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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2010

Public sitting

held on Tuesday 14 September 2010, at 10 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 mardi 14 septembre 2010, à 10 heures, 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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comme conseillers.

The PRESIDENT: Please be seated. The sitting is now open. This morning, the Court will hear the first round of oral argument of Georgia. I give the floor first to Ms Tina Burjaliani, Agent of Georgia.

1. Ms BURJALIANI: Mr. President, distinguished Members of the Court, as first Deputy-Minister of Justice, it is a great honour for me to appear before the International Court of Justice as the Agent of the Government of Georgia.

2. My Government initiated the present case under the International Convention on the Elimination of All Forms of Racial Discrimination in August 2008. Given the discrimination and expulsions that had occurred since 1991, it has to act to prevent further discrimination in the context of continued ethnic violence, persecution and the displacement of thousands of ethnic Georgians for which the respondent State has responsibility. Russia has pursued the policy of ethnic discrimination over nearly two decades beginning in 1991. Since then, ethnic Georgians have been persecuted and many of them forcibly expelled from the regions of Abkhazia and South Ossetia: the respondent State and the forces under its control and authority have contributed to these acts and failed to prevent their continuance.

3. Mr. President, Members of the Court, it may be said that Georgia has a number of political and legal disputes with Russia on different issues. However, these include but are not limited to the illegal use of force and the continued occupation. However, the dispute before this Court is not about those issues: it is about the ethnic discrimination committed both in and outside the armed conflicts. In 2001, 2005 and 2007, the Committee on Racial Discrimination expressly recognized that ethnic discrimination is a central aspect of the conflicts in Abkhazia and South Ossetia[1].

4. In bringing the present case to the International Court of Justice, Georgia has no other purpose but to prevent discrimination and to allow right of return. In so doing, it invokes the rights and obligations of the 1965 Convention — the first universal human rights treaty that reflects a

[1]United Nations Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Georgia*, UN doc. CERD/C/304/Add. 120 (27 Apr. 2001), para. 4; WSG, Vol. III, Ann. 66; UN Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Georgia* UN doc. CERD/C/GEO/CO/3, (1 Nov. 2005), para. 5; United Nations Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Georgia*, UN doc. CERD/C/GEO/CO/3 (27 Mar. 2007), para. 5; WSG, Vol. III, Ann. 86.

deliberate priority of the international community to suppress racial discrimination, including racially motivated violence. The 1965 Convention prohibits ethnic discrimination and it recognizes a right of return. It relates not only to discrimination against individuals but also to discrimination against entire communities. It encompasses educational and linguistic matters and withholding of nationality — these are all practices that are widely applied by the respondent State in the Georgian territories of Abkhazia and South Ossetia. Due to the policy of the respondent State, almost 10 per cent of the Georgian population is now living in exile in their own country.

5. Some 40,000 ethnic Georgians in the Gali district of Abkhazia have survived at least two waves of ethnic cleansing. Now they are subject to discriminatory measures imposed and implemented by the Russian and Abkhaz authorities, with the aim of forcing them either to abandon their Georgian nationality and citizenship or leave Abkhazia altogether. The increased Russian military presence in Gali since 2008, and Russian control of the administrative boundary line with the rest of Georgia has made the situation for ethnic Georgians in Abkhazia increasingly precarious. This was confirmed by the OSCE in November 2008[2]. The prohibition of education in the mother tongue, compulsory "passportization", forced conscription into the Abkhaz military forces, and restrictions of freedom of movement have all limited the ability of ethnic Georgians in Gali to preserve their identity, language and culture — so reported the OSCE High Commissioner on Nationalities in January 2009[3]. These acts make it impossible for displaced persons to contemplate a return.

6. The situation is no better in the Akhalgori district, which was under the control of the Government of Georgia before August 2008. Akhalgori has always had a majority ethnic Georgian population. As a result of ethnic cleansing, since 2008, the ethnic Georgian population of more than 7,000 in Akhalgori has been reduced to less than 1,000. This population is subject to ongoing acts of ethnic discrimination, including violent attacks against their persons, destruction of their property, denial and restriction of their civil and political rights and other abuses[4]. In April 2009,

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[2]OSCE, *Human Rights in the War-Affected Areas* (2008), p. 7; MG, Vol. II, Ann. 71.

[3]Statement of Knut Vollebaek, OSCE High Commissioner on National Minorities to the 765th. Plenary Meeting of the OSCE Permanent Council (18 June 2009), p. 4; MG, Vol. II, Ann. 73. See also Letter from the OSCE High Commissioner on Minorities, Knut Vollebaek, to the OSCE Chairman, Minister Alexander Stubb (27 Nov. 2008), p. 2; MG, Vol. V, Ann. 312.

[4]International Crisis Group, *Georgia: The Risks of Winter* (26 November 2008), p. 5; MG, Vol. III, Ann. 164.

the Council of Europe found that there was extensive evidence of systematic looting, pillaging, hostage taking and attacks on ethnic Georgians by South Ossetian militias with Russian forces present and doing nothing — and I emphasize the word *nothing* — to prevent ethnic discrimination[5].

7. The conditions of the Georgian population in Gali and Akhalgori have been worsened by the restrictions on freedom of movement over the administrative boundary lines. Russia's military presence and control over the territories has substantially increased since the Decision on Provisional Measures of 15 October 2008; according to the International Crisis Group "Russia is open about its overwhelming control"[6]. The European Union's Independent International Fact-Finding Mission on the Conflict in Georgia in its 2009 Report concludes that the Russian control over South Ossetia has been "decisive", "systematic, and exercised on a permanent basis"[7].

8. In September 2009, the Council of Europe passed a resolution calling on "Russia and the *de facto* authorities of South Ossetia and Abkhazia to fully and unconditionally ensure the right of return of internally displaced persons"[8]. This has been totally ignored by Russia.

9. Russia has repeatedly ignored the right of return. It asserts that ethnic Georgian IDPs "can return *only when all conditions for that exist*"[9]. This violates the 1965 Convention. This is why we have brought the case — to bring to an end years of ethnic discrimination with all its continuing effects. For Russia to say that there is no dispute with Georgia over these matters is simply untenable.

10. The United Nations General Assembly has responded to Russia's continuing refusal to allow displaced ethnic Georgians to exercise their right of return. In 2009, the General Assembly

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[5]Council of Europe, Parliamentary Assembly, *The implementation of Resolution 1633 (2009) on the consequences of the war between Georgia and Russia* (2009), para. 63; MG, Vol. II, Ann. 60.

[6]International Crisis Group, *Abkhazia: Deepening Dependence* (26 February 2010), p. 16; WSG, Vol. IV, Ann. 194.

[7]Independent International Fact-Finding Mission On the Conflict in Georgia, Report Vol. II (Sept. 2009), p. 132; WSG, Vol. III, Ann. 121; *ibid.*, pp. 132-133.

[8]Council of Europe, Parliamentary Assembly, *Resolution 1683, The war between Georgia and Russia: one year after* (29 Sept. 2009), para. 6.2; WSG, Vol. III, Ann. 119.

[9]"Lavrov: Refugees will return to Abkhazia after legal issues are regulated", *Rosbalt* (24 Dec. 2009) (emphasis added); WSG, Vol. IV, Ann. 217; Ministry of Foreign Affairs of the Russian Federation, *Transcript of the Statement and Answers to the Questions of the Mass Media by Sergey Lavrov, Minister of Foreign Affairs of the Russian Federation, at the Joint Press Conference on the Outcome of the Negotiations with Sergey Shamba, Minister of Foreign Affairs of Abkhazia, Moscow, 24 Dec. 2009* (24 Dec. 2009), p. 4; WSG, Vol. IV, Ann. 190.

called for "the development of a timetable to ensure the voluntary, safe, dignified and unhindered return of all internally displaced persons and refugees affected by the conflicts in Georgia to their homes"[10]. Russia rejected the resolution[11]. And still it says there was no dispute. Just last week, on 7 September 2010, another General Assembly resolution recognized, among others, "the right of return of all internally displaced persons and refugees and their descendants, regardless of ethnicity, to their homes throughout Georgia, including in Abkhazia and South Ossetia"[12]. What did Russia do? It rejected the resolution.

11. Mr. President, Members of the Court, the present case is a genuine attempt by Georgia to contribute to the resolution of this long-standing dispute between the two States on ethnic discrimination, in conformity with international law. Georgia has used political and diplomatic forums; however, Russia has been irresponsive to Georgia's claims both at bilateral and multilateral forums. On 12 August 2008, Georgia filed the Application after nearly two decades of futile attempts at engaging with Russia, having raised issues arising under the 1965 Convention on countless occasions in the preceding 17 years. The timing of the filing the Application coincided with the escalation of the events in summer 2008; however, this fact does not make the dispute about the use of force. Mr. President, the Court would have jurisdiction if the Application had been filed two months before or later. There was a long-standing dispute with Russia, and it was about issues that directly relate to matters regulated under the 1965 Convention: about ethnic discrimination, about the right of return, about compulsory passportization, about linguistic rights.

12. Mr. President, Members of the Court, the specific reasons why the Preliminary Objections of the Russian Federation should be rejected will be given by our distinguished counsel.

13. First, Mr. Paul Reichler will respond to Russia's first preliminary objection and demonstrate that there is a "dispute" between Georgia and Russia under the 1965 Convention;

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[10]United Nations General Assembly, *resolution 63/307, Status of internally displaced persons and refugees from Abkhazia, Georgia, and the Tskhinvali region/South Ossetia, Georgia*, UN doc. A/RES/63/307 (30 Sept. 2009); WSG, Vol. III, Ann. 102.

[11]United Nations General Assembly, Rules of Procedure of the General Assembly, Rule 74, UN doc. A/520/Rev.17 (2008). Pursuant to rule 74 of the rules of procedure of the General Assembly, Russia unsuccessfully moved a no-action motion on the draft resolution.

[12]United Nations General Assembly, *Georgia: draft resolution, Status of internally displaced persons and refugees from Abkhazia, Georgia, and the Tskhinvali region/South Ossetia, Georgia*, UN doc. A/64/L.62 (16 July 2010), p. 2.

14. Second, Professor James Crawford will address Russia's second preliminary objection and explain the legal requirements of Article 22 of the 1965 Convention;

15. Third, Professor Payam Akhavan will show that even though Article 22 of the 1965 Convention does not require negotiations, Georgia's efforts to negotiate have been fruitless;

16. Fourth, Professor Philippe Sands will address Russia's third and fourth preliminary objections and demonstrate that the 1965 Convention can be invoked with respect to Russia's actions on the Georgian territories of Abkhazia and South Ossetia. There is no temporal ground for rejecting the jurisdiction of the Court under the 1965 Convention.

17. Thank you, Mr. President and Members of the Court. I now ask you to allow Mr. Paul Reichler to continue with the oral arguments of Georgia.

The PRESIDENT: I thank Ms Tina Burjaliani for her statement. I now give the floor to Mr. Paul Reichler.

Mr. REICHLER:

RESPONSE TO RUSSIA'S FIRST PRELIMINARY OBJECTION

1. Mr. President, distinguished Members of the Court, good morning.

2. I will address the Court today on Russia's first preliminary objection, which was the subject of my good friend Mr. Wordsworth's eloquent presentation yesterday. It is Georgia's submission that even Mr. Wordsworth's eloquence cannot save a preliminary objection that is thoroughly contradicted by the evidence, and therefore without merit.

3. Russia's objection is this: that prior to the filing of the Application on 12 August 2008, there was no dispute between Georgia and Russia regarding any issues that fall under the CERD Convention [start slide 1]. According to Russia — and these are their words — the dispute that Georgia has lodged with the Court is one "in which it is alleged that 'Russia's conduct constitutes ethnic cleansing on a massive scale'. And yet it is a 'dispute' that was never mentioned [— never mentioned —] to Russia until the date of Georgia's Application to this Court . . ."[13] In its written pleadings, Russia asserts on at least six occasions that Georgia "never raised [— it never raised —]

[13]POR, para. 3.3.

beforehand the issue of alleged violations of CERD by the Russian Federation with regard to acts or omissions related to events in Abkhazia or South Ossetia"[14]. Not only Professor Wordsworth, but also Ambassador Gevorgian, Mr. Kolodkin, and Professor Zimmermann sounded this refrain during their oral presentations yesterday. [End slide 1.]

4. If repeated categorical denials like these were sufficient to change history, Russia's objection might have a chance. But the facts are the facts, and they cannot be washed away or altered after the fact. And the facts show that Georgia complained to Russia many times about Russia's role in ethnic discrimination — including its direct participation in massive exercises of ethnic cleansing — commencing in 1992 and regularly thereafter right up until, and culminating in, the days immediately preceding the filing of the Application.

5. In particular, Georgia expressly complained to Russia, repeatedly, about Russia's direct participation in ethnic cleansing of Georgians to expel them from South Ossetia and Abkhazia, which constitutes violations of Articles 2, paragraph 1 *(a)* and 5 of CERD; it expressly complained to Russia about Russia's direct support for third parties engaged in ethnic cleaning operations in those territories, which constitutes a violation of Article 2, paragraph 1 *(b)* of CERD; it expressly complained to Russia about Russia's deliberate failure to prevent ethnic cleansing in areas of South Ossetia and Abkhazia where it exercised effective control, which constitutes a violation of Articles 2, paragraph 1 *(d)* and 3 of CERD; and it expressly complained to Russia about Russia's persistent and long-standing denial of the rights of Georgians previously expelled from these regions to return to their homes, which constitutes violations of Articles 2 and 5 of CERD.

6. The documentary evidence — and there is a mountain of it — shows that Georgia regularly and repeatedly raised disputes with Russia about all of these acts of ethnic discrimination by Russia — all of which plainly constitute violations of CERD — over a period of more than 15 years preceding and leading up to the filing of the Application.

7. The argument over Russia's first preliminary objection turns primarily on this evidence, rather than on the law. The applicable law is clear from the Court's jurisprudence, and the Parties largely adopt the same view of it. Mr. Wordsworth said as much yesterday. First, we agree on

[14]POR, para. 1.6.

what constitutes a "dispute", which is, as stated in the *Mavromattis* case, "a disagreement on a point of law or fact". Second, we agree that, as Mr. Wordsworth said, quoting the Court, whether a dispute exists "is a matter for objective determination" by the Court; it does not depend on the subjective views of the Parties[15]. Third, the Parties agree that the law requires Georgia to demonstrate the existence of a dispute with Russia as of the date of the Application. Fourth, the Parties agree that to establish jurisdiction under Article 22 of the CERD Convention, the dispute submitted by Georgia must concern matters that fall within the scope of the Convention, which in this case means it must involve allegations by Georgia of ethnic discrimination by Russia in violation of specific provisions of the Convention. Fifth, and finally, the Parties agree that it is not necessary for Georgia to have expressly named the CERD Convention, prior to the filing of the Application; it is sufficient that Georgia had accused Russia of conduct that, if proven, would be in violation of the Convention.

8. In regard to this last point, Mr. Wordsworth very helpfully agreed that, under the rule established by the Court in the *Nicaragua* case in 1984, and these are his words: "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"[16]. This, in fact, has been Russia's position since the outset of this case, as reflected in Professor Pellet's remarks during the hearings on provisional measures two years ago[17]. The citation is in the written text of my speech.

9. The applicable law then is clear and undisputed. So let us now look at the evidence.

The evidence

10. As I said, there is considerable documentary evidence showing that Georgia had disputes with Russia over Russia's ethnic discrimination against persons of Georgian descent in South Ossetia and Abkhazia, repeatedly, between 1992 and 2008. Mr. Wordsworth very skilfully tried to

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[15]CR 2010/8, pp. 31-32, para. 15 (Wordsworth); *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion, I.C.J. Reports 1950*, p. 74; *East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995*, p. 100; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 17, para. 21; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 275, para. 87; *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Judgment, I.C.J. Reports 2006*, p. 40, para. 90.

[16]CR 2010/8, p. 32, para. 17 (Wordsworth).

[17]CR 2008/27, para. 15 (Pellet).

convert the quantity of Georgia's documentary evidence to his client's advantage. "How striking" he said "that Georgia goes on to deploy 80 or more documents in . . . its Written Statement in seeking to demonstrate the existence of a dispute — for what should really be a straightforward matter"[18]. He accused Georgia of "seeking to smother the Court in documentation for one reason, which is the absence on the record of the straightforward 'yes' and 'no'"[19].

11. Mr. President, Members of the Court, Georgia need make no apology for submitting 80 or more documents, covering the 16-year period from 1992 to 2008, which show the multiple occasions on which Georgia had disputes directly with Russia over ethnic discrimination by Russia against persons of Georgian descent in South Ossetia and Abkhazia. If the evidence is voluminous, it is because of the volume of Georgia's complaints to Russia in this regard. However, if Mr. Wordsworth wants a straightforward "yes" and "no", he can find it in several places in our 80 plus documents. Here are some of them.

Patent Disagreements on Points of Fact About Ethnic Cleansing

12. On 9 August 2008, the day after Russian troops crossed the border into South Ossetia in large numbers, the President of Georgia made a widely-distributed public statement aimed at Russia and accusing it of direct participation in ethnic cleansing to remove ethnic Georgians from territory under Russian control. [Start slide 2.] President Saakashvili's stated: "Russian troops" and "Russian tanks . . . moved . . . into South Ossetia" where they

> "expelled the whole ethnically Georgian population . . . This morning they've committed the ethnic cleansing in all areas they control in South Ossetia, they have expelled ethnic Georgians living there. Right now they are trying to set up the ethnic cleansing of ethnic Georgians from upper Abkhazia."[20]

This statement is included in your Judges' folder at tab 3. [End slide 2.]

13. The next day, on 10 August, Russia denied these accusations, in remarks to the Security Council by its Permanent Representative to the United Nations. "Yes" and "No". In the same

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[18]CR 2010/8, p. 28, para. 3 (Wordsworth).

[19]*Ibid*.

[20]Press Briefing, Office of the President of Georgia, "President of Georgia Mikheil Saakashvili met foreign journalists" (9 Aug. 2008); WSG, Vol. IV, Ann. 184. For an example of reporting on President Saakashvili's statement, see "Russian bear goes for West's jugular", *Mail on Sunday (London)* (10 Aug. 2008) (reporting President Saakashvili "said Russia was conducting ethnic cleansing of Georgians in Ossetia and Abkhazia's Kodor[i] Gorge region"); WSG, Vol. IV, Ann. 201.

session of the Security Council, Georgia's Permanent Representative accused Russia of trying to "exterminate the Georgian people" in South Ossetia[21]. Russia's Permanent Representative also denied this accusation. Again, a "Yes" and a "No".

14. On 11 August, one day after the military engagements between Georgia and Russia ended and Georgian forces withdrew from South Ossetia, Georgia again accused Russia of carrying out a campaign of ethnic cleansing in South Ossetia to rid it of ethnic Georgians. Georgia's Ministry of Foreign Affairs issued a widely-reported public statement declaring: "Russian servicemen and separatists carry out mass arrests of peaceful civilians of Georgian origin still remaining on the territory of [South Ossetia] and subsequently concentrate them on the territory of the village of Kurta."[22] This is at tab 4 in the Judges' folder.

15. The same day — 11 August — President Saakashvili made the following accusation that was broadcast around the world on CNN: [start slide 3.] The Russian army

> "expelled . . . the whole Georgian population" of South Ossetia, and "right now, as we speak, there is an ethnic cleansing of [the] whole ethnic Georgian population of Abkhazia taking place by Russian troops. I directly accuse Russia of ethnic cleansing there. And it's happening now."[23]

This statement is in the Judges' folder, at tab 5. [End slide 3.]

16. President Saakashvili's accusation was promptly denied by Russia, in the person of its Foreign Minister, Mr. Sergey Lavrov. According to an official transcript published by the Russian Foreign Ministry, in English translation, of course: "Mr. Saakashvili . . . did not feel shy of using the term ethnic cleansings . . . *it was Russia that he accused of carrying out those ethnic cleansings*"[24]. It was *Russia* that Georgia accused of carrying out those ethnic cleansings. Not Abkhaz or Ossetian separatists, as Russia's counsel have told you, but Russia itself that was accused. And this is acknowledged by the Russian Foreign Minister himself. His response was not

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[21]United Nations Security Council, *5953rd Meeting*, UN doc. S/PV.5953 (10 Aug. 2008), p. 16; WSG, Vol. III, Ann. 96.

[22]Ministry of Foreign Affairs of Georgia, *Statement of the Ministry of Foreign Affairs of Georgia* (11 Aug. 2008); WSG, Vol. IV, Ann. 185.

[23]"President Bush condemns Russian invasion of Georgia", *CNN* (11 Aug. 2008) (emphasis added); WSG, Vol. IV, Ann. 205.

[24]Ministry of Foreign Affairs of the Russian Federation, *Transcript of Remarks and Response to Media Questions by Russian Minister of Foreign Affairs Sergey Lavrov at Joint Press Conference After Meeting with Chairman-in-Office of the OSCE and Minister for Foreign Affairs of Finland Alexander Stubb, Moscow, Aug. 12, 2008* (12 Aug. 2008) (emphasis added). WSG. Vol. IV, Ann. 187. See also "Lavrov: 'Russia is frustrated with the cooperation with the Western countries on South Ossetia'", *Pravda* (12 Aug. 2008); WSG, Vol. IV, Ann. 208.

a mere denial of these charges, but a declaration that President Saakashvili should leave office[25] for having made them. To use Professor Wordsworth's simplified but efficient terminology, we have another "Yes" and another "No".

17. Russia's repeated incantation that Georgia's accusation that it had engaged in "conduct constitut[ing] ethnic cleansing on a massive scale" "was never mentioned to Russia until the date of Georgia's Application to the Court, that is, on 12 August 2008"[26], cannot stand in light of the indisputable evidence that between 9 and 11 August, prior to the filing of the *Application*, Georgia publicly accused Russia, on at least four separate occasions, of carrying out ethnic cleansing on a massive scale in South Ossetia and Abkhazia, and Russia responded by denying these accusations.

18. So what is my friend Mr. Wordsworth's response to these four exchanges between Georgia and Russia, these four "yeses" and "nos" regarding Georgia's accusations that Russia was engaged in ethnic cleansing on a massive scale? He says they don't count. *They do not count?* Why not? Mr. Wordsworth tells us they do not count because

> "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 . . . 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"[27].

19. With respect, there are several serious problems with Mr. Wordsworth's approach. In the first place, he is attempting to create new law. To properly seise the Court, it is not enough for him that there is a difference between the Parties over a question of law or fact — which, in regard to Russia's ethnic cleansing, there plainly was prior to the filing of Georgia's *Application* — but it must also be the case, according to Mr. Wordsworth, that this difference not have arisen in the context of what he calls an unlawful or unsuccessful use of force. To this, Mr. Wordsworth would add the further condition that the statements in which the dispute is identified must be such as to facilitate the achievement of its peaceful resolution. Nowhere in the Court's jurisprudence on

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[25]Ministry of Foreign Affairs of the Russian Federation, *Transcript of Remarks and Response to Media Questions by Russian Minister of Foreign Affairs Sergey Lavrov at Joint Press Conference After Meeting with Chairman-in-Office of the OSCE and Minister for Foreign Affairs of Finland Alexander Stubb, Moscow, Aug. 12, 2008* (12 Aug. 2008) (emphasis added); WSG. Vol. IV, Ann. 187. See also "Lavrov: 'Russia is frustrated with the cooperation with the Western countries on South Ossetia'", *Pravda* (12 Aug. 2008); WSG, Vol. IV, Ann. 208.

[26]WSG, para. 3.3.

[27]WSG, para. 33.

whether and in what circumstances a dispute is found to exist are any conditions, such as those proposed by Mr. Wordsworth, mentioned or implied.

20. But Mr. Wordsworth's approach also suffers from another infirmity. It flagrantly distorts the facts in a calculated effort to rob Georgia's complaints of their legitimacy. Mr. Wordsworth is not alone in doing this. It is central to Russia's argument, both in its written and oral pleadings, to depict Georgia as an aggressor, which first resorted to the use of force, and then, only when that failed, it concocted, as a last resort, a case of ethnic discrimination against Russia — not because a legitimate dispute existed, but because this was the only way it could get Russia before this Court. To this end, Russia and its advocates repeatedly call the dispute over ethnic discrimination "artificial" and "manufactured"[28].

21. To make these charges stick, they pretend that history began on the evening of 7 August 2008, when, according to them, Georgian forces initiated an armed conflict with Russia. Only when that effort failed, they claim, did Georgia invent a dispute about ethnic discrimination. What they ignore, and what they attempt to keep the Court from seeing, is that the dispute between Georgia and Russia over ethnic cleansing, and other forms of discrimination against ethnic Georgians in South Ossetia and Abkhazia, did not originate in August 2008. The evidence shows that it originated as far back as 1992, and that Georgia complained about ethnic cleansing to Russia on a regular basis thereafter, over the next 16 years, without satisfactory resolution of these claims. The evidence shows that the dispute between Georgia and Russia over ethnic cleansing did not arise from the armed conflict of August 2008, but that the reverse is true, the armed conflict of August 2008 resulted from more than a decade and a half of ethnic conflict, including ethnic cleansing and other forms of ethnic discrimination by Russia aimed at expelling ethnic Georgians from South Ossetia and Abkhazia and, once it expelled them, keeping them out on a permanent basis.

22. Before turning to this evidence, I must say that it would literally take hours for me to recount every occasion, during this 16-year period, when Georgia accused Russia of ethnic cleansing, or other discriminatory acts that violated specific provisions of the CERD Convention,

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[28]See, e.g,. POR, paras. 3.2, 3.33.

so in my speech I will necessarily limit myself to a few of the more notable examples. However, a more comprehensive collection of the occasions when Georgia and Russia disputed claims regarding Russia's discriminatory conduct falling under the Convention is annexed to Georgia's Written Statement, filed five months ago. The examples cited in my speech, as well as those annexed to the Written Statement are nevertheless new evidence, in the sense of not having been placed before the Court at the time of the provisional measures hearing when the Court found that there was already sufficient evidence, albeit on a prima facie basis, that Georgia had raised disputes under the CERD Convention sufficient to invoke the Court's jurisdiction under Article 22.

EXAMPLES OF PUBLIC STATEMENTS BY GEORGIA BETWEEN 1992 AND 2008 EVIDENCING A DISPUTE WITH RUSSIA ABOUT ETHNIC CLEANSING

23. The Court will recall from Georgia's Memorial that the first round of ethnic cleansing that targeted Georgians occurred in 1992. Yesterday, Ambassador Gevorgian referred to the armed conflicts in South Ossetia in 1991-1992 and Abkhazia in 1992-1993 that resulted in what he called "the displacement of tens of thousands of persons of various ethnicities"[29]. The evidence shows that Georgia contemporaneously accused Russia of direct participation in ethnic cleansing in both territories. In 1992, Georgia declared that Russia was responsible for "the mass shooting" of the civilian Georgian population and "the policy of ethnic cleansing" in South Ossetia. Georgia emphasized that these violent acts of discrimination included "immediate involvement of Russian armed forces"[30].

24. The following year, in April 1993, Georgia complained to the United Nations and the OSCE that "Russian troops" were committing "ethnic cleansing" in Abkhazia. Georgia alleged that "Russia" bore "full responsibility" for the "[s]ystematic mass murders, shootings, and unprecedented harassment of the Georgian population" that was designed to make them "leave their places of residence"[31].

25. Georgia acceded to the CERD Convention on 2 June 1999. I cite these earlier statements, relating to events in 1992 and 1993, not as a basis for Georgia's claims against Russia

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[29]CR 2010/8, p. 12, para. 1 (Gevorgian).

[30]Statement of the Parliament of Georgia (17 Dec. 1992); WSG, Vol. IV, Ann. 124.

[31]Appeal of the Parliament of Georgia to the United Nations, Conference on the Security and Cooperation in Europe, International Human Rights Organizations (1 Apr. 1993) (emphasis added); WSG, Vol. IV, Ann. 125.

in this action, but as evidence that the dispute with Russia over ethnic cleansing is long-standing and legitimate, and not of recent invention. In any event, soon after its accession to CERD, Georgia continued to accuse Russia of direct responsibility for ethnic cleansing of Georgians from Abkhazia and South Ossetia. For example, in October 2001 Georgia publicly declared that Russia's Peacekeeping Forces "committed numerous crimes against the peaceful population". Since their deployment, "the ethnic cleansing against Georgians has not stopped" and "more than 1,700 persons [had been] killed . . ."[32] [Start slide 4.] In February 2004, President Saakashvili issued a widely public statement directly accusing Russia of ethnic cleansing; he said: "most of the population" in Abkhazia had been "ethnically Georgian" but they were "thrown out by Russian troops and local separatists . . . [I]t's primarily [an] issue of our relations with Russia" since "[t]he Russian generals are in command there . . ."[33]. [End slide 4.]

26. President Saakashvili again accused Russia of ethnic cleansing in an address to the European Parliament in November 2006: "[t]he Russian administration first undertook ethnic cleansing" in the early 1990s, and "history seems to be repeating itself", with Russia again "targeting the same victims for a second time"[34]. Yesterday, Mr. Wordsworth dismissed statements such as these as referring only to pre-CERD historical events[35]. But here is President Saakashvili, in November 2006, declaring that that history of ethnic cleansing by Russia, was repeating itself at that very time. He made a similar accusation in September 2007 in a speech to the United Nations General Assembly, when he cited Russia for its: "morally repugnant politics of ethnic cleansing, division, violence and indifference"[36].

27. In April 2008, Georgia wrote to the Security Council that Russia supported and justified "the ethnic cleansing of hundreds of thousands of peaceful citizens"[37]. To the same effect, in

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[32]Resolution of the Parliament of Georgia, Concerning the situation on the territory of Abkhazia (11 Oct. 2001); WSG, Vol. IV, Ann. 145.

[33]"Ask Georgia's President", *BBC News* (25 Feb. 2004) (emphasis added); WSG, Vol. IV, Ann. 198.

[34]Office of the President of Georgia, Press Release, "Remarks by The President of Georgia Mikheil Saakashvili to the European Parliament, Strasbourg" (14 Nov. 2006) (quoting Otar Ioseliani); WSG, Vol. IV, Ann. 172.

[35]CR 2010/8, p. 39, para. 31 (Wordsworth).

[36]United Nations General Assembly, *7th Plenary Meeting, Address by Mr. Mikheil Saakashvili, President of Georgia*, UN doc. A/62/PV.7 (26 Sep. 2007), pp. 18-20; WSG, Vol. III, Ann. 88.

[37]United Nations General Assembly, *Letter dated 17 April 2008 from the Chargé d'affaires a.i. of the Permanent Mission of Georgia to the United Nations addressed to the Secretary-General, Annex*, UN doc. A/62/810 (21 pr. 2008); WSG, Vol. III, Ann. 91.

July 2008, Georgia's Foreign Ministry issued a public statement that Russia's "true designs" in South Ossetia and Abkhazia were "to legalize results of the ethnic cleansing" that had been "instigated by itself and conducted through Russian citizens"[38].

28. Now, what does Mr. Wordsworth have to say about the eight specific occasions I have just mentioned, between 1992 and July 2008, when Georgia publicly made allegations that gave rise to disputes with Russia about the latter's direct responsibility for ethnic cleansing aimed at expelling Georgians from Abkhazia or South Ossetia, or about the other evidence of the existence of these disputes, annexed to Georgia's Written Statement? He dismisses all of this as "background noise"[39]. This was not a careless or casual remark. He used the same phrase three times in the space of three consecutive paragraphs of his speech to describe the statements evidencing Georgia's accusations regarding Russia's role in, and responsibility for, ethnic cleansing[40]. As in: "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."[41] To this I might respond: What was it about the words "I directly accuse Russia of ethnic cleansing . . . And it's happening now" that made it so difficult for Russia to discern the existence of a dispute falling under CERD?

29. As the evidence covering the period from 1992 to 2008 shows, President Saakashvili's accusations against Russia between 9 and 11 August did not mark the beginning of the dispute between the two States over ethnic cleaning, but its culmination. By August 2008, more than 200,000 Georgians had been forcibly expelled from Abkhazia and South Ossetia; Georgia's repeated efforts over more than a decade to persuade Russia to allow the exercise of their right of return had gotten nowhere; they remained excluded; and the situation of the remaining Georgian communities in those two territories was rapidly growing more perilous, notwithstanding Georgia's protests that Russia's peacekeepers were not only failing in their duty to protect them, but actively engaged in harassing them, as Georgia has alleged in the Application.

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[38]Ministry of Foreign Affairs of Georgia, *Comment of the Press and Information Department of the Ministry of Foreign Affairs of Georgia* (17 July 2008) (emphasis added); WSG, Vol. IV, Ann. 182.

[39]CR 2010/8, p. 37, para. 26 (Wordsworth).

[40]CR 2010/8, pp. 37-38, para. 26, 27, 28 (Wordsworth).

[41]CR 2010/8, p. 37, para. 26 (Wordsworth).

30. Russia itself has suggested, at paragraph 3.9 of its written pleadings, that "Armed conflicts commonly arise in the context of some form of inter-ethnic conflict." And so it happened here, in August 2008. Armed conflict arose in the context of an ethnic conflict. But the fact that it did does not make Georgia's long-standing and repeated complaints about Russia's direct responsibility for ethnic cleansing disappear, or rob them of their legitimacy or authenticity.

31. There can be no question, in light of the documentary evidence submitted by Georgia, that Georgia and Russia were in dispute over ethnic cleansing that Georgia attributed to Russia, well before the Application was filed on 12 August 2008. Mr. Wordsworth pointed out that "around a quarter or more of the 80 documents on which Georgia relies are dated prior to the date of Georgia's ratification of CERD"[42]. Even if he were correct, that would leave 60 plus documents evidencing Georgia's complaints against Russia under CERD during the relevant time period.

32. I will now turn to the evidence showing that Georgia raised disputes with Russia not only about ethnic cleansing but also about other forms of ethnic discrimination falling within the Convention. So as not to tax the Court, and because the relevant evidence is set forth more fully in Georgia's Memorial, I will mention only two or three examples under each of these headings, enough to illustrate the point.

OCCASIONS WHEN GEORGIA'S ALLEGATIONS GAVE RISE TO A DISPUTE REGARDING RUSSIA'S SUPPORT FOR ETHNIC CLEANSING BY THIRD PARTIES

33. In regard to the dispute over Russia's support and facilitation of ethnic discrimination by other groups in Abkhazia and South Ossetia, Georgia accused Russia in May 1998 of "assist[ing] separatists in conducting punitive operations against peaceful population" in the Gali district of Abkhazia where "more than 1,500 ethnic Georgians" were murdered and "over 1,000 houses" burnt[43]. Georgia publicly held Russia and its peacekeeping forces "responsible for the tragedy in Gali District" where they "facilitated raids against [the] peaceful population and destruction of villages in their entirety"[44].

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[42]CR 2010/8, p. 39, para. 30 (Wordsworth).

[43]Statement of the Parliament of Georgia, 27 May 1998; WSG, Vol. IV, Ann. 136.

[44]*Ibid.*

34. In October 2005, Georgia accused Russia of providing assistance to separatist militias in Abkhazia and South Ossetia that made it responsible for "killings" of Georgians, "raids and robbery of the civilian population", "appropriating . . . refugee assets", "denial of the right of instruction to citizens in their native language" and "denial of their right to return"; Georgia expressly cited "the role of Russian Federation in inspiring and maintaining these conflicts . . ."[45]. In January 2006, Georgia reported to the Secretary-General that Russia's support for measures to "eliminat[e] . . . Georgian identity and cultural heritage" in the Gali istrict of Abkhazia, including the destruction of "Georgian historical sites, temples and churches", and the denial of the right to be taught in the Georgian language, amounted to Russia's "endorsement of ethnic cleansing"[46].

OCCASIONS WHEN GEORGIA'S ALLEGATIONS GAVE RISE TO A DISPUTE WITH RUSSIA OVER FAILURE TO PREVENT ETHNIC CLEANSING

35. The evidence also shows that Georgia and Russia were in dispute about Russia's responsibility for failure to prevent discrimination against ethnic Georgians in areas of Abkhazia and South Ossetia that it controlled. In September 2006, for example, President Saakashvili publicly accused Russia of failing to prevent violent discrimination against Georgians in areas under its control in Abkhazia, resulting in "more than 2,000 Georgian citizens . . . lo[sing] their lives and more than 8,000 Georgian homes destroyed"[47].

36. In November 2006, Georgia reported to the United Nations Human Rights Committee that in both Abkhazia and South Ossetia "[m]any citizens of Georgia living there are subjected to torture and other ill-treatment; they are victims of other numerous, grave human rights violations", and these "flagrant human rights violations . . . take place" "where the Russian Federation exercises effective control"[48]. In May 2008, Georgia's Minister of Foreign Affairs called upon Russia and the Russian peacekeepers in Abkhazia to provide "explanations" for "why they don't protect ethnic

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[45]Resolution of the Parliament of Georgia Regarding the Current Situation in the Conflict, Regions on the Territory of Georgia and Ongoing Peace Operations, 11 Oct. 2005; WSG, Vol. IV, Ann. 158.

[46]Ministry of Foreign Affairs of Georgia, *Statement by Mr. Irakli Alasania Special Representative of the President of Georgia to UN Security Council*, 26 Jan. 2006; WSG, Vol. IV, Ann. 163.

[47]Office of the President of Georgia, "Remarks of H.E. Mikheil Saakashvili, President of Georgian to the 61st Annual United Nations General Assembly" (23 Sep. 2006); WSG, Vol. IV, Ann. 170. See also Ministry of Foreign Affairs of Georgia, *Statement of Mr. Irakli Alasania, Ambassador Extraordinary and Plenipotentionary, Permanent Representative of Georgia in the UN*, 3 Oct. 2006 (emphasis added); WSG, Vol. IV, Ann. 171.

[48]UN Human Rights Committee, *Third periodic report of State parties due in 2006*, UN doc. CCPR/C/GEO/3, 7 Nov. 2006, para. 22; WSG, Vol. III, Ann. 85.

Georgians in the Gali district from physical violence" that deprives them of basic rights[49]. The Minister "condemn[ed]" these failures "in the strongest terms" and demanded that Georgia receive "receive . . . clarifications" from its Russian "colleagues" and "the Russian peacekeepers"[50].

37. Yesterday, Russia attempted to extract currency from the fact that Georgia "agreed" to the deployment of Russian soldiers to South Ossetia and Abkhazia and, in Mr. Wordsworth's words, it "warmly welcomed them"[51]. History is replete with examples of such agreements between small countries, like Georgia, and very big and militarily powerful neighbours, like Russia, providing for the stationing of military forces of the stronger power in the territory of the weaker one. It is possible to question whether such arrangements are negotiated in conditions of true equality and independence, especially where, as here, at the time Georgia was a newly independent State, previously been under the sovereignty to Russia or its predecessor.

38. Whatever the circumstances that brought about the initial arrangement, the evidence shows that Georgia, faced with the presence of Russian soldiers, or peacekeepers, in South Ossetia and Abkhazia, alternated between cajoling them to better protect vulnerable communities of ethnic Georgians still residing in those territories, and criticizing them for their failure to do so, and, as I will come to in a moment, criticizing them for refusing to allow Georgians displaced by previous rounds of ethnic cleansing from returning to their homes in the two territories. The document from which Mr. Wordsworth deduced the "warm welcome" given to the Russian forces was written in 1999[52]. Russia's written pleadings supplied no documentation of any similar praise for Russian peacekeepers after April 2001. The record shows that, for the seven years immediately preceding the Application, Georgia's predominant view — expressed publicly and directly to Russia on numerous occasions — was that the Russian peacekeepers were themselves engaging in specific practices which, in fact, violated the CERD Convention.

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[49]Ministry of Foreign Affairs of Georgia, *Transcript of the briefing of Minister of Foreign Affairs of Georgia Eka Tkeshelashvili*, 21 May 2008; WSG, Vol. IV, Ann. 180.

[50]*Ibid*.

[51]CR 2010/8, p. 33, para. 19 (Wordsworth).

[52]*Ibid*.

OCCASIONS WHEN GEORGIA'S ACCUSATIONS GAVE RISE TO A DISPUTE WITH RUSSIA OVER DENIAL OF THE RIGHT OF RETURN

39. As I have mentioned, the evidence further shows that Georgia repeatedly accused Russia — and particularly the Russian peacekeepers — of forcibly preventing ethnic Georgians, who were forced to flee their homes in Abkhazia and South Ossetia, from exercising their right of return. As early as May 1997, Georgia complained that the victims of ethnic cleansing in Abkhazia could not exercise their right to return because the Russian peacekeepers performed "the functions of [a] border guard" by physically obstructing them[53].

40. In March 2002, Georgia again accused Russia and its peacekeepers of serving "in reality" as "border guards between Abkhazia and the rest of Georgia and failing to perform the duties, envisi[oned] by their mandate", of facilitating the return of victims of ethnic cleansing[54]. In July 2006, Georgia wrote to the Secretary-General accusing Russia of "bringing about permanent attempts to legalize the results of ethnic cleansing" and a "massive violation of fundamental human rights" of the Georgian population that had been forcibly expelled from Abkhazia and South Ossetia, and was prevented from returning by the Russian border guards who controlled entry into these territories[55].

41. In June 2008, President Saakashvili wrote to President Medvedev proposing that Russia withdraw its forces from Georgian-populated areas in Abkhazia, so that previously-expelled Georgians could return[56]. President Medvedev rejected this proposal, as well as President Saakashvili's subsequent one that Russia facilitate the "[s]afe and dignified return of refugees and IDPs"[57]. President Medvedev rejected the return of Georgian refugees to Abkhazia as "untimely", notwithstanding the fact that Georgia had been calling consistently upon Russia to allow the return of its IDPs, as the evidence shows, for more than 12 years[58]. Plainly, Georgia and

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[53]Decree Issued By the Parliament of Georgia on Further Presence of Armed Forces of the Russian Federation Deployed in the Zone of Abkhaz Conflict under the Auspices of the Commonwealth of Independent States, 30 May 1997; WSG, Vol. IV, Ann. 132.

[54]Resolution of the Parliament of Georgia on the Situation in Abkhazia, 20 Mar. 2002; WSG, Vol. IV, Ann. 146.

[55]UN 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; WSG, Vol. III, Ann. 82.

[56]Letter from President Mikheil Saakashvili to President Dmitry Medvedev, 24 June 2008; MG, Vol. V, Ann. 308.

[57]Letter from President Mikheil Saakashvili to President Dmitry Medvedev, 24 June 2008; MG, Vol. V, Ann. 308.

[58]Letter from President Dmitry Medvedev to President Mikheil Saakashvili, 1 July 2008; MG, Vol. V, Ann. 311.

Russia were in dispute over the exercise of the right of return of ethnic Georgian IDPs, a right guaranteed by Article 5 of the CERD Convention, since long before the Application was filed.

42. Yesterday, Mr. Wordsworth acknowledged that Russia has quote — his words — "reiterated and reaffirmed as fundamentally important the right of return for all refugees to Abkhazia"[59]. There can be no question then, that Georgia's repeated complaints between 2002 and 2008, that Russian troops were discriminating against ethnic Georgians displaced from Abkhazia by preventing them from returning to their homes in that territory, evidenced a cognizable dispute under the CERD Convention.

43. This is the conclusion reached by the Court in its Order on Provisional Measures. In that Order, the Court observed that:

> "Georgia contends that the evidence it has submitted to the Court demonstrates that events in South Ossetia and in Abkhazia have involved racial discrimination of ethnic Georgians living in those regions and therefore under the provisions of Articles 2 and 5 of CERD";

further that Georgia,

> "alleges that displaced ethnic Georgians, who have been expelled from South Ossetia and Abkhazia, have not been permitted to return to their place of residence, even though their right of return is expressly guaranteed by Article 5 of CERD…".

In regard to these allegations, the Court found that: "the acts alleged by Georgia appear to be capable of contravening rights provided for by CERD, even if certain of these alleged acts might also be covered by other rules of international law, including international humanitarian law"; and that "this is sufficient at this stage to establish the existence of a dispute between the Parties falling within the provisions of CERD . . ." (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Provisional Measures, Order, I.C.J. Reports 2008*, para. 112).

44. Against all the evidence now before the Court, including all the evidence regarding Georgia's many complaints to Russia that were made prior to August 2008 — about ethnic cleansing or other forms of ethnic discrimination by Russia — none of which had been made available to the Court at the time of the provisional measures hearing.

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[59]CR 2010/8, p. 35, para. 22 (Wordsworth).

45. Against all of this evidence showing disputes between Georgia and Russia over acts by Russia capable of contravening rights provided by CERD, starting as far back as 1992 and continuing right up until the filing of the Application on 12 August 2008, Russia has served up a number of arguments still attempting to deny the existence of any such dispute. None of Russia's arguments is persuasive.

RUSSIA'S ARGUMENT THAT THE DISPUTE UNDER CERD IS NOT THE "REAL" DISPUTE BETWEEN THE PARTIES

46. In particular, Russia protests repeatedly that the "real" dispute underlying this case is between Georgia on the one hand and South Ossetia and Abkhazia on the other, in regard to the legal status of those territories. Russia makes this assertion, in identical language, three different times in the first 60 pages of its written pleading. And we heard it again from Mr. Wordsworth, who said yesterday: "Mr. President, Russia's case is not . . . 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."[60] Russia's point is, according to Mr. Wordsworth, that "the *real* dispute, or should I say disputes . . . are between Georgia on the one hand and South Ossetia on the other, in relation to the legal status of Abkhazia and South Ossetia"[61].

47. Now, the first part of Mr. Wordsworth's statement contains a very interesting concession: that the existence of a separate and justiciable dispute under CERD is not excluded by the existence of other disputes between Georgia and Russia, or between Georgia and anybody else. In other words, there may be two or more separate disputes and one of these may be a justiciable dispute under CERD. That being the case, why then should the Court not take jurisdiction over the dispute raised under CERD? Mr. Wordsworth comes up empty on that one. All he can say is the "real" dispute concerns the legal status of Abkhazia and South Ossetia. But what makes that dispute any more "real" than any of the others? What makes it more "real" than the dispute arising under CERD? Because Russia says it is? With respect, they do not get to decide which dispute Georgia brings to the Court. And once it is here, it is a matter of "objective determination" by the Court whether the dispute exists. Even if, *quod non*, the dispute over the legal status of Abkhazia

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[60]CR 2010/8, p. 38, para. 29 (Wordsworth).

[61]*Ibid*.; emphasis added.

and South Ossetia enjoyed some sort of hierarchical superiority over the dispute under CERD, which Georgia of course denies, that would not prevent the Court from exercising jurisdiction over the dispute under CERD.

48. Under the Court's well-established jurisprudence, it is immaterial that there are *other* disputes between Georgia and Russia, apart from the dispute under CERD. As the Court has previously held, "no provision of the Statute or Rules contemplates that the Court should decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, however, important" (*United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Judgment, I.C.J. Reports 1980,* p. 20, para. 36; *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988,* p. 69, para. 54; *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), I.C.J. Reports 1988,* p. 69, para. 96). In the Bosnian *Genocide* case, the Court exercised jurisdiction over a human rights claim under Article IX of the Genocide Convention even though it, too, arose in the context of a wider and more complex dispute over the legal status of territory and armed conflict (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II),* p. 617, para. 34).

49. Even when the same facts give rise to breaches of multiple international obligations, only some of which fall under a compromissory clause, there is still no basis for the Court to decline jurisdiction. This is clear from the *Oil Platforms* case, where the United States asserted a preliminary objection to the Court's jurisdiction under the US-Iran Treaty of Amity on the ground that Iran's claims raised issues relating to the use of force, which it argued, did not fall within the ambit of that Treaty. The Court rejected that argument, holding that "violation of the rights of one party under the Treaty by means of the use of force is as unlawful as would be a violation by administrative decision or by any other means" (*Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II),* pp. 811-812, para. 21). Thus, "[m]atters relating to the use of force" were "not *per se* excluded from the reach of the Treaty". Here, Russia cannot circumvent the Court's jurisdiction under the CERD Convention

by arguing that the discriminatory actions of which it has been accused were carried out by means of, or in the context of, a use of force.

50. In essence, Russia's argument is that there is an overarching dispute between the Parties regarding the use of force, and that this dispute necessarily takes priority over any subsidiary dispute about ethnic cleansing carried out in that context. This argument is wrong on the facts, for reasons I will come back to in a moment. But it is also wrong, and dangerous, on the law. Ethnic cleansing is necessarily carried out by use of force, or at least the threat of force. Entire communities of ethnic minorities do not normally abandon their homes and villages *en masse* unless they are forced to do so, and this is not uncommonly done at the point of a gun. If the use of force were sufficient to preclude jurisdiction over a claim of ethnic cleansing under the CERD Convention, what practical good would the Convention be as an instrument to address this violent and most abhorrent form of ethnic discrimination? Such a result could not possibly be consistent with the object and purpose of the Convention, or the intentions of its framers.

51. As I indicated, Russia is also wrong on the facts. The armed conflict between Georgia and Russia broke out on the night of 7-8 August 2008. Accordingly, all of Georgia's many complaints of ethnic cleansing by Russia between April 1992 and July 2008, which I described earlier, were made in advance of, and outside the context of, this armed conflict. Similarly, Georgia's complaints of ethnic cleansing after 10 August 2008, when its forces stopped fighting and withdrew from South Ossetia, were made subsequent to the armed conflict. The existence of an armed conflict between Georgia and Russia between 7 and 10 August cannot, therefore, preclude Georgia from making a claim of ethnic cleansing under the CERD Convention, or deprive the Court of jurisdiction over that claim.

RUSSIA'S ARGUMENT THAT THERE CANNOT BE A DISPUTE UNDER CERD UNLESS GEORGIA HAS INITIATED AND COMPLETED PROCEEDINGS UNDER ARTICLE 11 OF THE CONVENTION

52. Russia's final argument in support of its first preliminary objection is that the rules customarily applied by the Court, to determine whether a legal dispute exists, do not apply in regard to claims made under the CERD Convention. Mr. Wordsworth spent a considerable amount of time on this point yesterday. Professor Crawford, who follows me to the podium, will analyse

the texts of both Article 22 and Article 11 of the Convention, as well as other relevant provisions, and address and refute Mr. Wordsworth's argument.

CONCLUSION

53. Mr. President, Members of the Court, I have come to the conclusion of my speech. I will sum up by emphasizing these six points. As regards the facts: *First*, prior to filing its Application on 12 August 2008, Georgia made allegations about Russia's conduct that gave rise to disputes with Russia about ethnic discrimination by Russia against persons of Georgian ethnicity in South Ossetia and Abkhazia; *Second*, these disputes concerned direct participation by Russia in ethnic cleansing and other forms of discrimination against ethnic Georgians in these territories, direct support by Russia for third parties engaged in the same activities, deliberate failure by Russia to prevent these activities by third parties in areas under effective Russian control, and Russia's intentional prevention of ethnic Georgians, previously expelled from South Ossetia and Abkhazia, from returning to those territories. *Third*, that each of these acts attributed by Georgia to Russia falls within the scope of the CERD Convention, and evidences a dispute regarding the interpretation or application of that Convention.

54. As regards the law: *Fourth*, under the long-established and well-settled jurisprudence of the Court, it was not necessary for Georgia to expressly invoke, or specifically mention, the CERD Convention in order to establish a dispute under that Convention, over which the Court can exercise jurisdiction under Article 22; there is no rigid verbal formula for establishing a dispute under a treaty's compromissory clause; the rule is satisfied if the dispute concerns the subject matter of the treaty; Russia, as affirmed by Mr. Wordsworth yesterday, agrees with this proposition. *Fifth*, the fact that disputes between the Parties under the CERD Convention existed alongside, or within the overall context of, a more complex matrix of other disputes, which are themselves outside the scope of Article 22's compromissory clause, does not preclude the Court from exercising jurisdiction over the CERD-related disputes. *Sixth*, and finally, in particular, even if the disputes in relation to matters falling under the CERD Convention arose in the context of an armed conflict, or if the same acts also constitute violations of international humanitarian law, the Court still has jurisdiction over the CERD-related disputes under Article 22.

55. For these reasons, Mr. President, Members of the Court, Russia's first preliminary objection is without merit, and does not constitute a bar to the exercise of jurisdiction over Georgia's claims. I thank you for your courteous attention, and ask that you invite Professor Crawford to the podium.

The PRESIDENT: I thank Mr. Paul Reichler for his statement and then now I invite Professor James Crawford to take the floor.

Mr. CRAWFORD:

JURISDICTION OF THE COURT UNDER ARTICLE 22 OF CERD (RUSSIA'S SECOND PRELIMINARY OBJECTION)

I. Introduction

1. Mr. President, Members of the Court, it is my task to address to address Russia's second preliminary objection — that this Court lacks jurisdiction by reason of Article 22 of CERD. Russia makes a two-fold claim: first, that Article 22 subordinates the jurisdiction of this Court to the procedures set out in Part II of CERD; second, that the procedural preconditions are not alternatives but must be fulfilled cumulatively before a State Party may have recourse to this Court.

2. It is the position of Georgia that Article 22 does not impose any preconditions for resort to compulsory dispute settlement provided there is a dispute arising under the Convention. All it does is to require a simple finding of fact by the Court, namely, that there is a dispute which is not already settled either by negotiation or by recourse to the other procedures in the Convention. In the alternative, even if negotiations or resort to other procedures were preconditions under Article 22, these procedures are not cumulative, it is sufficient that any one of them is satisfied. Here, not merely was there, and I quote the Court, "some attempt . . . to initiate . . . discussions on issues that would fall under the Convention"; there were in fact extensive negotiations on such issues prior to the Application. My colleague, Professor Akhavam, will deal with the facts of these negotiations. It is my task to deal with the legal question, what Article 22 actually requires.

II. The Court and the Committee under the CERD

3. Mr. President, Members of the Court, we saw yesterday some impressive examples of textual exegesis from Messrs. Wordsworth and Pellet, I thought for a while we were in a Faculty of Scriptural Studies. But it was exegesis gone wild, producing results that cannot possibly have been intended. Let me illustrate with an example.

4. I am a small, newly independent State, recently separated from my parent State which I will call State B, "B" for "bear". The separation was acrimonious, and State B takes measures against villagers in its territory who share the same ethnicity and language as my own population. These measures involve ethnic cleansing and the matter is extremely urgent. I believe the measures violate the CERD. I try to negotiate with my powerful neighbour but the negotiations fail at once, and State B refuses further negotiations. There is a dispute as defined by the Court in numerous cases, though not in the special sense that Mr. Wordsworth discerned yesterday, to which I will return. I wish to come to this Court, believing that I have a strong case for interim measures. But before taking that drastic step I have to consult an international lawyer and I choose Professor Pellet, who, in his hitherto unaccustomed role as a legal formalist, tells me "No". According to him, the word "or" third occurring in Article 22 of the CERD actually means "and", with the result that I am compelled to go to the CERD Committee under Article 11, and thence — because Article 22 refers to the "procedures [in the plural] expressly provided in this Convention" and the Conciliation Commission is such a procedure — I have to go to an *ad hoc* Conciliation Commission under Article 12 as well. The matter — this is the word used in Article 13, paragraph 1 — will then go back to the Committee under Article 13. I take Professor Pellet's advice and ask him how long will this take, and in response I am helpfully provided, for Professor Pellet is nothing but helpful, with a list of 12 steps, specifying each step, its provenance in Part II, and how long it may take. You will find a translation of Professor Pellet's list at tab 7 in your binder. It contains 12 steps, with a total elapsed time of at least two years, and probably three to four years. You can see the time that it will likely take in the third column of the table. There are three stages of negotiations in the process — numbers one, five and 12 — whereas negotiations have already failed and failed utterly. In the end the recommendations of the Commission are relayed to the respondent State, which is free to reject them. The Commission's decisions are not

binding; it can only recommend. It cannot order provisional measures. It cannot decide points of law. Faced with an intransigent State, it is helpless.

5. I thank Professor Pellet for his advice, and I proceed under Part II, which takes many years and is predictably utterly futile. By now of course the ethnic villages in State B lie empty and ruined, while the refugee camps on my side of the border are full to overflowing with destitute people. The ethnic cleansing is over. But, as Professor Pellet remarks to me as he leaves, the integrity of the CERD Committee has been upheld. And the recommendation of the *ad hoc* Conciliation Commission — delivered two years too late —, recommending that urgent measures be taken to stop ethnic cleansing in State B, will be much cited in the literature!

III. The alleged special meaning of "dispute"

6. Mr. President, Members of the Court, let's have a sense of reality, and now it is my turn to do the exegesis. I will deal with three issues: first, the alleged special meaning of "dispute" in the CERD; second, the question whether Article 22 establishes procedural preconditions, and third, whether these are cumulative or alternative.

7. In the Preliminary Objections, Russia applied the Court's jurisprudence to the meaning of a "dispute"[62], we do not think they got it right, but that is what they did. But yesterday my friend Mr. Wordsworth suggested for the first time that the word "dispute" in Article 22 has a "special meaning" — a special meaning in the sense of Article 31, paragraph 4, of the Vienna Convention — in which case the Court's general jurisprudence on the meaning of "dispute" would be irrelevant.

8. The point can be dealt with very briefly. Russia has the burden of establishing this special meaning and that burden has not been discharged. It is true that a treaty could stipulate that a complaint did not become a dispute until some procedure had been applied: this is what the Indus Waters Treaty of 1960 expressly does[63]. Article IX, paragraph 2, of that Treaty provides that in defined circumstances "any difference [which has been considered by the Indus Waters Commission] may either be dealt with by a Neutral Expert in accordance with Part 2 of Annexure F

[62]POR, para. 3.17 *et seq.*

[63]India-Pakistan-IBRD, The Indus Waters Treaty, Karachi, 19 Sep. 1960 with Protocol, 27 Nov., 2 and 23 Dec. 1960; *UNTS*, No. 6032.

or be deemed to be a dispute to be settled" by arbitration under Annexure G — it is a complicated provision but it is quite clear that something is deemed to be a dispute at a certain point of time.

9. That provision is quite explicit in departing from the general international law definition of a "dispute", and it is entirely internally consistent in its terminology. The CERD, by contrast, is neither explicit nor consistent. Russia's argument that States only become parties to a "dispute" under CERD — and therefore entitled to invoke the Court's jurisdiction under Article 22 — if they complete the process outlined in Article 11 — which refers to "matters" — and then move on to Article 12 — which refers to "disputes" — is utterly defeated by the terms of Article 13. That Article, which elaborates the procedures of an Article 12 Commission, uses the words "matter", "dispute" and "issue" interchangeably. The first sentence of Article 13 refers to a situation where the "Commission has fully considered the matter", the second sentence refers to "parties to the dispute". This is compelling evidence that the drafters did not intend there to be any difference in meaning between the two words, at least not the decisive difference Russia claims.

10. A more plausible interpretation of Article 11 is that the CERD Committee was intended to receive communications from any State party to the CERD, whether or not it is a party to a dispute or difference, and that is precisely what Article 11, paragraph 1, says. Remember, this is 1965, your Court is about to hear the *Second South West Africa* cases; there is an influential body of professional opinion which limits standing to sue to directly injured States. The more flexible notion of a State party bringing a matter to the attention of the Committee was entirely appropriate for the Racial Discrimination Convention given its subject-matter. This in a world which as yet knew not the magic of obligations *erga omnes*!

IV. The meaning of "which is not settled"

11. I turn next to the meaning of the phrase "which is not settled" in Article 22, and I do so on the basis that the dispute settlement clauses of the Convention, in particular Article 22 providing for recourse to this Court, were intended to be effective. The little parable I told you earlier showed that the other interpretation makes them utterly ineffective.

(a) ***The ordinary meaning of Article 22 interpreted in its context***

12. [Start slide 1.] You will see on the screen the text of Article 22. Since Professor Pellet read it, I think, three times yesterday, I won't read it today.

13. I noticed the Court already interpreted Article 22 in its Order of 15 October 2008 in the following terms:

> "the phrase 'any dispute . . . which is not settled by negotiation or by the procedure expressly provided for in this Convention' does not, on its plain meaning, suggest that formal negotiations in the framework of the Convention or recourse to the procedure referred to in Article 22 thereof constitute preconditions to be fulfilled before the seisin of the Court . . . however Article 22 does suggest that some attempt should have been made by the claimant party to initiate, with the respondent party, discussions on issues that would fall under CERD"[64].

In the present case, as you held in the next paragraph of the Order, some attempts had indeed made to initiate "discussions on issues that would fall under CERD"[65]. You accordingly upheld your prima facie jurisdiction to hear the case, rejecting Russia's arguments to the contrary.

14. I suggest that what was a "plain meaning" in 2008 is a "plain meaning" now, and that on its face the text of Article 22 does not support Russia's position.

15. Russia claims that Article 22 imposes three conditions that must be satisfied, and all satisfied, before Georgia is entitled to have access to the Court:

— first, Georgia must have complied with some general "duty to settle the dispute before seising the Court";

— second, Georgia must have complied with the obligation to negotiate with Russia; and

— third, Georgia must have had recourse to "the procedures expressly provided for in [the] Convention"[66], that is to say, in Articles 11 and 12.

16. Yet none of these conditions are to be found in the actual text of Article 22. Specifically:

— Article 22 says nothing — expressly or impliedly — about any general "duty to settle the dispute before seising the Court";

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[64]Order of 15 October 2008, *I.C.J. Reports 2008*, p. 388, para. 114

[65]*Ibid.*, para. 115.

[66]POR, para. 4.5 *et seq.*

— Article 22 says that a State Party may unilaterally refer a dispute to the Court if that dispute "is not settled by negotiation", or the other means, but it does not establish any express obligation to negotiate;

— Article 22 provides that a State Party may unilaterally refer a dispute to the Court if it "is not settled by . . . the procedures expressly provided for", but it does not establish any obligation to have recourse to these procedures. [End slide 1.]

17. If the drafters of the Convention had intended to include the conditions that Russia reads into the text, they could and would have done so. Article 11 is an example of the drafter's approach when it does impose procedural conditions.

18. Article 11, paragraph 3, imposes another explicit precondition, the exhaustion of local remedies before the claimant State files a renewed application to the Committee. It is perfectly clear:

> "The Committee *shall* deal with a matter referred to it in accordance with paragraph 2 of this article *after* it has ascertained that *all available domestic remedies* have been invoked and exhausted."(Emphasis added.)

When the drafters wanted to impose mandatory conditions, whether by reference to the State Party or the Court or Tribunal, they knew how to do so. Article 22 nowhere provides that the Court shall have regard to a precondition, that all available remedies referred to in Article 11 have been invoked and exhausted. That language could have been used. Given the contrast with Article 11, it has to be concluded that this was a deliberate choice.

19. Equally, the drafters of the Convention agreed that it was sufficient that the dispute "*is not settled"*. That is a statement of fact, whether a dispute is settled or not. There was no express language of priority. They did not even use the phrase "cannot be settled" by negotiation or other means, as drafters have done in many other conventions (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2,* p. 13; *South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 435; *Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 15). The difference was noted by Judge Jessup, for example, in the *South West Africa* cases, where he said: "The phrase 'cannot be settled' clearly must mean something more

than 'has not been settled' [or 'is not settled]" (*South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 435)[67].

20. The ordinary meaning of Article 22 does not impose any general duty to attempt to settle the dispute before seising the Court. Nor does the ordinary meaning require the exhaustion of other optional means for the pacific settlement of disputes. This is highlighted by the context of the Convention, including the separate location of Article 22 in Part III, the different drafting approach as contrasted with the detailed and conditioned complaint procedures in Part II, as well as the adoption of Article 16 at the end of Part II of the Convention.

(b) ***The international jurisprudence does not support Russia's approach***

21. I turn next to the jurisprudence. In this context I recall the Court's long-standing practice of rejecting preliminary objections on the grounds of alleged deficiencies of negotiations preceding the institution of those proceedings. So long as there has been some attempt to negotiate, that is sufficient. The objection has been repeatedly rejected both by the Permanent Court and your Court[68]. In *Military and Paramilitary Activities* (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 392), the United States argued that Nicaragua had not raised in prior negotiations or diplomatic efforts the application or interpretation of the 1956 Friendship, Commerce and Navigation Treaty (FCN Treaty). But you ruled decisively that the dispute was "clearly one which is not satisfactorily adjusted by diplomacy". And you said:

> "In the view of the Court, it does not necessarily follow that, because a State has not expressly referred in negotiations with another State to a particular treaty as

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[67]See also *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S.* v. *Islamic Republic of Pakistan, Decision on Jurisdiction*, 14 Nov. 2005, ICSID case No. ARB/03/29), para. 98, available at: http://www.worldbank.org/icsid/cases/awards.htm.

[68]*Mavrommatis Palestine Concessions* (*Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, pp. 13-15), *South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa)* (*Preliminary Objections, Judgment, I.C.J. Reports 1962*, pp. 319, 346), *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran)* (*Judgment, I.C.J. Reports 1980*, p. 27, para. 51), *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*, pp. 33-34, para. 55) and *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* (*Libyan Arab Jamahiriya* v. *United Kingdom)* (*Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 17, para. 21); *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America)* (*Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 122, para. 20) and *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility* (*Judgment, I.C.J. Reports 1984*, pp. 428-429, para. 83).

> having been violated by the conduct of that other State, it is debarred from invoking a compromissory clause in that treaty." (*Ibid.*, p. 428.)

22. Sir Robert Jennings voted with the majority on the meaning and effect of Article XXXIV (2) of the 1956 Treaty; for him it was the only basis for jurisdiction. I will not quote the passage from his judgment which is well known — just the final sentence: "In short it appears to be intended to do no more than to ensure that disputes that have already been adequately dealt with by diplomacy, should not be reopened before the Court." (*Ibid.*, Separate Opinion of Judge Sir Robert Jennings, p. 556.) And that is a concern that other treaties have manifested. For example, the Pact of Bogotá dispute settlement provision which you have had to consider in some cases.

23. Sir Robert's words apply equally to our Article 22. All that is required [by Article 22, like Article XXXIV (2)] is that the claims shall not have been settled by negotiation (or the procedures expressly provided for in the Convention). They have not been so settled.

24. Professor Pellet made a valiant attempt to distinguish the *Nicaragua* case, on three grounds[69]. Actually, I thought there were two grounds, one of which was repeated twice, but it does not really matter. First, he said the jurisdictional clause in *Nicaragua* was subjective, not satisfactorily settled by diplomacy. But there is little difference between the two. It is not usual to speak of a dispute being settled to the dissatisfaction of the parties. Then, he said that Sir Robert Jennings's opinion should be discounted because Sir Robert failed to appreciate his first point, about dissatisfaction; I have to say, I am with Sir Robert. Finally, he said that the FCN Treaty of 1956 referred to settlement by diplomacy, whereas Article 22 refers to negotiation — negotiation is a synonym for diplomacy in an inter-State context — and to the procedures provided for in the Convention which, as I have shown, are merely a very elaborate framework for diplomacy. So none of Professor Pellet's distinctions works.

25. There is, with all respect, no reason why the Court should abandon its earlier jurisprudence[70]. The ordinary meaning of Article XXXIV (2) was clear to you in 1984 and did not require any reference to the negotiating history of the FCN Treaty. This is equally the case for this Convention. As in 1984, the question for the Court is simple: has the dispute between Georgia and

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[69]CR 2010/8, pp. 50-51, para. 29.

[70]*United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980*, p. 3.

Russia — if there is a dispute — concerning ethnic cleansing and the right to return of internally displaced persons been settled by negotiation or the procedures explicitly provided for in the Convention? The answer to that question is plainly no.

26. In an attempt to reopen the Court's 1984 judgment, Russia invokes a series of unrelated judgments rendered in circumstances materially different from the present one.

27. For example it invokes the *Oil Platforms* case (*Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 803). And in that case neither party contested the fact that there had been an effort to settle the dispute, so the Court did not need to elaborate on the meaning and effect of the dispute settlement clause. It cites the *ELSI* case[71], despite the fact that the jurisdiction of the Chamber there was not in dispute.

28. And it places heavy reliance on the *Armed Activities* case, (*Democratic Republic of the Congo* v. *Rwanda),* the renewed Application. There Rwanda argued that the conditions in Article 75 of the WHO Constitution were cumulative and the Court in a brief passage seems to have accepted that view[72]. But in *Armed Activities*, the Court did not need to decide on the meaning of "or" in the jurisdictional clause. Unlike here, the DRC failed to present any evidence whatever of negotiations, or even of a dispute, or of the articulation of a claim that would be covered by the WHO Constitution. That was a case where the Applicant relied after the event on a wide range of treaties, none of which had any obvious relevance to the underlying issues. Indeed, if the WHO had concerned itself with the legality as such of the armed conflict in the Congo, it would have been acting *ultra vires*, as you held it was doing when it concerned itself with the legality as such of the use of nuclear weapons. Your primary finding in *Armed Activities* — unquestionably correct — was that the DRC completely failed to produce any evidence that the case was one "concerning the interpretation or application of the WHO Constitution on which itself and Rwanda had opposing views, or that it had a dispute with that State in regard to this matter", paragraph 99 of the Judgment. You went on to note in the alternative, and briefly, that "the other preconditions for seisin of the Court established by" Article 75 had not been shown to be satisfied

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[71] *Elettronica Sicula S.p.A. (ELSI), Judgment, I.C.J. Reports 1989*, p. 15.

[72] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. Rwanda), *Jurisdiction of the Court and Admissibility of the Application, I.C.J. Reports 2006*, para. 100 (in relation to Article 75 of the WHO Constitution).

(para. 100). They certainly had not. But three comments are in order. *First*, the facts did not remotely cross any threshold for a dispute implicating the WTO Constitution any more than the other treaties artificially relied on by the DRC. As Professor Greenwood as he then was, counsel for Rwanda noted, the central claim was one of aggression: "an allegation which could not on any analysis fall within the jurisdictional provisions of any of the treaties on which the Congo relies" (CR 2005/17, (Greenwood)). *Secondly*, that illusory claim concerned the constitution of an international organization and the competence of its chief political organ, the World Health Assembly. *Thirdly*, there was no equivalent in the WHO Constitution to Article 16 of the CERD. For these and other reasons, the dictum in paragraph 100 of the *Armed Activities* Judgment is not decisive of the present case.

29. Finally, Russia relies upon jurisprudence of the Law of the Sea Tribunal. What it fails to mention is that Article 283, paragraph 1, of the Law of the Sea Convention (UNCLOS) does stipulate negotiation as a precondition:

> "When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute *shall* proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means."

That is perfectly clear. But the Tribunal has consistently interpreted this much stronger wording of the obligation to negotiate as not mandatory. The Tribunal in the *Straits of Johor case*[73] rejected Singapore's contentions that the requirements of Article 283 were a precondition to the activation of Part XV compulsory dispute settlement procedures[74] based on the consideration, "that *in fact* the parties were not able to settle the dispute or agree on a means to settle it"[75]. That as a matter of fact. And further:

> "the Tribunal has held that 'a State Party is not obliged to pursue procedures under Part XV, section 1, of the Convention when it concludes that the possibilities of settlement have been exhausted' (*Southern Bluefin Tuna Cases*, Order of 27 August 1999, paragraph 60)"[76].

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[73] *Case Concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore), Provisional Measures Order, 8 October 2003, ITLOS, Case No. 12.*

[74] *Ibid.*, para. 34.

[75] *Ibid.*, para. 46 (emphasis added).

[76] *Ibid.*, para. 47.

30. Both these considerations are valid *a fortiori* for the interpretation and application of the much softer reference to negotiation and other procedures in Article 22.

Mr. President, I have got about ten minutes to go before I get to my next main topic. I am in your hands.

The PRESIDENT: You can proceed, Professor Crawford.

Mr. CRAWFORD: Thank you.

(c) ***Convergent interpretation of the authentic language texts***

31. I turn to the convergent interpretation of the authentic language texts. Professor Pellet made quite a lot of this yesterday, although he did not exhaust the official languages of the United Nations. I am reliably informed that in all the official languages of the United Nations there is apparently no official text in Arabic; at least we could not find one. But I am reliably informed they all mean effectively the same thing. He does rely, however, on the French and Russian. Neither of them provide Russia with any assistance. The use of the future perfect tense in French, "*qui n'aura pas été réglée*", merely indicates that prior to the seisin of the Court the dispute between the Parties should not have been settled. The French text says nothing about any obligation to have engaged in prior negotiations or to have invoked other procedures; and it does not indicate one way or the other anything as to their formality or scope.

32. Similarly, I am reliably informed that the Russian words — and I will not try to pronounce them out of respect for my opponents — refer to the Russian past passive participle of the verb to settle, whose function is precisely to characterize the dispute as one which has not been settled in the past. Its use in conjunction with the word "*katorui*" underlines that the sentence is in past perfect tense. Finally, the Russian word "*putiom*" in the formula may literally be translated as "by way of" — "*par voie de*" in French — and merely refers to one amongst various ways in which the dispute may be resolved. So there is no assistance to be gained from the other language texts.

33. To conclude, the elaborate network of procedural obligations and prerequisites which the Respondent tries to build upon the simple language of Article 22 fails. In accordance with the plain

language of Article 22, the only question for the Court is whether there exists a dispute which is not settled by negotiation — the normal method of settling international disputes — or by the procedures expressly provided as options in the Convention. Mr. President, that would be a useful moment to break, because I am going on to the cumulative alternative argument.

The PRESIDENT: Thank you, Professor Crawford, for your suggestion. The Court also thinks that it is about time that we have a short break of 15 minutes until a quarter to 12.

The Court adjourned from 11.30 to 11.45 a.m.

The PRESIDENT: Please be seated. Yes, Professor Crawford, you may now proceed.

Mr. CRAWFORD:

V. The meaning of "by negotiation or by the procedures expressly provided for in this Convention"

34. Mr. President, Members of the Court, I turn to my third point, responding to Russia's argument that the forms of settlement mentioned in Article 22 of the Convention are cumulative. Notwithstanding the ordinary meaning of the text, Russia asserts that the "conjunction 'or' [between "negotiation" and "the procedures expressly provided"] does not express alternatives but rather cumulative conditions"[77].

(a) *Ordinary meaning of the conjunction "or"*

35. [Start slide 2.] One might start by observing that "or" in Article 22 means "or". I put Article 22 back on the screen, this time with the conjunctions highlighted. You will note the care taken over the conjunctions. In its English version Article 22 is a long sentence of 65 words, with five subordinate phrases, each carefully drafted and punctuated. The word "or" appears three times. Russia suggests that we replace that conjunction, third occurring, with "and". But it clearly means what it says on the other two occasions: "two *or* more States Parties", "the interpretation *or* application". Why not on the third occasion? Negotiations may make it clear beyond peradventure that a dispute cannot be settled: why in such a case should the injured State be forced to undergo

[77] POR, para. 4.59.

the fruitless, time-consuming, non-binding procedures of Part II of the Convention? My story of State A and State B illustrates that point exactly.

36. In short, whether or not there is a precondition to access to the Court, the drafters treated "negotiation" and "the procedures expressly provided for in this Convention" as alternatives. [End slide 2.]

37. Professor Pellet suggested that unless the procedures of the CERD Committee were mandatory, it would be rendered without authority to preserve and enhance the application of "its" Convention. The treaty bodies, as it were, own the Convention, despite the fact they are not courts. If this were true, however, all treaty bodies would lack authority. In most cases they are not even referred to in the relevant compromissory clause: this is true, for example, of the Committee Against Torture, the Committee on the Elimination of Discrimination Against Women and the Committee on Migrant Workers. In no case that we have been able to find, under any other human rights treaty which has both a treaty body and a jurisdictional clause referring to this Court or to arbitration, is exhaustion of treaty body procedures a prerequisite to reliance on the jurisdictional clause. None of the eight multilateral treaties establishing human rights treaty bodies makes exhaustion of their non-binding procedures mandatory, or subordinates this Court's jurisdiction to those procedures[78]. In the case of the most important of those committees, the Human Rights Committee, Article 44 of the ICCPR expressly preserves other means of dispute settlement, including resort to this Court; yet this has not affected the status of the Human Rights Committee.

38. Likewise Mr. Wordsworth lamented that the CERD Committee's procedures will become obsolete if this Court asserts jurisdiction. But you have already provisionally asserted such jurisdiction in 2008, without protest from the Committee and without observable effect on it's status, except possibly to enhance it. (I note in parenthesis that what is obsolete is the elaborate procedure laid down in CERD's Articles 11-13, which has never been used, and for good reason, as we have seen.)

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[78]Viz., Human Rights Committee (ICCPR, Art. 44): ESCR Committee (no I.C.J. dispute settlement clause); CERD Committee (CERD, Art. 16); CEDAW Committee (CEDAW, Art. 29, arbitration, or I.C.J. if no agreement); Committee against Torture (CAT, Art. 30, arbitration, or I.C.J. if no agreement); Committee on Rights of the Child (no dispute settlement clause); Committee on Migrant Workers (International Convention on the Protection of All Migrant Workers and Members of Their Families, Arts. 78, 92, priority given to arbitration, or I.C.J. if no agreement); Committee on the Rights of Persons with Disabilities (no judicial dispute settlement clause).

(b) ***The systematic interpretation of Article 22 in the context of the Convention***

39. Russia fails to consider Article 22 in its context. The dispute settlement clause is located in Part III of the Convention, which is clearly separated from Part II governing the functioning of the Committee.

40. As we have seen, Article 11, which is in Part II, establishes a distinct procedure; a complaints procedure for referral of "matters" not limited to disputes. The outcome of its Application is not binding, in contrast to the compulsory dispute settlement in Article 22.

41. Mr. President, Members of the Court, there must be some principle that when there is a potential conflict between a specialist non-court and a court, and in particular the principal judicial organ of the United Nations, the compromissory clause is to be interpreted so as to preserve the jurisdiction of the court.

42. The step-by-step requirements imposed by Articles 11 and 12 — which establish, as we have seen, detailed preconditions — the 12-step process to the exercise of procedural rights — stand in sharp contrast to the failure of the drafters to impose similar requirements in relation to the exercise of rights under Article 22.

43. Part II of the Convention contains a further clause that is of material significance. [Start slide 3.] Article 16 of the Convention provides as follows:

> "The provisions of this Convention 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 the constituent instruments of, or conventions adopted by, the United Nations and its specialized agencies, and shall not prevent the States Parties from having recourse to other procedures for settling a dispute in accordance with general or special international agreements in force between them."

That, incidentally, is another long sentence, 77 words, six subordinate clauses or phrases; once again, the word "or" means "or", the word "and" means "and".

44. Article 16 is located at the very end of Part II of the Convention, thus encompassing the schemes established by Articles 11, 12 and 14. It makes it clear that the drafters of the Convention did not want to make these complaint procedures a precondition to the use of any other procedures that might be available outside the CERD. Article 16 confirms that the procedures expressly provided for in the Convention are not exclusive or exhaustive or compulsory. Take, for example, a case in which a State had invoked the jurisdiction of this Court in relation to CERD under the

Optional Clause in relation to another State Party to the Optional Clause. That jurisdiction would be preserved by Article 16 because it would be jurisdiction laid down in the constituent instruments of the United Nations, or it would be another procedure for settling a dispute in accordance with the general international agreement in force between them. Can it possibly be suggested that this Court would have jurisdiction under the Optional Clause in relation to the dispute, but not jurisdiction under Article 22 of the Convention? It does not make any sense. The language of Article 16, and its location in Part II of the Convention, is inconsistent with the claim that the Convention imposes a hierarchy of remedies or that the Court may only be reached down the track, in the never-never once all other remedies — if they are remedies at all — have been exhausted. [End slide 3.]

(c) ***Conclusion***

45. In sum, the cumulative exhaustion of all inter-State and individual-to-State complaints procedures which results from Russia's line of reasoning would postpone indefinitely any recourse to your Court. That interpretation would render Article 22 wide open to abuse by recalcitrant States. But, and I stress this, the cumulation point is absolutely critical to Russia's position. It is only if they can force us to use the lengthy and futile procedure of Part II that this case will go away because whatever the position with respect to negotiation or notice, it now exists and if the only condition is negotiation, we can start again. I refer to what the Court said in the *Croatia* v. *Serbia* case in relation to futile procedures.

VI. The preparatory work of Article 22

46. Mr. President, Members of the Court, for the sake of completeness and to confirm this conclusion, I turn to the preparatory work of the Convention. The two Parties tell a completely different story with respect to the *travaux*. We have put the entire *travaux* in as an annex, and the Court will read it for itself. What I will do is simply trace what our version of the *travaux* means and you can decide it in due course. But, of course, you can only decide it to the extent that it is necessary to resolve ambiguities or to confirm the meaning of the text. We say, to confirm the meaning which flows from the ordinary interpretation of Article 22 in its context and in light of its object and purpose.

47. Article 22 has its roots in an entirely distinct process from that involved in constructing the mechanism of the CERD Committee. All reference to the Court was expressly removed from that mechanism during the key debates of the Third Committee, despite protests from some of the drafters. It was intended to be applied — that is, Article 22 — without prejudice to other procedures for settling disputes.

48. Article VIII of the working document on final clauses was prepared by the Commission on Human Rights and entitled "settlement of disputes". It was set out in a separate working paper from the draft measures of implementation prepared by the Sub-Commission on Prevention of Discrimination and Protection of Minorities, where a conciliation procedure was first proposed by a Mr. Ingles from the Philippines, on whom Professor Pellet placed considerable reliance. [Start slide 4.] In contrast, it was the Commission on Human Rights that put forward suggestions for four alternative drafts of what became the compromissory clause. Contrary to the claim by the Russian Federation[79], this article stood apart from the conciliation mechanism long before it reached the Third Committee. Proposals 8A and 8B on the screen, were identical, they refer to "any dispute . . . which is not settled by negotiation . . . to be referred to the International Court of Justice". Proposal 8A, however, provided that *any* party might choose to engage the Court — that was by unilateral application, whereas Proposal 8B envisaged seisin only through common consent with the use of the word "all".

49. Article 8 D envisaged a mandatory process of dispute resolution, with strict preconditions for the jurisdiction of the Court. The parties to a dispute were required — by the use of the word *shall* — first to consult together to settle the dispute by a peaceful means of their choice. Subsequently, any dispute which could not be settled "in the manner prescribed" was to be referred to the Court for decision. That is the origins of the compromissory clause Article 22.

50. The text on conciliation presented to the 1349th meeting of the Third Committee aimed at satisfying as many States as possible. The joint text of the working group[80], as the representative from Ghana stressed when presenting it to the Committee, "*did not contain any clause concerning*

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[79]Preliminary Objections of Russia, para. 4.64.

[80]A/C.3/L.1291.

intervention by the ICJ, for which provision could be made in the final clauses"[81]. The working group had thus removed the Philippine's specific proposal that if the conciliation procedure failed, unilateral recourse could then be had to this Court, preferring to leave this, as was normal, to the final clauses rather than clash with what was included in the proposals. [End slide 4.]

51. Now this development of the conciliation provisions is not to be confused with the final clauses text later produced by the working group of the Officers of the Third Committee[82]. Russia falls precisely into that confusion in paragraph 4.28 of its Preliminary Objections. The final clauses text was intended — as the conciliation procedures were not — to provide separately for involvement of this Court. It was particularly noted in the final clauses text that these articles were "*self contained and referred to articles within themselves*"[83]. This provides further support for Georgia's view that the mechanisms provided for under the Convention, in Part 2, on the one hand, and the right of recourse to the International Court on the other hand, were separate and distinct.

52. Indeed, it is clear that a conscious decision was taken by the drafters of the new implementation measures text to keep the conciliation process wholly *separate* from the question of this Court's jurisdiction. That they were seen as separate issues is explicitly underscored by the comments of the Belgian delegate to the effect "that he supported both the idea of setting up a Committee such as had been advocated by the Philippines . . . *and* the idea of allowing recourse to the ICJ"[84].

53. No inference can be drawn from the *travaux* to the effect that recourse to the Court was to be subject to the conciliation phase. The two sets of provisions emerged and were considered and developed separately, and clear steps were taken by the sponsors to remove any suggestion that the two sets of provisions were linked in any cumulative way. When the representative of Ghana came under pressure to reintroduce reference to this Court as an element of the conciliation process[85], the effort was rebuffed. The representative of Ghana stressed the completeness of the

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[81] A/C.3/SR.1349 p. 348, para 29.

[82] A/C.3/L.1237.

[83] A/6181, p. 35.

[84] A/C.3/SR.1349, p. 346, para. 6.

[85] A/C.3/SR.1345, p. 378, para. 53.

procedure, noting that the final clauses provided in any event for unilateral seisin[86], so that a direct link between the two was unnecessary.

54. Article by article, the implementation measures were then considered and voted upon. At the 1358th meeting, the Third Committee turned to the final clauses which were self-contained. In the draft submitted by the Officers of the Third Committee, clause VIII almost exactly mirrored the first proposal that had been put forward earlier — what had been article 8 A. [Start slide 5.]

55. Thus, the Officers of the Committee clearly decided to reject Proposal 8 D of the Secretary-General's draft as a model, with its clear cumulative approach. Instead, they chose to adopt a simple compromissory clause that was separate from and unconnected to the conciliation process, in any organic way. [End slide 5.]

56. Nowhere was it stated that recourse to the Court was conditional upon previous attempts to settle the dispute through the CERD machinery, and nowhere was it stated that negotiation and recourse to the procedures under the Convention were cumulative. It was simply stressed that unilateral seisin was very important for effective implementation, but that there were also many other opportunities for alternative dispute resolution open to the parties[87]. The approach taken was not a simple one-way street for the range of options. Reference to the Court was not mandatory, but it could be invoked at the instance of a single party to a dispute.

57. The three-power amendment put forward by Ghana, Mauritania and the Philippines and referred to by Professor Pellet yesterday, simply called for the deletion of the comma after "negotiation" and then the insertion of the new text namely, "or by the procedures expressly provided for in this Convention". But that text was inserted in what was the Model 8A and not the Model 8D.

58. This proposal was unanimously approved as a "useful addition"[88], whereas according to the Respondent it transformed the character of the dispute settlement provision creating the situation which I started this presentation with. By reminding the reader of the possibility of pursuing negotiations or the CERD machinery before seising the Court — and without requiring it

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[86]A/C.3/SR.1354, p. 379, para. 54 and p. 376, para. 20.

[87]See, for example, *ibid.*, paras. 39 and 40.

[88]A/C.3/SR.1354, p. 454, para. 39.

as Model 8D would have done — the clause served to remind the Parties of the various options for dispute resolution in the matter of discrimination, without implying cumulative or other preconditions to the right of recourse to your Court.

59. That proposal was — as it was stated at the time — based upon the Protocol to the Convention against discrimination in education adopted by UNESCO[89], but it was not incorporated into the final draft because, as the Polish delegate stressed, it was wholly unnecessary[90]. The reliance now placed by Russia[91] on the statement of the Ghanaian delegate Mr. Lamptey that the conciliation procedure must be used before recourse to the Court is misconceived: Ghana's own explicit proposal to that effect was not accepted, and Mr. Lamptey's intervention only suggested that the CERD machinery "should be used", not that it had to be used[92].

60. In sum, the *travaux* confirm the interpretation of Article 22 draw from its ordinary meaning in context and in light of its object and purpose. In particular three things are clear. *First*, negotiations and the CERD procedures are *(a)* not a prerequisite to the Court's exercise of jurisdiction, and *(b)* not cumulative requirements. *Second*, the Conciliation Commission was envisaged as a useful addition to other procedures for dispute settlement, including your Court, and not as a mandatory process. *Third*, the Court's jurisdiction was considered as a self-contained issue all the way from negotiations at the Sub-Commission through to the final drafting in the Third Committee.

VII. Conclusion

61. Mr. President, Members of the Court, let me summarize:

(1) Article 22 does not include any mandatory preconditions to the seisin of the Court once there is a dispute arising under the Convention, and Georgia was not under any obligation, once there was such a dispute which had not been settled, to engage in formal negotiations to settle the dispute, or to have recourse to the "procedures expressly provided for in [the] Convention".

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[89]United Nations Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Summary record of 427th Meeting, UN doc. E/CN.4/Sub.2/SR.427 (12 Feb. 1964), 12.

[90]United Nations General Assembly, 20th Session, Official Records, Anns., Report of the Third Committee, UN doc. A/6181 (18 Dec. 1965), 38.

[91]POR, paras. 4.69, 5.42.

[92]*Ibid.*, para. 4.69.

(2) In any case, if there was a mandatory precondition, it was in the alternative and it was sufficient that there was negotiation.

62. Mr. President, this concludes my presentation. I would now ask you to give the floor to Professor Akhavan.

The PRESIDENT: I thank Professor James Crawford for his presentation. I now invite Professor Payam Akhavan to take the floor.

Mr. AKHAVAN:

JURISDICTION UNDER CERD ARTICLE 22 — HISTORY OF NEGOTIATIONS [RUSSIA'S SECOND PRELIMINARY OBJECTION]

1. Mr. President, Members of the Court, it is an honour to appear before you again on behalf of Georgia. With respect to the second preliminary objection, Professor Crawford has set forth our view that Article 22 does not establish any preconditions for the seisin of the Court. I shall now show that even if Article 22 did require prior negotiations — as submitted by Russia — that such requirement has been clearly satisfied by Georgia.

2. The question of what qualifies as negotiations is well-established. [Start slide 1.] The 1924 *Mavrommatis* case, repeatedly invoked in the Court's jurisprudence, put it as follows:

> "Negotiations do not of necessity always presuppose a more or less lengthy series of notes and despatches; it may suffice that a discussion should have been commenced, and this discussion may have been very short . . ."[93] [End slide 1.]

3. To repeat, a "very short" discussion may be sufficient to satisfy the negotiation requirement.

4. There can be no doubt, we respectfully submit, that the voluminous evidence of negotiations offered by Georgia far exceeds what is required. I refer the Court to Chapter VIII of Georgia's Memorial and Chapter III of its Written Statement.

5. But for the sake of argument, let us accept Professor Zimmermann's assertion on this preliminary objection, that Georgia is, as he said "re-writing diplomatic history". Let us ignore 17 years of bilateral and multilateral negotiations with Russia on systematic discrimination against

[93] *Mavrommatis Palestine Concessions Case, Jurisdiction, Judgment, P.C.I.J., Series A, No. 2*, 1924, p. 13.

Georgian victims of ethnic cleansing. Even if such a generous allowance is made, Professor Zimmermann's assertion that there have been no negotiations between Georgia and Russia under CERD manifestly fails.

6. It is sufficient to consider, even in isolation from the long history of the dispute, the diplomatic exchanges between the parties in the days immediately prior to the filing of Georgia's Application on 12 August 2008.

7. As Mr. Reichler explained, ethnic cleansing was an integral element of the full-scale Russian invasion of 8 August 2008. On 9 August, just three days prior to the Application, President Saakashvili of Georgia had specifically accused "Russian troops" of having "expelled the . . ethnically Georgian population of South Ossetia"[94]; conduct that is clearly prohibited under CERD. The following day, on 10 August, an emergency session of the Security Council was convened at Georgia's request. At that meeting, Georgia's Permanent Representative repeated the allegations of ethnic cleansing, referring to the Russian forces' attempt to "exterminate the Georgian population"[95].

8. He also reported that "the Georgian leadership reached out overnight to the Russian political leadership", but that the Russian President had "refused to directly engage with his Georgian counterpart in dialogue". It was in this light that Georgia called upon the Security Council for "an immediate diplomatic . . . initiative"[96].

9. In response, the Russian Permanent Representative to the United Nations stated as follows: [start slide 2]

> "With respect to the Permanent Representative of Georgia's outrage that our President had refused to speak with the President of Georgia. Excuse me, but what decent person would talk to him now?"[97] [End slide 2.]

10. Just two days later, Russia reiterated its refusal to negotiate with President Saakashvili. [Start slide 3.] During a press conference, the Russian Foreign Minister, Mr. Sergei Lavrov,

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[94]Press Briefing, Office of the President of Georgia, "President of Georgia Mikheil Saakashvili met foreign journalists" (9 Aug. 2008); WSG, Vol. IV, Ann. 184.

[95]United Nations Security Council, *5953rd Meeting*, UN doc. S/PV.5953 (10 August 2008); WSG, Vol. III, Ann. 96.

[96]*Ibid.*

[97]*Ibid.* See also, "The Russian President refused to speak with Saakashvili" *Pravda* (11 Aug. 2008); WSG, Vol. IV, Ann. 206.

disputed Georgia's ethnic cleansing allegations and repeated that Russia refused to speak with President Saakashvili, let alone negotiate with him. He stated as follows:

> "I do not think that Russia will have the mindset not only to negotiate, but even to speak with Mr. Saakashvili."[98] [End slide 3.]

11. Mr. President, Members of the Court, the statements of these senior Russian officials leave no doubt whatsoever that Russia harboured no willingness to negotiate. Quite obviously, neither the diplomatic overtures that I have mentioned, nor any other negotiations between Georgia and Russia during this period put an end to the ethnic cleansing, which expanded in the days that followed. Thus, even if the long diplomatic history of the dispute is disregarded as Professor Zimmermann wants, Russia's post-invasion diplomatic posture, including most prominently its refusal to negotiate with Georgia's President, satisfies any conceivable negotiation precondition under Article 22, assuming that such a requirement exists.

12. This view is consistent with this Court's Provisional Measures Order of 15 October 2008. Based on the limited requirement that there be, and I quote from the Order "some attempt . . . to initiate . . . discussions on issues that would fall under CERD", the Court held that not only had disputes under the Convention been "raised in bilateral contacts between the Parties" and "not resolved by negotiation prior to the filing of the Application," but that the "same issues" were raised by Georgia in "representations to the United Nations Security Council in the days before the filing of the Application". These representations, the Court found, were "commented upon by the Russian Federation", but no diplomatic resolution was achieved[99].

13. The Court was thus satisfied at the provisional measures phase that the requirements of Article 22 had been satisfied. Russia's recent pleadings, we submit, have not given the Court any reason to deviate from its earlier decision. On the contrary, the significant additional evidence submitted by Georgia in its Memorial and Written Statement fully reinforces the Court's conclusions concerning Article 22. These include a long history of bilateral and multilateral

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[98]Ministry of Foreign Affairs of the Russian Federation, *Transcript of Remarks and Response to Media Questions by Russian Minister of Foreign Affairs Sergey Lavrov at Joint Press Conference After Meeting with Chairman-in-Office of the OSCE and Minister for Foreign Affairs of Finland Alexander Stubb, Moscow, August 12, 2008* (12 Aug. 2008) (emphasis added); WSG, Vol. IV, Ann. 187.

[99]*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Provisional Measures, Order, I.C.J. Reports, 2008,* para. 115.

discussions and diplomatic exchanges with Russia concerning discriminatory human rights violations against ethnic Georgians. By any measure, these satisfy the simple *Mavrommatis* standard of what constitutes negotiations.

14. As early as the June 1992 Sochi Agreement — signed by President Shevardnadze and President Yeltsin — the parties negotiated an agreement to ensure "respect for human rights and fundamental freedoms, as well as the rights of ethnic minorities"[100]. Furthermore, the negotiations produced an agreement to require the "creation of proper conditions for the return" of people who had been ethnically cleansed[101].

15. These negotiations, and others like them, were plainly related to disputes falling under the Convention, although evidently, they failed to achieve an effective settlement. Shortly after, for example, in September 1992, the Presidents of Georgia and Russia negotiated another agreement that in clear terms "reaffirm[ed] the need to respect international standards in the area of human rights and national minorities" and to "prevent discrimination based on nationality, language or religion"[102]. This document is found at Annex 45, Volume III of Georgia's submissions. The agreement required further appropriate "conditions . . . for the return of refugees to their permanent homes"[103].

16. Bilateral negotiations also resulted in the *Protocol of Negotiations between the Government Delegations of the Republic of Georgia and the Russian Federation*, signed on 9 April 1993 by the Prime Minister of Georgia and the Defence Minister of Russia. Following Georgia's accusation the week before that ethnic cleansing in Abkhazia was Russia's "full responsibility"[104], the Protocol specifically required Russia to "undertake . . . effective measures" to "prevent infiltration" into Abkhazia of "illegal military formations, individuals and weapons and

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[100]Agreement on Principles of Settlement of the Georgian-Ossetian Conflict (24 June 1992); MG, Vol. III, Ann. 102.

[101]*Ibid.*

[102]United Nations Security Council, *Letter dated 8 September 1992 from the Chargé D'Affaires A.I. of the Permanent Mission of the Russian Federation to the United Nations Addressed to the President of the Security Council, Annex*, UN doc. S/24523 (8 Sep. 1992); WSG, Vol. III, Ann. 45.

[103]*Ibid.*

[104]Appeal of the Parliament of Georgia to the United Nations, Conference on the Security and Cooperation in Europe, International Human Rights Organizations (1 Apr. 1993); WSG, Vol. IV, Ann. 125.

ammunitions"[105], an obligation that was intended to make Russia cease facilitating the transit of such forces and material from its territory into Abkhazia in furtherance of ethnic cleansing. Professor Zimmermann suggested that such agreements do not relate to matters falling under CERD but any appreciation of the context would clearly demonstrate that preventing such infiltration was directly related to the ongoing ethnic cleansing in Abkhazia. The agreement also required "conditions for the return of refugees to their places of permanent residence"[106]. And the Agreement further stipulated that these issues required further "negotiations" — the word "negotiations" — between "Georgia, Abkhazia *and Russia*"[107], Russia being specifically mentioned as a party to the Agreement.

17. It is evident that Russia was a direct party to these negotiations with respect to disputes falling under CERD. A further example is the allegation of President Shevardnadze in September 1993 before the United Nations Security Council that the ethnic cleansing in Abkhazia, which was then ongoing, was "achieved with the direct support and complicity" of Russian forces[108]. President Shevardnadze specifically reported: "My talks with General Grachev, Minister of Defence of the Russian Federation, yielded no results."[109]

18. Of course, Professor Zimmermann contends that all these examples are irrelevant because they fall outside the *ratione temporis* of the Court in so far as Georgia only acceded to CERD in 1999. My colleague Professor Sands will explain why this argument is untenable. It should be noted nonetheless that the evidence is also replete with instances of negotiations concerning matters falling within CERD subsequent to 1999 — should there be any doubt.

19. For example, negotiations produced an agreement, signed by Georgia's State Minister and Russia's Deputy Prime Minister, in December 2000, to "create conducive conditions" for the "return of refugees and internally displaced persons" by creating an "Inter-Governmental

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[105]Protocol of Negotiations between the Governmental Delegations of the Republic of Georgia and the Russian Federation (9 Apr. 1993); MG, Vol. III, Ann. 105.

[106]*Ibid.*

[107]*Ibid.*

[108]United Nations Security Council, *Letter dated 20 September 1993 From the Permanent Representative of Georgia to the United Nations Addressed to the President of the Security Council, Annex,* UN doc. S/26472 (20 Sep. 1993); WSG, Vol. III, Ann. 48.

[109]*Ibid.*

program" — with the involvement of both Georgia and Russia — "of repatriation, accommodation, integration and re-integration of refugees"[110]. These negotiations between Georgia and Russia clearly related to matters under CERD, including the right of return under Article 5.

20. On another occasion, in July 2002, the Secretary of Georgia's National Security Council negotiated with his Russian counterpart over Russia's denial of the right of return of ethnic Georgians. The Parties' Joint Statement stated that the two sides had "stressed the importance" of "agreeing on measures" to "secure" the "return of the refugees to their places of residence", in this case to the Gali District in Abkhazia[111].

21. [Start slide 4.] On still another occasion, this time in March 2003, President Shevardnadze and President Putin negotiated over what the Parties' Concluding Statement referred to as "the most burning problem", namely the "dignified and safe[] return of refugees and internally displaced person"[112]. They agreed that "all the efforts should be devoted" to the "return of refugees and internally displaced persons" to Gali[113]. These discussions plainly concerned issues under CERD, specifically Article 5. Should Professor Zimmermann argue that these were merely what he described as "contacts" that do not qualify as negotiations under Article 22, I refer the Court to the Concluding Statement that expressly refers to the discussions as *"negotiations"*[114]. This is found at Annex 136 in Volume III of Georgia's Memorial. [End slide 4.]

22. In later negotiations, Georgia proposed a "compromise" under which Gali would be administered by a Joint Provisional Administration under the aegis of international organizations, which would oversee the return of ethnic Georgians[115]. Russia refused. Indeed, a negotiating

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[110]Agreement between the Government of Georgia and the Government of the Russian Federation on Cooperation in Restoration of Economy in the Georgian-Ossetian Conflict Zone and Return of Refugees, Tbilisi (23 Dec. 2000); MG, Vol. III, Ann. 131.

[111]Joint Statement, Secretary of the National Security Council of Georgia, T. Japaridze and Secretary of the National Security Council of the Russian Federation, V. Rushailo (11 July 2002) (emphasis added); WSG, Vol. IV, Ann. 151.

[112]Concluding Statement on the meetings between Mr. Vladimir Putin, President of the Russian Federation and Mr. Eduard Shevardnadze, President of Georgia, *Svobodnaya Gruzia*, No. 60 (12 Mar. 2003); MG, Vol. III, Ann. 136.

[113]*Ibid.*

[114]*Ibid.*

[115]Information Note prepared by the Ministry of Foreign Affairs of Georgia (20 Jan. 2004); WSG, Vol. IV, Ann. 155.

session was cancelled, due to, in the words of Georgia's Foreign Ministry, "the differences between the Georgian and Russian sides over the mode of negotiations"[116]. Georgia's view was that the "agreement on the conditions of safe return of refugees was to be reached first between Georgia and Russia", that is, Georgia and Russia should negotiate bilaterally. Russia, however, "insisted on the presence of the Abkhaz side"[117]. In short, Georgia wanted to negotiate with Russia, but Russia refused.

23. Another example is from April 2004. Shortly after President Saakashvili declared that "Russian troops" were responsible for ethnic cleansing in Abkhazia[118], Georgia's State Minister told his Russian counterpart that Georgia expected "concrete results" regarding the return of ethnic Georgians[119]. Georgia made specific proposals, including their return to the Gali district[120]. The failure of these negotiations is clear from notes of subsequent negotiations between Georgia's Ambassador in Moscow and Russia's Deputy Minister of Foreign Affairs in October 2004, which show that Georgia had to repeat that "real progress concerning the return of IDPs" remained "essential"[121].

24. Another example relates to the intensification of bilateral negotiations in June 2008. [Start slide 5.] In a letter dated 23 June 2008, to which both the honourable Agent of the Russian Federation and Professor Zimmermann made reference, President Saakashvili wrote to President Medvedev requesting that Russia withdraw its forces — which Georgia had accused of ethnic discrimination, including preventing the return of victims of ethnic cleansing — from parts of Abkhazia populated by the few remaining Georgians[122]. President Medvedev refused. After meeting with the Russian President later that month, President Saakashvili reminded him they had

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[116]Information Note prepared by the Ministry of Foreign Affairs of Georgia (20 Jan. 2004); WSG, Vol. IV, Ann. 155.

[117]*Ibid.*

[118]"Ask Georgia's President, BBC News (25 Feb. 2004); WSG, Vol. IV, Ann. 198.

[119]Minutes of the Meeting Between the State Minister, Mr. G. Khaindrava and the Deputy Minister of Foreign Affairs of the Russian Federation, Mr. V. Loshinin held on 27 Apr. 2004 (27 Apr. 2004); WSG, Vol. IV, Ann. 156.

[120]*Ibid.*

[121]Information Note: Concerning the meeting of Ambassador of Georgia in Russian Federation, Valeri Chechelashvili and the First Deputy Foreign Affairs Minister of the Russian Federation, Mr. V. Loshinin (21 Oct. 2004); WSG, Vol. IV, Ann. 157.

[122]Letter from President Mikheil Saakashvili to President Dmitry Medvedev (23 June 2008); MG, Vol. V, Ann. 308.

agreed to organize the "[s]afe and dignified return of refugees and IDPs", proposing that they "draft[], sign[] and enter[] into force" agreements addressing the right of return[123]. Russia's President refused, saying it was "untimely to put the question of return of refugees in such a categorical manner"[124]. This is a decade and a half after the displacement of this population. [End slide 5.] Disregarding this obvious context, Professor Zimmermann argued that this letter is not an attempt to negotiate under CERD because it does not accuse Russian peacekeepers of ethnic discrimination against Georgians[125]. But as Mr. Reichler explained, denial of the right of return is clearly an issue under CERD.

25. To these instances of bilateral negotiations may be added the numerous multilateral negotiations under the auspices of a variety of different institutions, including the Joint Control Commission, the Commonwealth of Independent States, the OSCE and the United Nations, where Georgia also negotiated with Russia to resolve disputes that fall under CERD, including once again the right of return for the victims of ethnic cleansing. This is set out in the Memorial and Written Statement. Today, I will confine myself to commenting on Georgia's diplomacy at the United Nations, and will give two brief examples.

26. In August 2006, Georgia addressed a letter to the Secretary-General of the United Nations and to the Security Council stating that "Russian peacekeepers continue to act in defiance of their mandated obligations, turning a blind eye to gross violations of law and human rights taking place in their very presence"[126]. Georgia clearly sought, by involving the United Nations, to resolve this dispute with Russia concerning its failure to prevent discriminatory violations of human rights as required by CERD. It specifically called upon "the CIS peacekeeping forces and their leadership" to take action to prevent such abuses[127]. On another occasion, also in

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[123]Letter from President Mikheil Saakashvili to President Dmitry Medvedev (23 June 2008); MG, Vol. V, Ann. 308.

[124]Letter of President Dmitry Medvedev of the Russian Federation to President Mikheil Saakashvili of Georgia (1 July 2008); MG, Vol. V, Ann. 311.

[125]CR 2010/8 (13 Sep. 2010), p. 62, para. 10 (Zimmermann).

[126]United Nations General Assembly, Security Council, *Identical letters dated 11 Aug. 2006 from the Chargé d'affaires A.I. of the Permanent Mission of Georgia to the United Nations addressed to the Secretary-General and the President of the Security Council, Ann.,* UN doc. A/60/976-S/2006/638 (14 Aug. 2006); WSG, Vol. III, Ann. 83.

[127]*Ibid.*

2006, Georgia represented to the United Nations General Assembly that the presence of Russian peacekeepers had resulted in "permanent attempts to legalize the results of ethnic cleansing"[128].

27. Faced with this evidence — and much more — of Georgia's longstanding attempts to negotiate through multilateral fora, Professor Zimmermann adopted an extremely narrow approach to what qualifies as negotiations, going so far as to claim that diplomatic discussions, even when done for the explicit purpose of resolving a dispute under the Convention, cannot constitute negotiations if they are conducted in a multilateral context. He asserted that only bilateral negotiations could satisfy the requirements of Article 22[129].

28. To support this view, he argued that Georgia cannot rely on United Nations multilateral negotiations in so far as the precedent in the *South West Africa* case is "crucially different" from the present case[130]. He clarified that this crucial difference lies in his assertion that, unlike Russia, South Africa was deemed to be a "common adversary State", which in his view qualified the negotiations as "quasi-bilateral"[131] to quote Professor Zimmermann in the specific context of that case. But an examination of that passage at page 346 of the Judgment, indicates that immediately preceding it, the Court categorically states as follows: "[t]he number of parties to one side or the other of a dispute is of no importance"[132]. It is irrelevant. Furthermore, with respect to an asserted difference between bilateral and collective negotiations, the Court expressly stated as follows, in a passage that I am sure Members of the Court are well familiar with:

> "it is not so much the form of negotiation that matters as the attitude and views of the Parties on the substantive issues of the question involved. So long as both sides remain adamant, and this is obvious even from their oral presentation before the Court, there is no reason to think that the dispute can be settled by further negotiations between the Parties."[133]

29. Finally, Mr. President, Members of the Court, I will repeat what my colleague Mr. Reichler has already alluded to, that there is no basis for the assertion, that unless Georgia

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[128]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).

[129]CR 2010/8 (13 September 2010), p. 63, para.18 (Zimmermann).

[130]*Ibid.*, para. 14 (Zimmermann).

[131]*Ibid.*, para. 15 (Zimmermann).

[132]*South West Africa Cases (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 346.

[133]*Ibid.*

specifically invoked CERD in its negotiations with Russia, that it cannot somehow satisfy the requirements of Article 22. This is plainly inconsistent with the Court's jurisprudence in the *Nicaragua* case, which held that reference to a treaty in negotiations is not required to invoke its compromissory clause if the subject-matter of the treaty was discussed, and, it is our submission that Georgia has certainly done so with respect to its negotiations with Russia (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, pp. 428-429, para. 83). The Court's Provisional Measures Order specifically rejected that argument, holding that "the fact that CERD has not been specifically mentioned in a bilateral or multilateral context is not an obstacle to the seisin of the Court on the basis of Article 22"[134].

30. In summary, Mr. President, Members of the Court, Russia's contentions concerning what qualifies as negotiations finds no basis whatsoever either in the Court's well-established jurisprudence or in the evidence that is before the Court. If Russia's exacting standards were to be accepted, it is difficult to see how any dispute could be adequately negotiated. By any measure, even if Article 22 requires negotiations as a precondition to seisin by the Court, by any measure, Georgia's voluminous evidence has satisfied such a requirement.

31. That concludes my submissions, I thank you Mr. President and Members of the Court for your kind attention. I now ask you to give the floor to my colleague, Professor Sands, to address Russia's third and fourth preliminary objections.

The PRESIDENT: I thank Professor Payam Akhavan for his statement. I now invite Professor Philippe Sands to take the floor.

[134]Provisional Measures, Order, para. 115.

Mr. SANDS:

THE COURT HAS JURISDICTION *RATIONE LOCI* AND *RATIONE TEMPORIS* [RUSSIA'S THIRD AND FOURTH OBJECTIONS]

I. Introduction

1. Mr. President, Members of the Court, it is a privilege for me appear on behalf of the Government of Georgia, and also to be able to extend on behalf of our entire team our personal wishes to the Court's distinguished new judges. Whether their presence be characterized as a small step or a great leap for mankind or womankind, we think it is certainly a jolly good thing.

2. Mr. President, you have heard my colleagues and it remains for me to address the two outstanding issues raised by Russia, namely its third and fourth preliminary objections. It might appear that there is no longer a need for Georgia to dwell at any great length on the objections based on matters territorial or temporal. For, as you heard from Ambassador Kolodkin yesterday, the Russian Federation has cut them free from Russia's case this week.

3. When these objections were first raised, in December 2009, Georgia took care to respond carefully and completely to the third preliminary objection — on jurisdiction *ratione loci* — and the fourth preliminary objection — on jurisdiction *ratione temporis*. It seems our response may have had some effect: suddenly and noiselessly, a bit like one of those houses that suddenly disappears in the extraordinarily wonderful novel that is *The Master and Margarita*, the arguments just magically "collapsed, [and] nothing was left"[135]. The only thing that was missing yesterday, to paraphrase Mr. Bulgakov, was the trademark "cloud of black smoke" — there was none. The magical consequence is that my speech this morning can be a great deal shorter than it was originally expected to be. But it cannot be dispensed with altogether, as Russia's concessions necessitate some reactions from our side, if only to indicate our view on what the Court should now do in respect of the two objections. And I will deal with each in turn.

II. Russia's third preliminary objection: territory

4. Russia's third preliminary objection was that the Court lacks jurisdiction *ratione loci*. In our written statement we explained why this was wrong and that the territorial scope of the

[135]Mikhail Bulgakov, *The Master and Margarita* (Penguin, 1997 tr., Richard Pevear and Larissa Volokhonsky).

1965 Convention was rather clear: namely, that Georgia is entitled to invoke the jurisdiction of the Court in respect of Russia's obligations under the 1965 Convention where the acts for which Russia is responsible occur or are felt upon the territory of Georgia, including in particular, South Ossetia and Abkhazia[136].

5. In his speech yesterday Ambassador Kolodkin said "upon further reflection, we find that this objection is not necessarily of an exclusively preliminary nature"[137]. Russia seems to suggest that the Court should join this jurisdictional objection to the next phase of the proceedings, apparently because — while this was not said — it is so closely intertwined with the merits. We disagree: the Court can, and we say, should dispose of this objection now.

6. Let me explain why. Russia's argument in this regard was primarily based on the assertion that there is, as it put it, a "position of general international law which provides that, unless specifically indicated, treaty obligations only apply territorially"[138]. According to Russia, since there is no such provision in CERD, this Court can only have jurisdiction in respect of Russia's obligations relating to acts or omissions of Russian officials if they take place *within* the territory of the Russian Federation. We made in our written statement, very clear our view that argument lacks any merit whatsoever: there is simply no such general "position" in international law. Moreover, Russia's claim is contradicted by your jurisprudence, most notably in your Advisory Opinion in the *Construction of a Wall* (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 179), in your Judgments in 1996 in the *Bosnia* case (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 616, para. 31), in 2005 in the *DRC* case (*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 242-243, para. 216), and in 2007, again in *Bosnian Genocide* (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 68). And Russia's

[136]WSG, Chap. IV.

[137]CR 2010/8, para. 31 (Kolodkin).

[138]POR, para. 5.9 *(a)*.

argument is also contradicted by the case law and practice of the United Nations Human Rights Committee and the CERD Committee. We pointed out that Russia was inviting you to overturn your settled case law, and we assume from their silence they have now decided that this was not a sensible or wise thing to do[139].

7. In fact, as is absolutely clear, there is nothing about this argument that is remotely connected to the merits. It is a legal argument, the interpretation of the Convention is a pure legal issue, and has an "exclusively preliminary nature". It does not fall within Ambassador Kolodkin's exhortation, and we take it that it has, in effect, been dropped, but without any black smoke. Accordingly, and even if some might find the point to be of particular interest amongst us in the room, there is no need for example to the Court to express a view or get into the merits or demerits or meaning or effect of the *Bankovic* judgment of the European Court of Human Rights, on which Russia largely relied for this argument — as we said in the written statement, it is not relevant to this case. The approach taken by Judge Sir Elihu Lauterpacht in his Separate Opinion in the *Bosnian Genocide* case must be right: it would be a "nonsense", as he put it, for a State to be able to escape the obligations of a global human rights convention to which all the relevant States are party, and to escape the jurisdiction of the Court, just because the alleged violations for which responsibility is said to occur were felt outside its territory of the State[140]. So we take it that Russia's first and general argument is gone.

8. That leaves Russia's second argument on jurisdiction *ratione temporis*. This was originally put by way of alternative, it appears that it is now all that really remains. Russia recognizes that the extraterritorial application of treaty obligations can arise, but according to Russia there are only "two types of extraterritoriality": "first, acts taken by a State's diplomatic and consular authorities on foreign soil, and second, the effective control of a territory"[141].
Georgia responded to this argument, in some detail, at paragraphs 4.35 to 4.66 of our Written Statement. It makes very clear that we disagree with Russia's approach, and we do so on the basis

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[139]WSG, paras. 4.9-4.24.

[140]*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Provisional Measures, Order, I.C.J. Reports 1993*, p. 444, para. 114.

[141]POR, para. 5.50.

of your consistent case law. Russia has been completely silent in failing to respond to anything we said.

9. Indeed, what we said was that Russia has misread your jurisprudence. They say, for example, in relation to what they call the "second type of extraterritoriality", that: "A glance at the Court's jurisdiction reveals that it has accepted arguments based on 'effective control' only in very narrowly defined scenarios, and, in particular, in situations of belligerent occupation"[142]. Well, in our submission, it is usually more productive and usually reliable, not to glance at judgments, but to actually read them. Judge Buergenthal has not only read them, he has helped write them, and he recently summarized your jurisprudence on the extra-territoriality of global human rights instruments, writing in an extra-judicial capacity. As he puts it, in a recent article, the extraterritorial reach of human rights treaties is not limited to occupied territories:

> "That conclusion finds support, in the first place, in the Court's language. Thus, when the Court in *Congo* v *Uganda* concludes that international human rights instruments are applicable to acts done by a State in the exercise of its jurisdiction outside its own territory, it emphasizes that this is so 'particularly in occupied territories'. It is readily apparent that an extraterritorial exercise of jurisdiction can fall under Article 2(1) [of the ICCPR] even if it takes place elsewhere than in occupied territories."[143]

10. Mr. President, that is this Court's approach, and it is also adopted by other international courts and tribunals and decision-making bodies, including the United Nations Human Rights Committee, the Inter-American Court of Human Rights (for example, in the case of *Coard* v. *United States*[144]) and the European Court of Human Rights (for example, in the case of *Issa* v. *Turkey*[145]).

11. These authorities do not support Russia's proposition as regards the two "exceptional" grounds for extraterritorial application of the 1965 Convention. So, whilst the parties now appear to be in some agreement that the 1965 Convention can apply extraterritorially, they disagree as to whether it does so in this case. So, what is the Court to do?

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[142]POR, para. 5.51.

[143]Thomas Buergenthal, "The ICJ, Human Rights and Extraterritorial Jurisdiction" in S. Breitenmoser *et al.*, (eds.), *Human Rights, Democracy and the Rule of Law: Liber Amicorum Luzius Wildhaber*, 2007, pp. 147-148; WSG, Vol. IV, Ann. 197.

[144]*Coard et al.* v. *United States of America*, Case 10.951, Report No. 109/99, IACHR (29 Sept. 1999), para. 37.

[145]*Issa and Others* v. *Turkey*, ECHR, Application No. 31821/96, Judgment (6 Nov. 2004), paras. 71, 76, 81, 82.

12. In our submission, the correct approach is to reject Russia's preliminary objection and, by confirming your existing jurisprudence, recognize the principle that the 1965 Convention applies, in this case, to acts occurring or felt in Georgia[146]. In the Advisory Opinion on *The Wall*, you concluded the ICCPR is applicable in respect of "acts done by a State in the exercise of its jurisdiction outside its own territory" (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 180, para. 111). In *Armed Activities on the Territory of the Congo* you adopted exactly the same formulation (*Armed Activities (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 243, para. 216). And yesterday, as you heard, Russia did not assert any argument for a different standard. In our submission you can and should maintain the standard you have consistently applied.

13. Accordingly, what we say is the 1965 Convention is applicable in respect of acts done by Russia on its territory and in the exercise of jurisdiction on the territory of Georgia, including South Ossetia and Abkhazia. The question of whether or not Russia has performed acts that engage its responsibility under the 1965 Convention is, of course, a matter for the merits. But we see no need to join to the merits an issue of settled law on an issue of jurisdiction. This limited matter is of an "exclusively preliminary character". It can be decided now, so that the Parties can rely upon your well-established standard to prepare their arguments on the merits.

III. Russia's fourth preliminary objection: time

14. I turn now to the fourth preliminary objection raised by the Russian Federation. In its document of December 2009, this issue was put with considerable brevity and, it must be said, confidence as to the arguments did not exactly leap from the page. The objection is that the Court's jurisdiction is limited *ratione temporis* to "events having taken place after the entry into force of CERD as between the Parties, i.e. to events which occurred after 2 July 1999"[147]. Ambassador Kolodkin did not say, as he did in respect of Russia's third objection, that this objection is "not necessarily of an exclusively preliminary nature"[148]. He merely referred you to

[146]WSG, paras. 4.9-4.24.

[147]POR, para. 1.33.

[148]CR 2010/8 (13 Sept. 2010), p. ;26, para. 31 (Kolodkin).

the relevant pages of Russia's preliminary objections[149]. He did not invite you to defer the issue to the merits phase. We agree that you can decide this now, and we say that you should do so.

15. We set out our detailed arguments on this objection in response in our Written Statement at paragraphs 5.1 to 5.25. In our submission, there can be no temporal objection to any of Georgia's claims as put to the Court.

16. Russia's first point was that Georgia was arguing for a retroactive application of this Convention. That is wrong: Georgia is not. Georgia has never asserted that the Convention should apply retroactively. Georgia's claim is merely that the Court is entitled to look at acts that occurred prior to the date of the entry into force of the 1965 Convention for the two Parties. That it is entitled to do and, indeed, the Russian Federation has done that in the course of this week; not least because, in our submission, they produced continuing effects as at 2 July 1999. In our submission, it is plain that they produce continuing effects. It has been described: more than 250,000 ethnic Georgians were forced out of South Ossetia and Abkhazia before July 1999[150], and each and every one of them has a continuing right of return under the 1965 Convention. The Court is perfectly entitled to exercise jurisdiction over the question of whether Russia's acts preventing the exercise of the right of return of pre-1999 ethnic Georgian internally displaced persons does or does not violate the Convention. Such exercise of jurisdiction is entirely consistent with your case law, for example, from the Inter-American Court of Human Rights. It is also entirely consistent with the principle articulated in Article 14, paragraph 2, of the ILC's Articles on State Responsibility.

17. Russia's second point on this preliminary objection was that Georgia was looking for remedies in respect of events that occurred prior to 2 July 1999[151]. We explained in our Written Statement why that is wrong[152]. Again, Russia has nothing to say in response. We invite you to draw the necessary conclusion as to its perception of the force of its own argument.

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[149] *Ibid.*, para. 32.

[150] Human Rights Watch/Helsinki, Human Rights Watch Arms Project, *Georgia/Abkhazia: Violations of the Laws of War and Russia's Role in the Conflict*, Vol. 7, No. 7 (Mar. 1995), p. 43; MG, Vol. III, Ann. 146.

[151] POR, paras. 6.5-6.14.

[152] WSG, paras. 5.13-5.15.

18. Russia's third point was to the effect that the Court cannot deal with facts or events *subsequent* to the filing of the Application, unless those facts are connected to those already within the Court's jurisdiction and their consideration would not transform the character of the dispute[153]. Georgia provided, again, a careful response to this point[154]. Once again, Russia has nothing to say in response. We can understand why Russia would not wish to embroil itself in this issue and why it failed to do so on Monday: to engage with this matter now would cause it to emphasize a consistent practice of ethnic discrimination that began in the early 1990s, continued after July 1999, was reinforced in 2006 and 2007 and 2008, and extends and continues today. Russia's responsibility over time is manifested — in particular, but not exclusively — by the continuing failure on the part of Russia to recognize and allow the rights of return of hundreds of thousands of ethnic Georgians to their homes in South Ossetia and Abkhazia. They allow Abkhaz to return to their homes, and that is the nub of this case, about a situation of plain and blatant discrimination. Russia's continuing role has been confirmed by the 2009 Report of the European Union, to which Russia professed such attachment yesterday. The EU Report describes in detail violence against ethnic Georgians and their property before and after the 2008 ceasefire in South Ossetia and the adjacent territories. It describes pervasive and continuing ethnic discrimination against ethnic Georgians. It describes in detail Russia's continuing failure to prevent those acts, even when they occur in the direct presence of Russian troops. And it describes the continuing failure of Russia to take "appropriate measures to ensure that internally displaced persons and refugees, including those from the conflicts of the early 1990s, are able to return to their homes with no conditions imposed other than those laid down in relevant international standards"[155].

19. So we can quite understand why Russia would not wish to highlight these matters in this hearing, by provoking a detailed discussion of what is going on right now, today, as I talk, in South Ossetia and Abkhazia. Russia's actions and its failures violate your Provisional Measures Order, as we described in Chapter VI of our Written Statement on Preliminary Objections. Yesterday Russia had nothing to say about its previous temporal objections. We invite you to conclude that this

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[153]POR, paras. 6.15.

[154]WSG, paras. 5.16-5.24.

[155]Independent International Fact-Finding Mission on the Conflict in Georgia, *Report*, Vol. I (Sept. 2009), para. 28; WSG, Vol. III, Ann. 120.

objection is, in effect, dropped, and to determine that you are entitled to look at the situation on the ground, as it is today.

20. Before I conclude on temporal issues, I would like to respond to one point made by Professor Zimmermann, who raised a different temporal issue. Referring to correspondence from Georgia to the Security Council dating back to 1993, he claimed that this document and others like it, were "irrelevant . . . *ratione temporis* as originating from a period prior to the entry into force of CERD as between the parties"[156]. With respect, such documents are highly relevant, and you are perfectly entitled to look at them, indeed we say you have to look at them to understand this story. They provide incontrovertible evidence that the dispute between Russia and Georgia — not between Georgia and anyone else — on the issue of discrimination in respect of the ethnic Georgians of South Ossetia and Abkhazia dates back as long ago as to that period. The document that Professor Zimmermann wants you to exclude — a Note Verbale from Georgia to the Security Council no less, and many others from that period — make it abundantly clear this dispute is not only about the events of the summer of 2008 — that is why they do not want you to look at those documents —, even if the events of the summer of 2008 did create conditions in which Georgia felt bound to initiate legal proceedings to protect, such as it could, the right of ethnic Georgians. The temporal element of this case is significant, but not in the way that Professor Zimmermann suggests. Like causes of action and disputes, time is not subject to neat pigeon-holes. The life of international law is to be found in continuous interchanges, not in closed compartments; we are on a highway, we are not in a cul-de-sac.

IV. Conclusion

21. Mr. President, Members of the Court, that concludes my presentation, and with it the Republic of Georgia's first round. We invite you to reject Russia's third and fourth preliminary objections at this stage, and to confirm that the Court is entitled to exercise jurisdiction over all of the claims raised by Georgia. In so doing, we submit that you will be confirming the role of the Court, the principal judicial organ of the United Nations, as the ultimate guardian of the rule of law on these vital matters, and one that is able to act in a timely and immediate manner, as you did in

[156]CR 2010/8 (13 Sep. 2010), p. 64, para. 19 (Zimmermann).

respect of the provisional measures phase. To decline jurisdiction at this phase would send a signal that the Court is not to be available when it is needed most on the issues of the greatest human importance. I thank you, Mr. President, Members of the Court, for your kind attention.

The PRESIDENT: I thank you, Professor Philippe Sands, for your statement. Your statement, indeed, brings to an end the first round of oral argument by Georgia. I wish to thank each of the Parties for the statements presented in the course of this first round of oral argument.

The Court will meet again tomorrow from 4 p.m. to 6 p.m. to hear the second round of oral argument of the Russian Federation. At the end of tomorrow's sitting the Russian Federation will present its final submissions. I recall that Georgia will then take the floor on Friday, 17 September from 10 a.m. to 12 noon for its second round of oral argument and will present its final submissions at the end of that sitting. Therefore, each Party will have a speaking time of two hours. I should nevertheless like to remind both Parties that, pursuant to Article 60, paragraph 1, of the Rules of Court, the oral proceeding presentations must be as succinct as possible. The purpose of the second round of oral argument, I would add, is to enable each of the Parties to reply to the argument advanced orally by the other Party in the first round. The second round must not therefore constitute a repetition of past statements. It therefore goes without saying that the Parties are not obliged to avail themselves of the entire time allowed to them.

Thank you. The sitting is adjourned.

The Court rose at 1 p.m.

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