[137] or finally general allegations of providing support and assistance[138] could constitute the required negotiations under Article 22 of CERD. Yet, even if those allegations were true, how could Russia have known that Georgia was trying to enter into negotiations as to CERD while it was exclusively referring to certain alleged shipments of arms or violations of the laws of war, which allegations, besides, did not involve allegations of racial discrimination.

11. Similarly, information provided by Georgia to the Committee against Torture[139] and the Human Rights Committee[140] is not relevant: neither did it contain allegations of breaches of CERD, nor was it addressed to Russia, as it formed part of Georgia's periodic reports submitted to the respective treaty body only.

12. The same goes for discussions within the United Nations which Georgia now also seeks to portray as negotiations within the meaning of Article 22 of CERD.

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[134]WSG, para. 3.96; footnote 387.

[135]Cf. WSG, para. 3.73; footnotes 324 and 325.

[136]WSG, para. 3.96., footnote 388.

[137]Cf. the letter dated 2 July 1993 from the Head of State of the Republic of Georgia to the President of the Security Council, UN doc. S/26031, referred to in the WSG, footnote 321.

[138]WSG, para. 3.96, footnotes 387.

[139]Cf. WSG, para. 3.73, footnote 328.

[140]Cf. WSG, para. 3.109, footnote 413.

III. Discussions in the United Nations as alleged Article 22 CERD "negotiations"

13. Mr. President, Georgia refers to a whole range of occasions on which it claims to have "negotiated" with Russia over questions of CERD within the framework of the United Nations.

14. Yet, Article 22 of CERD requires negotiations between the parties, to which mere discussions in international fora cannot simply be equated. Georgia seems to disagree, relying on the *South West Africa* Judgments[141] (*South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 319 *et seq.* (346)). Yet a careful analysis reveals that the present case is crucially different to this very early precedent.

15. For one, in the *South West Africa* cases the Court has specifically noted that South Africa itself — unlike Russia — had explicitly acknowledged previous negotiations within the framework of the United Nations (*South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 319 *et seq.* (345)). Moreover, the dispute concerning the status of Namibia opposed South Africa on the one hand and most, if not all, Member States of the United Nations on the other. In *South West Africa*, the Court accordingly and rightfully so, stressed that within the United Nations setting there had been a "common adversary State" (*ibid.*, p. 346, also referring to "collective negotiations with . . . [said] State in opposition").

16. It was only in this quasi-bilateral setting that the Court then considered it unnecessary to require direct bilateral negotiations involving the States concerned. The case at hand is fundamentally different.

17. On the one hand, none of the parties — indeed no third party — had, prior to bringing this case, ever considered or alleged that a dispute had arisen between Georgia and Russia under CERD nor, accordingly, that they had entered into negotiations as to the application or interpretation of CERD.

18. On the other hand, Article 11 paragraph 2, of CERD specifically refers to *bilateral* negotiations before a State is able to submit a matter to the CERD Committee. Yet, it would be contradictory to require formal *bilateral* negotiations before the Committee, while at the same time

[141] Cf. WSG, paras. 359-3.60.

dispensing with such requirement of *bilateral* negotiations when it comes to the much more stringent and adversarial procedure before the Court.

19. Moreover, certain discussions within the United Nations to which Georgia makes reference are also irrelevant, either *ratione temporis* as originating from a period prior to the entry into force of CERD as between the parties[142], or because they emanated from the Georgian parliament and, besides, were directed to the Georgian Government.[143]

20. Yet other documents merely mentioned the presence of CIS peacekeepers without containing complaints about their behaviour[144].

21. Where such complaints were made, they specifically referred to certain provisions of human rights treaties such as Article 8 of the ICCPR or Article 4 of the European Convention on Human Rights[145] — but tellingly did not mention the specific provisions of those treaties dealing with discrimination, and even less CERD. Yet, now, and for obvious reasons, Georgia claims these were further attempts to enter into negotiations under CERD[146].

22. On further occasions complaints of racial discrimination were directed at the local authorities only, while no claims were made that Russian peacekeeping forces were involved in such acts[147].

23. To the extent Georgia alleged that Russia violated international law, those allegations referred to consular relations, conventions on mutual legal assistance and "the . . . territorial integrity of States, sovereign equality of States, inviolability of borders and non-interference in

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[142] Cf., e.g., United Nations Security Council, Letter dated 20 Sep. 1993 from the Permanent Representative of Georgia to the United Nations Addressed to the President of the Security Council, Ann, UN doc. S/26472 (20 Sep. 1993) (WSG, Vol. III, Anns., Ann. 48), p. 2; cf. also, *mutatis mutandis*, Letter dated 25 Dec. 1992 from the Chairman of the Parliament and Head of State of the Republic of Georgia addressed to the Secretary-General, WSG, Vol. III, Anns., Ann. 46. For further examples cf. the references in footnote 17.

[143] Cf. the document referred to in footnote 330 of the WSG (referring to Vol. III, Ann. 82).

[144] Cf. WSG, para. 3.106, footnote 404 referring to a letter dated 14 Apr. 1998 from the Permanent Representative of Georgia to the United Nations addressed to the Secretary-General, UN doc. S/1998/329 (15 Apr. 1998) (preceding the entry into force of CERD as between Georgia and Russia), as well as to the letter dated 20 July 1999 from the Permanent Representative of Georgia to the United Nations addressed to the President of the Security Council, UN doc. S/1999/806 (21 July 1999).

[145] WSG, para. 3.109, footnote 411 referring to WSG, Vol. III, Anns., Ann. 83.

[146] WSG, para. 3.109.

[147] Cf. in particular the truncated quote at the end of para. 3.108. of WSG and *ibid*., footnote 410 referring to WSG, Vol. III, Anns., Ann. 77.

internal affairs of States"[148]. Even the 10 August 2008 Security Council meeting[149] — which Georgia requested after its own armed attack had proven unsuccessful — was solely convened to deal with what Georgia then deliberately and falsely described as a "military aggression launched by the Russian Federation against Georgia"[150].

24. Accordingly, the whole meeting focused on the use of force and violations of international humanitarian law but not on racial discrimination — and even less on violations of CERD.

25. Nor did Georgia complain about Russia violating CERD or otherwise committing acts of racial discrimination in either Abkhazia or South Ossetia within the framework of the OSCE[151].

IV. Discussions in the OSCE as alleged Article 22 CERD "negotiations"

26. Mr. President, this is quite clear, to give but one example, from Georgia's statement to the OSCE Permanent Council of 17 April 2008. This statement — like others[152] — clearly focused on issues of territorial integrity and alleged "illegal annexation" rather than on racial discrimination. What is more, it shows that Georgia perceived Russia as not being a party to the conflict: hence, before the OSCE, in April 2008, Georgia explicitly referred to Security Council resolution 1808 (2008)[153]. This Security Council resolution has, of course, already been discussed by my friend and colleague Sam Wordsworth, so I can limit myself to repeating that the resolution had correctly qualified Georgia and the Abkhaz authorities as disputing parties while referring to Russia as a "facilitator"[154].

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[148] Cf. letter dated 17 Apr. 2008 from the Chargé d'affaires a.i. of the Permanent Misison of Georgia to the United Nations addressed to the Secretary-General, UN doc. A/62/810 (21 Apr. 2008), reproduced in WSG, Vol. III, Anns. Ann. 91.

[149] Cf. for the proposition that this meeting entailed negotiations under Art. 22 CERD, WSG, para. 3.76.

[150] Letter dated 9 Aug. 2008 from the Permanent Representative of Georgia to the United Nations addressed to the President of the Security Council, S/2008/537 (9 Aug. 2008).

[151] Thus, *inter alia*, a 2004 Georgian statement in the OSCE Permanent Council meeting PC.DEL/654/04 (13 July 2004), p. 1 merely referred to "provocative actions of the handful of separatists" and Russia's alleged support for the "separatist mood in the region", cf. MG, Vol. II, Ann. 77, p. 1.

[152] Cf. WSG, Vol. III, Anns., Anns. 113 and 114.

[153] Cf. OSCE, 709th Plenary Meeting of the Council, Statement by the Delegation of Georgia, PC.JOUR/709 (17 Apr. 2008), p. 4 (WSG, Vol. III, Anns., Ann. 112, referred to in para. 3.84. of WSG.

[154] Cf. Security Council resolution 1808 (2008), preambular paras. 4 and 5 as well as operative paras. 1 and 7.

27. Accordingly, Georgia's statement before the OSCE was not meant, and could not be understood by Russia, as aiming to engage the Russian Federation in a negotiation process within the meaning of Article 22 of CERD.

28. In particular, a mere call to engage more actively in the return of IDPs and refugees could not have bona fide been perceived by Russia as a reference to possible violations of its obligations under CERD. This is confirmed by the fact that Georgia, before the OSCE, endorsed the Security Council's call upon "the sides in conflict"[155], i.e., Georgia and Abkhazia, to address the problems of IDPs and refugees.

V. Discussions within the United Nations Geneva Process, the Group of Friends of Georgia and the CIS as alleged Article 22 CERD 'negotiations'

29. A very similar point can be made with respect to discussions within the United Nations Geneva Process. Again, these did not concern CERD issues at all. Georgia now tries to "re-brand" these discussions as negotiations with Russia within the meaning of Article 22 of CERD[156]. However, it suffices to recall that Georgia itself confirmed that Russia had been acting as a mere facilitator in that process[157] and was not involved as a disputing party to negotiations.

30. As to the Group of Friends of Georgia, it similarly suffices to refer to the fact, again acknowledged by Georgia itself[158], that the participating States, including Russia, have a very limited status. Those States are "not the sides to the negotiations and shall not be invited to sign documents agreed upon [during] the negotiations"[159] — unlike the parties, that is, Georgia and Abkhazia.

31. Lastly, Georgia also attempts to rely on developments within the CIS[160]. Some of the documents are irrelevant *ratione temporis*[161] or mention contacts between parliamentarians

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[155] Cf. OSCE, 709th Plenary Meeting of the Council, Statement by the Delegation of Georgia, PC.JOUR/709 (17 Apr. 2008), p. 4 (WSG, Vol. III, Anns, Ann. 112).

[156] Cf. MG, paras. 8.59 *et seq.*

[157] Cf. MG, para. 8.59.

[158] Cf. MG, para. 8.61.

[159] Cf. para. 3 of the Final Statement on the Outcome of the Resumed Meeting Held Between the Georgian and Abkhaz Parties Held in Georgia (17-19 Nov. 1997), reproduced in MG, Vol. III, Ann. 125.

[160] *Cf.* MG, paras. 8.77-8.80.

[161] *Cf.*, e.g., the Decision taken by the Council of the Heads of States of the CIS on further steps towards the settlement of the Conflict on Abkhazia, Georgia of 2 Apr. 1999, thus pre-dating by three months the entry into force of CERD as between Georgia and Russia, to which Georgia refers in its memorial, cf. MG, Vol. III, Ann. 127.

again[162] — or both. Moreover, the documents in question show only Georgia and Abkhazia as being the disputing parties, while Russia is — once again — perceived as facilitating negotiations *between them*, Georgia and Abkhazia, but not as being itself a party to any negotiations with Georgia[163].

32. Mr. President, Members of the Court, the closer we look, the less remains of Georgia's version of alleged negotiations.

33. Of course, Georgia did raise the Abkhazian and Ossetian conflicts in international fora. Mentioning a conflict in international fora is, however, not the same as negotiating with the respondent State about specific treaty breaches.

34. Of course, the Abkhazian and Ossetian conflicts were frequently at the forefront of Georgia's diplomatic communications. But this in fact rather supports Russia's case: the exchanges that Georgia fostered on issues such as its territorial integrity and alleged acts of annexation stand in sharp contrast to the complete absence of references to CERD. The matter was simply not seen by Georgia itself as a topic relevant for negotiations under CERD — until, all of a sudden, Georgia's approach changed after its illegal use of force proved unsuccessful and then Georgia turned to the Court on the basis of Article 22 of CERD.

35. Georgia, likewise, did not seek to settle the alleged CERD dispute by way of bilateral negotiations.

VI. Lack of bilateral negotiations

36. Mr. President, permit me to begin again with three brief remarks of a more general character. *First*, just as in the case of multilateral fora, discussions prior to mid-1999, i.e., prior to Georgia even becoming a party of CERD per se, cannot constitute attempts to settle an alleged dispute under CERD.

37. *Second*, when reading Georgia's written observations, one gains the clear impression that Georgia seeks to have it both ways: it claims that *ever since 1992* unsuccessful bilateral

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[162] Cf. *inter alia* the decision taken by the Council of the Inter-Parliamentary Assembly of the Member-States of the CIS on the situation of conflict settlement in Abkhazia, Georgia (28 Feb. 1998), MG, Vol. III, Ann. 126.

[163] Cf. e.g. the Decision taken by the Council of the Heads of States of the CIS on further steps towards the settlement of the Conflict on Abkazia, Georgia (2 Apr. 1999) (reproduced in MG, Vol. III, Ann. 127), preambular para. 3.

negotiations were ongoing while at the very same time frequently referring to agreements reached with the Russian Federation — not least within the framework of the Joint Control Commission — which *successfully* settled certain issues as to the ongoing conflict in Abkhazia and South Ossetia and provided for *agreed* mechanisms to address certain problems between the parties to the conflict[164], i.e., Abkhazia and South Ossetia on the one hand and Georgia on the other.

38. Finally, *third*, and just as in the case of multilateral discussions, Russia was continuously perceived by Georgia as a third-party facilitator — but why should Russia then consider discussions with Georgia in this context to constitute negotiations under Article 22 of CERD? This brings me now to some specific instances of alleged bilateral negotiations[165].

39. Let me start with a 2003 meeting of the two Heads of States[166], which Georgia alleges amounted to negotiations under CERD. For one, it is worth noting that the Abkhaz side participated in the discussions. Besides, there was agreement that the return of IDPs and refugees was a common principal priority for all participants[167] — hence no disagreement and hence no need to negotiate on this. And finally, of course, the document that Georgia relies on mentions neither CERD nor racial discrimination.

40. In the same vein, during a 2004 meeting in Moscow, Georgia again, according to its own records[168], perceived itself and Abkhazia as those that have to agree on the return of IDPs and refugees, while the Russian representative fully shared Georgia's view.

41. A 2004 exchange of letters between the two Presidents, to which Georgia now also refers as an example of relevant negotiations under Article 22 of CERD[169], in turn did not contain any hint whatsoever of allegations of racial discrimination[170].

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[164] See, *inter alia*, the 1992 Sochi Agreement, the 1992 Final Document of the Moscow meeting between President Yeltsin and President Shevardnadze, the Quadripartite Agreement on the Voluntary Return of Refugees and Displaced Persons, or the 1997 Protocol # 7, Meeting of the JCC for the Georgian-Ossetian Conflict Settlement (13 Feb. 1997).

[165] For a full assessment cf. WOR, specifically paras. 4.90-4.95.

[166] Cf. WSG, para. 3.86.

[167] Cf. also the reference to follow-up negotiations, *ibid*., dealing, however, only with the rehabilitation of certain railroad tracks.

[168] Cf. WSG, para. 3.87 referring to *ibid*, Vol. IV, Anns., Ann. 156.

[169] Cf. WSG, para. 3.107.

[170] Cf. MG, Vol. V, Anns., Ann. 309.

42. Finally, there is the exchange of letters between Presidents Saakashvili and Medvedev of late June 2008, which Ambassador Kolodkin has already dealt with in some detail. For present purposes, let me just underline that these letters, written only weeks before the present proceedings were instituted, clearly spoke of a dispute between "the parties to the conflict"[171], i.e., Georgia and Abkhazia, and made no mention whatsoever of racial discrimination by Russia. It is indeed telling that Georgia *now* claims that Russian peacekeeping forces were "responsible for continuing acts of violence against ethnic Georgians"[172] while no such allegations were made in the letter, which accordingly does not constitute an attempt to negotiate under CERD either.

43. Mr. President, Georgia has attempted to make much of the alleged refusal of Russia to enter into discussions with Georgia after Georgia had already attacked Russian peacekeepers by 7 August and while Russia was exercising its inherent right of self-defence under the Charter of the United Nations.

44. In that regard one has to first note that both, Georgia and Russia, at that time were focused on issues of the legality of the use of force and the necessity to abide by applicable norms of international humanitarian law as constituting *lex specialis* during times of armed conflict (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 240, para. 25; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 178, para. 106).

45. Moreover, it should also be noted that an international negotiation process had already started leading to a ceasefire agreement to be concluded on 12 August 2008, that is, the very day Georgia brought its case before the Court. That agreement, however, confirmed the uniform perception of the parties that the conflict was governed by applicable rules of *jus ad bellum* and *jus in bello*, while issues related to CERD were, once again, neither raised with Russia during the negotiations leading to the adoption of the ceasefire agreement, nor indeed mentioned in the text of the agreement itself.

46. Finally, it must be noted that, as the Russian representative in the Security Council had stated publicly on 10 August 2008, and without Georgia then denying it, that there had been

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[171]MG, Vol. V, Anns., Ann. 309.

[172]Cf. WSG, para. 3.75.

high-level diplomatic contacts between Russia and Georgia even while the armed conflict was ongoing[173]. It is therefore misleading, to say the least, to state that an attempt to start negotiations within the meaning of Article 22 of CERD was unnecessary since, as Georgia now alleges, Russia had refused to enter into negotiations.

VII. Concluding observations

47. Mr. President, Members of the Court, Article 22 of CERD is a compromissory clause that must be taken seriously. It is never a light matter to bring a contentious case before this Court. It is for that reason that the drafters of CERD deliberately decided to require parties to settle disputes arising under CERD by way of negotiations and the procedures expressly provided for in the Convention. It is all the more important to apply these provisions in circumstances where a CERD claim has never before been formulated and where suddenly racial discrimination is alleged on a massive scale.

48. Mr. President, let me summarize: Georgia has — obviously — not made use of the procedures expressly provided for in CERD. For this reason alone, its case cannot be entertained.

49. Moreover, Georgia has neither fulfilled the other procedural requirement set out in Article 22 of CERD, namely, the requirement of negotiations.

50. It is therefore respectfully submitted that for this additional reason, too, the Court lacks jurisdiction to entertain Georgia's Application.

51. Mr. President, this brings me to the end of my presentation and, at the same time, concludes Russia's first round of oral pleadings. Thank you very much for your kind attention.

The PRESIDENT: I thank Professor Andreas Zimmermann for his statement. Now this brings to an end today's sitting. The Court will meet again on Tuesday 14 September at10 a.m. to hear the first round of oral argument of Georgia.

The sitting is adjourned.

The Court rose at 1.20 p.m.

[173]Cf. S/PV.5953, p. 9.