INTERNATIONAL COURT OF JUSTICE

Case Concerning Application
of the International Convention on the Elimination
of All Forms of Racial Discrimination

(Georgia v. Russian Federation)

PRELIMINARY OBJECTIONS
OF THE RUSSIAN FEDERATION

Volume I

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(OUTLINE)

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LIST OF ABBREVIATIONS

CAT	-	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CED	-	International Convention for the Protection of All Persons from Enforced Disappearance
CEDAW	-	Committee on the Elimination of Discrimination against Women
CERD	-	International Convention on the Elimination of All Forms of Racial Discrimination
CERD Committee	-	Committee for the Elimination of Racial Discrimination
CIS	-	Commonwealth of Independent States
CMW	-	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
CSCE	-	Conference on Security and Cooperation in Europe
ECHR	-	Convention on the Protection Human Rights and Fundamental Freedoms
ECOSOC	-	Economic and Social Council
GM	-	Memorial of Georgia, 2 September 2009
ICCPR	-	International Covenant on Civil and Political Rights
IDP	-	internally displaced persons
IHL	-	international humanitarian law
ILC	-	International Law Commission
ITLOS	-	International Tribunal for the Law of the Sea
JCC	-	Joint Control Commission for the Settlement of the Georgian-Ossetian Conflict
JPKF	-	Joint Peacekeeping Forces, Joint Forces for the Maintenance of Peace in the Area of the Georgian-Ossetian conflict

Moscow Agreement	-	Agreement on a Cease-Fire and Separation of Forces, 14 May 1994
OSCE	-	Organisation on Security and Cooperation in Europe
Quadripartite Agreement	-	Quadripartite Agreement on voluntary return of refugees and displaced persons, 4 April 1994
Sochi Agreement	-	Agreement on the Principles of Settlement of the Georgian-Ossetian Conflict of 24 June 1992
UNHCR	-	United Nations Office of the High Commissioner for Refugees
UNOMIG	-	United Nations Observer Mission in Georgia
WHO	-	World Health Organisation

CHAPTER I

INTRODUCTION

Section I. Background

1.1 On 7 August 2008 Georgia commenced large-scale military operations in South Ossetia which included an armed attack against Russian peacekeeping forces that were stationed in Tskhinvali in accordance with the 24 June 1992 Sochi Agreement on Principles of a Settlement of the Georgian-Ossetian Conflict.[1] This was an attack that, as the Independent International Fact-Finding Mission on the Conflict in Georgia correctly determined, could not be justified as an exercise of the right of self-defence and thus constituted a clear violation of international law. As the Independent International Fact-Finding Mission stated it in its report[2]:

> "There was no ongoing armed attack by Russia before the start of the Georgian operation. Georgian claims of a large-scale presence of Russian armed forces in South Ossetia prior to the Georgian offensive on 7/8 August could not be substantiated by the Mission. It could also not be verified that Russia was on the verge of such a major attack, in spite of certain elements and equipment having been made readily available. There is also no evidence to support any claims that Russian peacekeeping units in South Ossetia were in flagrant breach of their obligations under relevant international agreements such as the Sochi Agreement and thus may have forfeited their international legal status. Consequently, the use of force by Georgia against Russian peacekeeping forces in Tskhinvali in the night of 7/8 August 2008 was contrary to international law."[3]

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[1] See GM, Annex 102.

[2] References to the report by the Independent International Fact-Finding Mission on the Conflict in Georgia should not be interpreted as an endorsement of all findings by the Mission.

[3] Independent International Fact-Finding Mission on the Conflict in Georgia, Report, vol. I (September 2009), p. 23, para. 20. Annex 75 to these Preliminary Objections. See also at p. 22, para 19:

1.2 On 11 August 2008, *i.e.* only four days after it had started hostilities, Georgia sought interim measures to be ordered by the European Court of Human Rights alleging violations of the European Convention on Human Rights by Russia and, one day later, *i.e.* on 12 August 2008, Georgia also instituted proceedings before this Court against the Russian Federation, now relying on Article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). This sequence of events alone is telling for two different reasons.

1.3 *First*, it is apparent that Georgia only decided to have recourse to methods providing for the judicial settlement of disputes after an (unlawful) use of force and after it had become obvious to Georgia that it would not be able to regain control over Abkhazia and South Ossetia by such an illegal use of military force.

1.4 *Second*, Georgia engaged in a search for any legal forum where it could bring claims against the Russian Federation, regardless of the underlying substantive issues and, in particular, regardless of the real character of the alleged dispute and its parties. The real dispute in this case concerns the conflict, between Georgia on the one hand and Abkhazia and South Ossetia on the other, in relation to the legal status of Abkhazia and South Ossetia, a conflict that has on occasion erupted into armed conflict. It is manifest that there was a period of armed conflict between Georgia and Russia, following on from Georgia's unlawful use of force on 7 August 2008. Yet, this is not a case about racial discrimination covered by Article 22 of CERD.

"There is the question of whether the use of force by Georgia in South Ossetia, beginning with the shelling of Tskhinvali during the night of 7/8 August 2008, was justifiable under international law. It was not".

Hereinafter, "Annex xx" refers to annexes to these Preliminary Objections reproduced in Volume II; "GM, Annex xx" refers to annexes to the Memorial of Georgia.

1.5 As the joint dissenting opinion attached to the Court's Order of 15 October 2008 aptly put it:

> "It is curious, to say the least, that Georgia, which has cited acts of racial discrimination allegedly committed by the Russian Federation since the early 1990s in violation of CERD, has awaited the armed conflict with Russia (and South Ossetian forces) to which it is a party immediately to seise the Court of a dispute relating to the interpretation and the application of that Convention."[4]

Section II. The artificial character of Georgia's case

1.6 It is also telling, as will be demonstrated in more detail in Chapter III below, that Georgia had never raised beforehand the issue of alleged violations of CERD by the Russian Federation with regard to acts or omissions related to events in Abkhazia or South Ossetia – despite the fact that CERD entered into force with respect to Georgia on 2 July 1999, and the further fact that the dispute to which Georgia refers allegedly dates back to 1991.[5]

1.7 In particular, Georgia never raised the issue of racial discrimination by the Russian Federation with reference to the situation in Abkhazia and South Ossetia in negotiations prior to seeking to bring this case before the Court;[6] nor has Georgia ever made use of the procedures expressly provided for in CERD, as required by Article 22 of CERD.[7] Indeed, had it been the case that, as Georgia

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[4] See Joint dissenting opinion of Vice-President Al-Khasawneh and Judges Ranjeva, Shi, Koroma, Tomka, Bennouna and Skotnikov attahced to the Court's Order of 15 October 2008, para. 3.

[5] See *e.g.* Georgia's Application of 12 August 2008, para. 6.

[6] For details see *infra* Chapter IV, para. 4.84 *et seq.*

[7] See *infra* Chapter III, para. 3.51 *et seq.*, Chapter IV, para. 4.123 *et seq.*

now claims, Georgia and the Russian Federation had a dispute concerning CERD, it would have been in Georgia's own interests to bring its concerns to the attention of the Russian Federation in an unambiguous way; thus the Russian Federation would have had the opportunity to be aware of and, if necessary, to react to Georgia's alleged grievances.

1.8 Moreover, and further confirming the artificial character of the case at hand, prior to the filing of the Application, Georgia never alleged that the Russian Federation was a party to conflicts that were ongoing between Georgia on the one hand and Abkhazia and South Ossetia on the other.[8] Further, Georgia had frequently confirmed the internationally recognized role of the Russian Federation as a third-party facilitator in those conflicts.

1.9 Finally, Georgia never claimed prior to bringing this case, nor has the Committee on the Elimination of Racial Discrimination established under CERD ever considered, that CERD would be applicable to acts of organs of the Russian Federation on the territory of Abkhazia or South Ossetia.[9]

1.10 It was only when it submitted its Application that Georgia, for the first time, claimed that the Russian Federation had violated the provisions of CERD – in an obvious attempt to construct a case that would come within the Court's jurisdiction under Article 22 of CERD while, significantly, not raising any claim under Article 14 of the ECHR when it lodged an Application before the European Court of Human Rights (while the European Court of Human Rights could certainly have been seized of a claim of racial discrimination on the same basis).

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[8] See *infra* Chapter III and Chapter IV, *e.g.* para. 4.115 *et seq*.

[9] See *infra* Chapter V.

Section III. Georgia's impermissible approach to dispute settlement

1.11 It is important to pause to see how these two factors, *i.e.* Georgia's commencement of military operations on 7 August 2008, and the fact that it sought to seise the Court with a never previously mentioned dispute on 12 August 2008, fit within the applicable legal framework.

1.12 In accordance with any plain reading of Article 22 of CERD, there must be (i) a dispute with respect to the interpretation or application of the Convention, which (ii) has not been settled by negotiation or by the procedures expressly provided for in the Convention, prior to (iii) referral of the dispute to the Court.[10]

1.13 Stepping back from the detail, this can be recognised as a 3-stage process. That 3-stage process is consistent with the basic principles of peaceful dispute settlement, as reflected, for example, in the 1970 Friendly Relations Declaration.[11] As also follows from these basic principles and the prohibition of the use of force, there is of course no "stage 4", *i.e.* there can be no recourse to military force to settle the dispute. As the Friendly Relations Declaration provides:

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[10] Article 22 of CERD provides:

"Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement."

[11] Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, United Nations General Assembly Resolution 2625 (XXV) of 24 October 1970.

> "Every State shall settle its international disputes with other States by peaceful means in such a manner that international peace and security and justice are not endangered.
>
> States shall accordingly seek early and just settlement of their international disputes by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their choice. In seeking such a settlement the parties shall agree upon such peaceful means as may be appropriate to the circumstances and nature of the dispute.
>
> The parties to a dispute have the duty, in the event of failure to reach a solution by any one of the above peaceful means, to continue to seek a settlement of the dispute by other peaceful means agreed upon by them.
> States parties to an international dispute, as well as other States shall refrain from any action which may aggravate the situation so as to endanger the maintenance of international peace and security, and shall act in accordance with the purposes and principles of the United Nations."

1.14 What has happened in this case with respect to the application of the agreed 3-stage process to a dispute that, according to Georgia, dates back to 1991?

1.15 *First*, Georgia has gone straight to (the non-permitted) "stage 4". Georgia has resorted to military force to resolve the conflict concerning the legal status of Abkhazia and South Ossetia, as referred to in paragraph 1.4. above, that Georgia now characterises as a dispute under CERD. It has engaged in armed action that would patently aggravate the situation and endanger the maintenance of international peace and security. Its actions have been found to be unlawful in the Independent International Fact-Finding Mission report.[12]

1.16 *Second*, and no doubt in the light of the lack of success in achieving its goals by means of (the non-permitted) "stage 4", Georgia has sought to go to

[12] Independent International Fact-Finding Mission on the Conflict in Georgia, Report, vol. I (September 2009), pp. 22-23, paras. 19-20. Annex 75.

stage 3 of the process established by Article 22 of CERD. It has not – over an alleged period of 17 years prior to the date of the Application – communicated the existence of a claim to the Russian Federation such that the Russian Federation could positively oppose that claim (stage 1); still less has it sought to settle that dispute by negotiation or by the procedures expressly provided for in CERD (stage 2). And yet it now seeks to seise the Court of a dispute under Article 22 of CERD (stage 3).

1.17 The position of the Russian Federation is simple. This is not an approach to the resolution of disputes that the Court can countenance. Georgia has sought not only to bypass the agreed procedures of Article 22 of CERD, but to overturn the most fundamental principles on the peaceful settlement of disputes.

1.18 It is useful to ask the common sense question as to what would have happened if Georgia had been successful in its military intervention in South Ossetia – because it had defeated the South Ossetian forces, and disabled the peacekeeping forces of Russia. Would this case have been brought before the Court on 12 August 2008? The answer to that question is, of course, "no". Georgia elected to take dispute settlement into its own hands, and through unlawful means. It would be unconscionable for Georgia now to be permitted to reinvent the history of its claim, to be treated as if the Russian Federation was aware of the alleged long-standing dispute, to be treated as if Georgia had in fact had recourse to the pre-conditions contained in Article 22 of CERD, to be treated as if it had not first sought to achieve its aims by use of force, and as if it had not first brought to Russia's notice the existence of a dispute under CERD only on 12 August 2008.

Section IV. The Order of the Court on Provisional Measures of 15 October 2008

1.19 Having submitted its Application on 12 August 2008, Georgia filed a request for the indication of provisional measures on 14 August 2008. On 15 October 2008, the Court adopted an order indicating provisional measures by eight votes to seven. While Georgia had of course requested the Court to address such measures to the Russian Federation only,[13] the Court decided *proprio motu* to indicate provisional measures addressed to *both Parties, i.e.* to the Russian Federation, as well as to Georgia.

1.20 It is also important to underline that the Court has stressed the provisional and mere *prima facie* character of its finding as to its jurisdiction under Article 22 of CERD. As the Court put it:

> "Whereas the Court, in view of all the foregoing, considers that, prima facie, it has jurisdiction under Article 22 of CERD to deal with the case ...."[14]

1.21 The Court further confirmed that its jurisdiction (if ever it has jurisdiction, *quod non*), would be limited to issues the subject-matter of which relate to the "interpretation or application of the International Convention on the Elimination of All Forms of Racial Discrimination".[15]

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[13] See CR 2008/25, para. 11 (Burjaliani).

[14] Order of 15 October 2008, para. 117.

[15] *Ibid.*

1.22 Finally, the Court also underlined that its *prima facie* finding on jurisdiction was without prejudice to a later and definitive determination of these questions. The Court stated:

> "Whereas the decision given in the present proceedings in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case or any questions relating to the admissibility of the Application …."[16]

1.23 It should also be noted in this regard that the Court has previously found that it lacks jurisdiction although it had previously held in proceedings on provisional measures that it had jurisdiction *prima facie*. The *Anglo-Iranian Oil* case, the *Aegean Sea Continental Shelf* case and the *Case concerning the Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America)* are examples at hand.

1.24 The Court has confirmed the right of the Government of the Russian Federation to submit arguments in respect of those very questions.[17] It is in exercise of this right, and in conformity with Article 79 of the Rules of Court, that the Russian Federation submits the following preliminary objections as to the jurisdiction of the Court.

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[16] *Ibid*., para. 148.

[17] *Ibid*.

Section V. The structure of Russia's Preliminary Objections

1.25 The Court has reiterated, time and again, that it is the fundamental principle of consent that governs the exercise by the Court of its contentious jurisdiction. As the Court has stated:

> "… one of the fundamental principles of its Statute is that it cannot decide a dispute between States without the consent of those States to its jurisdiction …."[18]

1.26 Accordingly, it is only if and to the extent that the parties to the case have consented to such jurisdiction that the Court may rule on the merits of the case. Given that the Application submitted by Georgia does not come within the jurisdiction provided for by Article 22 of CERD, the Russian Federation respectfully submits the preliminary objections summarised in paragraphs 1.28 to 1.33 below.

1.27 In Chapter II, which follows, the Russian Federation first seeks to identify the real dispute in this case, consistent with the past jurisprudence of the Court. That real dispute is as identified in paragraph 1.4 above.[19]

1.28 The *first preliminary objection* put forward by the Russian Federation will demonstrate that there was no dispute between Georgia and Russia with respect

[18] See *inter alia Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Request for the Indication of Provisional Measures, Order of 10 July 2002, ICJ Rep. 2002, p. 241.

[19] In doing so, the Russian Federation does not, save insofar as is necessary for the issue of the jurisdiction of the Court, take a position as to the facts of the case as presented by the Applicant. The same applies to the remainder of these Preliminary Objections. The Russian Federation reserves its rights to do so, should the need arise, even more so since the facts, as presented by Georgia, do not represent the realities before, during or after the outbreak of hostilities.

to the interpretation or application of CERD concerning the situation in and around Abkhazia and South Ossetia prior to 12 August 2008, *i.e.* the date Georgia submitted its application.[20]

1.29 For one, *the parties to any dispute* involving allegations of racial discrimination committed on the territory of Abkhazia and South Ossetia, if ever there was such a dispute, *were Georgia on the one side, and Abkhazia and South Ossetia on the other, but not the Russian Federation* which, prior to the filing of the application and the starting of hostilities by Georgia, had been perceived by all relevant actors, including Georgia, as being a facilitator and a State contributing stabilising peace-keeping forces.

1.30 Besides, it will be also shown that in any event, if ever there was a dispute between Georgia and Russia, *any such dispute was not one related to the application or interpretation of CERD*.

1.31 The *second preliminary objection* relates to the fact that, apart from the lack of any relevant dispute, Georgia has not satisfied the requirements laid down in Article 22 of CERD, namely to attempt to settle the alleged dispute by way of negotiation or by the procedures expressly provided for in the Convention, before bringing the case before the Court. In particular, the Respondent will show that any State that wants to bring a case under Article 22 of CERD must, before doing so, raise the issue of alleged violations of CERD in prior negotiations, and must make use of the methods specifically provided for in CERD, in order for the Court to be able to exercise its jurisdiction under Article 22[21].

[20] See *infra* Chapter III.

[21] See *infra* Chapter IV.

1.32 In its *third preliminary objection*, Russia will demonstrate that the jurisdictional reach of Article 22 of CERD does not extend to acts or omissions by the Russian Federation allegedly having taken place on the territory of either Abkhazia or South Ossetia. This is due to the consideration that the Court's jurisdiction under Article 22 of CERD is limited to disputes related to the interpretation or application of CERD which, in turn, does not apply to acts having taken place beyond the territory of the respective contracting party of CERD.[22]

1.33 In any event, and in the further alternative, it will be demonstrated by way of a *fourth preliminary objection* that the Court's jurisdiction *ratione temporis* would be limited to events having taken place after the entry into force of CERD as between the Parties, *i.e.* to events which occurred after 2 July 1999,[23] should the Court find that it has jurisdiction at all, *quod non.*

Section VI. The Russian Federation and the International Convention on the Elimination of All Forms of Racial Discrimination

1.34 The adoption of CERD in 1965 by the United Nations General Assembly constituted a significant milestone in the efforts of the international community in countering racism and racial discrimination. Russia, as a multi-ethnic society, where various ethnic groups live peacefully together, attaches particular importance to strengthening efforts at the national, regional and universal levels aimed at eliminating all forms and manifestations of racism, racial discrimination, xenophobia and related intolerance. It has therefore always

[22] See *infra* Chapter V.

[23] See *infra* Chapter VI.

supported the Convention and the implementation and monitoring mechanism established by it.

1.35 The Russian Federation has been a State Party to CERD since 1969 by virtue of continuing the international legal personality of the Union of Soviet Socialist Republics. It has made no reservation insofar as the implementation clauses of CERD are concerned, and withdrew its reservation as to Article 22 of CERD in 1989.

1.36 Moreover, it has made a Declaration under Article 14 of CERD recognizing the competence of the Committee on the Elimination of Racial Discrimination to receive and consider communications from individuals or groups of individuals claiming to be victims of a violation by Russia of any of the rights set forth in the Convention.

1.37 Ever since becoming a contracting party, Russia has duly cooperated with the Committee on the Elimination of Racial Discrimination, having submitted 19 periodic reports since 1969, the latest of which[24] was considered by the Committee in 2008[25], the Committee adopting its concluding observations on 13 August 2008[26], i.e. after the outbreak of hostilities.

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[24] Committee on the Elimination of Racial Discrimination, 73rd session, Consideration of reports submitted by States Parties under Article 9 of the Convention, Concluding Observations of the Committee on the Elimination of Racial Discrimination: Russian Federation, U.N. Doc. CERD/C/RUS/CO/19 (20 August 2008). Annex 70.

[25] See CERD/C/SR.1882 and 1883.

[26] Committee on the Elimination of Racial Discrimination, 73rd session, Consideration of reports submitted by States Parties under Article 9 of the Convention, Concluding Observations of the Committee on the Elimination of Racial Discrimination: Russian Federation, U.N. Doc. CERD/C/RUS/CO/19 (20 August 2008), Annex 70; for the Summary Records see CERD/C/SR.1897 and 1898.

1.38 The Respondent has also actively participated in the Third World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance held in August-September 2001 in Durban, South Africa, as well as most recently in the Durban Review Conference held in April 2009 in Geneva.

1.39 The Outcome document of the Review Conference underlines the important functions that the Committee on the Elimination of Racial Discrimination plays in monitoring the implementation of the CERD and, in particular, also noted with appreciation the early warning and urgent action procedure, as well as the follow-up procedure, established by the Committee.[27]

Section VII. Concluding observations

1.40 When ratifying CERD, the Union of Soviet Socialist Republics entered a reservation as to Article 22 of CERD. This reservation provided, as far as relevant:

> " (...) The Union of Soviet Socialist Republics does not consider itself bound by the provisions of article 22 of the Convention, under which any dispute between two or more States Parties with respect to the interpretation or, application of Convention is, at the request of any of the parties to the dispute, to be referred to the International Court of Justice for decision, and states that, in each individual case, the consent of all parties to such a dispute is necessary for referral of the dispute to the International Court of Justice."[28]

1.41 Currently, 23 contracting parties of CERD maintain reservations which are, *mutatis mutandis*, identical to the one then entered by the Soviet Union. It

[27] U.N., Report of the Durban Review Conference, U.N. Doc. A/CONF.211/8 (20-24 April 2009), para. 44. Annex 74.

[28] United Nations, *Treaty Series*, vol. 676, pp. 397-398 (1969).

may be hoped that further States will follow the example given by the USSR in 1989 and will withdraw such reservations, and that additional States will desist from making such reservations when they ratify the Convention.

1.42 When deciding to withdraw this and parallel reservations to other human rights treaties in 1989, the USSR did so

> "… due to the major importance it attaches to upholding at present the role played in world affairs by the United Nations International Court of Justice."[29]

1.43 In taking that decision, the USSR was also

> "… guided by the interests of strengthening the international legal order ensuring the primacy of law in politics."[30]

1.44 It is against this background that the Russian Federation would consider it a deplorable development if Georgia were to be permitted to bring an artificial case before the Court under Article 22 of CERD, having first had recourse to the use of force and then having bypassed the requirements laid down in the Convention. Doing so might also endanger the overall acceptance of the system of peaceful settlement of disputes through the Court as the principal judicial organ of the United Nations generally, and the Court's role, as provided for in Article 22 of CERD, in particular, and would, by the same token, also undermine the authority of the Committee on the Elimination of Racial Discrimination, as well as that of the other human rights treaty bodies.

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[29] Letter dated 28 February 1989 from the Soviet Minister of Foreign Affairs Eduard A. Shevardnadze to United Nations Secretary-General Javier Perez de Cuellar (unofficial English translation), 83 A.J.I.L. 457 (1989), p. 457.

[30] *Ibid.*

CHAPTER II

THE REAL DISPUTE

Section I. Introductory observations

2.1 As the Court held in *Nuclear Tests*: "it is the Court's duty to isolate the real issue in the case and to identify the object of the claim."[31] To similar effect, the Court held in *Fisheries Jurisdiction (Spain v. Canada),* referring to its past jurisprudence:

> "The Court will itself determine the real dispute that has been submitted to it (see *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment, I. C. J. Reports* 1995, pp. 24-25). It will base itself not only on the Application and final submissions, but on diplomatic exchanges, public statements and other pertinent evidence (see *Nuclear Tests (Australia v. France), Judgment, I. C. J. Reports* 1974, pp. 262-263)."[32]

2.2 The identification of the real dispute is of particular importance in this case given that, as is considered further in Chapter III below, (i) it is for Georgia to establish that there is a "dispute between two or more State Parties [in this case, Georgia and Russia] with respect to the interpretation or application of this Convention", as is required by Article 22 of CERD, and (ii) Russia only learnt that there was a claim against it under CERD and/or in respect of alleged racial discrimination in Abkhazia and South Ossetia on 12 August 2008, i.e. the date of Georgia's Application instituting proceedings.

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[31] *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 466, para. 30; see also *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 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; *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 448, paras. 29-30.

[32] *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 448, para. 31.

2.3 It is Russia's position that the real dispute in this case concerns the conflict, between Georgia on the one hand and Abkhazia and South Ossetia on the other, in relation to the legal status of Abkhazia and South Ossetia, a conflict that has on occasion erupted into armed conflict. It is manifest that there was a period of armed conflict between Georgia and Russia, following on from Georgia's unlawful use of force on 7 August 2008. This is not a case about racial discrimination.

Section II. The ongoing conflict between Georgia and Abkhazia / South Ossetia concerning the legal status of Abkhazia and South Ossetia

2.4 From the early 1990s, Georgia has been engaged in lengthy and very costly (in human and, no doubt, economic terms) conflict with Abkhazia and South Ossetia, in which Russia has had a role as a facilitator at the express request of Georgia and the other parties engaged in the conflict.

2.5 During the Perestroika, the democratic movement in Georgia was largely nationalist in orientation. The first President of independent Georgia, Zviad Gamsakhurdia, elected in October 1990, openly stood for a "Georgia for Georgians".[33] Abkhazia and South Ossetia perceived this as a threat and favoured remaining within the USSR. With the break-up of the Soviet Union, Abkhazia and South Ossetia sought to establish their own power structures. Both regions declared independence remained beyond the sphere of Georgia's direct control. Georgia made several attempts to restore its territorial integrity by

[33] Human Rights Watch / Helsinki, "Bloodshed in the Caucasus: Violations of Humanitarian Law and Human Rights in Georgia-South Ossetia Conflict" (1992), p. 8. Annex 25.

military force, first in South Ossetia, and then in Abkhazia. These attempts failed, and also resulted in tens or hundreds of thousands of people, including of course, ethnic Georgians, fleeing the two regions.[34]

A. SOUTH OSSETIA: THE SOCHI AGREEMENT, THE ESTABLISHMENT OF THE JOINT PEACEKEEPING FORCES, AND A PERIOD OF RELATIVE STABILITY

2.6 A useful insight into the nature of the conflict that commenced in 1991-1992 in South Ossetia can be derived from the Report of the Representative of the Secretary-General on the human rights of internally displaced persons dated 24 March 2006, which Georgia refers to in its Memorial. At paragraph 4.5 of its Memorial, Georgia describes, by reference to this Report, a violent campaign of ethnic cleansing directed by Ossetian separatists at ethnic Georgians in 1991-1992, and it is said that over 10,000 ethnic Georgians were permanently forced from their places of residence.

2.7 However, the Report of the Representative of the Secretary-General in fact shows that the main victims of violence were *ethnic Ossetians*, not ethnic Georgians, some of whom were having to flee due to fear, harassment or forcible eviction in parts of Georgia:

> "The 1990-1992 conflict in the Tskhinvali Region/South Ossetia is estimated to have displaced some 60,000 persons, including about 10,000 ethnic Georgians [footnote omitted]. The vast majority, however, were ethnic Ossets from both the breakaway territory and other parts of Georgia, most of whom have fled abroad (primarily to the Russian Federation region of North Ossetia). Some were displaced as a direct consequence of fighting in and around the Tskhinvali Region/South

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

> Ossetia, while others moved due to fear, harassment or forcible eviction in parts of Georgia that remained otherwise largely peaceful during the conflict."[35]

2.8 At paragraph 4.6 of its Memorial, Georgia cites a Human Rights Watch report of 1992, setting out an extract in which it is recorded that Ossetian guerrillas burned an estimated 62 homes of Georgians in South Ossetia.[36]

2.9 The extract that Georgia relies on is from a section of the 1992 report entitled "Pillage, Outrage Against Personal Dignity, Torture, Violence to Life and Person, and Forced Displacement of the Civilian Population: By Ossetians". The section is, however, preceded by an equivalent (if slightly longer) section on Pillage etc "*By Georgian Paramilitaries*", to which Georgia makes no reference. That section, which Georgia chose not to annex to its Memorial, commences as follows:

> "Georgian paramilitary groups committed acts of violence against Ossetian civilians within South Ossetia that were motivated both by the desire to expel Ossetians and reclaim villages for Georgia, and by sheer revenge against the Ossetian people. As a consequence of this violence, between sixty and 100 villages in South Ossetia are reported to have been burned down, destroyed or otherwise abandoned."[37]

2.10 Thus, while Georgia portrays the Human Rights Watch 1992 report as showing that Ossetians burned down 62 Georgian homes, the report in fact

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[35] Report of the Representative of the Secretary-General on the human rights of internally displaced persons, Addendum, Mission to Georgia, Walter Kalin, 24 March 2006, para. 8. GM Annex 40.

[36] GM, para. 4.6 and fn. 409. An incorrect fn. reference is given at fn. 409. The reference should be to: Human Rights Watch/Helsinki, *Bloodshed in the Caucasus: Violations of Humanitarian Law and Human Rights in the Georgia-South Ossetia Conflict*, 1992, pp. 22-23, GM Annex 145.

[37] Human Rights Watch / Helsinki, "Bloodshed in the Caucasus: Violations of Humanitarian Law and Human Rights in Georgia-South Ossetia Conflict" (1992), p. 17. Annex 25.

shows far more extensive acts of violence by Georgian paramilitary groups. Further, it is notable that this 1992 report also considers the acts of "Georgians" and "Ossetians" under five other heads (Indiscriminate Shelling and Artillery Fire, Civilian Casualties of Shelling and Gunfire, Interference with Medical Personnel, Hostage-taking and Summary Executions), but there is no suggestion of acts by Russia (or the USSR) under any of these heads.[38]

2.11 The 1992 report also contains the following conclusion (which Georgia did not annex to its Memorial):

> "We conclude that the Georgian government allowed and indirectly encouraged paramilitary groups to pursue a guerrilla war against the rebel defense forces of South Ossetia, in which both sides - Ossetian and Georgian - violated customary rules of war." [39]

2.12 Thus the conflict opposed Georgia and South Ossetia.

2.13 This is also reflected in the Agreement on the Principles of Settlement of the Georgian-Ossetian Conflict, signed in the city of Sochi on 24 June 1992 ("the Sochi Agreement").[40] In concluding the Agreement, Georgia and Russia were, as the Preamble to the Agreement records: "Striving for immediate cessation of bloodshed and achieving a comprehensive settlement *of the conflict between Ossetians and Georgians*" (emphasis added). It is important to focus briefly on the Sochi Agreement and related documents, as these identify the role in which Russia was engaged.

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[38] *Ibid*., pp. 26-37. There is also a lengthy section entitled "Discrimination and Violence Against Ossetians in Georgia" (by definition, by Georgia). *Ibid*, pp. 37-47.

[39] *Ibid*., p. 4. There is no such finding so far as concerns Russia (or the USSR). At p. 5, the report states: "The CIS (formerly USSR) Interior Ministry (MVD) troops, acting as peacekeepers in the conflict zone, provided inadequate protection of Georgians in South Ossetia".

[40] GM, Annex 102.

2.14 Pursuant to Article 3(1) of the Sochi Agreement, the parties agreed on the establishment of a Joint Control Commission (JCC) "to exercise control over the implementation of a cease-fire, withdrawal of armed formations, disbandment of forces of self-defense and to maintain the regime of security in the region". Pursuant to Article 3(3), they agreed on the deployment of "joint forces for the maintenance of peace and order" (later known as the Joint Peacekeeping Forces, or JPKF) under the authority of the JCC.[41]

2.15 Initially, the JCC operated as a trilateral forum, comprising representatives of Russia, Georgia and of the "Ossetian side" – a formulation chosen because of the reluctance to recognize South Ossetia as an official party to the process.[42] On 4 July 1992, at the first meeting of the JCC, it was agreed that the Joint Peacekeeping Forces would be deployed, consisting of a Russian, a Georgian and an Ossetian battalion, each counting 500 active servicemen and a 300-strong reserve.[43]

2.16 Georgia's position in its Memorial is that it was compelled to agree to the deployment of the Joint Peacekeeping Forces.[44] That was not a position adopted in Georgia's Application of 12 August 2008, where it was also accepted that "the security situation in South Ossetia was relatively stable during the 12 years between 1992 and 2004".[45] Nor is it a position that is consistent with how the

[41] See also para. 4.90 (c) below.

[42] "Russia and Georgia have agreed that South Ossetia does not exist", by Liana Minasian, Nezavisimaya Gazeta (30 June 1992). Annex 24.

[43] GM, Annex 103.

[44] GM, para. 4.15.

[45] Application, para. 56.

Joint Peacekeeping Forces and the JCC were seen by Georgia at the time. For example:

a. In October 1994, an agreement on the further development of the process of settlement of the Georgian-Ossetian conflict was signed in Moscow by Georgia, South Ossetia, North Ossetia and Russia,[46] supplemented with the Regulation on the Joint Control Commission.[47] The parties noted that "the JCC ha[d] largely fulfilled its functions of ensuring control of ceasefire, withdrawing armed units and maintaining safety measures, thus laying foundation for the process of political settlement",[48] while they also decided to convert the JCC into a "permanently operating organ of the four parties that participate in the settlement of the conflict and the suppression of its consequences".[49] It was agreed that meetings of the JCC would be attended by representatives of the Conference on Security and Cooperation in Europe (CSCE) mission in Georgia. The parties to the conflict, Georgia and South Ossetia, reaffirmed their obligations to resolve all issues by peaceful means and not to resort to the use or threat of force.[50]

b. In December 1994, the JCC adopted the Regulation on the basic principles of the activities of military contingents and observation

[46] The Russian text appears in GM, Vol. III, Annex 113. For an English translation, see Annex 42 to these Objections.

[47] Regulation on the JCC for the settlement of the Georgian-Ossetian Conflict (adopted 31 October 1994). GM, Vol. III, Annex 113.

[48] Agreement on the further development of the process of the settlement of the Georgian-Ossetian conflict and on the Joint Control Commission (31 October 1994), clause 1(a). Annex 42.

[49] *Ibid.*, clause 1(c).

[50] *Ibid.*, clause 5.

groups.[51] The decision accompanying the Regulation, signed by all sides including Georgia, stated that:

> "The Russian battalion of the peacekeeping forces is the guarantor of relative stability in the conflict zone."[52]

c. On 31 March 1999, Georgia, together with Russia, and the North Ossetian and South Ossetian sides, signed a Decision of the Joint Control Commission recording that the "peacekeeping forces keep on being a major sponsor of the peace and [a] calm life".[53]

2.17 In fact, the presence of the Joint Peacekeeping Forces and the negotiation process within the JCC helped to maintain relative order and stability in South Ossetia for a lengthy period of time, *i.e.* until 2004, and even beyond, in spite of repeated attempts by the new leadership of Georgia to destabilise the conflict area.

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[51] Regulation concerning the Basic principles of Operation of the Military Contingents and of the Groups of Military Observers Designated for the Normalization of the Situation in the Zone of the Georgian-Ossetian Conflict, 6 December 1994, Annex No. 1 to the JCC Decision of 6 December 1994, GM, Vol. III, Annex 114.

[52] Joint Control Commission for the Settlement of the Georgian-Ossetian Conflict, Decision on the Joint Forces for the Maintenance of Peace (6 December 1994). Annex 43.

[53] Joint Control Commission for the Settlement of the Georgian-Ossetian Conflict, Decision on the activities of the Joint Peacekeeping Forces; on cooperation between law enforcement agencies of the Parties in the area of the Georgian-Ossetian conflict, Annex 1 to Protocol No.9 of the meeting of the Joint Control Commission (31 March 1999). Annex 47.

B. ABKHAZIA: RUSSIA'S ROLE AS FACILITATOR, AS RECOGNISED BY THE UNITED NATIONS[54]

2.18 For an insight into the Georgian-Abkhaz conflict that commenced in 1992, the Court is also referred to the Report of the Representative of the Secretary-General on the human rights of internally displaced persons dated 24 March 2006. This characterises the conflict as indeed "the Georgian-Abkhaz conflict".[55] There is no suggestion in the Report of Russian responsibility for ethnic cleansing in Abkhazia.

2.19 On 27 July 1993, a ceasefire agreement was concluded between Georgia and the Abkhaz authorities, with the mediation of the Deputy Foreign Minister of Russia acting as facilitator.[56] The parties called for the Security Council to deploy international peacekeeping forces in the conflict zones in Abkhazia, although it was stated that the "task may be shared, subject to consultation with

[54] See also Chapter IV, Section II (A) below, where Russia's role as facilitator is also considered in the context of the negotiations on which Georgia relies for the purposes of Article 22 of CERD.

[55] U.N. Economic and Social Council, Commission on Human Rights, 62nd session, Specific groups and individuals: mass exoduses and displaced persons, Report of the Representative of the Secretary-General on the human rights of internally displaced persons, Walter Kälin, Addendum: Mission to Georgia (21 to 24 December 2005), U.N. Doc. E/CN.4/2006/71/Add.7 (24 March 2006). See *e.g.* para. 12: "Throughout the Georgian-Abkhaz conflict, both parties [i.e. Georgia and Abkhazia] launched attacks on civilians designed to terrorize ethnic populations and drive them from particular areas, to the extent that the Security Council was 'deeply concerned […] at reports of 'ethnic cleansing' and other serious violations of international humanitarian law'." Annex 58. This passage of the Report has been omitted from the annex (Annex 40) to Georgia's Memorial.

[56] U.N. Security Council, Report of the Secretary-General in pursuance of Security Council Resolution 849 (1993) UN Doc. S/26250 (6 August 1993), para. 3. Annex 29. See also Security Council Resolution 849, 9 July 1993, authorising the Secretary-General to deploy an observation mission in Abkhazia (later known as UNOMIG).

the United Nations, by the Russian military contingent temporarily deployed in the zone".[57] When the Abkhaz side violated the cease-fire in September 1993, that violation was strongly condemned by the President of the Security Council,[58] and also by the Russian representative to the Security Council, as follows:

> "The Government of the Russian Federation, in the firmest possible way, called on the Abkhazian side to bring to a halt its flouting of human rights and its massive "ethnic cleansing", to cease its looting and banditry and to return to the Sochi agreements. If this is not done, we can in no way consider the lifting of our Russian sanctions against Abkhazia".[59]

2.20 On 19 October 1993, with the active support of Russia,[60] the Security Council adopted Resolution 876, reaffirming its "strong condemnation of the grave violation by the Abkhaz side of the Cease-fire Agreement of 27 July 1993 … and subsequent actions in violation of international humanitarian law".[61] Pursuant to paragraph 9 of Resolution 876, the Security Council also reiterated:

> "its support for the efforts of the Secretary-General and his Special Envoy, in cooperation with the Chairman-in-Office of the Conference on Security and Cooperation in Europe (CSCE) and with the assistance of the Government of the Russian Federation as a facilitator, to carry forward the peace process with the aim of achieving an overall political settlement."

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[57] *Ibid*., paras. 6 and 10.

[58] U.N. Security Council, Statement by the President of the Security Council of 17 September 1993, U.N. Doc. S/26463 (6 October 1993). Annex 31.

[59] Provisional Verbatim Record of the 3295th Meeting of 19 October 1993 (S/PV.3295), p. 7, GM Annex 12.

[60] Provisional verbatim record of the 3295th Meeting of the Security Council held on 19 October 1999 (S/PV.3295), GM Annex 12.

[61] Security Council Resolution 876, GM Annex 11.

2.21 Direct talks were held between Georgia and Abkhazia in Geneva on 30 November and 1 December 1993. As the Memorandum of Understanding signed by Georgia and the Abkhaz side recorded: "The first round of negotiations on a comprehensive settlement of the Georgian-Abkhaz conflict took place in Geneva from 30 November to 1 December 1993, under the aegis of the United Nations, with the Russian Federation as facilitator and a representative of the Conference on Security and Cooperation in Europe (CSCE)."[62] This marked the start of the so-called Geneva Process that became the main channel of negotiations for more than a decade. In parallel, a Group of Friends of the UN Secretary-General (composed of Russia, the United States, the United Kingdom, France and Germany) started to function as a contact group of the international community on the Abkhaz issue.

2.22 In early 1994, Russia and Georgia continued to seek deployment of an international peacekeeping force. In a joint letter of 4 February 1994 from Presidents Yeltsin and Shevardnadze to the Security Council, it was stated:

> "We once again propose that the Security Council consider, in the very near future, the question of a peace-keeping operation to be carried out by the United Nations or with its authorization, relying, if necessary, on a Russian military contingent."[63]

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[62] Memorandum of Understanding between the Georgian and the Abkhaz sides at the negotiations held in Geneva, 1 December 1993

(U.N. Security Council, Appendix to the Letter dated 9 December 1993 from the Permanent Representative of Georgia to the United Nations addressed to the Secretary-General, UN Doc. S/26875, 15 December 1993). Annex 33. The Georgian and Abkhaz sides committed themselves not to resort to force, to exchange prisoners of war, to create conditions for a return of the displaced persons, and to establish a group of experts in order to discuss the political status of Abkhazia.

[63] U.N. Security Council, Letter dated 4 February 1994 from the Representatives of Georgia and the Russian Federation addressed to the Secretary-General, U.N. Doc. S/1994/125 (7 February 1994). Annex 34.

2.23 Thus Georgia could not have been further from opposition to a Russian military presence, and Russia's role as facilitator was no less welcomed by the international community. Reporting to the UN Security Council on 18 March 1994, the UN Secretary-General expressed his "warm appreciation for the close support extended to the efforts of [his] Special Envoy by the Russian Federation, in its role of facilitator".[64]

2.24 On 4 April 1994, concrete steps were made by the Georgian and Abkhaz sides in the resolution of their dispute by way of conclusion of the "Declaration on measures for a political settlement of the Georgian/Abkhaz conflict" and also the Quadripartite Agreement on voluntary return of refugees and displaced persons (the latter being signed by the Georgian and Abkhaz sides as "the Parties" and also by Russia and the UN High Commissioner for Refugees).[65] The Declaration of 4 April 1994, *inter alia*, provided:

> "5. The parties [*i.e.* the Georgian and Abkhaz sides] reaffirm their request for the early deployment of a peacekeeping operation and for the participation of a Russian military contingent in the United Nations peace-keeping force, as stated in the Memorandum of Understanding of 1 December 1993 (S/26875, annex) and the communiqué of 13 January 1994."[66]

2.25 The Quadripartite Agreement did contain specific provisions relating to the right of voluntary return of displaced persons/refugees, as stated in Georgia's Memorial. However, the relevant obligations were placed on the Georgian and

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[64] U.N. Security Council, Report of the Secretary-General concerning the situation in Abkhazia, Georgia, U.N. Doc. S/1994/312 (18 March 1994), para. 14. Annex 35.

[65] Declaration on measures for a political settlement of the Georgian/Abkhaz conflict signed on 4 April 1994; Quadripartite agreement on voluntary return of refugees and displaced persons signed on 4 April 1994 (U.N. Security Council, Letter dated 5 April 1994 from the Permanent Representative of Georgia to the United Nations addressed to the President of the Security Council, U.N. Doc. S/1994/397, 5 April 1994, Annexes I and II). Annex 36.

[66] *Ibid.*, Annex I.

Abkhaz sides as "the Parties", as is perfectly clear from the face of the Agreement. It is quite wrong to state that the obligations were also imposed on Russia.[67]

2.26 On 14 May 1994, the Georgian and Abkhaz sides signed in Moscow the Agreement on a Cease-Fire and Separation of Forces (the "Moscow Agreement"), which was to become the main framework for further conflict settlement.[68] In addition to defining the terms of the ceasefire, the Agreement, *inter alia*, provided:

> "2. The armed forces of the parties shall be separated in accordance with the following principles:
>
> (a) … ;
>
> (b) The peacekeeping force of the Commonwealth of Independent States and the military observers, in accordance with the Protocol to this Agreement, shall be deployed in the security zone to monitor compliance with this Agreement; …."[69]

2.27 Thus, in the absence of deployment of international peacekeeping forces pursuant to a UN mandate (as had been expressly sought by both Georgia and Russia), the Georgian and Abkhaz sides sought and agreed to the deployment of a peacekeeping force under the auspices of the Commonwealth of Independent

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[67] Cf. GM, para. 6.48. The Quadripartite Agreement commences as follows: "The Abkhaz and Georgian sides, hereinafter referred to as the Parties, the Russian Federation and the United Nations High Commissioner for Refugees, …." The obligations to which Georgia refers are all, expressly, confined to the "Parties". Certain obligations were expressly agreed to by Russia, such as the guarantee of unimpeded transport of humanitarian supplies through its territory.

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

[69] *Ibid.*, Annex I, para. 2.

States (CIS). The CIS Council of Heads of States confirmed the deployment of a CIS peacekeeping pursuant to a decision taken on 22 August 1994, expressly by reference to "the appeal of the Abkhaz side of 15 May 1994 and the one of the Georgian side of 16 May of 1994 on an immediate deployment of collective peacekeeping forces of the CIS participating states in the conflict zone".[70]

2.28 The Security Council, by Resolution 934:

> "2. Note[d] with satisfaction the beginning of Commonwealth of Independent States (CIS) assistance in the zone of conflict, *in response to the request of the parties*, on the basis of the 14 May 1994 Agreement on a Cease-fire and Separation of Forces (S/1994/583, Annex I), in continued coordination with the United Nations Observer Mission in Georgia (UNOMIG), and on the basis of further coordinating arrangements with UNOMIG to be agreed by the time of the Council's consideration of the Secretary-General's recommendations on the expansion of UNOMIG."[71]

2.29 The "Geneva process" of negotiations continued, although there was of course no final resolution of the conflict, and sporadic outbursts of violence occurred. Russia continued to act, and to be welcomed as acting, as facilitator – as is evidenced by a long series of Security Council resolutions and reports of the Secretary-General. Criticism of the acts of Russia is notably absent from those resolutions and reports. Further, it was open to Georgia, as a member of the CIS, to vote against the continued presence of the CIS peacekeeping force in

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[70] Commonwealth of Independent States, Council of the Heads of State, Decision on the use of the Collective Forces for the Maintenance of Peace in the area of the Georgian-Abkhaz conflict (22 August 1994), para. 1. Annex 40.

[71] U.N. Security Council, Resolution 934 (1994), U.N. Doc. S/RES/934 (30 June 1994), emphasis added. Annex 38. Pursuant to Resolution 937, the Security Council adopted a renewed UNOMIG mandate that included at para. 6(i): "To maintain close contacts with both parties to the conflict and to cooperate with the CIS peace-keeping force and, by its presence in the area, to contribute to conditions conducive to the safe and orderly return of refugees and displaced persons". U.N. Security Council, Resolution 937 (1994), U.N. Doc. S/RES/937 (21 July 1994). Annex 39.

Abkhazia. Moreover, Georgia was entitled unilaterally to discontinue the peacekeeping operation,[72] but it did not do so (until 1 September 2008).[73]

2.30 Just as with respect to South Ossetia, the presence of Russian peacekeepers in Abkhazia depended on Georgian consent. If Georgia believed that Russia was or had been engaged in egregious acts of racial discrimination in Abkhazia (and South Ossetia), there is a very obvious question as to why it consented to the presence of Russian peacekeepers / why it did not terminate their military presence.

C. DEVELOPMENTS FROM 2004

2.31 The change in Government in Georgia in November 2003 was accompanied by a new and more belligerent approach to the regimes in Abkhazia and South Ossetia, and a deterioration in relations with Russia. As noted in the Independent International Fact-Finding Mission on the Conflict in Georgia:

> "After an initial short period which even showed some promising signs, relations between Russian President Vladimir Putin and the newly elected Georgian President Mikheil Saakashvili soon became tense. The political climate deteriorated rapidly. Military spending in Georgia under President Saakashvili´s rule increased quickly from below 1 % of GDP to 8 % of GDP, and there were few who did not see this as a message. …
>
> … While relations between Georgia and Russia were in a period of continued deterioration, marked by incidents as well as by unfriendly and

[72] Commonwealth of Independent States, Council of Heads of State, Decision on the stay of the Collective Peace-Keeping Forces in the conflict zone in Abkhazia (Georgia) and on measures aimed at further settlement of the conflict (7 August – 19 September 2003). Annex 54. See also GM, Annex 136.

[73] Commonwealth of Independent States, Council of Heads of State, Decision on the discontinuance of the activities of the Collective Forces for the Maintenance of Peace in the area of the Georgian-Abkhaz conflict (10 October 2008). Annex 71.

> sometimes even bellicose rhetoric, the United States assumed a clear lead among Tbilisi's foreign policy partners. The US gave their determined political support to Georgia and to President Saakashvili personally, culminating in President Bush's famous "beacon of liberty" speech in Tbilisi on 10 May 2005. The US provided generous economic assistance, too. Georgia became one of the most important recipients of US aid on a per capita basis. Most importantly, the US embarked upon an extensive military aid programme for Georgia, both in terms of training and equipment, also providing financial means." [74]

2.32 So far as concerns South Ossetia, in June 2004, Georgia undertook a military operation against Tskhinvali, the aims of which have been described by its then Foreign Minister, Salomé Zourabichvili, as follows:

> "A la suite d[e] … provocations, la tension monte. Les réunions du Conseil national de sécurité se succèdent. Le ministre de la Défense explique comment sécuriser nos populations. Il faut "prendre" Tskhinvali. La stratégie est claire: il faut trois heures pour occuper les hauteurs, et qui contrôle les hauteurs tient Tskhinvali. …
>
> C'est Micha [Saakachvili] qui decide et il va donner son feu vert à l'offensive éclair. Elle va échouer très vite. …
>
> Quelles que soient ses excuses et justifications, [la Géorgie] avait parlé le langage des armes, avait perdu des hommes et des positions, et, sur le plan politique, une partie du crédit dont elle jouissait…
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> Après ces incidents, la frontière administrative se durcit, les relations entre les entités se tendent. Et cette tension ne retombera plus jamais". [75]

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[74] Independent International Fact-Finding Mission on the Conflict in Georgia, Report, vol. I (September 2009), pp. 14-15. Annex 75.

[75] Salomé Zourabichvili, "La tragédie géorgienne 2003-2008" (Paris, 2008), pp. 58-62. Annex 73. Translation into English:

"Following the … provocations, tensions rise. Meetings of the National Security Council come one after another. The Defense Minister explains how to protect our population. We need to "take" Tskhinvali. The strategy is clear: three hours are needed to occupy the heights, and the one who controls the heights controls Tskhinvali. …

It is Misha [Saakashvili] who takes the decision, and he would give a green light to the lightning offensive. It would fail very soon. …

2.33 Since August 2006, Georgia has boycotted the work of the JCC. In November, simultaneously with elections in South Ossetia, Georgia held elections to parallel power structures in ethnic Georgian villages of the region.[76] In April 2007, the "provisional administration of South Ossetia" was officially established by Tbilisi in the ethnic Georgian village of Kurta to the north of Tskhinvali.[77]

2.34 So far as concerns Abkhazia, in July 2006, Georgia sent troops to its north-eastern most part, the Kodori gorge. The area was renamed "Upper Abkhazia" by Georgia, and a "government of Abkhazia" was established in the Kodori village of Chkhalta. This led to severely increased tension in the region and, pursuant to Resolution 1716 (2006), the Security Council:

> "3. … *expresse[d]* its concern with regard to the actions of the Georgian side in the Kodori Valley in July 2006, and to all violations of the Moscow agreement on ceasefire and separation of forces of 14 May 1994, and other Georgian-Abkhaz agreements concerning the Kodori Valley;
>
> 4. *Urge[d]* the Georgian side to ensure that the situation in the upper Kodori Valley is in line with the Moscow agreement and that no troops unauthorized by this agreement are present;

Whatever its excuses and justifications, [Georgia] spoke with the language of arms, lost men and positions and, in the political field, a part of the credit that it had enjoyed.

After these incidents, the administrative boundary consolidated, and the relations between the entities aggravated. And this tension would never come to an end".

[76] "S. Ossetia Quiet After Rival Polls", Civil Georgia, Daily News Online (12 November 2006). Annex 62.

[77] "MPs Pass Draft Law on S. Ossetia with Final Hearing", Civil Georgia, Daily News Online (13 April 2007). Annex 64. "S.Ossetian Alternative Leader to Address Georgian Parliament", Civil Georgia, Daily News Online (7 May 2007). Annex 65.

> 5. *Note[d]* with satisfaction the resumption of joint patrols in the upper Kodori Valley by UNOMIG and the CIS peacekeeping force and reaffirms that such joint patrols should be conducted on a regular basis;
>
> 6. *Urge[d]* both parties to comply fully with previous agreements and understandings regarding ceasefire, non-use of violence and confidence-building measures, and *stresse[d]* the need to strictly observe the Moscow Agreement on Ceasefire and the Separation of Forces in the air, on the sea and on land, including in the Kodori Valley;
>
> 7. *Acknowledge[d]* the important role of the CIS peacekeeping force and of UNOMIG in the Georgian-Abkhaz conflict zone, *stresse[d]* the importance of close and effective cooperation between UNOMIG and the CIS peacekeeping force as they currently play a stabilizing role in the conflict zone, *look[ed]* to all sides to continue to extend the necessary cooperation to them and *recall[ed]* that a lasting and comprehensive settlement of the conflict will require appropriate security guarantees;
>
> 8. *Once again urge[d]* the Georgian side to address seriously legitimate Abkhaz security concerns, to avoid steps which could be seen as threatening and to refrain from militant rhetoric and provocative actions, especially in upper Kodori Valley." [78]

2.35 Thus, so far as the international community was concerned, it was the acts of Georgia that were leading to "legitimate Abkhaz security concerns", whilst "the important role of the CIS peacekeeping force" was once again recognised.

2.36 To sum up, by 2007, Georgia had employed force against both Abkhazia and South Ossetia; parallel structures of power had been created by Georgia for both regions; the negotiating processes were scarcely being used; and Georgia's military preparations were continuing. The former Foreign Minister of Georgia describes this process:

> "A partir de 2007, l'arrivée d'un nouveau ministre de la Défense, de double nationalité géorgienne et israélienne, coïncide avec un bond en avant dans l'acquisition d'armements: de plus en plus sophistiqués, de

[78] U.N. Security Council, Resolution 1716 (2006), U.N. Doc. S/RES/1716 (13 October 2006). Annex 60.

> plus en plus chers, de plus en plus nombreux. Ainsi le budget de la Défense dépasse-t-il le quart des dépenses dans le budget 2007. …
>
> [On voit] de la rhétorique de la guerre qui ne cache pas ses desseins en direction des territoires perdus….
>
> Ainsi derrière une façade – une politique de défense destinée à protéger le territoire des incursions qui entachent la souveraineté territoriale –, on voit se mettre en place une politique d'armement et d'équipement qui correspondrait avantage à des intentions de revanche militaire et de réintégration par la force des terres perdues".[79]

2.37 According to the former Foreign Minister of Georgia, the second half of 2007 and the first half of 2008 was marked by a further Georgian military build-up.[80] The Independent International Fact-Finding Mission on the Conflict in Georgia describes the events leading to August 2008 as follows:

> "Already in spring 2008, a critical worsening of the situation in the Georgian-Abkhaz conflict zone could be observed. One of the sources of tension was the intensification of air activities over the zone of conflict, including flights over the ceasefire line both by jet fighters and by unmanned aerial vehicles (UAVs). A number of Georgian UAVs were reportedly shot down by Abkhaz and Russian forces. In April 2008, the Russian-staffed CIS PKF was reinforced by additional troops and in late

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[79] Salomé Zourabichvili, "La tragédie géorgienne 2003-2008" (Paris, 2008), pp. 137-139. Annex 73.

Translation into English:

"Starting from 2007, the arrival of a new Defense Minister, with double Georgian and Israeli nationality, coincides with a leap in the acquisition of armaments: more and more sophisticated, more and more expensive, more and more numerous. Thus, the defense budget surpassed a quarter of the overall budget expenses in 2007. …

Rhetoric of war [was seen], not hiding its aims towards the lost territories. …

Thus, behind the appearance of a defense policy aimed at protecting the territory from incursions threatening the territorial sovereignty, a policy of armament and of equipment was being put in place, rather corresponding to the intentions of a military *revanche* and of a forcible reintegration of the lost lands."

[80] Salomé Zourabichvili, *op. cit.*, at pp. 314-316, 322. Annex 73.

> May 2008, a Russian military railway unit was sent to Abkhazia to rehabilitate the local railway, allegedly for humanitarian purposes, in spite of Georgian protests. The spring events were followed in summer 2008 by bombings of public places on the Abkhaz side of the ceasefire line, as well as roadside explosions on the Georgian side. In the course of summer 2008, the main focus of tension then shifted from the Georgian-Abkhaz to the Georgian-Ossetian conflict zone, triggered by subversive attacks as well as by intensified exchanges of fire between the Georgian and South Ossetian sides, including mortar and heavy artillery fire. In early July the conflict already seemed on the verge of outbreak as diplomatic action intensified at the same time. In mid-July, a yearly US-led military exercise called "Immediate Response" took place at the Vaziani base outside Tbilisi, involving approximately 2 000 troops from Georgia, the United Sates, Armenia, Azerbaijan and Ukraine. During the period of 15 July – 2 August 2008, Russian troops carried out large-scale training exercises in the North Caucasus Military District, close to the Russian-Georgian border as well as on the Black Sea. In early August, the South Ossetian authorities started to evacuate their civilian population to locations on the territory of the Russian Federation. Indeed, the stage seemed all set for a military conflict." [81]

2.38 In his report of 23 July 2008 on the situation in Abkhazia, the Secretary-General "appeal[ed] to the Abkhaz side to observe the freedom of movement of UNOMIG and to the Georgian side to observe the freedom of movement of the CIS peacekeeping force in their respective areas of responsibility".[82] He noted, with respect to relations between Georgia and Russia, that:

> "against the background of already strained relations between the Russian Federation and Georgia, developments during the period under review have brought differences between the two countries to a new level, with Georgia blaming Russia for "accelerated annexation" of Abkhazia and Russia accusing Georgia of preparing for the imminent implementation of a military option in Abkhazia."[83]

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[81] Independent International Fact-Finding Mission on the Conflict in Georgia, Report, vol. I (September 2009), pp. 18-19. Annex 75.

[82] U.N. Security Council, Report of the Secretary-General on the situation in Abkhazia, Georgia, U.N. Doc. S/2008/480 (23 July 2008), para 73. Annex 69.

[83] *Ibid.*, para. 75.

2.39 To similar effect, the report notes that as of April 2008, Georgia had protested strongly against Russia's action in "authorizing direct relations with the Abkhaz and South Ossetian de facto authorities in a number of fields", which action was considered by Georgia as "a blatant violation of Georgia's sovereignty and territorial integrity, amounting to legalizing a factual annexation of Abkhazia and South Ossetia". [84] In May 2008, Georgia had responded to the repair by unarmed units of Russian railway troops of the Sochi to Ochamchira line by accusing Russia of annexation.[85]

2.40 Such accusations of annexation form the backdrop to Georgia's use of force in August 2008.

D. GEORGIA'S USE OF FORCE IN AUGUST 2008

2.41 At the outset of Georgia's extended treatment of the facts in its Memorial, it is said that "Russia's discriminatory acts commenced simultaneously with the opening of large-scale hostilities on 7 August 2008" and that:

> "In an effort to avoid full-scale war, Georgia declared a unilateral cease-fire on 7 August. … Massive attacks on Georgian villages in South Ossetia and adjacent districts, combined with the large-scale intervention of Russian military units through the Roki tunnel, compelled Georgia to initiate a defensive operation around midnight on 7 August."[86]

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[84] *Ibid.*, paras. 8-9.

[85] *Ibid.*, paras. 10-11.

[86] GM, para. 3.3 and footnote 54. The Court will also recall that, at the provisional measures phase, Georgia's use of force from 7 August 2008 was being portrayed as a limited and defensive measure. See *e.g.* Georgia's Application of 12 August 2008, para. 77: "In response to the persistent shelling of ethnic Georgian villages in South Ossetia by separatist forces, Georgian military forces launched a limited operation into territory held by ethnic separatists on 7 August 2008 for purposes of putting a stop to the attacks. Seizing the opportunity to realize its goal of an ethnically homogenous and compliant South Ossetia, Russia responded

2.42 That version of events is notably inconsistent with the findings of the Independent International Fact-Finding Mission on the Conflict in Georgia, as follows:

> at paragraph 14:
>
> "Open hostilities began with a large-scale Georgian military operation against the town of Tskhinvali and the surrounding areas, launched in the night of 7 to 8 August 2008. *Operations started with a massive Georgian artillery attack*."
>
> at paragraph 19:
>
> "There is the question of *whether the use of force by Georgia* in South Ossetia, beginning with the shelling of Tskhinvali during the night of 7/8 August 2008, *was justifiable under international law. It was not.*"
>
> at paragraph 20:
>
> "At least as far as the initial phase of the conflict is concerned, an additional legal question is *whether the Georgian use of force* against Russian peacekeeping forces on Georgian territory, *i.e.* in South Ossetia, *might have been justified. Again the answer is in the negative. There was no ongoing armed attack by Russia before the start of the Georgian operation. Georgian claims of a large-scale presence of Russian armed forces in South Ossetia prior to the Georgian offensive on 7/8 August could not be substantiated by the Mission*."[87]

2.43 These are relevant facts, even at this phase of the proceedings. The Court needs to be able to determine, not the underlying facts of a dispute, but rather the nature of the dispute itself. The true characterisation of the events of 7-8 August 2008 is critical to that issue as (i) they are at the heart of the real dispute in this case between Georgia and Abkhazia/South Ossetia which concerns the legal status of Abkhazia and South Ossetia, as to which dispute (ii) Georgia has already had recourse to use of force instead of peaceful dispute settlement.

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with a full-scale invasion of Georgian territory on 8 August 2008." See also Georgia's Request for Provisional Measures of 14 August 2008, para. 5.

[87] Independent International Fact-Finding Mission on the Conflict in Georgia, Report, vol. I (September 2009), pp. 19-23. Annex 75. Emphasis added.

2.44 It is of course the case that Georgia now seeks to characterise all events as going to CERD and unlawful racial discrimination under CERD. However, Georgia's characterisations in this respect cannot be relied upon any more than its after the fact description of the events of 7-8 August 2008. Indeed, Georgia's characterisation of those events has changed over time, as the Fact-Finding Mission report records:

> "At the very outset of the operation the Commander of the Georgian contingent to the Joint Peacekeeping Forces (JPKF), Brigadier General Mamuka Kurashvili, stated that the operation *was aimed at restoring the constitutional order in the territory of South Ossetia*. Somewhat later the Georgian side refuted Mamuka Kurashvili's statement as unauthorised and invoked the countering of an alleged Russian invasion as justification of the operation. The official Georgian information provided to the Mission says in this regard that "to protect the sovereignty and territorial integrity of Georgia as well as the security of Georgia's citizens, at 23.35 on August 7, the President of Georgia issued an order to start a defensive operation …." [88]

* * *

2.45 As Georgia's own Brigadier General said at the time, Georgia's military operation of August 2008 "was aimed at restoring the constitutional order in the territory of South Ossetia". On the true facts, the real dispute does indeed concern the conflict between Georgia on the one hand and Abkhazia and South Ossetia on the other, in relation to the legal status of Abkhazia and South Ossetia, and Georgia was indeed seeking to resolve that dispute by use of force.

2.46 In Chapter III, which follows, Russia turns to the question of whether, nonetheless, there could somehow be said to be a dispute between Georgia and Russia concerning the interpretation or application of CERD.

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[88] *Ibid*., vol. I, p. 19, para. 14, emphasis added.

CHAPTER III

FIRST PRELIMINARY OBJECTION:

THERE IS NO DISPUTE BETWEEN THE PARTIES REGARDING THE INTERPRETATION OR APPLICATION OF CERD

Section I. Introductory observations

3.1 The Court should be under no illusions as to the genesis of the so-called "dispute" that is asserted by Georgia in these proceedings.

3.2 This is a "dispute" manufactured by Georgia with a view to meeting the first of the requirements of Article 22 of CERD, and thereby establishing the compulsory jurisdiction of the Court. Pursuant to Article 22, the jurisdiction of the Court is, of course, predicated on the existence of a "dispute between two or more State Parties with respect to the interpretation or application of this Convention".

3.3 This is a "dispute" which, according to Georgia dates back to 1991. It is a "dispute" in which it is alleged that Russia has responsibility for (amongst other things) the killing of thousands of civilians and the forced displacement of over 300,000 people.[89] It is a "dispute" in which it is alleged that "Russia's conduct constitutes ethnic cleansing on a massive scale".[90] And yet it is a "dispute" that was never mentioned to Russia until the date of Georgia's Application to this Court, *i.e.* 12 August 2008.

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[89] See Georgia's Application of 12 August 2008, paras. 5-6 (allegations concerning the first of the alleged "three distinct phases of its interventions in South Ossetia and Abkhazia"). See also *e.g.* GM, para. 1.4: "As a result of Russia's discriminatory conduct, more than 200,000 ethnic Georgians have been forcibly and permanently displaced from their homes in Abkhazia in 1992-1994 and again in 2008. Over 30,000 more ethnic Georgians have been forcibly displaced from their places of residence in South Ossetia in 1991-1992 and again in 2008."

[90] See GM, para. 1.5.

3.4 Russia's position is straightforward: there was no dispute between the Parties with respect to the interpretation or application of CERD prior to 12 August 2008, and no dispute could somehow be brought into existence by Georgia's Application. States are not to be permitted to come to the Court to make, *for the first time*, allegations of the most serious nature against a close neighbour (with whom they are in regular contact in one forum or another), to await the denial of those allegations in the course of oral argument before the Court, and then to say that there is a dispute. This is all the more so where, as noted in Chapter I above, Georgia has first elected to take into its own hands resolution of the real dispute concerning the conflict between Georgia / Abkhazia / South Ossetia in relation to the legal status of Abkhazia and South Ossetia – through the (unlawful) commencement of military operations on 7 August 2008. Georgia's approach to the seisin of the Court in this case cuts across the wording of Article 22 of CERD, and undermines the fundamental principles on the peaceful settlement of disputes.

3.5 As noted further below, the general rule applied by the Court is that the dispute relied on must have come into existence as at the date of the application instituting proceedings. That rule is applied in a manner consistent with principles of the sound administration of justice – which in this case strongly support application of the general rule. It follows that, in the absence of any *relevant* dispute prior to 12 August 2008, the Court lacks jurisdiction in this case.

3.6 In this Chapter, Russia first identifies the principles that the Court applies in assessing whether there is a dispute with respect to the interpretation or application of a given treaty before it (Section II), before examining the relevant background to the existence of the so-called "dispute" alleged by Georgia (Section III) and applying, by way of conclusion, the criteria developed by the

Court to determine whether there is in this case a dispute before the Court within Article 22 of CERD (Section IV).

3.7 Before turning to these issues, Russia makes three further initial observations, all of which underscore the point that Georgia is asking the Court to assert jurisdiction in a manner that is inconsistent with both State practice and the Court's past jurisprudence.

3.8 First, it is self-evident that the immediate backdrop for the alleged dispute is the armed conflict of August 2008, precipitated by Georgia, and described by the Independent International Fact-Finding Mission report as

> "a combined inter-state and intra-state conflict, opposing Georgian and Russian forces at one level of confrontation as well as South Ossetians together with Abkhaz fighters and the Georgians at another".[91]

3.9 Even leaving to one side the fact that it was Georgia's use of force that led to armed conflict, the Court should be very wary in considering whether one of the parties to an armed conflict should be permitted to invoke a previously unmentioned human rights treaty in order to secure the jurisdiction of this Court. Armed conflicts commonly arise in the context of some form of inter-ethnic conflict. If each such conflict is now to be brought before the Court in a way never envisaged by (i) the drafters or (ii) the Parties to CERD, or (iii) the Committee established to supervise the application of CERD or, in this case, (iv) the specific States Parties concerned during the 17 years of the so-called "dispute", the risk is that States may start to retreat from this and other widely

[91] Independent International Fact-Finding Mission on the Conflict in Georgia, Report, vol. I (September 2009), p. 10. Annex 75.

ratified human rights treaties. Thus, Georgia's claim to jurisdiction in this case may in fact undermine the international system of human rights protection.[92]

3.10 In this respect, Georgia does accept the context of use of force and international humanitarian law (IHL) in which it initiated its claim.[93] It then seeks to portray its claims as deriving from CERD, not IHL. However, given the obvious and applicable IHL context, it is useful to recall that, at the time of the drafting of the 1949 Geneva Conventions, States expressly considered a common provision providing for the compulsory jurisdiction of the Court.[94] That provision was rejected. Instead, the 1949 Diplomatic Conference adopted a recommendation as follows (based on a suggestion put forward by the United Kingdom):

> "The Conference recommends that in the case of a dispute relating to the interpretation or application of the present Convention which cannot be settled by other means, the High Contracting Parties concerned endeavour

[92] See also the concerns reflected in the *travaux préparatoires* when forms of dispute settlement procedures were being considered for CERD, *e.g.* in the remarks of the Jordanian representative on the General Assembly Third Committee: "Some Governments would no doubt find it impossible to resist the temptation of using the international machinery for political ends, but that should not prevent the United Nations from seeking to build an international community capable of guaranteeing the principles of human justice and basic rights." U.N. General Assembly, 20th session, Official Records, Third Committee, Record of the 1347th meeting, U.N. Doc. A/C.3/SR.1347 (18 November 1965), p. 338, para. 32. Annex 13.

[93] See GM, para. 1.8: "Although the case was initiated in the context of Russia's unlawful use of force in August 2008, and Russia's widespread violation of international humanitarian and human rights law, Georgia does not ask the Court to make any findings in relation to those issues."

[94] The following common provision was in the original draft of all four Geneva Conventions (at Articles 4lA, 45A, 119D, 130D): "The High Contracting Parties who have not recognized as compulsory *ipso facto* and without special agreement, in relation to any State accepting the same obligation, the jurisdiction of the International Court of Justice in the circumstances mentioned in Article 36 of the Statute of the Court, undertake to recognize the competency of the Court in all matters concerning the interpretation or application of the present Convention."

to agree between themselves to refer such dispute to the International Court of Justice."[95]

3.11 In the words of the representative of the United Kingdom:

"In adopting this formula the Working Party had in mind the following considerations: first, it avoids any reference to Article 36 of the Statute of the Court; secondly, it expresses the idea that all other means of settling a dispute should first be tried and *then but only then* the States concerned should endeavour to agree upon reference of the dispute to the International Court, and thirdly, it does not, since it is based on the idea of an agreement between the Parties, suggest the possibility of one of the Parties to the dispute refusing to recognize the jurisdiction of the Court."[96]

3.12 Georgia not only seeks to seise the Court of a dispute that it could not bring under the 1949 Conventions:

a. Georgia also seeks to bypass the "idea that all other means of settling a dispute should first be tried and *then but only then*" there might be recourse to the Court. This is a principle that is also reflected in the specific negotiation and dispute settlement requirements of Article 22 of CERD, as discussed further in Chapter IV.

b. Georgia goes even further. It seeks to establish the compulsory jurisdiction of the Court under Article 22 of CERD in circumstances where there was no relevant dispute.[97]

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[95] Final Record of the Diplomatic Conference of Geneva of 1949, Vol. IIB, p. 432.

[96] *Ibid*. (emphasis added).

[97] It may also be recalled that, pursuant to Article 90 of Additional Protocol I, the States Parties to the 1949 Geneva Conventions agreed to the establishment of an International Fact Finding Commission competent (inter alia) to "inquire into any facts alleged to be a grave breach as defined in the Conventions and this Protocol or other serious violation of the Conventions or of this Protocol" (see Article 90(2)). Russia made, on 29 September 1989, a declaration accepting the competence of the Commission. Georgia has made no such declaration.

3.13 Secondly, Russia also observes that Georgia's claims denote a marked departure from the practice of States which have appeared as applicants before the Court in cases involving allegations of inter-ethnic violence. Neither Bosnia and Herzegovina nor Croatia invoked Article 22 of CERD in their respective cases brought against Serbia and Montenegro/Serbia.[98] The same point applies with respect to *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Burundi)*.[99] The exception is *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda).*[100] However, the applicant in that case had adopted a "scattergun" approach, invoking nine different treaties to establish the Court's jurisdiction – and failing with respect to all (including CERD[101]).

3.14 Finally, Russia observes that in cases where this Court has had to consider the application of human rights treaties in situations of occupation or armed conflict, there has been no suggestion that the Convention would also apply. Thus, in the *Wall* case, the Court referred to the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Rights of the Child, but did not mention CERD, and this despite the fact that written observations submitted by States had discussed the prohibition and elimination of racial

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[98] See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia).*

[99] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Burundi),* Application of 23 June 1999.

[100] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Provisional Measures, Order of 10 July 2002, I.C.J. Reports 2002,* paras. 64-67.

[101] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), I.C.J. Reports 2006,* pp. 34-35, paras. 74-79.

discrimination under international law.[102] In the *Congo v. Uganda* case, the Court found that Uganda had "incited ethnic conflicts and took no action to prevent such conflicts".[103] The Court then determined that a number of human rights instruments were both applicable and relevant to these Ugandan acts.[104] The list included the ICCPR, but not CERD, despite the fact that both the DRC, as well as Uganda, had been contracting parties of CERD at all relevant moments in time.[105]

Section II. The principles to be applied in assessing whether there is a dispute

3.15 The issue of whether there is a dispute for the purposes of Article 22 of CERD has already been addressed by the Court, but only on a *prima facie* basis, *i.e.* only for the purposes of exercising the Court's jurisdiction to indicate provisional measures under Article 41 of the Statute. The majority of the Court held at paragraph 112 of the Order of 15 October 2008:

> "Whereas, in the view of the Court, the Parties disagree with regard to the applicability of Articles 2 and 5 of CERD in the context of the events in South Ossetia and Abkhazia; whereas, consequently, there appears to exist a dispute between the Parties as to the interpretation and application of CERD; whereas, moreover, the acts alleged by Georgia appear to be capable of contravening rights provided for by CERD, even if certain of these alleged acts might also be covered by other rules of international law, including humanitarian law; whereas this is sufficient at this stage to

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[102] See *e.g.*, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Written Observations of Syria, p. 5.

[103] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 240, para. 209.

[104] *Ibid.*, p. 243, para. 217.

[105] This may be because CERD does not apply extra-territorially. See Chapter V below.

establish the existence of a dispute between the Parties capable of falling within the provisions of CERD, which is a necessary condition for the Court to have prima facie jurisdiction under Article 22 of CERD."

3.16 This reasoning brings together, in very compressed form, two related but analytically distinct concepts: first, whether there is a dispute between the Parties and, second, whether that dispute concerns the interpretation or application of CERD.

A. THE REQUIREMENT THAT THERE BE A DISPUTE

1. The meaning of "dispute"

3.17 With respect to the first of these two concepts, as follows from the consistent jurisprudence of the Court and the Permanent Court:

a. As the Court held in the *Nuclear Tests* cases: "The Court, as a court of law, is called upon to resolve existing disputes between States. *Thus the existence of a dispute is the primary condition for the Court to exercise its judicial function.*"[106]

b. As stated in the *Mavrommatis* case: "A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons."[107] Thus, three requirements are to be met: (i) disagreement, (ii) on a point of law or fact, etc, (iii) between two persons. It is self-evident that all these criteria have to be met. For example, a party would not have a justiciable dispute if criteria (i) and (ii) were met, but the disagreement

[106] *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, pp. 270-271, para. 55, emphasis added; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 476, para. 58.

[107] *Mavrommatis Palestine Concessions, Greece v. United Kingdom, Judgment (Merits*), 30 August 1924, 1924 PCIJ (ser. A), No. 2, p. 11.

was with a third party other than the State being brought before the Court (*i.e.* criterion 3).

c. The question of whether there is a disagreement is then broken down into two further elements: there must be a claim and also positive opposition to a claim. As stated in *South West Africa*:[108]

> "A mere assertion is not sufficient to prove the existence of a dispute any more than a mere denial of the existence of the dispute proves its non-existence. Nor is it adequate to show that the interests of the two parties to such a case are in conflict. It must be shown that the claim of one party is positively opposed by the other."[109]

d. The question of whether there is a dispute in a given case is a matter for "objective determination".[110]

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[108] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports* 1962, 328; see also *Certain Property (Germany v. Liechtenstein) Preliminary Objections, Judgment, I.C.J. Reports* 2005, p. 6 at 18.

[109] See also *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda),* I.C.J. Reports 2006, p. 43, para. 99: "The Court observes that the DRC has been a party to the WHO Constitution since 24 February 1961 and Rwanda since 7 November 1962 and that both are thus members of that Organization. The Court further notes that Article 75 of the WHO Constitution provides for the Court's jurisdiction, under the conditions laid down therein, over "any question or dispute concerning the interpretation or application" of that instrument. The Article requires that a question or dispute must specifically concern the interpretation or application of the Constitution. In the opinion of the Court, the DRC has not shown that there was a question concerning the interpretation or application of the WHO Constitution on which itself and Rwanda had opposing views, or that it had a dispute with that State in regard to this matter."

[110] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion, I.C.J. Reports* 1950, p. 65, at 74: "Whether there exists an international dispute is a matter for objective determination. The mere denial of the existence of a dispute does not prove its non-existence. In the diplomatic correspondence submitted to the Court, the United Kingdom, acting in association with Australia, Canada and New Zealand, and the United States of America charged Bulgaria, Hungary and Romania with having violated, in various ways, the provisions of the articles dealing with human rights and fundamental freedoms in the Peace Treaties and called upon the three Governments to take remedial measures to carry out their obligations under the Treaties. The three Governments, on the other hand, denied the charges.

3.18 As identified further below, none of these well-established requirements are met in this case. It is not just that Georgia failed to make any claim under CERD prior to 12 August 2008; it also failed to make a claim that Russia could positively oppose as to unlawful racial discrimination by Russia in Abkhazia and/or South Ossetia. It follows that this case is to be contrasted with the objection made by the respondent State in *Military and Paramilitary Activities in and against Nicaragua*, where the substance of the dispute clearly had been raised in bilateral negotiations, although the 1956 Treaty of Amity had not specifically been referred to.[111]

3.19 Further, consistent with the well-established requirements set out above, including that there be (i) a claim that is (ii) positively opposed, CERD codifies what is required for a dispute under that Convention, pursuant to its Articles 11 and 12. Thus Article 11 CERD provides as follow:

> "1. If *a State Party* considers that *another State Party* is not giving effect to the provisions of this Convention, it *may bring the matter to the attention of the Committee*. The Committee shall then transmit the communication *to the State Party concerned*. Within three months, *the receiving State* shall submit to the Committee written explanations or statements *clarifying the matter and the remedy, if any, that may have been taken by that State*.
>
> 2. If the matter is not adjusted to the satisfaction *of both parties*, either by bilateral negotiations or by any other procedure open to them, within six months after the receipt by *the receiving State* of the initial communication, *either State* shall have the right to refer the matter again to the Committee by notifying the Committee and also *the other State*.

There has thus arisen a situation in which the two sides hold clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations."

[111] Cf. *Military and Paramilitary Activities in and against Nicaragua, Jurisdiction and Admissibility, Rep.* 1984, pp. 428-429, para. 83; also at p. 427, para. 81, with respect to the objection of the respondent in that case. See, paras. 4.29-4.35 below, including with respect to other factors distinguishing the *Nicaragua* case.

> 3. The Committee shall deal with a matter referred to it in accordance with paragraph 2 of this article after it has ascertained that all available domestic remedies have been invoked and exhausted in the case, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged.
>
> 4. In any matter referred to it, the Committee may call upon *the States Parties concerned* to supply any other relevant information.
>
> 5. When any matter arising out of this article is being considered by the Committee, *the States Parties concerned* shall be entitled to send a representative to take part in the proceedings of the Committee, without voting rights, while the matter is under consideration."

3.20 The use of italics above seeks to emphasise two points:

> a. There is no reference to the word "dispute" in Article 11, which is concerned with the communication of a "matter" from one State to another.[112] That communication is then to be followed by a period of bilateral negotiations/settlement by any other procedure and, failing this, reference by either party to the Committee.[113]
>
> b. Consistent with this, the States concerned are at no stage referred to as parties to a dispute.

3.21 Pursuant to Article 12(1) of CERD, an *ad hoc* Conciliation Commission is then appointed to determine the matter. It is only at this stage that the States

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[112] In the French text, "la question".

[113] The draft of what became Article 11(1) originally used the word "complaint" in the second sentence, but this was changed to "communication" at the suggestion of the Mexican representative. See U.N. General Assembly, 20th session, Official Records, Third Committee, Record of the 1353th meeting, U.N. Doc. A/C.3/SR.1353 (24 November 1965), p. 371 *et seq.* Annex 15.

parties concerned are regarded as, and referred to as, "States parties to the dispute".[114] Thus, in contrast to Article 11, where that formula is carefully avoided, there are some six references to "States parties to the dispute" in Article 12.

3.22 It follows that, for there to be a dispute for the purposes of Article 12 of CERD, there must be (i) communication of a matter, (ii) to the Committee and on to the other State concerned, (iii) failed negotiations/other settlement procedures, then (iv) reference of the matter back to the Committee. It is only then that the States Parties concerned become "the parties to the dispute". There is no suggestion in the treaty language that they are to be regarded as parties to a dispute prior to this. Nor is there any basis for suggesting that a different approach is to be applied in determining whether there is a dispute under Article 22 of CERD.[115]

2. The point in time at which the existence (or otherwise) of a "dispute" is to be assessed

3.23 This case brings to the fore – just as in the recent judgment in *Genocide (Croatia v. Serbia)*[116] – the question of whether the fulfilment of a given jurisdictional requirement is to be assessed solely at the date of filing of an

[114] In the French text, "les Etats parties au différend"; this distinction exists in all other authentic texts.

[115] This submission goes to the correct meaning to be given to the word "dispute" in Article 22 of CERD. It is separate to the question, discussed in Chapter IV below, of whether the settlement procedures of Articles 11-13 must first be employed prior to a State having the right to seise the Court of a dispute under Article 22.

[116] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment (Preliminary Objections)*, 18 November 2008, at paras. 78 *et seq.*

application. The general rule is well-established. As the Court noted in *Genocide (Croatia v. Serbia):*

> "In numerous cases, the Court has reiterated the general rule which it applies in this regard, namely: "the jurisdiction of the Court must normally be assessed on the date of the filing of the act instituting proceedings" (to this effect, see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 613, para. 26; cf. *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 26, para. 44)."[117]

3.24 To similar effect, the Permanent Court in *Electricity Company of Sofia and Bulgaria* dismissed part of the claim on the ground that the relevant dispute had not arisen at the time of the filing of the application. It stated:

> "The last complaint adduced by the Belgian Government to the Bulgarian Government... relates to the promulgation of the law of February 3rd 1996....The Bulgarian Government argues that this contention of the Belgian Government is inadmissible because the claim respecting the law of February 3rd 1936 did not form the subject of a dispute between the two Governments prior to the filing of the Belgian Application. The Court considers this argument of the Bulgarian Government to be well-founded... *it rested with the Belgian Government to prove that, before the filing of the Application, a dispute had arisen between the Governments respecting the Bulgarian law of February 3rd 1936*. The Court holds that the Belgian Government had not established the existence of such a dispute...."[118]

3.25 Also, according to Rosenne:

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[117] *Ibid.*, at para. 79.

[118] *Electricity Company of Sofia and Bulgaria* P.C.I.J. Series A/B 77 1939, at p. 83, emphasis added.

> "Where a case is instituted unilaterally by the filing of an application the court's jurisdiction must normally be assessed as at the date of the filing of the application instituting the proceedings. This is the date by reference to which the existence of the dispute and the admissibility of the case are normally determined."[119]

3.26 So far as concerns the specific facts of this case, the majority of the Court found in the Order of 15 October 2008 that there appeared to be a dispute, by reference to the opposing stances taken by the Parties at the hearing of 8-10 September 2008.[120] However, this is not to be considered as a departure from the general rule, given that the Court was concerned only with the question of whether there was *prima facie* a dispute.

3.27 In their joint Dissenting Opinion of 15 October 2008, seven Judges (Judges Al-Khasawneh, Ranjeva, Shi, Koroma, Tomka, Bennouna and Skotnikov) considered that the general rule was to be applied. They found that, even *prima facie*, there was no dispute for the purposes of Article 22 of CERD:

> "8. Such a dispute must exist prior to the seisin of the Court. It is for this reason that the Court must consider whether the two Parties have opposing views with regard to the interpretation or application of the Convention. …
>
> 10. Moreover, the majority, unable to find any evidence that the acts alleged by Georgia fall within the provisions of CERD, has been content to observe merely that a dispute appears to exist as to the interpretation and application of CERD because the two Parties have manifested their disagreement over the applicability of Articles 2 and 5 of the Convention. In other words, an argument expounded during oral proceedings has mutated into evidence of the existence of a dispute between the Parties (Order, paragraph 112)!"

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[119] Rosenne, *The Law and Practice of the International Court 2002-2005*, 4th ed. Vol. II at p. 510.

[120] Order of 15 October 2008, para. 112, as set out at para. 3.15 above.

3.28 While Russia respectfully agrees with the minority's conclusions so far as concerns the absence even *prima facie* of a dispute, it must be correct that, for the purposes of ruling definitively on the question of its jurisdiction, the Court must be satisfied that a dispute existed prior to its being seised. This follows from:

a. The general rule referred to above; and

b. Any ordinary reading of Article 22, which provides in relevant part that: "Any dispute between two or more States Parties with respect to the interpretation or application of this Convention … shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision …."

3.29 It follows from this wording that it is only a dispute, *i.e.* a pre-existing dispute, that can be referred to the Court (subject to satisfaction of other criteria considered in Chapter IV), and only by a party to that dispute, *i.e.* a party to a pre-existing dispute.[121] Put simply, if there was no dispute, the essential basis for consent to the Court's jurisdiction is absent, and if Georgia was not party to a dispute at the moment of seisin, it failed to meet a necessary criterion for invoking the Court's jurisdiction. Further, the claim must of course be brought against the other party to the dispute (as follows from the third element in *Mavrommatis* identified at paragraph 3.17(b) above).

3.30 Whatever the position may be so far as concerns establishing *prima facie* jurisdiction, it cannot be sufficient for present purposes that the existence of a dispute between the Parties be established by the argument expounded during

[121] See also the Russian text: "по требованию любой из сторон в *этом* споре", "*po trebovaniyu liuboy iz storon v* etom *spore*", which is translated into English as "at the request by any of the parties to *this* dispute". Emphasis added.

the oral proceedings of September 2008. Otherwise it would be open to a State to lodge its application, and then request provisional measures, as to which the Court would then find *prima facie* jurisdiction on the basis of oral argument and, by the same token, a dispute would have been created.

3.31 Further, as the Court held in *Genocide (Croatia v. Serbia)*:

> "it must be emphasized that a State which decides to bring proceedings before the Court should carefully ascertain that all the requisite conditions for the jurisdiction of the Court have been met at the time proceedings are instituted. If this is not done and regardless of whether these conditions later come to be fulfilled, the Court must in principle decide the question of jurisdiction on the basis of the conditions that existed at the time of the institution of the proceedings." [122]

3.32 There was no such careful ascertainment in this case. Georgia has paid no attention whatsoever to the requirements of Article 22 of CERD.

3.33 Russia is of course aware that in certain situations the Court has desisted from applying the general rule for reasons of sound administration of justice. While the Court must be wary of converting the general rule into the exception,[123] the Court has shown on occasion a reluctance to uphold a jurisdictional objection if the defect could be addressed simply by the applicant commencing fresh proceedings.[124] There are three reasons why that is not a concern in this case:

a. This is as strong a case as could be conceived for the application of the general rule. In a case where the alleged dispute is said to date back 17

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[122] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment (Preliminary Objections),* 18 November 2008, at para. 80.

[123] See also in this respect *ibid.*, Separate Opinion of Judge Abraham, para. 54.

[124] *Ibid*., at para 85.

years prior to the Application, the sound administration of justice is undermined by permitting a State to seise the Court with no prior notification to the respondent State and, therefore, no opportunity for that State to consider its position, including to consider whether it would be appropriate to modify its behaviour in any way.[125] In *Genocide (Croatia v. Serbia)*, one of the critical factors for the Court was that: "while, as noted above (paragraph 80), a State filing an application with the Court should normally be expected to demonstrate sufficient care to avoid doing so prematurely, it cannot be said that the Applicant in the current proceedings has shown any careless approach in this regard."[126] As already noted, the Applicant in this case could not have shown less care so far as concerns meeting the requirements of Article 22 of CERD. Further, the Applicant in this case – which in fact first elected to take resolution of the conflict into its own hands by means of its (unlawful) military operations commencing on 7 August 2008 – could not have shown less care so far as concerns the fundamental principles on the peaceful settlement of disputes.[127]

b. This is an artificial case. An attempt has been made to transform a case turning on the use of force, and international humanitarian law, into a racial discrimination case that Russia could in no sense have been alerted to. Again, it must be permitted to a respondent State the opportunity to

[125] See also *Mavrommatis Palestine Concessions, Greece v. United Kingdom, Judgment (Merits*), 30 August 1924, 1924 PCIJ (ser. A), No. 2, p. 11, Dissenting Opinion of Judge Pessoa, at p. 88: "As being sovereign they [States] have the fundamental right to settle their disputes between themselves, and the interposition of an outside authority is only understandable when the former solution cannot be arrived at."

[126] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment (Preliminary Objections),* 18 November 2008, at para 90.

[127] See also under Chapter IV below, with respect to the failure to fulfil the other pre-conditions to jurisdiction in Article 22 of CERD.

consider its position. This is not a case equivalent to *Military and Paramilitary Activities (Nicaragua v. USA)*, where the Court noted: "The United States was well aware that Nicaragua alleged that its conduct was a breach of international obligations before the present case was instituted; and it is now aware that specific articles of the 1956 Treaty are alleged to have been violated. It would make no sense to require Nicaragua now to institute fresh proceedings based on the Treaty, which it would be fully entitled to do."[128] Russia had no means of knowing that Georgia considered it to be in breach of international obligations concerning racial discrimination with respect to Abkhazia and South Ossetia before the case was instituted. [129]

c. The wording of Article 22 of CERD supports application of the general rule. Not only does Article 22 require that there be a dispute prior to seisin of the Court; it requires that this dispute be crystallized to the extent provided for in Article 11 of CERD. This is not a requirement that Georgia has met, and nor has it given any indication that it will meet this requirement prior to the moment that the Court decides on its jurisdiction.

3.34 It follows from the above that the general rule should be applied, and that this is mandated by the sound administration of justice.

3.35 However, in any event, Georgia will not have satisfied the requirement that there be a dispute, whether at the date of seisin or at the date that the Court decides on its jurisdiction: even if it were accepted that the general rule should

[128] *Military and Paramilitary Activities in and against Nicaragua, Jurisdiction and Admissibility*, I.C.J. Reports 1984, pp. 428-429, para. 83.

[129] See also paras. 4.29-4.35 below, including with respect to other factors distinguishing the *Nicaragua* case (such as the fact that the Court anyway had jurisdiction under Article 36(2) of its Statute).

be dis-applied, Georgia would have to satisfy the particular requirements for there to be a dispute under CERD.[130] Georgia has not done so, and it has given no indication that it intends do so.

B. THE REQUIREMENT THAT THE DISPUTE CONCERN THE INTERPRETATION OR APPLICATION OF CERD

3.36 So far as concerns the question of whether the subject-matter of a given dispute falls within the treaty relied on, the Court held as follows in the *Oil Platforms* case:

> "… the Parties differ on the question whether the dispute between the two States with respect to the lawfulness of the actions carried out by the United States against the Iranian oil platforms is a dispute 'as to the interpretation or application' of the Treaty of 1955. In order to answer that question, the Court cannot limit itself to noting that one of the Parties maintains that such a dispute exists, and the other denies it. It must ascertain whether the violations of the Treaty of 1955 pleaded by Iran do or do not fall within the provisions of the Treaty and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain, pursuant to Article XXI, paragraph 2."[131]

3.37 It is important, however, to note that this test was formulated in a quite different context to that now before the Court. As the Court stated in the immediately preceding passage in the *Oil Platforms* case:

> "It is not contested that several of the conditions laid down by this text [Article XXI] have been met in the present case: a dispute has arisen between Iran and the United States; it has not been possible to adjust that dispute by diplomacy and the two States have not agreed 'to settlement by

[130] See Articles 11-12, 22 of CERD.

[131] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II),* p. 810, para. 16.

> some other pacific means' as contemplated by Article XXI [the compromissory clause in question]."[132]

3.38 Here, Georgia has approached the Court without notifying Russia (via the CERD procedures or otherwise) of the existence of any dispute, and without fulfilling the other pre-conditions established by Article 22 of CERD (as to which, see Chapter IV below). In these circumstances, further rigour is inevitably required: the reasoning in *Oil Platforms* is predicated on the existence of a recognised and established dispute (in that case, as to the lawfulness of the actions carried out by the United States against the Iranian oil platforms). That is precisely what is lacking in the instant case.

3.39 In these circumstances, it is appropriate to seek to identify the real dispute between the Parties, as Russia has sought to do in Chapter II above.[133]

3.40 In this case, the Court's focus should primarily be on the relevant diplomatic exchanges, public statements and other pertinent evidence, as opposed to the artificial and misleading formulation of the dispute in the Application and, now, in Georgia's Memorial. Further, to adopt the words of the tribunal in the *Southern Bluefin Tuna* case, the question is "whether the 'real

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[132] *Ibid.* Article XXI of the 1955 Treaty of Amity provides as follows: "Any dispute between the High Contracting Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties agree to settlement by some other pacific means."

[133] Referring to *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 448, para. 31, and *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 466, para. 30; see also *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 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.

dispute' between the Parties does or does not reasonably (and not just remotely) relate to the obligations set forth in the treaties whose breach is alleged".[134]

3.41 The real dispute in this case concerns the conflict, between Georgia on the one hand and Abkhazia and South Ossetia on the other, in relation to the legal status of Abkhazia and South Ossetia, a conflict that has on occasion erupted into armed conflict. It is manifest that there was a period of armed conflict between Georgia and Russia, following on from Georgia's unlawful use of force on 7 August 2008. This is not a case about racial discrimination, as is clear from Chapter II above, and further from the matters considered in Section III below. Russia reiterates its view that, if Georgia had been successful in its military intervention in South Ossetia in August 2008, the current claim would never have been brought. This, of itself, is a firm indication as to the nature of the real dispute. Indeed, even Georgia states that

> "the case was initiated in the context of Russia's unlawful use of force in August 2008, and Russia's widespread violation of international humanitarian and human rights law".[135]

3.42 It is also instructive to refer to the "negotiations" with respect to the alleged dispute, which Georgia relies on to satisfy the further requirements of Article 22 of CERD. These are considered in Chapter IV below, but by way of example:

> a. Georgia asserts that it "has attempted to raise the subject matter of this dispute with the Russian Federation and to make progress in resolving the

[134] *Southern Bluefin Tuna case (Australia and New Zealand v. Japan)*, 39 ILM 1359 (November 2000), at 1386, para. 48.

[135] See GM, para. 1.8.

conflict within the forum of the OSCE Permanent Council".[136] Certainly, Georgia has raised matters concerning Abkhazia and South Ossetia before the OSCE, but these concern grievances about: Russia's performance as a mediator, the alleged inefficiency of Russian peacekeepers, the slow pace of withdrawal of military bases, the delivery of military equipment to Abkhazia and South Ossetia, Russia's economic ties with Abkhazia and South Ossetia, the behaviour of Abkhaz and South Ossetian authorities, Russia's stance in bilateral relations with Georgia, Russia's economic blockade of Georgia, allegedly false Russian statements over Georgia's military preparations, and various other matters of this sort.

b. Moreover, and by contrast, Georgia has used the OSCE forum to raise alleged ethnic discrimination of Georgians within Russian territory (as opposed to allegations of ethnic discrimination concerning ethnic Georgians in Abkhazia and South Ossetia).

c. Georgia also contends in its Memorial that: "The Russian Federation also made use of the OSCE forum and made over thirty statements concerning the subject matter of the dispute". This assertion is accompanied by a footnote that enumerates 31 statements,[137] of which not one discusses the issue of ethnic discrimination (except one statement that raises issues with respect to minority rights in Georgia itself, not Abkhazia or South Ossetia).

3.43 The carefully tailored allegations of discrimination cannot be divorced from the underlying context of a claim precipitated by Georgia's unlawful use of

[136] See GM, para. 8.71.

[137] See GM, para. 8.74.

force in August 2008, and are not to be considered as the relevant "dispute" to which the test in the *Oil Platforms* case is to be applied.

3.44 Even if that were wrong, the violations pleaded by Georgia do not fall within the provisions of CERD, and in this respect Russia respectfully agrees with the position of Judges Al-Khasawneh, Ranjeva, Shi, Koroma, Tomka, Bennouna and Skotnikov, who considered that, even *prima facie*, there was no dispute for the purposes of Article 22 of CERD (at paragraphs 8-10 of their Dissenting Opinion).

3.45 In this respect, it is noted that the Judges in their Dissenting Opinion correctly focused on the events subsequent to 7-8 August 2008, but prior to the seisin of the Court, stating (at paragraph 8):

> "… the Court must consider whether the two Parties have opposing views with regard to the interpretation or application of the Convention. Admittedly, it is established that no such opposition was ever manifested before 8 August; but was it manifested after 7-8 August and the outbreak of hostilities between the two States?"

3.46 The jurisdiction of the Court, and any application of the approach followed in the *Oil Platforms* case, must also take into account the limits *ratione loci* and *ratione temporis* on the Court's jurisdiction. These are considered further in Chapters V and VI below. The former excludes the jurisdiction of the Court altogether. So far as concerns the limits *ratione temporis* on the Court's jurisdiction:

> a. In assessing whether the violations of CERD pleaded by Georgia do or do not fall within the provisions of CERD, the Court must exclude facts and events prior to Georgia's ratification of CERD in June 1999: self-evidently, Georgia had no rights under CERD to base a claim prior to that date.

b. It follows that the Court is primarily concerned with the period between 2 July 1999 and 12 August 2008. As follows from paragraphs 52-64 of Georgia's Application, entitled the "Second Phase of Russia's Intervention in Abkhazia and South Ossetia: 1994 to 2008",[138] there is nothing in that second phase that could conceivably be said to amount to a breach of CERD. The development of facts in Georgia's Memorial does not alter that conclusion

c. The Court has held that it only has jurisdiction over facts or events subsequent to the filing of an Application if those facts or events are connected to the facts or events already falling within the Court's jurisdiction, and consideration of those later facts or events would not transform the nature of the dispute.[139] The first limb of this test is particularly relevant in the present proceedings. Before it can rely on facts or events subsequent to the filing of the Application on 12 August 2008, Georgia must first establish the Court's jurisdiction under CERD with reference to facts or events *already falling within the Court's jurisdiction i.e.* facts or events in the period from 2 July 1999 to 12 August 2008. It is

[138] The Court will recall that, in its Application of 12 August 2008, Georgia divided its consideration of the facts into three phases "of Russia's intervention in South Ossetia and Abkhazia", on the basis that there were three phases to the alleged dispute. The first phase covered the period 1991-1994; the second phase, 1994 up to but not including 8 August 2008; and the third phase, commencing on 8 August 2008. See Georgia's Application of 12 August 2008, paras. 5-16.

[139] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, I.C.J. Reports 2008, at para. 87: "When the Court has examined its jurisdiction over facts or events subsequent to the filing of the application, it has emphasized the need to determine whether those facts or events were connected to the facts or events already falling within the Court's jurisdiction and whether consideration of those later facts or events would transform the 'nature of the dispute'." See also *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, I.C.J. Reports 1974, at para. 72; *LaGrand (Germany v. United States of America)*, I.C.J. Reports 2001, pp. 483-484, at para. 45; *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, I.C.J. Reports 1992, at paras. 69-70; and *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, I.C.J. Reports 2002, at para. 36.

> only then that facts or events subsequent to the filing of the Application may fall within the jurisdiction of the Court.

3.47 Once again, this brings into sharp focus the question of the correct characterisation of the dispute.

3.48 The armed conflict precipitated by Georgia's use of force spans the period 8 to 12 August 2008.[140] This appears to be Georgia's position also, although it asserts that the hostilities in most of South Ossetia had ended by 10 August.[141] This armed conflict cannot now correctly be characterised as a dispute under CERD.

3.49 The onus is of course on Georgia to establish that it is appropriate to apply the *Oil Platforms* test and that, if so, to establish that within this limited period of armed conflict, the violations of CERD pleaded by Georgia do indeed fall within the provisions of CERD. It has not met this threshold. As Judges Al-Khasawneh, Ranjeva, Shi, Koroma, Tomka, Bennouna and Skotnikov held (at paragraph 9 of their Dissenting Opinion):

> "Russia's armed activities after 8 August cannot, in and of themselves, constitute acts of racial discrimination in the sense of Article 1 of CERD unless it is proven that they were aimed at establishing a "distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin". However, the circumstances of the armed confrontation triggered in the night of 7 to 8 August were such that this cannot be the case. Admittedly, the ensuing armed conflict concerned a region in which serious ethnic tensions could lead to violations of humanitarian law, but it is difficult to consider that the armed acts in question, in and of themselves and whether committed by Russia or Georgia, fall within the provisions of CERD."

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[140] See e.g Independent International Fact-Finding Mission on the Conflict in Georgia, Report, vol. I (September 2009), pp. 10-11, para. 2. Annex 75.

[141] GM, para. 3.13.

Section III. The background to the so-called "dispute": the absence of allegations by Georgia of breach by Russia of CERD

3.50 At no stage prior to 12 August 2008 was Russia engaged in a dispute with Georgia over the interpretation or application of CERD, and nor was this ever contended by Georgia.

A. NO COMMUNICATION OF A MATTER BEFORE THE COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION

3.51 If Georgia had considered that Russia was not giving effect to the provisions of CERD, the most obvious, and required,[142] forum for Georgia to raise the matter was the Committee on the Elimination of Racial Discrimination. Yet, no such matter was ever raised by Georgia (or any other party) whether under Article 11 of CERD or otherwise, although it is now more than 10 years since Georgia ratified CERD.

3.52 Since 1999, in accordance with its obligations under Article 9,[143] Georgia has submitted three periodic reports to the Committee.[144] In none of these did

[142] If Georgia wished to have the possibility of seising the Court: see Chapter IV below.

[143] Pursuant to Article 9(1) of CERD: "States Parties undertake to submit to the Secretary-General of the United Nations, 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: (a) within one year after the entry into force of the Convention for the State concerned; and (b) thereafter every two years and whenever the Committee so requests. The Committee may request further information from the States Parties."

[144] Committee on the Elimination of Racial Discrimination, Reports submitted by States Parties under Article 9 of the Convention, Initial report of States Parties due in 2000, Addendum: Georgia, 24 May 2000, U.N Doc. CERD/C/369/Add.1 (1 February 2001) (Annex 48). See also CERD/C/461/Add.1 of 21 July 2004.

Georgia state that Russia was not giving effect to the provisions of CERD so far as concerns the current matters it brings before the Court. There is likewise no reference to any dispute with Russia in the discussions between Committee members and Georgia's representatives.[145] *A fortiori*, no reference to any such dispute is to be found in the Committee's concluding observations.

3.53 Tellingly, in its initial report to the Committee, Georgia did refer to a policy of "cleansing" founded on racial hatred in Abkhazia – but that policy was said to be pursued by "the authorities of the self-proclaimed 'Republic of Abkhazia'".[146] There is no suggestion that Russia was in any way responsible for the policy. Indeed, as is evident from Chapter II above, Georgia expressly did not regard Russia as a party to its dispute, but saw Russia as a facilitator, and welcomed the presence of CIS troops in Abkhazia (which is only understandable as Russia joined Georgia in condemning ethnic cleansing by the Abkhaz).

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[145] Summary records, see: CERD/C/SR.1453 of 15 March 2001, CERD/C/SR.1454 of 16 March 2001, [deleted records were sealed by CERD and are not publicly available] and CERD/C/SR.1706 of 4 August 2005.

[146] Committee on the Elimination of Racial Discrimination, Reports submitted by States Parties under Article 9 of the Convention, Initial report of States Parties due in 2000, Addendum: Georgia, 24 May 2000, U.N Doc. CERD/C/369/Add.1 (1 February 2001), para. 55: "Georgia 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 seen to "cleanse" the region of Georgians and - in many cases - representatives of other nationalities as well". Annex 48.

In the Committee's consideration of the report, the representative for Georgia (Mr Kavadze) stated, to similar effect that: "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." Committee on the Elimination of Racial Discrimination, 58th session, Summary Record of 1454th Meeting, 16 March 2001, U.N. Doc. CERD/C/SR.1454 (14 June 2001), at para. 21. Annex 51.

3.54 Georgia is not now asserting that it has only just come into possession of relevant facts. Its case is that there was massive ethnic cleansing, and that the authorities in Abkhazia and South Ossetia were at all material times completely dependent on Russia.[147] Possessed of all the (alleged) relevant information, it was for Georgia to formulate complaints against Russia before the Committee (or some other body) and/or otherwise to communicate the existence of a dispute. It did not do so.

3.55 In addition, there has been no reference to a dispute between Georgia and Russia concerning application of CERD with respect to Abkhazia and South Ossetia during the Committee's examination of Russia's reports.[148] No mention was made of any such dispute between Georgia and Russia during the Committee's 2008 session, which concluded in Geneva on 15 August 2008, one week after the armed conflict broke out (the Committee was then formulating its concluding observations on the Russian Federation's eighteenth and nineteenth periodic reports). There is no mention of any such dispute in the Committee's 2008 Annual Report.[149]

3.56 Further, it is recalled that, pursuant to Article 14(1) of CERD: "A State Party may at any time declare that it recognizes the competence of the Committee to receive and consider communications from individuals or groups

[147] See *e.g.* GM, para. 9.52.

[148] Cf. *e.g.* the concerns expressed by the Committee in its 2003 Annual Report with respect to Uganda: "The Committee expresses concern about allegations of abuses committed by Ugandan forces against members of particular ethnic groups in the Democratic Republic of the Congo. The Committee urges the State party to comply fully with Security Council resolutions 1304 (2000) and 1332 (2000)." Report of the Committee on the Elimination of Racial Discrimination, 23 October 2003, A/58/18, at para. 277.

[149] U.N. General Assembly, 63rd session, Official Records, Supplement No. 18, Report of the Committee on the Elimination of Racial Discrimination, U.N. Doc. A/63/18 (1 November 2008), at paras. 351–387. Annex 72.

of individuals within its jurisdiction claiming to be victims of a violation by that State Party of any of the rights set forth in this Convention." Such a declaration was made by the Soviet Union on 1 October 1991.[150] If Georgian nationals (with or without the assistance of Georgia) had considered that CERD was applicable to the events in Abkhazia and South Ossetia, no doubt this procedure would have been employed. Yet, tellingly, no individual complaint against Russia has ever been submitted to the Committee in respect of alleged violations concerning acts of Russia in Abkhazia or South Ossetia (or acts of the authorities allegedly controlled by Russia).

B. NO COMMUNICATION BY GEORGIA OF A DISPUTE BEFORE OTHER HUMAN RIGHTS BODIES

3.57 The same basic points may be made in respect of other human rights bodies before which Georgia might conceivably have articulated the existence of a dispute as to racial discrimination by Russia in respect of Abkhazia and South Ossetia.

1. No communication of a dispute before the Human Rights Committee

3.58 Georgia has not, in its reports to the Human Rights Committee, communicated the existence of any dispute with respect to racial discrimination by Russia concerning Abkhazia or South Ossetia (*i.e.* contrary to Articles 2(1) and/or 26 of the ICCPR). In its report to the Committee of 7 November 2006, Georgia did refer to a parliamentary resolution of 15 February 2006

[150] The declaration reads as follows: "The Union of Soviet Socialist Republics declares that it recognizes the competence of the Committee on the Elimination of Racial Discrimination to receive and consider communications, in respect of situations and events occurring after the adoption of the present declaration, from individuals or groups of individuals within the jurisdiction of the USSR claiming to be victims of a violation by the USSR of any of the rights set forth in the Convention".

characterising the "actions of the Russian Federation as permanent efforts aimed at annexation of this region of Georgia".[151] While Russia considers such allegations to be unsustainable, this does at least point to the eventual real dispute between the Parties (see Chapter II above).[152]

2. No communication of a dispute before ECOSOC

3.59 Likewise, Georgia has not, in its reports to the Economic and Social Council (ECOSOC) communicated the existence of a dispute with respect to racial discrimination by Russia concerning Abkhazia or South Ossetia. Before ECOSOC, Georgia has reported on ethnic cleansing in Abkhazia in terms similar to those in its Application (see paragraph 3.3 above), but with no mention of any responsibility on the part of Russia.[153] In the same report of 1998, Georgia described the situation expressly by reference to the language of armed conflict, as follows:

> "As the Union of Soviet Socialist Republics fell apart, separatist trends developed in two autonomous entities, Abkhazia and South Ossetia. The course of events led to armed conflicts – in both cases, political opposition that took the form of ethnic resistance." [154]

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[151] Human Rights Committee, Consideration of reports submitted by States Parties under Article 40 of the Covenant, Third periodic reports of States Parties due in 2006: Georgia, U.N. Doc. CCPR/C/GEO/3 (7 November 2006), para. 41.

[152] By contrast, Georgia had earlier reported to the Human Rights Committee, with respect to the conflict in Abkhazia, that: "The Russian Federation, too, has an important positive role to play in the settlement of the conflict." Second Periodic Report of Georgia, CCPR/C/GEO/2000/2, 26 February 2001, para. 30.

[153] Initial Report of Georgia, E/1990/5/Add. 37, 23 September 1998, para. 29, referring to "ethnic cleansing in both regions [Abkhazia and South Ossetia], reaching the scale of genocide in Abkhazia. The outcome has been thousands of dead and hundreds of thousands of people internally displaced."

[154] *Ibid*, para. 28.

3.60 Further, before ECOSOC, Georgia has characterised the conflicts in Abkhazia and South Ossetia as domestic conflicts (which is consistent with Russia's position on the nature of the real dispute: see Chapter II above).[155]

3. No communication of a dispute before the CEDAW Committee or the Committee on the Rights of the Child

3.61 Georgia has not, in its reports to the Committee on the Elimination of Discrimination against Women, communicated the existence of a dispute with respect to racial discrimination by Russia concerning Abkhazia or South Ossetia.

3.62 The same applies to Georgia's reports to the Committee on the Rights of the Child. By contrast, in its second periodic report of 28 April 2003, Georgia did note with respect to Abkhazia that:

> "In addition to United Nations structures, the Group of Friends of the Secretary-General on Georgia as well as Ukraine and other countries of the southern Caucasian region are participating in the consultation process. *The Russian Federation, too, has an important positive role to play in the settlement of the conflict*."[156]

[155] Consideration of Reports: E/C.12/2000/SR.3, of 8 November 2000.

[156] Second Periodic Report of Georgia: CRC/C/104/Add.1, of 28 April 2003, emphasis added.

C. NO COMMUNICATION OF A DISPUTE IN BILATERAL CONTACTS BETWEEN THE PARTIES, OR BEFORE OTHER INTERNATIONAL FORA SUCH AS THE SECURITY COUNCIL

3.63 These omissions would obviously be less significant if Georgia had communicated the existence of a dispute under CERD in diplomatic or other communications with Russia, or before other international fora. The point is that Georgia did not do so.

3.64 At the hearing of 8 September 2008, Georgia made reference to "extensive bilateral contacts", at which *inter alia* the issue of the return of internally displaced persons to Abkhazia was discussed. The contacts relied on have now been set out in a notably short passage in Chapter 8 of Georgia's Memorial. They are considered further in Chapter IV below. They support neither the existence of negotiations nor the existence of a dispute under Article 22 of CERD. As follows, for example, from the reasoning of Judge Higgins in *Land and Maritime Boundary between Cameroon and Nigeria*, the existence of negotiations and the existence of a dispute are separate issues, and the relevance of the issue of negotiations may lie in providing an indication as to whether a dispute exists at all:

> "I refer to the question of whether there is, in fact and in law, a dispute relating to the maritime zones of Cameroon and Nigeria out to the limit of their respective jurisdictions. Nigeria, in its written and oral pleadings on its seventh preliminary objection, has focused on the alleged absence of relevant negotiations. It contends that as a matter of general international law and by virtue of Articles 74 and 83 of the United Nations Convention on the Law of the Sea, a State must negotiate its maritime boundary and not impose it unilaterally and that the Court thus lacks jurisdiction and/or the claim on maritime delimitation is inadmissible. *But it may be that the real relevance of the issue of negotiation lies rather in providing an*

> *indication as to whether a dispute exists at all over this matter. This, rather than whether negotiation is a 'free standing' pre-condition for bringing a claim on a maritime boundary, seems to me the real issue.*"[157]

3.65 The negotiations – or otherwise – in this case do evidence the absence of a relevant dispute between Georgia and Russia.

3.66 The same applies so far as concerns the alleged contacts before other international fora, as also considered further in Chapter IV below (in relation to the alleged negotiations relied upon in Chapter VIII of Georgia's Memorial). It is not, for example, because Parties have discussed the return of refugees, in conjunction with the re-opening of railway traffic between Sochi and Tbilisi, that a Party may be taken as having communicated the existence of a dispute under Article 22 of CERD.[158] At the hearing of 8 September 2008, Georgia even relied on Security Council resolution 1494 of 30 July 2003 – which further highlights the difficulty that Georgia has had in pointing to relevant bilateral or other contacts.[159] This Security Council resolution contains a very similar

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[157] *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I. C. J. Reports 1998,* p. 275, Separate Opinion of Judge Higgins, at p. 346, emphasis added. She continued at p. 348: "But whether there exists a dispute or not is a different question and is "a matter for objective determination" *(Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950,* p. 74). Quite different elements from those the Parties have debated apply. There has to be a "claim of one party [that] is positively opposed by the other" *(South West Africa* cases, *Preliminary Objections, Judgment, I.C. J. Reports 1962,* p. 328). It is not sufficient for this purpose to say that as the Bakassi Peninsula is disputed, it necessarily follows that the maritime boundary is in dispute. And, in contrast to the position with regard to the land boundary, there is (beyond point G) no existing treaty line which constitutes the claim of one Party and which the other Party - even by implication - appears not to accept. No specific claim line beyond point G had, before the institution of these proceedings, been advanced by Cameroon and rejected by Nigeria."

[158] Cf. GM, para. 8.45, relying on the meeting between President Putin and President Shevardnadze of 12 March 2003; GM Vol. III, Annex 136.

[159] CR 2008/22, p. 35. U.N. Security Council, Resolution 1494 (2003), U.N. Doc. S/RES/1494 (30 July 2003) is at Annex 53. It appears that Georgia no longer relies on this resolution.

reference to the return of refugees, in conjunction with the re-opening of railway traffic between Sochi and Tbilisi. This does not come close to communication of the existence of a dispute under Article 22 of CERD. Indeed, Security Council resolution 1494, far from indicating the existence of a dispute to which Russia was a party, underscores the role in which Russia was engaged in Abkhazia. Thus, pursuant to this resolution, the Security Council:

> "*Welcom[ed] also* the important contributions made by UNOMIG and the Collective Peacekeeping Forces of the Commonwealth of Independent States (CIS peacekeeping force) in stabilizing the situation in the zone of conflict, and *stress[es]* its attachment to the close cooperation existing between them in the performance of their respective mandates;
> …
>
> 3. *Commend[ed] and strongly support[ed]* the sustained efforts of the Secretary-General and his Special Representative, with the assistance of the Russian Federation in its capacity as facilitator as well as of the Group of Friends of the Secretary-General and of the OSCE, to promote the stabilization of the situation and the achievement of a comprehensive political settlement …." (Emphasis added.)

3.67 By way of a further recent example, in resolution 1808 of 15 April 2008, the Security Council was again stressing "the importance of close and effective cooperation between UNOMIG and the CIS peacekeeping force as they currently play an important stabilizing role in the conflict zone".[160] At the same time, paragraph 14 of this resolution called upon Georgia and the Abkhaz authorities "to fulfil their obligations in this regard and to extend full cooperation to UNOMIG and the CIS peacekeeping force".[161]

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[160] U.N. Security Council, Resolution 1808 (2008), U.N. Doc. S/RES/1808 (15 April 2008). Annex 67.

[161] See also *e.g.* Resolution 937 (1994); Resolution 971 (1995) (commending the contribution of the CIS peace-keeping force); Resolution 1225 (1999); Resolution 1462 (2003) (welcoming the important contributions made by UNOMIG and the Collective Peacekeeping Forces of the Commonwealth of Independent States (CIS peacekeeping force) in stabilizing the situation in the zone of conflict); Resolution 1615 (2005) (to the same effect); Resolution 1781 (2007).

3.68 It is self-evident that the Security Council did not then consider that Georgia and Russia were engaged in a dispute under CERD. To the contrary, such Security Council resolutions are consistent with Russia's position as to the real dispute, as set out in Chapter II above. It is also recalled that, through a series of Security Council resolutions and statements made in the Council, Russia repeatedly condemned various unlawful acts of the Abkhaz authorities, and reiterated and reaffirmed as fundamentally important the right of return for all refugees and displaced persons to Abkhazia (by way of recent examples, in Security Council resolutions 1781 and 1808). The resolutions of the Security Council provide no indication that Russia was in a dispute with Georgia over Abkhazia, still less a dispute under CERD.

3.69 The position of the Security Council – viewing Russia as a facilitator in achieving a solution to conflict in Abkhazia, and not as one of the parties to a dispute (whether under the Convention or otherwise) – is entirely consistent with other contemporaneous documentation. As noted in Chapter II above, there are repeated statements of Georgian representatives, decisions and international agreements to which Georgia is a party, in which Russia's role and the role of the CIS peacekeeping forces in Abkhazia and South Ossetia are consented to by Georgia and recognised by Georgia as wholly beneficial. To take some examples:

> a. In December 1994, Georgia as part of the JCC for the Settlement of the Georgian-Ossetian Conflict was stating that: "The Russian battalion of the peacekeeping forces is the guarantor of relative stability in the conflict zone."[162]

[162] Joint Control Commission for the Settlement of the Georgian-Ossetian Conflict, Decision on the Joint Forces for the Maintenance of Peace (6 December 1994). Annex 43.

b. In the Final Statement on the results of the resumed meeting between the Georgian and Abkhaz sides held in Geneva from 17 to 19 November 1997, both sides welcomed the participation of Russia as facilitator, and also took note of the contribution made by the CIS peacekeeping force in stabilising the situation in the conflict zone.[163]

c. On 31 March 1999, Georgia was party to a Decision of the Joint Control Commission, signed by itself, Russia, and the North Ossetian and South Ossetian sides, recording that the "peacekeeping forces keep on being a major sponsor of the peace and [a] calm life".[164]

d. On 16 March 2001, Georgia and Abkhazia (alongside representatives of the United Nations and the CIS) signed the Yalta Declaration, pursuant to which Georgia (and the other signatories) "recognize[d] the stabilizing role of the CIS Collective Peacekeeping Forces and UNOMIG in the conflict zone". [165]

e. In its report of 28 April 2003 to the Committee on the Rights of the Child, Georgia stated with respect to Abkhazia: "The Russian Federation, too, has an important positive role to play in the settlement of the conflict."[166]

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[163] Final Statement on the results of the resumed meeting between the Georgian and Abkhaz sides held in Geneva from 17 to 19 November 1997. Annex 45.

[164] Joint Control Commission for the Settlement of the Georgian-Ossetian Conflict, Decision on the activities of the Joint Peacekeeping Forces; on cooperation between law enforcement agencies of the Parties in the area of the Georgian-Ossetian conflict, Annex 1 to Protocol No.9 of the meeting of the Joint Control Commission (31 March 1999). Annex 47.

[165] GM, Annex 132.

[166] Second Periodic Report of Georgia CRC/C/104/Add. 1, of 28 April 2003, emphasis added.

3.70 If Georgia's allegations as to the existence of a dispute prior to August 2008 were to be accepted, this would be against a backdrop in which Georgia not only failed to communicate the existence of a dispute under CERD, but also consented to and welcomed the presence or involvement in Abkhazia and South Ossetia of a party (Russia) that is now characterised as responsible for racial discrimination against ethnic Georgians. The correct position is that Russia condemned the Abkhaz authorities through governmental statements and CIS decisions, as well as in the Security Council; that it made joint initiatives with Georgia on the resolution of the conflict; and that in the early stage of the South Ossetian conflict it also acted together with Georgia.

3.71 Similarly, as identified further in Chapter IV below with respect to the alleged negotiations relied upon in Chapter VIII of Georgia's Memorial, Georgia failed to communicate to Russia the existence of a dispute with respect to racial discrimination through the channel provided by the OSCE, or in the other fora now relied upon by Georgia.

3.72 Even in its provisional measures application of 11 August 2008 to the European Court of Human Rights, Georgia did not refer to Article 14 of the European Convention on Human Rights.[167] If there had been a real dispute between the Parties concerning racial discrimination, Georgia's application of 11 August 2008 before the European Court of Human Rights would no doubt have alleged such a breach. This underlines once again the fact that Georgia's real dispute with Russia is not founded on issues of racial discrimination.[168]

[167] Article 14 ECHR provides: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

[168] This absence is now justified as follows at para. 3 of Georgia's Application of 6 February 2009 to the European Court of Human Rights: "The Applicant State wishes it to be noted at

3.73 On occasion, Georgia has made ill-focused allegations in respect of ethnic cleansing. By a letter of 21 March 1995 from the Permanent Representative of Georgia to the President of the Security Council, Georgia asserted:

> "The negotiations about the peaceful settlement of the conflict in Abkhazia serve as a cover for separatists. The *neutrality* of the commanders of Russian peace-keeping forces is inconsistent with their mandate, which has been approved by the heads of the States members of the Commonwealth of Independent States and which stipulates that the main task of the peace-keeping forces is to create the necessary preconditions for the secure return of refugees and displaced persons. I wish to warn the Abkhaz separatists: the patience of people is not inexhaustible. *The conciliatory position of the United Nations, CIS Member States and the Russian peace-keeping forces towards mass crimes and vandalism, genocide and ethnic cleansing committed by the regime of the Abkhaz separatists has its limits*."[169]

3.74 The complaint here is that Russian peace-keeping forces are *neutral*, and that they, along with the United Nations and CIS Member States, have adopted a conciliatory position towards mass crimes and vandalism, genocide and ethnic cleansing. But such correspondence cannot conceivably be taken as initiating a dispute under CERD. Indeed, if it were, this would apparently be a dispute to which the United Nations and unspecified CIS Member States would also be

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the outset that specific complaints regarding the targeting of these attacks against civilians of ethnic Georgian origin could also have been properly advanced on the facts of this case pursuant to articles 8 and 14 of the Convention, articles 1 and 2 of Protocol 1 to the Convention and Article 2 of Protocol 4 to the Convention. The Applicant State has not invited the Court to consider such complaints at this juncture as the approach which has been adopted is not to include matters in this application which are property ventilated in the concurrent proceedings before the International Court of Justice relating to the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (CERD). Should it become necessary to do so, the Applicant State reserves the right to seek permission to amend this Application to include those matters at a later stage."

[169] U.N. Security Council, Letter dated 20 March 1995 from the Permanent Representative of Georgia to the United Nations addressed to the President of the Security Council, U.N. Doc. S/1995/212 (21 March 1995), emphasis added. Annex 44.

parties. Further, the object of the dispute would be Russia's *neutrality* in the Abkhazian conflict, not racial discrimination by Russia in breach of CERD.

Section IV. Conclusion: there is no dispute between the two Parties with respect to the interpretation or application of CERD

3.75 It follows from the need for a dispute as at the moment of the seisin of the Court that it is not open to Georgia to rely on the exchanges in the course of the hearing of 8-10 September 2008 to establish the requisite disagreement between Georgia and Russia on a point of law or fact, a conflict of legal views or of interests, with respect to the interpretation or application of CERD.

3.76 As follows from Section III above, Georgia has failed to establish the existence of any such dispute between Georgia and Russia prior to lodging of the Application. So far as concerns the three elements to a dispute established in *Mavrommatis*, which must of course be satisfied cumulatively:

a. *Disagreement (claim / positive opposition)*: Georgia has been unable to evidence relevant claims to which Russia could voice its opposition, let alone the existence of (i) a claim made by Georgia that (ii) was positively opposed by Russia.[170] Further, even though it would not be adequate for Georgia to show that the interests of it and Russia were in conflict (cf. *South West Africa*, as referred to at paragraph 3.17(c) above), it has failed to meet even that threshold.

[170] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports* 1962, 328; see also *Certain Property (Germany v. Liechtenstein) Preliminary Objections, Judgment, I.C.J. Reports* 2005, p. 6 at 18.

b. *On a point of law or fact, a conflict of legal views or of interests*: Insofar as Georgia has been able to establish conflict, this concerns the conflict, between Georgia on the one hand and Abkhazia and South Ossetia on the other, in relation to the legal status of Abkhazia and South Ossetia. If there had been a dispute concerning racial discrimination under CERD, this fact would have been conveyed to Russia at some stage in the 9-year period from Georgia's ratification of CERD in 1999 (or indeed earlier, with respect to a racial discrimination claim falling under another international instrument). There was no such communication – until 12 August 2008. Further, however adroitly Georgia has sought in its Memorial to portray this dispute as one based on rights under CERD, the fact remains that the critical focus of the dispute concerns the territorial issues and armed conflict.

c. *Between two persons*: the real dispute in this case is between Georgia on the one hand and Abkhazia and South Ossetia on the other. There are no doubt multiple instances to which Georgia could refer that establish the existence of a dispute between it and Abkhazia or South Ossetia on various matters prior to 12 August 2008, but that is of no relevance to the question of whether there was a dispute between it and Russia.

3.77 So far as concerns the specific requirements for there to be a dispute under CERD, the position is all the more straightforward: there has been no communication of a matter to the Committee and on to the other State concerned, there have been no failed negotiations/other settlement procedures, and no reference of the matter back to the Committee.

3.78 Further, this is not a case where the defects in an application can be regarded as *de minimis* in view of the fact that they could be cured by recommencement of the proceedings by a fresh application:

a. Georgia can never cure the fact that it first sought to resolve its conflict by recourse to use of force – in flagrant contradiction of the fundamental principles on the peaceful settlement of disputes.

b. Georgia cannot now cure its failure to crystallise a dispute within the specific meaning of Articles 11-12 and 22 of CERD (it has in any event not revealed any intention of doing so).

c. Even if the existence of a dispute could be established (it cannot), it would also be for Georgia to establish that the dispute fell within the scope *ratione materiae* of CERD. This also Georgia cannot do, as the real dispute concerns not racial discrimination but a conflict, between Georgia on the one hand and Abkhazia and South Ossetia on the other, in relation to the legal status of Abkhazia and South Ossetia, a conflict that has on occasion erupted into armed conflict.

3.79 Finally, insofar as there is a dispute (*quod non*), then this is not a dispute as to the interpretation or application of CERD. The real dispute is as identified in Chapter II above. Insofar as there is a dispute between Georgia and Russia, this is the dispute arising out of Georgia's unlawful use of force on 7 August 2008, born out of the allegations that Georgia has made as to the "annexation" of its territory. Annexation is not a matter that falls within CERD.

CHAPTER IV

SECOND PRELIMINARY OBJECTION:

THE PROCEDURAL CONDITIONS OF ARTICLE 22 OF CERD ARE NOT FULFILLED

4.1 Georgia invokes Article 22 of the 1965 Convention as the only basis for the jurisdiction of the Court in the present case[171]. According to that provision:

> "Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement."

4.2 The pre-conditions to jurisdiction established in this provision must not be taken lightly. This provision represents a careful compromise reached during the negotiation of the Convention between the proponents of an automatic jurisdiction of the Court and those for whom the monitoring mechanism created by the Convention itself was to play the predominant role[172]. One of the great merits of this mechanism is that it guarantees to a State Party accused by another State Party of racial discrimination within the meaning of the 1965 Convention a possibility first to discuss and clarify the matter[173] and then to benefit from a debate under the auspices of the Committee on the Elimination of Racial Discrimination (CERD Committee), followed by a conciliation procedure[174]. This complex procedure is subject to a time-frame fixed by the Convention,

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[171] Application, para. 18; GM, p.293, para. 8.2.

[172] See *infra*, paras. 4.46-4.50.

[173] Article 11(1) of the Convention.

[174] See Articles 12 and 13. A more detailed account of this procedure is given below under para. 4.44.

which is flexible enough to offer ample opportunities for an amicable settlement. In bypassing this carefully balanced mechanism and directly seising the ICJ, Georgia has shown contempt for dispute resolution via diplomacy and the possibility of finding a solution through the mechanism created by CERD and has also misinterpreted the letter and the spirit of the Convention.

4.3 As the Court has explained in some detail in several recent cases, the question of whether the conditions set forth in a compromissory clause under which a State has consented to the Court's jurisdiction are fulfilled must be seen as an issue of jurisdiction, and not as a problem of admissibility:

> "48. The Court first notes that in determining the scope of the consent expressed by one of the parties, the Court pronounces on its jurisdiction and not on the admissibility of the application. The Court confirmed, in the case concerning *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda)*, that "its jurisdiction is based on the consent of the parties and is confined to the extent accepted by them" (*ICJ Reports 2006*, p.39, para. 88), and further, that:
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> "the conditions to which such consent is subject must be regarded as constituting the limits thereon... The examination of such conditions relates to its jurisdiction and not to the admissibility of the application" *(ibid.)*.
>
> This remains true, whether the consent at issue has been expressed through a compromissory clause inserted in an international agreement, as was contended to be the case in *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda)*, or through "two separate and successive acts" (*Corfu Channel (United Kingdom* v. *Albania), Preliminary Objection, Judgment, 1948, ICJ Reports 1947-1948*, p.28), as is the case here." [175]

[175] I.C.J., Judgment, 4 June 2008, *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, para. 48. See also: I.C.J., Judgment, 18 November 2008, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Preliminary Objections*, para. 66, and the case-law cited in the ICJ Judgment of 3 February 2006, *Jurisdiction of the Court and Admissibility of the Application, Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Rep*. 2006, p.39, para. 88.

4.4 In the present case, independently of the various grounds discussed in the previous Chapter, it is apparent that the pre-conditions to the jurisdiction of the Court established by this Article are not fulfilled because:

a. Article 22 of CERD conditions the jurisdiction of the Court on previous attempts to settle the dispute through negotiations and the procedures provided for in the Convention (Section I); and

b. those conditions are not fulfilled since the Parties had not conducted any negotiations on the dispute alleged by Georgia, nor has Georgia used the procedures provided for by the Convention (Section II).

Section I. Jurisdiction of the Court conditional on previous attempts to settle the dispute through negotiations and the procedures provided for by the Convention

4.5 The two preconditions provided for in Article 22 of the 1965 Convention – the failure of negotiations and of the use of the procedures expressly provided for in the Convention – have two central features:

a. they are prerequisites to the seisin of the Court, in that the Court has no jurisdiction if they have not been fulfilled; and

b. they are cumulative, in that both means of settlement must have proved unsuccessful before recourse may be had to the ICJ.

A. THE CONDITIONS PROVIDED FOR IN ARTICLE 22 OF CERD ARE PRECONDITIONS TO THE SEISIN OF THE COURT

4.6 As the Court recalled in its Judgment of 3 February 2006,

> "its jurisdiction is based on the consent of the parties and is confined to the extent accepted by them …. When that consent is expressed in a compromissory clause in an international agreement, *any conditions to which such consent is subject must be regarded as constituting the limits thereon*."[176]

Since in the present case these conditions are not fulfilled, the Court cannot but declare that it lacks jurisdiction. From this point of view, the title of Chapter VIII of the Georgian Memorial ("*Jurisdiction and Procedural Requirements*") and the division between the two sections (section I: "*Jurisdiction*", section II: "*Procedural Requirements for the Submission of the Dispute to the Court*") are misleading, since they imply that the conditions set out in Article 22 are not related to the Court's jurisdiction. On the contrary, these are fundamental parameters which must be assessed by the Court before being able to examine the substance of the case.

1. The duty to try to settle the dispute before seising the Court

4.7 The obligation to attempt to settle the dispute[177] through negotiations is not merely formalistic; rather, it expresses one of the *sine qua non* conditions to

[176] *Armed Activities on the Territory of the Congo (New Application: 2002), Jurisdiction of the Court and Admissibility of the Application, (Democratic Republic of the Congo v. Rwanda), Rep.* 2006, p.39, para. 88 – emphasis added; see also: 4 June 2008, *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, para. 48, quoted above, at para. 4.3.

[177] This of course assumes the existence of a dispute. The discussion of the procedural conditions in Article 22 in this Chapter by no means implies that the Russian Federation

which the States Parties to CERD subordinate their acceptance of the compromissory clause. And, in the case of Russia, the withdrawal of its former reservation to Article 22 could only have been made in view of the wording of that provision.

4.8 According to Georgia, "under Article 22 of the 1965 Convention, there is no affirmative obligation for the Parties to have attempted to resolve the dispute through negotiations (or through the procedures established by the Convention). All that is required is that, as a matter of fact, the dispute has not been so resolved"[178]. This is an untenable interpretation in view of the text, the context, as well as the *travaux préparatoires* of that provision. This is also confirmed by a comparison with other clauses of the same character in other international conventions. By applying the rules of interpretation reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, the Russian Federation will demonstrate that Article 22 of the CERD imposes not one, but two further positive obligations on the Parties before they can validly seise the Court.

a) The textual interpretation

4.9 In the expression "which is not settled", the present tense does not describe a state of fact, but requires that a previous attempt to settle the dispute has been made *bona fide*. This is all the more obvious in the French version, "*qui n'aura pas été réglée*"; here, the *futur antérieur* [179] expresses that a

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recognizes the existence of a dispute between itself and Georgia. It does not, as Chapter III (above) has explained.

[178] GM, p.304, para. 8. 27.

[179] Whose English equivalent is the future perfect – *"will not have been setlled*" – a grammatical form rather rare. The same can be said for the Spanish text: "Toda controversia (...) que no se resuelva mediante negociaciones o mediante los procedimientos que se establecen expresamente en ella, será sometida a la decisión de la Corte Internacional de

previous action (*i.e.* an attempt to settle the dispute) must have taken place before another future step (*i.e.* the seisin of the Court). This is the only possible common sense interpretation of Article 22 confirmed by the textual analysis of other authentic texts of the Convention.

4.10 For its part, the Russian version reads: "*kotoryy ne razreshen putem peregovorov ili procedur*" ("который не разрешен путем переговоров или процедур"). Both the words *ne razreshen* (a past passive participle corresponding to the verb "to settle", indicating an action which has been carried out on the noun to which it refers) and the word *putem* (literally "by the way of", a direct equivalent of "*par voie de*") indicate a process of settlement of a dispute rather than the pure status of a dispute as a pending one.

b) Identifying an effet utile *for the phrase"which is not settled by negotiation or by the procedures expressly provided for in this Convention"*

4.11 Georgia's interpretation of the phrase "which is not settled" renders it tautological and meaningless: if a dispute is referred to the International Court of Justice, it inevitably means that the dispute in question has not otherwise been resolved. Georgia's interpretation would be to state the obvious, and leave a key phrase without any "*effet utile*". In the *Free Zones of Upper Savoy and the District of Gex* case, the PCIJ already applied the principle of the effectiveness of interpretation (*ut res magis valeat quam pereat*): "[I]n case of doubt, the clauses of a special agreement by which a dispute is refered to the Court, must, if it does not involve doing violence to their terms, be construed in a manner enabling the clauses themselves to have appropriate effects"[180]. What would be

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Justicia (...)."; the Spanish language has a grammatical equivalent to the French *futur antérieur – subjuntivo pretérito perfecto* – but, as in English, it is rarely used.

[180] P.C.I.J., Order of 19 August 1929, *Free Zones of Upper Savoy and the District of Gex*, Series A, N° 22, p.13. See also, I.C.J., Judgment of 9 April 1949, *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania), Rep.* 1949, p.24; I.C.J., Judgment of 3 February 1994, *Territorial Dispute (Libyan Arab Jamahiriya/Chad*), *Rep.* 1994, p.23,

the purpose of introducing the phrase "by negotiation or by the procedures expressly provided for in this Convention" in Article 22 if no logical and legal consequence is to be derived from it?

4.12 Contrary to Georgia's assertions, the fulfillment of the conditions contained in Article 22 is not simply a question of fact[181]. That would be tantamount to reducing these conditions to the question of the existence of a dispute (which is a separate issue[182]). The word "dispute" in Article 22 does not stand alone; it is followed, and therefore qualified, by the phrase "which is not settled by negotiation or by the procedures expressly provided for in this Convention". This phrase must *add* something to the word "dispute": the only disputes which fall within the ambit of the clause are those which cannot be settled by the means indicated therein.[183] Consequently, the right to have recourse to the Court, and reciprocally the competence of the Court to entertain the claim, depend on attempts to satisfy this condition and cannot arise unless and until such attempts have been made and have failed. Article 22 imposes on the Parties at least an "obligation of behaviour" (*obligation de comportement*),

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ICSID, Decision of 27 June1990, *Asian Agricultural Products Ltd c. Sri Lanka* (ARB/87/3), para. 40 (rule E) or Decision of 12 October 2005, *Noble Ventures, Inc. c. Roumanie* (ARB/01/11), para. 50. See also the definition given by C. Calvo as early as 1885: "*Si l'ambiguïté ou l'obscurité, au lieu de porter seulement sur les mots, s'étend à une ou à plusieurs clauses, il faut interpréter ces clauses dans le sens qui [peut] leur faire sortir leur effet utile, et en faveur de celui au profit de qui l'obligation a été souscrite*" C. Calvo, *Dictionnaire manuel de diplomatie et de droit international public et privé*, 1885, republished by The Lawbook Exchange Ltd, New Jersey, 2009, p.223.

[181] "Whether the condition is satisfied is a simple question of fact: has the dispute been 'settled by negotiation or by the procedures expressly provided for in this Convention'?" (GM p.303, para. 8. 26); see also p.304, para. 8. 27.

[182] See Chapter III above.

[183] On the conventional characterization of the category of disputes that fall within the scope of a compromissory clause, see *mutatis mutandis* I.C.J., Judgment, 2 December 1963, *Northern Cameroons (Cameroon v. United Kingdom), Preliminary Objections*, Separate Opinion of Judge Sir Percy Spender, *Rep.* 1963, pp. 88-90. See also the Opinion of Judge Sir Gerald Fitzmaurice, p.119.

the fulfillment of which is apt for judicial review. Article 22 describes the actions required from the Parties before they can lodge an Application before the Court: negotiation and recourse to the conciliation mechanism provided by the Convention. Any other interpretation would lead to a denial of the plain meaning as well as of the *effet utile* of the clause.

4.13 Moreover, the interpretation described above is also in line with the case law of the Court, according to which "before a dispute can be made the subject of an action at law, its subject matter should have been clearly defined by means of diplomatic negotiations"[184]. For its part, the interpretation alleged by Georgia would be tantamount to imposing on the Court the heavy burden of determining a dispute the contours of which the Parties have not determined[185].

c) The travaux préparatoires

4.14 The *travaux préparatoires* of the Convention reveal the difficulty in introducing an effective compromissory clause and confirm the interpretation resulting from a textual approach.

4.15 Within the United Nations, the drafting history of the implementation clauses in the 1965 Convention involved three different bodies (the Sub-Commission on Prevention of Discrimination and Protection of Minorities, the Commission on Human Rights, and the Third Committee of the General Assembly).

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[184] P.C.I.J., Judgment of 30 August 1924, *Mavrommatis Palestine Concessions, Objection to the Jurisdiction of the Court*, Series A, N° 2, p.15. See also I.C.J., Judgment of 26 November 1957, *Right of Passage over Indian Territory (Portugal v. India), Preliminary Objections, Rep.* 1957, p.148-149.

[185] See above, Chapter III, para. 3.64

4.16 The introduction in the Convention itself of articles on its implemention is much due to the insistence of Mr. Inglés (the Philippinean Expert in the Sub-Commission)[186]. Due to lack of time, the Sub-Commission could not discuss at length the articles on measures for implementation; however, Mr. Inglés' preliminary draft was transmitted to the Commission for consideration.

4.17 The Members of the Commission on Human Rights recognized that further discussion was needed on the implementation measures[187]; but, again due to lack of time, the Commission decided to include Mr. Inglés' preliminary text in the draft and transmitted the text as it stood to the Third Committee of the General Assembly, specifying that the implementation part needed further discussion and that no vote had been taken on it by the Commission[188]. The Third Committee of the General Assembly discussed the preliminary draft and adopted it with some modifications, mostly reflecting the amendments made by the Philippines and Ghana.

4.18 The Third Committee was confronted with a number of proposals and amendments that purported either to provide for the Court's jurisdiction in a separate Protocol or to introduce a cautiously drafted clause into the Convention itself[189]. The latter formula was finally accepted, but the drafters were once again faced with two possibilities:

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[186] U.N. Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Summary record of the 427th Meeting, U.N. Doc. E/CN.4/Sub.2/SR.427 (12 February 1964), pp. 11-17. Annex 6.

[187] U.N. Economic and Social Council, Commission on Human Rights, Summary record of the 810th Meeting, U.N. Doc. E/CN.4/SR.810 (15 May 1964), p.9. Annex 8.

[188] U.N. General Assembly, 20th session, Official Records, Annexes, Report of the Third Committee, U.N. Doc. A/6181 (18 December 1965). Annex 23. See also U.N. General Assembly, 20th session, Official Records, Third Committee, Record of the 1344th meeting, U.N. Doc. A/C.3/SR.1344 (16 November 1965), p.315, para. 23. Annex 10.

[189] U.N. General Assembly, 20th session, Third Committee, Poland: amendments to document A/C.3/L.1221, U.N. Doc. A/C.3/L.1272 (1 November 1965). Annex 22. See also, *e.g.*, the

- seisin of the Court through the common consent of the Parties to the dispute, a possibility which, as some members of the Third Committee explained, already existed in international law under the form of the *compromis* and would have rendered the clause in the Convention superfluous:

> "Mr. MacDonald (Canada) referring to the suggested final clause VIII, said that he opposed the sixth Polish amendment (A/C.3/L.1272), since it would have the effect of nullifying the entire clause on the settlement of disputes. If all parties to a dispute had to consent to its submission to the International Court of Justice, there was no need for a special provision on the subject, since any inter-State dispute could be brought before the Court with the common consent of the parties"[190];

- or the introduction of compromissory clause that would allow for unilateral seisin. Several delegations considered this necessary. As the discussions in the Third Committee reveal, the supporters of the compromissory clause nonetheless underlined that recourse to the Court was conditioned by previous attempts to settle the dispute. This certainly facilitated the acceptance of the compromissory clause:

> "Mr. MacDonald (Canada): Any party to a dispute over the interpretation or application of the Convention should be able to bring the matter before the Court, for the Convention was being

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statement by the Polish representative, M. Resich, U.N. General Assembly, 20th session, Official Records, Third Committee, Record of the 1347th meeting, U.N. Doc. A/C.3/SR.1347 (18 November 1965), p.341, paras. 68-69 (Annex 13). Ghana, which otherwise was one of the most devoted sponsors of the implementation measures, agreed to forego the possibility of unilateral seisin, in order to avoid relegating all the implementation measures to a separate protocol. See U.N. General Assembly, 20th session, Official Records, Annexes, Third Committee, Ghana: revised amendments to document A/C.3/L.1221, U.N. Doc. A/C.3./L.1274/REV.1 (12 November 1965) (Annex 9).

[190] U.N. General Assembly, 20th session, Official Records, Third Committee, Record of the 1367th meeting, U.N. Doc. A/C.3/SR.1367 (7 December 1965), p.453, para. 24. Annex 19.

> prepared under United Nations auspices and the Court was the Organization's principal juridical organ. Moreover, clause VIII allowed parties to a dispute considerable latitude. They could resort to negotiation and other modes of settlement and no time-limit was imposed for settlement. A controversy could thus be protracted almost indefinitely before recourse was had to the Court. In view of the flexibility of the article's terms, he did not see why the Polish delegation should want, in effect, to eliminate reference to the Court under the Convention."[191]

4.19 The possibility of unilateral seisin was eventually accepted, but the discussions in the Third Committee show that this was possible only by a multiplication of safeguards designed to address the concerns that various States had in submitting themselves to the Court's jurisdiction:

> "Mr. Lamptey (Ghana): (...) the idea of recourse to the International Court of Justice (...) gave rise to many reservations"[192]

Thus, the compromissory clause was on occasion seen as an obstacle to the ratification of the Convention:

> Mr Kornienko (Ukrainian Soviet Socialist Republic): "[A] sovereign State could not be subject to the Court's jurisdiction except by its own consent. (...) The Committee should not now take a backward step and create fresh obstacles for prospective signatories."[193]

The approach that finally allowed for the introduction of unilateral seisin was to ensure the existence of a whole process of settling the dispute before recourse was to be made to the Court:

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[191] *Ibid.*, p.453, para. 25.

[192] U.N. General Assembly, 20th session, Official Records, Third Committee, Record of the 1354 meeting, U.N. Doc. A/C.3/SR.1354 (25 November 1965), p.379, para. 54. Annex 16.

[193] U.N. General Assembly, 20th session, Official Records, Third Committee, Record of the 1367th meeting, U.N. Doc. A/C.3/SR.1367 (7 December 1965), p.453, para. 27. Annex 19.

> As Mr. Cochaux (Belgium) explained: "As others have noted, clause VIII provided for various modes of settlement offering ample opportunity for agreement *before the Court was resorted to*"[194].

d) The ICJ's interpretation of compromissory clauses providing for procedural requirements

4.20 A table appended to the present Chapter (Table 1, *Compromissory clauses providing for preconditions to the Court's seisin*)[195] compares the various formulas which can be found in a number of treaties providing for the jurisdiction of the ICJ, in relation to various procedural requirements.

4.21 A study of Table 1 leads to the inescapable conclusion that, whenever a compromissory clause establishes prerequisites for the Court's seisin, the Court has constantly required their fulfillment, regardless of the drafting variations.

4.22 The obligation to try to settle the dispute before the Court's seisin has been expressed in different ways:

- "dispute... if it cannot be settled";[196]
- "dispute... which cannot be settled";[197]

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[194] *Ibid.*, p.454, para. 40 – emphasis added.

[195] See *infra*, Table 1, at the end of the Chapter, p.173.

[196] PCIJ, Judgment, 30 August 1924, *Mavrommatis Palestine Concessions Case (Jurisdiction)*, P.C.I.J., Series A, No. 2 (Article 26 of the Mandate for Palestine); ICJ, Judgment, 21 December 1962, *South West African Cases (Liberia and Ethiopia v. South Africa), Preliminary Objections* (Article 7 of the Mandate for South West Africa); ICJ, Judgment, 2 December 1963, *Northern Cameroons (Cameroon v. United Kingdom), Preliminary Objections* (Article 19 of the Trusteeship Agreement for the Territory of the Cameroons under British Administration).

[197] ICJ, Judgment, 27 February 1998, *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* (Article 14, paragraph 1, of the Montreal Convention); ICJ, Judgment, 3 February 2006, *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda),*

- "dispute... which is not settled";[198]

- "dispute... not satisfactorily adjusted by diplomacy";[199]

- "dispute which the High Contracting Parties shall not satisfactorily adjust by diplomacy". [200]

4.23 In all these cases, where the compromissory clauses entailed an obligation on the parties to try to settle the dispute, the Court considered that it had to verify, *in casu*, the fulfilment of this obligation. The different formulations of the compromissory clause sometimes left the parties some margin for manœuvre ("dispute... not satisfactorily adjusted by diplomacy") and the Court has appeared to take this into account[201]. But when the clauses left no such margin,

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Jurisdiction of the Court and Admissibility of the Application (in relation to article Article 14, paragraph 1, of the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation) ; ICJ, Order, 28 May 2009, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal) Provisional Measures* (Article 30, paragraph 1 of the Convention against Torture).

[198] ICJ, Advisory Opinion, 26 April 1988, *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947* (Section 21, paragraph (a) of the Headquarters Agreement between the United Nations and the United States); ICJ, Judgment, 3 February 2006, *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda) Jurisdiction of the Court and Admissibility of the Application* (Article 29, paragraph 1, of the Convention on Discrimination against Women and Article 75 of the WHO Constitution).

[199] ICJ, Judgment, 24 May 1980, *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, (Article XXI, paragraph 2, of the Treaty of Amity, Economic Relations, and Consular Rights of 1955 between the United States of America and Iran); ICJ, Judgment, 26 November 1984, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction of the Court and Admissibility of the Application* (Article XXIV, paragraph 2, of the Treaty of Friendship, Commerce and Navigation between the United States of America and Nicaragua,); ICJ, Judgment, 12 December 1996, *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection* (Article XXI, paragraph 2, of the Treaty of Amity, Economic Relations, and Consular Rights of 1955 between the United States of America and Iran).

[200] ICJ, Judgment, 20 July 1989, *Elettronica Sicula S. p.A. (ELSI) (United States of America v. Italy)* (Article XXVI of the Treaty of Friendship, Commerce and Navigation of 2 June 1948 between Italy and the United States).

[201] See *infra*, paras. 4.29-4.35.

the Court has considered it necessary to strictly verify that real attempts had actually taken place or met with a categorical rejection from the other side. As Table 1 shows through an analysis of the Court's decisions, this conclusion is reached regardless of whether the clause was formulated as "cannot be settled" or "is not settled".

4.24 As for the methods open to the Parties for settling the dispute, these differ and depend upon each treaty. As Sir Gerald Fitzmaurice aptly recalled in his Separate Opinion in the *Northern Cameroons* case:

> "Article 19 [of the Trusteeship Agreement for the Territory of the Cameroons under British Administration between the United Kingdom and the French Republic, approved by the General Assembly on 13 December 1946[202]] is an absolutely common-form jurisdictional clause such as appears, or has appeared, in scores, not to say hundreds, of treaties and other international agreements. Its meaning is perfectly well understood by international lawyers the world over. What it contemplates in the present connection is a settlement or attempted settlement directly *between the parties*- by negotiation or other means. By 'other means' is meant such things as conciliation, arbitration, fact-finding enquiries, and so on. Under Article 19 of the Trust Agreement, *an attempt at settlement by negotiation, or by one or other of these means, would have had to precede any proposal for a reference to the International Court, before any obligation to have recourse to the Court could arise*. It is quite clear that no such attempt at settlement, at least by any normally envisaged 'other means', was made in the present case; and here it may be useful to recall that in a common-form jurisdictional clause such as Article 19, settlement by 'other means' denotes a settlement by means other than negotiation, but nevertheless by means such as the parties have jointly *agreed* to resort to or employ. It does not include means *imposed* by the one party on the other, or on both of them by an outside agency. The whole point of the ultimate reference to the Court (to which the parties *have* duly agreed under the jurisdictional clause) is that they have not

[202] Text of Article 19: "If any dispute whatever should arise between the Administering Authority and another Member of the United Nations relating to the interpretation or application of the provisions of this Agreement, such dispute, if it cannot be settled by negotiation or other means, shall be submitted to the International Court of Justice, provided for in Chapter XIV of the United Nations Charter."

> been able to settle the dispute *themselves,* by negotiation or agreed other means"[203].

4.25 Thus, in the *Armed activities (2002)* case, the Democratic Republic of the Congo sought to found the jurisdiction of the Court on Article 75 of the WHO Constitution, which provides:

> "Any question or dispute concerning the interpretation or application of this Constitution which is not settled by negotiation or by the Health Assembly shall be referred to the International Court of Justice in conformity with the Statute of the Court, unless the parties concerned agree on another mode of settlement."

In respect to this article, the Court found that none of the preconditions to its seisin were met:

> "The Article [75 of the WHO Constitution] requires that a question or dispute must specifically concern the interpretation or application of the Constitution. In the opinion of the Court, the DRC has not shown that there was a question concerning the interpretation or application of the WHO Constitution on which itself and Rwanda had opposing views, or that it had a dispute with that State in regard to this matter.
>
> The Court further notes that, even if the DRC had demonstrated the existence of a question or dispute falling within the scope of Article 75 of the WHO Constitution, it has in any event not proved that the other preconditions for seisin of the Court established by that provision have been satisfied, namely that it attempted to settle the question or dispute by negotiation with Rwanda or that the World Health Assembly had been unable to settle it"[204].

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[203] I.C.J., Judgment, 2 December 1963, *Northern Cameroons (Cameroon v. United Kingdom), Preliminary Objections,* Separate Opinion of Judge Sir Gerald Fitzmaurice, pp. 122-123. Emphasis added.

[204] I.C.J., Judgment of 3 February 2006, *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction of the Court and Admissibility of the Application, Rep.* 2006, p.43, paras 99-100.

Nothing distinguishes the present case from *Armed Activities* in this respect. It is, in particular, worth noting that Article 75 of the WHO Constitution is worded exactly as Article 22 of CERD so far as concerns the precondition to the seisin of the Court ("which is not settled by negotiation…").

4.26 It follows that, according to an interpretation made in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose, Article 22 of CERD must be interpreted as imposing upon a Party complaining of the misapplication of the Convention the obligation to endeavour to settle the dispute by negotiation or by the procedures expressly provided for in the Convention prior to referring it to the ICJ for decision. This interpretation is in keeping with the Court's interpretation of similar provisions and with the *travaux préparatoires* of Article 22 of CERD.

2. The Means to Settle the Dispute (as established by Article. 22 of CERD)

a) Negotiations

4.27 Negotiations provide the usual means of settling disputes in international law and it must be noted that even in the absence of a formal requirement for prior negotiations in a compromissory clause, the Court has considered the existence of negotiations prior to the submission of the dispute[205].

4.28 The fundamental importance of the obligation to negotiate, and its role in the peaceful settlement of disputes, has been underlined time and again by the Court:

[205] The Judges observed that negotiations may indicate the existence of a dispute, and could facilitate a determination of the object of that dispute. See above, para. 3.64. See also, above, para. 4.24, Separate Opinion of Judge Sir Gerald Fitzmaurice.

> "[T]he Court would recall not only that the obligation to negotiate which the Parties assumed by Article 1, paragraph 2, of the Special Agreements arises out of the Truman Proclamation, which, for the reasons given in paragraph 47, must be considered as having propounded the rules of law in this field, but also that this obligation merely constitutes a special application of a principle which underlies all international relations, and which is moreover recognized in Article 33 of the Charter of the United Nations as one of the methods for the peaceful settlement of international disputes. There is no need to insist upon the fundamental character of this method of settlement, except to point out that it is emphasized by the observable fact that judicial or arbitral settlement is not universally accepted"[206].

4. 29 Negotiations are all the more important where required in a compromissory clause, and hence are correctly construed as pre-conditions to jurisdiction. When Parties to a dispute are bound by a treaty provision to that effect, it is imperative that they go through an agreed negotiation phase before seising the Court. The principle of *pacta sunt servanda* is in play. Correlatively, when a court or tribunal is seised under such a compromissory clause, the judges must verify that the condition is effectively fulfilled in order to preserve the fundamental principle of consent to jurisdiction.

4.29 It is true that in *Nicaragua*, the Court was of the view that:

> "it does not necessarily follow that, because a State has not expressly referred in negotiations with another State to a particular treaty as having been violated by conduct of that other State, it is debarred from invoking a compromissory clause in that treaty. The United States was well aware that Nicaragua alleged that its conduct was a breach of international obligations before the present case was instituted; and it is now aware that specific articles of the 1956 Treaty are alleged to have been violated. It would make no sense to require Nicaragua now to institute fresh proceedings based on the Treaty, which it would be fully entitled to do. As the Permanent Court observed, 'the Court cannot allow itself to be hampered by a mere defect of form, the removal of which depends solely

[206] I.C.J., Judgment, 20 February 1969, *North Sea Continental Shelf (Federal Republic of Germany/Denmark)*, *Rep.* 1969, pp. 47, para. 86.

> on the party concerned (*Certain German Interests in Polish Upper Silesia*, Jurisdiction, Judgment, No. 6, 1925, P.C.I.J., Series A, No. 6, p.14)."[207]

4.30 But the present case is quite different[208].

4.31 *Firstly*, the compromissory clause itself was differently worded and referred not to "disputes not settled by negotiation", but to disputes "not satisfactorily *adjusted* by *diplomacy*", [209] an expression which, as noted by Sir Robert Jennings, is "not an exigeant requirement"[210]. The use of words such as "adjusted" and, even more, "satisfactorily" supports this view and shows that that provision did not require the Court to assess an objective reality, but rather to inquire into the subjective opinion of the Parties. In this respect, the situation was comparable to the jurisdictional requirements of the Pact of Bogotá[211], as

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[207] I.C.J., Judgment, 26 November 1984, *Military and Paramilitary Activities in and against Nicaragua*, *Jurisdiction and Admissibility*, *Rep.* 1984, pp. 428-429, para. 83. On formalistic defaults see also: I.C.J., Judgment, 18 November 2008, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Preliminary Objections*, para. 82. One can see that the formalistic default approach was here applied in connection with a *ratione temporis* exception and not to the prerequisites of a compromissory clause.

[208] As explained above (Chapter III, para. 3.33 (b)), Russia was *not* (and could not have been) *aware* that Georgia considered it to be in breach of obligations relating to racial discrimination.

[209] The full text of Article XXIV, paragraph 2, of the Treaty of Friendship, Commerce and Navigation between the United States of America and Nicaragua, signed at Managua on 21 January 1956 reads as follows: "Any dispute between the Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the Parties agree to settlement by some other pacific means".

[210] I.C.J., Judgment, 26 Nov. 1984, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Jurisdiction and Admissibility*, Separate Opinion of Judge Sir Robert Jennings, *Rep.* 1984, p.556. (quoted in GM, pp. 303-304, para. 8. 26).

[211] Article II of the Pact of Bogotá: "The High Contracting Parties recognize the obligation to settle international controversies by regional procedures before referring them to the Security Council of the United Nations.

analyzed by the Court in the case of *Border and Transborder Armed Actions* between Nicaragua and Honduras. In that case, the Court observed

> "that that jurisprudence concerns cases in which the applicable text referred to the possibility of such settlement; Article II however refers to the opinion of the parties as to such possibility. The Court therefore does not have to make an objective assessment of such possibility, but to consider what is the opinion of the Parties thereon".[212]

In *Nicaragua*, the mere fact that one of the Parties had seised the Court was a sufficient proof that it was not satisfied with the result obtained from diplomacy, and, therefore, that the dispute was "not satisfactorily adjusted". However, as shown in the previous Section, in the present case, Article 22 imposes the requirement that negotiations *have taken place* and have failed.

4.32 *Secondly,* – and even more importantly – the objection made by the United States in *Nicaragua* centred on the fact that Nicaragua had not expressly invoked the violation of the 1956 FCN Treaty during the negotiations with the United States. The United States did not allege that negotiations had not taken place, it limited itself to denouncing the absence of a formal invocation of the Treaty:

Consequently, in the event that a controversy arises between two or more signatory states which, in the opinion of the parties, cannot be settled by direct negotiations through the usual diplomatic channels, the parties bind themselves to use the procedures established in the present Treaty, in the manner and under the conditions provided for in the following articles, or, alternatively, such special procedures as, in their opinion, will permit them to arrive at a solution."

[212] I.C.J., Judgment, 20 December 1988, *Jurisdiction of the Court and Admissibility of the Application*, *Rep.* 1988, p.94, para. 63.

> "[A]ccording to the United States, Nicaragua has never even raised in negotiations with the United States the application or interpretation of the Treaty to any of the factual or legal allegations in its Application."[213]

In the present case, not only has Georgia never invoked CERD in its relations with Russia in the context of the situation in Abkhazia and South Ossetia prior to the filing of its Application, but also, as Chapter III of the present Objections demonstrates[214], the circumstances could not be interpreted as obliging Russia to infer a claim over racial discrimination from the various political disagreements it had had with Georgia over the recent years. As the Court noted in the *Armed Activities (2002)* case:

> "… Article 75 of the WHO Constitution[[215]] … requires that a question or dispute must specifically concern the interpretation or application of the Constitution. In the opinion of the Court, the DRC has not shown that there was a question concerning the interpretation or application of the WHO Constitution on which itself and Rwanda had opposing views, or that it had a dispute with that State in regard to this matter."[216]

Similarly, as demonstrated in Chapter III, and further in Section II of this Chapter, Georgia has not shown that there was a question concerning the interpretation or application of CERD regarding which the Parties had opposing views.

4.33 *Thirdly*, the character of the treaties at stake in *Nicaragua* on the one hand and in the present case on the other hand, is entirely different. In *Nicaragua*, the

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[213] I.C.J., Judgment, 26 Nov. 1984, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility*, p.227, para. 81.

[214] See above, para. 3.33 (b)

[215] See above, para. 4.25.

[216] I.C.J., Judgment, 3 February 2006, *Armed Activities on the Territory of the Congo (New Application: 2002)* (Democratic Republic of the Congo v. Rwanda), *I.C.J. Reports* 2006, p.43, para. 99.

FCN Treaty between the U.S. and Nicaragua mainly established purely synallagmatic obligations, while, in the present case, CERD is a multilateral treaty that establishes objective/integral obligations. The *erga omnes* character of the obligations instituted therein is reflected in the procedures established by the Convention to deal with the inter-State complaints, which involve the other Parties to the Convention. Moreover, the present situation is radically different from *Nicaragua*, where the state of armed conflict between the parties (which was at the heart of Nicaragua's Application) automatically affected the FCN Treaty. It could not have been otherwise since the state of armed conflict is the very negation of friendly relations promoted by this type of treaty.

4.34 Finally, in *Nicaragua*, the 1956 FCN Treaty was a subsidiary basis of jurisdiction only, and the Court had already accepted that it had jurisdiction under the optional clause. The Court was therefore more concerned to discuss whether the acts regarding which its jurisdiction was already established, and the wrongfulness of which could be appreciated under customary international law, could also be qualified in view of the Treaty.

4.35 Besides, as Sir Robert Jennings made clear,

> "the facts in [that] case disclose that Nicaragua brought the subject of the application before the Security Council, where they were met with the United States exercising its veto. The United Nations Organization, not least the Security Council, must now surely be an orthodox forum for diplomacy. It would seem, therefore, that the requirements of Article XXIV are most fully met in this matter."[217]

By contrast, no negotiations have taken place between Russia and Georgia on the subject-matter of the alleged dispute (and the fact that Georgia has proved unable to mention a single occasion when CERD has been invoked in the

[217] I.C.J., Judgment, 26 Nov. 1984, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility*, Separate Opinion of Judge Sir Robert Jennings, *Rep.* 1984, p.556

relations between the Parties is only a sign – but a very revealing sign – that there is no dispute between them on issues of racial discrimination). In other words, the issue here is not only that Georgia has not expressly invoked CERD, but that this silence is a confirmation that there is no dispute that concerns racial discrimination between the Parties.

4.36 Moreover, although it is certainly correct that an obligation to negotiate (*pactum de negociando*) does not imply an obligation to agree (*pactum de contrahendo*), nevertheless the former does imply that negotiations have effectively taken place. It is only when (and if) these have failed that the parties may start the next phase of the settlement process. Absent initiation of negotiations, the question of their outcome (and of their failure) does not even arise.

4.37 The case-law of the Court is rich as to the criteria to be applied to evaluate whether or not negotiations between parties to a dispute have reached a deadlock. The Judgments do not focus on the existence of a negotiation process, but on how long this should have lasted and how real the efforts were to come to a negotiated solution of the dispute before the Court could be seised. Whatever form they may take, substantially, negotiations are an exchange of points of view on law and facts, of mutual compromises in order to reach an agreement:

> "As the Permanent Court of International Justice said in its Order of 19 August 1929 in the case of the *Free Zones of Upper Savoy and the District of Gex*, the judicial settlement of international disputes "is simply an alternative to the direct and friendly settlement of such disputes between the parties" (P.C.I.J., *Series A*, No. 22, at p.13). Defining the content of the obligation to negotiate, the Permanent Court, in its Advisory Opinion in the case of *Railway Traffic between Lithuania and Poland*, said that the obligation was "not only to enter into negotiations but also to pursue them as far as possible with a view to concluding agreements", even if an obligation to negotiate did not imply an obligation

> to reach agreement (P.C.I.J., *Series A/B*, No. 42, 1931, at p.116). In the present case, it needs to be observed that whatever the details of the negotiations carried on in 1965 and 1966, they failed of their purpose because the Kingdoms of Denmark and the Netherlands, convinced that the equidistance principle alone was applicable, in consequence of a rule binding upon the Federal Republic, saw no reason to depart from that rule; and equally, given the geographical considerations stated in the last sentence of paragraph 7 above, the Federal Republic could not accept the situation resulting from the application of that rule. So far therefore the negotiations have not satisfied the conditions indicated in paragraph 85 (a), but fresh negotiations are to take place on the basis of the present Judgment."[218]

4.38 In all the following cases, the Court concluded that the applicant initiated a negotiation process that resulted in a peremptory *non possumus* or *non volumus*, which led it to conclude that any negotiation would be fruitless[219]:

- in *Mavrommatis*, the discussions had commenced (by exchange, although brief, of notes between the two Governments on the issue brought before the PCIJ); moreover, these discussions were the continuation of previous negotiations between Mr. Mavrommatis and the British Government on the very same subject matter as the one subsequently submitted by the Greek Government to the Court[220].

- in the *South West Africa* cases, the negotiations had reached a deadlock and expectations of success were nil[221]; the Court based its appreciation on

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[218] I.C.J., Judgment, 20 February 1969, *North Sea Continental Shelf (Federal Republic of Germany/Denmark), Rep.* 1969, pp. 47-48, para. 87.

[219] See also Table 1, at the end of this Chapter, p.173.

[220] P.C.I.J., Judgment, 30 August 1924, *Mavrommatis Palestine Concessions Case (Jurisdiction)*, P.C.I.J., Series A, No. 2, p.13

[221] I.C.J., Judgment, 21 December 1962, *South West African Cases (Liberia and Ethiopia v. South Africa), Rep.* 1962, pp. 344-346.

several letters sent by the Permanent Representative of the Union of South Africa to the Chairman of the Committee on South West Africa, in which it was stated that South Africa considers "doubtful whether there is any hope that new negotiations within the scope of your Committee's terms of reference will lead to any positive results"[222].

- in the case relating to the *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, bilateral contacts had taken place between the parties to the dispute, expressly referring to the compromissory clause[223]; during these contacts, the United States had made clear that it could not and would not participate in the arbitration procedure that was the very subject matter of the dispute before the Court. The Court therefore considered that "taking into account the United States attitude, the Secretary-General has in the circumstances exhausted such possibilities of negotiation as were open to him"[224].

4.39 In the same vein, in the *Northern Cameroons* case, Sir Gerald Fitzmaurice defined the meaning of "negotiation" in international law and diplomacy and concluded that "disputation" and "negotiation" are two distinct concepts:

> "Was there any attempt at settlement by 'negotiation', and what does negotiation mean? It does not, in my opinion, mean a couple of States arguing with each other across the floor of an international assembly, or circulating statements of their complaints or contentions to its member States. That is disputation, not negotiation; and in the Joint Opinion of Judge Sir Percy Spender and myself in the *South West Africa* case, we

[222] I.C.J., Judgment, 21 December 1962, *South West African Cases (Liberia and Ethiopia v. South Africa), Preliminary Objections, Rep,* p.345.

[223] I.C.J., Advisory Opinion, 26 April 1988, *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Rep.* 1988, pp. 32-33, paras. 51-55.

[224] *Ibid., Rep.* 1988, p.33, para. 54.

> gave reasons for not regarding this kind of interchange as constituting a negotiation within the contemplation of such a provision as Article 19 of the Trust Agreement.
>
> It was there equally pointed out that, even if it were possible to regard such interchanges as constituting negotiation according to the generally received concept of that term, it would still not be right to hold that a dispute 'cannot' be settled by negotiation, when the most obvious means of attempting to do this, namely by direct discussions between the parties, had not even been tried since it could not be assumed that these would necessarily fail because there had been no success in what was an entirely different, and certainly not more propitious, milieu."[225]

4.40 The International Tribunal for the Law of the Sea has had the occasion to underline that diplomatic notes on a precise subject matter, precisely stating the claims of the Parties, do amount to negotiation:

> "39. Considering that Malaysia states that, on several occasions prior to the institution of proceedings under Annex VII to the Convention by Malaysia on 4 July 2003, it had in diplomatic notes informed Singapore of its concerns about Singapore's land reclamation in the Straits of Johor and had requested that a meeting of senior officials of the two countries be held on an urgent basis to discuss these concerns with a view to amicably resolving the dispute;
>
> 40. Considering that Malaysia maintains that Singapore had categorically rejected its claims and had stated that a meeting of senior officials as requested by Malaysia would only be useful if the Government of Malaysia could provide new facts or arguments to prove its contentions"[226].

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[225] I.C.J., Judgment, 2 December 1963, *Northern Cameroons (Cameroon v. United Kingdom), Preliminary Objections, Separate Opinion of Judge Sir Gerald Fitzmaurice, Rep.* 1963, p.123.

[226] ITLOS, Order, 8 October 2003, Provisional Measures, *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore), Reports* 2003, Volume 7, p.19, paras. 39-40. See also: ITLOS, Order of 27 August 1999, Cases Nos. 3 and 4, S*outhern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan), Provisional Measures, Reports* 1999, Volume 3, pp. 294-295, paras. 57-60; ITLOS, Order, 3 December 2001, *MOX Plant (Ireland v. United Kingdom), Provisional Measures, ITLOS Rep.* 2001, p.107, para. 60; Arbitral tribunal constituted pursuant to article 287, and in accordance with Annex VII of the United Nations Convention on the Law of the Sea, Award of 11 April 2006,

On the contrary, in the *Armed Activities (2002)* case, the Court considered that mere protests cannot amount to negotiation:

> "The Court notes that in the present case the DRC made numerous protests against Rwanda's actions in alleged violation of international human rights law, both at the bilateral level through direct contact with Rwanda and at the multilateral level within the framework of international institutions such as the United Nations Security Council and the Commission on Human and Peoples' Rights of the Organization of African Unity. In its Counter-Memorial and at the hearings the DRC presented these protests as proof that 'the DRC has satisfied the preconditions to the seisin of the Court in the compromissory clauses invoked'. Whatever may be the legal characterization of such protests as regards the requirement of the existence of a dispute between the DRC and Rwanda for purposes of Article 29 of the Convention, that Article requires also that any such dispute be the subject of negotiations. The evidence has not satisfied the Court that the DRC in fact sought to commence negotiations in respect of the interpretation or application of the Convention"[227].

4.41 Similarly, in the present case there has been no negotiation, whether direct or indirect, bilateral or multilateral, between the alleged Parties on the subject matter of the alleged dispute. If ever Georgia made an attempt to attract the attention of the international community towards racial discrimination allegedly committed by Russia in Abkhazia and South Ossetia (*quod non*), it would not even qualify as "disputation"[228]: not only has no claim been formulated that Russia could positively oppose, but indeed no international forum and no third State has ever indicated having understood any of Georgia's *démarches* as referring to the alleged dispute now brought before the Court. Indeed the alleged

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Barbados v. The Republic of Trinidad and Tobago, paras. 194-208, available: http://www.pca-cpa.org/upload/files/Final%20Award.pdf.

[227] I.C.J., Judgment of 3 February 2006, *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction of the Court and Admissibility of the Application, Rep.* 2006, pp. 40-41, para. 91.

[228] See above, para. 4.39.

dispute in question could not have been settled by negotiation in the absence of any commencement of negotiation. Nor could these "non-negotiations" have reached a deadlock before even starting.

b) The CERD Mechanism

4.42 Speaking of the CERD mechanism, Russia refers to "the procedures expressly provided for in this Convention" (Article 22 of CERD). The use of the adverb *expressly* reflects the fact that Article 22 insists that these procedures are the method open to the parties for settling the dispute prior to the seisin of the ICJ. As the *Oxford Dictionary* explains, "expressly" means: "In direct or plain terms; clearly, explicitly, definitely", but also "For the express purpose; on purpose" [229]. The French version, *expressément*, has exactly the same meaning[230]. The Russian version confirms the emphasis upon intent: the word "специально" (*specialno*) that corresponds to "expressly" in the English text, is commonly translated as "specially", "especially", or else "deliberately". Since the procedures were expressly, *i.e.* deliberately, provided for in the Convention, to allow a State Party to seise the Court without having tried to use those procedures would go against this understanding.

(i) The applicable rules / The inter-State complaint Procedure as established by the Convention

4.43 While the demand for prior negotiation is quite usual in the international practice of peaceful settlement, recourse to the procedures expressly provided

[229] The *Oxford English Dictionnary*, available: http://dictionary.oed.com/.

[230] As explained by the CNRS Dictionary, *Le Trésor de la Langue Française Informatisé* (TLF), *expressément* means: "1. De façon précise, formelle; en termes exprès, de façon expresse. 2. Avec une intention bien déterminée", available: http://atilf.atilf.fr/dendien/scripts/tlfiv5/advanced. exe?8;s=852343365.

for in the Convention mechanism is more innovative since it introduces a supervision and conciliation procedure as a prerequisite to the judicial settlement. CERD is actually the first universal human rights treaty to provide for an inter-State complaint mechanism (see Articles 11 and 12).

4.44 More precisely, the procedures expressly provided for in the Convention which must be followed before the ICJ can be seised are as follows:

- *first*, a State Party alleging that another State Party does not comply with its obligations under the Convention must address a communication to the latter through the Committee on the Elimination of Racial Discrimination[231];

- *second*, the receiving State is given three months to submit written explanations or statements[232];

- *third*, if, within six months, the matter is not adjusted to the satisfaction of both parties, it is to be referred once more to the Committee[233];

- *fourth*, the Committee ascertains that all domestic remedies have been exhausted, in conformity with the generally recognized principles of international law[234];

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[231] Article 11, para. 1, two first sentences: "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. The Committee shall then transmit the communication to the State Party concerned."

[232] Article 11, para. 1, third sentence: "Within three months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State."

[233] Article11, para. 2: "If the matter is not adjusted to the satisfaction of both parties, either by bilateral negotiations or by any other procedure open to them, within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter again to the Committee by notifying the Committee and also the other State".

[234] Article 11, para. 3: "The Committee shall deal with a matter referred to it in accordance with paragraph 2 of this article after it has ascertained that all available domestic remedies have been invoked and exhausted in the case, in conformity with the generally recognized principles of international law".

- *fifth*, if this is the case, there will be appointed an *ad hoc* Conciliation Commission[235];

- *sixth*, the Conciliation Commission submits to the Chairman of the Committee a report embodying its findings and containing recommendations for the amicable solution of the dispute[236];

- *seventh*, the States parties to the dispute inform the Chairman of the Committee whether or not they accept the recommendations of the Conciliation Commission[237];

- *eighth*, the report and the declarations of the States Parties concerned are transmitted to the other States Parties to the Convention[238];

- *ninth*, the dispute can be referred to the Court if all the previous stages have proved fruitless[239]

4.45 The general philosophy of the mechanism provided for by the Convention is patently of a conciliatory nature: the emphasis upon "bilateral negotiations" (Article 11(2)), "good offices" and "amicable solutions" (Article 12(1)(a))

[235] Article12, para. 1 (a): "After the Committee has obtained and collated all the information it deems necessary, the Chairman shall appoint an *ad hoc* Conciliation Commission (hereinafter referred to as the Commission) comprising five persons who may or may not be members of the Committee".

[236] Article 13, para. 1: "When the Commission has fully considered the matter, it shall prepare and submit to the Chairman of the Committee a report embodying its findings on all questions of fact relevant to the issue between the parties and containing such recommendations as it may think proper for the amicable solution of the dispute".

[237] Article 13, para. 2: "These States shall, within three months, inform the Chairman of the Committee whether or not they accept the recommendations contained in the report of the Commission".

[238] Article 13, para. 3: " [T]he Chairman of the Committee shall communicate the report of the Commission and the declarations of the States Parties concerned to the other States Parties to this Convention"

[239] Article 22.

indicates that this particular inter-State procedure was designed in such a way as to facilitate dialogue, with the Committee's mediation.

(ii) The *travaux préparatoires*

4.46 The mandatory character of the inter-State mechanism before seisin of the Court is confirmed by the *travaux préparatoires*. The preliminary draft of the Sub-Commission[240] provided already for a committee whose mission would be to receive periodical reports but also to serve as a conciliation body in an inter-State complaint procedure.[241] The sponsors of the implementation measures were much concerned with obtaining agreement for the creation of this monitoring and conciliation body whose competence would be mandatory. To In their view, this was vital if the Convention were to become effective and not a merely hortatory instrument, as evidenced by one of the main sponsors' declarations:

> Mr Garcia (Philippines): "[H]is delegation wondered whether the Convention in its present form [*i.e.* absent the part on implementation] was very different from the United Nations Declaration on the Elimination of All Forms of Racial Discrimination adopted by the General Assembly in 1963 (...). The Convention would acquire meaning and substance only if it was accompanied by effective measures on implementation; such measures were the very core of the instrumentum and without them it would remain a dead letter."[242]

4.47 The mechanism of inter-State complaints raised some objections, since some States feared its political misuse:

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[240] *Supra*, para. 4.16.

[241] U U.N. General Assembly, 20th session, Official Records, Third Committee, Record of the 1344th meeting, U.N. Doc. A/C.3/SR.1344 (16 November 1965), p.314, paras. 14-22. Annex 10.

[242] *Ibid.*, p.315, para. 27.

> Mr. Pant (India): "His delegation was not opposed in principle to the establishment of some machinery to deal with disputes between States; it was to be feared however, that States might resort to that organ less in order to succour the oppressed than to pursue political ends. Furthermore, the question arose how an *ad hoc*, non-judicial committee could exercise judicial functions[243]. If two States wished in good faith to settle their differences, it will always be open to them to adopt the process of agreed conciliation"[244].

States were nevertheless willing to accept this risk in order to ensure the full effectiveness of the Convention. In the words of one delegate:

> Mrs. Ramaholimihaso (Madgascar): "The third proposal, which deserved even closer attention, envisaged the filing of complaints by one State Party against another- a possibility to which no State should object in the interest of ensuring better protection of human rights and fundamental freedoms. The texts before the Committee appeared to offer sufficient safeguards against cases of abuse for political purposes."[245]

4.48 The mechanism provided for by the Convention was intended to be at the same time restrictive and flexible: restrictive in its mandatory character and the temporal framing of the procedure, flexible through the role it gives to the Parties to the dispute. In establishing the conciliation procedure, the drafters sought thus both to preserve the Convention's efficiency and to respond to the States' reluctance to be bound by too restrictive a mechanism. This is what may be distilled from the discussions in the Third Committee.

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[243] It must be stressed that the final formula did not provide for a committee with a judicial function, but a conciliation one.

[244] U.N. General Assembly, 20th session, Official Records, Third Committee, Record of the 1346th meeting, U.N. Doc. A/C.3/SR.1346 (17 November 1965), p.331, para. 21. Annex 12.

[245] U.N. General Assembly, 20th session, Official Records, Third Committee, Record of the 1345th meeting, U.N. Doc. A/C.3/SR.1345 (17 November 1965), p.326, para. 34. Annex 11.

4.49 Mr. Lamptey (Ghana) emphasized that the conciliation commission should be beyond any doubt as to partiality:

> "Introducing his delegation's amendments (...) to the Philippine draft (...), he said that the committee (...) elected by States Parties to the Convention, which would be responsible for receiving reports from States and overseeing the effective application of the Convention, would not be sufficiently independent and impartial to be able to serve as a conciliation body in the event of a dispute between parties. (...). It had therefore been considered wiser to provide for the creation, on an *ad hoc* basis, of a conciliation commission of relative impartiality, by the unanimous consent of the parties to the dispute, with the assistance of the chairman of the committee of plenipotentiaries. (...) For similar reasons, article VI provided that, when any matter arising out of article III was being considered by the Committee, the Governments in question should (...) be entitled to send a representative to take part in the proceedings of the committee, but without voting rights. Article VII contained provisions designed to ensure the impartiality of the members of the conciliation commission, who were not to be nationals of the States parties to the dispute."[246]

4.50 When the articles concerning the inter-State procedure were specifically discussed by the Third Committee, the idea of an inter-State conciliation procedure had been already accepted. The principle was not contested and the amendments submitted under what would become Articles 11 to 13 either concerned the exhaustion of domestic remedies or details concerning the procedure to be followed by the conciliation commission[247].

[246] U.N. General Assembly, 20th session, Official Records, Third Committee, Record of the 1344th meeting, U.N. Doc. A/C.3/SR.1344 (16 November 1965), p.316, para. 40. Annex 10.

[247] U.N. General Assembly, 20th session, Official Records, Annexes, Report of the Third Committee, U.N. Doc. A/6181 (18 December 1965), pp. 27-29, paras. 118-143. Annex 23.

(iii) The practice of States before the CERD Committee

4.51 To date, the Committee has never been seised of a matter under Article 11 of CERD. Nevertheless, this does not mean that it has not been seised of inter-State complaints at all; rather, these have been made under the guise of the Article 9 procedure imposing on States Parties an obligation to 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", "one year after the entry into force of the Convention for the State concerned; and thereafter every two years and whenever the Committee so requests".

4.52 While some Committee members have been reluctant to accept this use of Article 9[248], the practice is now well-established: faced with a situation where the State Party cannot complain under Article 11 because the putative defendant is not a State Party to the Convention, the Committee has decided to take up the question under Article 9, and this has always resulted in a decision[249]; but, when both concerned States are parties to the Convention, the Committee has discussed the issue but has refused to take a formal decision[250], and it has

[248] The Russian Federation does not take any position as to the legality or advisability of such use of Article 9.

[249] Panama (in relation with the Panama Canal Zone): Decision 3 (IV) of 26 August 1971, CERD Annual Report, GAOR, 1971, A/8418, p.34. Syria (in relation with the Golan Heights); Decision 4 (IV) of 30 August 1971, *idem*., endorsed by the GA in A/RES/2784 (XXVI) of 6 December 1971. Cyprus: Decision 3(XI) of 8 April 1975, CERD Annual Report, GAOR, 1975, A/10018, p.69. Some authors consider that the Committee has "thus far wisely eschewed restrictive and formalistic interpretations which would have forclosed the gradual development of a meaningful reporting system" (T. Buergenthal, "Implementing the UN Racial Convention", 12 *Texas International Law Journal*, 1977, pp. 187-221, at p.218).

[250] Syria (in relation with the Golan Heights), CERD Annual Report, GAOR, 1984, A/39/18, pp. 47-50, para. 209-211. Democratic Kampuchea (in relation with Vietnam), CERD Annual Report, GAOR, 1987, A/42/18, pp. 92-93, para. 436-442, or p.97, para. 447. Austria (in

reminded the States Parties of the difference between the reporting and the inter-State procedures in a General Recommendation[251]. Two conclusions may be drawn from this practice:

a. even though it has never been used so far, the procedure set forth in Article 11 of the Convention is by no means obsolete and Georgia could have resorted to it, had it really considered that Russia was in breach of the Convention;

b. while the use of Article 9 as a means of complaining of such a violation may not have resulted in a formal decision, the fact is that, in contrast to several States on other occasions, Georgia has apparently not even thought of using this procedure to put forward its alleged dispute with Russia.

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relation with the situation in the former Yugoslavia, CERD Annual Report, GAOR, 1992, A/47/18, p.49, para. 187; p.50, para. 196.

[251] See General recommendation XVI (42) concerning the application of article 9 of the Convention, 19 March 1993:

"1. Under article 9 of the International Convention on the Elimination of All Forms of Racial Discrimination, States parties have undertaken to submit, through the Secretary-General of the United Nations, for consideration by the Committee, reports on measures taken by them to give effect to the provisions of the Convention.

2. With respect to this obligation of the States parties, the Committee has noted that, on some occasions, reports have made references to situations existing in other States.

3. For this reason, the Committee wishes to remind States parties of the provisions of article 9 of the Convention concerning the contents of their reports, while bearing in mind article 11, which is the only procedural means available to States for drawing to the attention of the Committee situations in which they consider that some other State is not giving effect to the provisions of the Convention"

U.N. General Assembly, 48th session, Official Records, Supplement No.18, Report of the Committee on the Elimination of Racial Discrimination, U.N. Doc. A/48/18 (15 September 1993), p.116. Annex 30.

4.53 Georgia's failure to notify the Committee of alleged violations of the Convention allegedly taking place in its own territory in its periodical reports (during the whole period since it has become a Party to the Convention, as Georgia alleges that the "dispute" has lasted for 17 years) is all the more revealing in that it has not hesitated to complain to the Committee of the deportation of ethnic Georgians from Russia in 2006. In conformity with its usual practice, the Committee discussed the matter under Article 9 and made appropriate recommendations[252].

4.54 At present, the panoply of procedures before the Committee also includes the early-warning and urgent mechanism instituted to face serious, mass crises.[253] This procedure is obviously intended to respond to grave crises of racial discrimination for which the situation in the former Yugoslavia was the catalyst. At its 45th session in 1994, the Committee decided that preventive measures, including early warning and urgent procedures, should become part of its regular agenda. Several measures can be taken by the Committee under this new procedure:

> "When receiving information between sessions of CERD about grave incidents of racial discrimination covered by one or more of the relevant indicators, the Chairperson of the working group on early warning/urgent action, in consultation with its members and with the follow-up coordinator and the Chairperson of the Committee, may take the following action:
>
> 1. Request further urgent information from the State party.

[252] Committee on the Elimination of Racial Discrimination, 73rd session, Consideration of reports submitted by States Parties under Article 9 of the Convention, Concluding Observations of the Committee on the Elimination of Racial Discrimination: Russian Federation, U.N. Doc. CERD/C/RUS/CO/19 (20 August 2008), para. 13. Annex 70.

[253] U.N. General Assembly, 48th session, Official Records, Supplement No.18, Report of the Committee on the Elimination of Racial Discrimination, U.N. Doc. A/48/18 (15 September 1993). Annex 30.

> 2. Forward the information to the Secretary-General and his Special Adviser on the Prevention of Genocide.
>
> 3. Prepare a decision to be submitted for adoption by the Committee at its next session.
>
> 4. Adopt a decision at the session in the light of the most recent developments and action taken by other international organizations"[254].

4.55 As aptly explained by Mr. Régis de Gouttes, former chairman of the Committee, in an interview for *Human Rights and Local Governments*[255]*:*

> "Une nouvelle fonction que nous avons en quelque sorte inventée, c'est la procédure dite de situations d'urgence ou de prévention et d'action d'urgence. C'est en 1993 que notre comité a institué cette procédure, après avoir constaté qu'il n'avait pas suffisamment su analyser à l'avance les phénomènes qui allaient se passer dans la région de l'ex-Yougoslavie. Face à la crise, nous avons fait une sorte d'examen rétrospectif des rapports que nous avions étudiés auparavant et nous nous sommes aperçus qu'il y avait des indices de naissance de ce conflit et nous nous sommes dit qu'à l'avenir il fallait inventer une procédure d'alerte rapide dans des cas où nous décelons des indices de discrimination massive, de crise grave"[256].

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[254] Report of the Committee on the Elimination of Racial Discrimination, 3 October 2005, U.N. Doc. A/60/18(SUPP), p.12.

[255] An association of French law (Act of 1901), created in 2007; it is a permanent structure based in Nantes (France). See: http://www.spidh.org/en/home/index.html.

[256] Video interview of Mr. Régis de Gouttes, 1st Lawyer at the French Court of Cassation (France), chairman of the Committee of the United Nations for the Elimination of Racial Discrimination, July 2006, available: http://www.spidh.org/en/documentation/videos/mr-regis-de-gouttes/index.html.

Translation: "A new function was somewhat invented by the Committee: it is the early-warning and urgent procedure. It was instituted in 1993, when the Committee realized that it had not known how to analyze the phenomena that were about to happen in the region of the former Yugoslavia. Faced with the crisis, we conducted a sort of retrospective examination of the reports we had already considered and we understood that there were indicia of the outbreak of the conflict and we agreed that we needed to set up an early-warning procedure in those cases where we detected a pattern of massive discrimination or a serious crisis."

This early-warning procedure can be activated by the States Parties, through the submission of information to the Committee. This information can be contained in a periodical report or addendum thereto in which the State draws the Committee's attention to the urgent aspect of a matter or the serious nature of a case of discrimination. Under this procedure, the Committee can either engage in exchanges with the State Party concerned or adopt decisions[257].

4.56 To sum up, it is significant that Georgia has abstained from bringing the matter before the Committee under Article 11, the legal procedure referred to in Article 22; nor has it mentioned in any of its Reports to the Committee under Article 9 any breach of the Convention by Russia, allegedly taking place in Abkhazia or South Ossetia; and nor has any urgent procedure ever been activated by Georgia.

B. THE CONDITIONS IN ARTICLE 22 OF CERD ARE CUMULATIVE

4.57 As discussed above, Article 22 of CERD subordinates the seisin of the Court to two distinct conditions: previous negotiation and the use of the procedures expressly provided for in this Convention ("the CERD mechanism"). The purpose of this subsection is to focus on the use of the conjunction "or" in the enumeration of the two prior means of settlement ("which is not settled by negotiation *or* by the procedures expressly provided for in this Convention"). This phrase is not correctly interpreted as meaning "which is not settled *either* by negotiation *or* by the procedures expressly provided for in this Convention": neither the terms of the phrase (a) nor the drafting history of the Convention (b) support such an interpretation. This conclusion is further confirmed by a

[257] For an overview of this procedure, see: http://www2.ohchr.org/english/bodies/cerd/early-warning.htm#about.

comparison with other universal human rights treaties providing for monitoring mechanisms (c).

1. Textual interpretation

4.58 Article 22 establishes under what circumstances a dispute under CERD can be referred to the Court: it is a dispute that could not previously be settled by the Parties. At the same time, Article 22 also establishes the means available to the Parties to attempt to settle the dispute: negotiation and the CERD mechanism. Negotiation comes naturally first in order since it is the ordinary way of settling disputes in international law[258]. Should this procedure fail, the Convention opens another possibility, and that is the recourse to "the procedures expressly provided for in [the] Convention" – *i.e.* in Articles 11 and 12 (that is the CERD mechanism).

4.59 Here, the conjunction "or" does not express alternatives but rather cumulative conditions. While the natural conjunction to express accumulation is "and" introducing an "and" in Article 22 would render the phrase grammatically meaningless: if the dispute is settled by negotiation, there is no room for settlement "by the procedures expressly provided for in this Convention"; and, if, *vice versa*, the negotiation has failed, then the only means of settlement will be the procedures in question. The dispute has to be settled by negotiation *or* by the treaty procedures – not by both; not "by negotiation *and* by the procedures expressly provided for in this Convention": this would simply make no sense. But, at the same time, it is meaningful to refer to both means of settlement successively: if the negotiation fails, *then* the dispute can still be settled by the Convention procedures.

[258] See above, paras. 4.27-4.28.

4.60 The phrase in Article 22 must actually be read as implying successive steps: the parties must have held negotiations (step 1). Failing this, they must have activated the inter-State complaint procedure (step 2). Only the failure of both these steps allows the parties to seise the Court. Negotiation is in any case a *passage obligatoire* at two junctures: it is expressly provided for in Article 22 as preliminary to the CERD procedures, and it constitutes an integral part of the Committee's inter-State procedure. In other words, States must make their best efforts to settle their dispute "by negotiation" and "by the procedures expressly provided for" by the Convention.

4.61 It is to be noted that the Court will always depart from a supposed literal interpretation when it proves meaningless in the context of the instrument to be interpreted and when the contextual interpretation suggests otherwise. Thus in the Advisory Opinion of 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Court had to clarify the meaning of Article 2, paragraph 1, of the International Covenant on Civil and Political Rights which provides:

> "Each State Party to the present Covenant undertakes to respect and to ensure to al1 individuals within its territory *and* subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

The conjunction "and" was especially important for determining the scope of the Convention. As the Court acknowledged:

> "This provision can be interpreted as covering only individuals who are both present within a State's territory and subject to that State's jurisdiction. It can also be construed as covering both individuals present within a State's territory and those outside that territory but subject to that

> State's jurisdiction. The Court will thus seek to determine the meaning to be given to this text."[259]

Relying on the authoritative interpretation given by the Human Rights Committee and on the *travaux préparatoires*, the Court came to the conclusion that, in this context, "and" expresses alternative conditions[260].

4.62 Conversely, in the present instance, the use of the conjunction "or" in Article 22 of the Convention expresses, given its object and purpose, cumulative conditions which are *both* prerequisites to the seisin of the ICJ. Therefore, Article 22 means that a dispute can be referred to the Court only if attempts have been made with regard to the use of both of the means indicated in this provision.

2. The travaux préparatoires

4.63 The *travaux préparatoires* confirm that, as negotiations[261], the CERD mechanism must also be utilized before seising the Court. As shown by the initial proposal which led to the adoption of Article 22 and the further discussions[262], the provisions concerning the CERD machinery, on the one hand, and the Court's jurisdiction, on the other hand, must be read together. They lay down successive steps for the implementation of the Convention: direct negotiation, reference to the Committee and to its *ad hoc* Commission of conciliation, and *then*, if the previous means have failed, the ICJ.

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[259] I.C.J., Advisory Opinion of 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Rep.* 2004, p.179, para. 108.

[260] *Idem*, pp. 179-180, paras. 109-111.

[261] *Supra*, paras. 4.27-4.41.

[262] See *infra*, paras. 4.65- 4.67.

4.64 All the implementation articles (negotiation / Committee procedures and ICJ jurisdiction) were initially considered together as part of a single text by the Sub-Commission and the Commission of Human Rights. It was only during the final review of the text by the Third Committee that they were split into two different sections of the Convention, without this purely formal reorganisation having any consequence as to the meaning of the provisions in question.

a) Sub-Commission on Prevention of Discrimination and Protection of Minorities

4.65 In the initial proposition of Mr. Inglés[263] concerning the Measures of implementation, the provision concerning the ICJ came just after the articles concerning the Committee machinery. The Court was to be seised if "no solution has been reached" through the Convention's mechanism:

> "Article 16: The States Parties to this Convention agree that any State Party complained of or lodging a complaint may, if no solution has been reached within the terms of article 13, paragraph 1, bring the case before the International Court of Justice, after the report provided for in article 13, paragraph 3, has been drawn up"[264].

Mr. Inglés explained that a conciliation procedure between the States would be better suited to address human rights questions; it is only in case this failed that the States could have recourse to the ICJ:

> "Under the proposed procedure, States Parties to the convention should first refer complaints of failure to comply with that instrument to the State party concerned; it is only when they are not satisfied with the explanation

[263] As to his role on the elaboration of the provisions on the implementation of the Convention, see above, para. 4.16-4.18.

[264] U.N. Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Report of the Sixteenth Session of the Sub-Commission on Prevention of Discrimination and Protection of Minorities to the Commission on Human Rights, U.N. Doc. E/CN.4/873, E/CN.4/Sub.2/241 (11 February 1964), p.57. Annex 5.

> of the State Party concerned that they may refer the complaint to the Committee. *Direct appeal to the International Court of Justice, provided for in both the Covenants on Human Rights and the UNESCO Protocol, was also envisaged in his draft. But he proposed the establishment of a Conciliation Committee because the settlement of disputes involving human rights did not always lend themselves to strictly judicial procedure.* The Committee, as its name implied, would ascertain the facts before attempting an amicable solution to the dispute. Application could be made to the Committee, through the Economic and Social Council, for an advisory opinion from the Court on legal issues. *If the Committee failed to effect conciliation within the time allotted, either of the Parties may take the dispute to the International Court of Justice*"[265].

b) Commission on Human Rights

4.66 As explained above[266], the proposal of the Philippines expert could not be discussed within the Sub-Commission. Mr. Quiambao (Philippines) insisted upon the conciliatory mechanism proposed by the Convention and explained that it was only following a failure of that mechanism that the Parties to the dispute could have recourse to the Court:

> "That preliminary draft [speaking of Mr. Inglés proposition] provided in particular for the establishment of a good offices and conciliation committee consisting of eleven members, which would be responsible for seeking the amicable settlement of disputes between States parties concerning the interpretation, application or fulfilment of the convention. A State party which considered that another State party was not giving effect to the provisions of the convention would be able to bring the matter to the attention of that state by written communication. If after six months the matter was not adjusted to the satisfaction of both States, either State would have the right to refer the matter to the Committee. *In*

[265] U.N. Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Summary record of the 427th Meeting, U.N. Doc. E/CN.4/Sub.2/SR.427 (12 February 1964), p.12, emphasis added. Annex 6.

[266] See above, para. 4.16.

the event of no solution being reached, the States would be free to appeal to the International Court of Justice"[267].

c) Third Committee of the General Assembly

4.67 In the Third Committee, the implementation measures (CERD mechanism and ICJ) were split into two different sets of provisions for several reasons:

- first, for editorial reasons: the drafters decided to harmonize the final clauses with those of other conventions. Thus the Secretariat of the Sub-Commission was asked to prepare a handbook on final clauses[268]. All the relevant instruments contained reference to the Court in their final clauses. The Committee agreed to follow that example[269]. However, the final formulation was to be adjusted according to the results of the negotiations concerning the Committee. The *quid pro quo* was that if the CERD mechanism was accepted, then recourse to the Court was to be subjected to the conciliatory phase. This is what the Ghana amendment aimed to achieve[270] and it is only because it achieved that balance that it was finally accepted.[271] The Committee, on the other hand, was considered as central for the implementation of the Convention,

[267] U.N. Economic and Social Council, Commission on Human Rights, Summary record of the 810th Meeting, U.N. Doc. E/CN.4/SR.810 (15 May 1964), p.7, emphasis added. Annex 8.

[268] U.N. Economic and Social Council, Commission on Human Rights, Draft International Convention on the Elimination of All Forms of Racial Discrimination Final Clauses, Working Paper prepared by the Secretary-General, U.N. Doc. E/CN.4/L.679 (17 February 1964). Annex 7.

[269] U.N. General Assembly, 20th session, Official Records, Annexes, Report of the Third Committee, U.N. Doc. A/6181 (18 December 1965), p.35, paras. 173-174. Annex 23.

[270] U.N. General Assembly, 20th session, Official Records, Third Committee, Record of the 1367th meeting, U.N. Doc. A/C.3/SR.1367 (7 December 1965), p.453, para. 29. Annex 19.

[271] *Ibid.*, p.454, paras. 38-39.

given its human rights nature, and that is why the provisions concerning the Committee are part of the corpus of the Convention;[272]

- second, in all likelihood, this was a strategical move on the part of the negotiators to split two difficult questions: that of the establishment of the Committee on the one hand and that of the acceptance of the Court's jurisdiction on the other hand[273]. Indeed, the establishment of the Committee and the Court's jurisdiction seemed difficult to obtain separately, and even more so together. The first because of its innovative character[274], the second mainly due to the reluctance of some States to accept the Court's jurisdiction and also due to a misconception regarding the compulsory jurisdiction and the compromissory clause[275]. Ghana, Mauritania and the Philippines, as the main sponsors of the implementation articles, strived to obtain the inclusion of the Committee mechanism, which appeared of paramount importance to them[276]; in a first phase, the three sponsoring States envisaged that the Court's jurisdiction should be subject to the conclusion of a *compromis*, whether the question was dealt

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[272] See UK's representative statement U.N. General Assembly, 20th session, Official Records, Third Committee, Record of the 1363rd meeting, U.N. Doc. A/C.3/SR.1363 (3 December 1965), p.431, para. 3. Annex 18.

[273] See i.e. the declarations of the representative of Ghana: U.N. General Assembly, 20th session, Official Records, Third Committee, Record of the 1349th meeting, U.N. Doc. A/C.3/SR.1349 (19 November 1965), p.348, para. 29 (Annex 14); U.N. General Assembly, 20th session, Official Records, Third Committee, Record of the 1354 meeting, U.N. Doc. A/C.3/SR.1354 (25 November 1965), p.379, para. 54 (Annex 16).

[274] U.N. General Assembly, 20th session, Official Records, Third Committee, Record of the 1346th meeting, U.N. Doc. A/C.3/SR.1346 (17 November 1965), p.330, para. 12. Annex 12.

[275] U.N. General Assembly, 20th session, Official Records, Third Committee, Record of the 1358th meeting, U.N. Doc. A/C.3/SR.1358 (29 November 1965), p.399, paras. 20-22 (Annex 17); U.N. General Assembly, 20th session, Official Records, Third Committee, Record of the 1367th meeting, U.N. Doc. A/C.3/SR.1367 (7 December 1965), p.453, paras. 28-32 (Annex 19).

[276] U.N. Economic and Social Council, Commission on Human Rights, Summary record of the 810th Meeting, U.N. Doc. E/CN.4/SR.810 (15 May 1964), p.7. Annex 8.

with or not by the future Committee[277]. However, since the sponsors obtained the establishment of a Committee with compulsory competence, and insisted that the Polish amendment (which required a compromis for the Court's jurisdiction) be rejected, they introduced in Article 22 the phrase "or by the procedures expressly provided for in this Convention". And this had the desired effect: by the addition of this phrase, the drafters obtained and combined at one and the same time (i) the compulsory jurisdiction of CERD and (ii) that of the ICJ.

4.68 It was the Third Committee that actually drafted the compromissory clause. The course of the negotiation can briefly be described as follows:

- The Philippines reindorsed the Commission's propositions[278].

- Ghana initially proposed an amendment providing only for a seisin of the Court by a special agreement:

> "Within their common consent the parties to a dispute arising out of the interpretation or the application of the Convention, whether it has been dealt with by the Commission of Conciliation or not, may submit the dispute to the International Court of Justice."[279]

[277] U.N. General Assembly, 20th session, Official Records, Annexes, Third Committee, Ghana: revised amendments to document A/C.3/L.1221, U.N. Doc. A/C.3./L.1274/REV.1 (12 November 1965). Annex 9.

[278] U.N. General Assembly, 20th session, Official Records, Annexes, Third Committee, Phillipines: proposed articles relating to measures of implementation, U.N. Doc. A/C.3/L.1221 (11 October 1965), Articles 18 and 19. Annex 21.

[279] U.N. General Assembly, 20th session, Official Records, Annexes, Third Committee, Ghana: revised amendments to document A/C.3/L.1221, U.N. Doc. A/C.3./L.1274/REV.1 (12 November 1965). Annex 9.

- A working group was constituted to re-draft the implementation articles (with the assistance of the Secretariat). The text of the working group was thus drafted:

> "Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation, shall at the request of any party to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement."[280]

- At this late stage, amendments were submitted by Ghana and the Philippines on one side and by Poland on the other side.

> "The amendment of Poland (A/C.3/L.1272) sought to replace the word 'any' after the words 'at the request of' by the word 'all'.
>
> The amendment of Ghana, Mauritania and Philippines (A/C.3/L.1313) called for the deletion of the comma after 'negotiation'[281] and the insertion of the following between the words 'negotiation' and 'shall': 'or by the procedures expressly provided for in this Convention'"[282].

4.69 The opposing trends in the Third Committee, as illustrated by the proposed amendments, reveal the reluctance of many States to accept the Court's jurisdiction. In fact, one group sought to subordinate this to the acceptance of all the parties to a dispute by compromis (cf. the Polish amendment), while an opposing group tried to preserve the possibility of unilateral seisin of the Court introducing the conciliation phase in the compromissory clause (cf. the Ghanaian amendment):

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[280] U.N. General Assembly, 20th session, Official Records, Annexes, Report of the Third Committee, U.N. Doc. A/6181 (18 December 1965), p.38. Annex 23.

[281] The deletion of the comma suggests that the phrases describe successive phases and not alternatives.

[282] U.N. General Assembly, 20th session, Official Records, Annexes, Report of the Third Committee, U.N. Doc. A/6181 (18 December 1965), p.38. Annex 23.

> "Mr. Lamptey (Ghana) said that the Three-Power amendment was self-explanatory. Provision has been made in the draft Convention for machinery which should be used in the settlement of disputes *before recourse was had to the International Court of Justice*. The amendment simply referred to the procedures provided for in the Convention"[283].

4.70 It must be underlined that the amendment of Ghana, Mauritania and the Philippines was adopted unanimously. All the States present therefore considered that the CERD mechanism had to be exhausted before recourse was made to the Court. It was on this basis that Clause VIII (which was to become Article 22 of the Convention), and therefore the Court's jurisdiction, was adopted by 70 votes to 9, with 8 abstentions[284].

4.71 Several statements in the Third Committee are particularly enlightening as to the meaning and scope of that provision. Some States explained that the Court's seisin was meant to be a last resort, and that the Committee was actually the natural forum for the settling of inter-State disputes:

> "Mr. Garcia (Philippines): Articles 2 to 18 would provide for the establishment of a good offices and conciliation committee to which States Parties might complain on grounds of non-implementation of the Convention, but only after all domestic remedies had been exhausted. If a solution could not be reached, the Committee would draw up a report on the facts and indicate recommendations. *Eventually* the States Parties could bring the case before the International Court of Justice"[285].

> "Mr. Mommersteeg (Netherlands): The system of complaints proposed by the Philippines (A/C.3/L.1221) and Ghana (A/C.3/L.1274/Rev. 1) provided that, if a matter was not adjusted to the satisfaction of both the

[283] U.N. General Assembly, 20th session, Official Records, Third Committee, Record of the 1367th meeting, U.N. Doc. A/C.3/SR.1367 (7 December 1965), p.453, emphasis added. Annex 19.

[284] U.N. General Assembly, 20th session, Official Records, Third Committee, Record of the 1367th meeting, U.N. Doc. A/C.3/SR.1367 (7 December 1965), p.455, Annex 19.

[285] *Ibid.*, U.N. General Assembly Official Records, Third Committee, Record of the 1344th meeting, U.N. Doc. A/C.3/SR.1344 (16 November 1965), p.314 – emphasis added. Annex 10

> complaining State and the State complained against, either by bilateral negotiations or by any other procedure open to them, either State should have the right to refer the matter to a committee, which in the Philippine text was a good offices and conciliation committee and in the Ghanian text a fact-finding committee, conciliatory powers being vested in an ad hoc commission appointed by the chairman of the committee. Under that system, the case might be referred to the International Court of Justice *as a last resort*; his delegation could not but approve such provision but it would be effective only if the State complained of or the State lodging a complaint could submit the dispute to the Court without first having to obtain the consent of the other State"[286].

Notably, no statement was made to the opposite.

4.72 These statements leave no room for doubt if reference is had to the conventional precedents that inspired the drafters. This is further confirmed by an analysis of those precedents. Besides the ILO mechanisms (which are of a rather special character), the drafters of the Convention relied on the mechanism set up by the Protocol to the Convention against Discrimination in Education adopted by UNESCO[287]. This Protocol establishes that it is only following the failure of the conciliation commission to resolve the dispute that the door is opened to the ICJ:

> "Any State may, at the time of ratification, acceptance or accession or at any subsequent date, declare, by notification to the Director-General, that it agrees, with respect to any other State assuming the same obligation, to refer to the International Court of Justice, after the drafting of the report provided for in Article 16, paragraph 3, any dispute covered by this Protocol *on which no amicable solution has been reached in accordance with Article 17, paragraph 1*".[288]

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[286] *Ibid.*, p.319 – emphasis added.

[287] Mr. Caportoti: "The Commission could also rely on a precedent, one, moreover, on which Mr. Inglés had based his proposal: the Protocol to the Convention against Discrimination in Education adopted by UNESCO" (E/CN.4/Sub.2/SR.428, p.6).

[288] Protocol Instituting a Conciliation and Good offices Commission to be Responsible for Seeking the settlement of any Disputes which may Arise between States Parties to the Convention against Discrimination in Education, 10 December 1962, Article 25.

3. Other universal human rights treaties providing for monitoring mechanisms

4.73 The CERD Committee is outstanding among the monitoring bodies established by universal human rights treaties. The first of its kind, it was considered a forerunner, an example for all the others. As such, it presents undeniable similarities with all of the other bodies. In addition, it is one of a kind, since it provides for a mandatory inter-State complaint procedure. Table 2 appended to this Chapter[289] presents, in synthesis, the similarities and differences of all the monitoring bodies under the universal human rights treaties, as regards the inter-State complaint procedure. Table 2 equally incorporates the compromissory clauses of these treaties, in order to determine the possible relation between the monitoring body and the Court, as organs designed for the Conventions' implementation.

4.74 Several treaties allow for an *optional* system of inter-State complaints. The facultative nature of those mechanisms results from the necessity of a special declaration through which the State accepts this procedure: this is the case for the International Covenant on Civil and Political Rights (ICCPR)[290], the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)[291], the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW)[292] and the International Convention for the Protection of All Persons from Enforced

[289] Table 2, *Implementation Mechanisms in Universal Human Rights Treaties*, p.178

[290] See Article 41.

[291] See Article 21.

[292] See Article 76.

Disappearance (CED)[293]. But CERD is the *only* universal human rights treaty establishing a *mandatory* inter-State complaint procedure. No special acceptance of the procedure is required from the States: the ratification of the Convention automatically implies the acceptance of the inter-State procedure. In terms of implementation measures, the Convention is certainly the most elaborate project, never subsequently equalled, as shown in Table 2 appended at the end of the present Chapter. No subsequent human rights treaty provides for an inter-State conciliation mechanism that all the States Parties to the convention would accept through simple ratification. This means that all 173 States parties to CERD are equally parties to the inter-State complaint mechanism[294]. Accepting that such a constraining mechanism could be ignored and that a State can seise the ICJ without having first complied with its requirements would effectively eliminate this unique aspect of CERD.

4.75 Together with the competence of the monitoring body to receive inter-State complaints, three conventions (other than CERD) equally provide for the unilateral seisin of the International Court of Justice[295]: CAT [296], CMW[297] and

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[293] See Article 32.

[294] By way of comparison:

- for ICCPR, there are 48 States that made the declaration under Article 41 (out of 165 States parties);

- for CAT, 69 States made the declaration under Article 21 (out of 146 States parties);

- for CMW, out of 42 States parties, none made the declaration under Article 76;

- for CED, out of 16 States parties, 5 made the declaration under Article 32 (the Convention is not yet in force).

[295] ICCPR does not have an ICJ compromissory clause.

[296] See Article 30.

[297] See Article 92.

CED[298]. As regards the treaties that have a monitoring body whose competence does not extend to receiving inter-State complaints, CEDAW is the only one to have an ICJ compromissory clause[299].

4.76 A reading of the compromissory clauses of these treaties makes apparent that they *always* provide for a three steps procedure. *First*, they *all* contain the "negotiation" prerequisite. *Second*, they *all provide for an arbitration* should the negotiations fail, except for CERD which alone introduces "the procedures expressly provided for in the Convention" in its compromissory clause. *Third*, in *all* these treaties (CERD, CAT, CMW, CEDAW and CED), the seisin of the Court appears at the end of the line, after the other means have failed.

4.77 The difference among these treaties is only found, therefore, in the second stage: CERD provides for a conciliation procedure, while the others provide for mandatory arbitration. The fact that CERD does not provide for arbitration previous to the seisin of the Court cannot be interpreted as a form of liberalism with regard to the Court's jurisdiction. The analysis of the *travaux préparatoires* demonstrates that no such intent can be attributed to the drafters[300]. It is because CERD drafters *included a mandatory conciliation procedure* under the auspices of the Committee that a reference to arbitration in the compromissory clause became superfluous. Conversely, it is because the drafters of the subsequent human rights treaties *did not include a mandatory conciliation procedure* that they introduced the reference to arbitration in the compromissory clause.

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[298] See Article 42.

[299] The International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities do not include a procedure to address inter-State complaints.

[300] See above, paras. 4. 63-4. 72.

4.78 The Court had already had the occasion to confirm the mandatory character of these previous stages, in respect of the condition of arbitration[301]. For instance, in the *Armed Activities (2002)* case, the Court has already stressed upon the compulsory character of the attempt at arbitration under CEDAW[302], as it equally did, on a *prima facie* basis, in *Questions relating to the Obligation to Prosecute or Extradite* case, when interpreting Article 31 of CAT[303]. The same conclusion must apply in the case of the conciliation procedure provided by CERD[304].

4.79 The previous seisin of the Committee, under the *mandatory inter-State conciliation mechanism* of Articles 11 and 12 of CERD, has to be ascertained by the Court in order to establish its jurisdiction under Article 22 CERD. As with the arbitration condition in other universal human rights treaties, the Applicant must provide proof of having made a *bona fide* attempt to initiate the conciliation procedure. Absent any such attempt, any inquiry into the effectiveness of the conciliation procedure without object. As shown below, Georgia has not made any such attempt.

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[301] See Table 1, *Compromissory clauses providing for prerequisites to the Court's seisin*, appended, p.173.

[302] I.C.J., *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Rep.* 2006, pp. 38-39, para. 87.

[303] ICJ, Order, 28 May 2009, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Provisional Measures*, paras. 51-52.

[304] In its Memorial, Georgia relies on *Lockerbie* (at p.304, para. 8. 28). But article 14(1) of the Montreal Convention also provides for a clear step-by-step procedure. Like under Article 22 of CERD, the seisin of the Court only comes at the end of the line, after a number of successive steps have been taken and after the other means have failed. And, as Georgia itself acknowledges (GM, p.305, para. 8. 30), in the *Lockerbie* case, the Court did not refrain from determining whether the procedural conditions of Article 14(1) of the Montreal Convention had been fulfilled; and only afterwards it affirmed its jurisdiction.

4.80 Furthermore, CERD relies upon a permanent committee as the primary guardian of the Convention. By-passing the conciliation mechanism provided in the Convention could have an impact that the violation of the arbitration requirement does not otherwise have: it may undermine the authority of the permanent organ established to preserve and enhance CERD's efficiency.

Section II. The conditions for the seisin of the Court are not fulfilled

4.81 The negotiations and the use of the procedures provided for in CERD prior to the seisin of the Court are important barometers to ascertain the existence or otherwise of a dispute, and that importance has been referred to in Chapter III of these Preliminary Objections. Moreover, under the Convention regime, they also serve as essential procedural prerequisites to the Court's jurisdiction.

4.82 The "negotiation / CERD procedures" condition is more than a formalistic condition[305]. As noted in Chapter III above, in its 2008 Judgment in the *Genocide* case (*Croatia v. Serbia)*, the Court explained the *rationale* for possible exceptions to the general rule of fulfilment of jurisdictional conditions at the date of the seisin:

> "What matters is that, at the latest by the date when the Court decides on its jurisdiction, the applicant must be entitled, if it so wishes, to bring fresh proceedings in which the initially unmet condition would be fulfilled. In such a situation, it is not in the interests of the sound administration of justice to compel the applicant to begin the proceedings anew — or to initiate fresh proceedings — and it is preferable, except in

[305] See P.C.I.J., Judgment of 30 August 1924, *Mavrommatis Palestine Concessions, Objection to the Jurisdiction of the Court*, Series A, N° 2, p.15 or I.C.J., Judgment, 26 November 1984, *Military and Paramilitary Activities in and against Nicaragua, Jurisdiction and Admissibility, Rep.* 1984, pp. 428-429, para. 83.

> special circumstances, to conclude that the condition has, from that point on, been fulfilled."[306]

In addition to the issues raised in Chapter III above, it may also be noted that, to date, no negotiation process relating to the Convention has been initiated nor has Georgia launched any CERD procedure.

4.83 It is for Georgia to prove that these conditions are fulfilled and it is apparent that Georgia has not:

a. the Parties have had no negotiation on the dispute alleged by Georgia;

and

b. Georgia has not used the procedures provided for in CERD.

A. THE PARTIES HAVE NOT HELD ANY NEGOTIATION ON THE DISPUTE ALLEGED BY GEORGIA

4.84 In order to amount to a "negotiation" over a CERD-related dispute *per se*[307], the contacts between the Parties to a dispute must expressly refer to the Convention or to its substantive provisions or, at least, to its object. The relevant

[306] I.C.J., Judgment of 18 November 2008, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Preliminary Objections*, para. 85.

[307] As shown in Chapter III above, in order to have a "dispute" under the Convention, the parties must have utilised the CERD Mechanism.

diplomatic contacts must be prior to the date of the seisin of the Court,[308] and they must relate to the subject-matter submitted to the Court[309].

4.85 The lack of substance to Georgia's contentions on this point were noted by the seven dissenting Judges during the Provisional Measures phase, who based their finding that the Court had no jurisdiction on the following observation:

> "Thus, it is not sufficient that there have been contacts between the Parties (…); these contacts must have been regarding the subject of the dispute, either the interpretation or application of the Convention. Even so, this precedent may not be dismissed in the present case, given that the two compromissory clauses are different, in that Article 29 of the Convention on Discrimination against Women requires arbitration after negotiation and before filing suit in the Court. In fact, when it rendered its judgment on 3 February 2006 on jurisdiction, the Court concluded that Article 29 established cumulative conditions and that it 'must therefore consider whether the preconditions on its seisin (...) have been satisfied in this case' (*Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction of the Court and Admissibility of the Application, Judgment, ICJ Reports 2006, p.*39, para. 87)."[310]

The Applicant's Memorial does not add any new element in this respect.

4.86 Any reading of the four volumes of annexes to the Georgian Application leaves this matter beyond argument: not once is the Convention mentioned in

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[308] See above, para. 3.23 *et seq*.

[309] I.C.J., Judgment, 21 December 1962, *South West African Cases (Liberia and Ethiopia v. South Africa), Rep.,* p.344: "In considering the question, it is to be noted, first, that the alleged impossibility of settling the dispute obviously could only refer to the time when the Applications were filed".

[310] Order of 15 October 2008, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation),* Joint dissenting opinion of Vice-President Al-Khasawneh and Judges Ranjeva, Shi, Koroma, Tomka, Bennouna and Skotnikov, para. 15.

the relations between Russia and Georgia or in Georgia's statements before various international bodies.

4.87 The Dissenting Judges in the provisional phase of the present case stressed that it is for the Applicant to establish the initiation of the negotiation process. There is no place for a presumption in favour of the Applicant here:

> "For the condition of prior negotiation to be fulfilled, it suffices for an attempt to have been made and for it to have become clear at some point that there was no chance of success. In any event, it 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."[311]

And further:

> "The very least that the Court should have done was to ask itself whether negotiations had been opened and whether they were likely to lead to a certain result, but it did not do so. Thus, it is understandable why a State party to CERD, in this case Russia, finds it unacceptable for an action to be brought against it before the Court without having been first advised of Georgia's grievances with regard to this Convention."[312]

4.88 Russia respectfully maintains that this is the question that the Court must ask. The position is that at no time have there been bilateral or multilateral contacts on relevant issues of racial discrimination between the Parties (a), but also Georgia has on many occasions expressed its appreciation of the Russian role as facilitator in the ongoing negotiations relating to the conflict, between Georgia on the one hand and Abkhazia and South Ossetia on the other, in relation to the legal status of Abkhazia and South Ossetia (b).

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[311] *Ibid.*, para. 13.

[312] *Ibid.*, para. 16.

1. There have been no bilateral or multilateral contacts on relevant issues of racial discrimination between the Parties

4.89 As Russia has already noted in Chapter III, the bilateral and multilateral contacts between itself and Georgia have not dealt with the question of racial discrimination[313]:

a. In *no* international forum has Georgia initiated a dispute with Russia relating to CERD or, in general terms, to racial discrimination.

b. On the contrary, there are many documents – including those annexed by Georgia to its Memorial – which show that the role of Russia as a facilitator was met with appreciation[314].

a) Bilateral contacts

4.90 As far as the bilateral contacts between the Parties are concerned, it is convenient to follow step by step the Georgia's "Chronology of Bilateral Negotiations" appearing at pages 307 to 315 of its Memorial:

a. *8.35 An account of the lengthy but unsuccessful bilateral consultations and negotiations between Russia and Georgia begins with the meeting between the Chairman of the Supreme Council of the RSFSR, Boris Yeltsin, and the Chairman of the Supreme Council of the Republic of Georgia, Zviad Gamsakhurdia, on 23 March 1991, in relation to the conflict in South Ossetia. According to the minutes of the meeting [Annex 96], Russia and Georgia, together with representatives of South Ossetia, undertook to establish the conditions necessary for the return of refugees to the places of their permanent residence.*

[313] Paras. 3.63 *et seq*.

[314] See also below, paras. 4.112-4.119.

(1) There is no mention of any ethnic related issue in that document; a mention of the refugees cannot be assimilated to a discussion of a claim of racial discrimination brought against Russia.

(2) The Georgian Memorial makes a factual error: speaking of the conditions necessary for returns, Annex 96 mentions North Ossetia, not South. The mention of North Ossetia means that Russia, like Georgia, at that moment denied the South Ossetian authorities any official role in the settlement of the conflict. North Ossetia, being a part of Russia, and having narrow ethnic ties with South Ossetia, was seen as another useful mediator, and a useful executor of rehabilitation programmes.

(3) There is no sign of Russia being a party to the conflict.

(4) This document (and the facts reported therein) predate Georgia's accession to the Convention[315].

b. *8.35 (cont.) Shortly afterwards, on 24 April 1991, representatives of the "Inter-Parliamentary Commission" from the Supreme Soviets of the USSR, the RSFSR and Georgia, called upon each State to "institute legal proceedings against persons who were engaged in violence, robberies and arsons, also those guilty of inflaming the ethnic conflict". [Annex 97]*

(1) The document expressly condemns the persons "guilty of inflaming the ethnic conflict"[316], thus demonstrating the unity of approaches of the USSR, Russia and Georgia to the problem.

(2) Overall, the text only supports the idea that the USSR and the Russian authorities were eager to help Georgia in settling the conflict, without challenging its sovereignty and territorial integrity. Moreover, the mentioning of the "*former* South Ossetian

[315] See below, Chapter VI.

[316] Paragraph 5.

Autonomous Area"[317] further confirms the unity of positions between Moscow and Tbilisi (the autonomous status of South Ossetia had been formally abolished by the Georgian authorities).

(3) This document cannot anyway serve as an example of negotiations since it is only the document of a parliamentary commission that cannot qualify as an official position of the respective governments.

(4) This document (and the facts reported thereof) predate Georgia's accession to the Convention.

c. *8.35 (cont.) An "Agreement on Principles of Settlement of the Georgian-Ossetian Conflict" was then signed by President Boris Yeltsin and President Eduard Shevardnadze on 10 June 1992 [Annex 102]*

(1) This document has already been considered in Chapter II above[318]. According to the preamble:

"The Republic of Georgia and the Russian Federation,

seeking to stop the bloodshed and achieve, as soon as possible, a comprehensive settlement of the conflict between Ossetians and Georgians,

guided by their desire to restore peace and stability in the region,

confirming their commitment to the principles of the UN Charter and of the Helsinki Final Act,

acting in the spirit of respect for human rights and freedoms, as well as for the rights of national minorities…".

This agreement thus aims at putting an end to an armed conflict, not to acts of racial discrimination[319].

[317] Paragraph 2, last bullet point – emphasis added.

[318] See para. 2.13 *et seq*.

(2) The Agreement draws a clear distinction between the parties to the Agreement (obviously, Georgia and Russia) and the "opposing parties" (Article 1, implying Georgia and South Ossetia): the conflict in question is described as being "between Ossetians and Georgians". Indeed, Article 2 then rules out "the possibility of involvement of the armed forces of the Russian Federation into the conflict."[320] Therefore, again, this is not an agreement between the parties to the conflict, but an agreement between one country in whose territory the conflict was developing (Georgia) and another country that was seen as a potential facilitator and guarantor of the conflict settlement process and that was receiving numerous Ossetian refugees (Russia)[321].

(3) This document (and the facts reported therein) predate Georgia's accession to the Convention.

d. *8.36 In relation to the conflict in Abkhazia, the Presidents of Russia and Georgia met on 3 September 1992 and agreed to the "Final Document of the Moscow Meeting" [Annex 106]. A ceasefire was announced in respect of the military confrontation between the Georgian armed forces and the militias in Abkhazia. The Final Document made clear reference to the protection of the rights of minorities and was signed by the Heads of State of Russia and Georgia. Article 5 of the Agreement annexed to the Final Documents reads:*

> *The conditions for the return of refugees to the places of their permanent residence are being secured. They shall receive the adequate assistance and aid.*

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[319] See also Article 1, para. 1: "From the very moment of signing of present Agreement, the opposing parties commit themselves to undertake all necessary measures aimed at termination of hostilities and achievement of comprehensive cease-fire by 28 June 1992".

[320] The words "armed forces of the Russian Federation in the conflict" in the translation provided by Georgia are misleading.

[321] This is also confirmed by criticism over the Agreement initially expressed by the South Ossetian side (see para 2.15 above).

8.37 This was supplemented with an explicit obligation imposed upon the parties by Article 8:

> *The Sides confirm the necessity of observing the international norms in the sphere of human rights and minority rights, inadmissibility of discrimination of the rights of citizens with regards to ethnicity, language or religion, and the securing of free democratic elections.*

(1) The substance of the document reveals that no dispute existed between Russia and Georgia. On the contrary, agreements were reached on all matters, with the acknowledgement of the territorial integrity of Georgia, the right of displaced persons to return, etc., *including the principle of the inadmissibility of discrimination*: this points to an *agreement,* not to a dispute;

(2) According to Article 9: Russian armed forces "shall firmly observe neutrality and do not participate in internal conflicts": notably, the conflicts in question are referred to as internal ones.

(3) This document (and the facts reported therein) predate Georgia's accession to the Convention.

e. *8.38 Thus, as early as in 1991-1992, Georgia and Russia had recognized the problem of ethnic discrimination as being at the heart of the conflicts in Abkhazia and South Ossetia.*

(1) This is incorrect: they recognized that there existed an armed conflict between Georgia on the one hand, Abkhazia and South Ossetia on the other hand and Russia was wishing to do what it could to put an end to that conflict – to which Russia was not a party. Even if Georgia and Russia recognized the issue of ethnic discrimination as one of the aspects of the conflict, they were clearly not in a dispute over it.

(2) And again, mentions of refugees cannot be assimilated to a claim of racial discrimination brought against Russia, still less the existence of negotiations in relation to such a claim.

(3) All these documents (and the facts reported therein) predate Georgia's accession to the Convention.

f. *8.39 A "Protocol of Negotiations between the Governmental Delegations of the Republic of Georgia and the Russian Federation" was then signed on 9 April 1993 in Sochi by the Russian Minister of Defence, Pavel Grachev and the Georgian Prime Minister, Tengiz Sigua [Annex 105]. A "Commission for Control and Inspection in Abkhazia was established, inter alia, to "address the issues related to the return and accommodation of refugees and internally displaced persons". The Protocol called for "measures aimed at... the protection of human rights of ethnic minorities…in full conformity with international law".*

(1) A mention of the refugees cannot be assimilated to a reference to racial discrimination.

(2) The English translation provided by Georgia seeks to demonstrate that Russia was a party to the conflict:

> "The parties to the conflict … expressed their strong determination to … introduce a cease-fire … and denounce the use of military force against each other …".

However, the Russian original text in reality reads:

> "The parties [*i.e.* the parties to the negotiations; the words 'to the conflict' do not appear] … have spoken firmly in favour of a … cease-fire …, of a prohibition of any use of force … [without saying 'against each other'] …".

Indeed, if Russia had been a party to the conflict, this sentence, in whatever form, would be meaningless. Since the parties to the Protocol declare themselves to be in favour of a ceasefire, then why not sign it straight away if they are also the parties to the conflict? In fact, that sentence shows that Russia and Georgia were in favour of a ceasefire, but that reaching a ceasefire did not depend only on

them. The 3rd paragraph of Part I also shows that the "parties to the conflict" are to be distinguished from the parties to the negotiations of which Annex 105 is a procès-verbal, while the last paragraph of Part I expressly mentions the "Georgian-Ossetian conflict".

(3) In the 9th paragraph of Part I, Russia expresses its readiness to discuss the relevant matters with Abkhazia, showing that Russia was a mediator[322].

(4) Part II of the document demonstrates the constructive atmosphere of the meeting and the general improvement of Russian-Georgian relations.

(5) This document (and the related facts) predate Georgia's accession to the Convention.

g. *8.40 The next step involved the wider international community, reflected in the conclusion of a "Memorandum of Understanding" between Georgia and the Abkhaz* de facto *government, with the participation of Russia, the United Nations and the CSCE on 1 December 1993 [Annex 108]. This was the start of the "Geneva negotiations", in which Russia was described as a "facilitator". This agreement mandated the following action from the parties:*

> *The parties consider it their duty to find an urgent solution to the problem of the refugees and displaced persons. They undertake to create conditions for the voluntary, safe and speedy return of refugees to the places of their permanent residence in all regions of Abkhazia. The apartments, houses, plots of land and property which they left shall be returned to all those refugees who return.*

(1) Russia is described as a facilitator, not as a Party to the conflict let alone as responsible for racial discrimination.

[322] This indeed was done: on 5-6 May 1993, Russian-Abkhaz consultations took place, at which "fulfilling its mediating functions, the delegation of the Russian Federation familiarised the representatives of Abkhazia with the results of the negotiations [between Russia and Georgia] that had taken place in Sochi on 6-9 April". Communiqué on Russian-Abkhaz consultations, Maykop (5-6 May 1993). Annex 28.

(2) No ethnicity-related issues are mentioned: it is not sufficient to mention the "return of the refugees" to establish the existence of a racial discrimination dispute brought against Russia, still less the existence of negotiations.

(3) This document (and the facts reported therein) predate Georgia's accession to the Convention.

h. *8.41 The human tragedy underlying the present case before the Court is that the right of return guaranteed by Article 5 of the Convention and endorsed in the official documents signed by the Presidents of Russia and Georgia at the start of negotiations some fifteen years ago has proven to be illusory, as a result of Russia's conduct throughout this time.*

The right of return in Art. 5(d)(ii) of CERD must be interpreted in the context of the Convention, in view of its object and purpose and in the light of other international instruments in which the same right is enshrined: it relates to the right physically to cross state borders and does not bear upon the right of return of displaced persons (*i.e.* a complex process involving matters of property, social rehabilitation and re-integration etc.) following an armed conflict.

i. *8.42 On 3 February 1994, the "Agreement between Georgia and the Russian Federation on Friendship, Good Neighborhood and Cooperation", known as the "Framework Agreement", was signed by both parties [Annex 109]. It was seen as the legal basis for any kind of relations, and although some progress was made at various stages and working commissions were established, it was never ratified by the Russian Federation*[323].

(1) It is difficult to imagine a country signing a Friendship Agreement with another country that the former was accusing of egregious acts of racial discrimination.

[323] In fact, it was not ratified due to a deterioration in bilateral relations, – not in relation with the dispute now alleged by Georgia.

(2) This document (and the related facts) predate Georgia's accession to the Convention.

j. *8.43 The "Quadripartite Agreement on the Voluntary Return of Refugees and Displaced Persons" was then concluded on 4 April 1994 in Moscow between Georgia, Russia, representatives of Abkhazia and the UN High Commissioner for Refugees [Annex 110]. A "Commission" was established pursuant to the Agreement "to formulate, discuss and approve plans to implement programmes for the safe, orderly and voluntary repatriation of the refugees and displaced persons to Abkhazia from Georgia, the Russian Federation and within Abkhazia for their successful reintegration".*

(1) There is no mention in the document of any ethnicity-related issue (with the exception of the proclaimed right of "[d]isplaced persons/refugees … to return voluntarily to their places of origin or residence irrespective of their ethnic, social or political affiliation…"[324]); a mention of the refugees cannot be assimilated to negotiation of a claim of racial discrimination brought against Russia.

(2) Again, a deliberate distinction is made between Russia on the one hand and the Parties to the conflict on the other hand; the Agreement is concluded between "[t]he Abkhaz and Georgian sides, hereinafter referred to as the Parties, the Russian Federation and the United Nations High Commissioner for Refugees"[325].

(3) This document (and the related facts) predate Georgia's accession to the Convention.

[324] Paragraph 3(b).

[325] Paragraph 1 of the Preamble.

k. *8.43 (cont.) The Commission met on 4 April 1994[326] and 27 April 1994 [Annexes 111 and 112].*

(1) The rapid schedule of the meetings points to the seriousness of the parties' intentions to positively solve the refugees problem.

(2) The penultimate paragraph of Annex 111 reads: "The sides reaffirmed their readiness to strictly pursue principles and proposals of the Moscow Agreement of 4 April 1994 on voluntary return of refugees and displaced persons proceeding from the fact that the process of return would be connected with deployment of the peacekeeping forces", whereas the last paragraph of Annex 112 reads: "The meeting was held in constructive environment and full mutual understanding". Both paragraphs underline the common accord of the sides to implement the framework agreement on the return of refugees.

(3) Alongside Georgia and Abkhazia, these documents are signed not only by Russia but also by the UNHCR, attesting to the facilitating role of Russia.

(4) This document (and the related facts) predate Georgia's accession to the Convention.

l. *8.44 On 24 July 1995, the Parties to the Quadripartite Agreement signed a protocol referring to the following steps for the return of IDPs: [Annex 116]*

The working group shall start its activities beginning from August 1995 and within two weeks, and in accordance with an action plan adopted by the working group, the process of organized return of refugees to places of their permanent residence, first of all to the Gali region, shall commence.

[326] In fact, the first meeting took place on 9 April, not 4 April (see GM Annexes 111 and 112).

(1) The document reproduced in Annex 116 is clearly a "draft", as can be seen from its first line. According to the best knowledge of the Russian Federation, it has never been signed, but only initialled by representatives of the sides, with the Abkhaz side later refusing to sign it (as is also clear from the penultimate line of Annex 116).

(2) But even if it were signed, there is no mention of any ethnicity-related issue in that document (but for a call to "inter-ethnic concord"[327]); a mention of the refugees cannot be assimilated to negotiation of a claim of racial discrimination brought against Russia.

(3) Again, a deliberate distinction is made between Russia on the one hand and the Parties to the conflict on the other hand; the protocol was to be concluded by the "representatives of [the] Georgian and [the] Abkhaz sides, under the mediation of representatives of [the] Russian Federation[328].

(4) According to Article 3, "[f]or organization of works aimed at return of refugees, a special working group composed of representatives of the Parties and the Russian Federation and the UNHCR, shall be set up"; this again shows a high degree of confidence by the Parties (including Georgia) with respect to the positive role of Russia.

(5) This document (and the related facts) predate Georgia's accession to the Convention.

m. *8.45 A number of meetings were held at the Presidential level to discuss the situations in Abkhazia and South Ossetia. On 6-7 March 2003, a meeting was held in Sochi between President Vladimir Putin and President Eduard Shevardnadze [Annex 136]. According to the*

[327] In paragraph 4 of the Preamble.

[328] Paragraph 1 of the Preamble.

Respondent, the resulting "Sochi Agreements" made the Geneva Process redundant, despite the latter involving the wider international community. A solution to the plight of the IDPs was high on the agenda for this meeting, where it was emphasised that the first priority must be the return of ethnic Georgian IDPs to the Gali region of Abkhazia.

(1) This is the first document relating to the period following the accession of Georgia to the Convention. Also to be noted is the gap between 1995 and 2003 in Georgia's own chronology which of course reflects Georgia's inability to identify any relevant document – however remotely linked to the subject matter of the Application the ones it has produced may be.

(2) The return of the refugees was one of the three issues to be further discussed, the two others being the restoration of the Sochi-Tbilisi railway connection, and the modernization of the Inguri hydroelectric plant. A mention of the refugees cannot be assimilated to negotiation of a claim of racial discrimination against Russia.

(3) Contrary to the Georgian allegation, Annex 136 does not mention "ethnic Georgians"; there is no mention of any ethnicity-related issue in that document.

n. *8.45 (cont.): A working group was established to secure that objective. But when the working group met on 16 June 2003 and 31 July 2003, the Russian side rejected the Georgian proposal for a Joint Provisional Administration under the auspices of the United Nations in Gali to secure the dignified and safe return of the IDPs [Annex 137]; Russia defended its rejection on the ground that Abkhaz representatives were against such a JPA being established. The Russian side then insisted that the return of the IDPs should only occur on the basis of the conditions presented by the Abkhaz de facto government.*

(1) Of the three (or at least two) unrelated documents in Annex 137 only the first page corresponds to the title of the Annex and to the contents of paragraph 8.35 of the Memorial.

(2) The content of that first page (presumably, it is a translation of an internal Georgian information note about the results of the meetings mentioned) is distorted in the Memorial. The document merely shows that Russia took no position of its own, but rather was ready to agree to any decision that Georgia and Abkhazia could reach as between themselves, and was insisting on direct negotiations between the two parties to the conflict. Among other things, it is not clear why Annex 137 calls the working groups in questions "Georgian-Russian".

o. *8.45 (cont.): The working group met again on 26-27 April 2004 at the Russian Ministry of Foreign Affairs [Annex 139]. The UN Special Representative in Georgia, Heidi Tagliavini, noted that they had elaborated the main parameters for the return of IDPs together with the UNHCR. But, the Abkhaz representatives had refused to sign the resultant "Intentions Document".*

(1) Overall, Annex 139 is a good example of the constructive position of Russia as facilitator in the negotiations between Georgia and Abkhazia [329].

(2) No ethnicity-related issue is mentioned. The fact that the object of the meeting was the return of the refugees does not make it equivalent to a negotiation of a claim of racial discrimination brought against Russia.

(3) As made clear by the declaration of the Special Representative of the Secretary-General of the United Nations, the return of the refugees was a matter for Georgia and Abkhazia ("I suggest to the Georgian and Abkhazian sides to declare about their readiness to

[329] See *e.g.* the following passage of the document reporting the Russian position: "Due to the positions of the sides it is impossible accept/approve the Letter of Intentions. It is advisable to continue work to achieve the coincidence of the positions and to work out the agreed document";or: "It is necessary to find out terms that will be acceptable for both sides". These positions also show that Russia was not directly and primarily concerned.

start the process of return of refugees"). Similarly, the representative of the UNHCR mission in Georgia took the position that the process of return of the refugees was the business of "both sides", thus designating Georgia and Abkhazia – not Russia[330].

p. *8.45 (cont.): Another meeting of the working group took place on 20 July 2004 [Annex 140]. Once again the "Intentions Document" was circulated calling for the return of IDPs to the Gali region as a first step and in recognition of the fact that "fundamental principles" relating to "the return of refugees and IDPs" require "the establishment of security conditions and protection of human rights enshrined in [the] Universal Declaration of Human Rights of 1948, as well as in other major Human Rights treaties" [Annex 307]. The working group met again on 15-16 June 2005 [Annex 92].*

The three documents mentioned in this paragraph are scarcely relevant:

(1) Annex 92 goes no further than stating that

> "During the year of 2005, 4 meetings … of the Joint Control Commission for the resolution of Ossetian conflict have been held in Moscow, as well as 1 meeting … in the context of conflict resolution in Abkhazia, of the Working Groups on the Return of Refugees and on Restoration of Railways".

If this proves anything it is that the Russian Government wished to assist in finding a solution to the refugees issue. By no means can the problem of the refugees be equated with racial discrimination, just like Russian mediating efforts in respect of the resolution of the conflicts of others cannot be equated to the existence of a Russian-Georgian dispute.

[330] "In case of agreement from both sides we will support the process of return of refugees but we need the joint statement by both sides". See also the Position of Commander-in-chief of the CIS Collective forces in the conflict zone: "After defining the positions by Georgian and Abkhazian sides we can specifically define our task…".

(2) Annex 140 briefly discusses some practical matters concerning the return of the refugees, without hinting at any issue of racial discrimination – by Russia or otherwise.

(3) And the same can be said of Annex 307 which only mentions by name the "Georgian and Abkhaz sides" and which anyway was not agreed to by them, if the document reproduced in Annex 307 was indeed annexed to the accompanying letter (nothing suggests it was)[331] and is indeed the draft letter of intentions circulated on 20 July 2004.

r. *8.46 The new President of Georgia, Mikhail Saakashvili, wrote to President Putin on 26 July 2004 in order to draw attention to the lack of any real progress in resolving the conflicts in South Ossetia and Abkhazia [Annex 309]. President Putin responded on 14 August 2004 [Annex 310]. In relation to South Ossetia, he expressed the following assessment:*

> *I would like to emphasize that the most important aspect[332] of the resolution of Georgian-Ossetian conflict should be the ensuring of protection of rights and interests of the population of South Ossetia the majority of which are Russian citizens. Taking into consideration the above-mentioned we will continue purposeful mediatory work for a peaceful settlement of the conflict.*

8. 47 In relation to Abkhazia, President Putin wrote:

> *To my belief the main line direction of the work for solving problems with Abkhazia should be the practical and coherent realization of Sochi agreements.*

(1) While this exchange of letters shows tensions between both countries, it also bears witness to the good will of the two leaders and their wish to find a resolution of the conflict which, as is shown

[331] An English translation is reproduced in Annex 59 to these Objections.

[332] The words "the most important aspect" are phrased in the original Russian text in a way that may equally be translated as "one of the most important aspects".

by both letters, raises the question of military and paramilitary activities and of territorial integrity.

(2) It should be noted that this exchange of letters followed an attempt by Georgia to re-establish control over South Ossetia by force.[333]

(3) The letter of President Saakashvili demonstrates what the real grievances of Georgia were: alleged infiltration of mercenaries from Russia into South Ossetia; alleged training of South Ossetian forces by Russian servicemen; alleged introduction of extra military equipment by Russia into South Ossetia; alleged distribution of Russian passports in South Ossetia; alleged improper declarations by the JPKF Commander; alleged privatisation of property in Abkhazia by Russian companies; smuggling and other criminal activities. It is telling that this long list does not include anything even remotely related to racial discrimination.

(4) As for the reference by President Putin in Annex 102 to the Sochi agreements, this only confirms that the main question in these exchange of letters is the implementation of the accords (reached in 2003) on the re-establishment of the railway link; the hydroelectric plant; and the return of displaced persons, that, as seen from the letter, was fully supported by Russia.

s. *8.48 Once again, the President of Georgia initiated correspondence with the new Russian President Dmitri Medvedev in June 2008 [Annex 308]. He raised the problem of the return of IDPs to Abkhazia. President Medvedev's response of 1 July 2008 was as follows: [Annex 311]*

> *It is also apparently untimely to put the question of return of refugees in such a categorical manner. Abkhazs perceive this as a threat to their national survival in the current escalated situation and we have to understand them.*

[333] See above, Chapter II, para. 2.32.

(1) In this exchange of letters, the two Presidents refer to the question of the return of the refugees, but none of the letters suggests that a claim as to racial discrimination is under negotiation. Moreover the question on the refugees is only one aspect of a great number of questions addressed in the letters, together with, *inter alia*, the peace-keeping troops, the establishment of a free economic zone, naval communication between Sukhumi and Trabzon, the Olympic Games of 2014 etc.

(2) Regarding President Medvedev's response, Georgia takes his words out of context. From the second (third in the Russian original) paragraph of President Medvedev's letter it is clear that the Russian position was that Georgia should first of all speak to the Abkhaz:

> "I have attentively reviewed your proposals on the problems of regulation of Georgian-Abkhazian conflict. Most of the elements can be relevant at different stages of regulation, after the proper elaboration/modification. Here, the principle partner must be Abkhazia.[334]
>
> Apparently, this presumes first of all the full-scale negotiation process. Unfortunately, the sides feel deep mutual mistrust as of today and the recently resumed contacts between Tbilisi and Sokhumi have only occasional character".

Therefore, when the issue of the return of refugees was qualified by President Medvedev as untimely and categorical, he was not referring to a refusal by Russia to discuss it, but rather to an objective statement of fact, given the attitude of Abkhazia.

(3) The next paragraphs of President Medvedev's letter demonstrate that Russia had a vision of a positive agenda for negotiations

[334] There is a mistranslation; the sentence should read "Here, *your* primary partner must be *the Abkhaz side*".

between Tbilisi and Sukhumi on the settlement of political issues that divided them.

t. *8.49 The Russian President's characterisation of the question of the return of the IDPs to Abkhazia as "untimely and categorical" in July 2008 stands in contrast to the Memorandum of Understanding signed by Russia*[335] *in December 1993, which committed the parties to finding an "urgent solution to the problem of the refugees and displaced persons" [Annex 108].*

(1) The document relates again to the question of the return of refugees and IDP's and not to racial discrimination.

(2) Moreover, even though this is not the question, it cannot be deduced from the fact that after so many years the problem of the refugees had not found a solution that *Russia* bears responsibility for this relative deadlock.

u. *8.49 (cont.): This makes clear that in 2008 the parties were plainly in dispute on the issue of protections needed for ethnic Georgians against discrimination and exclusion.*

Contrary to what Georgia implies, there is no proof that there was a disagreement between Russia and itself on questions of ethnic discrimination. Moreover, Georgian complaints regarding refugees (that Georgia portrays as claims on racial discrimination, *quod non*) are not addressed to Russia.

v. *8.49 (cont.): On 15 May 2008 Russia voted against UN General Assembly resolution GA/10708 which focused on the right of return of all refugees and IDPs to Abkhazia, and recognised that there had been attempts to alter the pre-conflict demographic composition.*

[335] As clear from its very name ("Memorandum of Understanding between the Georgian and Abkhaz sides at the negotiations in Geneva"), Annex 108 is a bilateral Georgian – Abkhaz document.

(1) Georgia refers to General Assembly Resolution 62/249, remarkable in itself by having been adopted by 14 votes to 11 with 105 abstentions.

(2) It is to be noted that, speaking before the adoption of the Resolution, the Georgian representative used the word "Russia" only once, when he invited Russia to continue to fulfil its mediation role:

> "…our proposals include the following: [description of substantive proposals on the resolution of the conflict]; and an invitation to the Russian Federation, along with the rest of the international community, to act as mediator in this process"[336].

(3) Russia explained in detail why it voted against the Resolution[337]. The main idea was that the draft was politicized and that it could only harm the negotiation process, as the Abkhaz would perceive the Resolution as a non-friendly gesture. The Russian statement is also helpful to demonstrate what the "real" dispute was (and still is[338]):

> "It is clear that this initiative has been concocted by the authors to put pressure on the Abkhaz side to resolve political, rather than humanitarian issues. That has indeed been reaffirmed by the statements that we have heard today following the representative of Georgia's introduction of the draft resolution, which referred only to political aspects of the settlement of the conflict in [this] territory of the former Union of Soviet Socialist Republics, and said virtually

[336] U.N., General Assembly, 62nd session, Official Records, 97th plenary meeting, U.N. Doc. A/62/PV.97 (15 May 2008), p.3. Annex 68.

[337] *Ibid.*, p.7.

[338] See above, Chapter II, para. 2.45

> nothing about the problems of refugees and internally displaced persons (IDPs).”[339]

In so doing, Russia was thus acting merely as a mediator interested in the success of its mediation.

4.91 By way of conclusion of its alleged account of “the extensive negotiations between Georgia and Russia concerning the subject matter of Georgia’s claims under the 1965 Convention”[340], Georgia asserts that:

> *8.50 In sum, despite numerous bilateral meetings and discussions between Georgia and Russia, and notwithstanding several agreements reached and commitments made regarding non-discrimination against ethnic Georgians and facilitation of the return of Georgian IDPs to South Ossetia and Abkhazia, the situation in the two territories remained fundamentally unchanged for the ethnic Georgians living there or seeking to return. The extensive negotiations that were held over more than 15 years failed to resolve the dispute between the Parties.*

4.92 The lack of underlying evidence of negotiations that Georgia relies upon is striking. Of course Georgia has been able to point to multiple contacts between itself and others concerning Abkhazia and South Ossetia, but the question is whether such contacts concerned “the subject matter of Georgia’s claims under the 1965 Convention” against Russia. They did not. As the paragraph by paragraph rebuttal above shows: in spite of Georgia quest for documents showing, even remotely, that such a claim was made, it could find none. At no occasion in their bilateral relations did Georgia articulate any claim of racial discrimination by Russia, and Georgia and Russia did not engage in negotiations in respect of any such claim.

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[339] U.N., General Assembly, 62nd session, Official Records, 97th plenary meeting, U.N. Doc. A/62/PV.97 (15 May 2008), p.7. Annex 68.

[340] GM, p.304, para. 8. 32.

4.93 One of the recurrent questions dealt with in the documents on which Georgia relies is that of the return of refugees and IDPs. But this is a different issue, all the more so as the numerous documents provided by Georgia demonstrate that this matter was not treated in the negotiations under a racial discrimination angle. Moreover, many of the documents invoked by Georgia show that it called for Russia's cooperation on the issue and that Russia answered positively, while constantly making clear that it had no responsibility on the creation of this situation, and, at the same time, no means of solving this problem without agreement of the parties to the conflict – Abkhazia and South Ossetia.

4.94 And indeed, none of the documents invoked by Georgia qualifies Russia as a party to a dispute or conflict; on the contrary, they constantly identify Georgia, Abkhazia and/or South Ossetia as parties; they always carefully distinguish between Russia and the parties to the conflict. They confirm that, as will be shown below (Sub-Section (b)) in more detail, Georgia has constantly acknowledged the positive role of Russia in respect to the now alleged dispute.

4.95 And all these documents also confirm that the real object of Georgia's grievances is by no stretch of the imagination a Georgian claim of racial discrimination against Russia but the neatly distinct question of the territorial integrity of Georgia and the use of force in Abkhazia and South Ossetia with the consequential problem posed by the refugees fleeing from the combat zone.

b) Multilateral fora

4.96 The same observations can be made with respect to the contacts of the Parties within or through multilateral fora and to the position taken in each instance, whether the Joint Control Commission for the Georgian-Ossetian Conflict Settlement (JCC), the United Nations Geneva Process and the Group of

Friends of Georgia, the Organisation for Security and Cooperation in Europe (OSCE) or the Commonwealth of Independent States (CIS).

4.97 As noted in Chapter II above, and as recalled by Georgia[341], the *JCC* was created by the Sochi Agreement of 24 June 1992, the full title of which is, by itself, revealing: "Agreement on Principles of the Settlement *of the Georgian-Ossetian* Conflict"[342]. Its aim is made clear in the Preamble: the speedy restoration of peace and stability in the region. This is confirmed by the Regulation on the JCC of 31 October 1994 (also invoked by Georgia[343]) which states that the Parties act "with the aim of ensuring the monitoring of the ceasefire through the withdrawal of armed formations, the dissolution of self-defense forces, and the assurance of a security regime in the zone of conflict, as well as through the maintenance of peace, the prevention of a renewal of military actions, and the carrying out of coordination of the joint activities of the parties for the stabilization of the situation, for the political settlement of the conflict, for economic restoration of the afflicted zones, and for the return and reestablishment of refugees and forced resettlers". The rights of ethnic minorities are mentioned[344], but far from showing a disagreement between both countries on this point, the Sochi Agreement and the 1994 Regulation[345] bear witness of their complete agreement on this point.

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[341] GM, p.315, para. 8. 51.

[342] See GM, Annex 102.

[343] GM, Annex 113.

[344] GM, Annex 102, para. 4 of the Preamble: "Acting in the spirit of respect for human rights and fundamental freedoms, as well as rights of ethnic minorities".

[345] GM, Annex 113, para. 5: "The following functions and tasks are assigned to the Joint Control Commission: … f) organization of supervision concerning the observation of human rights and national minorities in the zone of conflict".

4.98 Moreover, it is most revealing that, while it acknowledges that the JCC held thirty-two meetings between 1992 and 2007[346], Georgia, which, here again, was, without any doubt, desperately searching for documents in support for its argument – could only mention four documents, none of them supporting, even remotely, the existence of negotiations between Georgia and Russia on a claim of racial discrimination of the former against the latter:

- a Memorandum on necessary measures to be undertaken in order to ensure security and strengthening of mutual trust between the parties to the Georgian-Ossetian conflict of 16 May 1996 (Annex 118 to the Georgian Memorial);

- two "Agreements between Georgia and Russia" on the return of refugees signed on 23 July and 23 December 2000 (Annexes 129 (annex 3) and 131); and

- a draft "Inter-State Russian-Georgian Program on the Return, Accommodation, Integration and Reintegration of Refugees and IDPs" said to have been approved at the meeting of the JCC of 23-26 June 2003 (which Georgia has not annexed) and elaborated upon in the minutes of the meeting of the Co-Chairmen of the JCC of 16 April 2004 (Annex 138).

4.99 The extract of Annex 118 quoted by Georgia[347] only shows that the signatories were *in agreement* – and agreement is just the opposite of a dispute – that it was necessary to put an end to violations based on ethnicity.

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[346] GM, p.317, para. 3. 55.

[347] At p.317, para. 8.56: "The Parties shall undertake all necessary measures aimed at prevention and cutting short any illegal actions that may violate human rights on the ground of ethnic origin".

Contrary to Georgia's assertion, Annex 118 not a JCC document, but a multilateral agreement signed by Russia in its capacity of facilitator, as the OSCE representative did: "Under the facilitation of representatives of the Russian Federation and participation of representatives of the Republic of North Ossetia–Alania and Organization for Security and Cooperation in

4.100 Annex 3 to Annex 129[348] and Annex 131 also confirm Russia's mediating role[349], and if they contain an allusion (a very indirect allusion) to a risk of racial discrimination, it is directed at Georgia: "The Georgian Side, in full conformity with norms of the international law, shall secure full respect of human rights of refugees and internally displaced persons returning to their places of permanent residence"[350]. More generally, Annex 131 is an agreement whereby Russia accepted to assist in rehabilitation of the conflict area in order to create conditions for returns. Accordingly, there was no dispute between Georgia and Russia as to the problem of refugees and Russia not only did not hinder, but was ready to facilitate returns.

4.101 Annex 138 only confirms this analysis, demonstrating that a significant number of ethnic Ossetian refugees were (and still are) staying in the Russian territory, in North Ossetia. Georgia has offered no evidence of a claim of racial discrimination against Russia. Moreover, the program referred to was never adopted by the JCC; the documents invoked by Georgia are simply preparatory[351] and it is important to note that they do not involve any question of racial discrimination. The problem of refugees (to which Russia was also confronted during and in the aftermath of the Georgian-Ossetian conflict) was

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Europe (OSCE), representatives of the Georgian and South Ossetian delegations held negotiations on further development of the process of comprehensive political settlement of the Georgian-Ossetian conflict and […] [have] agreed upon the following" (Preamble).

[348] Annex 3 to Annex 129 is a JCC decision, not a Russian-Georgian agreement.

[349] See in particular paragraphs 5 and 6 of annex 3 to Annex 129 which clearly imply that Russia is a third party in the Georgian – South Ossetian dispute. In Article 1 of Annex 131, [t]he Parties acknowledge the necessity for further financing of restoration works *in the Georgian-Ossetian conflict* zone."

[350] GM, Annex 131, Article 1, para. 3.

[351] Georgia says that the programme was adopted in June 2003, while in reality only in April 2004 the JCC stated that the preliminary work had been finished (see Annexes 52 and 55).

addressed without any consideration of their ethnic origin. Georgians and Ossetians were to be treated alike, as refugees fleeing the consequences of armed conflict.

4.102 Georgia has not been more successful in its search of documents confirming its case among those issued by the Special *Ad Hoc* Committee on the Facilitation of the Voluntary Return of Refugees and IDPs to the Places of Former Residence which was established by the JCC on 13 February 1997 (Protocol 7). As noted by the Applicant[352], the Committee met thirteen times between 1997 and 2002; yet Georgia does not cite any episode or document adopted by that Committee confirming its case.

4.103 Similarly, the developments in relation to *the United Nations Geneva Process and the Group of Friends of Georgia* do not help Georgia. They simply show that Russia was acting as a facilitator and was seen as acting in this capacity by the parties to the conflict. Thus, in the "Final statement on the outcome of the resumed meeting held between the Georgian and Abkhaz parties held in Georgia (17 - 19 November 1997)", the Russian Federation is mentioned as one of "the states of the Group of Friends under the Secretary General" together – and on an equal footing – with France, Germany, the United Kingdom and the United States, all "acting as observers"[353]. As the Applicant itself acknowledges, the mechanism of the "Coordination Council of the Georgian and Abkhazian Parties", created to implement the decisions made in the Geneva Process, "was chaired by the Special Representative of the UN Secretary-General for Georgia and consisted of two representatives of Georgia

[352] GM, p.318, para. 8. 58.

[353] GM, Annex 125, para. 1. See also para. 5: "The sides welcome the positive results of the meeting between Mr. Shevardnadze and Mr. Ardzinba in Tbilisi on 14 and 15 August 1997, organized with the support of the Russian Federation *as facilitator*." (emphasis added).

and Abkhazia, as well as *representatives from Russia as facilitator*, the OSCE and the Group of Friends."[354]

4.104 Just like with the JCC, the Geneva Process documents annexed by Georgia constitute evidence of constructive negotiations, not of an ongoing dispute, and the issues discussed are not about ethnic discrimination, but mainly about the refugees' return.

4.105 Georgia asserts in paragraph 8.71 of its Memorial that

> "[o]n several occasions Georgia has attempted to raise the subject matter of this dispute with the Russian Federation and to make progress in resolving the conflict within the forum of the OSCE Permanent Council. The OSCE itself has been involved in monitoring the conflict zone since 1994 [Annex 74]"[355].

Interestingly, the Applicant omits to indicate "the subject matter of this dispute with the Russian Federation" which would have been raised by Georgia on several undisclosed occasions. However, the "conflict" which is dealt with by the *OSCE* has nothing to do with the alleged dispute in this case. As explained in the Mandate of the OSCE Mission to Georgia, adopted on 13 December 1992: "the objective of the Mission was to promote negotiations between the conflicting parties in Georgia which are aimed at reaching a peaceful political settlement", and the conflicts in question are "the Georgian-Ossetian conflict" and "the conflict in Georgia/Abkhazia";[356] for its part, the Russian Federation appears only as far as the border monitoring is concerned but not at all as a party to the conflict. Moreover, this document does not mention any question of racial discrimination.

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[354] GM, pp. 319-320, para. 8. 60 (emphasis added).

[355] GM, p.323.

[356] GM, Annex 74.

4.106 Similarly, in his statement before the Permanent Council of the OSCE, on 30 March 2001, the Georgian Minister of Special Affairs of Georgia declared:

> "With regard to the conflict settlement in Tskhinvali Region, we are concerned by the fact that despite the efforts of the OSCE and the Russian Federation to move the peace process ahead, the real progress has not been achieved." [357]

Georgia thus saw the OSCE and Russia as engaged in the same effort to move the peace process ahead. Self-evidently it did not see Russia as party to any conflict, let alone to the carefully constructed dispute that it now seeks to bring before the Court.

4.107 In this same statement, Minister Kakabadze clearly indicated that:

> "It has been eight years since my country fell victim to an ethnic violence in Abkhazia, Georgia. Since then, with invaluable help from the international community, we try to move the peace process ahead. However, the progress has been practically non-existent. Unfortunately, the illegitimate Abkhaz regime stubbornly refuses to move the negotiation process ahead."[358]

While the Russian Federation does not share the views of Georgia as to the responsibilities borne in this respect, it is again manifest that this Georgian complaint is not addressed to the Russian Federation.

4.108 By contrast, in his statement of 24 April 2006 at the OSCE Permanent Council Meeting, the Minister of Foreign Affairs of Georgia made a whole range of claims (including against Russia), but none concerned racial discrimination.[359] The same holds true with respect to the "South Ossetia

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[357] GM, Annex 75.

[358] *Ibid.*

[359] GM, Annex 81.

Conflict Resolution Plan", presented by the Prime Minister of Georgia at the Permanent Council on 27 October 2005[360], which does not mention overcoming problems of racial discrimination. However, it is to be noted that the Plan looks to:

> "Introduce a new framework in conflict settlement process with participation of OSCE, EU, US, Russia",

a formula which underlines again Russia's role of facilitator; and

> "Ensure direct Georgian-South Ossetian dialogue through regular meetings with South Ossetian leaders",

which confirms it was the South-Ossetian leaders that were identified by Georgia as parties to the dispute.

4.109 Georgia then proceeds to a confusing presentation of various declarations made by its representatives in the OSCE mixing invocation of documents post-dating its seisin of the Court[361] with others cited without any cross-reference to an annexed document[362]. And when, exceptionally, Georgia cites a document which it annexes, it happens that the document in question has no relation whatsoever with the present alleged dispute: thus any reading of the only document produced by Georgia in this respect (the Statement of the Georgian

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[360] GM, Annex 85.

[361] *E.g.* Annex 84, Statement by Deputy Head of Mission PC. DEL/34/09 (23 January 2009) – mentioned in para. 8.72 of the Memorial as having been delivered on 22 January 2004.

[362] See *e.g.* GM, p.304, footnotes 979 and 982, or p.305, footnote 983. When quotes are made, the quotations are plainly irrelevant for the issue of whether there have been Russian-Georgian contacts on discrimination (see *e.g.*, pp. 324-325, para. 8.73: "On 2 March 2006, Georgia reiterated in the Permanent Council its 'readiness…to continue constructive dialogue at all levels' and referred to detailed recent communications 'initiated by the Georgian side' with Russia").

Delegation at the Special Permanent Council of the OSCE of 13 July 2004[363]) shows that the Georgian complaints made by Georgia against Russia before various organs of the OSCE concerned armed hostilities linked with the secession of Abkhazia and South Ossetia, but does not mention racial discrimination.

4.110 And nothing can be inferred from the robust Georgian assertion that "[t]he Russian Federation also made use of the OSCE forum and made over thirty statements concerning the subject matter of the dispute" – an assertion supported by no quotation and no document[364]. Similarly, the reference to the "EU Statement on Georgia and the Batumi Conference" of 21 July 2005, which welcomed "the initiative of the Georgian government in hosting the international conference in Batumi on 10 July 2005 to continue active cooperation in the interest of political settlement of the Georgian-South Ossetian conflict"[365] has no relation to the present alleged dispute: by its very nature, such a document could not prove the existence of negotiations between Russia and Georgia on questions of racial discrimination, and it does not even hint at that[366]. And the

[363] Annex 77, cited at GM, p.325, para. 8. 73. In this statement, Georgia blames Russia for: a massive anti-Georgian campaign in the media and open support for separatist mood; attempts to introduce "illegal non-guided missiles" into the South Ossetia conflict zone; "bellicose and counter productive" statements, "undermining the prestige of the OSCE"; allowing "Cossack and Abkhaz mercenaries" enter the conflict zone. There is no mention of racial discrimination.

[364] See GM, p.325, para. 8.74.

[365] GM, Annex 79, referred to in GM, p.325, para. 8. 75.

[366] Moreover, the EU Declaration is less appreciative of the Georgian behaviour than Georgia would like the Court to think; among other things, Annex 79 says: "In the process of political settlement, active cooperation among all parties remains indispensable. The EU therefore regrets that representatives from the South Ossetian region of Georgia did not participate in the conference. We suggest that the results of the conference should be brought to the attention of the authorities in South Ossetia and encourage them to participate in any further initiatives"; to the best of the knowledge of the Russian Federation, South Ossetian representatives were simply not invited to attend the event. For its part, Russia is not mentioned at all.

declarations of the United States representatives expressing "concern at the 'unilateral actions' of the Russian Federation", including "activities that appear to enhance the separate status of Abkhazia"[367] or reiterating "the concern that Russia was openly siding with the *de facto* regimes"[368] are equally manifestly irrelevant for the present alleged dispute, even though they help in defining its real scope.

4.111 Finally, with respect to the *CIS* documents presented by Georgia, two remarks are in order:

a. In the first place, they mostly bear upon the question of the return of refugees, and in no event on racial discrimination[369].

b. They also demonstrate that there was no dispute on these matters between Georgia and Russia since, as rightly recalled by the Georgian Memorial[370], those decisions were signed at the highest level by the Representatives of both sides.

4.112 In reality, in the framework of the CIS as well as in the other international fora dealt with in the Georgian Memorial, Russia was acting as a mediator or a facilitator. This is evidenced with particular clarity in the decision of the Council

[367] GM, pp. 324-325, para. 8.75, referring to GM, Annex 76.

[368] *Ibid.*, p.325, referring to GM, Annex 83.

[369] See in particular the decision of The Council of the Inter-Parliamentary Assembly of the Member States of the CIS of 28 February 1998 (GM, Annex 126) or the Decisions taken by the Council of the Heads of States of the CIS: on further steps towards the settlement of the conflict on Abkhazia, Georgia of 2 April 1999 (GM, Annex 127), on the presence of Collective Peace Keeping Forces in the Conflict Zone of Abkhazia, of 1st March 2002 (GM, Annex 117) or on the prolongation of the peacekeeping operation in the conflict zone in Abkhazia of 2 October 2002 (Annex 133).

[370] GM, p.327, para. 8.79.

of the Inter-Parliamentary Assembly of the Member States of the CIS decided on 28 February 1998:

> "To call upon the Parties to achieve substantive progress without further delay towards a comprehensive settlement, first of all in the organized and secure return of refugees and displaced persons to their places of residence and the definition of the political status of Abkhazia, Georgia, with the facilitation of the Russian Federation."[371]

4.113 And there is nothing strange in the fact that the mediator sometimes tends to agree with one party rather than the other. Russia, for its part, actively supported Georgia in the early years of the conflict[372]. Thus, on 28 March 1997, the Council of the Heads of States of the CIS adopted a decision, reproduced in Annex 122 to the Georgian Memorial, reading as follows:

> "The Council …,
>
> […]
> Taking note of the Declaration of Lisbon Summit of the Heads of OSCE member-States (December 1996) condemning the "ethnic cleansing resulting in mass destruction and forcible expulsion of predominantly Georgian population in Abkhazia", as well as obstruction of the return of refugees and displaced persons, […]
>
> Condemning the position of the Abkhaz side obstructing the achievement of agreement on political settlement of the conflict in Abkhazia, Georgia and return of refugees and displaced persons to the places of their residence, […]
>
> The Council of Heads of States declares, that the member-states of the Commonwealth of Independent States:
>
> - will exert every effort to early and comprehensive political settlement of the conflict in Abkhazia, Georgia, return of refugees and displaces persons to their places of residence […]."[373]

[371] GM, Annex 126.

[372] See above, Chapter II, paras. 2.15, 2.19, 2.22

[373] Slight mistranslations corrected.

This decision is a telling manifestation of the position that the CIS (including Russia, and to a large extent led by it) was taking regarding the conflict at that period. Far from revealing a Russian-Georgian dispute, this text shows that Russia was condemning the acts of ethnic cleansing in Abkhazia.

4.114 The contacts between Georgia and Russia within the framework of international organisations, or in other multilateral fora, call for the same conclusion as that made above[374] in respect of bilateral negotiations: there have never been negotiations on the dispute now alleged by Georgia on the application of the 1965 Convention on racial discrimination. And, more than that, Georgia has never suggested that it was accusing the Russian Federation of racial discrimination – until it lodged its Application before the Court on 12 August 2008.

2. Georgia has constantly acknowledged the positive role of Russia in respect to the now alleged dispute

4.115 In reality, throughout the relevant period, Russia's role has been that of a facilitator or a mediator. It is important to re-visit this point, already addressed in Chapter II, as it is vital to the capacity in which Russia participated in negotiations, of which it was not a principal party, in respect of conflicts where it was not a party at all. The role of this third party is not clearly established in international law, in the sense that it is not certain whether its mission is only to provide good offices or also to suggest solutions, in the latter case the term conciliator being maybe better suited. Moreover, the distinction is not set in stone and a third party that initiates its mission as a mediator may move to

[374] See paras. 4.90-4.92.

conciliation. One thing is clear nevertheless: the facilitator / mediator / conciliator is not a party to the dispute[375].

4.116 This role of facilitator was acknowledged and welcomed by Georgia itself on many occasions. For example :

> "The international community has extended a helping hand to Georgia, and I should like to convey our appreciation and gratitude to the Governments of the United States of America, the Russian Federation, Germany, other States members of the European Union and Turkey, to name but a few, as well as to the United Nations and its specialized agencies, for their invaluable assistance to my country in times of hardship…
>
> Convinced of the possibility of a fair solution under the auspices of the United Nations, the Georgian Government has been negotiating with the separatists in good faith all this time under the auspices of the Special Representative of the Secretary-General, with the Russian Federation as facilitator and the Conference on Security and Cooperation in Europe (CSCE) as an observer. As a result, a number of agreements have been signed, which are designed to promote the return of the displaced persons to their homes and a settlement of the conflict…
>
> The Russian Federation is an active participant in the process designed to find a peaceful solution to the Abkhazian conflict. It has taken on a great responsibility with regard to this peace process. We firmly believe that, despite the feelings of some political groups, the Russian Federation, as a great Power - and President Yeltsin, as the leader of that nation - does indeed want to see a strong, stable, sovereign, united and friendly Georgia on its southern border. Any other considerations would be contrary to logic. We are gratified that in his address to this Assembly a few days ago President Yeltsin alluded to this when he said that Russia's relations towards other States members of the Commonwealth of Independent States are based on good will and mutual benefit. In short, it is a time to think not about the mistakes of the past, but about the possibilities for the future"[376].

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[375] S. M. G. Koopmans, *Diplomatic Dispute Settlement: The Use of Inter-State Conciliation*, T.M.C. Asser Press, 2008, 325 pages, p.26-27.

[376] U.N. General Assembly, 49th session, Official Records, 16th Meeting, U.N. Doc. A/49/PV.16 (4 October 1994), Statement by Alexander Chikvaidze, Minister of Foreign Affairs of Georgia, pp. 24-26. Annex 41. For similar statements made at other periods, see

4.117 In the same spirit, the Council of Heads of State of the Commonwealth of Independent States,

> *"*welcoming *the resumption of direct bilateral talks between the Georgian and Abkhaz sides and* active assistance of the Russian Federation in this process*, ...*
>
> *5. ... call[ed] on the member-states of the CIS ...to participate more actively in peacekeeping operation jointly with the* Russian Federation currently bearing the whole burden of responsibility for this operation*"*[377].

4.118 As already noted in Chapters II and III above, the international community has also praised the role played by Russia and the CIS peace-keeping forces:

> "*Welcoming* the role of the United Nations Observer Mission in Georgia (UNOMIG) and of the Collective Peacekeeping Forces of the Commonwealth of Independent States (CIS peacekeeping force) as stabilizing factors in the zone of conflict, noting that the cooperation between UNOMIG and the CIS peacekeeping force is good, and stressing the importance of continued close cooperation and coordination between them in the performance of their respective mandates"[378].

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e.g. the Yalta Declaration of the Georgian and Abkhaz Sides, 15-16 March 2001 (GM, Annex 132) or the Press conference of the Prime Minister of Georgia, Zurab Noghaideli, 13 December 2005, circulated at the meeting of the Joint Control Commission of 27-28 December 2005: "*Russia is the guarantor of long-term peace in the Caucasus*; I think that the recent steps of Russia will bring positive momentum into the relations between the two countries" (emphasis added) (Annex 57).

[377] Commonwealth of Independent States, Council of the Heads of State, Decision on additional measures for the settlement of the conflict in Abkhazia, Georgia, 28 April 1998 (U.N. Security Council, Letter dated 5 May 1998 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General, U.N. Doc. S/1998/372, 5 May 1998). Annex 46.

[378] Security Council, Resolution 1187 (1998). Similar acknowledgements can be found in resolutions 1255 (1999), 1287 (2000), 1311 (2000), 1393 (2002), 1427 (2002), 1462 (2003), 1494 (2003), 1524 (2004), 1554 (2004), 1582 (2005), 1615 (2005). See also, *e.g.* PACE Resolution 1363 (2004) "Functioning of democratic institutions in Georgia", para. 12.

4.119 Georgia tries to present these statements as proof of negotiations on an on-going dispute between itself and Russia on issues of racial discrimination. Quite to the contrary, it is obvious that they acknowledge the role of the Russian Federation in trying to mediate a conflict to which it is not a party.

4.120 Georgia, having positively asserted Russia's role as a facilitator, cannot now change its mind and use these positions as evidence of negotiations on a dispute related to the CERD. As was so clearly explained by Judge Alfaro in his well-known Separate Opinion in the *Temple* case:

> "This principle, as I understand it, is that a State party to an international litigation is bound. by its previous acts or attitude when they are in contradiction with its claims in the litigation. (...) The principle, not infrequently called a doctrine, has been referred to by the terms of "estoppel", "preclusion", "forclusion", "acquiescence". (...)
>
> Whatever term or terms be employed to designate this principle such as it has been applied in the international sphere, its substance is always the same: inconsistency between claims or allegations put forward by a State, and its previous conduct in connection therewith, is not admissible (*allegans contraria non audiendus est*). Its purpose is always the same: a State must not be permitted to benefit by its own inconsistency to the prejudice of another State (nemo potest mutare consilium suum in alterius injuriam). A fortiori, the State must not be allowed to benefit by its inconsistency when it is through its own wrong or illegal act that the other party has been deprived of its right or prevented from exercising it (*nullus commodum capere de sua injuria propria*.) Finally, the legal effect of the principle is always the same: the party which by its recognition, its representation, its declaration, its conduct or its silence has maintained an attitude manifestly contrary to the right it is claiming before an international tribunal is precluded from claiming that right (*venire contra factum proprium non valet*)" [379].

4.121 Georgia, which has praised Russia for its positive role as a facilitator, cannot now take the exactly opposite position and allege a dispute on racial

[379] *I.C.J., Judgment of 15 June 1962, Temple of Preah Vihear (Cambodia v. Thailand),* Separate Opinion of Vice-President Alfaro, *Rep.* 1962, pp. 39-40.

discrimination which it had *never* mentioned before, let alone negotiated with the Respondent.

4.122 Moreover and in any case, Georgia has not fulfilled the other condition included in Article 22 of the 1965 Convention since it has used none of the possibilities offered by the CERD mechanism.

B. GEORGIA HAS NOT USED THE PROCEDURES PROVIDED FOR BY THE CONVENTION

4.123 Here again, the burden of proof bears upon the Applicant State, which could of course invoke no presumption that the condition has been fulfilled.[380] Georgia has made no attempt to prove that it has seised the CERD Committee: there is not a word about this in Section II (Procedural Requirements for the Submission of the Dispute to the Court) of Chapter VIII (Jurisdiction and Procedural Requirements) of its Memorial. And that despite the fact that, by the use of the plural – "requirements"- it implicitly admits that Article 22 contains more than one prerequisite to the Court's seisin.

4.124 As shown in Section 1 of this Chapter, the phrase "the procedures expressly provided for in this Convention" reflects the inter-State complaint procedure as settled in Articles 11 and 12 of the Convention[381]. This

[380] On a comparable pre-condition to its seisin, the Court considered that "since this is a condition formally set out in Article 29 of the Convention on Discrimination against Women, the lack of agreement between the parties as to the organization of an arbitration cannot be presumed. The existence of such disagreement can follow only from a proposal for arbitration by the applicant, to which the respondent has made no answer or which it has expressed its intention not to accept", *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda, Rep.* 2006, p.41, para. 92.

[381] *Supra*, paras. 4.42-4.45.

interpretation is confirmed by the travaux préparatoires[382]. Georgia has not seised the CERD Committee before 12 August 2008, as the Court already concluded in the Provisional Measures phase:

> "Whereas Article 22 of CERD refers also to "the procedures expressly provided for" in the Convention; whereas, according to these procedures, "if a State Party considers that another State Party is not giving effect to the provisions of this Convention" the matter may properly be brought to the attention of the Committee on the Elimination of Racial Discrimination; whereas the Court notes that neither Party claims that the issues in dispute have been brought to the attention of the Committee."[383]

The same remains true today[384].

* * *

4.125 When it withdrew its reservation to Article 22 of the Convention, Russia accepted the jurisdiction of the Court under the conditions established in this provision. This Article excludes the jurisdiction of the Court when no attempt has been made to settle the dispute on the interpretation or application of the Convention (when it exists) "by negotiation or by the procedures expressly provided for in this Convention". As shown in the present Chapter, none of these essential, and cumulative, conditions has been fulfilled in the present case.

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[382] *Supra*, paras. 4.46-4.50 and 4.63-4.72.

[383] I.C.J., Order, 15 October 2008, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Provisional Measures, para. 116.

[384] The Committee on the Elimination of Racial Discrimination convenes twice a year for sessions of three weeks' duration, normally in February and August at the United Nations Office in Geneva. Its last sessions took place between 28 July - 15 August 2008, 16 February - 6 March 2009 and 3 - 28 August 2009.

TABLE 1

Compromissory clauses providing for preconditions to the Court's seisin

Case	Compromissory clause	The Court's Analysis of the Clause
PCIJ, Judgment, 30 August 1924, *Mavrommatis Palestine Concessions Case (Jurisdiction)*, P.C.I.J., Series A, No. 2	Article 26 of the Mandate for Palestine : «The Mandatory agrees that, if any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate, such dispute, if it **cannot be settled** by negotiation, shall be submitted to the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations.»	The Court focused on the duration of negotiations and on whether they have reached a deadlock by the time of the Application. The existence of negotiations was not disputed (Series A, No. 2, p.13).
ICJ, Judgment, 21 December 1962, *South West African Cases (Liberia and Ethiopia v. South Africa), Preliminary Objections*	Article 7 of the Mandate for South West Africa : «The Mandatory agrees that, if any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate, such dispute, if it **cannot be settled** by negotiation, shall be submitted to the Permanent Court of International Justice.»	The Court focused upon the fora for negotiations, and concluded that within the multilateral fora of the UN, negotiations had reached a deadlock. The existence of negotiations was not disputed (*Reports* 1962, pp. 344-346).
ICJ, Judgment, 2 December 1963, *Northern Cameroons (Cameroon v. United Kingdom), Preliminary Objections*	Article 19 of the Trusteeship Agreement for the Territory of the Cameroons under British Administration : «If any dispute whatever should arise between the Administering Authority and another Member of the United Nations relating to the interpretation or application of the provisions of this Agreement, such	The Court, having rejected the Application on admissibility grounds, did not consider necessary to examine the jurisdiction conditions (*Reports* 1963, pp. 34-38).

	dispute, if it **cannot be settled** by negotiation or other means, shall be submitted to the International Court of Justice, provided for in Chapter XIV of the United Nations Charter.»	
ICJ, Judgment, 24 May 1980, *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*	Article XXI, paragraph 2, of the Treaty of Amity, Economic Relations, and Consular Rights of 1955 : «Any dispute between the High Contracting Parties as to the interpretation or application of the present Treaty, **not satisfactorily adjusted by diplomacy**, shall be submitted to the International Court of Justice, unless the High Contracting Parties agree to settlement by some other pacific means».	The Court established that the US had tempted to negotiate and that negotiations faced a peremptory *non volumus* (*Reports 1980*, p.27, § 51). Obs: this compromissory clause was a subsidiary basis of jurisdiction.. The Court had already established that it had jurisdiction under Article 1 of the Optional Protocols concerning the Compulsory Settlement of Disputes accompanying the Vienna Conventions of 1961 and of 1963.
ICJ, Judgment, 26 November 1984, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction of the Court and Admissibility of the Application*	Article XXIV, paragraph 2, of the Treaty of Friendship, Commerce and Navigation between the United States of America and Nicaragua: «Any dispute between the Parties as to the interpretation or application of the present Treaty, **not satisfactorily adjusted by diplomacy**, shall be submitted to the International Court of Justice, unless the Parties agree to settlement by some other pacific means.»	The Court established that the US was aware that Nicaragua "alleged that its conduct was a breach of international obligations" (*Reports* 1984, p.428, § 83). Obs.: this compromissory clause was a subsidiary basis of jurisdiction. The Court had already established that it had jurisdiction under art. 36 para. 2 of the Statute.
ICJ, Advisory Opinion, 26 April 1988, *Applicability of the Obligation to Arbitrate under*	Section 21, paragraph (a) of the Headquarters Agreement between the United Nations and the United States:	The Court focused on whether negotiations have reached a deadlock by the time of the Application. The

Section 21 of the United Nations Headquarters Agreement of 26 June 1947	«Any dispute between the United Nations and the United States concerning the interpretation or application of this agreement or of any supplemental agreement, which **is not settled** by negotiation or other agreed mode of settlement, shall be referred for final decision to a tribunal of three arbitrators, one to be named by the Secretary-General, one to be named by the Secretary of State of the United States, and the third to be chosen by the two, or, if they should fail to agree upon a third, then by the President of the International Court of Justice.»	existence of previous negotiations was not disputed. (*Reports* 1988, pp. 32-33).
ICJ, Judgment, 20 July 1989, *Elettronica Sicula S. p.A. (ELSI) (United States of America v. Italy)*	Article XXVI of the Treaty of Friendship, Commerce and Navigation of 2 June 1948 between Italy and the United States : «Any dispute between the High Contracting Parties as to the interpretation or the application of this Treaty, which the High Contracting Parties **shall not satisfactorily adjust by diplomacy**, shall be submitted to the International Court of Justice, unless the High Contracting Parties shall agree to settlement by some other pacific means.»	The jurisdiction of the Court was not disputed.
ICJ, Judgment, 27 February 1998, *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*	Article 14, paragraph 1, of the Montreal Convention : «Any dispute between two or more Contracting States concerning the interpretation or application of this Convention which **cannot be settled** through negotiation, shall, at the request of one of them, be submitted to arbitration. If within six months of the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.»	The Court established that the negotiation and arbitration proposals faced a *non volumus* from the Respondent (*Reports* 1998, p.122, § 20).
ICJ, Judgment, 12 December 1996, *Oil Platforms (Islamic Republic of Iran v. United States of America*), *Preliminary*	Article XXI, paragraph 2, of the Treaty of Amity, Economic Relations, and Consular Rights of 1955 : «Any dispute between the High Contracting Parties as to the interpretation or application of the present Treaty, **not satisfactorily adjusted by**	The fulfillment of the previous conditions was not disputed and the Court established their fulfillment. (*Reports* 1996, pp. 809-810).

Objection	**diplomacy**, shall be submitted to the International Court of Justice, unless the High Contracting Parties agree to settlement by some other pacific means ».	
ICJ, Judgment, 3 February 2006, *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction of the Court and Admissibility of the Application* .	Article 29, paragraph 1, of the Convention on Discrimination against Women : «Any dispute between two or more States Parties concerning the interpretation or application of the present Convention which **is not settled** by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.»	The Court considered that neither of the preconditions was fulfilled *Reports* 2006, pp. 40-41, §§87-91).
	Article 75 of the WHO Constitution : «Any question or dispute concerning the interpretation or application of this Constitution which **is not settled** by negotiation or by the Health Assembly shall be referred to the International Court of Justice in conformity with the Statute of the Court, unless the parties concerned agree on another mode of settlement.»	The Court considered that neither of the preconditions was fulfilled (*Reports* 2006, p.43, §100).
	Article XIV, paragraph 2, of the UNESCO Constitution: «Any question or dispute concerning the interpretation of this Constitution shall be referred for determination to the International Court of Justice or to an arbitral tribunal, as the General Conference may determine under its rules of procedure.»	The Court considered that neither of the preconditions was fulfilled (*Reports* 2006, p.46, §108).
	Article 14, paragraph 1, of the Montreal Convention for the Suppression	The Court considered that neither of

	of Unlawful Acts against the Safety of Civil Aviation: «Any dispute between two or more Contracting States concerning the interpretation or application of this Convention which **cannot be settled** through negotiation, shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.»	the preconditions was fulfilled (*Reports* 2006, p.49, §§117-118).
ICJ, Order, 28 May 2009, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Provisional Measures*	Article 30, paragraph 1 of the Convention against Torture: «Any dispute between two or more States Parties concerning the interpretation or application of this Convention which **cannot be settled** through negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.»	The Court considered *prima facie* that the conditions were fulfilled (§§51-52).

TABLE 2

Implementation mechanisms in universal human rights treaties

Treaty	Monitoring body provision	Mandatory inter-State complaint	Optional inter-State complaint	Compromissory clause providing for ICJ jurisdiction
International Convention on the Elimination of All Forms of Racial Discrimination **(CERD)**	Art. 8	Art. 11		Art. 22 Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement.
International Covenant on Civil and Political Rights **(ICCPR)**	Art. 28		Art. 41 A State Party to the present Covenant may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant. Communications under this article may be received and considered only if submitted by a State Party which has made a declaration	

			recognizing in regard to itself the competence of the Committee. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.	
International Covenant on Economic, Social and Cultural Rights **(CESCR)**	ECOSOC Resolution 1985/17 of 28 May 1985		No inter-State procedure	
Convention on the Elimination of All Forms of Discrimination against Women **(CEDAW)**	Art. 17		No inter-State procedure	Article 29 1. Any dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.
Convention against Torture and Other Cruel, Inhuman or	Art. 17		Article 21 1. A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State	Article 30 1. Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation shall, at the request of one of them, be

Degrading Treatment or Punishment **(CAT)**			Party claims that another State Party is not fulfilling its obligations under this Convention. Such communications may be received and considered according to the procedures laid down in this article only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be dealt with by the Committee under this article if it concerns a State Party which has not made such a declaration.	submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.
Convention on the Rights of the Child **(CRC)**	Art. 43		No inter-State procedure	
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families **(CMW)**	Art. 72		Article 76 1. A State Party to the present Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Convention. Communications under this article may be received and considered only if submitted by a State Party that has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.	Article 92 1. Any dispute between two or more States Parties concerning the interpretation or application of the present Convention that is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

International Convention for the Protection of All Persons from Enforced Disappearance **(CED)**	Art. 26		Article 32 A State Party to this Convention may at any time declare that it recognizes the competence of the Committee to receive and consider communications in which a State Party claims that another State Party is not fulfilling its obligations under this Convention. The Committee shall not receive communications concerning a State Party which has not made such a declaration, nor communications from a State Party which has not made such a declaration.	Article 42 1. Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation or by the procedures expressly provided for in this Convention shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.
Convention on the Rights of Persons with Disabilities **(CRPD)**	Art. 34		No inter-State procedure	

CHAPTER V

THIRD PRELIMINARY OBJECTION:

THE COURT LACKS JURISDICTION *RATIONE LOCI*

Section I. Introduction

5.1 Georgia alleges that the Russian Federation violated obligations arising under Articles 2, 3 and 5 of CERD through conduct that took place outside Russia's territory. Hence in its submissions, it refers *e.g.* to "the ethnic cleansing of Georgians *in South Ossetia*", to "the frustration of the right of return of Georgians to their homes *in South Ossetia and Abkhazia*"; and to "the destruction of Georgian culture and identity *in South Ossetia and Abkhazia*".[385]

5.2 While focusing its case exclusively on conduct that occurred in Abkhazia and South Ossetia, Georgia says relatively little about why Articles 2, 3 and 5 of CERD should govern Russian conduct outside the territory of the Russian Federation. Georgia's arguments are based, and indeed depend, at least first and foremost, on a presumption of "global application". Pursuant to this presumption, obligations, unless specifically limited, would restrict States' conduct irrespective of its *locus.*

5.3 The thrust of Georgia's approach is clear from the opening lines of the section in the Georgian Memorial on the "spatial scope of Russia's obligations under CERD", which begins with the following observation:

> "The 1965 Convention does not contain a general provision imposing a spatial limitation upon the obligations it creates."[386]

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[385] GM, Part F, para. 1; emphasis added.

[386] GM, para. 8.10.

5.4 Georgia's approach fails to take account of the complexity of the spatial application of obligations arising under treaties. Russia submits that the matter is of crucial importance and cannot be addressed merely by relying on a presumption that cannot be sustained. To the contrary, to clarify the spatial scope of obligations, it is necessary to undertake a detailed examination of the specific treaty provisions the breach of which has been alleged, *i.e.* Articles 2, 3 and 5 of CERD.

5.5 It appears that Georgia accepts this, or at least that is conveyed by Georgia's decision to omit from its Memorial allegations of breach of Article 4 of CERD. That provision, which featured in its Application, is worded restrictively in that it relates to the prohibition of organizations or the regulation of public authorities or public institutions. It provides, as far as relevant:

> "States Parties (…)
>
> (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;
>
> (b) *Shall declare illegal and prohibit organizations*, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;
>
> (c) Shall not permit *public authorities or public institutions, national or local*, to promote or incite racial discrimination."[387]

5.6 If Georgia now no longer bases its claims on alleged breaches of Article 4 of CERD, this may be taken to suggest that it does not consider the provision to

[387] Emphasis added.

govern Russia's extraterritorial conduct. By implication, Georgia appears to accept that in order to determine the spatial scope of an obligation arising under CERD, it is required to proceed with an interpretation of its text, as well as its context and drafting history.

5.7 Any such interpretation cannot, however, be undertaken in a legal vacuum, but must take place against the background of the rules of general international law governing the territorial application of treaty rules. These will be outlined in the following section (Section II), and precede the interpretation of the specific provisions of CERD on whose alleged breach Georgia bases its case (Sections III – V).

Section II. General rules governing the territorial application of obligations

5.8 In order to support its claim that Articles 2, 3 and 5 of CERD apply extraterritorially, Georgia advances two inter-related arguments:

a. In Georgia's view, no territorial restriction is contained in either Article 2 or Article 5 of CERD. Both are, as the Georgian Memorial asserts with respect to Article 2 (a) of CERD, "capable of being applied by the State in respect of any persons over which a State organ or agent exercises power, whether or not the State has effective control over the area in which those persons are present".[388]

b. In Georgia's view, a specific territorial restriction would have been required, as CERD "does not contain a general provision imposing a

[388] GM, para. 8.16.

spatial limitation upon the obligations it creates"[389] and, by implication, such a limitation cannot be read into it.

5.9 Both arguments are unconvincing. The former will be rebutted through a detailed interpretation of the text, context and purpose of Articles 2, 3 and 5 of CERD, to be undertaken below. The latter invites a response of a more general nature, as it is based on a fundamental misconstruction of the general principles governing the territorial application of obligations. More specifically, there are two alternative reasons for which Georgia's approach must be rejected:

a. Contrary to Georgia's assertion, obligations under CERD as a general matter only apply on the territory of the States parties. This is in line with the position of general international law, which provides that, unless specifically indicated, treaty obligations apply only territorially.

b. In the alternative, should this Court hold that even in the absence of a special clause to this effect, general international law provides for the extraterritorial application of treaty obligations, instances of such extraterritoriality would be exceptional, and the present case would not be covered by any of the exceptions.

5.10 Accordingly, given that the Court's jurisdiction under Article 22 of CERD, which is the only jurisdictional basis invoked by the Applicant, is limited to deciding disputes "with respect to the interpretation or application of this Convention", the Court lacks jurisdiction *ratione loci* with regard to acts of the Russian Federation which, allegedly, have taken place in either Abkhazia or South Ossetia.

[389] GM, para. 8.10.

5.11 Before exploring both arguments, it must be stressed that the Court has not so far decided them. The question of extraterritoriality was addressed by both Parties during the interim stage of the present proceedings[390]. The Court, in its order on provisional measures of 15 October 2008, did not subscribe to Russia's arguments that Articles 2 and 5 of CERD, not being applicable extraterritorially, could not form the basis of an interim order of protection, but instead found

> "that these provisions of CERD *generally appear* to apply, like other provisions of instruments of that nature, to the actions of a State party when it acts beyond its territory".[391]

5.12 However, that statement was phrased cautiously ("appear to") and was made in the different context of provisional measures, in which the Court, according to well-established jurisprudence,

> "need not finally satisfy itself, before deciding whether or not to indicate such measures, that it has jurisdiction on the merits of the case"[392]

but was merely required to assess whether

> "the provisions invoked by the Applicant appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded".[393]

5.13 Thus, the finding above, therefore, did not, and indeed was not intended to, dispose of the matter at hand. The Russian Federation respectfully submits that at the current preliminary objections stage of the proceedings, in which the Court is in a position to form a final view on the issue, having been fully

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[390] See *e.g.* CR 2008/22, pp. 26-28 (Crawford); CR 2008/23, pp. 40-42 (Zimmermann)

[391] Order of 15 October 2008, para. 109; emphasis added.

[392] *Ibid.*, para. 85

[393] *Ibid.*

informed of the parties' view on the matter, should uphold the Russian objection.

5.14 Moreover, the preliminary objection that the Court's jurisdiction *ratione loci* arising under Article 22 of CERD does not extend to alleged acts of the Russian Federation beyond its own borders possesses an exclusively preliminary character: it does not require an analysis of disputed facts and may accordingly be decided without considering the merits of the case.

5.15 As the Court stated, in the recent *Nicaragua* v. *Colombia case*,

> "In principle, a party raising preliminary objections is entitled to have these objections answered at the preliminary stage of the proceedings unless the Court does not have before it all facts necessary to decide the questions raised or if answering the preliminary objection would determine the dispute, or some elements thereof, on the merits."[394]

A. IN THE ABSENCE OF A SPECIAL RULE TO THE CONTRARY, OBLIGATIONS UNDER CERD APPLY TERRITORIALLY

5.16 Georgia's argument is flawed in that it suggests that territorial restrictions of obligations have to be imposed[395]. This however misconstrues the relationship between the rule and the exception. Whenever international law envisages instances of extraterritorial application of obligations, these instances are

[394] Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment of 13 December 2007, para. 51. See also Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America, ICJ Rep. 1986, at p. 31, para. 41; and further, Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Preliminary Objections, ICJ. Rep. 1998, pp. 27-29.

[395] GM, paras. 8.10. and 8.13.

exceptions to the general rule, pursuant to which, as a matter of principle, obligations apply only territorially.

1. The principle of territorial application

5.17 This "principle of territorial application" is borne out by the treaty practice of States and is also mirrored in the essentially territorial understanding of the doctrine of jurisdiction.

5.18 As for international practice, few treaties *expressly* provide that obligations contained in them should apply only territorially. However, a great many treaties provide *implicit* support for the principle of territorial application in that they contain clauses expressly regulating their spatial scope of application *and by extending this scope beyond a State's borders.*

5.19 The various jurisdiction clauses found in human rights treaties such as Article 2(1) ICCPR or Article 1 ECHR (which will be addressed further below) are two examples in point.

5.20 The same is also true for certain disarmament treaties such as the Chemical Weapons Convention. Its Article I ("General obligations") provides:

> "2. Each State Party undertakes to destroy chemical weapons it owns or possesses, *or that are located in any place under its jurisdiction or control,* in accordance with the provisions of this Convention.
>
> 3. Each State Party undertakes to destroy all chemical weapons it abandoned *on the territory of another State Party,* in accordance with the provisions of this Convention.
>
> 4. Each State Party undertakes to destroy any chemical weapons production facilities it owns or possesses, *or that are located in any place*

> *under its jurisdiction or control*, in accordance with the provisions of this Convention."[396]

5.21 Various environmental conventions also contain specific clauses extending the scope of application to areas beyond the territory of the respective contracting party. Thus, *inter alia*, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal regulates the transboundary movement of wastes and applies to any such movement

> "from an area *under the national jurisdiction of one State* to or through an area under the *national jurisdiction of another State* (…)"[397]

5.22 International humanitarian law treaties also contain language that provides for extraterritorial application, *e.g.* by providing for the applicability of the Fourth Geneva Convention to occupied territories, thereby establishing that these obligations arising under international humanitarian law have to be complied with beyond the boundaries of the respective contracting party.

5.23 In addition, States have also seen fit to clarify the territorial scope of application of *specific* obligations. With respect to CERD, Article 3 of CERD – referring to the "territories under their jurisdiction" – provides one example of such a special clause. In line with its general approach, Georgia considers this clause to have a restrictive effect. Yet, this reading does not take account of the fundamental importance of Article 3 of CERD within the context of the Convention. Rather than outlawing racial discrimination generally, the provision condemns two qualified forms of racial discrimination, namely apartheid and racial segregation.

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[396] Emphasis added.

[397] Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Art. 2, para. 3; emphasis added.

5.24 The drafting history of the Convention indicates that these two practices, and apartheid in particular, were considered a flagrant denial of the principle of non-discrimination. In line with this understanding, it cannot credibly be argued, that the rule against apartheid and racial segregation should have been territorially restricted, whereas the general rule against racial discrimination in all its forms should not.

5.25 While Georgia suggests that some States parties to the Convention were cautious not to accept a duty of "positive intervention in South Africa",[398] this concern was, as will be shown below, accommodated by adopting a narrow understanding of the phrase "territories under their jurisdiction".

5.26 As is well known, the interpretation of jurisdictional clauses such as Article 1 ECHR, and the reach of their extraterritorial effects, has prompted much debate. For present purposes, these debates can be left to one side. Instead, it is important to reflect on why they were considered necessary in the first place. The Russian Federation submits that their very existence undermines Georgia's assertion that, unless territorially restricted, obligations applied "globally". Quite to the contrary, the reason for States to insert such clauses into specific treaties, or to include within a given treaty clauses governing the extraterritorial application of specific provisions (such as Article 3 of CERD), was to provide exceptions to the general rule pursuant to which obligations arising under treaties, as a matter of principle, apply territorially only.

5.27 This understanding of the relationship between the rule (territoriality) and the exception (extraterritoriality) is borne out by the Court's own jurisprudence. While most scholarly attention has focused on instances of extraterritorial application, the Court has clarified that these are exceptional and admitted only

[398] GM, para. 8.14.

when mandated by a specific treaty provision envisaging a broader geographical scope of obligations.

5.28 In the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Advisory Opinion*, the Court confirmed that human rights obligations apply "primarily territorial[ly]"[399].

5.29 By implication, that approach was also adopted in the 2005 judgment in the *Congo-Uganda case*. In that case, the Democratic Republic of the Congo had *inter alia* accused Uganda to have "incited ethnic conflict and took no steps to put an end to such conflicts"[400] in the Ituri province. In response to that allegation, the Court determined that a number of instruments in the field of human rights were both applicable and relevant to these Ugandan acts[401]. The list of treaties fulfilling both criteria included the ICCPR and a number of other universal and regional human rights agreements. It did not, however, include CERD despite the fact that both the DRC and Uganda had been contracting parties of CERD at all relevant points in time. This suggests that both parties to a dispute, which Georgia would seemingly have qualified as a case "with respect to the interpretation or application of [the 1965] Convention", as well as the Court itself, never considered CERD to govern a State party's conduct during inter-ethnic conflicts taking place on foreign soil.

5.30 This reading (and this reading only) is in line with the essentially territorial understanding of the doctrine of jurisdiction under international law.

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[399] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *I.C.J. Reports* 2004, at p. 179, para. 109.

[400] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005, *I.C.J. Reports* 2005, at p. 240, para. 209.

[401] *Ibid*., para. 217.

The link between the spatial scope of obligations and the notion of jurisdiction was brought out with particular clarity in the judgment of the Grand Chamber of the European Court of Human Rights in the case of *Banković and others v Belgium and others.*[402] While that case concerned the interpretation of the jurisdiction clause found in Article 1 ECHR, which did *not* refer to a State's territory, it is still of particular relevance for the present proceedings. This is so because the European Court of Human Rights sought to interpret Article 1 ECHR in the light of "other principles of international law of which [the Convention] forms part."[403]

5.31 This approach led the European Court of Human Rights to make important findings of a general nature about the spatial scope of treaty obligations under contemporary international law:

> "[T]he Court is satisfied that, from the standpoint of public international law, the jurisdictional competence of a State is primarily territorial. While international law does not exclude a State's exercise of jurisdiction extra-territorially, the suggested bases of such jurisdiction (including nationality, flag, diplomatic and consular relations, effect, protection, passive personality and universality) are, as a general rule, defined and limited by the sovereign territorial rights of the other relevant States (Mann, *"The Doctrine of Jurisdiction in International Law*", RdC, 1964, Vol. 1; Mann, "*The Doctrine of Jurisdiction in International Law, Twenty Years Later*", RdC, 1984, Vol. 1; Bernhardt, *Encyclopaedia of Public International Law*, Edition 1997, Vol. 3, pp. 55-59 "*Jurisdiction of States"* and Edition 1995, Vol. 2, pp. 337-343 "*Extra-territorial Effects of Administrative, Judicial and Legislative Acts*"; Oppenheim's *International Law*, 9th Edition 1992 (Jennings and Watts), Vol. 1, § 137; P.M. Dupuy, *Droit International Public*, 4th Edition 1998, p. 61; and Brownlie, *Principles of International Law*, 5th Edition 1998, pp. 287, 301 and 312-314). (…)

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[402] *Banković et al. v. Belgium et al*., App. No. 52207/99, Eur. Ct. H.R. (2001), *available at* 41 ILM. 517.

[403] *Ibid*., para. 57.

> The Court is of the view, therefore, that Article 1 of the Convention must be considered to reflect this ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case (see, *mutatis mutandis* and in general, Select Committee of Experts on Extraterritorial Criminal Jurisdiction, European Committee on Crime Problems, Council of Europe, "*Extraterritorial Criminal Jurisdiction*", Report published in 1990, at pp. 8-30)."

5.32 The reasoning of the European Court of Human Rights is important in that it indicates that *even in the presence of a jurisdiction clause not specifically referring to State territory,* treaty obligations apply "essentially territorial[ly]".

5.33 As regards jurisdictional clauses found in many human rights treaties (other than CERD), international jurisprudence and treaty practice confirms that clauses referring to territory and/or jurisdiction are intended positively to *extend* the spatial scope of obligations and thus to deviate from the general principle of territoriality.

5.34 Thus, in the advisory opinion on the *Israeli Wall*, this Court recognised that provisions of the International Covenant on Civil and Political Rights governed Israeli conduct within the Occupied Palestinian Territories, but arrived at this result through an interpretation of Article 2(1) ICCPR. Hence, the Court's treatment of questions of extraterritoriality is preceded by a reference to Article 2(1) ICCPR and draws on the crucial notion of "jurisdiction" used in that provision, which is interpreted to be "primarily territorial", but "may sometimes be exercised outside the national territory."[404]

5.35 Similarly, the jurisprudence of the Human Rights Committee, exploring the possibility and limits of extraterritorial effects of the ICCPR, is based not on

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[404] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Adv. Op., ICJ Reports 2004, p. 178-179, para. 108 - 109.

general considerations, but is premised on the existence of a specific clause envisaging the application of ICCPR obligations not only within the contracting parties' territories, but also "subject to [their] jurisdiction".

5.36 By way of illustration, this may be seen from the Human Rights Committee's General Comment 31 (2004), which expressly draws on the wording of Article 2 para. 1 ICCPR[405] in order to justify the recognition of some form of extraterritoriality. In the words of the Human Rights Committee,

> "States Parties are required *by article 2, paragraph 1*, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. *This* means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party".[406]

5.37 Contrary to Georgia's argument, States invoking the extraterritorial effects of treaty obligations cannot simply content themselves with noting the absence of a restrictive clause. Rather, in light of the principle of territoriality, they must positively establish the intention in favour of extraterritoriality. Silence is not sufficient to bring about that result, but must be taken as intention to apply the general rule, *i.e.* the principle of territoriality.

5.38 Whereas provisions like Article 2 ICCPR or Article 1 ECHR *deviate* from the general rule and *extend* the spatial scope of obligations to territories beyond

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[405] Art. 2 para. 1 ICCPR provides:

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

[406] Human Rights Committee, 18th session, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 29 March 2004, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (26 May 2004), para. 10, emphasis added. Annex 56.

a State's territory, treaties without such a clause follow the general principle of territoriality, *i.e.* do not apply outside a State's territory. With respect to CERD, this means that, unless mandated by an interpretation of the specific provisions at hand, obligations enshrined by the Convention do *not* govern the extraterritorial conduct of States.

2. The drafting history of CERD

5.39 This approach is also in line with the drafting history of CERD. "Territorial issues" were discussed mainly with respect to non-self-governing territories. However, these debates, while illustrating different understandings of the concept of a State's territory, demonstrate an intention as to the essentially territorial application of the Convention.

5.40 Already at an early stage, when the draft Convention was being discussed at the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the then Commission on Human Rights, the representative of Sudan, Mr. *Mudawi*, stated that

> "[t]he draft convention should *expressly* state that those principles must be applied to all Non- Self-Governing, trust and colonial territories."[407]

5.41 This implies *a contrario* that he considered that the future Convention would otherwise *not* apply to areas *not* forming part of the territory of a Contracting party.

[407] U.N. Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Summary record of the 407th Meeting, U.N. Doc. E/CN.4/Sub.2/SR.407 (5 February 1964), p. 11; emphasis added. Annex 1.

5.42 While the inclusion of a so-called "colonial clause" into CERD was later rejected for political reasons, the debate confirms that it was taken for granted that the Convention was thought to be applicable only to territories that a contracting party was formally administering. As the delegate of Poland put it:

> "His delegation was opposed to clause IV [*i.e.* the proposed 'colonial clause'] because it appeared to some extent to indicate approval of the existence of colonialism."[408]

He later continued, however:

> "Such a possibility [of excluding the applicability of the Convention to dependent territories] was contrary to the very nature of a convention on the elimination of all forms of racial discrimination, the provisions of which should be applicable equally to a contracting metropolitan State and *to all the territories administered or governed by it."*[409]

5.43 This general perception was also shared by the delegate of Ghana, Mr. Lamptey who stated:

> "(…) the Polish representative had objected to the inclusion of the territorial application clause on the ground that it (…) was furthermore unnecessary since a binding international instrument *applied to all the territory* of the contracting party, whether metropolitan or not (…)"[410]

5.44 The territorial scope of application is also brought out by Article 15(1)(a) of CERD and the drafting history of this provision, which provides:

> "(a) The Committee established under article 8, paragraph 1, of this Convention shall receive copies of the petitions from, and submit expressions of opinion and recommendations on these petitions to, the bodies of the United Nations which deal with matters directly related to

[408] U.N. General Assembly, 20th session, Official Records, Third Committee, Record of the 1358th meeting, U.N. Doc. A/C.3/SR.1358 (29 November 1965), p.398, para. 14. Annex 17.

[409] *Ibid*., p. 399, para. 16.

[410] U.N. General Assembly, 20th session, Official Records, Third Committee, Record of the 1363rd meeting, U.N. Doc. A/C.3/SR.1363 (3 December 1965), p. 433, para. 28. Annex 18.

> the principles and objectives of this Convention in their consideration of petitions from the inhabitants of Trust and Non-Self-Governing Territories and all other territories to which General Assembly resolution 1514 (XV) applies, relating to matters covered by this Convention which are before these bodies;"

5.45 On the one hand, the right of petition is limited to the *inhabitants* of the territories mentioned, which in turn sheds light on the understanding of the term "jurisdiction" as used in Article 14 of CERD. What is more, the drafting history confirms that the idea underlying Article 15 of CERD was to *extend* to those populations the substantive rights which were otherwise granted by CERD, which rights themselves were perceived as being limited to the inhabitants of metropolitan territories.

5.46 As the representative of Nigeria, Mrs. Aguta, put it:

> "Paragraph 2 [of draft Article 15 of CERD] simply extended to inhabitants of colonial countries the safeguard of fundamental rights *which other articles of the Convention provided for inhabitants of independent countries* the world over, but through a special body competent to give an opinion on questions of human rights."[411]

3. Interim conclusions

5.47 To summarise, the fact that CERD does not contain a general clause governing the territorial scope of obligations does not support Georgia's argument on extraterritoriality. Quite to the contrary, general international law lays down a principle of territoriality, which provides that, unless specifically indicated, treaty obligations apply only territorially. In the absence of a general

[411] U.N. General Assembly, 20th session, Official Records, Third Committee, Record of the 1368th meeting, U.N. Doc. A/C.3/SR.1368 (8 December 1965), p. 458, para. 14, emphasis added. Annex 20.

clause governing the treaty's territorial scope, obligations under CERD cannot be presumed to apply extraterritorially.

B. IN THE ALTERNATIVE, SHOULD OBLIGATIONS UNDER CERD BE CAPABLE OF APPLYING EXTRATERRITORIALLY, THE REQUIREMENTS OF SUCH APPLICATION ARE NOT FULFILLED

5.48 In the alternative, should this Court hold that even in the absence of a treaty provision extending the spatial scope of obligations, general international law provides for the extraterritorial application of treaty obligations, instances of such extraterritoriality would be exceptional, and the present case would not be covered by any of the exceptions.

5.49 Any assessment of a general legal standard is rendered difficult by the heterogeneity of treaty clauses and treaty language. Should this Court hold that notwithstanding that heterogeneity, general international law recognises exceptions to the principle of territoriality, these exceptions must be construed narrowly. Two arguments support such an approach:

a. International practice, insofar as it is said to support a more liberal approach to the question, is typically treaty-specific, *i.e.* it interprets the specific jurisdictional clause of a given treaty. This may be illustrated by reference to General Comment 31 (2004) adopted by the Human Rights Committee, which, rather than endorsing a general position, put forward a specific interpretation of Article 2 para 1 ICCPR.[412] As noted above, the Grand Chamber judgment in the *Bankovic case* presents one of the few exceptions to this general rule, as it specifically draws on the position of

[412] See *supra* para. 5.36.

general international law – but does so in order to justify a restrictive interpretation of a treaty-based jurisdiction clause.

b. What is more, even instances of international practice or jurisprudence frequently cited in support of some form of extraterritoriality almost inevitably qualify extraterritoriality as the exception to the recognised rule. In this respect, it suffices to refer again to the Court's statement, in the *Wall* opinion, pursuant to which human rights treaties apply "primarily territorial[ly]"[413], or to the Grand Chamber's reiteration, in *Bankovic*, of the "essentially territorial" scope of human rights obligations.

5.50 As for potential general exceptions, two types of extraterritoriality are commonly discussed: first, acts taken by a State's diplomatic and consular authorities on foreign soil, and second the effective overall control of a territory.

Neither of these scenarios fits, indeed not even *prima facie*, the present case. For obvious reasons, this case does not involve questions of diplomatic or consular activity abroad. More importantly, the Russian Federation has never, and does not currently, exercise effective control over territories on which, according to Georgia's assertions, breaches of CERD have taken place.

5.51 A glance at the Court's jurisprudence reveals that it has accepted arguments based on "effective control" only in very narrowly defined scenarios, and, in particular, in situations of belligerent occupation. This specifically applies to the *Wall* opinion, in which human rights treaties (and namely those concerning a jurisdiction clause) were said to apply to the West Bank. As the Court repeatedly observed, this result was based on the intensive and longstanding control exercised by Israel with regard to the Occupied Palestinian

[413] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Adv. Op., ICJ Reports 2004, at p. 179, para. 109.

Territories, which amounted to and was recognized as constituting belligerent occupation.[414]

5.52 By the same token, in *Congo-Uganda*, the Court's findings on Uganda's human rights violations on Congolese territory were premised on the special role of occupying powers. As the Court observed at the beginning of the section on potential human rights violations, it thought it "essential" first to

> "consider the question as to whether or not Uganda was an occupying Power in the parts of Congolese territory where its troops were present at the relevant time."[415]

It was only after it had answered that question in the affirmative, that the Court held that Uganda was required

> "to secure respect for the applicable rules of international human rights law".[416]

Crucially, that finding (requiring Uganda to secure respect for human rights) did *not* result from any extraterritorial application of human rights treaties as such, but was based on the determination that Uganda had acted as an occupying power[417].

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[414] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, at p. 167, 172, 178-179, paras. 78, 89, 108, 109.

[415] *Democratic Republic of Congo (DRC) v. Uganda*, Judgment of 19 December 2005, ICJ Rep. 2005, at p. 227, para. 166.

[416] *Ibid*., para. 178.

[417] In fact, this was made express in the judgment:

"The Court thus concludes that Uganda was the occupying Power in Ituri at the relevant time. *As such* it was under an obligation, according to Article 43 of the Hague Regulations of 1907, to take all the measures in its power to restore, and ensure, as far as possible, public order and safety in the occupied area (…)", *ibid.*, at p. 231, para. 178, emphasis added.

5.53 Even if one were to find otherwise and also consider CERD to apply to situations not amounting to belligerent occupation, one would have to, at the very least, require effective overall control by the contracting party of CERD concerned in order to trigger the extraterritorial applicability of CERD, if ever there was such at all, *quod non.*

5.54 This was admitted by Georgia itself when it asked the Court, during the proceedings on provisional measures, to order such measures in areas

> "under the effective control of the Russian Federation".[418]

It should be stressed that this "effective control" test was developed on the basis of treaties that, unlike CERD, contain a general provision envisaging at least *some* degree of extraterritorial application. Even under such circumstances, however, international jurisprudence has applied a strict standard.

5.55 Thus, the Human Rights Committee has interpreted the jurisdictional clause contained in Art. 2 para. 1 of the Covenant as only extending to all persons within the power or *effective control* of the States Party concerned[419].

5.56 Similarly, the European Court of Human Rights found in *Loizidou* that

> "the responsibility of a Contracting Party may also arise when as a consequence of military action - whether lawful or unlawful - it exercises *effective control* of an area outside its national territory."[420]

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[418] See Amended Request, para. 23.

[419] Human Rights Committee, General Comment No. 31. See para. 5.36 above.

[420] European Court of Human Rights, Application No. 15318/89 (*Loizidou v. Turkey*), judgment on preliminary objections of 23 March 1995, Series A No. 310, para. 62; emphasis added.

5.57 This suggests that, if indeed, effective overall control over territory can trigger the application of human rights obligations (in the absence of a specific jurisdiction clause to this effect contained in the treaty concerned), then this would only apply to instances of belligerent occupation or to situations where the State concerned has exercised effective control with regard to the territory in question.

5.58 This approach is also in line with the practice of the CERD Committee established to monitor compliance with the 1965 Convention. While the Committee, in exceptional cases, has inquired whether State parties have complied with obligations under CERD outside their State territory, it has done so only in cases of complete and semi-permanent factual control over territory.

5.59 This notably applies to those aspects of the Committee's reports on Israel which address the situation in the Palestinian territories. For example, in its concluding observations on Israel's fifth and sixth periodic reports, the Committee was critical of Israel's decision to "describe[e] the situation only within the State of Israel itself".[421] Yet, this comment merely covered compliance with Article 3 of CERD, which, as will be shown, expressly refers to "territories under jurisdiction". What is more, the Committee indicated that it was concerned not with a general standard of factual control, but specifically inquired into the situation "in the occupied territories".[422]

[421] U.N. General Assembly, 46th session, Official Records, Supplement No.18, Report of the Committee on the Elimination of Racial Discrimination, U.N. Doc A/46/18 (1992), para. 368. Annex 26.

[422] *Ibid.*

5.60 By the same token, the Committee's decision to address compliance with CERD in the Panama Canal Zone or the Golan Heights,[423] admits of no generalisation, as both the Golan Heights and the Panama Canal Zone were under a special territorial regime (occupation on the one hand, territorial lease on the other), which not only prescribed the powers and responsibilities of an outside State in express terms, but which were also under the complete *de facto* control of the State concerned.

5.61 On that basis, even if a general exception to the territoriality principle is admitted under CERD, it would not cover the present case. The reason for this is that Russia's presence in either Abkhazia or South Ossetia cannot, even *prima facie*, be qualified as either one of belligerent occupation or as one of effective control over the territories concerned, whether before, during or after the outbreak of hostilities.

5.62 As the Court observed in the recent *Congo-Uganda case*,

> "under customary international law, as reflected in Article 42 of the Hague Regulations of 1907, territory is considered to be occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised".[424]

5.63 For that to be the case, it would not be sufficient to show that Russian troops were stationed in foreign territory, but that they had in fact, to paraphrase

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[423] For a recent instance see *e.g.* Committee on the Elimination of Racial Discrimination, 70th session, Consideration of reports submitted by States Parties under Article 9 of the Convention, Concluding Observations of the Committee on the Elimination of Racial Discrimination: Israel, U.N. Doc. CERD/C/ISR/CO/13 (14 June 2007), para. 32 (Annex 66); for comment on the Committee's earlier practice see T. Buergenthal, "Implementing the UN Racial Convention", 12 Texas International Law Journal (1977), 187.

[424] Democratic Republic of Congo (DRC) v. Uganda, Judgment of 19 December 2005, ICJ Rep. 2005, at p. 229, para. 172.

the Court, "substituted their own authority for that of the [territorial] Government".[425]

5.64 Situations of belligerent occupation moreover need to be distinguished from other instances of military presence, notably the stationing of a limited number of troops in accordance with an agreed international mandate. In particular, peacekeeping troops deployed in accordance with the Charter of the United Nations, by either the United Nations themselves, a regional organization or individual States do not qualify as occupying powers within the meaning of applicable rules of international humanitarian law.

5.65 In the present case, the presence of Russian forces on the ground in Abkhazia and South Ossetia could at no point in time be qualified as one of belligerent occupation. This is true for the whole period ever since the "dispute" alleged by Georgia had arisen. As a matter of fact, until the outbreak of hostilities on 7 August 2008, and as demonstrated above[426], Russian forces were present in Abkhazia and South Ossetia as part of international efforts to monitor the conflicts between Georgia on the one hand, and Abkhazia and South Ossetia on the other.

5.66 Their presence was expressly envisaged by international agreements such as the Sochi Agreement of 14 July 1992, which put in place a peacekeeping operation in South Ossetia, consisting of a Joint Control Commission and joint Russian – Georgian – South Ossetian peacekeeping forces. In Abkhazia, Russia's military presence was equally authorised by international agreements and expressly consented to by Georgia (as well as endorsed by the Security Council).

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[425] *Ibid.*, para. 173.

[426] See Chapter II above.

5.67 This shows that, rather than amounting to belligerent occupation, the Russian presence in Abkhazia and South Ossetia prior to 8 August 2008 was in line with the international community's efforts at conflict resolution and repeatedly endorsed by international organisations such as the United Nations and the OSCE[427].

5.68 Besides, given the limited number of merely 2500 servicemen in Abkhazia and 1000 servicemen in South Ossetia and their limited peace-keeping mandate, the Russian peace-keeping forces could not be considered to have exercised effective control as to the territory of Abkhazia or South Ossetia. The situation is notably dissimilar to, for example, Israel on the Golan Heights or the United States in the Panama Canal zone.

5.69 This is also confirmed by a comparison with the 30,000 - 40,000 Turkish troops stationed in the northern part of Cyprus (which besides are stationed throughout the whole of the respective territory and constantly patrol all lines of communications).

5.70 While the outbreak of hostilities on 7 August 2008 forced the Russian Federation *temporarily* to increase its military presence in the region in order to defend its peace-keeping contingent against attacks by Georgian troops, it did not, at any point in time, lead to effective control over the area.

5.71 For one, the number of troops deployed in Abkhazia and South Ossetia, when compared to other instances such as the northern part of Cyprus, was at all relevant times, *i.e.* prior to the seising of the Court on 12 August 2008, so limited that no effective control could be exercised, and indeed no such control

[427] For details see Chapters II, III and IV above.

was ever exercised over the two territories by the Russian Federation. Besides, those troops that entered the territory on 8 August 2008, were actively involved in combat activities against the illegal Georgian offensive which again excludes any ability to exercise effective control and even less be an occupying power.

5.72 Immediately after the end of hostilities, all the additional forces started to withdraw. Both Abkhazia and South Ossetia requested the continued presence of a limited number of Russian troops on their territory, on which issue bilateral agreements have been concluded,[428] circumscribing the limited functions those troops may exercise. The number (approximately 2500 in each Republic), functions and role of the Russian troops present exclude any ability of the Russian Federation to exercise overall effective control in either Abkhazia or South Ossetia, even if the Court were to find, *quod non,* that the situation after the seisin of the Court would be of relevance.

5.73 It follows that Russia's presence at no point in time could be perceived as either constituting belligerent occupation or as leading to effective overall control by the Russian Federation with regard to either Abkhazia or South Ossetia. This suggests that even if a general exception to the territoriality principle is admitted for situations of either belligerent occupation or effective control over a given territory, *quod non,* any such exception would not, even *prima facie,* cover the present case.

5.74 Further, this interpretation of the legal situation is confirmed by the practice of the Committee on the Elimination of Racial Discrimination.

[428] See Report of the Russian Federation on compliance with the provisional measures indicated by the Order of the Court of 15 October 2008, 8 July 2009.

5.75 When dealing with the Russian reports submitted pursuant to Article 9 of CERD, the Committee on the Elimination of Racial Discrimination has never considered CERD as applicable vis-à-vis the Russian Federation as far as concerns the situation in Abkhazia or South Ossetia. Even during the consideration of the latest report submitted by the Russian Federation, which the Committee on the Elimination of Racial Discrimination discussed and finally adopted *after Georgia had commenced hostilities*, *i.e.* on 13 August 2008,[429] the situation in Abkhazia and South Ossetia was not raised by any of the members of the Committee and even less mentioned in its concluding observations.

5.76 This silence is all the more revealing in that the discussion of Russia's report took place on 31 July and 4 August 2008, *i.e.* only days before the outbreak of hostilities, and since the concluding observations were adopted on 13 August 2008, *i.e.* just after the hostilities ended.

5.77 Given the prominence of the Russo-Georgian conflict in August 2008, it is inconceivable that the Committee's approach should have been based on an oversight. At a time when all attention was focused on the conflict, the treaty body entrusted with monitoring compliance with CERD found CERD to be of no relevance to the ongoing military conflict. In Russia's submission, there could be no clearer indication that CERD did not govern its conduct in South Ossetia and/or Abkhazia.

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[429] See U.N. General Assembly, 63rd session, Official Records, Supplement No. 18, Report of the Committee on the Elimination of Racial Discrimination, U.N. Doc. A/63/18 (1 November 2008) (Annex 72), at para. 350:

"The Committee considered the combined eighteenth and nineteenth periodic reports of the Russian Federation (CERD/C/RUS/19) at its 1882nd and 1883rd meetings (CERD/C/SR.1882 and 1883), *held on 31 July and 4 August 2008*. At its 1897th and 1898th meetings (CERD/C/SR.1897 and 1898), *held on 13 August 2008*, the Committee adopted [its] concluding observations." (emphasis added)

5.78 Finally, as has been discussed in more detail elsewhere,[430] this interpretation is corroborated by the fact that neither Georgia nor any individual has brought proceedings against Russia for breaches of CERD in relation to the situation in Abkhazia or South Ossetia, either before or after the outbreak of hostilities. Georgia could have, at any time after becoming a contracting party of CERD, availed itself of the mandatory mechanism of inter-State complaints envisaged in Article 11 of CERD, while individuals could have brought complaints against the Russian Federation under Article 14 of CERD from 1 October 1991 onwards, *i.e.* the date on which the Soviet Union declared its willingness to accept individual complaints.

5.79 Both factors – the silence of the CERD Committee when considering Russia's Report and the lack of individual and inter-State complaints – can be explained in different ways: they may be taken to indicate that (as explained in Chapter III above) the dispute currently before the Court is not a dispute about the interpretation and application of CERD, or that (as explained in the preceding paragraphs) the obligations in question do not govern Russia's extraterritorial conduct in Abkhazia and South Ossetia. On either reading, both factors undermine Georgia's attempt to institute proceedings before this Court on the basis of Article 22 of CERD.

5.80 The conclusion that CERD does not apply extraterritorially and that, more specifically, it does not cover acts of the Russian Federation having occurred in either Abkhazia or South Ossetia is also further supported by analysis of those specific provisions of CERD allegedly violated by the Russian Federation in the context of the Georgian – Abkhazian/ South Ossetian context, namely Articles 2, 3 and 5 of CERD.

[430] See above, Chapter III, para. 3.51.

Section III. Article 2, para. 1, lit. a), b) and d) of CERD does not apply extraterritorially

5.81 The different obligations listed in Article 2, para. 1, lit. a), b) and d) of CERD are phrased as obligations to be implemented within the territory of each contracting party.

A. ARTICLE 2, PARA. 1, LIT. A) OF CERD

5.82 Article 2, para. 1, lit. a) of CERD requires each State Party

> "to ensure that all public authorities and public institutions, *national and local,* shall act in conformity with this obligation[431]",

i.e. shall not engage in racial discrimination. The very purpose of this provision, as demonstrated by its drafting history, was to bring autonomous entities such as (for example State) railways, power or port authorities and local cultural institutions within the reach of the Convention[432]. Any such entities, however, are by their very nature, of a localized nature, *i.e.* do not perform acts beyond the borders of the State concerned. This confirms that Article 2 of CERD was meant only to cover acts within the territory of the respective State.

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[431] Emphasis added.

[432] See Statement by Mr. Caportorti, U.N. Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Summary record of the 417th Meeting, U.N. Doc. E/CN.4/Sub.2/SR.417 (5 February 1964), p. 4. Annex 2. See also N. Lerner, "The U.N. Convention on the Elimination of All Forms of Racial Discrimination" (2nd. ed. 1980), p. 37.

5.83 It is thus surprising, to say the least, to argue that *e.g.* "local institutions" could apply to the obligation contained in Article 2, para. 1, lit. a) of CERD extraterritorially, as argued by Georgia[433]. Rather the reference to "local institutions" confirms the localized character of the obligations contained in this provision. Even less can it be argued that Article 2, para. 1, lit. a) of CERD could be applied extraterritorially where the State concerned does not even exercise effective control over the respective area.

5.84 It may be also noted in passing that Article 2, para. 1, lit. c) of CERD similarly refers to the review of "governmental, *national and local* policies"[434], which formula suggests the absence of any form of extraterritorial applicability of Article 2 of CERD. It is telling that the Georgian Memorial does not mention this provision.

B. ARTICLE 2 PARA. 1 LIT. B) OF CERD

5.85 Article 2, para. 1, lit. b) of CERD provides:

> "(b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;"

5.86 In his commentary on the Convention, *Natan Lerner* describes the content of this provision as follows:

> "(…) sub-paragraph (b) simply intends to prevent persons or organizations from getting the official support *of the State*"[435]

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[433] GM, para. 8.16.

[434] Emphasis added.

[435] N. Lerner, The U.N. Convention on the Elimination of All Forms of Racial Discrimination (2nd. ed. 1980), p. 37; emphasis added.

which State is the territorial State where the persons or organizations to be supported are located.

5.87 He then continues:

> "Thus, for instance, *an official publishing house that prints a racist book,* or a *local government* that gives financial support to a school engaging in racial discrimination, would be violating sub-paragraph (b)",

both of which are again obviously located on the territory of the respective contracting party.

5.88 The proponents of what was to become Article 2, para. 1, lit. b) of CERD[436] had not even hinted at the possibility of this proposed new provision being applied beyond the borders of the respective Contracting Party. Rather, Article 4, lit. c) of CERD, the content of which is similar in nature to that of Article 2, para. 1, lit. b) of CERD and which provides that States Parties

> "[s]hall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination"

was considered during the drafting of the Convention as similarly containing merely an

> "obligation assumed by the State to take the necessary steps to prevent individuals and institutions *within its territory* from practising such discrimination."[437]

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[436] U.N. General Assembly, 20th session, Official Records, Annexes, Report of the Third Committee, U.N. Doc. A/6181 (18 December 1965), p. 18, paras. 45 – 46. Annex 23.

[437] U.N. Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Summary record of the 422nd Meeting, U.N. Doc. E/CN.4/Sub.2/SR.422 (10 February 1964), p. 11 (Capotorti). Annex 3.

5.89 This lack of extraterritorial reach of Article 2, para. 2, lit. b) of CERD is also brought out by the usage of the term "defend/ *defender*". This term, which was used to replace the broader term "advocate" in an earlier Brazilian proposal for what was to become Article 2, para. 1, lit. b) of CERD[438], implies that the respective State might be in a position to shield racial discrimination committed by private individuals or organizations from criminal prosecution by way of legislation, which it may only do on its own territory.

5.90 Similar considerations apply with regard to Article 2, para. 1, lit. d) of CERD.

C. ARTICLE 2, PARA. 1, LIT. D) OF CERD

5.91 Article 2, para. 1, lit. d) of CERD provides:

> "(d) Each State Party shall *prohibit* and bring to an end, by all appropriate means, *including legislation* as required by circumstances, racial discrimination by any persons, group or organization; "[439]

5.92 According to the far-reaching interpretation of Article 2, para. 1 lit. d) of CERD Georgia proposes, any one of the by now 173 contracting parties of CERD would be under an obligation to prohibit and bring to an end racial discrimination abroad and for that purpose enact legislation with extraterritorial reach regardless of any nexus with the respective acts entailing racial discrimination.

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[438] U.N. General Assembly, 20th session, Official Records, Annexes, Report of the Third Committee, U.N. Doc. A/6181 (18 December 1965), p. 18, paras. 45 – 46. Annex 23.

[439] Emphasis added.

5.93 Yet a reading of Article 2, para. 1, lit d) of CERD in line with customary methods of interpretation must lead to the result that it is limited to acts of racial discrimination taking place on the territory of the respective contracting party. It is only on a State`s own territory and with regard to that territory that a State may prohibit racial discrimination and that it may enact legislation.

5.94 The practice of the Committee on the Elimination of Racial Discrimination that Georgia refers to in its Memorial with regard to Article 2, para. 1, lit. d) of CERD, *i.e.* para. 543 of the report on the implementation of CERD by the Federal Republic of Yugoslavia (Serbia and Montenegro) containing the concluding observations adopted during the Committee's 1012th meeting, held on 20 August 1993[440], contains recommendations linked to the *domestic* situation in the Federal Republic of Yugoslavia (Serbia and Montenegro). This may be derived from the fact that the Committee, in the paragraph immediately preceding para. 543, deals generally with issues of territorial integrity, while the following paragraph 544 then deals with the situation in Kosovo which then undoubtedly formed part of the Federal Republic of Yugoslavia (Serbia and Montenegro).

5.95 It is thus misleading to refer to para. 543 of the above-mentioned report of the Committee on the Elimination of Racial Discrimination as an indication of practice of the Committee supporting an extraterritorial application of Article2, par. 1, lit. d) of CERD.

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5.96 In short, the general content of Article 2 of CERD, as well as the specific provisions of Article 2 of CERD, lead to the conclusion that both Article 2 of

[440] See GM, para. 9.65.

CERD generally, as well as the specific sub-paragraphs thereof do not apply in an extraterritorial context.

5.97 The same is true, *mutatis mutandis*, for Article 5 of CERD, since, given its wording and content, it does not apply beyond the national borders of the respective contracting party.

Section IV. Article 5 of CERD does not apply extraterritorially

5.98 Before analysing the content of Article 5 of CERD, it should first be mentioned that Georgia has not been able to specify which of the rights enumerated or referred to in Article 5 of CERD it alleges have been specifically violated by acts allegedly attributable to the Russian Federation.[441] This makes it difficult, if not impossible, for the Respondent to deal fully with the jurisdictional questions arising in that regard.

5.99 Yet, given that Georgia has focused on the rights and freedoms of refugees and displaced persons, Russia will also focus on this specific aspect of Article 5 of CERD.

5.100 It is true that, as submitted by the Applicant, Article 5 of CERD does not contain a specific clause regulating the geographical scope of application of this provision. This fact, however, as demonstrated above, militates in favour of limiting its scope of application *ratione loci* to the territory of the contracting party concerned rather than extending it[442].

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[441] See GM, paras. 9.20 *et seq.*

[442] See *supra* para. 5.18 *et seq.*

5.101 It must also be noted that Article 5 of CERD, by underlining that States parties, implementing Article 5 of CERD, must act in compliance with the fundamental obligations laid down in Article 2 of CERD, is not intended to impose obligations upon contracting parties that extend beyond Article 2 of CERD. Rather, it requires States to implement those obligations arising under Article 5 of CERD, themselves rooted in Article 2 of CERD, in a certain specific manner.

5.102 Accordingly, Article 5 of CERD by the same token also refers, embraces and includes the geographical limitations contained in Article 2 of CERD itself. The geographical scope of this latter provision (*i.e.* Article 2 of CERD) and accordingly also the Court's jurisdiction arising under Article 22 of CERD itself is however, as was demonstrated above[443], limited to acts occurring on the territory of a given State party to the Convention.

5.103 This limited territorial scope of application of Article 5 is also brought out by the wording of Article 5 of CERD.

5.104 First and foremost, Article 5 of CERD, unlike other provisions of the Convention such as Articles 3 or 6 of CERD, does *not* contain any specific clause the effect of which would be to extend the scope of application *ratione loci* to foreign territories. *A contrario,* Article 5 of CERD only applies to the territory of the respective contracting party.

5.105 This is further confirmed by the chapeau of Article 5 of CERD which obliges contracting parties

> "to prohibit and to eliminate racial discrimination in all its forms".

[443] See *supra* para. 5.82 *et seq.*

5.106 Given that a State may not, under international law, exercise sovereign rights on foreign territory, unless specifically authorized to do so, any such State is thus not in a position to either prohibit or eliminate racial discrimination occurring abroad. Accordingly, the text of Article 5 of CERD necessarily implies that the scope of application of Article 5 of CERD was thought to be limited to the territory of a given contracting party (where said party could indeed fulfill the obligation to prohibit and eliminate racial discrimination in all its forms).

5.107 This is further confirmed by lit. a) of Article 5 of CERD, the content of which reconfirms the territorial requirement underlying Article 5 of CERD. A natural reading of the notion of "tribunals and all other organs administering justice" implies that Article 5 lit. a) of CERD is, once again, limited to the territory of the State concerned, since it is only on its own territory that a State possesses tribunals and is administering justice.

5.108 *Mutatis mutandis*, similar considerations apply to other parts of Article 5 of CERD. Thus, to give just a few examples, it is only on its own territory that a State is legally in a position to protect individuals from violence emanating from private groups or institutions. This is even more true with regard to the holding of elections, the conduct of public affairs and the access to public service contemplated in Article 5 lit. c) of CERD, the right to freedom of movement and residence "within the border of the State" guaranteed by Article 5, lit. d (i) of CERD, or finally the regulation of access to public services such as transport or parks, guaranteed by Article 5, lit. f) of CERD.

5.109 More specifically with regard to Article 5 lit. d) ii) of CERD, *i.e.* the "right to leave any country, including one's own, and to return to one's country", it is obvious that the right *to leave* any country, including the respective home

country, is only addressed to the respective territorial State on the territory of which the individuals concerned are finding themselves, *i.e.* in the case at hand Georgia. Accordingly, the Court's jurisdiction under Article 22 of CERD, which is limited to issues related to the interpretation or application of the Convention, does not in that regard relate to obligations of the Russian Federation.

5.110 The same is also true for the right "to return to one's country"/ "de revenir dans son pays" enshrined in the second part of Article 5 lit. d) ii) of CERD. Already the very wording "one's country/ son pays" indicates that the addressee of the obligation is the home State of the individual concerned.

5.111 This is further confirmed by a reading of Article 5 lit. d) i) and ii) of CERD. Article 5 lit. d), (i) of CERD limits the right to freedom of movement to the "freedom of movement and residence *within the border of the State*", *i.e.* thus to the freedom of movement within the boundaries of the respective contracting party. Accordingly, the Court's jurisdiction under Article 22 of CERD read in conjunction with Article 5 lit. d), (i) of CERD is limited in the case at hand to determining vis-à-vis the Russian Federation the legality of limitations upon the freedom of movement within the Russian Federation itself, but not within areas which do *not* form part of the territory of the Russian Federation. The wording of Article 5 lit. d) (i) of CERD therefore again demonstrates that this provision does not apply extraterritorially.

5.112 Yet, just as Article 5 lit. d) (i) of CERD provides for the internal freedom of movement within the boundaries of a given contracting party, the parallel guarantee contained in Article 5 lit. d) (ii) of CERD, dealing with the *external* aspect of the freedom of movement, similarly provides for the right to re-enter the territory of the respective contracting party and is thus similarly addressed to this contracting party, not to third States.

5.113 The limited territorial scope of application of Article 5 of CERD is also further confirmed by the two General Recommendations adopted by the Committee on the Elimination of Racial Discrimination specifically relating to Article 5 of CERD.

5.114 For one, the geographical limitation inherent in Article 5 of CERD is confirmed by "General Recommendation No. 20: Non-discriminatory implementation of rights and freedoms (Article 5)" adopted by the Committee on the Elimination of Racial Discrimination on 15 March 1996. Its para. 3 provides:

> "3. Many of the *rights and freedoms mentioned in article 5,* such as the right to equal treatment before tribunals, are to be enjoyed by all *persons living in a given State;* others such as the right to participate in elections, to vote and to stand for election are the rights of citizens."[444]

5.115 While the main point addressed in para. 3 of General Recommendation 20 is possible distinctions between citizens and non-citizens, its reference to individuals present in a given territory nevertheless confirms that Article 5 of CERD is to be applied solely to "all persons *living in a given State*", *i.e.* the rights guaranteed by Article 5 of CERD are to be guaranteed by the territorial State concerned and those individuals that are living on the territory of this State.

5.116 Moreover, "General Recommendation 22: Article 5 and refugees and displaced persons" does not support the broad assumption of an extraterritorial application of Article 5 of CERD[445].

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[444] Emphasis added.

[445] GM, paras 9.22. *et seq.*

5.117 Starting with the preamble of General Recommendation 22, to which Georgia has devoted some attention[446], it should first be noted that the first preambular paragraph is nothing but a mere description "of the fact" that certain situations have in the past resulted in flows of refugees and the displacement of persons without including any kind of legal conclusion to be drawn form this factual determination, and even less any conclusion as to a possible extraterritorial applicability of Article 5 of CERD. Indeed, by recalling the 1951/1967 Convention on the Status of Refugees, which relates to the obligations of States on the territory of which refugees find themselves, the Committee on the Elimination of Racial Discrimination underlines the obligations of such *territorial States* with regard to persons displaced for ethnic reasons.

5.118 This understanding is further confirmed by para. 2 lit. b) of General Recommendation 22 which again relates solely to the obligations of the country of residence of displaced persons and the circumstances of their departure from the respective country of refuge.

5.119 Moreover, para. 2, lit. c) and d) of General Recommendation 22 relate only to the situation of refugees and displaced persons already having returned to their homes, which question does not, however, form part of the dispute between the parties in the current proceedings.

5.120 Finally, it has also to be noted that para. 2 lit. a) of General Recommendation 22 does not mention, as seems to be alleged by Georgia in its Memorial[447], obligations of third States, but rather solely confirms the rights of individual refugees and displaced persons to return to their homes.

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[446] GM, para. 9.22.

[447] GM, para. 9.23.

5.121 It is misleading to refer to the practice of the Committee on the Elimination of Racial Discrimination concerning Bosnia and Herzegovina as an indication of an unlimited extraterritorial reach of Article 5 of CERD relating to obligations vis-à-vis displaced persons.[448] The relevant part of the Committee's 1994 report states:

> "In that connection, the Committee strongly recommended that effective action should be taken to ensure that refugees and other displaced persons were allowed to return to their homes, all detainees were released immediately into conditions of safety and adequate reparation was given to the victims."[449]

5.122 This recommendation formed part of the *report on Bosnia and Herzegovina* and was thus addressed to the government of Bosnia and Herzegovina and thus to the territorial State concerned. Accordingly, the parties to the conflict that could take measures aiming at the return of refugees and displaced persons and to which the report referred were the Bosnian parties to the conflict, *i.e.* the Bosnian government forces on the one hand, and local Bosnian Serb insurgent forces on the other, thus not entailing any form of extraterritorial reach of Article 5 of CERD, as implied by Georgia.

5.123 Moreover, the only reference to Article 5 (d) (ii) of CERD, *i.e.* the right to return to one's own country, contained in the 2007 Committee's report on Israel to which report Georgia referred in its Memorial[450], relates to the right of Palestinians to return to Israel (*i.e.* the territory of the contracting party

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[448] GM, paras. 9.24. – 9.25.

[449] U.N. General Assembly, 48th session, Official Records, Supplement No.18, Report of the Committee on the Elimination of Racial Discrimination, U.N. Doc. A/48/18 (15 September 1993), paras. 453-473; para. 470. Annex 30.

[450] GM, para. 9.26., footnote 1025.

concerned) and thus does not relate to the Occupied Palestinian Territories (*i.e.* did *not* relate to territory beyond the boundaries of said contracting party). The Committee stated:

> "18. The Committee is concerned about the denial of the right of many Palestinians to return and repossess *their land in Israel*. (Article 5 (d) (ii) and (v) of the Convention).
>
> The Committee reiterates its view, expressed in its previous concluding observations on this issue, and urges the State party to assure equality in the *right to return to one's country* and in the possession of property."[451]

5.124 It is also telling that Georgia itself, when reporting to the Committee on the Elimination of Racial Discrimination under Article 9 of CERD and specifically when referring to the situation in Abkhazia, did *not* refer at any point in time to any form of responsibility of the Russian Federation arising under Article 5 of CERD. Georgia thereby indicated its *opinio juris* that Article 5 of CERD did not apply vis-à-vis the Russian Federation to either Abkhazia or South-Ossetia. Rather, Georgia merely referred to alleged acts of racial discrimination attributable to the local authorities of Abkhazia:

> "82. In the context of this article of the Convention [*i.e.* Article 5 of CERD], particular attention should be drawn to the *situation around Abkhazia*. Since the 1992-1993 armed conflict, the *leaders of the self-proclaimed republic* have continued to pursue their policy of violence directed against the Georgian population of the region, particularly in Gali district."[452]

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[451] Emphasis added.

[452] Committee on the Elimination of Racial Discrimination, Reports submitted by States Parties under Article 9 of the Convention, Initial report of States Parties due in 2000, Addendum: Georgia, 24 May 2000, U.N Doc. CERD/C/369/Add.1 (1 February 2001), para. 82, emphais added. Annex 48.

5.125 The Committee in turn took note of this and shared the understanding that any violations of Article 5 of CERD would be attributable to the Abkhaz authorities without mentioning the Russian Federation. It stated:

> "On repeated occasions, attention has been drawn to the *obstruction by the Abkhaz authorities of the voluntary return of displaced populations,* and several recommendations have been issued by the Security Council to facilitate the free movement of refugees and internally displaced persons."[453]

5.126 In its latest Concluding Observations dealing with the situation in Georgia, the Committee on the Elimination of Racial Discrimination again referred to the situation in Abkhazia and South Ossetia. After having deplored "discrimination against people of different ethnic origins, including a large number of internally displaced persons and refugees" arising under Article 5 of CERD, the Committee took note of various recommendations which had been issued by the Security Council to facilitate the free movement of refugees and internally displaced persons"[454], none of which however was addressed to the Russian Federation.

5.127 This approach by the Committee once again confirms the understanding that Article 5 of CERD did not entail the responsibility of the Russian Federation vis-à-vis the situation in Abkhazia or South Ossetia.

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[453] Committee on the Elimination of Racial Discrimination, Consideration of reports submitted by States Parties under Article 9 of the Convention, Concluding observations of the Committee on the Elimination of Racial Discrimination: Georgia, U.N. Doc. CERD/C/304/Add.120 (27 April 2001), emphasis added. Annex 50.

[454] Committee on the Elimination of Racial Discrimination, 67th session, Consideration of reports submitted by States Parties under Article 9 of the Convention, Concluding observations of the Committee on the Elimination of Racial Discrimination: Georgia, U.N. Doc. CERD/C/GEO/CO/3 (27 March 2007). Annex 63.

Section V. Article 3 of CERD does not apply to the conduct of the Russian Federation in Abkhazia and South Ossetia

5.128 While mainly focusing on Articles 2 and 5 of CERD, Georgia also alleges that Russia has violated Article 3 of CERD[455] and thus implies that the Court has jurisdiction to consider such alleged violations under Article 22 of CERD.

5.129 Unlike the other provisions invoked by Georgia, Article 3 of CERD does indeed clarify its own territorial application by providing that

> "States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature *in territories under their jurisdiction*."[456]

5.130 As noted above, the reference to "jurisdiction" must be read as broadening the spatial application of the obligation in question in that it deliberately goes beyond a territorial application[457].

5.131 Georgia addresses the spatial scope of Article 3 of CERD in very brief terms. It asserts that Abkhazia and South Ossetia, as well as adjacent areas of Georgia, qualify as "'territories under the jurisdiction' of the Russian Federation for the purposes of Article 3 of the Convention".[458] In support, it relies on Russia's alleged "control of the *de facto* governmental administrations, finances and military and police services" prior to 2008, and Russia's alleged "military

[455] GM, paras. 9.70. *et seq.*

[456] Emphasis added.

[457] See *supra* para. 5.38.

[458] GM, para. 8.24.

occupation", said to amount to "contro[l] [over] South Ossetia and Abkhazia" after 8 August 2008.[459]

5.132 The Russian Federation submits that while Article 3 of CERD does, as a matter of principle, re-define the spatial scope of obligations, it must be interpreted restrictively. In particular, in Russia's submission, neither South Ossetia nor Abkhazia qualify as "territories under [Russia's] jurisdiction" in the sense of Article 3 of CERD. This result is borne out by three alternative arguments:

5.133 *First,* this result follows from the general understanding of the term "jurisdiction" in other international conventions. As noted above, "jurisdiction", while typically denoting a move away from the principle of territoriality, is interpreted narrowly in the international jurisprudence of this Court, as well as other international courts and tribunals such as the European Court of Human Rights. In line with the "essentially territorial notion of jurisdiction", instances in which human rights obligations have been said to govern the extraterritorial conduct of States have been construed narrowly.

Contrary to Georgia's argument, "control" as such is not a sufficient basis for extending the spatial scope of obligations under international law. In contrast, for the reasons set out above, only military occupation or the effective overall control of a territory may be seen as an agreed basis of extraterritoriality.

5.134 The reference, in Article 3 of CERD, to "territories under their jurisdiction" must thus take account of this approach, which has concretised the ordinary meaning of the term "jurisdiction". In line with this ordinary meaning, the phrase territories under their jurisdiction in the sense of Article 3 of CERD

[459] *Ibid.*

must be narrowly construed. For the reasons set out above, Russia's involvement in Abkhazia and South Ossetia was never amounted to "belligerent occupation"; nor has the Russian Federation ever exercised effective control, and thus the applicability of Article 3 of CERD is not triggered.

5.135 *Secondly*, this general argument is supplemented by more specific considerations based on the character of the prohibitions mentioned in Article 3 of CERD, as well as the forms of conduct that States parties have agreed to undertake under the provision.

5.136 Article 3 of CERD does not cover racial discrimination in general, but two very specific, qualified, forms of it, namely racial segregation and apartheid. As noted above, this undermines Georgia's reasoning pursuant to which obligations under other provisions of CERD, which cover racial discrimination in a much broader sense, should apply without any territorial limitation. For present purposes, it is important to note that the specific character of racial segregation and apartheid informs the interpretation of the phrase "territories under their jurisdiction" and points towards a narrow understanding. As is clear from the *travaux* and indeed its very wording, Article 3 of CERD was included into CERD as part of attempts to stigmatize the policy of apartheid then implemented within South Africa and by the then South African government in the mandate territory of South West Africa/Namibia.

5.137 In the *Namibia* advisory opinion, the Court described this policy in the following terms:

> "the official governmental policy pursued by South Africa in Namibia is to achieve a complete physical separation of races and ethnic groups in separate areas within the [mandate] Territory"[460]

and thus amounted to an attempt

> "to establish (...) and to enforce distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin".[461]

5.138 This, as the Court further observed, constituted

> "a flagrant violation of the purposes and principles of the Charter."[462]

5.139 Seen against this background, it becomes clear that Article 3 of CERD aimed at stigmatising a narrowly-defined and universally-condemned policy. For present purposes, it is important to note, however, that the specific focus of Article 3 of CERD affects the interpretation of the phrase "territories under their jurisdiction".

5.140 Given South Africa's attempt to impose racial policies extraterritorially and thus beyond its own territory, *i.e.* in Namibia, Article 3 of CERD serves to extend the territorial scope of Article 3 of CERD and to include forms of extraterritorial control as well.

5.141 Thus, representatives endorsed a proposal, made during the work of the Sub-Commission on Prevention of Discrimination and Protection of Minorities by Mr. Abram, to add the phrase "in territories subject to their jurisdiction" to

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[460] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, *I.C.J. Reports 1971*, at p. 57, para. 130.

[461] *Ibid*., para. 131.

[462] *Ibid*, para. 131.

what was to become Article 3 of CERD[463] precisely because (as was noted by Mr. Calvocoressi)

> "(...) "apartheid" could be interpreted as applying exclusively to the situation in South Africa."[464]

5.142 While there had to be some reference covering situations like that in Namibia, it was clear that, just as under other jurisdictional clauses, the exceptions to the territoriality principle were to be interpreted narrowly, taking account of the specific situation envisaged by Article 3 of CERD.

5.143 In particular, it is clear from the very wording of the provision that Article 3 of CERD only covers qualified forms of racial discrimination that, by their very nature, presuppose an intensive control over territory: there is no way of imposing a regime of apartheid unless a State exercises complete control over territory. This may *e.g.* be the case in situations of prolonged belligerent occupation, *i.e.* where territory is "actually placed under the authority of the hostile army", but even then "extends only to the territory where such authority has been established and can be exercised".[465] In light of the historical background of Article 3 of CERD, it seems clear that a mandate territory would also qualify as a "territory under jurisdiction" for the purposes of said provision.

5.144 Given the intention underlying Article 3 of CERD to outlaw the abuse of mandate regimes, and given the decision underlying Article 3 of CERD to single out practices of apartheid and racial segregation, Article 3 of CERD presupposes

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[463] U.N. Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Summary record of the 425th Meeting, U.N. Doc. E/CN.4/Sub.2/SR.425 (11 February 1964), p. 29. Annex 4.

[464] *Ibid.*

[465] See *Democratic Republic of Congo (DRC) v. Uganda*, Judgment of 19 December 2005, ICJ Rep. 2005, at p. 229, para. 172.

intensive and full-fledged administrative control over territory. It thus seems clear that Article 3 of CERD cannot be read to cover broadly-construed forms of influence exercised abroad.

5.145 Finally, *thirdly*, a closer look at the forms of conduct mentioned in Article 3 of CERD confirms this result. Unlike other provisions of the Convention, Article 3 of CERD does not lay down a duty of States to abstain from a certain conduct, but rather imposes upon States three obligations to take positive action, namely to prevent, to prohibit and to eradicate apartheid and racial segregation.

5.146 By deciding to focus on "positive duties", the drafters implicitly accepted that Article 3 of CERD would have a restrictive territorial scope. If interpreted as a broad clause covering all forms of extraterritorial control or influence, Article 3 of CERD would have justified, or even required, States to intervene in the domestic affairs of another State. Yet, as Georgia admits itself (albeit in a different setting)[466], the drafters were cautious not to impose upon States parties far-reaching duties of intervention or prevention.

5.147 What is more, general rules of international law suggest that at least as a matter of principle, States can only prohibit or eradicate behaviour that takes place within their borders or exceptionally in other areas for which they assume regulatory responsibility, such as mandate or trust territories.

5.148 To summarise, unlike Article 2 and 5, Article 3 of CERD was deliberately formulated so as to apply to territories under a State's jurisdiction. In line with general international law, the concept of "jurisdiction" however, is to be interpreted as a narrow exception to an "essentially territorial" character of obligations. This result is borne out and confirmed by the specific features of

[466] GM, 8.14.

Article 3 of CERD itself, which outlaws qualified forms of racial discrimination requiring an intensive control over territory and which imposes upon States potentially far-reaching duties to act that can only be performed within territories under the complete control of a State.

5.149 Both factors suggest that the obligations derived from Article 3 of CERD, while not limited to a State's own territory, can only apply to narrowly construed forms of extraterritorial control, such as occupied territory and mandates and thus does not cover the situation at hand. Accordingly, the Court's jurisdiction *ratione loci* under Article 22 of CERD, which is limited to decide disputes as to the interpretation or application of CERD, does not extend to the allegations made by Georgia that the Russian Federation has violated Article 3 of CERD in Abkhazia and South Ossetia, *quod non*.

Section VI. Conclusions

5.150 To summarize, it is apparent that, given a lack of any clause extending its geographical scope of application, CERD does not apply beyond the borders of its contracting parties.

5.151 In the alternative, any form of extraterritorial application of CERD, if ever there could be such, would be limited to situations of long-term belligerent occupation or effective control, which there is, even *prima facie*, none in the case at hand.

5.152 Besides, given their specific wording and content of Articles 2 and 5 of CERD, said provisions confirm that they are not governing activities of contracting parties abroad.

5.153 Moreover, Article 3 of CERD does not apply to conduct of the Russian Federation in Abkhazia and South Ossetia.

5.154 Accordingly, the Court's jurisdiction *ratione loci*, which is limited to deciding issues related to the interpretation and application of CERD, does not extent to alleged violations of CERD said to be attributable to the Russian Federation and said to have taken place in Abkhazia or South Ossetia.

CHAPTER VI
FOURTH PRELIMINARY OBJECTION: THE COURT'S JURISDICTION IS LIMITED *RATIONE TEMPORIS*

Section I. Introductory observations

6.1 Georgia asserts in the Introduction to its Memorial that it "is seeking relief from the Court only with respect to acts occurring after – or with continuing effect from – the date when CERD entered into force with respect to Georgia, *i.e.* 2 July 1999".[467]

6.2 Without prejudice to Russia's position that the Court lacks jurisdiction in this case, and as a subsidiary issue, Russia wishes:

a. To alert the Court to the tension between Georgia's strong emphasis in its Memorial on events prior to 2 July 1999 (the date of entry into force of CERD so far as concerns Georgia), and Georgia's formal legal position with respect to the Court's jurisdiction *ratione temporis* as set out above;

b. To identify to the Court that the remedies sought by Georgia in fact go beyond Georgia's formal legal position (as set out above), as Georgia appears to seek a form of restitution that would re-establish the situation as it existed in the early 1990s (on Georgia's version of the facts), not to re-establish the situation which existed before the alleged wrongful acts of Russia were committed (*i.e.* by definition, no earlier that 2 July 1999);

[467] GM, para. 1.13.

c. Finally, to recall that the Court's jurisdiction is also limited in respect of facts or events subsequent to the filing of an application.

6.3 At this jurisdictional phase of the proceedings, with respect to the Court's jurisdiction *ratione temporis*, Russia submits that the Court should find, insofar as the issue arises for consideration (*quod non*), that the provisions of CERD do not provide a basis for any claim by Georgia against Russia in relation to any act or fact which (allegedly) took place, or any situation which ceased to exist, before 2 July 1999 – and that the Court's jurisdiction is limited accordingly. This follows from the basic rule on non-retroactivity of treaties found in Article 28 of the 1969 Vienna Convention on the Law of Treaties, which provides:

> "Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of entry into force of the treaty with respect to that party." [468]

6.4 It is open to States to provide that a given treaty shall have retroactive effect; however, no intention to this effect appears from CERD, and nor does Georgia suggest otherwise. It follows that CERD can have no application as between Russia and Georgia in respect of conduct relied upon by Georgia taking place before 2 July 1999, and similarly that the Court can have no jurisdiction in respect of alleged breaches concerning acts and omissions occurring prior to that date.[469]

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[468] See also Article 13 of the ILC's Articles on State Responsibility: "An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time it occurs."

[469] See also *e.g. Ambatielos case (jurisdiction), Judgment, I.C.J. Reports 1952*, p. 28 at p. 40.

Section II. Georgia's emphasis on events prior to 2 July 1999

6.5 Although Georgia became a State party to CERD only on 2 July 1999, it is Georgia's case that the dispute dates back to 1991,[470] and there is a strong emphasis in Georgia's Memorial on events in Abkhazia and South Ossetia in the early and mid-1990s. There are extensive sections on alleged ethnic cleansing in South Ossetia in 1991-1992 (Memorial, paragraphs 5.4-5.8), in Abkhazia in 1992-1994 (Memorial, paragraphs 6.6-6.34) and 1998 (Memorial, paragraphs 6.35-6.46). This is notwithstanding the need to apply the rule on non-retroactivity of treaties. Further, in Georgia's Chapter IX, it is said that:

> "The present dispute centres upon the confrontation of various ethnic groups within the national borders of Georgia. The *de facto* authorities in South Ossetia and Abkhazia, in concert with Russia, have succeeded, *over a period of approximately 15 years*, in cleansing the territories under their *de facto* control of the vast majority of ethnic Georgians".[471]

6.6 It follows that, with respect to the above example, Georgia is invoking actions going back around five years before it became a party to CERD (in 1999). To similar effect, Georgia asserts:

> "The issue in the present case is a narrow one, namely the extent of Russia's responsibility in respect of the construction, maintenance and consolidation of ethnically homogeneous enclaves in South Ossetia and Abkhazia."[472]

6.7 On Georgia's case, this alleged "construction" is understood to have taken place in the early 1990s.

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[470] See *e.g.* Georgia's Application of 12 August 2008, para. 6.

[471] GM, para. 9.17, emphasis added.

[472] *Ibid.*

6.8 Further, it appears that Georgia seeks reparation by reference to the factual situation as of the early 1990s, not as of 2 July 1999. One of the central focuses in Georgia's Memorial is on the (approximately) 300,000 persons that are said to have left Abkhazia and South Ossetia in the early to mid-1990s as a result of ethnic cleansing. Georgia seeks various remedies in respect of those persons, including a declaration that

> "the Russian Federation is under an obligation to re-establish the situation that existed before its violations of Articles 2(1)(a), 2(1)(b), 2(1)(d), 3 and 5 of the 1965 Convention, in particular by taking prompt and effective measures to secure the return of the internally displaced Georgians to their homes in South Ossetia and Abkhazia."[473]

6.9 However, as at the date that Georgia became party to CERD, such displaced persons (other than those displaced in or from August 2008) had already left Abkhazia and South Ossetia. Georgia assumes an identity between the re-established "situation" and the return of displaced persons that is inconsistent with the basic facts, and thereby seeks a remedy that cannot be apt for alleged breaches of Russia post-July 1999.

6.10 It is no answer to say that the breaches Georgia alleges are continuing in character. Georgia in effect seeks a remedy apt for an expulsion of displaced persons, when that expulsion – on Georgia's own case – took place many years before any act for which Russia could be responsible under CERD. As Article 14(2) of the ILC's Articles on State Responsibility provides:

> "The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation."

[473] GM, p. 408.

6.11 In other words, to be truly continuing in character the breach must be (i) continuing and (ii) uninterrupted ("extends over the entire period"). The Commentary provides examples of various wrongful acts of a continuing character:

> "the maintenance in effect of legislative provisions incompatible with treaty obligations of the enacting State, unlawful detention of a foreign official or unlawful occupation of embassy premises, maintenance by force of colonial domination, unlawful occupation of part of the territory of another State or stationing armed forces in another State without its consent".[474]

6.12 The (alleged) expulsion of displaced persons is not analogous to such acts, and in this respect it is important not to confuse the question of whether an act is continuing in character with the question of whether or not the *effects* of that act continue in time. The fact that the situation created by an act, *i.e.* the effects thereof, may continue in time does not have the impact of transforming an act of a State that does not have a continuing character into one that does. This may be seen from Article 14(1) of the ILC's Articles on State Responsibility, which provides:

> "The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue."

6.13 The point is then made more explicitly in the Commentary to Article 14:

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[474] Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries, commentary to Article 14, at para. 3. *Yearbook of the International Law Commission*, 2001, Vol.II, Part Two, p.60.

A definition of a continuing breach is provided by Pauwelyn in *The Concept of a 'Continuing Violation' of an International Obligation: Selected Problems*, BYIL 56 (1995), p. 415 as follows: "a continuing violation is the breach of an international obligation by an act of a subject of international law extending in time and causing a duration or continuation of that breach".

> "An act does not have a continuing character merely because its effects or consequences extend in time. It must be the wrongful act as such which continues. In many cases of internationally wrongful acts, their consequences may be prolonged. … They do not, however, entail that the breach itself is a continuing one."[475]

6.14 Even where it is established that a breach is of a continuing character, this does not negate the rule on the non-retroactivity of treaties. In such a case, a treaty breach can only be found from the date from which the State is bound by the obligation in question, and the jurisdiction of the international tribunal concerned is limited accordingly.[476] In such a case, the tribunal has no jurisdiction to award reparation that in fact does more than wipe out all the consequences of the alleged illegal acts, *i.e.* reparation that seeks to re-establish a situation that is said to have existed many years prior to the alleged acts.[477]

Section III. Events subsequent to the filing of the Application

6.15 Finally, Russia recalls that the Court has held that it only has jurisdiction over facts or events subsequent to the filing of an application if:

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[475] Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries, commentary to Article 14, at para. 6. *Yearbook of the International Law Commission*, 2001, Vol.II, Part Two, p.60.

[476] See *e.g.* Pauwelyn, *op. cit.*, at p. 435: "One set of problematic cases remains: those where the period during which the relevant international obligation is allegedly breached starts *before* the critical date (subsequent to which 'acts' or 'situations' will fall before the specific or general jurisdiction of the tribunal), but ends only *after* that date. The general rule is that in these cases the international tribunal will be allowed to exercise jurisdiction over the alleged breach for the period which continues to elapse after the critical date, even though the breach came into existence before that date." (Internal reference omitted.) See also *Carballal v. Uruguay* (1981) ILR 62, p. 240 at 0.245; *Teti v. Uruguay* (1982) ILR 70, p. 287 at pp. 295-296; and *Mondev International Ltd. v. USA*, ILM 42 (2003), p. 85 at p. 98, para. 70 (… "it must still be possible to point to conduct of the State after that date which is itself a breach"), cited by the tribunal in *SGS v. Philippines*, Award of 29 January 2004, para. 166.

[477] Cf. *Factory at Chorzów, Merits,* 1928, PCIJ, Series A, No. 17, p. 47.

a. Those facts or events are connected to the facts or events already falling within the Court's jurisdiction; and

b. Consideration of those later facts or events would not transform the nature of the dispute.[478]

6.16 The first limb of this test is particularly relevant in the present proceedings. Before it can rely on facts or events subsequent to the filing of the Application on 12 August 2008, Georgia must first establish the Court's jurisdiction under CERD with reference to facts or events *already falling within the Court's jurisdiction i.e.* facts or events in the period from 2 July 1999 to 12 August 2008. It is only then that facts or events subsequent to the filing of the application could fall within the jurisdiction of the Court. However, as noted in Chapter III above, Georgia fails to satisfy that test.

[478] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, I.C.J. Reports 2008, at para. 87. See also *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, I.C.J. Reports 1974, at para. 72; *LaGrand (Germany v. United States of America)*, I.C.J. Reports 2001, pp. 483-484, at para. 45; *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, I.C.J. Reports 1992, at paras. 69-70; and *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, I.C.J. Reports 2002, at para. 36.

CHAPTER VII
CONCLUSIONS

7.1 Russia's principal contentions may be summarized as follows:

a. Georgia has attempted to manufacture a case that would come within the Court's jurisdiction under Article 22 of CERD. The real dispute in this case does not come within the jurisdiction provided for by that Article. Moreover, Georgia's approach to international dispute settlement is tainted in that Georgia has only brought its so-called "dispute" before the Court after having in vain sought to provide for a solution for its conflict with Abkhazia and South Ossetia by illegally resorting to use of force.

b. The real dispute in this case concerns the conflict, between Georgia on the one hand and Abkhazia and South Ossetia on the other, in relation to the legal status of Abkhazia and South Ossetia, a conflict that has on occasion erupted into armed conflict. It is manifest that there was a period of armed conflict between Georgia and Russia, following on from Georgia's unlawful use of force on 7 August 2008. This is not a case about racial discrimination.

c. There was no dispute between Georgia and Russia with respect to the interpretation and application of CERD with regard to the situation in and around Abkhazia and South Ossetia prior to the date Georgia submitted its Application to the Court, *i.e.* prior to 12 August 2008.

d. Apart from the lack of any relevant dispute, Georgia has not satisfied the requirements laid down in Article 22 of CERD. Those requirements are not fulfilled since:

(i) Article 22 of CERD conditions the jurisdiction of the Court on, cumulatively, previous attempts by the State that brings a case before the Court to settle the dispute through (a) negotiations and (b) the procedures expressly provided for in the CERD; and

(ii) Georgia has not attempted to negotiate with Russia on the alleged "dispute" referred to in the Application;

(iii) nor has Georgia attempted to use the procedures expressly provided for in the CERD.

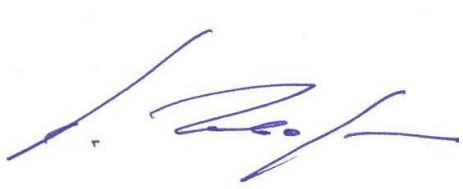
e. The jurisdictional reach of Article 22 of CERD does not extend to acts or omissions by Russia allegedly having taken place on the territory of either Abkhazia or South Ossetia. The Court's jurisdiction under Article 22 of CERD is limited to disputes related to the application or interpretation of CERD which in turn does not apply to acts having taken place beyond the territory of the respective contracting party.

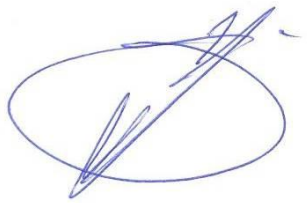
f. In the alternative and should the Court find that it otherwise has jurisdiction, *quod non*, the Court's jurisdiction is limited *ratione temporis* to events having taken place after the entry into force of CERD as between Georgia and Russia, *i.e.* to events which occurred after 2 July 1999.

7.2 In the present Preliminary Objections Russia does not discuss issues related to the substance of Georgia's claims. These pleadings are confined to objections on jurisdiction only. Insofar as certain matters of a factual nature are referred to herein, this is done solely for the purposes of Russia's contentions on jurisdiction.

SUBMISSION

For the reasons advanced above, 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.





Kirill GEVORGIAN

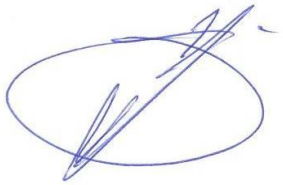
Roman KOLODKIN

Agents of the Russian Federation

Moscow, 1 December 2009

CERTIFICATION

We hereby certify that the annexes are true copies of the documents referred to and that the translations provided are accurate.



Kirill GEVORGIAN

Roman KOLODKIN

Agents of the Russian Federation

Moscow, 1 December 2009

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