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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2010

Public sitting

held on Wednesday 15 September 2010, at 4 p.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 mercredi 15 septembre 2010, à 16 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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The PRESIDENT: Please be seated. The sitting is open. The Court meets today to hear the second round of oral argument of the Russian Federation. As I announced yesterday, we have two hours for this particular sitting and I am going to call the first speaker on the side of the Russian Federation to take the floor but, before doing so, let me say that, given the fact that we have only a two-hour session this afternoon, my intention is not to have a coffee break. Of course, subject to circumstances which might require having a break, but that is the understanding on which I am going to conduct the business this afternoon.

I am going to call Mr. Samuel Wordsworth to the floor.

Mr. WORDSWORTH:

1. Mr. President, Members of the Court, I will deal with the issues in the same order as in my speech on Monday, that is: first, the meaning of the term "dispute" in Article 22; secondly, general legal principles, and thirdly, the documents on which Georgia relies to establish the existence of a dispute.

2. The first issue: it is not "exegesis gone wild" to focus on the wording of Article 22. My friend Professor Crawford says that what is needed is a "sense of reality", and he gives the example of States A and B, where State B takes measures against villagers in State A's territory, and State A believes that there is a CERD dispute with its powerful neighbour, seeks unsuccessfully to negotiate the resolution of that dispute, and is then faced with the decision of whether to come to this Court or to seek provisional measures or to go to the CERD Committee under Article 11 of CERD.

3. But, however much Georgia may wish things were different, that State A and State B analogy is not this case. On any reading, Article 22 establishes the preconditions for the peaceful settlement of disputes by the Court. To apply, for a moment, a rather more accurate sense of reality, the relevant example is where State A has gone down a different and impermissible route. It has resorted to unlawful military force to resolve its problems or, to use the words of the Commander of the Georgian contingent to the Joint Peacekeeping Forces — without of course wishing to give away the identity of State A — it has launched a military operation "aimed at

restoring the constitutional order in the territory of South Ossetia"[1]. State A then, without ever having mentioned CERD to State B, appears before this Court and suddenly says that it has a 15 or 20 year old CERD dispute with State B.

4. In these circumstances, it is a vital part of this Court's judicial function to subject the preconditions in CERD to the seisin of the Court to the closest scrutiny, and to apply them in accordance with well-established principles of interpretation. And this close scrutiny is all the more warranted in circumstances where States Parties to CERD have not previously sought to seise this Court with CERD disputes in the context of an armed conflict[2], with the one exception, of course, of the *Congo* v. *Rwanda* case, where CERD was one of the nine different treaties invoked (*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. 6, para 1).

5. I move onto Professor Crawford's specific comments on Russia's case on the meaning of the term "dispute" in Article 22 which, I should clarify, was not in fact raised for the first time at the hearing on Monday, but is outlined in Russia's Preliminary Objections[3]. He dealt with the point very briefly because, as he put it, Russia's interpretation is "utterly defeated" by the use of the word "matter" in Article 13, and it was said that the terms "dispute" and "matter" were used interchangeably in Article 13.

6. But, with all the respect due to such a distinguished colleague, the point cannot be batted away quite so easily. The first phrase of Article 13, which is the phrase that Professor Crawford is focussing on, establishes what happens "When the Commission has fully considered the matter". The use of the term "matter" is what would be expected in that context. It is a "matter" that is submitted to the Committee under Articles 11, paragraphs 1 and 2: that is the formal name for the originating document on which the Commission is reporting. The Commission reports on a matter, just as a court determines a claim. The point is made all the more clear when one looks at the

[1]Fact-Finding Mission, Vol. 1, para. 14; PORF, Ann. 75.

[2]See PORF, para. 3.13.

[3]CR 2010/9, p. 34, para. 4 (Crawford); cf. PORF, paras. 3.19 to 3.22.

travaux: the word originally used in Article 13 was "complaint", not "matter", before this was changed in line with the changes to Article 11 that I referred to on Monday[4].

7. Nothing Professor Crawford said detracts from the main point, which is that the States Parties to CERD evidently did not consider the "matter", as first communicated by the complaining State to the Committee under Article 11, paragraph 1, to be correctly characterized as a dispute. The matter has to undergo a five-stage crystallization process before it is characterized as a dispute. That is not just Russia's interpretation, it is the interpretation of the Committee in the formulation of its Rules of Procedure, as to which Professor Crawford had nothing to say[5].

8. As to Professor Crawford's suggested "more plausible interpretation", which was that the intention behind the different terms used in Articles 11 and 12 was to enable the CERD Committee to receive communications from State Parties to CERD whether or not they were party to an underlying dispute — because, he said, the world did not yet know the magic of obligations *erga omnes* — that is flatly contradicted by the intention of the drafters as established in the *travaux*[6].

9. The simple point remains that CERD carefully distinguishes between a non-crystallized "matter" and a "dispute" in Articles 11 and 12, and makes an equivalent distinction in Article 16, whereas Article 22 only uses the term "dispute". So, we have a situation where a treaty deliberately distinguishes, in two sets of provisions, between a "matter" or "complaint" on the one hand, and a "dispute" on the other hand, but, when it comes to the third relevant provision, the compromissory clause, which only uses the term "dispute", it is said that the term can be interpreted and applied as if there was no distinction at all.

10. Article 22 can of course be interpreted as if it lived in splendid isolation, as if it were not located in the only human rights treaty with a mandatory conciliation procedure that carefully distinguishes between non-crystallized matters and disputes, but was instead, for example, to be found in a bilateral FCN treaty with no such procedures and no such distinctions, but we submit that cannot be the correct approach. Professor Crawford's reference to the esoteric provisions of the Indus Waters Treaty does not change matters.

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[4]CR 2010/8, p. 30, para. 10 (Wordsworth).

[5]*Ibid.*, p. 30, para 9 (Wordsworth); Rules of Procedure of the Committee on the Elimination of Racial Discrimination, CERD/C/35/Rev.3.

[6]See, e.g., Third Committee, 1356th Meeting, Mr. Lamptey, p. 388, para. 12 (WSG, Ann. 34).

11. I turn to our case on the generally legal principles, as to which my friend Mr. Reichler was happy to list a number of matters on which the Parties agree. Three points.

12. First, Russia's case is that the general principles do not apply. Mr. Reichler's position was, in essence, just apply *Mavrommatis* and we're home and dry. But the *Mavrommatis* definition (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*), which is fundamental to Georgia's case on the existence of a dispute, was established by the Permanent Court in a context where the underlying treaty — the Mandate for Palestine — contained no crystallization and conciliation procedures analogous to those in CERD. And, although of course *Mavrommatis* has frequently been applied in this Court's jurisprudence, this has been in the context of optional declarations under Article 36, paragraph 2[7], or compromissory clauses in bilateral[8] or multilateral[9] treaties that did not have the special features of CERD that I have outlined. CERD is *lex specialis*.

13. Second, Mr. Reichler placed great emphasis on Russia's acceptance from the *Nicaragua* case that there is, as I said on Monday, no absolute requirement as a matter of the general principles that a State must have specified that a given treaty has been violated in order later to invoke that treaty before the Court[10]. But Mr. Reichler did not respond to the thrust of my submission: this was to highlight that the absence of a specific claim in the record will often be a very important indicator that there is no such dispute, but also that the obvious inference to draw from Georgia's failure to say to the CERD Committee that it had a dispute with Russia was that Georgia did not, in fact, have a CERD claim against Russia. About that failure, he said not one word.

14. Third, Mr. Reichler places great weight on Russia's position that the existence of a dispute as to the use of force or compliance with the laws of war does not exclude the possibility that there is a separate and justiciable dispute under CERD. That is not a concession, as was

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[7]See, for example, *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections*, Judgment, *I.C.J. Reports 1998*, p. 279, para 1; *East Timor (Portugal* v *Australia)*, *Judgment, I.C.J. Reports 1995*, p. 92, para 1.

[8]*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 395, para 5.

[9]*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. 118, para 1; *Certain Property (Liechtenstein* v. *Germany), Preliminary Objections, Judgment, I.C.J. Reports 2005*, p. 10, para 1.

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

suggested[11]. The point is that there is no such separate and justiciable dispute in this case. In this respect, the Court has repeatedly held that it is for the Court, itself, to determine "the real dispute that has been submitted to it". (*Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 449, para. 31; and *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 466, para. 30)[12]. This is a point that Georgia is very sensitive to, and it has taken the care in its Written Statement to assert that "the ethnic discrimination alleged by Georgia was not merely parallel or peripheral to the wider conflict between the two States (as Russia would have the Court believe), *but a central element of it*" (emphasis added). Let me test this in one rather obvious way.

15. In this Court's Advisory Opinion in the *Wall* case, particular attention was accorded to the contentions that Israel had made in its reports to the Human Rights Committee as to the applicability of the ICCPR in the West Bank and Gaza, and on the conclusions of that Committee on those contentions (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 179, para. 110). A similar attention was paid to Israel's reports to the Committee on Economic, Social and Cultural Rights and the views of that Committee (*ibid.*, p. 180, para. 112). In a related vein, in the *Bosnian Genocide* case, the Court stated that "it should in principle accept as highly persuasive relevant findings of fact made by the Tribunal" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), I.C.J. Reports 2007*, *Judgment*, p. 134, para. 223)[13].

16. Thus the Court has, quite naturally, placed a particular weight on the views of the United Nations human rights committees or international tribunals with a direct interest in a matter that has become before it. In this case, when it comes to the determination of the existence of a dispute, the position of the CERD Committee should also be accorded a particular importance. Indeed, I note

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[11]CR, 2010/9, p. 29, para 47 (Reichler).

[12]See also *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 Dec. 1974 in the* Nuclear Tests (New Zealand v. France) *Case (New Zealand* v. *France), Order of 22 September 1995, I.C.J. Reports 1995*, p. 304, para. 55.

[13]See also President Higgins's statement to the press of 26 Feb. 2007, in which she noted how the Court had "greatly benefited from the findings of fact that had been made by the International Criminal Tribunal for the former Yugoslavia (ICTY) when it was dealing with accused individuals".

that the honourable Agent for Georgia expressly relied on the CERD Committee's characterizations in her opening remarks yesterday, drawing attention to the CERD Committee's Concluding Observations of 2001, 2005 and 2007[14]. If I can take these and the relevant Georgian reports in turn:

(a) In its first report to the Committee, dated May 2000, Georgia said that it:

[Slide SW1]

> "Unreservedly condemns any policy, ideology or practice conducive to racial hatred or any form of 'ethnic cleansing' such as that practised in the Abkhaz region of Georgia following the armed conflict of 1992-1993. Hundreds of thousands of displaced persons, a large majority of whom are women, elderly persons and children, lost their homes and means of survival and became exiles in their own country. *Such has been the outcome of the policy pursued by the authorities of the self-proclaimed 'Republic of Abkhazia',* the aim of which has been to "cleanse" the region of Georgians and — in many cases — representatives of other nationalities as well."[15]

(b) The matter was then specifically discussed in the Committee on 15 and 16 March 2001[16]. Various questions were raised by the Country Rapporteur. There was no suggestion of any kind of Russian responsibility for any form of racial discrimination, whether in terms of ethnic cleansing in Abkhazia, discriminating against IDPs or otherwise. However, Georgia's representative did refer to the ethnic and political violence in Abkhazia in 1992 and 1993 and say:

[Slide SW2]

> "The efforts of the international community had not managed to resolve the conflict and serious ethnically motivated human rights violations were still occurring. *The Government was currently engaged in high-level negotiations to reach an agreement with the separatist organization responsible for the disturbances*, and the issue of respect for human rights loomed large in the talks."[17]

(c) The Committee then reported as follows:

[Slide SW3]

> "the situations in South Ossetia and Abkhazia have resulted in discrimination against people of different ethnic origins, including a large number of internally displaced persons and refugees. On repeated occasions, attention has been drawn *to the*

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[14]CR 2010/9, p.10, para.3 (Ms Burjaliani).

[15]WSG, Ann. 64, para. 55; emphasis added.

[16]WSG, Anns. 65 and 67.

[17]WSG, Ann. 67, para. 21; emphasis added.

> *obstruction by the Abkhaz authorities of the voluntary return of displaced populations*"[18].

(d) I move on to Georgia's second and third periodic reports, which were lodged in October 2004 (Annex 70) and considered in the Committee in August 2005 (Annex 72). Georgia's representative said that:

[Slide SW4]

> "Her Government was gravely concerned about violations of the human rights of Georgian citizens in the Gali district of Abkhazia and called for the establishment of a United Nations human rights protection office in the city of Gali to monitor the situation. The situation of internally displaced persons who had been unable to return to Abkhazia was another cause for concern. Her Government was hopeful that an agreement *could be reached with the Abkhaz authorities to the satisfaction of all parties . . .*" [19]

(e) I would add that Georgia then submitted further information to the Committee in December 2006, which contains no suggestion of an allegation of racial discrimination by Russia, although I do note that Georgia informed the Committee of a new draft law "aimed at restituting property and restoring rights and freedoms of persons affected by [the] *Georgian-Ossetian conflict*, whose rights were roughly violated during this conflict"[20]. No mention of Russia.

(f) The Committee's Concluding Observations, issued in March 2007, then contain no suggestion whatever of Russian responsibility for alleged acts of racial discrimination[21].

17. So much, we say, for the case on which so much emphasis was placed yesterday, on the alleged dispute with Russia over return of the IDPs to Abkhazia. A dispute that Georgia never saw fit to mention to the CERD Committee, a dispute that is inconsistent with the Concluding Observations of the CERD Committee on three separate reports — that is, on each occasion that the Committee has had the opportunity to make its observations so far as concerns Georgia. A dispute that is, in addition, radically inconsistent with multiple Security Council resolutions, including resolution 1808 of April 2008, which, as I said on Monday, repeatedly refers to Georgia

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[18]WSG, Ann. 66, para. 4; emphasis added.

[19]WSG, Ann. 72, para. 24; emphasis added.

[20]CERD/C/GEO/CO/3/ADD.1, para. 27; emphasis added.

[21]WSG, Ann. 86.

and Abkhazia as the two sides to a conflict[22], and as to which Georgia had precisely nothing to say yesterday.

18. Mr. President, Georgia cannot be entitled to take a very careful selection of documents from a no doubt vast diplomatic record, characterize these as CERD claims against Russia, and say that it is entitled to bring a 17 or 18-year old dispute over alleged discrimination in the return of refugees before the Court. If Georgia had had a claim to make it would have been made it before, before, the landscape changed with Georgia's unlawful use of force in August 2008. Georgia would have made that claim before the CERD Committee or, on Georgia's understanding of Article 22, before this Court. It did not do so, and it is not entitled to do so now.

19. I move on to the August 2008 conflict, now also repackaged as a CERD dispute, but a conflict that in fact took place at a time when the CERD Committee was in session, *and* Russia was appearing before the Committee. And yet the Committee raised no questions or concerns of any kind concerning the armed conflict. It gave no indication of any kind that it thought that the armed conflict engaged Russia's responsibility under CERD. Of course, that does not have the weight of a positive determination or expression of view, but it is nonetheless a very significant silence.

20. Mr. President, our case remains strongly that the real dispute so far as concerns the armed conflict does not concern CERD and, in this regard, we respectfully endorse the views of the seven Judges at paragraph 9 of the Joint Dissenting Opinion of 15 October 2008.

21. The statements of President Saakashvili of 9 and 11 August 2008, on which so much emphasis is now placed do not detract from this; likewise the other press briefings and cuttings that Mr. Reichler relies on[23]. Of course, the President said what he said, and it is almost as if in directly accusing Russia of ethnic cleansing on 11 August, he had in mind that Georgia would be lodging a CERD claim within less than 24 hours. In any event, Mr. Reichler elected completely to ignore the central point, which is, as I said on Monday, that these statements to the press were made at a time when Georgia *was* in fact engaged in negotiations with Russia, and was *not* in fact alleging in those negotiations breach of CERD or, indeed, racial discrimination more broadly[24].

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[22]CR 2010/8, p.38, para. 29 (Wordsworth); PORF Ann. 67.

[23]WSG, Anns. 185, 187 and 201.

[24]CR 2010/8, p. 40, para 33 (Wordsworth).

Georgia has a bizarre argument that Russia was refusing to engage in negotiations with Georgia at this time, but I will leave it to Professor Zimmermann to deal with that. For now, it is sufficient to say that the argument is self-evidently incorrect. Mr. Reichler also said that Russia denied President Saakashvili's 9 August allegation of ethnic cleansing in the debates before the Security Council on 10 August 2008[25]. No reference was given by Mr. Reichler, so that is no doubt a task for the second round. But so far as I can see from the document relied on in Georgia's Written Statement, there was no such denial[26]. As to the statement of Mr. Lavrov of 12 August 2008, this needs to be read in its context, and who knows whether it was made before or after Georgia lodged its Application on the very same day. Self-evidently it cannot have inspired the alleged dispute recorded in Georgia's Application.

22. Mr. President, both Mr. Reichler and Professor Akhavan elected to put Georgia's case on the existence of a dispute, and the existence of negotiations, by reference to the events of 9 to 12 August 2008. Then, but very much as the second string to Georgia's bow, they both said — look, this reference to CERD on 12 August 2008 was not artificial despite what Russia has repeatedly said, because there are in fact some 17 or 18 years of dispute, and negotiations of that dispute, that trail behind. Mr. President, the re-packaging of the armed conflict of August 2008 as a CERD dispute in this case is a legal concoction, and the avowed need to parcel it up with the 17 or 18 years simply serves to emphasize the point.

23. For a start, there is no continuum. President Saakashvili's briefings on ethnic cleansing self-evidently are not the same allegations of ethnic cleansing that were earlier levelled so far as concerns the events of Abkhazia of 1993, however much those earlier allegations are now re-packaged as allegations against Russia.

24. And, when it comes to the documents, the re-packaging of those earlier events falls apart as soon as one takes a closer look. Take the statement of President Saakashvili of 25 February 2004 that was at tab 6 of Georgia's folder yesterday — my friend Mr. Reichler described this as a "widely disseminated public statement directly accusing Russia of ethnic

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[25]CR 2010/9, p.17, para. 13 (Reichler).

[26]From Georgia's written pleadings, it is understood that the annex relied on is WSG, Ann. 96.

cleansing" in Abkhazia in the early 1990s[27]. The statement is in fact a transcript of a lengthy interview called "Ask Georgia's president: Georgia's new president, Mikhael Saakashvili, answers your questions", in the BBC news "talking points" series. From this 15-page transcript, Georgia has selected two sound bites from the President's response to the fifth member of the public who calls in. If this had been a case about how Georgia and Russia were on good relations at this time, Georgia would have no doubt have selected sound bites such as "But we want to be also on good terms with the Russians", which is what the President had said to the third caller, one Alexei from Moscow. It is almost surreal that this is being put forward as a statement of a CERD claim against Russia, and this is all the more so given the relevant context, that is, the context of what Georgia was *in fact* saying to the CERD Committee at this time.

25. Let me take you to some more of Mr. Reichler's selection of Georgia's best documents. These are the next two documents in the series in which he introduced the talking points interview[28].

26. First, there is what Mr. Reichler described as President Saakashvili accusing Russia of ethnic cleansing in an address to the European Parliament of November 2006. I do not think so. President Saakashvili was in fact quoting — and I quote — "one of the most famous Georgian-French film directors, Mr. Otar Ioseliani, while commentating on the current anti-Georgian campaign in Russia who remarked that history seems to be repeating itself", and then there is a quote from this film director about Russian ethnic cleansing in Abkhazia[29]. So, the subject-matter of what is being said is in fact some alleged anti-Georgian campaign in Russia, not a matter before you. The allegedly relevant words are those of a film director who may have a significant role in Georgian-Russian relations, but I doubt it. Then, at other points in this lengthy speech, President Saakashvili says that his message is one of reconciliation and, interestingly, there is one reference to "disputes". The President says, with reference to "our separatist problems":

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[27]CR 2010/9, p. 22, para. 25 (Reichler); WSG, Ann. 198.

[28]CR 2010/9, p. 22, para 26 (Reichler); WSG, Anns. 172 and 88.

[29]WSG, Ann. 172, ninth page.

[Slide SW5]

> "Our disputes continue because they are based on recidivist territorial claims — remnants from the Soviet period when an empire collapsed — and elites sought to retain their privileges and fiefdoms."

27. In the unlikely event that this was all being followed by the Russian Government, could this have been understood as a CERD claim? I think not.

28. Next document in Mr. Reichler's series — it is said by Mr. Reichler that the President

> "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'"[30].

I respectfully invite the Court to give the speech a careful read, as with every single one of Georgia's documents. The extract relied on says nothing about Russia at all — nothing. The extract is to be found in the seventeenth paragraph of a lengthy speech, as to which in the eighth paragraph there is a reference to Georgia's most challenging relationship being with its neighbour, Russia. In between this reference to Russia and the reference to ethnic cleansing, on which Georgia now relies, one learns about matters such as the rate of growth of Georgia's economy and reforms in education. How the remark is interpreted as a CERD claim against Russia I have no idea. Two paragraphs further down, there is an oblique reference to Russian peacekeepers, and a further two paragraphs down we find the following reference to ethnic cleansing in Abkhazia:

[Slide SW6]

> "The brutal campaign of ethnic cleansing uprooted ethnic Georgians, Armenians, Estonians, Greeks, Jews, Russians and others who had lived peacefully in that land for centuries . . ."

29. So this is a case that turns on Russia's ethnic cleansing of Russians. As I said on Monday, a very serious refugee issue, yes; a dispute between Georgia and Russia over racial discrimination, no, and this particular document could not conceivably be construed as the communication of a CERD claim. Let me continue a little further into the speech. If one goes down four more paragraphs, rather out of the blue, there is a reference to "years of biased and unbalanced actions by supposed peacekeeping forces", then some Martin Luther King and then, this:

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[30]CR 2010/9, p. 22, para. 26 (Reichler); WSG Ann. 88.

[Slide SW7]

> "The continued ignorance of the ethnic cleansing in Abkhazia, Georgia is a stain on the moral account book of the international community. [Note: of course, no reference to Russia.] These disputes are no longer about ethnic grievances; they are about the manipulation of greed by a tiny majority of activists, militants, militias and foreign backers, at the expense of the local population . . ."

30. No longer about ethnic grievances.

31. That brings me onto my next point. Mr. Reichler mis-characterized my references to what I called "background noise". I did not say that Georgia's allegations of CERD were background noise[31]; to the contrary, I said that there was a very high level of background noise *against which* Russia would have had to discern the existence of the alleged CERD dispute with Georgia. The background noise is all the claims that Georgia was in fact making, its claims in particular against the South Ossetian and Abkhazian authorities, that principally concerned Georgia's territorial sovereignty[32].

32. But that was not the only form of background noise. For much of the noise was of Georgia saying things that are completely inconsistent with the case that it now seeks to bring — like President Saakashvili saying to the United Nations General Assembly that the "disputes are no longer about ethnic grievances"[33]. If I can take another of the documents that Mr. Reichler relies on, a statement of Georgia's Permanent Representative in the United Nations of October 2006[34], there is an assertion that Russia's actions have for years only served to de-stabilize the situation in Georgia's regions of Abkhazia and Tskinvali, there is a statement which Georgia deploys on the failure of Russian peacekeepers to carry out their mandate of creating favourable security environment for returning IDPs, and then there is this:

[Slide 8]

> "The Russian political leader's statements and actions once again make clear that what we are dealing with is not a fundamentally ethnic conflict, but rather one stemming from Russia's territorial ambitions against my country."

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[31]CR 2010/9, p. 23, para. 28 (Reichler).

[32]CR 2010/8, p. 37, paras. 26-27 (Wordsworth).

[33]WSG, Ann. 88.

[34]CR 2010/9, p. 25, footnote 47 (Reichler); WSG, Ann. 171.

33. Not a fundamentally ethnic conflict. Quite right. True in 2006; true in 2007 when President Saakashvili said the same thing to the General Assembly; true in 2008 when Georgia unlawfully used force against the Russian peacekeeping forces and a few days later turned to this Court with its concocted CERD claim.

34. Mr. President, I do not have time to go through all of Mr. Reichler's documents in the detail I would like, but as I said in opening, there is a vital who, what and when question for every single one. I note that the exchange of June-July 2008[35] relied on by Mr. Reichler was addressed in some detail by Ambassador Roman Kolodkin in the first round — no need to say anything further on that. The remaining documents that Mr. Reichler referred to are as follows:

(a) The who: Mr. Reichler refers to Annexes 82, 124, 125, 132, 136, 145, 146 and 158 which are all documents that emanate from Georgia's Parliament. As I said on Monday, the Georgian Parliament does not implement Georgia's foreign policy[36]. There was no response to that. The Georgian Parliament cannot make a CERD claim. It does not speak with the same voice as the Georgian Government, as the concrete example that I gave you on Monday of the competing accounts of events of May 1998 amply demonstrated — another matter on which Mr. Reichler has had nothing to say[37]. To take another obvious example, Georgia's Parliament has repeatedly passed resolutions on the withdrawal of Russian peacekeepers — on which Georgia now relies, but, which the Georgian Government repeatedly ignored at the time.

(b) The who question, a second limb: there is a further category of documents, press statements that were not communicated to Russia: these are Annexes 180 and 182.

(c) The what question: Mr. Reichler refers to Annexes 91, 163 and 170 which when read in their entirety in fact concern assertions that Russia is seeking to annex Georgia's territory, or that some political act of recognition of the authorities in South Ossetia or Abkazia in fact constitutes support for ethnic cleansing. Or there is some banal reference to Russian peacekeepers. Mr. Reichler also referred to a report submitted before the Human Rights Committee, which is Annex 85, but the complaint made there is not of racial discrimination, it

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[35]MG, Anns. 308 and 311.

[36]CR 2010/8, p. 37, para. 27 (Wordsworth).

[37]*Ibid*.

is not under Article 26 of the ICCPR, and I note in passing that Mr. Reichler sought to rely on this report but of course passed over all Georgia's reports before the CERD Committee[38].

(d) The when question, finally: Mr. Reichler refers to Annexes 124, 125, 132, 136 and 138 which all concern events prior to 1999. Professor Zimmermann will return to the *ratione temporis* issue later today. But it is absurd to say that a pre-1999 document can constitute the communication by Georgia of a claim under CERD. And that is the full list of documents deployed by Mr. Reichler.

35. Mr. President, Members of the Court, that completes my remarks. I thank you for your kind attention, and may I ask you to hand the floor to Professor Pellet.

The PRESIDENT: I thank Mr. Samuel Wordsworth for his statement. I now invite Professor Alain Pellet to take the floor.

M. PELLET : Thank you very much Mr. President. Monsieur le président, Mesdames et Messieurs les juges, le texte que je vais lire vous dira sûrement quelque chose.

A. La nécessité d'un sens utile

[Projection n° 1]

1. «Tout différend entre deux ou plusieurs Etats parties touchant l'interprétation ou l'application de la présente convention sera porté, à la requête de toute partie au différend, devant la Cour internationale de Justice pour qu'elle statue à son sujet.» Et pourtant ce n'est pas le texte de l'article 22 de la convention CERD. C'est ainsi que la Géorgie lit cette disposition. Et je comprends pourquoi le professeur Crawford a préféré éviter de la relire lorsqu'il s'est employé à la «désinterpréter».

[Projection n° 2]

2. C'est que cette disposition dit en réalité quelque chose de très différent de ce que la Partie géorgienne tente de lui faire dire. Je la lis pour de vrai :

> «Tout différend entre deux ou plusieurs Etats parties touchant l'interprétation ou l'application de la présente convention, *qui n'aura pas été réglé par voie de négociation ou au moyen des procédures expressément prévues par ladite convention*,

[38] WSG, Ann. 85.

> sera porté, à la requête de toute partie au différend, devant la Cour internationale de Justice pour qu'elle statue à son sujet...»

3. Le professeur Crawford s'est donné la peine de compter les mots de la vraie version, celle de la convention. Soixante-cinq mots nous dit-il[39] (en français, langue plus fleurie que l'anglais, cela fait soixante et onze — et encore, sans les apostrophes) ; mais, en réalité, l'interprétation qu'il s'efforce de promouvoir réduit cette disposition à cinquante-deux mots. En d'autres termes mon contradicteur fait passer dix-neuf mots à la trappe comme si les négociateurs de la convention CERD les avaient inclus par inadvertance alors qu'ils ne signifieraient rien. Cela ne se peut : il faut leur trouver un sens — et pourtant, le conseil de la Géorgie ne s'en soucie guère : «Article 22 provides that a State Party may unilaterally refer a dispute to the Court if that dispute «is not settled by … the procedures expressly provided for in [the] Convention», but it does not establish any obligation to have recourse to those procedures.»[40]

4. Encore une fois, Monsieur le président, la thèse de la Géorgie revient à compter pour rien — à effacer, une expression faite d'une vingtaine de mots qui, selon son interprétation, devrait être privée de tout effet utile, au mépris des méthodes d'interprétation les mieux établies.

[Fin de la projection n° 2]

5. Et cette superbe indifférence pour le vrai sens des mots (du mot «ou» en l'occurrence) se retrouve dans l'obstination de mon adversaire et ami à affirmer benoîtement que «whether or not they are preconditions to access to the Court, the drafters treated «negotiation» and «the procedures expressly provided for in this Convention» as alternatives»[41]. Ce n'est tout simplement pas exact pour au moins trois raisons décisives :

— l'une de texte : dans la phrase litigieuse utiliser la conjonction «et» au lieu de «ou» aurait constitué un non-sens ;

— une autre de «vérité historique», si je puis dire qui tient aux travaux préparatoires de la convention ;

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[39] CR 2010/9, p. 44, par. 35. Voir aussi p. 33, par. 2 (Crawford).

[40] CR 2010/9, p. 37-38, par. 16 ; voir aussi p. 38, par. 17 (Crawford).

[41] CR 2010/9, p. 45, par. 36 (Crawford).

— quant à la troisième, elle est fondée sur un argument d'autorité : cela va à l'encontre de votre jurisprudence bien établie.

B. Le sens ordinaire du texte de l'article 22 interprété dans son contexte

[Projection n° 3 (= projection n° 4-2 du premier tour)]

6. Monsieur le président, sur le premier point, je ne puis que me répéter puisque le professeur Crawford n'en n'a rien dit — son silence (une attitude inhabituelle chez lui) témoignant sans doute de son embarras tant la chose paraît évidente ; écrire «et» au lieu de «ou» *dans cette phrase* aurait été tout simplement absurde : on ne peut régler un différend à la fois par l'un *et* par l'autre de ces moyens ; on peut tenter de le régler successivement par l'un *ou* par l'autre.

7. Et le curieux argument selon lequel dans d'autres dispositions de la convention — ou dans l'article 22 lui-même, il y a des «et» cumulatifs et des «ou» alternatifs[42] n'y change rien : nous n'avons évidemment jamais dit que les deux conjonctions sont *toujours* interchangeables : tout est question de circonstances et de contexte. S'agissant de l'expression qui nous occupe, les rédacteurs de la convention pouvaient seulement utiliser «ou» ; et ce «ou» ne pouvait qu'être cumulatif, comme c'est en général le cas dans une phrase négative[43]. Dans d'autres cas (bien sûr plus nombreux), ils ont, bien sûr aussi, retenu «ou» dans son sens alternatif.

[Projection n° 4 (article 2 1) *b)* en mettant les deux «ou» ou «*or*» en gras et en rouge)]

8. Au demeurant, Monsieur le président, l'article 22 n'est pas, tant s'en faut, la seule disposition de la convention qui utilise la conjonction «ou» après une formule verbale négative. Il y en a beaucoup d'exemples mais l'article 2, paragraphe 1 *b)*, présente un intérêt particulier car, dans son texte français, il comporte deux fois la conjonction «ou», qui a dans chacun une signification distincte et qui, pourtant est traduite de manière non uniforme dans les différentes langues officielles : «*b)* Chaque Etat partie s'engage à ne pas encourager, défendre *ou* appuyer la discrimination raciale...» Ici le verbe négatif («à ne pas...») est suivi par «ou» qui correspond bien à «or» en anglais, à «o» en espagnol ; et pourtant ce «ou» signifie évidemment «et», ce qui est

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[42] CR 2010/9, p. 44, par. 35 (Crawford) ; voir aussi p. 46, par. 43 (Crawford).

[43] Voir CR 2010/8, p. 54-55, par. 36 (Pellet).

illustré sans ambiguïté par le «и» [i]) en russe. Je continue ma lecture : «la discrimination raciale pratiquée par une personne *ou* une organisation quelconque».

Cette fois, le «ou» — que l'on retrouve également en anglais et en espagnol — est sans aucun doute alternatif ; le mot en russe «или» [«ili»], en revanche, a un sens exclusivement alternatif.

[Fin de la projection n° 4]

C. Les travaux préparatoires de la convention

9. Monsieur le président, pour ce qui est des travaux préparatoires, on ne peut pas dire qu'ils soient d'un grand secours à la Géorgie malgré les tentatives téméraires du professeur Crawford qui, de même que le saint protecteur de la Géorgie avait affronté le dragon, n'hésite pas à tenter de retourner le sens, fort clair, des travaux préparatoires. La différence, c'est que saint Georges, lui, avait terrassé le dragon...

10. Sans répéter ce que j'ai dit lundi[44], passons brièvement en revue les travaux préparatoires tels que mon contradicteur tente de se les approprier.

11. Sans se lasser, il reprend l'antienne de la Géorgie à ce sujet : «Article 22 has its roots in an entirely distinct process from that involved in constructing the mechanism of the CERD Committee.»[45] Et d'insister sur la confusion qu'aurait commise la Russie, qui se serait trompée sur l'origine de la clause compromissoire et sur le chemin qu'elle a parcouru lors de la négociation[46].

12. Monsieur le président, il est exact que le Bureau de la Troisième Commission a proposé le texte des dispositions finales[47], mais cet épisode n'est ni le début, ni la fin de l'histoire.

13. Elle commence, comme le concède du bout des lèvres le professeur Crawford (en utilisant une formule un peu méprisante), avec «un certain M. Inglés des Philippines» («a Mr. Inglés from the Philippines»)[48] — il s'agit du très respecté expert philippin à la Sous-Commission des droits de l'homme, qui est véritablement «l'inventeur» du mécanisme de surveillance de la convention par un comité d'experts indépendants et qui a proposé, de prévoir,

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[44] CR 2010/8, p. 55-58, par. 39-45 (Pellet).

[45] CR 2010/9, p. 48, par. 47 (Crawford).

[46] CR 2010/9, p. 49, par. 51 (Crawford).

[47] Voir CR 2010/8, p. 56-57, par. 41-43 (Pellet).

[48] CR 2010/9, p. 48, par. 48 (Crawford).

dans la même disposition[49], la saisine de la Cour «faute pour le comité de parvenir à une solution dans le délai imparti»[50]. C'est ce texte qui a été remis à la Commission des droits de l'homme[51] puis à la Troisième Commission[52]. Et ce n'est qu'à ce stade que, pas pour des raisons de principe mais pour des motifs de commodité, le principe de la compétence de la Cour a été renvoyé aux clauses finales.

14. Ceci était, au surplus, conforme à la pratique usuelle selon laquelle les clauses juridictionnelles figurent en général dans des dispositions finales. C'est donc très légitimement que, dans le document de travail sur les clauses finales préparé par le Secrétariat (et non par la Commission des droits de l'homme)[53], celui-ci a fait figurer un choix de rédactions possibles pour ce qui est de la saisine de la Cour. *Mais*, le professeur Crawford occulte deux éléments significatifs :

— d'une part, ce document du Secrétariat, après l'énumération de quatre clauses-types empruntées à divers traités conclus antérieurement, attire explicitement l'attention «sur l'avant-projet de mesures de mise en œuvre complémentaires, dont on a proposé l'insertion dans le projet de convention internationale sur l'élimination de toutes les formes de discrimination raciale et que la Sous-Commission a transmis à la Commission [en fait, il s'agissait du projet Inglés]»[54] ; et,

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[49] Article 17 de la proposition Inglés, onglet n° 4 du dossier de plaidoiries, Russie, 13 septembre 2010 : «Les Etats parties à la présente convention conviennent que tout Etat partie, défendeur ou plaignant, peut, si aucune solution n'a pu être obtenue selon les dispositions du paragraphe 1 de l'article 14, porter l'affaire devant la Cour internationale de Justice, après que le rapport prévu au paragraphe 3 de l'article 14 a été établi.» (M. Inglés, *Projet relatif aux mesures de mise en œuvre*, Nations Unies, doc. E/CN.4/Sub.2/L.321, 17 janvier 1964.)

[50] Conseil économique et social, *Projet de convention internationale sur l'élimination de toutes les formes de discrimination raciale*, compte rendu analytique de la 427e séance, Nations Unies, doc. E/CN.4/Sub.2/SR.427, p. 13 (observations écrites de la Géorgie (OEG), vol. II, annexe 7).

[51] Conseil économique et social, *Rapport de la sous-commission de la lutte contre les mesures discriminatoires et de la protection des minorités*, Nations Unies, doc. E/CN.4/873 E/CN.4/Sub.2/241, p. 53-54.

[52] Philippines, *Projet d'articles concernant les mesures de mise en œuvre*, Nations Unies, doc. A/C.3/L.1221, 11 octobre 1965 ; voir aussi onglet n° 4 du dossier de plaidoiries, Russie, 13 septembre 2010.

[53] Cf. CR 2010/9, p. 48, par. 48 (Crawford).

[54] Nations Unies, Conseil économique et social, *Projet de convention internationale sur l'élimination de toutes les formes de discrimination raciale, Clauses finales, Document de travail préparé par le Secrétariat*, OEG, vol. II, annexe 13, p. 17 pour la version française et p. 16 pour la version anglaise.

— d'autre part, ce même avant-projet est annexé au rapport de la Commission des droits de l'homme à la Troisième Commission — alors que le document sur les clauses finales du Secrétariat ne l'est pas[55].

15. Et, contrairement aux affirmations de mon d'habitude savant contradicteur[56], lors des débats au sein de la Troisième Commission elle-même, les discussions sur la clause compromissoire sont longtemps allées de pair avec celles relatives aux autres mesures de mise en œuvre[57] ; ce n'est qu'à la 1349e séance, soit le 19 novembre 1965, que les promoteurs de ces mesures ont renoncé à l'inclusion de la clause juridictionnelle parmi ces mesures et présenté un projet ne comportant aucune clause sur l'intervention de la Cour internationale de Justice. Ceci tout en précisant expressément par la voix du représentant du Ghana que la saisine de la Cour «pourra être prévue dans les clauses finales»[58].

16. A ce stade, contrairement à ce que suggère M. Crawford[59], la possibilité de saisine unilatérale de la Cour était loin d'être acquise. Comme l'a précisé — à ce moment là — le représentant du Ghana, dans une déclaration que mentionne mon contradicteur sans la citer : «[L]'idée de recours à la Cour internationale de Justice, dont il sera question dans les clauses finales, donne lieu à de nombreuses réserves.»[60]

17. C'est pour, je dirais, «assurer» d'abord le rôle du Comité que le Ghana et les Philippines ont exclu toute mention de la Cour de leurs propositions sur la procédure de conciliation. Et cette dissociation temporaire a été unanimement approuvée[61]. Mais on ne saurait en tirer la conclusion

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[55] Nations Unies, Commission des droits de l'homme, *Rapport sur la vingtième session* (17 février-18 mars 1964), doc. E/CN.4/874, p. 113-117, OEG, vol. II, annexe 16.

[56] CR 2010/9, p. 48, par. 47 (Crawford).

[57] Cf. *Documents officiels de la Troisième Commission de l'Assemblée générale*, *vingtième session*, Nations Unies, doc. A/C.3/SR.1344, p. 338, par. 16 ; p. 341, par. 43 ; *Documents officiels de la Troisième Commission de l'Assemblée générale, vingtième session*, Nations Unies, doc. A/C.3/SR.1345, p. 351, par. 40 ; *Documents officiels de la Troisième Commission de l'Assemblée générale, vingtième session*, Nations Unies, doc. A/C.3/SR.1347, p. 365, par. 68-69.

[58] *Documents officiels de la Troisième Commission de l'Assemblée générale*, *vingtième session*, Nations Unies, doc. A/C.3/SR.1349, p. 373, par. 29 (OEG, vol. II, annexe 28).

[59] CR 2010/9, p. 50, par. 53 (Crawford).

[60] *Documents officiels de la Troisième Commission de l'Assemblée générale*, *vingtième session*, Nations Unies, doc. A/C.3/SR. 1354, p. 403, par. 54.

[61] *Documents officiels de la Troisième Commission de l'Assemblée générale*, *vingtième session*, Nations Unies, doc. A/C.3/SR.1353, p. 398, par. 58.

hâtive et erronée que la clause compromissoire allait pour autant faire cavalier seul. Il a toujours été entendu par les négociateurs, que «la Commission ne devrait pas étudier les clauses finales avant les clauses d'application»[62].

18. Du reste, une fois la procédure de conciliation sous l'égide du Comité acquise, les mêmes Etats auxquels la Mauritanie s'était associée ont déposé l'amendement «des trois puissances» au projet de clause compromissoire élaboré par le Bureau[63]. Ceci était conforme à la décision de la Commission, que la Géorgie s'obstine à citer d'une manière tronquée, selon laquelle les dispositions finales «seraient revisées compte tenu du texte final de la convention»[64]. L'adoption de l'amendement des trois puissances constitue, elle, «la fin de l'histoire» : dorénavant, comme je l'ai expliqué lundi[65], le rôle premier du Comité et celui, ultime, de la Cour, sont préservés et, pourrait-on dire, sont «synchronisés» : d'abord la négociation et les procédures institutionnelles ; ensuite, en cas d'échec, la Cour.

19. Voici donc, Monsieur le président, ce que les auteurs de la convention *ont, délibérément, voulu* faire : trouver un équilibre entre la faculté pour les Etats de saisir la Cour tout en préservant le rôle du Comité, de façon à lui permettre de désamorcer le différend avant que celui-ci soit, en cas d'échec, porté devant la Cour. Le dragon remue toujours, Monsieur le président ! M. Crawford n'a pas réussi à débarrasser la Géorgie du spectre des travaux préparatoires.

20. Sur un point cependant, je suis prêt à reconnaître que ces travaux préparatoires laissent un aspect de l'article 22 dans une certaine incertitude : qu'avant de saisir la Cour l'Etat requérant doive avoir fait une tentative de règlement au titre de la phase de conciliation des articles 11 à 13, cela ne fait aucun doute. Qu'il faille également que «la Partie demanderesse [doive] avoir tenté d'engager, avec la Partie défenderesse, des discussions sur des questions pouvant relever de la

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[62] *Documents officiels de la Troisième Commission de l'Assemblée générale*, *vingtième session*, Nations Unies, doc. A/C.3/SR.1326, p. 208, par. 58 ; voir aussi déclaration du représentant de l'Irlande ; *Documents officiels de la Troisième Commission de l'Assemblée générale*, *vingtième session*, Nations Unies, doc. A/C.3/SR.1348, par. 3.

[63] *Projet de convention internationale sur l'élimination de toutes les formes de discrimination raciale; Ghana, Mauritanie, Philippines: amendements aux suggestions relatives aux clauses finales présentées par le Bureau de la Troisième Commission*, Nations Unies, docs. A/C.3/L.1237, A/C.3/L.1313, Russie, dossier de plaidoiries, 13 septembre 2010, onglet n° 5.

[64] *Documents officiels de l'Assemblée* générale, *Rapport de la Troisième Commission*, Nations Unies, doc. A/6181, 18 décembre 1965, p. 36, par. 174 (pour le texte anglais du rapport, voir OEG, vol. II, annexe 40, p. 35, par. 174). Voir CR 2010/8, p. 56, par. 41 (Pellet) et par contraste, CR 2010/9, p. 49, par. 51 (Crawford).

[65] CR 2010/8, p. 48-49, par. 24-25 et p. 57-58, par. 44 (Pellet).

CIEDR» (*Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie)*, *mesures conservatoires,* ordonnance du 15 octobre 2008, par. 114) comme vous l'avez noté dans votre ordonnance de 2008, cela n'est pas non plus douteux. Mais en quoi doit consister cette négociation ? Rien dans le texte de l'article 22, ni dans les travaux préparatoires, ne permet de le déterminer avec certitude.

21. Tout ce que l'on peut constater est que l'exigence d'une négociation est indissociable de celle des «procédures expressément prévues par ladite convention» et que ces procédures prévoient elles-mêmes des négociations bilatérales suite à la saisine du Comité, ce qui implique sans doute possible que, lorsque, contrairement à la Géorgie, un Etat suit la procédure prévue par la convention, la condition de la négociation — ou plutôt de l'échec des tentatives de négociation — devra nécessairement être réputée avoir été remplie. Etant donnée la date très tardive à laquelle le compromis «Comité d'abord/Cour ensuite» a été atteint, il est certainement raisonnable de soutenir qu'interprétée dans son contexte, l'exigence de tentatives de négociation préalable renvoie à l'article 11 comme la mention des procédures prévues par la convention le fait à l'évidence.

22. J'ajoute que si, comme vous l'avez constaté même *prima facie*, la Partie demanderesse doit avoir tenté d'engager des discussions avec la Partie défenderesse (*Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie), mesures conservatoires,* ordonnance du 15 octobre 2008, par. 114[66]), cela montre que, contrairement à l'insistance appuyée de l'avocat de la Géorgie, il n'est pas exact que tout ce qu'exige l'article 22 est «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»[67]. Vous ne sauriez, Mesdames et Messieurs de la Cour, vous contenter de ce constat, fût-il double. Il vous appartient, au contraire, de vous assurer que des tentatives de négociation ont effectivement eu lieu — de même qu'il vous incombe d'ailleurs de vérifier que les procédures CERD ont été utilisées (mais, en l'espèce, il n'est pas contesté qu'elles ne l'ont pas été).

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[66] *Op. cit.* par. 20.

[67] CR 2010/9, p. 33, par. 2 ; voir aussi, p. 38, par. 16 ; p. 39, par. 20 ; p. 43-44, par. 33 ou p. 51, par. 61 1) (Crawford).

D. Une jurisprudence bien établie

23. Il est, à cet égard, très curieux que le professeur Crawford appelle à la rescousse l'article II du pacte de Bogotá appliqué par la Cour (notamment dans l'affaire des *Actions armées* de 1988), ou l'opinion de Jessup dans les affaires du *Sud-Ouest africain*[68]. Dans l'un comme dans l'autre cas, un élément subjectif était en jeu : dans le premier, la Cour devait seulement «s'interroger sur l'avis des Parties» quant à la possibilité de régler le différend par la voie diplomatique (*Actions armées frontalières et transfrontalières (Nicaragua c. Honduras), compétence et recevabilité, arrêt, C.I.J. Recueil 1988*, p. 94, par. 63) ; dans le second (*Sud-Ouest africain*), il s'agissait d'apprécier si les Parties avaient «démontré que le différend n'[était] pas susceptible d'être réglé par des négociations» (*Sud-Ouest africain (Ethiopie c. Afrique du Sud; Libéria c. Afrique du Sud), exceptions préliminaires, arrêt,* opinion individuelle du juge Jessup, *C.I.J. Recueil 1962*, p. 435) et, dans cette hypothèse, l'appréciation devait émaner de la Cour (comme c'était aussi le cas dans l'affaire du *Nicaragua* de 1984 dans laquelle le *FCN Treaty* exigeait que le différend ne pût «être réglé *d'une manière satisfaisante [satisfactorily adjusted]* par la voie diplomatique» (*Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique), compétence et recevabilité, arrêt, C.I.J. Recueil 1984*, p. 427, par. 81)[69]). Je n'ai pas de querelle à cet égard avec le professeur Crawford — sinon que ... ceci n'a aucune pertinence en ce qui nous concerne. Nul ne conteste que la Cour doit déterminer objectivement si le différend a ou n'a pas («n'aura pas») «été réglé» ; mais, s'il ne l'a pas été, elle doit s'assurer aussi que les moyens énumérés à l'article 22 ont été tentés.

24. C'est ce qu'elle fait en effet chaque fois qu'il lui est demandé d'exercer sa juridiction sur la base d'une clause compromissoire du type de celle qui figure à l'article 22 de la convention CERD — c'est-à-dire d'une disposition permettant à une partie à un différend de saisir la Cour unilatéralement si le différend en question n'a pas été réglé auparavant par des moyens spécifiés. A cet égard, les explications embarrassées du professeur Crawford concernant l'affaire *RDC c. Rwanda)*[70] ne peuvent dissimuler :

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[68] CR 2010/9, p. 38, par. 19 (Crawford).

[69] Voir aussi l'opinion individuelle de sir Robert Jennings, *ibid.*, p. 556. Voir aussi CR 2010/8, p. 50-51, par. 29 (Pellet).

[70] CR 2010/9, p. 41-42, par. 28 (Crawford).

— *primo :* que l'article 75 de la Constitution de l'OMS est en tous points comparable à l'article 22 de la convention CERD ;

— *secondo :* que la constatation par la Cour de l'absence de différend au sujet de l'application de la Constitution de l'OMS — sur laquelle notre contradicteur met exclusivement l'accent — n'a justement pas empêché la Cour de s'interroger sur la réalisation des deux conditions procédurales posées par l'article 75 ; et

— *tertio :* qu'elle a expressément indiqué qu'il s'agissait de «conditions préalables» qui doivent être «remplies» — et ceci au pluriel (*Activités armées sur le territoire du Congo (nouvelle requête 2002) (République démocratique du Congo c. Rwanda), compétence et recevabilité, arrêt, C.I.J. Recueil 2006*, p. 43, par. 100).

E. Les relations entre les modes conventionnellement prévus et les autres modes de règlement des différends

25. Au demeurant, dire que les conditions posées à l'article 22 de la convention CERD sont des préalables nécessaires à la saisine de la Cour, ne signifie évidemment pas que les Parties ont une obligation juridique de régler leur différend par l'un de ces moyens — contrairement à ce que le professeur Crawford veut nous faire dire lorsqu'il prétend que, selon la Russie, l'article 22 imposerait *trois* conditions préalables à la saisine de la Cour dont la première serait le «devoir de régler le différend avant de saisir la Cour» («the «duty to settle the dispute before seizing the Court»»)[71]. Il m'arrive sûrement de dire des bêtises, Monsieur le président, mais de proférer une telle absurdité, honnêtement je ne crois pas : il est en effet inconcevable que le règlement du différend puisse être une condition à la saisine de la Cour — dont la mission est justement de régler les différends ! En revanche, ce qui est vrai, c'est que tous les Etats ont le devoir absolu de — vous reconnaîtrez la formule — «régler leurs différends internationaux par des moyens pacifiques, de telle manière que la paix et la sécurité internationales ainsi que la justice ne soient pas mises en danger»[72]. Et ce n'est sûrement pas en utilisant la force armée que la Géorgie pouvait espérer régler son prétendu différend avec la Russie conformément au droit international.

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[71] CR 2010/9, p. 37, par. 15 (Crawford).

[72] Charte des Nations Unies, art. 2, par. 3 ; voir aussi art. 33, par. 1.

26. Au demeurant, ce que nous avons dit est tout à fait différent que ce que l'avocat de la Géorgie veut nous faire dire : ce n'est évidemment pas que la Géorgie devait avoir *réglé* ce prétendu différend avant de le soumettre à la Cour — ce qui n'a aucun sens — mais qu'elle devait s'y être *efforcée* en utilisant les deux moyens expressément mentionnés à l'article 22. Etant entendu que rien n'aurait empêché les deux Etats de le régler par tout autre moyen licite convenu entre eux comme le rappellent et l'article 22 lui-même et l'article 16 de la convention.

27. Et ceci me conduit à dire à nouveau un mot de l'extraordinaire insistance mise par la Géorgie à chercher secours dans cette dernière disposition, dans l'article 16. Celle-ci confirme, sans doute aucun, «that the procedures expressly provided for in the Convention are not exclusive or exhaustive»[73] ; mais les choses sont plus compliquées lorsque mon contradicteur affirme qu'elles ne sont pas non plus «obligatoires» («compulsory»), car, comme je l'ai dit lundi, c'est là qu'il joue sur les mots[74]. Elles ne sont pas obligatoires, c'est vrai, à deux points de vue :

— du moment que la paix et la sécurité internationales ne sont pas mises en danger, les Etats, même s'ils sont en désaccord sur une question concernant l'interprétation ou l'application de la convention ne sont pas obligés d'y recourir, non plus d'ailleurs qu'à aucun autre moyen ; et

— rien, évidemment, ne leur interdit, de régler leurs différends à ce sujet par d'autres moyens ; en revanche (et à cet égard les recours à la négociation et aux procédures expressément prévues par la convention sont rigoureusement «obligatoires» («compulsory»)),

— la Cour de céans ne peut pas être saisie d'un différend (à condition qu'il existe effectivement) si le requérant n'a pas tenté de le régler par les moyens spécifiés à l'article 22.

28. J'ajoute que je ne vois pas du tout pourquoi il ne pourrait «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.»[75] — c'est M. Crawford qui le dit. Cela, en réalité, fait parfaitement sens : l'une des raisons pour lesquelles de nombreux Etats — et c'est le cas de la Fédération de Russie — ne font pas de déclaration facultative de l'article 36, paragraphe 2, du Statut tout en acceptant les clauses compromissoires de

[73] CR 2010/9, p. 46, par. 44 (Crawford).

[74] CR 2010/8, p. 45, par. 15 (Crawford).

[75] CR 2010/9, p. 47, par. 44 (Crawford).

nombreux traités en précisant qu'ils ne récusent pas par principe la compétence de la Cour, mais qu'ils souhaitent que les conditions particulières dont celle-ci est assortie par ces traités soient respectées.

29. Quant à l'emplacement respectif des articles 16 et 22, je persiste et signe : l'argument est parfaitement chimérique : l'article 16 est situé là où il doit l'être, à la fin de la partie sur les mesures de mise en œuvre, car les négociateurs n'entendaient pas, que la création du comité, porte atteinte à l'autorité d'organes déjà établis par d'autres conventions internationales. Ainsi, comme l'avait expliqué, toujours M. Inglés,

> «les Etats parties à la convention sont entièrement libres de recourir à «d'autres procédures» pour le règlement de leur différend. Ces procédures pourraient inclure … par exemple la Cour des droits de l'homme créée par la convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales.»[76]

Du reste, la Géorgie ne s'est pas privée du bénéfice de cette clause puisqu'elle a saisi la Cour européenne des droits de l'homme[77].

30. De même, comme c'est le cas des clauses juridictionnelles de nombreux traités, l'article 22, qui concerne le règlement des différends, figure dans les clauses finales ; il renvoie aux procédures prévues dans la deuxième partie de la convention, et rappelle, lui aussi, que le recours possible et conditionnel à la Cour, dont il pose le principe, n'est pas exclusif. Il n'y a rien d'épatant dans tout ceci — et l'on ne saurait assurément y trouver un argument pour priver le renvoi effectué à l'article 22 de tout effet utile.

F. Les relations entre la Cour et le Comité

31. Monsieur le président, il m'est arrivé de dénoncer les excès de ce que j'appelle le «droits-de-l'hommisme» en droit international[78]. Mais je dois dire que la charge véhémente du

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[76] M. Inglés, Conseil économique et social, *Projet de convention internationale sur l'élimination de toutes les formes de discrimination raciale*, compte rendu analytique de la 427e séance, Nations Unies, doc. E/CN.4/Sub.2/SR.427, p. 13 ; voir aussi Natan Lerner, *The U.N. Convention on the Elimination of All Forms of Racial Discrimination,* Sitjhoff & Noordhoff, 1980, p. 90.

[77] CEDH, 5e section, décision sur la recevabilité, 3 juillet 2009, *Géorgie c. Russie*, requête no 13255/07.

[78] Voir ««Human Rightism» and International Law», *Italian Yearbook of International Law*, 2000, p. 3-16 (traduction anglaise de la «Conférence Gilberto Amado» prononcée aux Nations Unies à Genève le 18 juillet 2000 sur ««Droits de l'hommisme» et droit international» (http://untreaty.un.org/ilc/sessions/52/french/amado.pdf) et également disponible dans *Droits fondamentaux*, http://www.droits-fondamentaux.org/article.php3?id_article=27.

professeur Crawford contre le Comité CERD m'a mis extrêmement mal à l'aise[79]. Selon lui, les procédures prévues par la convention sont «futiles»[80] et «obsolètes»[81]. «The [Conciliation] 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.»[82] Ce mépris affiché pour le CERD s'étend d'ailleurs à l'ensemble des organes de traités de droits de l'homme qui, pas plus que lui, ne sont de véritables juridictions («they are no courts»)[83] et auxquels, dans la plupart des cas, les clauses compromissoires ne se réfèrent pas[84].

32. Je dois dire, Monsieur le président, que malgré la grande estime amicale et la sincère admiration professionnelle que je lui porte, que je sois l'Etat A, B ou G, j'hésiterais, dans ces conditions, à consulter le professeur Crawford sur la procédure à suivre : il n'y a pas besoin d'être particulièrement «formaliste»[85] pour admettre que, comme les juridictions elles-mêmes, les juristes sont appelés «à interpréter … non à réviser» les traités (*Interprétation des traités de paix conclus avec la Bulgarie, la Hongrie et la Roumanie, deuxième phase*, *avis consultatif, C.I.J. Recueil 1950*, p. 229). Or c'est ce que fait mon contradicteur et ce qu'il veut vous convaincre de faire : il n'aime pas — la Géorgie n'aime pas les mécanismes de la convention CERD ; elle juge les procédures qu'elle met à sa disposition futiles ; elle les proclame obsolètes ; elle s'en libère et décrète pouvoir vous saisir directement car ce serait plus efficace. Ce n'est pas juridiquement défendable, ni objectivement soutenable.

33. Ce n'est pas juridiquement défendable car ce n'est pas parce que des dispositions conventionnelles ne sont pas du goût de la Géorgie qu'elle peut se dégager des règles qu'elles posent. Le professeur Crawford ne dit pas que la description que j'ai faite des étapes de la procédure des articles 11 à 13 est inexacte ; il dit qu'elle est trop lente et qu'elle présente l'inconvénient de ne pas aboutir à une décision obligatoire. Le premier point est subjectif mais,

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[79] Voir CR 2010/9, p. 34-35, par. 4-5 ; p. 45, par. 37-38 ; et p. 47, par. 45 (Crawford).

[80] CR 2010/9, p. 35, par. 5, ou p. 47, par. 45 (Crawford).

[81] CR 2010/9, p. 45, par. 38 (Crawford).

[82] CR 2010/9, p. 34, par. 4 (Crawford).

[83] CR 2010/9, p. 45, par. 37 (Crawford).

[84] *Ibid.*

[85] Cf. CR 2010/9, p. 34, par. 4 (Crawford).

avec tout le respect que j'ai pour la Cour, je ne suis pas certain que la rapidité soit la caractéristique première de la procédure qu'elle suit. Quant au second reproche, il appelle trois remarques :

1) il n'est pas du tout évident que, dans tous les cas, une procédure contentieuse aboutissant à une décision juridiquement obligatoire soit le meilleur moyen de régler les différends entre Etats ;
2) que cela plaise ou non à la Géorgie et au professeur Crawford, les négociateurs ont délibérément privilégié ces modes souples de règlement et conditionné la saisine de la Cour à leur échec ; tel est le droit ; en outre,
3) la possibilité de saisir votre haute juridiction lorsque cette condition est remplie constitue, justement, l'une des grandes hardiesses de la convention CERD.

34. Il est donc fort injuste, Monsieur le président, d'accabler le mécanisme CERD de tant de critiques : faut-il rappeler qu'il est, de tous ceux institués par la suite, par les conventions de protection des droits de l'homme, le seul à inclure l'obligation pour les Etats parties de se soumettre à une procédure de règlement de leurs différends *inter se* ? Faut-il rappeler que parmi toutes ces conventions, celle de 1965 est l'une des quatre seules — et la première — à prévoir qu'*in fine* la Cour de céans peut être saisie unilatéralement pour régler ces différends (et d'ailleurs, que les trois autres excluent également la saisine inconditionnelle et immédiate de la Cour[86]) ?

35. Mais le dédain manifesté par le professeur Crawford à l'égard des procédures de la convention est également grandement injustifié pour une autre raison : contrairement à ses allégations, le CERD n'est pas désarmé face aux situations d'urgence ; le prétendre, c'est faire sciemment abstraction de la procédure d'alerte rapide que le Comité a mis en place dans le contexte de la crise yougoslave, avec l'objectif spécifique de pouvoir répondre aux situations d'urgence. Comme le relève l'opinion dissidente commune jointe à l'ordonnance de la Cour du 15 octobre 2008[87]. Cette procédure n'est ni obsolète (elle a été utilisée à une vingtaine de reprises

[86] Voir la convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants (1984), art. 30, par. 1 ; la convention internationale sur la protection des droits de tous les travailleurs migrants et des membres de leur famille (1990), art. 92, par. 1, et la convention internationale pour la protection de toutes les personnes contre les disparitions forcées (2006), art. 42.

[87] *C.I.J. Recueil 2008*, p. 55, par. 18, qui renvoie au rapport du Comité pour l'élimination de la discrimination raciale, Nations Unies, doc. A/48/18, annexe III.

depuis 1993 et elle a été revisée en 2007), ni lente (la réaction du Comité peut être presque instantanée lorsqu'il est saisi), ni futile (elle peut aboutir à la saisine du Conseil de sécurité)[88].

36. Et il y a autre chose : la Géorgie a longuement expliqué que le différend l'opposant à la Russie remontait au début des années quatre-vingt-dix. Elle est devenue partie à la convention CERD en 1999. Depuis cette date, il ne tenait qu'à elle d'actionner les mécanismes prévus par cet instrument. Elle ne l'a pas fait ; elle est bien mal venue à invoquer l'urgence — et il est, pour le moins suspect que ce soit justement au moment où l'échec de son offensive armée était avéré qu'elle ait découvert l'urgence qu'il y avait à saisir la Cour de céans d'un différend qu'elle n'avait jugé utile ni de notifier à la Russie, ni de régler, pendant presque vingt ans.

37. Mesdames et Messieurs de la Cour, par votre ordonnance du 15 octobre 2008, vous avez estimé que l'article 22 semblait *prima facie* constituer une base sur laquelle la compétence de la Cour pourrait être fondée. Comme vous l'avez précisé dans une formule qui, pour être habituelle, n'est pas une clause de style[89], cette décision «ne [préjugeait] en rien la question de la compétence de la Cour pour connaître du fond de l'affaire» (*Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie), mesures conservatoires,* ordonnance du 15 octobre 2008, par. 148). Elle a été rendue à une courte majorité — sans que j'insinue que votre ordonnance en soit «moins obligatoire» pour les Parties ; simplement c'est un fait. Au surplus, nous n'avions pu discuter que superficiellement de l'interprétation de cet unique fondement de la compétence de la Cour invoqué par la Géorgie, des travaux préparatoires qui avaient conduit à son adoption et de la jurisprudence de la Cour face à des clauses similaires.

38. Nous sommes convaincus qu'après le débat contradictoire, écrit et oral, auquel les exceptions préliminaires de la Fédération de Russie ont donné lieu, vous reviserez votre position et

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[88] Voir note sur l'alerte rapide et les mesures d'urgence (http://www2.ohchr.org/english/bodies/cerd/docs/A_48_18_Annex_III_French.pdf) et les directives applicables aux procédures d'alerte rapide et d'intervention d'urgence (rapport annuel A/62/18, annexe, chap. III) également disponible à l'adresse suivante : http://www2.ohchr.org/english/bodies/cerd/docs/Revised_Guidelines_2007_fr.doc. Voir rapport du Comité pour l'élimination de la discrimination raciale, 22 septembre 1995, Nations Unies, doc. A/50/18, par. 224.

[89] Voir *Anglo-Iranian Oil Co. (Royaume-Uni c. Iran), mesures conservatoires, ordonnance du 5 juillet 1951*, *C.I.J. Recueil 1951*, p. 92-93, et *Anglo-Iranian Oil Co. (Royaume-Uni c. Iran), exception préliminaire, arrêt*, *C.I.J. Recueil 1952*, p. 115 ; voir aussi *Demande en interprétation de l'arrêt du 31 mars 2004 en l'affaire* Avena et autres ressortissants mexicains (Mexique c. Etats-Unis d'Amérique) *(Mexique c. Etats-Unis d'Amérique)*, ordonnance du 16 juillet 2008, *C.I.J. Recueil 2008*, p. 326, par. 57 et arrêt du 19 janvier 2009, par. 45.

que vous ne permettrez pas à la Géorgie d'utiliser le forum de la Cour mondiale pour prendre, sur le terrain judiciaire, une revanche à l'échec du recours à la force armée pour trancher un conflit territorial qu'elle a ensuite déguisé en un différend concernant l'application de la convention CERD. Et que vous ne permettrez pas non plus que, ce faisant, elle court-circuite les procédures expressément prévues par cet instrument, et qu'il ne tenait qu'à elle d'actionner si elle considérait vraiment qu'un tel différend l'opposait à la Russie. Ce faisant, non seulement vous vous prononcerez, comme il se doit, conformément au droit international, mais encore, loin de menacer d'une manière quelconque le système international de protection des droits de l'homme, vous contribuerez à le renforcer en préservant l'intégrité des compétences du CERD.

Mesdames et Messieurs de la Cour, je vous remercie de votre écoute attentive. Et je vous prie, Monsieur le président, de bien vouloir donner la parole au professeur Zimmermann.

The PRESIDENT: I thank Professor Alain Pellet for his statement. I now invite Professor Andreas Zimmermann to take the floor.

Mr. ZIMMERMANN:

LACK OF NEGOTIATIONS REQUIRED BY ARTICLE 22 CERD

1. Mr. President, Members of the Court, it is my task to deal again with the requirement of negotiations as provided for in Article 22 of CERD. In the second part of my intervention, I will also briefly reply to Georgia's arguments on jurisdiction *ratione temporis* and *ratione loci*.

A. Absence of negotiations

I. Introduction

2. Mr. President, let me begin by emphasizing the important function of negotiations. They are a flexible mode of dispute settlement, but they are also designed to bring about clarity — a clarity that is particularly important where, as in the case at hand, an applicant State *expos facto* artificially seeks to portray a whole range of issues as a treaty-specific dispute.

3. This suggests that negotiation requirements should not be seen as a formality. And this is corroborated by a second, more specific concern.

4. Mr. President, Article 22 of CERD contains two equally important procedural requirements before a CERD dispute may be brought before the Court, namely, the prior use of CERD procedures, and inter-State negotiations.

5. Of course, if Russia is correct, then it is obvious that Georgia cannot seise the Court with a dispute that it has never presented to the CERD Committee. But even if the Court does not accept this argument, Russia submits that the special set of dispute settlement mechanisms on which CERD relies — namely, involving negotiations, Committee procedures, and this Court — must be taken into account when interpreting the requirement of prior negotiations.

6. In this respect, it is highly relevant that Articles 11-13 CERD envisage very specific forms of negotiations. Pursuant to Article 11 of CERD, the receiving State must have an opportunity to submit written explanations as to the allegation that it is not "giving effect to the provisions of the Convention".

7. It must be told about the specific allegations made against it, and it has an opportunity to discuss these with the State bringing the application.

8. Mr. President, the fact that Article 11 of CERD stresses the importance of bilateral and CERD-specific negotiations supports Russia's view that negotiations under CERD are more than a mere formality. While Georgia has treated Article 22 of CERD like a regular dispute settlement clause, Russia would point out that it is one of the few clauses that operate in tandem with a Committee procedure emphasising the importance of bilateral and specific negotiations.

9. In this particular setting, the comments made two years ago, in the joint dissent of seven Members of this Court at the provisional measures stage of these proceedings, are of particular relevance:

> "[I]t is clear that when negotiation is expressly provided for by a treaty, the Court cannot ignore this prior condition without explanation; nor can the Court dispose of this condition merely by observing that the question has not been resolved by negotiation." (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Order of 15 October 2008*, Joint dissenting opinion of Vice-President Al-Khasawneh and Judges Ranjeva, Shi, Koroma, Tomka, Bennouna and Skotnikov, para. 13.)

10. Mr. President, in the light of this statement, and given the importance that CERD places on negotiations, I need not spend much time on Professor Akhavan's attempts to rescue the specific

approach to multilateral negotiations sanctioned in the *South West Africa* cases[90]. What is important is that the Court only recognized the relevance of multilateral negotiations in exceptional circumstances, namely "where the disputed questions are of common interest to a group of States" and where, moreover the State bringing the case had "already fully participated in the collective negotiations with the same State in opposition" (*South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 346).

11. Neither factor — common interest, nor collective negotiations — is present here.

12. Mr. President, I can be equally brief with respect to the so-called negotiations preceding Georgia's accession to CERD in 1999, which are irrelevant. I can be brief because Professor Sands merely claimed that you are entitled to look at pre-1999 evidence[91] — well, of course you are.

13. Yet, neither Professor Sands nor Professor Akhavan argue that such pre-1999 instances could constitute negotiations under Article 22 of CERD as between Georgia and Russia — indeed how could it be otherwise since Georgia was during that time not a contracting party and since Article 22 of CERD requires negotiations to take place — let me remind you — between "States parties . . . to this Convention"?

14. This brings me now to the remaining specific instances of alleged negotiations alluded to yesterday — and I will begin with evidence originating from the days immediately following Georgia's illegal use of force — or as Professor Akhavan rather put it — the days immediately prior to the filing of Georgia's case.

II. Alleged negotiations between 8-12 August 2008

15. Mr. President, Professor Akhavan presented this evidence right at the outset of his first round pleading[92], and one can safely assume that Georgia has put its best foot forward.

16. In that regard I first note in passing, however, that, by immediately falling back on events of August 2008, when called upon to provide specific evidence, Professor Akhavan — just like Mr. Reichler before him — weakens Georgia's broader claim, namely, that there had been a continuing dispute and ensuing negotiations spanning nearly two decades.

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[90]CR 2010/9, p. 60, para. 28 (Akhavan).

[91]CR 2010/9, p. 69, para. 20 (Sands).

[92]CR 2010/9, pp. 53 *et seq.*, paras. 6 *et seq.* (Akhavan).

17. During his pleading, Professor Akhavan specifically referred to two statements — one by President Saakashvili and the other by Georgia's permanent representative in the Security Council[93].

18. While both are full of accusations against Russia, the one by President Saakashvili of 8 August 2008 is completely silent on negotiations — and besides constitutes nothing but a compte rendu of a mere press briefing not addressed in any manner whatsoever to Russia.

19. The second statement of 10 August 2008 by the Georgian representative in the Security Council, indeed claims that "the Georgia leadership had reached out overnight to the Russian political leadership"[94], while Russia in turn is repeatedly said to have refused to negotiate[95].

20. Mr. President, but did Georgia really "reach out" to discuss questions of racial discrimination — or rather matters relating to the use of force, which dominated the Security Council meeting? And, more importantly, did Russia really refuse to negotiate? Let us have a look at the very exchange of statements that Professor Akhavan relied upon yesterday. The Russian representative had stated:

[Start slide 1]

> "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?"[96]

[End slide 1]

21. The Russian representative then went on, however, to explain why President Saakashvili was not, to put it mildly, the ideal person to conduct negotiations with Russia, given that he had just ordered the attack against Russian peacekeepers and the South Ossetian civilian population. But more importantly, the Russian representative expressly stated the following:

[Start slide 2]

> "But this, of course, does not mean that we are evading any contacts with our Georgian colleagues. Such contacts are continuing at a wide variety of levels. For example, the most recent was just a few hours ago: a lengthy telephone conversation

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[93]Cf., CR 2010/9, p. 53, para. 7 (Akhavan).

[94]UN Security Council, 5953rd Meeting, UN doc. S/PV.5953 (10 Aug. 2008), p. 5.

[95]Cf., e.g., CR 2010/9, p. 53 *et seq.*, paras. 9 and 10 (Akhavan).

[96]UN Security Council, 5953rd Meeting, UN doc. S/PV.5953 (10 Aug. 2008), p. 9.

> between our Minister for Foreign Affairs and the Minister for Foreign Affairs of Georgia. What, then, is the problem here?"[97]

22. Mr. President, indeed — what, then, is the problem here? This statement — to which, indeed, I had already previously referred to[98] — appears just one paragraph below the excerpt presented to you by Professor Akhavan. It is easy to find for anyone seeking to present a balanced account of the exchange that went on between Georgia and Russia in the Security Council.

[End slide 2]

23. It confirms that the two Parties were in close diplomatic contact even while the armed conflict was on-going[99].

24. It confirms that contacts were taking place at the highest diplomatic level.

25. It confirms that the problem was not Russia's alleged refusal to negotiate.

26. Rather, it confirms — but this is a problem for Georgia — that the actual negotiations simply did not concern questions of racial discrimination.

27. Mr. President, allow me to reiterate the point I made on Monday[100], and to which Professor Akhavan had nothing to say. Issues related to CERD were simply not raised with Russia during the armed conflict, they did not feature in the discussions between Presidents Sarkozy and Medvedev, and they were not taken up in the six-point plan agreed between the Parties.

28. That leaves us with the alleged refusal to negotiate by the Russian Foreign Minister on 12 August[101] — or "just two days later", as Professor Akhavan prefers to put it[102] — 12 August 2008.

29. This statement again only referred to possible direct talks with President Saakashvili. Moreover, at the very same time the ceasefire negotiations between the Parties were right

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[97]UN Security Council, 5953rd Meeting, UN doc. S/PV.5953 (10 Aug. 2008), p. 9.

[98]CR 2010/8, p. 69-70, para. 46 (Zimmermann).

[99]See also Ministry of Foreign Affairs of the Russian Federation, Press Release 1153 of 10 Aug. 2008, available at http://www.mid.ru/brp_4.nsf/0/6D57680797E966AEC32574A200354EB7.

[100]CR 2010/8, pp. 69-70, para. 46 (Zimmermann).

[101]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); WSG, Vol. IV, Ann. 187.

[102]CR 2010/9, p. 53, para. 10 (Akhavan).

underway under the auspices of President Sarkozy — a fact to which Minister Lavrov explicitly referred.

30. And what is even more telling is that Georgia's Application was lodged on the very same day, during the very same hours the Press Conference of Mr. Lavrov was being held — and that alone renders the document irrelevant.

31. So, with respect to Professor Akhavan's primary evidence, it is obvious that Russia did not refuse to negotiate in August 2008 and that, besides, Georgia simply did not raise CERD-related issues in discussions with Russia.

32. Mr. President, that now brings me to the period between 2000 and June 2008.

III. Alleged negotiations between 2000-August 2008

33. The first instance[103] referred to by Professor Akhavan relates to a December 2000 Agreement concerning the restoration of the economy in the Georgian-Ossetia Conflict Zone[104], which warrants several remarks.

34. For one, it is what it is — namely, an agreement: hence, even if there had been a CERD dispute, *quod non*, it was addressed to the extent governed by the agreement. Moreover, the agreement dealt with economic prerequisites for a return of refugees only — an issue not covered by CERD. And finally, and most important, it provided for an obligation of Georgia — and Georgia alone — to secure the respect for human rights of refugees and IDPs — while Russia is not mentioned in that regard. It is therefore surprising, to say the least, to take this document as evidence of Russia's obligations under CERD forming the subject-matter of negotiations.

35. As to his next document, Professor Akhavan referred to an internal information note of the Georgian Ministry of Foreign Affairs[105], which is just that, namely, a one-page summary of how Georgia perceived six days of discussions and consultations that took place with Russia throughout 2003[106]. What is first important to note is that Georgia and Russia had reached, in early

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[103]Cf., CR 2010/9, p. 56, para. 19 (Akhavan).

[104]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.

[105]CR 2010/9, pp. 57-58, para. 22 (Akhavan).

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

2003, an "agreement about the need to take specific steps, directed . . . at the solution of such problems as the dignified return of refugees and IDPs". The discussions first and foremost then dealt with the political status of the Gali district. Finally, it is also telling that the involvement and agreement of the Abkhaz side as being the party to the dispute was seen as the crucial element in bringing about a solution to the return of IDPs and refugees. So, again, this is not proof of CERD-related negotiations between Georgia and Russia.

36. Next, the April 2004 meeting Professor Akhavan referred to[107] confirms that both Georgia and Russia, as well as third parties such as UNHCR, considered Georgia and Abkhazia as being responsible for solving the problem of refugees and IDPs. As a matter of fact, Georgia's own internal report confirms that Russia had characterized the Abkhazian position as "unacceptable" and that it — Russia — "fully shared the position of Georgia"[108] — so, if there was need to negotiate, both Russia and Georgia had to negotiate with the Abkhaz side.

37. Finally, it is also striking to note that the next document Georgia refers to refers to the interrelationship between the restoration of the railway system in Abkhazia and the return of refugees[109]. Moreover, Georgia stressed its willingness to "renew the process of negotiations" — yet a negotiation process Georgia itself perceived as one with "the leaders . . . in Abkhazia" rather than a negotiation process with Russia[110].

38. That brings me to the June 2008 exchange of letters between the two Presidents — a matter already dealt with quite extensively on Monday[111]. Georgia again portrays this exchange of letters as evidence of negotiations related to CERD — this time when it comes to the return of IDPs and refugees[112]. Yet, Georgia itself perceived Abkhazia as its negotiation partner in this respect — hence its proposal that the Parties to the conflict — Georgia and Abkhazia — should conclude an

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[107]CR 2010/9, p. 58, para. 23 (Akhavan).

[108]Cf. 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.

[109]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.

[110]*Ibid.*

[111]CR 2010/8, pp. 21-22, paras. 9-12 (Kolodkin) and p. 69, para. 42 (Zimmermann).

[112]CR 2010/9, p. 58-59, para. 24 (Akhavan), referring to Letter from President Mikheil Saakashvili to President Dmitry Medvedev (23 June 2008); MG, Vol. V, Ann. 308.

agreement on the matter followed by a remark of the Russian President that the other side, Abkhazia, might not be willing to follow suit. And this ties in precisely with what Georgia had been telling the CERD Committee all these years long about responsibility for the IDP problem, as noted by my friend and colleague Sam Wordsworth.

39. Lastly, one wonders why a proposal to eventually redeploy peacekeeping troops, not withdraw them[113] should — or indeed could — form part of a negotiation process related to racial discrimination.

40. And that leaves me with the very few instances of diplomatic contacts within the framework of the United Nations[114] — provided one were to consider them to be relevant at all, *quod non*.

41. The first of these is a letter addressed to the Secretary-General and the Security Council[115] — thus not addressed to Russia — which in any case I have already touched upon in my first intervention on Monday[116]. May I simply remind the Court that the document in question (which alleges instances of forced labour to have occurred in Abkhazia) did not make a claim of racial discrimination as Georgia now claims[117]: while referring to specific provisions of both the ICCPR and the European Convention on Human Rights, neither Article 26 of the ICCPR nor Article 14 of the European Convention prohibiting discriminatory practices are mentioned.

42. During my first round speech[118], I have also already dealt with the very last document Professor Akhavan referred to in which, as he put it, Georgia "represented to the General Assembly" certain allegations[119]. What he unfortunately fails to mention is that this "representation" — apart from obviously not being addressed to Russia — originated from the Georgian parliament and not from an organ being in a position to represent Georgia in its external affairs, with the said document moreover being addressed to the Georgian Government only.

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[113] *Ibid*.

[114] CR 2010/9, pp. 59-60, para. 26 (Akhavan).

[115] 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.

[116] CR 2010/8, p. 64-65, para. 23 (Zimmermann).

[117] CR 2010/9, p. 59-60, para. 26 (Akhavan).

[118] CR 2010/8, p. 64, para. 19 (Zimmermann).

[119] CR 2010/9, p. 59-60, para. 26 (Akhavan).

IV. Concluding observations

43. Mr. President, it is safe to assume that, out of the 80 plus documents Georgia had included in its written pleadings, Georgia has chosen to present those during the oral hearing that in its view were the strongest to prove the existence of negotiations under Article 22 of CERD. Yet, none of them proves what they are supposed to demonstrate, namely the existence of negotiations under CERD.

B. The territorial and temporal scope of jurisdiction under CERD

44. Mr. President, Members of the Court, allow me now briefly to reply to arguments that counsel for Georgia made with respect to Russia's third and fourth preliminary objections. Russia is convinced that its first and second objections preclude the Court from entertaining the Application. Accordingly, I would have preferred not to take up your time on these matters, but given Georgia's posture, it feels the need briefly to reply.

I. Russia's Third Preliminary Objection

45. Mr. President, Russia continues to consider the third preliminary objection to be not of an exclusively preliminary character[120].

46. Let me first note in passing my surprise at hearing Professor Sands emphatically — and quite emphatically — arguing how preliminary this question is, given that the relevant section in Georgia's written observations seeks to persuade the Court to join Russia's third preliminary objection to the merits[121] — as not being of a preliminary character.

47. Moreover, let me reiterate that Russia has *not* withdrawn its objection *ratione loci*[122]; it has only decided to no longer plead it as a *preliminary* objection. Having considered Russia's arguments and Georgia's counter-arguments, Russia considers that to reach a decision on this objection, the Court will have to have before it much more detailed pleadings from both Parties on the merits or otherwise of Georgia's claims.

48. In fact Professor Sands's pleading yesterday confirmed Russia's approach. Russia obviously disagrees entirely with Professor Sands' characterization of the applicable law, which

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[120]Cf. already CR 2010/8, p. 26, para. 31 (Kolodkin).

[121]Cf. paras. 4.45-4.49.

[122]Cf. CR 2010/8, p. 26, para. 31 (Kolodkin).

seemed to suggest that CERD was applicable extraterritorially as a matter of course. The cases Professor Sands referred to, in so far as they accepted the extraterritorial application of human rights treaties, have done so only after careful discussion and in very special circumstances only — sometimes relying on the law of occupation, sometimes on the wording of a specific treaty, and not the least on the degree of effective control that a State exercises outside its own territory.

49. Russia submits that rather than showing how detached from the merits these issues are, Professor Sands's own pleading underlined how closely jurisdiction *ratione loci* is intertwined with the facts. By way of illustration, how could a Court assess questions of "effective control" without engaging with the facts? This is why Russia respectfully invites the Court, should it ever decide to uphold jurisdiction, to address issues related to the extraterritorial application of CERD as part of the merits — and with the benefit of full argument by both Parties.

II. Russia's Fourth Preliminary Objection

50. Mr. President, allow me to make some final remarks in relation to Russia's fourth objection.

51. However, Russia considers that the matter can be dealt with briefly: both Parties are in agreement that CERD does not apply retroactively.

52. Russia's position on this point is straightforward: there can be no retroactivity. Georgia in turn seeks to avoid the obvious implications of this statement, but equally accepts the principle. So there is common ground.

53. Yet the Parties are in disagreement about the consequences to be drawn from their agreed position of principle. Russia's view is again clear. Assuming the Court has jurisdiction at all — which it does not — its jurisdiction only begins on 2 July 1999, the date on which both Georgia and Russia had become "States parties" to CERD.

54. Georgia's position is somewhat more complex: it accepts that there can be no retroactivity, but then seeks to do all it can to avoid the implication of its own position. More specifically, it invokes the doctrine of "continuous acts" to magically avoid problems of retroactivity.

55. Mr. President, Members of the Court, the notion of continuous acts on which Georgia relies and with which its argument is said to be "entirely consistent"[123] was developed by the International Law Commission in a very careful manner to address the specific issue of the extension over time of a wrongful act.

56. It is not a "catch-all" concept that justifies the introduction of retroactivity "through the backdoor". The ILC's commentary in fact makes that abundantly clear. It gives a number of examples of continuous acts such as the maintenance in effect of national laws incompatible with international law, the unlawful occupation of a foreign embassy, or finally the unlawful detention of an individual[124]. These are of course exceptional instances, and so the concept of "continuous act" is exceptional in character as it is characterized by the continuing nature of the breach itself — the continuing nature of the breach. As the ILC stressed, it must be "the act [that] continues and [that] remains not in conformity with the international obligation"[125].

57. By contrast, and contrary to Georgia's argument yesterday, an act does *not* become a continuous act simply because its consequences extend over time. In the ILC's words: "It must be the wrongful act *as such* which continues."[126] And further — and in direct contradiction of Georgia's argument yesterday: "An act does not have a continuing character merely because its effects or consequences extend in time."[127]

58. To be perfectly clear, this is not Russia's statement, it is the ILC's commentary from which I have just quoted — the same ILC with which, if we were to follow Professor Sands, Georgia's catch-all construction of the continuing act is "entirely consistent"[128]. It is not.

59. In short, Georgia claims to accept the principle of non-retroactivity and at the same time puts forward a catch-all notion of continuing acts that ignores the limitations of the ILC's approach and effectively tries to reintroduce retroactivity in all but in name. Russia submits that if indeed,

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[123]CR 2010/9, p. 67, para. 16 (Sands).

[124]ILC, Commentary to Art. 14 of the Articles on State Responsibility, para. (3) (reproduced in *Report of the International Law Commission on the work of its Fifty-third session*, UN doc. A/56/10, at 43 *et seq.*).

[125]Art. 14, para. 2 of the Articles on State Responsibility.

[126]ILC, Commentary to Art. 14 of the Articles on State Responsibility, para. (6) (reproduced in *Report of the International Law Commission on the work of its Fifty-third session*, UN doc. A/56/10, at 43 *et seq.*).

[127]*Ibid*.

[128]CR 2010/9, p. 67, para. 16 (Sands).

the notion of continuing acts is of relevance, it ought to be applied cautiously, not as a licence to extend jurisdiction.

60. Finally, Professor Sands yesterday suggested that Russia had dropped its fourth preliminary objection in so far as it related to acts subsequent to the filing of the Application[129]; this is not correct.

61. Mr. President, Members of the Court, this concludes my argument. I thank you for your kind attention. I would ask you to give the floor to Ambassador Gevorgian who will present Russia's concluding statement. Thank you very much.

The PRESIDENT: I thank Professor Andreas Zimmermann for his statement. Now I call His Excellency Ambassador Kirill Gevorgian to take the floor.

Mr. GEVORGIAN:

1. Mr. President, distinguished Members of the Court, yesterday, the honourable Agent of the applicant State once again presented this case as a case of long-standing discrimination against ethnic Georgians, for which Russia allegedly has responsibility. According to the Georgian version of events, it all started in 1991-1992 with the sudden and unprovoked oppression and expulsion of thousands of ethnic Georgians from South Ossetia and Abkhazia.

2. The real sequence of events is very different. In our Written Statement and oral presentations we have stressed the point that the Georgian-Ossetian and Georgian-Abkhaz conflicts exploded after the Georgian authorities openly declared the policy of a "Georgia for Georgians"[130] as a basis for their country's new statehood. The applicant State did not try to contest this.

3. This policy of the Georgian authorities inflamed inter-ethnic conflicts, which led to a humanitarian catastrophe, ending in uprooting the lives of thousands of people of various nationalities, including ethnic Georgians. Georgia has never mentioned during these proceedings, that besides Georgians, there were tens of thousands of persons of other ethnicities who perished, were displaced or otherwise suffered in those conflicts.

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[129]CR 2010/9, p. 68-69, para. 19 (Sands).

[130]CR 2010/8, p. 12, para. 1 (Gevorgian); PORF, p. 17, para. 2.5.

4. Contrary to Georgia's assertion, Russia at no time was a party to these conflicts. Those were constantly on the agenda of the United Nations Security Council, OSCE and other international bodies, none of which ever regarded Russia as a conflicting party. Georgia has failed to produce a single document from an intergovernmental international body that would evidence to the contrary.

5. The internationally recognized role of Russia in these conflicts was that of a facilitator and peacekeeper. Yesterday, counsel for Georgia implied that the Applicant, as a small country, was not under "conditions of true equality and independence"[131] when it agreed to station Russian peacekeeping forces in South Ossetia and Abkhazia. However, he failed to explain the fact that Georgia itself sought Russia's mediation services and peacekeeping. Nor did he explain, why on a number of occasions its representatives praised Russian efforts in that capacity. Even in July 2008, in his letter to the Russian counterpart, President Saakashvili suggested that the peacekeeping operation under the auspices of CIS should continue and that Russia should become a guarantor of agreements between the parties to the conflict[132].

6. Georgia asserted that since 2001, it has never praised Russian peacekeepers, as if the absence of praise could legally amount to the withdrawal of consent. For the sake of legal clarity, let me respectfully remind the Court that the consent was withdrawn only on 1 September 2008.

7. In its own logic, Georgia could not terminate the peacekeeping mandates because of the fear of its big neighbour[133]. How striking then that Georgia had no fear to brutally attack the peacekeeping units of this big neighbour using multiple-launch rocket systems, and file the case against it to the Court immediately afterwards. If I may remind the Court, the size of Georgia's army doubled in the five or so years prior to the armed conflict of August 2008. In fact, the argument of "big and small" was yesterday put in the centre of Georgia's position. I cannot help asking myself: is it possible to win a case in this Court by saying, we are so small, and they are so big? Is it possible to cure the deficiencies of one's legal position by such an argument even if it is put forward by the most distinguished lawyers?

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[131]CR 2010/9, p. 26, para. 37 (Reichler).

[132]MG, Vol. 5, Ann. 311, Letter from President Dmitry Medvedev to President Mikhail Saakashvili (1 July 2008).

[133]CR 2010/9, p. 26, para. 37 (Reichler); CR 2010/9, p. 34, para. 4 (Crawford).

8. Mr. President, according to the applicant State, for more than 16 years it repeatedly asserted a CERD dispute and called for Russia to negotiate on issues of racial discrimination, but Russia persistently ignored its appeals. Not so. In fact, Russia did participate, as a mediator, in multiple negotiations between Georgia on the one side and South Ossetia and Abkhazia on the other. In many cases, Russia itself initiated negotiations between the conflicting parties. However, Russia did not take part in those negotiations as a party to the conflict. Moreover, these negotiations concerned various aspects related to the settlement of Georgian-Ossetian and Georgian-Abkhazian conflicts, including the return of refugees and IDPs of various nationalities, but never, never, issues of racial discrimination.

9. This raises a further issue: Russia's alleged "ignoring" of the right to return, which, supposedly, violates CERD[134]. First, Russia has always supported the right to return — in numerous Security Council resolutions, agreements and statements[135]. Second, non-return as such cannot automatically be equated to racial discrimination, just as discussions on displacement do not automatically constitute negotiations on discrimination — and in the circumstances they have never been. Third, Russia has consistently applied the same standard to the issue of return of displaced persons regardless of their ethnicity, that standard being fully in line with the standard applied by the United Nations: returns may only be sustainable if they are voluntary, safe and dignified[136].

10. The Agent of Georgia accused Russia of "rejecting" recent United Nations General Assembly resolutions on refugees and displaced persons from Abkhazia and South Ossetia[137]. In fact, the primary reason for Russia's opposition to those resolutions was the characterization of Abkhazia and South Ossetia as part of Georgia, unacceptable to Russia in view of its recognition of their independence. As evidenced by the amendments proposed by Russia to the draft resolution in

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[134]CR 2010/9, p. 12, para. 9 (Burjaliani).

[135]PORF, Vol. 2, Ann. 38, UN Security Council, resolution 934 (1994), UN doc. S/RES/934, 30 June 1994; UN Security Council, resolution 1582 (2005), UN doc. S/RES/1582; PORF, Vol. 2, Ann. 36, Quadripartite agreement on voluntary return of refugees and displaced persons signed on 4 Apr. 1994 (UN Security Council, Letter dated 5 Apr. 1994 from the Permanent Representative of Georgia to the UN addressed to the President of the Security Council, UN doc. S/1994/397, 5 Apr. 1994, Anns. I and II); MG, Vol. III, Ann. 136, Concluding Statement on the Meeting Mr. Vladimir Putin, President of the Russian Federation and Mr. Eduard Shevarnadze, President of Georgia, 12 Mar. 2003; UN doc. S/PV.3407, 21 July 1994, p. 6.

[136]Guiding Principles on Internal Displacement, UN doc. E/CN.4/1998/53/Add.2, 11 Feb. 1998.

[137]CR 2010/9, p. 13, para. 10 (Burjaliani).

2009, our country was broadly in agreement with the humanitarian aspects of the text[138]. Moreover, the displacement issues are under consideration at the ongoing Geneva Discussions under the auspices of the European Union, United Nations and OSCE, with all sides adhering to the principle of the right to a voluntary, safe and dignified return without any discrimination.

11. Yesterday, counsel for Georgia made various assertions as to alleged current actions of Russia in South Ossetia and Abkhazia. Those allegations are not relevant to your jurisdiction and were evidently made for prejudicial purposes.

12. Mr. President, our opponents were very critical of the CERD implementation machinery and remedies provided thereto and even doubted whether "they are remedies at all"[139]. In their view, the CERD Committee could be simply "helpless"[140] in protecting the rights guaranteed by the Convention. We are convinced that the Court will not follow this regrettable invitation to send a wrong message that would undermine the role of the carefully designed system established under major human rights instruments.

13. Moreover, Georgia has failed to explain why it did not start a CERD Committee procedure years ago and, if there have ever been considerations of urgency, why it did not resort to the urgent procedures before the Committee.

14. If we assume, as the applicant State proposes, that exhausting the CERD Committee procedure and negotiations were not required under Article 22 of the Convention, Georgia's position becomes even less clear. What prevented Georgia from directly seising the Court during almost ten years after its accession to CERD? Why did it not do so before unlawfully using force against the Respondent?

15. Mr. President, never before has any country ever tried to seise the Court in such circumstances! If I may remind you of the words of the EU Mission Report: "on 7 August 2008 open hostilities began with a large-scale Georgian military operation against the town of Tskhinvali and the surrounding areas"[141]. Never before has the Court had to decide whether it should consider

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[138]UN docs. A/63/L.81-98.

[139]CR 2010/9, p. 47, para. 44 (Crawford).

[140]CR 2010/9, p. 35, para. 4 (Crawford).

[141]PORF, Vol. 2, Ann. 75, Independent International Fact-Finding Mission on the Conflict in Georgia, Report, Vol. I, Sep. 2009, p. 19, para. 14.

a case brought by a State which had not only resorted to illegal use of force just days before seising the Court, but which directed this force against an internationally recognized peacekeeper, which it is now portraying as a party to a dispute under CERD. No doubt, current and potential contributors to peacekeeping efforts are following these proceedings with particular attention.

18. Mr. President, indeed, this is a case with no precedent in your jurisprudence. We trust that this honourable Court will give a due assessment of these exceptional features of the current proceedings when considering the issue of jurisdiction.

19. This leaves me with the task of briefly recapitulating Russia's Preliminary Objections.

20. First. The Court has no jurisdiction to entertain the Application because, as of the date when it was lodged, there was no dispute between Georgia and Russia over the interpretation or application of the International Convention on the Elimination of All Forms of Racial Discrimination with regard to the ethnic Georgian population of Abkhazia and South Ossetia.

21. Second. The Court has no jurisdiction since the Applicant State has failed to fulfil the requirements established by Article 22 of the Convention, namely, negotiations and resort to the procedures expressly provided in the Convention.

22. Third. If the Court has any jurisdiction — and we submit it does not in the light of the first two preliminary objections — that jurisdiction is limited *ratione temporis* to acts or omissions that have taken place after CERD entered into force as between Georgia and Russia on 2 July 1999.

23. Fourth. As regards the objection to the jurisdiction of the Court *ratione loci*, the Russian Federation submits that questions of the extra-territorial application of CERD are closely intertwined with the facts, for which reason that objection is not of a preliminary nature and should be considered by the Court only in the improbable case of these proceedings ever reaching the merits stage.

Mr. President, before reading our final submission, let me express our gratitude to the Registrar of the Court and the members of the Registry, who have been extremely helpful during all these proceedings, and to the interpreters. I would also like to express my appreciation to our counsel and the entire team for their excellent co-operation. And, of course, our sincere thanks go to you, Mr. President and Members of the Court, for your kind and patient attention.

24. Mr. President, distinguished Members of the Court, now I have the honour to read the final submission of the Russian Federation which, for the reasons set out in our written and oral pleadings, and in accordance with the presentations made by our counsel, is as follows:

> The Russian Federation requests the Court to adjudge and declare that it lacks jurisdiction over the claims brought against the Russian Federation by Georgia, referred to it by the Application of Georgia of 12 August 2008.

Mr. President, distinguished Members of the Court, this bring Russia's presentation on the Preliminary Objections to a close. I thank you for your kind attention.

The PRESIDENT: Thank you, Your Excellency Ambassador Kirill Gevorgian. The Court takes note of the final submissions which you have now read on behalf of the Russian Federation.

The Court will meet again on Friday 17 September from 10 a.m. to 12 noon to hear the second round of oral argument of Georgia.

The sitting is adjourned.

The Court rose at 6 p.m.