Non Corrigé
Uncorrected

CR 2010/11

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2010

Public sitting

held on Friday 17 September 2010, at 10 a.m., at the Peace Palace,

President Owada presiding,

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

VERBATIM RECORD

ANNÉE 2010

Audience publique

tenue le vendredi 17 septembre 2010, à 10 heures, au Palais de la Paix,

sous la présidence de M. Owada, président,

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

COMPTE RENDU

Present:	President	Owada
	Vice-President	Tomka
	Judges	Koroma
		Al-Khasawneh
		Simma
		Abraham
		Keith
		Sepúlveda-Amor
		Bennouna
		Skotnikov
		Cançado Trindade
		Yusuf
		Greenwood
		Xue
		Donoghue
	Judge *ad hoc*	Gaja
	Registrar	Couvreur

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

M. Couvreur, greffier

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The PRESIDENT: Please be seated. The sitting is open. The Court meets today to hear the second round of oral argument of Georgia. I shall now give the floor to the first speaker, who is Paul Reichler: you have the floor.

Mr. REICHLER:

THE EXISTENCE OF A DISPUTE AND NEGOTIATIONS

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

2. Russia's case — that there is no legal dispute between the Parties under the CERD Convention, and that no negotiations ever took place on matters of ethnic discrimination — requires the Court to ignore well-established principles of international law.

3. If you think I may be exaggerating, you don't have to take my word for it. You can take that of Russia's counsel, Mr. Wordsworth. This is what he said on Wednesday: "*Russia's case is that the general principles do not apply*."[1] (Emphasis added.)

4. Now that is quite a high bar Russia has set for itself.

5. And they go to some very imaginative extremes to attain it. Not only do they cast aside some of the Court's most venerable rules on determining whether a dispute exists; but they also invent an entire panoply of new rules to replace them.

6. This is most apparent in their effort to impeach and disqualify the voluminous documentary evidence that Georgia presented in the first round, and in its Written Statement, showing that a dispute existed between the Parties in regard to matters falling under the CERD Convention as of the date of Georgia's Application [12 August 2008].

7. I will begin today by giving brief responses to Russia's various challenges to these documents. Then I will respond to Russia's denial that this case is about ethnic discrimination, and its insistence that the "real" dispute is about armed conflict or the legal status of territories. I will conclude with Georgia's view of what this dispute is about.

8. First, the documents. And the first of these challenged by Russia is the statement by President Saakashvili on 25 February 2004 that "most of the population" in Abkhazia had been

[1] CR 2010/10, p. 13, para. 12 (Wordsworth).

"ethnically Georgian" but they were "thrown out by Russian troops and local separatists" and that this problem is "primarily [an] issue of our relations with Russia" since "[t]he Russian generals are in command there . . ."[2] Mr. Wordsworth does not dispute that the statement was made, or that it accused Russia of ethnic discrimination. Instead, he challenges me for referring to it as "widely-disseminated", but then, in his next sentence, he acknowledges that it was broadcast live on the BBC[3]. Then he reveals that it was a call-in format, where listeners could call in and ask questions of the Georgian President, and, as if by providence, one of the callers was "Alexei from Moscow"[4]. So, thanks to him, it is confirmed that President Saakashvili's statement was broadcast to Russia.

9. But Mr. Wordsworth says that the statement still does not count, because it was made during an interview in which the President addressed various topics[5]. That is a new rule of international law. A claim made publicly by a Head of State against another State does not constitute evidence of a dispute, unless the statement is entirely devoted to that single claim. If any other subjects are included in the statement, it does not count. A rather strange rule.

10. Mr. Wordsworth next challenges President Saakashvili's address to the European Parliament in November 2006, in which the President said that Russia "first undertook ethnic cleansing" in the 1990s, and that "history seems to be repeating itself"[6]. This one does not count either, because the Georgian President was quoting the words of a prominent Georgian filmmaker[7]. Another new rule of international law. A statement cannot be attributable to you if it was first made by someone else, even though you cite it approvingly. Here, after quoting the words of the filmmaker, President Saakashvili expressly adopted them as his own, stating: "This is the painful legacy we have inherited. And this is the lawlessness and injustice that we confront. And this

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

[3]CR 2010/10, p. 19, para. 24 (Wordsworth) (citing "Ask Georgia's President", *BBC News*, 25 Feb. 2004; emphasis added; WSG, Vol. IV, Ann. 198).

[4]*Ibid*.

[5]CR 2010/10, p. 19, para. 24 (Wordsworth).

[6]CR 2010/10, p. 20, para. 26 (Wordsworth) (quoting Office of the President of Georgia, Press Release, *"Remarks by The President of Georgia Mikheil Saakashvili to the European Parliament, Strasbourg"*, 14 Nov. 2006; WSG, Vol. IV, Ann. 172.).

[7]CR 2010/10, p. 19, para. 26 (Wordsworth).

time, let us not be silent."[8] Under the new rule, when on Tuesday Professor Sands read approvingly from an article by Judge Buergenthal, regarding the extraterritorial reach of human rights treaties[9], you may not presume that he was in agreement with or endorsing what Judge Buergenthal said.

11. Mr. Wordsworth next attempts to disqualify President Saakashvili's statement to the Security Council in September 2007, for the reason that is not absolutely clear his charge of practising the "morally repugnant politics of ethnic cleansing, division, violence and division" was directed at Russia[10]. He does not suggest who else was being accused. Georgia says it was Russia, as an objective reading of the text will prove. In regard to this same document, Mr. Wordsworth quickly brushed past what he euphemistically referred to an "oblique reference to Russian peacekeepers"[11]. Here is that reference:

> "In the time since Russian peacekeepers were deployed there, more than 2,000 Georgians have perished and a climate of fear has persisted . . . Years of biased and unbalanced actions by supposed peacekeeping forces must be replaced with competent and neutral ones . . . rather than in trying to maintain the status quo, while in fact being biased and preserving the injustices that have happened there."[12]

12. Mr. President, Members of the Court, we have heard a lot of self-congratulation from Russia for its role as a facilitator and peacekeeper. But this role did not give Russia license to divest itself of its international legal obligations, including under the CERD Convention. Not even Russia makes that argument. So the question is this: Does a dispute exist under the CERD Convention by virtue of Georgia's frequent complaints that the Russian peacekeepers joined local Ossetian and Abkhaz militias in attacking Georgian communities, and took advantage of their services as border guards in South Ossetia and Abkhazia, to prevent ethnic Georgians — but not members of other ethnic groups — from exercising their right of return? The answer can only be Yes. Article 5 of the Convention makes clear that the right of return is guaranteed. Counsel for

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[8]Office of the President of Georgia, Speech, *"Remarks H.E. The President of Georgia Mikheil Saakashvili European Parliament, Strasbourg"*, 14 Nov. 2006.

[9]CR 2010/9, p. 65, para. 9 (Sands).

[10]CR 2010/10, p. 20, para. 28 (Wordsworth) (quoting UN General Assembly, *7th Plenary Meeting, Address by Mr. Mikheil Saakashvili, President of Georgia*, UN doc. A/62/PV.7, 26 Sep. 2007, pp. 18-20; WSG, Vol. III, Ann. 88).

[11]CR 2010/10, p. 20, para. 28 (Wordsworth).

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

Russia reiterated and reaffirmed "as fundamentally important the right of return for all refugees to Abkhazia". Presumably, this principle applies to South Ossetia as well[13]. Plainly, Georgia has raised a dispute in regard to a right enshrined in Article 5 of the Convention.

13. Mr. Wordsworth attempts to disqualify the remainder of Georgia's evidence with broad brushstrokes. Eight of Georgia's documents do not count because they are parliamentary resolutions[14]. Another new rule: resolutions of parliament are not evidence of the existence of an inter-State dispute. But even if we accept this principle, for which no authority is cited, it cannot apply to parliamentary resolutions that are adopted by the foreign ministry and submitted to the United Nations as statements of the government's position, as in Annexes 76 and 82 to Georgia's Written Statement, which accuse Russia of discrimination.

14. Here is another new rule. Public statements by the Georgian Foreign Ministry do not count[15]. This is indeed a new rule, and it conflicts with the old one established by the Court, that the Court will determine the existence of a dispute based on "diplomatic exchanges, public statements and other pertinent evidence"[16]. At a stroke, Russia disqualifies several of Georgia's key documents, including the Foreign Ministry's statement of 17 July 2008, which is a direct response to a statement from Russia's Foreign Minister opposing the return of Georgian internally displaced persons (IDPs) to Abkhazia: "Mr. Lavrov's statement is completely at variance with the mandate of the CIS collective peacekeeping forces, which binds them . . . to create appropriate conditions for the unconditional and dignified return of refugees and internally displaced persons."[17]

15. Mr. Wordsworth has not challenged our assertion that this and the Foreign Ministry's other public statements make claims of ethnic discrimination against Russia, in the case of this document, over denial of the right of return. He disqualifies them *only* because they were not issued directly to Russia.

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[13]CR 2010/8 , p. 35, para. 22.

[14]CR 2010/10, p. 15, para. 16 *(a)* (Wordsworth).

[15]*Ibid.*, para. 16 *(b)* (Wordsworth).

[16]*Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 449, para. 31.

[17]Ministry of Foreign Affairs of Georgia, Comment of the Press and Information Department of the Ministry of Foreign Affairs of Georgia, 17 Jul. 2008; WSG, Vol. IV, Ann. 182.

16. Also disqualified are all statements by Georgia prior to Georgia's accession to CERD on 2 June 1999. Mr. Wordsworth gave red cards to five different documents on this ground[18]. But truly documents from this period confirm the existence of a long-standing dispute about ethnic discrimination — a dispute which remained unresolved as of the filing of the Application on 12 August 2008. Whatever, they do not count.

17. This is like a surreal football match. Georgia scores goal after goal, but each time the Russian team — not the referee, but the Russian team — calls an offside, or a foul, or invalidates the goal because the ball is said not to cross the line. Whenever Georgia scores, it simply does not count.

18. Let us look at some of the clearest examples: President Saakashvili's statement of August 2008 that Russian troops and Russian tanks "expelled the whole ethnically Georgian population . . . in South Ossetia"[19]; and his statement of 11 August 2008 that "I directly accuse Russia of ethnic cleansing there. And it's happening now."[20]

19. On Wednesday, in the second round, Mr. Wordsworth admitted that: "Of course the President said what he said . . . "[21]. OK. Maybe we are finally making some progress here. Could it be that these goals will be allowed?

20. No way! Why not? Because, he says "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" [22]. This is another new rule, and a highly pernicious one. Russia asks the Court to look into the mind, if not the soul, of the President of Georgia and adjudge that he made these statements, on 9 and 11 August, because he was cynically plotting to create grounds for a phony lawsuit.

21. Could the Court possibly adjudge that Georgia and its President fabricated charges of ethnic cleansing as a pretext to bring this lawsuit? Not according to every single respected,

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[18]CR 2010/10, p. 16, para. 16 *(d)* (Wordsworth).

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

[20]"President Bush condemns Russian invasion of Georgia", CNN, 11 Aug. 2008; WSG, Vol. IV, Ann. 205.

[21]CR 2010/10, p. 17, para. 21(Wordsworth).

[22]*Ibid.*

independent, international organization. The Report of the European Union's Independent International Fact-Finding Mission, upon which Russia placed such emphasis this week, concluded that "ethnic cleansing was . . . practised against ethnic Georgians in South Ossetia both during and after the August 2008 conflict"[23]. The Rapporteur of the Council of Europe's Parliamentary Assembly concluded that the "systematic destruction of every" ethnic Georgian house in areas under Russian occupation demonstrated "an intention to ensure that no Georgians have . . . property to return to" and constituted "ethnic cleansing"[24].

22. Mr. Wordsworth suggests another reason why the President of Georgia's statements should be disallowed. They were "made at a time when Georgia *was* in fact engaged in negotiations with Russia . . ."[25]. Is that so? Well, here is a Russian own goal, one that cannot be overruled due to a Georgian offside. Until the second round, Russia consistently argued that Georgia had failed to attempt negotiations with Russia. But in his second round presentation, Professor Zimmermann read this excerpt from the Russian Permanent Representative's statement to the Security Council on 10 August 2008:

> "this, of course, does not mean 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 between our Minister of Foreign Affairs and the Minister of Foreign Affairs of Georgia . . ."[26]

23. This statement is in the present tense. Negotiations are in process at a variety of levels, including Foreign Ministers. This is 10 August 2008. Russian troops have been marauding Georgian villages in South Ossetia for two days. The previous day the President of Georgia had publicly denounced this. The next day, the Georgian Foreign Ministry publicly raised the alarm that: "Russian servicemen" were "carry[ing] out mass arrests" of Georgians in South Ossetia[27]. Yet both Professor Zimmerman and Mr. Wordsworth ask the Court to believe that none of this was

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[23]Independent International Fact-Finding Mission on the Conflict in Georgia, Report Vol. I, Sep. 2009, (hereinafter "IIFFMCG Report, Vol. I"), para. 27; WSG, Vol. III, Ann. 120.

[24]Council of Europe, Parliamentary Assembly, Committee on Migration, Refugees and Population, *Report, The humanitarian consequences of the war between Georgia and Russia: follow-up given to resolution 1648 (2009)*, doc. 11859, 9 Apr. 2009, para. 29; MG, Vol. II, Ann. 62.

[25]CR 2010/10, p. 17, para. 21 (Wordsworth).

[26]CR 2010/10, pp. 41-42, para. 21 (Zimmermann).

[27]CR 2010/9, p. 18, para. 14 (Reichler) (quoting Ministry of Foreign Affairs of Georgia, Statement of the Ministry of Foreign Affairs of Georgia, 11 Aug. 2008; WSG, Vol. IV, Ann. 185).

discussed in the negotiations that were taking place at the very same time. What were they talking about in those negotiations, the football scores? The ongoing massive uprooting, killing and arrest of ethnic Georgians, the burning and looting of homes and villages, was the proverbial elephant in the room. In fact it filled the room. Was it not only the Russians, but also the Georgian diplomats, who chose to ignore it completely? Simply not credible. Judges are not required to denude themselves of their common sense and practical experience when they put on their judicial robes.

24. Further evidence of negotiations consists of exchanges of correspondence between Presidents Saakashvili and Medvedev in June and July of 2008, in which President Saakashvili called for the withdrawal of Russian peacekeepers from the remaining Georgian-populated areas of Abkhazia, so that Georgian IDPs could return to their homes there[28]. President Medvedev's rejection of that proposal, on the ground that it was "untimely"[29], made agreement unlikely, but efforts continued, until Russian troops imposed a solution in August, chasing out virtually every last Georgian. Plainly, *any* requirement for negotiations that could conceivably be found in Article 22 was satisfied.

25. Russia's counsel called attention to two statements, one by President Saakashvili and another by Georgia's Permanent Representative to the United Nations, to the effect that "these disputes are no longer about ethnic grievances"[30], or are "not a fundamentally ethnic conflict"[31]. These statements, in 2007 and 2006, respectively, were made a year and two years before the ethnic cleansing campaign launched by Russia in August 2008. What they really are is Georgia's response, at the time, to Russia's repeated refusal to permit ethnic Georgians to return to South Ossetia or Abkhazia on the ground that, according to Russia, ethnic tensions were so high it would be unsafe for any Georgians to return. It was in this context that President Saakashvili asserted that this was pretext, that the majority of Georgians and Ossetians, and Georgians and Abkhaz, could

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[28]Letter of President Mikheil Saakashvili of Georgia to President Dmitry Medvedev of the Russian Federation, 24 Jun. 2008; MG, Vol. V, Ann. 308.

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

[30]CR 2010/10, p. 21, para. 29 (Wordsworth) (quoting UN General Assembly, 7th Plenary Meeting, Address by Mr. Mikheil Saakashvili, President of Georgia, UN doc. A/62/PV.7, 26 Sep. 2007, p. 19; WSG, Vol. III, Ann. 88.).

[31]CR 2010/10, p. 21, para. 32 (Wordsworth) (quoting Ministry of Foreign Affairs of Georgia, *Statement of Mr. Irakli Alasania, Ambassador Extraordinary and Plenipotentionary, Permanent Representative of Georgia to the UN*, 3 Oct 2006; WSG, Vol. IV, Ann. 171.).

live peacefully with one another, as they had in the past, but for "the manipulation of greed by a tiny majority of activists, militants, militias and *foreign backers*, at the expense of the local population"[32]. In the same speech, to the General Assembly in September 2007, he made it very clear who he thought those "foreign backers" were: "The only obstacle to the integration of South Ossetia is a separatist regime that basically consists of elements from security services from neighbouring Russia that have no historical ethnic or cultural links to the territory whatsoever."[33]

26. Mr. Wordsworth showed the Court three slides that leave no doubt that this is fundamentally a dispute about ethnic discrimination. First, he showed the Court what Georgia's representative told the CERD Committee in March 2001: that "*serious ethnically motivated human rights violations were still occurring*"[34]. Then he displayed an excerpt from the CERD Committee's report in April 2001: that "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"[35]. Then he showed a slide with Georgia's comments to the CERD Committee in August 2005, that it was "gravely concerned about violations of the human rights of Georgian citizens in the Gali District of Abkhazia . . . The situation of IDPs who had been unable to return to Abkhazia was another cause for concern".[36]

27. Given these statements to and by the CERD Committee, it can no longer be argued plausibly that there was not a long-standing and fundamental dispute about ethnic discrimination and denial of the right of return — matters falling under the CERD Convention. The only remaining issue is whether Georgia ever accused Russia of responsibility for these discriminatory acts and practices.

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[32]UN General Assembly, 7th Plenary Meeting, Address by Mr. Mikheil Saakashvili, President of Georgia, UN doc. A/62/PV.7, 26 Sep. 2007, p. 19; emphasis added; WSG, Vol. III, Ann. 88.

[33]UN General Assembly, 7th Plenary Meeting, Address by Mr. Mikheil Saakashvili, President of Georgia, UN doc. A/62/PV.7, 26 Sep. 2007, p. 20; WSG, Vol. III, Ann. 88.

[34]CR 2010/10, p. 15, para 16 *(b)* (Wordsworth) (*quoting* UN Committee on the Elimination of Racial Discrimination, *Summary Record of the 1454th Meeting*, UN doc. CERD/C/SR.1454, 16 Mar. 2001, para. 21); WSG, Vol. III, Ann. 67 (emphasis added).

[35]CR 2010/10, p. 15, para. 16 *(c)* (Wordsworth) (*quoting* UN Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Georgia*, UN doc. CERD/C/304/Add. 120, 27 Apr. 2001, para. 4); WSG, Vol. III, Ann. 66.

[36]CR 2010/10, p. 16, para. 16 (*d*) (Wordsworth) (*quoting* UN Committee on the Elimination of Racial Discrimination, *Summary Record of the 1706th Meeting*, UN doc. CERD/C/SR.1706, 10 Aug. 2005, para. 24; emphasis added; WSG, Vol. III, Ann. 72.

28. Russia suggests that "the obvious inference to draw from Georgia's failure to suggest to the CERD Committee that it had a dispute with Russia was that it did not, in fact, have a CERD claim against Russia"[37]. With respect, the inference is neither obvious nor justified. Georgia's reports to the CERD Committee, like those of all States Parties, were submitted under Article 9. That Article calls upon States to report on their *own* measures to give effect to the Convention. An Article 9 report is not where States Parties are expected to comment on or criticize the practices of other States Parties. That is provided for in Article 11. Professor Crawford will have more to say about this later.

29. The bottom line is, it was not necessary for Georgia to accuse Russia directly of ethnic discrimination at the CERD Committee, and no inferences can be drawn from the fact that it did not. But more to the point, the "obvious inference", for which Russia's counsel so gamely contends — that Georgia never claimed that Russia was responsible for acts of discrimination prohibited by the CERD Convention — is completely eviscerated by each and every one of Georgia's multiplicity of statements to the Security Council, the General Assembly, the European Parliament, the OSCE, the international news media, and to Russia itself, in which it directly accused Russia of ethnic cleansing, support for others engaged in ethnic cleansing, failure to prevent ethnic discrimination in areas under its effective control, and denial of the right of return.

30. In fact, at the very same time that Georgia was complaining in its CERD reports about ethnic discrimination in Abkhazia and South Ossetia, it was publicly proclaiming in numerous fora that the real authority in both Abkhazia and South Ossetia, the party responsible for the ethnic discrimination in the two territories, was Russia itself, and, in particular, that the *de facto* administrations in South Ossetia and Abkhazia were run by Russian government and security personnel[38]. Citations for this will appear in the *compte rendu*.

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[37]CR 2010/10, p. 13, para. 13 (Wordsworth).

[38]See, e.g., UN Security Council, Letter dated 27 October 2005 from the Permanent Representative of Georgia to the United Nations addressed to the President of the Security Council, UN doc. S/2005/678, 27 Oct. 2005); WSG, Vol. III, Ann. 75. ("Positions in the separatist Governments are filled with people sent directly from public jobs in the Russian Federation, from as far away as Siberia."). See also UN General Assembly, Security Council, Letter dated 9 November 2005 from the Permanent Representative of Georgia to the United Nations addressed to the Secretary-General, Annex, UN doc. A/60/552-S/2005/718, 10 Nov. 2005; WSG, Vol. III, Ann. 76 ("citizens of Russia have been appointed to the high-level positions (i.e., Prime-Minister, Ministers of Defense and Law Enforcement, commanders of military units, etc.) in Tskhinvali and Sukhumi — individuals who simultaneously continue to work in law enforcement and the special services of the Russian Federation").

31. In the end, what Russia is left with — all they are left with — is their essentially political argument that the "real" dispute in this case is about armed conflict, annexation of territory, and the legal status of South Ossetia and Abkhazia. They maintain this position despite all the evidence, which they have failed to refute, except by inventing new rules of international law and using them to claim repeatedly that all of Georgia's evidence "doesn't count". Georgia's claim of ethnic discrimination, for them, is nothing but "a legal concoction"[39]. Georgia has acted in bad faith in bringing this case. It comes to the Court with unclean hands. It should be sent home.

32. Where have we heard this argument before? In *Nicaragua* v. *United States*, the United States sought to have Nicaragua's claims declared inadmissible on very similar grounds:

> "Nicaragua urges . . . that this Court adjudicate a claim centrally rooted in an armed conflict . . . Moreover, and even more remarkably, Nicaragua urges this action in a setting of hostilities triggered in part by its own attacks against its neighbours . . . when Nicaragua could use the Court to focus attention away from its own human rights abuses . . . This upside-down, and essentially political, Nicaraguan request is inadmissible . . ."[40]

33. This argument was rejected by the Court by a unanimous vote of 16-0, which included the vote of Judge Schwebel[41].

34. In specific regard to the issue of jurisdiction, as distinguished from admissibility, the Court had this to say in the *Legality of Use of Force* case: "In the view of the Court, it cannot decline to entertain a case simply because of a suggestion as to the motives of one of the parties or because its judgment may have implications in another case."[42]

35. Mr. President, Members of the Court, because of Russia's focus on the minutiae of individual documents and statements, I have been required to respond at the level of details rather than address the bigger picture. It is on that bigger picture that I would like to spend the last few minutes of my speech.

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[39]CR 2010/10, p. 18, para. 22 (Wordsworth).

[40]*Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*), *Jurisdiction and Admissibility, Oral Argument*, Vol. III, p. 251 (Moore).

[41]*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 442, para. 113.

[42]*Legality of Use of Force (Serbia and Montenegro* v. *United Kingdom),* Preliminary Objections, *Judgment, I.C.J. Reports 2004 (III),* p. 1323, para. 38.

36. Mr. Wordsworth described the facts of the case in the following way: "a very serious refugee issue, yes; a dispute between Georgia and Russia over racial discrimination, no . . ."[43] It is a telling and unhappy remark for what it says about Russia's approach to the facts on the ground: it seems that Russia is simply unable or unwilling to confront the reality of what caused hundreds of thousands of ethnic Georgians to leave their homes, and villages and towns, in South Ossetia and Abkhazia between 1992 and 2008, and so become "refugees", as Mr. Wordsworth put it. It was not a natural disaster that caused their departure from their homes. They did not leave voluntarily, in search of pastures anew and opportunities fresh. They were not prevented from returning from a seasonal holiday by reason of some unexpected volcanic action.

37. No, Mr. President, they are "refugees" in their own country because they were forced out pursuant to a policy of ethnic discrimination. The policy was adopted by Russia in 1991 and has been applied systematically ever since, with the aim of transforming the population in those two territories. That policy is no doubt part of a broader geopolitical effort to create a new zone of influence, extending over Abkhazia and South Ossetia, now as ethnically homogenous entities free of Georgians, but the Court need not be concerned with motive or geopolitics. At this stage, the focus is on the application of Russia's policy in a manner that deliberately discriminated against ethnic Georgians in an effort to drive them out of Abkhazia and South Ossetia, and Georgia's *persistent* objections to Russia's actions in this regard. That constitutes a dispute.

38. Mr. President, there *is* a serious "refugee" issue, and it is a direct result of Russia's policy of discrimination that is incompatible with the requirements of the Convention. Refugees need not be refugees if they can return. There are hundreds of thousands of ethnic Georgian "refugees" in Georgia because Russia will not let them return. In his closing remarks, the Agent of Russia addressed the issue. He made a number of points. He said that "non-return as such cannot automatically be equated to racial discrimination"[44]. No doubt as a general proposition that may be right. But Russia's Agent accepts that, in certain circumstances, preventing the right of return will be an act of racial discrimination that violates the Convention. This is a significant concession. It is all the more important in relation to Ambassador Gevorgian's claim that "Russia has consistently

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[43]CR 2010/10, p. 20, para. 29 (Wordsworth).

[44]CR 2010/10, p. 51, para. 9 (Gevorgian).

applied the same standard to the issue of return of displaced persons regardless of their ethnicity"[45]. The evidence does not support that claim. The reality is that South Ossetia and Abkhazia have had an open-door policy of return for Ossetians and Abkhaz, and a closed-door policy for ethnic Georgians[46]. That is called discrimination. It falls within the Convention. Georgia has persistently and clearly objected to the policy since the early 1990s[47]. Who has implemented and enforced the policy? Russia. On the so-called "border" with Georgia, who has administered the entry process for visitors? Russia. And who has policed the border: the Russian army[48].

39. The issue of Russia's responsibility for these actions under the CERD Convention is a matter for the merits. But as to the question, whether there was a dispute between Russia and Georgia on matters relating to the Convention as of 12 August 2008, the answer is blindingly clear: obviously there was such a dispute. For Russia to claim that there was no dispute with Georgia as to ethnic discrimination against Georgians in South Ossetia and Abkhazia, and as to the discriminatory denial of the right of return — in the period between 1999 and 2008 — is to turn its back to the realities of the situation. We trust that is *not* something the *Court* will wish to do.

40. Mr. President, Members of the Court, I thank you again for your kind courtesy and patient attention, and I ask you to give the floor to Professor Crawford.

The PRESIDENT: I thank Mr. Paul Reichler for his presentation. May I now call Professor James Crawford to take the floor.

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[45]CR 2010/10, p. 51, para. 9 (Gevorgian).

[46]MG, paras. 5.1-5.25, 6.47-6.87;7.36-7.51; WSG, paras. 6.4-6.18.

[47]See, e.g., UN Security Council, *Letter dated 8 Sep. 1992 from the Chargé d'affaires a.i. of the Permanent Mission of the Russian Federation to the United Nations Addressed to the President of the Security Council, Annex,* UN doc. S/24523, 8 Sep. 1992. WSG, Vol. III, Ann. 45; OSCE, *Statement by the Delegation of Georgia on Developments in Georgia,* PC.DEL/306/08, 17 Apr. 2008. WSG, Vol. III, Ann. 112. For additional evidence of Georgia and Russia's negotiations over the right of return, see WSG, paras. 3.78-3.110.

[48]MG, paras. 5.1-5.25, 6.47-6.87;7.36-7.51; WSG, paras. 6.4-6.18.

Mr. CRAWFORD:

PRELIMINARY OBJECTIONS 2-4

I. Introduction

1. Mr. President, Members of the Court, in this thankfully brief presentation, I will develop a number of issues associated with the 2nd, 3rd and 4th preliminary objections, and this in an impressionistic, if not a pointillistic, form.

II. The special meaning theory

2. My first point concerns Mr. Wordsworth's special meaning theory, by which a "matter" only becomes a "dispute" when subject to the alchemy of the *ad hoc* Conciliation Commission. I refuted that on Tuesday by showing that Article 13 uses the terms "matter", "issue" and "dispute" indistinctly, without any trace of the "special meaning" which Mr. Wordsworth discerns in those articles[49]. His response was that, at the time the complaint is referred to the Commission, it is still a "matter" and that it only becomes a "dispute" at a later point (CR 2010/10, p. 12, para. 7). Let's observe this little exercise in transubstantiation close up. Here is Article 12, paragraph 1, with the relevant words highlighted. [Show Art. 12 (1)] You can see, in the second sentence, at the time they are consenting to the members of the Conciliation Commission, and therefore before it has been established, the parties are "parties to the dispute" so the change has happened already. Abracadabra! But wait; the magic has not worked, for at the end of the sentence we have the words "amicable solution of the matter". So the "dispute" has slipped back to its former condition. But wait: help is on the way, because in the next sentence the States are confirmed as "parties to the dispute", a phrase twice occurring in paragraph 1 *(b)*, and once each in paragraphs 2, 5, 6, and 7. Surely now there can be no going back, no further entropy. But alas, even at the end of the Article 12 process, what do we find? I refer to Article 13, paragraph 1, which describes our affair simultaneously as a "matter", an "issue" and a "dispute". This is not consistency, it is oscillation.

[49] CR 2010/9, pp. 35-36, paras 6-8.

3. Mr. Wordsworth praised the CERD Committee, but complained that I did not refer to the rules of procedure drawn up by the Committee (CR 2010/10, p. 12 para. 7). The reason I did not do so was that the issue we are discussing concerns the interpretation of the 1965 Convention, not the later-adopted Rules. But the fundamental distinction drawn by Mr. Wordsworth between "matter" and "dispute", if it exists, must surely have been *appreciated* by the Committee, and they would surely have reflected it in the Rules.

4. Thus Mr. Wordsworth referred to a "five-stage crystallization process" for turning "matters" into "disputes"; he attributes this to "an interpretation of the Committee in the formulation of its rules of Procedure" (CR 2010/10, p. 12, para. 7). The Committee first adopted the rules in 1970. In Mr. Wordsworth's words: "Rule 72 makes it clear that the dispute only arises under Article 11, paragraph 2, i.e., only once the five-stage process has been completed and the matter has come back to the Committee for the second time, as is foreseen in Article 11, paragraph 2" (CR 2010/8, p. 30, para. 9).

[Graphic showing Art. 11 (2) with "matter" highlighted; Rule 72 with "dispute" highlighted]

5. As you can see on the screen, Article 11, paragraph 2, which refers only to a "matter" — and does so twice. But there is Rule 72, that refers to "a dispute that has arisen under Article 11, paragraph 2" — and does so twice.

6. Unfortunately, while the Committee may have thought it as a "dispute", Article 11, paragraph 2, is clear in referring to it is a "matter". Indeed, Article 11 *is* internally consistent, but the Committee seems not to have appreciated this. Its own Rules refer to a "dispute" at the Article 11 stage.

7. There are other examples of inconsistencies in terminology as between the Rules and the CERD, but the point has been made. Not even the CERD Committee adheres to Mr. Wordsworth's dichotomy.

8. Finally, Mr. Wordsworth dismissed my reference to the Indus Waters Treaty as "esoteric" (CR 2010/10, p. 12, para. 10). I must say I find it slightly odd to describe a major river treaty allocating water rights to many millions of people in the sub-continent as "esoteric". What *is* esoteric, however, is the complexity of the dispute settlement system, under that treaty, with its explicit provision as to precisely when a mere "difference" becomes a "dispute" and therefore

justiciable. My point was that such a refined and, well, esoteric system could not be implied, and that the linguistic basis on which Mr. Wordsworth sought to do the same thing in Part II of CERD was plainly inadequate.

9. Then Mr. Wordsworth takes refuge in a Latin maxim, *lex specialis*, as if in a talisman: CERD is a *lex specialis* (CR 2010/10, p. 13, para. 12), and is thus inoculated against the infection of general international law and the *Mavrommatis* case in particular. According to Mr. Wordsworth, *Mavrommatis* — with its expansive definition of "dispute" and its flexible requirement of "negotiation" — only applies "in the context of optional declarations under Article 36, paragraph 2, or compromissory clauses in bilateral or multilateral treaties" which do not possess the special character of CERD (CR 2010/10, p. 13, para. 12). There is some circularity here — the *lex specialis* maxim is invoked on the ground that the treaty is special; the treaty is special because it is *lex specialis*. But all treaties have special features; on Russia's view they are so many *leges speciales*. On this basis there is no general international law of treaties at all.

III. The story of State A and State B

10. I turn to the story of State A and State B — you may remember it. Mr. Wordsworth rather misunderstood my parable of the two States. He said with what he thought to be "a more accurate sense of reality" would be that "State A has gone down a different and impermissible route. It has resorted to military force to resolve its problems." (CR 2010/10, pp. 10-11, para. 3.)

11. But my parable was not intended to mirror the disputed facts of the present case; and in my parable the ethnic cleansing occurred in State B. The point of the story was to show the evident meaning of Article 22 and its relation to Articles 11-13. That meaning does not change depending on the factual situation. The Court either has or has not jurisdiction to hear a case under CERD, depending on the interpretation of Article 22, and irrespective of any question concerning the use of military force. I would note, furthermore, that from the Respondent's side there is — and no doubt advisedly — no preliminary objection relying on the so-called "clean hands" doctrine. The rest is for the merits.

IV. The system of Part II of CERD

12. The Respondent accused us of neglecting Part II of CERD and leaving Article 22 in splendid, you might say clinical, isolation. But Part II has its own economy, quite distinct from the final clauses. This can be seen, for example, from Article 9. Article 9 says that States Parties must submit for consideration by the Committee a "report on the legislative, judicial, administrative or other measures which they have adopted and which give effect to the provisions of this Convention".

13. Article 11, paragraph 1, which is the next substantive article (Article 10 concerns the Committee's rules, officers, secretariat and meetings) repeats that language: "If a State Party considers that another State Party is not giving effect to the provisions of this Convention, it may bring the matter to the attention of the Committee."

14. It seems clear that the Article 11 and 12 procedures are designed to work in tandem with Article 9. Article 9 requires States to report on how they are giving effect to the Convention, especially through legislation. If another State believes that the reporting State's measures to "give effect" are inadequate, Article 11 is the appropriate mechanism for bringing this observation to the Committee's attention. This makes perfect sense since it is the Committee that reviews the Article 9 submissions. It contrasts sharply with Article 22, which is phrased broadly: "any dispute . . . with respect to the interpretation or application of this Convention . . .".

15. All of this indicates that Articles 11 and 12 were not intended to establish mandatory procedures that must precede the seisin of this Court. Instead, they were intended to assist the Committee in fulfilling the function assigned to it by Article 9, paragraph 2, which is to "make suggestions and recommendations based on the examination of the reports and information received from the States Parties".

16. Russia seeks to reformulate the case by calling on the Court to preserve the integrity of some imaginary system of compulsory conciliation before, or under, the CERD[50]. This is misconceived. CERD is not "the only human rights treaty with a mandatory conciliation procedure", it is the first human rights treaty establishing a treaty body, which served as a model for those that followed it and neither it, nor the other seven human rights committees have been

[50]CR 2010/10, p. 38, para. 38 (Pellet).

given the authority to conciliate against the will of the States parties. In fact, this would be counterproductive, since consent, mutual adjustment and compromise lie at the heart of conciliation.

V. Article 22 of CERD

17. I turn against this background to the core interpretative issue of Article 22.

18. Professor Pellet said we ignored it but in fact we do — as you did in paragraph 114 of your Order on provisional measures — we do attribute meaning to the phrase "which is not settled by negotiation or by the procedures expressly provided for in this Convention". In the words of your Order, "some attempt should have been made by the claimant party to initiate, with the Respondent Party, discussions on issues that would fall under CERD"[51]. But you clearly considered that the phrase did not require exhaustion of CERD processes.

19. Professor Pellet drew the opposite conclusion from the word "or" — this was an "or" he mined repeatedly. Armed with the *Cambridge Advanced Learners Dictionary*, but driving still slightly on the wrong side of the road, he produced the postulate that "or" means "and" after a negative clause (CR 2010/10, p. 25, para. 7). I regret that despite the *Cambridge Advanced Learners Dictionary*, the English language is barely amenable to rules, and indeed many languages have difficulties with "and" and "or". It is enough to draw the Court's attention to Article 11, paragraph 2, of the Convention, which lists the procedural preconditions for referring a dispute to the Committee for a second time. It states: "If the matter is not adjusted to the satisfaction of both parties, [not adjusted, a negative phrase] either by bilateral negotiations *or* by any other procedure open to them . . ." The "or" there, there the word is in the negative but the "or" still means what it says.

20. There is in the end nothing for it but to follow Vienna Convention rules on interpretation, having regard to the object and purpose of the Convention. And the CERD was intended above all to provide an effective remedy at the international level for serious cases of racial, including ethnic, discrimination. It was intended to be effective. The Respondent's interpretation makes of the CERD machinery a snare and an obstacle, as my parable of States A and B showed.

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

Professor Pellet insisted that in certain contexts "or" can mean "and"; but I would remind him that in all contexts "or" can mean "or". The principle of effectiveness is a crucial factor in rejecting the cumulative interpretation.

21. Professor Pellet made a faint attempt to suggest that an *ad hoc* Conciliation Commission was at least as appropriate a forum for discrimination complaints as this Court; he noted that cases before this Court can be drawn out, which I suppose is true. But the Court has — what neither the CERD Committee nor the *ad hoc* Conciliation Commission have — a power to indicate binding interim measures of protection. Article 16 of CERD applies the normal international principle of the free choice of means to the CERD in so far as concerns other remedies. Professor Pellet conceded my point that under Article 16, parties to the Optional Clause would not be required to resort to procedures under Part II of CERD (CR 2010/10, pp. 33-34, para. 28). He regarded that as one of the hazards or advantages of the Optional Clause, depending on whether you are State A or State B. But if the integrity of Part II procedures was a strong value, it could have been imposed on the parties as a condition of belonging to the régime. The presence of Article 16 helps to show that the CERD is not such a régime, and that the principle of free choice of means should prevail.

22. Professor Pellet made no attempt to deal with the substance of my points concerning the *Rwanda* case; he simply stigmatized them as *les explications embarrassées*[52]. But the attempt to invoke the WHO Constitution in that case was a mere *post hoc* construction, and a speculative one at that. I would recall that the *Rwanda* case was cited in the provisional measures phase of the present case, and did not prevent the Court from concluding that the relevant phrase in Article 22 "does not, in its plain meaning, suggest that formal negotiations in the framework of the Convention or recourse to the procedure referred to in Article 22 thereof constitute preconditions to be fulfilled before the seisin of the Court"[53].

23. As to the *travaux*, there is no reason to repeat what was said on Tuesday — it is for the Court to decide between the diametrically opposed arguments of the Parties. On this we cannot

[52]CR 2010/10, pp. 31-32, para. 24, referring to CR 2010/9, p. 37, para. 15.

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

both be right. I would simply commend to you the summary which is an appendix to our Written Observations[54]; the complete *travaux* Annexes 1-40 in Volume 2 annexed to the Observations.

24. For all these reasons there is no basis for this Court to revise the interpretation of Article 22 provisionally given in its Order of 2008. Professor Pellet claimed that this should be done because of the issue of military force (CR 2010/10, p. 38, para. 38). But as I have observed, the case having been pleaded as it has been, that issue belongs to the merits.

VI. Preliminary objections 3 and 4

25. I turn to deal very briefly with the two remaining — if "remaining" is the right word — preliminary objections.

26. In the first round Russia had nothing to say about its third and fourth preliminary objections, despite the fact that we responded very fully in our Written Statement. In response to what we said on Tuesday, Russia has painted a confusing picture as to its intentions in respect of the third preliminary objection, on jurisdiction *ratione loci*. Professor Zimmermann told the Court that Russia had decided to "no longer plead it as a preliminary objection"[55]. Then, the Agent, Mr. Gevorgian, said that the issues were so closely intertwined with the facts that they should be considered at the merits stage[56], but he never actually asked you to join them.

27. It seems you have three options: (1) decide that the preliminary objection has been dropped and say nothing further about it; (2) rule on the objection as we have invited you to do, namely, by rejecting it, on the grounds that Russia has provided no authority or argument to contradict our detailed arguments; or — maybe it should be "and" — (3) join the objection to the merits.

28. We do not see any basis for the third course of action in the circumstances in which Russia has provided no arguments to justify such a decision, and no response to our submission that the claim is unconnected to the merits. In circumstances in which we have fully pleaded our case, we say you should reject the objection at this stage, and not merely treat it as having been

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[54]WSG, pp. 352-367.

[55]CR 2010/10, p. 46, para. 47 (Zimmermann).

[56]*Ibid*., p. 53, para. 22 (Gevorgian).

dropped. One party has provided "full argument", as Professor Zimmermann in his helpful way put it[57], and the fact that Russia has chosen not to respond should not delay your decision. The third preliminary objection is without merit and we invite the Court to so rule.

29. As regards the fourth preliminary objection — the *ratione temporis* objection — it now seems that this is not really an objection to jurisdiction at all, but more in the nature of a request for a declaration as to the non-retroactive application of the Convention. It is not the function of the preliminary objections phase to make such a declaration. Nor is it the place to expound the meaning and effect of the concept of the continuing violation, as Russia appears to suggest[58]. Georgia therefore invites the Court also to reject this preliminary non-objection.

VII. Conclusion: the role of the Court

30. To conclude, as to the role of the Court, when he is not being a legal formalist in these proceedings, Professor Pellet adopts another unwonted role, that of the *droits-de-l'hommiste*. He vehemently accuses me in effect of trashing the CERD Committee[59]. Of course, nothing I said was intended as a criticism of the good work done by that and the other human rights treaty bodies[60]. The question, however, is a legal one, whether their "jurisdiction" — if that is the right word — excludes that of the Court, or at least postpones access to the Court for years on end. In a situation where it is obvious that no amount of further negotiations, however structured, will resolve anything, it is futile and may be very damaging to the victims to insist that the Article 12 process run its cumbersome course.

31. Mr. Wordsworth used language redolent of the Royal Courts of Justice in describing CERD: he referred, for example, to a "matter" as "the formal name for the originating document on which the Commission is reporting", and added, helpfully: "The Commission reports on a matter, just as a court determines a claim."[61] I say again that treaty bodies such as the CERD

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[57]\CR 2010/10, p. 47, para. 49 (Zimmermann).

[58]*Ibid*., p. 48, paras. 55-57 (Zimmermann).

[59]See CR 2010/10, pp. 34-35, para. 31.

[60]See, e.g., P. Alston & J. Crawford (eds.), *The Future of UN Human Rights Treaty Monitoring*, Cambridge, Cambridge University Press, 2000).

[61]CR 2010/10, p. 11, para. 6.

Committee are not judicial bodies; they are not courts, they do not have the power to bind States. It is true that the CERD Committee has developed early warning and urgent action procedures, since 1993. They are no doubt useful and have been resorted to. But they are not a substitute for provisional measures ordered by this Court. They involve — and I quote from the procedures themselves — "the *expression* of specific *concerns*, along with *recommendations* for action"[62].

32. The fundamental point is this. No doubt States can create special procedures and entrust functions to *ad hoc* conciliation commissions, human rights committees or whoever else they choose. They can make the jurisdiction of these bodies exclusive or they can require prior exhaustion of their procedures. But the jurisdiction of this Court *ratione materiae* extends to the whole of international law. I said on Tuesday that there must be a presumption that the jurisdiction of this Court is not ousted or unduly delayed by reference to non-binding procedures before bodies which are not courts[63]. That is part of your role as the principal judicial organ of the United Nations, a universal international organization. Counsel for the Russian Federation did not address my proposition on Wednesday; it stands unrebutted.

33. This does not mean that you cannot have regard to recommendations and views formed by human rights treaty bodies; of course, you can. But it does no disrespect to the treaty bodies to point out that they are not courts, as the New Zealand Court of Appeal pointed out in a case concerning the Human Rights Committee, perhaps unnecessarily blessed subsequently by the Privy Council[64]. These preliminary objections are not about the standing or influence of the human rights treaty bodies or of CERD; it is about the role of your Court in relation to a major multilateral treaty. Bodies which do not exercise judicial power at the international level cannot, without an explicit mandate, indefinitely postpone a State's access to judicial power, especially that of this Court.

34. The point of my little parable of State A and State B is to show the absurdity of requiring a State, which has suffered from large-scale ethnic cleansing, going through the motions of an

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[62]See para. 14 *(c)* of the Guidelines for Early Warning and Urgent Action Procedures, Annual Report A/62/18, Anns., Chap. III last revised by the CERD Committee at its 71st Session in August 2007; emphasis added.

[63]CR 2010/9, p. 46, para. 41 (Crawford).

[64]*Tangiora* v. *Wellington District Legal Services Committee*, (1997) 115 *ILR* 655, aff'd [1999] UKPC 42.

extensive procedure focusing on negotiation and leading to a mere recommendation in a case where the other State adamantly refuses to co-operate. Yet, that is the effect of the interpretation that Russia insists on.

35. Mr. President, Members of the Court, thank you for your careful attention to conjunctions: of such things are constitutional principles made and unmade. Mr. President, I would now ask you to give the floor to Georgia's Agent, Ms Burjaliani.

The PRESIDENT: I thank Professor James Crawford for his presentation. I now call the Honourable Tina Burjaliani, the Agent of Georgia.

Ms BURJALIANI:

CONCLUDING REMARKS ANDSUBMISSIONS

1. Mr. President, Members of the Court. I am honoured to conclude the oral pleadings of Georgia and make our final submissions.

2. Mr. Reichler has explained that there has been a long-standing dispute and negotiations between Georgia and Russia concerning ethnic discrimination of the Georgian population from Abkhazia and South Ossetia and concerning discriminating them by denial of their right of return. This dispute is clearly over matters falling under the 1965 Convention. Professor Crawford has explained that there are no preconditions to the jurisdiction of the Court under Article 22, and that if there are any preconditions, they are certainly not cumulative and have been clearly satisfied. This Court has jurisdiction over the case.

3. Throughout these proceedings, the Russian Federation has made a series of unfounded accusations against Georgia that are legally irrelevant. On the first day of pleadings, the Honourable Agent of the Russian Federation asserted before this Court that Georgia has "turned the facts upside down" and "fabricated claims"[65]. Yet, it is the Russian Federation that has done everything imaginable to defeat the Court's jurisdiction, and to prevent objective consideration of these facts. Georgia is condemned by Russia for recourse to this Court, for its commitment to international law. Yet, it is Georgia that invites the Court to make a determination on the facts,

[65]CR 2010/8, p. 13, paras. 5-7 (Gevorgian).

confident that the overwhelming evidence of ethnic discrimination and violence satisfies the legal requirements of the 1965 Convention.

4. Georgia comes before this Court as a last resort. It comes before this Court to protect the human rights and fundamental freedoms of hundreds of thousands of its citizens against discriminatory violence and forced displacement from their homes as a result of the acts of the respondent State and the forces under its control and authority.

Despite the many obstacles it has encountered since its independence in 1991, Georgia has emerged as a democratic, multi-ethnic State with different ethnic groups, living in harmony. But it has constantly suffered from the instigation of ethnic conflicts on its territory, which is used as an instrument of control and domination by the respondent State. This policy has forced over 300,000 ethnic Georgians to leave homes in South Ossetia and Abkhazia beginning in the 1990s and continuing through to 2008. For almost 20 years, these ethnic Georgian IDPs have been prevented by the respondent State from returning to their homes, on discriminatory grounds.

5. The distinguished Agent of the Russian Federation heavily relied on the 2009 Report of the European Union's Independent International Fact-Finding Mission on the Conflict in Georgia. He did so to support their argument that Georgia seised the Court solely because of the armed conflict in the summer of 2008. However, the EU Report does not support this position. The European Union's Fact-Finding Mission views the August 2008 military confrontation as a "culminating point of a long period of increasing tensions, provocations and incidents" and it confirms that "the conflict has deep roots in the history of the region"[66]. The Report further confirms that "the interest of great and neighbouring powers, in particular those of the Russian Federation" has been a core aspect of Georgia's relations with Abkhazians and Ossetians[67]. Thus, contrary to what the honourable Agent of the Russian Federation stated in his closing remarks, the European Union's Fact-Finding Mission confirms that the escalation of events in the summer of 2008 is merely a point along the continuum of a two-decade dispute with deep roots in history — all that, Russia is directly involved.

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[66]Independent International Fact-Finding Mission on the Conflict in Georgia, Report, Vol. I, Sep. 2009, p. 11, para. 3.

[67]*Ibid.*, Vol. II, Sep. 2009, (hereinafter "IIFFMCG Report, Vol II"), p. 121, para 3.

6. The respondent State did not deny its direct military intervention and its consequences. Yet it tries to justify its actions with an alleged Georgian attack on Russian peacekeepers. There was no such attack. The European Union's Fact-Finding Mission found no evidence of any military confrontation with the Russian peacekeepers prior to the Russian invasion[68]. The sole purpose of the Russian military operation in South Ossetia, Abkhazia and adjacent regions in the summer of 2008 was to consummate two decades of ethnic discrimination by forcibly expelling the last remnants of the Georgian population in Abkhazia and South Ossetia, respectively, that have deep historic roots in these territories and thereby to create ethnically homogenous entities. The international community has condemned and rejected this unlawful and unjust conduct.

7. Mr. President, Members of the Court, the respondent State sponsored and supported the South Ossetian and Abkhaz separatists in their campaigns to change the ethnic composition of South Ossetia and Abkhazia through the forced transfer of ethnic Georgians from their homes and communities. This policy is inconsistent with the obligations Russia has assumed under the 1965 Convention and Georgia has consistently said so.

8. The distinguished Agent for the Russian Federation, in his concluding observations, stated that over the years there have been "[negotiations] over various aspects related to the Georgian-Ossetian and Georgian-Abkhazian conflicts, including the return of refugees and IDPs of various nationalities but never, never issues of racial discrimination"[69]. With great respect, the Agent of Russia misses the point that Russian policy on return is a discriminatory act. To complain about that policy is to complain about discrimination. The denial of a right to return of IDPs and refugees on grounds of ethnicity is covered by Article 5 of the 1965 Convention; a related point is that, in the contexts of the Georgian-Russian negotiations, the question of return has been closely related to other matters, including, but not limited to, the security and other aspects of the peaceful resolution of the conflict. The European Union's 2009 Report, which the Respondent endorses, states:

> "[the return of IDPs and refugees] had strong political and security aspects, since the return of Georgian refugees and IDPs *en masse* to Abkhazia would again seriously alter its ethnic composition and, eventually, its power structure. These two issues,

[68]IIFFMCG Report, Vol. II, pp. 270, 327.

[69]CR 2010/8, p. 51, para. 8 (Gevorgian).

> however, were largely interconnected and therefore, during that period, they were frequently negotiated *de facto* in one package."[70]

To suggest that these matters do not fall under the 1965 Convention finds no basis in the reality of what conditions of safe and dignified return require on the ground.

9. Mr. President, Members of the Court, Georgia believes that this long-standing dispute between the two States should be resolved in accordance with international law. This case has great importance for the Georgian people, for hundreds of thousands of men, women, and children who have witnessed their homes and villages burned and razed to the ground, who have lost their family members to murder and cruelty. Those few who remain in the Gali and Akhalgori districts suffer every day from the ethnic violence and other forms of discrimination. Georgia believes that the Court has an important role to play in contributing to the peaceful resolution of the dispute between the two countries. Georgia brings this case on behalf of ordinary men and women who have suffered and for whom this Court is a symbol of justice. It is their only hope for, one day, returning to the lives they were forced to leave behind, solely because of their ethnic identity.

10. Mr. President, Members of the Court, this brings me to our concluding submissions. Georgia invites the Court to reject the arguments of the Russian Federation. I shall now read out our final submissions:

Georgia respectfully requests the Court:

1. to dismiss the preliminary objections presented by the Russian Federation;
2. to hold that the Court has jurisdiction to hear the claims presented by Georgia and that these claims are admissible.

It remains for me to thank the distinguished members of the Russian delegation for their courtesy throughout the proceedings; to thank the Registry for its assistance; to thank the interpreters, and finally, Mr. President, Members of the Court, thank you for your attention.

The PRESIDENT: I thank the honourable Tina Burjaliani, the Agent of Georgia, for her presentation. The Court takes note of the final submissions which you have read out on behalf of Georgia, as it took note on Wednesday of the final submissions of the Russian Federation.

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[70] IIFFMCG Report, Vol. II, p. 82.

Now I have a few Judges who wish to take the floor to ask questions to the Parties. I shall now give the floor to Judge Koroma, who has a question for the Parties. Judge Koroma, if you please.

Judge KOROMA: Thank you, Mr. President. Given its centrality to these proceedings, I am inviting both Parties to again study Article 22 of the Convention and elaborate for the benefit of the Court. The question is as follows:

What precisely, in the view of the Parties, is the object and purpose of the clause contained in Article 22 of the Convention on the Elimination of All Forms of Racial Discrimination which reads as follows: "which is not settled by negotiation or by the procedures expressly provided for in this Convention"? Thank you, Mr. President.

The PRESIDENT: Thank you, Judge Koroma. Next is Judge Abraham, who wishes to ask a question to the Parties. Judge Abraham, you have the floor.

M. le juge ABRAHAM : Merci, Monsieur le president. Merci. Ma question s'adresse à la Fédération de Russie.

Au stade actuel de la procédure, la Cour est appelée seulement à se prononcer sur les exceptions préliminaires soulevées par la Partie défenderesse. Compte tenu des débats qui ont eu lieu au cours des audiences, faut-il comprendre que la Russie a retiré sa troisième exception en tant qu'exception préliminaire ? Merci.

The PRESIDENT: Thank you, Judge Abraham, for your question. Now I call Judge Cançado Trindade, who has a question to put to both of the Parties. Judge Cançado Trindade, you have the floor.

M. le juge CANÇADO TRINDADE : Merci, Monsieur le président. Je me permets de poser ma question aux deux Parties.

A votre avis, la nature des traités relatifs aux droits de l'homme tels que la convention CIEDR (régissant des relations au niveau *intra*-étatique) a-t-elle des conséquences ou une incidence sur l'interprétation et l'application des clauses compromissoires qu'ils contiennent ?

Pour préserver l'équilibre linguistique de la Cour, je pose ma question aux deux Parties aussi en anglais, l'autre langue officielle de la Cour.

In your understanding, does the nature of human rights treaties such as the CERD Convention (regulating relations at *intra*-State level) have a bearing or incidence on the interpretation and application of a compromissory clause contained therein? Thank you, Mr. President.

The PRESIDENT: Thank you, Judge Cançado Trindade. The written text of these questions will be sent to the Parties as soon as possible. The Parties are invited to provide their written replies to the questions no later than Friday, 24 September 2010. I would add that any comments a Party wishes to make, in accordance with Article 72 of the Rules of the Court, on the replies by the other Party, must be submitted by Friday, 1 October 2010.

Now, this brings us to the end of this week of hearings devoted to the oral argument of the Parties. I should like to thank the Agents, counsel and advocates for their statements.

In accordance with practice, I shall request both Agents to remain at the Court's disposal to provide any additional information it may require. With this proviso, I now declare closed the oral proceedings on the preliminary objections raised by the Russian Federation in the case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation).*

The Court will now retire for deliberation. The Agents of the Parties will be advised in due course of the date on which the Court will deliver its Judgment.

As the Court has no other business before it today, the sitting is closed.

The Court rose at 11.15 a.m.

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