1 APRIL 2011

JUDGMENT

CASE CONCERNING APPLICATION OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

(GEORGIA *v.* RUSSIAN FEDERATION)

PRELIMINARY OBJECTIONS

AFFAIRE RELATIVE À L'APPLICATION DE LA CONVENTION INTERNATIONALE SUR L'ÉLIMINATION DE TOUTES LES FORMES DE DISCRIMINATION RACIALE

(GÉORGIE c. FÉDÉRATION DE RUSSIE)

EXCEPTIONS PRÉLIMINAIRES

1er AVRIL 2011

ARRÊT

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INTERNATIONAL COURT OF JUSTICE

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CASE CONCERNING APPLICATION OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

(GEORGIA *v.* RUSSIAN FEDERATION)

PRELIMINARY OBJECTIONS

Article 22 of CERD invoked by Georgia as a basis for the jurisdiction of the Court — Four preliminary objections to the jurisdiction of the Court raised by the Russian Federation.

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First preliminary objection – Existence of a dispute.

Contention by the Russian Federation that there is no dispute between the Parties with respect to the interpretation or application of CERD — Meaning of the word "dispute" in Article 22 of CERD — Evidence as to the existence of a "dispute" — The Court limits itself to official documents and statements — Distinction between documents and statements issued before and after CERD entered into force between the Parties — Primary attention given by the Court to statements made or endorsed by the Executives — Agreements and the Security Council resolutions relating to the situation in Abkhazia and South Ossetia.

Documents and statements from the period before CERD entered into force between the Parties — No legal significance given by the Court to these documents and statements for the purposes of the case — No basis for a finding that there was a dispute between the Parties about racial discrimination by July 1999 — Even if there had been such a dispute prior to 2 July 1999, it could not have been a dispute with respect to the interpretation or application of CERD.

Documents and statements from the period after CERD entered into force between the Parties and before August 2008 — Reports made after 1999 to human rights treaty monitoring committees — No allegations of non-compliance by the Russian Federation with its obligations under CERD — Reports to the committees not significant in determining the existence of a dispute — Documents and statements issued by the Parties during this period — No legal significance for the purposes of the case — No legal dispute between Georgia and the Russian Federation during that period with respect to the interpretation or application of CERD.

Events in August 2008 — Documents and statements issued in the period between the beginning of armed hostilities and the filing of the Application — Georgia's claims expressly referred to alleged ethnic cleansing by Russian forces — Claims made against the Russian Federation directly and rejected by the latter — Existence of a dispute between the Parties about the Russian Federation's compliance with its obligations under CERD.

First preliminary objection dismissed.

*

Second preliminary objection — Procedural conditions in Article 22 of CERD.

Contention by the Russian Federation that two procedural preconditions in Article 22 of CERD were not met — Question of whether Article 22 establishes preconditions for the seisin of the Court — Ordinary meaning of Article 22 of CERD — The Court's Order on provisional measures without prejudice to the definitive decision as to its jurisdiction to deal with the merits — Functions of the requirement for prior resort to negotiations — Reference in Article 22 of CERD to "negotiation or [to] the procedures expressly provided for" in CERD — Words "dispute . . . which is not settled" by the means of peaceful resolution specified in Article 22 must be given effect — Express choice of two modes of dispute settlement, namely negotiations or resort to special procedures under CERD, suggests an affirmative duty to resort to them prior to the seisin of the Court — Use of future perfect tense in the French version of the expression "which is not settled" reinforces the idea that an attempt to settle the dispute must have taken place before referral to the Court can be pursued — Other three authentic texts of CERD do not contradict this

interpretation — Jurisprudence of the Court concerning compromissory clauses comparable to Article 22 of CERD — Reference to negotiations is interpreted as constituting a precondition to seisin — In their ordinary meaning, the terms of Article 22 of CERD establish preconditions to the seisin of the Court — No need to resort to supplementary means of interpretation — Extensive arguments made by the Parties relating to the travaux préparatoires *of Article 22 — Resort by the Court to the* travaux préparatoires *in other cases in order to confirm its interpretation of the relevant texts —* Travaux préparatoires *do not suggest a different conclusion from that at which the Court has already arrived through the main method of ordinary meaning interpretation.*

Question of whether the conditions for the seisin of the Court under Article 22 of CERD have been fulfilled — No claim from Georgia that, prior to seising the Court, it used or attempted to use the procedures expressly provided for in CERD — Examination limited to the question of whether the precondition of negotiations was fulfilled — Concept of negotiations — Nature of the precondition of negotiations — Distinction between negotiations and protests or disputations — No need to reach an actual agreement between the Parties — In the absence of evidence of a genuine attempt to negotiate, the precondition of negotiation is not met — Where negotiations are attempted the precondition of negotiation is met only when there has been a failure of negotiations or when negotiations have become futile or deadlocked — General criteria provided by the jurisprudence of the Court to ascertain whether negotiations have taken place — Negotiations must relate to the subject-matter of the treaty containing the compromissory clause.

Question of whether the Parties have held negotiations on matters concerning the interpretation or application of CERD — Only possible for the Parties to negotiate in the period during which a dispute capable of falling under CERD has arisen between the Parties — Negotiations prior to this period are of no relevance — Documents and statements submitted by Georgia as evidence of negotiations — Facts in the record show that Georgia did not attempt to negotiate CERD-related matters with the Russian Federation — Parties did not engage in negotiations with respect to the Russian Federation's compliance with its substantive obligations under CERD — As neither of the two modes of dispute settlement constituting preconditions to the seisin of the Court was attempted by Georgia, the Court does not need to examine whether these two preconditions are cumulative or alternative.

Second preliminary objection of the Russian Federation upheld — Court not required to consider other preliminary objections raised by the Russian Federation — Case cannot proceed to the merits phase.

*

Lapse of the Order of the Court of 15 October 2008 — Parties under a duty to comply with their obligations under CERD.

JUDGMENT

Present: *President* OWADA; *Vice-President* TOMKA; *Judges* KOROMA, AL-KHASAWNEH, SIMMA, ABRAHAM, KEITH, SEPÚLVEDA-AMOR, BENNOUNA, SKOTNIKOV, CANÇADO TRINDADE, YUSUF, GREENWOOD, XUE, DONOGHUE; *Judge* ad hoc GAJA; *Registrar* COUVREUR.

In the case concerning application of the International Convention on the Elimination of All Forms of Racial Discrimination,

between

Georgia,

represented by

Ms Tina Burjaliani, First Deputy-Minister of Justice,

H.E. Mr. Shota Gvineria, Ambassador of Georgia to the Kingdom of the Netherlands,

as Agents;

Mr. Payam Akhavan, LL.M., S.J.D. (Harvard), Professor of International Law, McGill University, Member of the Bar of New York,

as Co-Agent and Advocate;

Mr. James R. Crawford, S.C., LL.D., F.B.A., Whewell Professor of International Law, University of Cambridge, Member of the Institut de droit international, Barrister, Matrix Chambers,

Mr. Philippe Sands, Q.C., Professor of Law, University College London, Barrister, Matrix Chambers,

Mr. Paul S. Reichler, Foley Hoag LLP, Washington D.C., Member of the Bars of the United States Supreme Court and the District of Columbia,

as Advocates;

Ms Nino Kalandadze, Deputy-Minister for Foreign Affairs,

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

Ms Khatuna Salukvadze, Head of the Political Department, Ministry of Foreign Affairs,

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

Mr. Zachary Douglas, Barrister, Matrix Chambers, Lecturer, Faculty of Law, University of Cambridge,

Mr. Andrew B. Loewenstein, Foley Hoag LLP, Member of the Bar of the Commonwealth of Massachusetts,

Ms Clara E. Brillembourg, Foley Hoag LLP, Member of the Bars of the District of Columbia and New York,

Ms Amy Senier, Foley Hoag LLP, Member of the Bars of the Commonwealth of Massachusetts and New York,

as Advisers,

and

the Russian Federation,

represented by

H.E. Mr. Kirill Gevorgian, Director, Legal Department, Ministry of Foreign Affairs of the Russian Federation,

H.E. Mr. Roman Kolodkin, Ambassador of the Russian Federation to the Kingdom of the Netherlands,

as Agents;

Mr. Alain Pellet, Professor at the University Paris Ouest, Nanterre-La Défense, member and former Chairman of the International Law Commission, associate member of the Institut de droit international,

Mr. Andreas Zimmermann, Dr. jur. (Heidelberg University), LL.M. (Harvard), Professor of International Law at the University of Potsdam, Director of the Potsdam Center of Human Rights, Member of the Permanent Court of Arbitration,

Mr. Samuel Wordsworth, member of the English Bar, member of the Paris Bar, Essex Court Chambers,

as Counsel and Advocates;

Mr. Evgeny Raschevsky, Egorov Puginsky Afanasiev & Partners,

Mr. M. Kulakhmetov, Adviser to the Minister for Foreign Affairs of the Russian Federation,

Mr. V. Korchmar, Principal Counsellor, Fourth CIS Department, Ministry of Foreign Affairs of the Russian Federation,

Mr. Grigory Lukyantsev, Senior Counsellor, Permanent Mission of the Russian Federation to the United Nations, New York,

Mr. Ivan Volodin, Acting Head of Section, Legal Department, Ministry of Foreign Affairs of the Russian Federation,

Mr. Maxim Musikhin, Counsellor, Embassy of the Russian Federation in the Kingdom of the Netherlands,

Ms Diana Taratukhina, Third Secretary, Permanent Mission of the Russian Federation to the United Nations, New York,

Mr. Arsen Daduani, Third Secretary, Embassy of the Russian Federation in the Kingdom of the Netherlands,

Mr. Sergey Leonidchenko, Attaché, Legal Department, Ministry of Foreign Affairs of the Russian Federation,

Ms Svetlana Shatalova, Third Secretary, Embassy of the Russian Federation in the United States of America,

Ms Daria Golubkova, expert, Ministry of Foreign Affairs of the Russian Federation,

Mr. M. Tkhostov, Deputy Chief of Administration, Government of North Ossetia-Alania,

Ms Amy Sander, member of the English Bar, Essex Court Chambers,

Mr. Christian Tams, LL.M., Ph.D. (Cambridge), Professor of International Law, University of Glasgow,

Ms Alina Miron, Researcher, Centre for International Law (CEDIN), University Paris Ouest, Nanterre-La Défense,

Ms Elena Krotova, Egorov Puginsky Afanasiev & Partners,

Ms Anna Shumilova, Egorov Puginsky Afanasiev & Partners,

Mr. Sergey Usoskin, Egorov Puginsky Afanasiev & Partners,

as Advisers,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

1. On 12 August 2008, the Government of Georgia filed in the Registry of the Court an Application instituting proceedings against the Russian Federation in respect of a dispute concerning "actions on and around the territory of Georgia" in breach of the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter "CERD") of 21 December 1965.

In its Application, Georgia, referring to Article 36, paragraph 1, of the Statute, relied on Article 22 of CERD to found the jurisdiction of the Court and also reserved the right to invoke Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 as an additional basis for jurisdiction.

2. In accordance with Article 40, paragraph 2, of the Statute, the Application was communicated forthwith to the Government of the Russian Federation by the Registrar; and, in accordance with paragraph 3 of that Article, all States entitled to appear before the Court were notified of the Application.

3. On 14 August 2008, Georgia, referring to Article 41 of the Statute and to Articles 73, 74 and 75 of the Rules of Court, filed in the Registry of the Court a Request for the indication of provisional measures in order "to preserve [its] rights under CERD to protect its citizens against violent discriminatory acts by Russian armed forces, acting in concert with separatist militia and foreign mercenaries". In accordance with Article 73, paragraph 2, of the Rules of Court, the Registry transmitted a certified copy of this Request forthwith to the Russian Government.

4. On 15 August 2008, the President, referring to Article 74, paragraph 4, of the Rules of Court, addressed a communication to the two Parties, urgently calling upon them "to act in such a way as will enable any order the Court may take on the request for provisional measures to have its appropriate effects".

5. On 25 August 2008, Georgia, referring to "the rapidly changing circumstances in Abkhazia and South Ossetia", filed in the Registry an "Amended Request for the Indication of Provisional Measures of Protection"; the Registry immediately transmitted a certified copy of this Request to the Russian Government.

6. Since the Court included upon the Bench no judge of Georgian nationality, Georgia availed itself of its right under Article 31, paragraph 2, of the Statute and chose Mr. Giorgio Gaja to sit as judge *ad hoc* in the case.

7. By an Order of 15 October 2008, the Court, after hearing the Parties, indicated certain provisional measures to both Parties. The Court also directed each Party to inform it about compliance with the provisional measures.

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

9. On 26 January 2009, the Agent of Georgia submitted a "Report of Georgia to the Court in Compliance with Paragraph 149 (D) of the Order of 15 October 2008". On 8 July 2009, the Agent of the Russian Federation submitted to the Court a "Report of the Russian Federation on Compliance with the Provisional Measures indicated by the Order of the Court of 15 October 2008".

10. On 31 July 2009, in accordance with Article 43 of the Rules of Court, the Registrar addressed the notification provided for in Article 63, paragraph 1, of the Statute to all States parties to CERD; on the same day, the Registrar also sent to the Secretary-General of the United Nations the notification provided for in Article 34, paragraph 3, of the Statute.

11. On 1 December 2009, within the time-limit set by Article 79, paragraph 1, of the Rules of Court, as amended on 5 December 2000, the Russian Federation raised preliminary objections to the jurisdiction of the Court. Consequently, by an Order of 11 December 2009, the Court, noting that by virtue of Article 79, paragraph 5, of the Rules of Court, the proceedings on the merits were suspended, fixed 1 April 2010 as the time-limit for the presentation by Georgia of a written statement of its observations and submissions on the preliminary objections made by the Russian Federation. Georgia filed such a statement within the time-limit so prescribed, and the case thus became ready for hearing in respect of the preliminary objections.

12. By a letter dated 1 April 2010, the Registrar, in accordance with Article 69, paragraph 3, of the Rules of Court, transmitted to the United Nations copies of the written pleadings filed in the case and asked the Secretary-General of the United Nations to inform him whether or not the Organization intended to present observations in writing within the meaning of the said provision. The Registrar further stated that, in view of the fact that the current phase of the proceedings related to the question of jurisdiction, any written observations should be limited to that question. In a letter dated 30 July 2010, the Senior Legal Officer in charge of the Office of the Legal Counsel indicated that the United Nations did not intend to submit any such observations.

13. Pursuant to Article 53, paragraph 2, of the Rules of Court, the Court, after ascertaining the views of the Parties, decided that copies of the pleadings and documents annexed would be made accessible to the public on the opening of the oral proceedings.

14. Public hearings on the preliminary objections raised by the Russian Federation were held from Monday 13 September to Friday 17 September 2010, at which the Court heard the oral arguments and replies of:

For the Russian Federation: H.E. Mr. Kirill Gevorgian,
H.E. Mr. Roman Kolodkin,
Mr. Samuel Wordsworth,
Mr. Alain Pellet,
Mr. Andreas Zimmermann.

For Georgia: Ms Tina Burjaliani,
Mr. Paul S. Reichler,
Mr. James R. Crawford,
Mr. Payam Akhavan,
Mr. Philippe Sands.

15. At the hearings, Members of the Court put questions to the Parties, to which replies were given in writing, within the time-limit fixed by the President in accordance with Article 61, paragraph 4, of the Rules of Court. In accordance with Article 72 of the Rules of Court, each of the Parties submitted comments on the written replies provided by the other.

*

16. In the Application, the following requests were made by Georgia:

"The Republic of Georgia, on it own behalf and as *parens patriae* for its citizens, respectfully requests the Court to adjudge and declare that the Russian Federation, through its State organs, State agents, and other persons and entities exercising governmental authority, and through the South Ossetian and Abkhaz separatist forces and other agents acting on the instructions of or under the direction and control of the Russian Federation, has violated its obligations under CERD by:

(a) engaging in acts and practices of 'racial discrimination against persons, groups of persons or institutions' and failing 'to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation' contrary to Article 2 (l) *(a)* of CERD;

(b) 'sponsoring, defending and supporting racial discrimination' contrary to Article 2 (l) *(b)* of CERD;

(c) failing to 'prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination' contrary to Article 2 (l) *(d)* of CERD;

(d) failing to condemn 'racial segregation' and failing to 'eradicate all practices of this nature' in South Ossetia and Abkhazia, contrary to Article 3 of CERD;

(e) failing to 'condemn all propaganda and all organizations . . . which attempt to justify or promote racial hatred and discrimination in any form' and failing 'to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination', contrary to Article 4 of CERD;

(f) undermining the enjoyment of the enumerated fundamental human rights in Article 5 by the ethnic Georgian, Greek and Jewish populations in South Ossetia and Abkhazia, contrary to Article 5 of CERD;

(g) failing to provide 'effective protection and remedies' against acts of racial discrimination, contrary to Article 6 of CERD.

The Republic of Georgia, on it own behalf and as *parens patriae* for its citizens, respectfully requests the Court to order the Russian Federation to take all steps necessary to comply with its obligations under CERD, including:

(a) immediately ceasing all military activities on the territory of the Republic of Georgia, including South Ossetia and Abkhazia, and immediate withdrawing of all Russian military personnel from the same;

(b) taking all necessary and appropriate measures to ensure the prompt and effective return of IDPs to South Ossetia and Abkhazia in conditions of safety and security;

(c) refraining from the unlawful appropriation of homes and property belonging to IDPs;

(d) taking all necessary measures to ensure that the remaining ethnic Georgian populations of South Ossetia and the Gali District are not subject to discriminatory treatment including but not limited to protecting them against pressures to assume Russian citizenship, and respect for their right to receive education in their mother tongue;

(e) paying full compensation for its role in supporting and failing to bring to an end the consequences of the ethnic cleansing that occurred in the 1991-1994 conflicts, and its subsequent refusal to allow the return of IDPs;

(f) not to recognize in any manner whatsoever the *de facto* South Ossetian and Abkhaz separatist authorities and the fait accompli created by ethnic cleansing;

(g) not to take any measures that would discriminate against persons, whether legal or natural, having Georgian nationality or ethnicity within its jurisdiction or control;

(h) allow Georgia to fulfil its obligations under CERD by withdrawing its forces from South Ossetia and Abkhazia and allowing Georgia to restore its authority and jurisdiction over those regions; and

(i) to pay full compensation to Georgia for all injuries resulting from its internationally wrongful acts."

17. In the written proceedings on the merits, the following submissions were presented on behalf of the Government of Georgia in its Memorial:

"On the basis of the evidence and legal argument presented in this *Memorial*, Georgia requests the Court to adjudge and declare:

1. that the Russian Federation, through its State organs, State agents and other persons and entities exercising governmental authority, and through the *de facto* governmental authorities in South Ossetia and Abkhazia and militias operating in those areas, is responsible for violations of Articles 2 (1) *(a)*, 2 (1) *(b)*, 2 (1) *(d)*, 3 and 5 of the 1965 Convention by the following actions: (i) the ethnic cleansing of Georgians in South Ossetia; (ii) the frustration of the right of return of Georgians to their homes in South Ossetia and Abkhazia; and (iii) the destruction of Georgian culture and identity in South Ossetia and Abkhazia;

2. that the Russian Federation is responsible for the violation of the Court's Order on Provisional Measures of 15 October 2008 by the following actions: (i) acts of discrimination, including by violence, against Georgians in South Ossetia and Abkhazia; (ii) the frustration of the right of return of Georgians to their homes in South Ossetia and Abkhazia; (iii) the destruction of Georgian culture and identity in South Ossetia and Abkhazia; and (iv) the obstruction of access to humanitarian assistance;

3. that the Russian Federation is under an obligation to cease all actions in contravention of its obligations under Articles 2 (1) *(a)*, 2 (1) *(b)*, 2 (1) *(d)*, 3 and 5 of the 1965 Convention and the Court's Order on Provisional Measures, including all acts of discrimination as well as all support, defence, sponsorship of, or efforts to consolidate, such discrimination, and to provide appropriate assurances and guarantees that it will refrain from all such acts in the future;

4. 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;

5. that the Russian Federation is under an obligation to compensate for the damage caused by its violations of Articles 2 (1) *(a)*, 2 (1) *(b)*, 2 (1) *(d)*, 3 and 5 of the 1965 Convention and of the Court's Order on Provisional Measures with such compensation to be quantified in a separate phase of these proceedings."

18. In the preliminary objections, the following submissions were presented on behalf of the Government of the Russian Federation:

> "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."

In the written statement of its observations and submissions on the preliminary objections, the following submissions were presented on behalf of the Government of Georgia:

> "For these reasons Georgia respectfully requests the Court:
>
> 1. to dismiss the *Preliminary Objections* presented by the Russian Federation;
>
> 2. to hold that it has jurisdiction to hear the claims presented by Georgia, and that these claims are admissible."

19. At the oral proceedings on the preliminary objections, the following submissions were presented by the Parties:

On behalf of the Government of the Russian Federation,

at the hearing of 15 September 2010:

> "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."

On behalf of the Government of Georgia,

at the hearing of 17 September 2010:

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

*

* *

I. INTRODUCTION

20. It is recalled that in its Application, Georgia relied on Article 22 of CERD to found the jurisdiction of the Court (see paragraph 1 above). Article 22 of CERD reads as follows:

> "[a]ny 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".
>
> CERD entered into force as between the Parties on 2 July 1999.

21. It is further recalled that in its Application, Georgia also reserved the right to invoke Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 as an additional basis for jurisdiction (see paragraph 1 above). Georgia did not however subsequently invoke this Convention as a basis for the Court's jurisdiction.

22. The Russian Federation has raised four preliminary objections to the Court's jurisdiction under Article 22 of CERD. According to the first preliminary objection put forward by the Russian Federation, there was no dispute between the Parties regarding the interpretation or application of CERD at the date Georgia filed its Application. In its second preliminary objection, the Russian Federation argues that the procedural requirements of Article 22 of CERD for recourse to the Court have not been fulfilled. The Russian Federation contends in its third objection that the alleged wrongful conduct took place outside its territory and therefore the Court lacks jurisdiction *ratione loci* to entertain the case. During the oral proceedings, the Russian Federation stated that this objection did not possess an exclusively preliminary character. Finally, according to the Russian Federation's fourth objection, any jurisdiction the Court might have is limited *ratione temporis* to the events which occurred after the entry into force of CERD as between the Parties, that is, 2 July 1999.

II. FIRST PRELIMINARY OBJECTION — EXISTENCE OF A DISPUTE

23. The Russian Federation's first preliminary objection is that "there was no dispute between Georgia and Russia with respect 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". In brief, it presented two arguments in support of that objection. First, if there was any dispute involving any allegations of racial discrimination committed in the territory of Abkhazia and South Ossetia, the parties to that dispute were Georgia on the one side and Abkhazia and South Ossetia on the other, but not the Russian Federation. Secondly, even if there was a dispute between Georgia and the Russian Federation, any such dispute was not one related to the application or interpretation of CERD.

24. Georgia, in response, contends that the record shows that, over a period of more than a decade prior to the filing of its Application, it has consistently raised its serious concerns with the Russian Federation over unlawful acts of racial discrimination that are attributable to that State, making it clear that there exists a long-standing dispute between the two States with regard to matters falling under CERD.

25. The Parties, in elaborating their positions, addressed the legal requirements for the existence of a dispute and the facts in the record in this case.

1. The meaning of "dispute"

26. On the law, the Russian Federation contends in the first place that the word "dispute" in Article 22 of CERD has a special meaning which is narrower than that to be found in general international law and accordingly more difficult to satisfy. The Russian Federation submits that, under CERD, States Parties are not considered to be in "dispute" until a "matter" between those parties has crystallized through a five-stage process involving the procedures established under the Convention. This contention depends on the wording of Articles 11 to 16 of CERD and the distinctions they are said to make between "matter", "complaints" and "disputes". Under Article 11, paragraph 1, of CERD, a State Party which considers that another State Party is not giving effect to the provisions of the Convention "may bring the matter to the attention of the Committee [on the Elimination of Racial Discrimination established by and elected under the Convention]". According to the Russian Federation, Article 11 sets out a procedure to be followed under CERD, including transmission of "the matter" to the State Party concerned, its making of written explanations to the Committee clarifying the matter and the remedy, if any, it has taken (para. 1). If the matter is not adjusted to the satisfaction of both parties, either by bilateral negotiations or any other procedure within six months either State has the right to refer the matter again to the Committee (para. 2). The Committee is to deal with the matter after it has ascertained that domestic remedies have been exhausted (para. 3). It may "[i]n any matter referred to it" call upon the States concerned to supply any other relevant information (para. 4) and the States concerned are entitled to representation in the proceedings of the Committee while "the matter is under consideration" (para. 5).

27. The Russian Federation points out that it is only after those five stages are completed that in Article 12 the word "dispute" (in the phrase "parties to the dispute") appears. In its submission:

> "In contrast to Article 11, where the term 'dispute' is carefully avoided, there are some six references to 'States parties to the dispute' in Article 12. This cannot be inadvertent — the parties evidently wished to distinguish between the communication and adjustment of a non-crystallized matter, and the point at which that matter had been escalated via a 5-stage process such that it could then, but only then, be properly characterized as a dispute."

The same distinction, says the Russian Federation, between the non-crystallized "matter" and the "dispute" is reflected in the relevant parts of the Committee's Rules of Procedure. Article 16 also uses both terms in establishing that the provisions of CERD "concerning the settlement of disputes or complaints shall be applied without prejudice to other procedures for settling disputes or complaints" laid down in other instruments. The reference to "complaints" in that provision is explained, according to the Russian Federation, by the drafting history which shows that the term "complaint" was the term originally used for "matter" in Article 11. The wording, confirmed by the drafting history, in the Russian Federation's submissions, leads to the conclusion that:

> "as a matter of the interpretation of the word 'dispute' in Article 22 in its relevant context, a specific degree of crystallization is required for there to be a 'dispute' at all. And, even on Georgia's case on the relevant facts, that degree of crystallization is manifestly absent."

*

28. Georgia, in its submissions, rejects the argument that the term "dispute" in Article 22 has a special meaning. It contends that the relevant provisions of CERD, particularly Articles 12 and 13, use the terms "matter", "issue" and "dispute" without distinction or any trace of any special meaning. While in Article 12, paragraph 1, the term "dispute" (in the phrase "parties to the dispute") does appear early in the provision, the subject-matter of the process for amicable solution remains identified as "the matter". Further, although the word "dispute" is used in paragraphs 2, 5, 6 and 7 of Article 12, once the process prescribed in that provision is completed, Article 13, paragraph 1, which regulates the final stage of the process, uses the terms "matter", "issue" and "dispute". Moreover, the usage by the Committee on the Elimination of Racial Discrimination in Article 72 of its Rules is not consistent on this matter, whatever weight may be given to them in the interpretation of the Convention.

* *

29. The Court does not consider that the words "matter", "complaint", "dispute" and "issue" are used in Articles 11 to 16 in such a systematic way that requires that a narrower interpretation than usual be given to the word "dispute" in Article 22. Further, the word "dispute" appears in the first part of Article 22 in exactly the same way as it appears in several other compromissory clauses adopted around the time CERD was being prepared: "Any dispute between two or more States Parties with respect to the interpretation or application of this Convention . . ." (e.g., Optional Protocol of Signature to the Conventions on the Law of the Sea of 1958 concerning the

Compulsory Settlement of Disputes, Article 1; Single Convention on Narcotic Drugs of 1961, Article 48; Convention on the Settlement of Investment Disputes between States and Nationals of other States of 1965, Article 64). That consistency of usage suggests that there is no reason to depart from the generally understood meaning of "dispute" in the compromissory clause contained in Article 22 of CERD. Finally, the submissions made by the Russian Federation on this matter did not in any event indicate the particular form that narrower interpretation was to take. Accordingly, the Court rejects this first contention of the Russian Federation and turns to the general meaning of the word "dispute" when used in relation to the jurisdiction of the Court.

30. The Court recalls its established case law on that matter, beginning with the frequently quoted statement by the Permanent Court of International Justice in the *Mavrommatis Palestine Concessions* case in 1924: "A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons." (*Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11.) Whether there is a dispute in a given case is a matter for "objective determination" by the Court (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74). "It must be shown that the claim of one party is positively opposed by the other" (*South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328) (and most recently *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 40, para. 90). The Court's determination must turn on an examination of the facts. The matter is one of substance, not of form. As the Court has recognized (for example, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 315, para. 89), the existence of a dispute may be inferred from the failure of a State to respond to a claim in circumstances where a response is called for. While the existence of a dispute and the undertaking of negotiations are distinct as a matter of principle, the negotiations may help demonstrate the existence of the dispute and delineate its subject-matter.

The dispute must in principle exist at the time the Application is submitted to the Court (*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*, pp. 25-26, paras. 42-44; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 130-131, paras. 42-44); the Parties were in agreement with this proposition. Further, in terms of the subject-matter of the dispute, to return to the terms of Article 22 of CERD, the dispute must be "with respect to the interpretation or application of [the] Convention". While it is not necessary that a State must expressly refer to a specific treaty in its exchanges with the other State to enable it later to invoke that instrument before the Court (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, pp. 428-429, para. 83), the exchanges must refer to the subject-matter of the treaty with sufficient clarity to enable the State against which a claim is made to identify that there is, or may be, a dispute with regard to that subject-matter. An express specification would remove any doubt about one State's understanding of the subject-matter in issue and put the other on notice. The Parties agree that that express specification does not appear in this case.

2. The evidence about the existence of a dispute

31. The Court now turns to the evidence submitted to it by the Parties to determine whether it demonstrates, as Georgia contends, that at the time it filed its Application, on 12 August 2008, it had a dispute with the Russian Federation with respect to the interpretation or application of CERD. The Court needs to determine (1) whether the record shows a disagreement on a point of law or fact between the two States; (2) whether that disagreement is with respect to "the interpretation or application" of CERD, as required by Article 22 of CERD; and (3) whether that disagreement existed as of the date of the Application. To that effect, it needs to determine whether Georgia made such a claim and whether the Russian Federation positively opposed it with the result that there is a dispute between them in terms of Article 22 of CERD.

32. Before the Court considers the evidence bearing on the answers to those issues, it observes that disputes undoubtedly did arise between June 1992 and August 2008 in relation to events in Abkhazia and South Ossetia. Those disputes involved a range of matters including the status of Abkhazia and South Ossetia, outbreaks of armed conflict and alleged breaches of international humanitarian law and of human rights, including the rights of minorities. It is within that complex situation that the dispute which Georgia alleges to exist and which the Russian Federation denies is to be identified. One situation may contain disputes which relate to more than one body of law and which are subject to different dispute settlement procedures (see, for example, *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Judgment, I.C.J. Reports 1980*, pp. 19-20, paras. 36-37; *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, pp. 91-92, para. 54); the Parties accepted that proposition.

33. The Parties referred the Court to many documents and statements relating to events in Abkhazia and South Ossetia from 1990 to the time of the filing by Georgia of its Application and beyond. In their submissions they emphasized those with an official character. The Court will limit itself to official documents and statements.

34. The Parties also distinguished between documents and statements issued before 2 July 1999 when Georgia became party to CERD, thus establishing a treaty relationship between Georgia and the Russian Federation under CERD, and the later documents and statements, and, in respect of those later documents and statements, between those issued before the armed conflict which began on the night of 7 to 8 August 2008 and those in the following days up to 12 August when the Application was filed. Georgia cited statements relating to events before 1999 "not as a basis for Georgia's claims against Russia in this action, but as evidence that the dispute with Russia over ethnic cleansing is long-standing and legitimate and not of recent invention". The Court will also make a distinction between documents issued and statements made before and after Georgia became party to CERD.

35. The documents and statements also vary in their authors, their intended, likely and actual recipients or audience, the occasion of their delivery and their content. Some are issued by the Executive or members of the Executive of one Party or the other — the President, the Foreign Minister, the Foreign Ministry and other Ministries — and others by Parliament, particularly of Georgia, and members of Parliament. Some are press statements or records of interviews, others are internal minutes of meetings prepared by one Party. Some are directed to particular recipients, particularly by a member of the Executive (the President or Foreign Minister) to the counterpart of the other Party or to an international organization or official such as the United Nations Secretary-General or the President of the Security Council. The other Party may or may not be a member of the organization or body. One particular category consists of reports submitted to treaty monitoring bodies, such as the Human Rights Committee, the Committee on the Elimination of Racial Discrimination, and the Committee against Torture. Another category is made up of Security Council resolutions adopted between 1993 and April 2008 relating to Abkhazia. Other documents record agreements between various parties or are formal minutes of their meetings. The parties sometimes include the "Abkhaz side", the "South Ossetian side", the "North Ossetian side", in some cases with Georgia alone and in the others with Georgia and Russia and both "Ossetian sides". The reference to "parties" may sometimes be elaborated as "parties to the conflict" or "parties to the agreement". The United Nations High Commissioner for Refugees (UNHCR) and the Organization for Security and Co-operation in Europe (OSCE) have also been signatories in appropriate cases, but are not named as parties to the agreements.

36. The Russian Federation, in addressing the above matters, emphasized the need, if documents and statements were to be evidence of a dispute between it and Georgia, that they be presented by members of the Georgian Executive and in such a way that the document or statement would, or would be expected to, come to the attention of the authorities of the Russian Federation. It accordingly contended that statements and resolutions adopted by the Georgian Parliament or statements made by Parliamentary officers were not relevant. Georgia replied that a number of those Parliamentary resolutions were "adopted by the foreign ministry and submitted to the United Nations as statements of the government's position".

37. The Parties gave their main attention to the contents of the documents and statements and the Court will do likewise, while taking account of the various matters addressed in the previous two paragraphs. It observes at this stage that a dispute is more likely to be evidenced by a direct clash of positions stated by the two Parties about their respective rights and obligations in respect of the elimination of racial discrimination, in an exchange between them, but, as the Court has already noted, there are circumstances in which the existence of a dispute may be inferred from the failure to respond to a claim (see paragraph 30). Further, in general, in international law and practice, it is the Executive of the State that represents the State in its international relations and speaks for it at the international level (*Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, I.C.J. Reports 2006*, p. 27, paras. 46-47). Accordingly, primary attention will be given to statements made or endorsed by the Executives of the two Parties.

38. The Parties in addressing the contents of the various documents and statements considered (1) the alleged parties to the various disputes or conflicts, (2) the various roles which the Russian Federation played and (3) the different subject-matter of the disputes. On the first, the Russian Federation contended that the principal relationships in issue were between Georgia on the one side, and Abkhazia or South Ossetia on the other, while Georgia submitted that the relationships were between it and the Russian Federation. On the second matter, which is related to the first, the Russian Federation emphasized that its role was as facilitator in contacts and negotiations between Georgia and the Abkhaz and South Ossetian sides and as peacekeeper while Georgia contended that the Russian Federation had a more direct role, which included the facilitating and tolerating of acts of racial discrimination by the separatists. And, on the third, the Russian Federation submitted that the primary dispute which existed between Georgia on one side and Abkhazia and South Ossetia on the other was about the status of the regions. The primary dispute that existed between Georgia and the Russian Federation was about the allegedly unlawful use of force by the Russian Federation after 7 August 2008. Georgia by contrast emphasized the references in the statements to "ethnic cleansing" and to the obstacles in the way of the return of refugees and internally displaced persons (IDPs). The Court will take account of those matters as it reviews the legal significance of the documents and statements to which the Parties gave their principal attention.

39. Before it considers those documents and statements, the Court addresses the agreements reached in the 1990s and the Security Council resolutions adopted from the 1990s until early 2008. Those agreements and resolutions provide an important part of the context in which the statements which the Parties invoke were made. In particular they help define the different roles which the Russian Federation was playing during that period.

3. Relevant agreements and Security Council resolutions

40. So far as South Ossetia is concerned, Georgia and the Russian Federation on 24 June 1992 concluded an agreement on principles of settlement of the Georgian-Ossetian conflict (the Sochi Agreement). In the preamble they declared that they were striving for the immediate cessation of the bloodshed and achieving a comprehensive settlement of the conflict between the Ossetians and Georgians; they were guided by the desire to witness a speedy restoration of peace and stability in the region; they reaffirmed their commitment to the principles of the United Nations Charter and the Helsinki Final Act; and they acted in the spirit of respect for human rights and fundamental freedoms, as well as the rights of ethnic minorities. The agreement provided for a ceasefire and a withdrawal of armed formations (with particular contingents of the Russian Federation identified); and, to exercise control over the implementation of those measures, a mixed control commission was to be established, consisting of representatives of all parties involved in the conflict. It was to work in close co-operation with the joint group of military observers already agreed to. The parties were to start negotiating immediately on the economic recovery of the regions located in the conflict zone, and the creation of proper conditions for the return of refugees. The first decision of the Joint Control Commission (JCC) adopted on 4 July 1992 was to determine that the joint forces (later known as the Joint Peacekeeping Forces) would have 1,500 persons

(500 from each of Georgia, the Russian Federation and the Ossetian side) with 900 in reserve. In a Georgia-Russian Federation Protocol of Negotiations of 9 April 1993, the delegations agreed, in the context of the Georgian-Ossetian conflict, to render support to the endeavours of the Conference on Security and Co-operation in Europe (CSCE) aimed at facilitating a dialogue between the parties to the conflict in order to secure a peaceful and comprehensive settlement and to creating conditions for the return of refugees to the places of their permanent residence.

41. Two years later, on 31 October 1994, an Agreement on the Further Development of the Georgian Ossetian Peaceful Settlement Process and on the JCC was signed by the Georgian Party, the Russian Federation Party, the South-Ossetian Party and the North-Ossetian Party in the presence of the CSCE representatives. The Agreement distinguished between "the Parties" and the "Parties in conflict". The "Parties", recognizing the urgent need for a wholesale settlement of the Georgian-Ossetian conflict, agreed on the need further to develop the process of peaceful settlement of that conflict. They noted that the JCC had "largely fulfilled its functions of ensuring control of [the] ceasefire, withdrawing armed units and maintaining safety measures, thus laying [the] foundation for the process of political settlement" and they decided that the JCC would be a permanent body of the four Parties involved in settling the conflict and mitigating its consequences. The "Parties in conflict" reaffirmed their obligations to resolve all differences through peaceful means. In December 1994 the JCC stated that the Russian Federation battalion of the peacekeeping forces was the guarantor of relative stability in the area.

42. In the course of 1997, 1998 and 1999, the JCC and bodies established by it met and adopted decisions for the voluntary return of IDPs and refugees. Those meetings continued until at least 2004. The record of the last in the case file, held on 16 April 2004, states that "the preliminary stage [on certain matters] within the competence of the JCC has been completed" and the JCC requests the Governments of the Russian Federation and Georgia to give instructions to appropriate ministries and calls for regular meetings between the Governments to discuss progress.

43. On 31 March 1999, the JCC stated its opinion that "the peacekeeping forces keep on being a major sponsor of the peace and a calm life". It also noted the positive contribution of the OSCE Mission in Georgia.

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44. So far as Abkhazia is concerned, the President of the Russian Federation and the Chairman of the State Council of the Republic of Georgia on 3 September 1992 signed the Moscow Agreement. Their discussions, they recorded, had involved "leaders of Abkhazia, the North Caucasus Republics, Regions and Districts of the Russian Federation". The agreement provided for a ceasefire, confirmed the necessity of observing the international norms in the sphere of human rights and minority rights, the inadmissibility of discrimination, and provided that "[t]he Troops of

the Russian Federation, temporarily deployed on the territory of Georgia, including in Abkhazia, shall firmly observe neutrality". A protocol of negotiations signed by Georgia and the Russian Federation on 9 April 1993 provided for the functioning of the Commission for Control and Inspection in Abkhazia, composed of representatives appointed by the Georgian authorities including those from Abkhazia and the authorities of the Russian Federation. It was to guarantee compliance with the ceasefire and to perform other functions agreed by the Parties represented in the Commission. A special group was to address the return and accommodation of refugees and IDPs and measures were to be taken to protect the human rights of minorities (see paragraph 40).

45. On 9 July 1993 the Security Council requested the Secretary-General to make the necessary preparations for a military observer mission once the ceasefire between the Government of Georgia and the Abkhaz authorities was implemented (Security Council resolution 849 (1993)). The ceasefire agreement was signed on 27 July 1993 with the mediation of the Deputy Foreign Minister of the Russian Federation in the role of facilitator and the joint commission was established. The parties considered it necessary to invite international peacekeeping forces in the conflict zones; "[t]his task may be shared, subject to consultation with the United Nations, by the Russian military contingent temporarily deployed in the zone". The United Nations Observer Mission in Georgia (UNOMIG) was established by Security Council resolution 858 (1993) on 24 August 1993. On the outbreak of fighting in September, the Security Council, in the words of its President, "strongly condemn[ed] this grave violation by the Abkhaz side of the . . . ceasefire agreement of 27 July 1993" (United Nations doc. S/26463), and the representative of the Russian Federation recorded the deep concern felt in the Russian Federation at the violation by the Abkhazian side of its ceasefire agreement (United Nations doc. S/PV.3295). On 19 October 1993 the Council, expressed its deep concern at the human suffering caused by conflict in the region and at reports of "ethnic cleansing" and other serious violations of international humanitarian law, reaffirmed its strong condemnation of the grave violation by the Abkhaz side of the ceasefire agreement and affirmed the right of refugees and displaced persons to return to their homes. It reiterated its support for the efforts of the Secretary-General and his Special Envoy, in co-operation with the Chairman-in-Office of the 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 (Security Council resolution 876 (1993)).

46. At the first round of negotiations between the Georgian and Abkhaz sides, held 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 CSCE, the parties committed themselves not to use force or the threat of force during the peaceful settlement negotiations, stated that the maintenance of peace would be promoted by an increase in the number of international observers and by the use of international peacekeeping forces, agreed to exchange prisoners of war, to find an urgent solution to the problem of refugees and displaced persons, and to have a group of experts prepare a report on the status of Abkhazia. On 4 April 1994 a Quadripartite Agreement on Voluntary Return of Refugees and Displaced Persons was signed by the Abkhaz and Georgian sides as "the Parties", as well as by the Russian Federation and UNHCR. In that Agreement, the Russian Federation undertook certain obligations relating to the return of refugees and displaced persons.

47. The Geneva process continued for more than a decade and was assisted by the Group of Friends of the Secretary-General (France, Germany, the Russian Federation, the United Kingdom and the United States). Georgia and the Russian Federation again proposed that the Security Council consider the question of a peacekeeping operation to be carried out by the United Nations or with its authorization, relying, if necessary, on a Russian Federation military contingent (joint letter of 4 February 1994 (United Nations doc. S/1994/125); see also the Georgian/Abkhazian declaration of 4 April 1994). The Security Council did not respond to that proposal and on 14 May 1994 the Georgian side and the Abkhaz side in the Agreement on a Ceasefire and Separation of Forces agreed that "[t]he peacekeeping force of the Commonwealth of Independent States and the military observers . . . shall be deployed in the security zone to monitor compliance with this Agreement." On 30 June 1994 the Security Council "[n]ote[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" (Security Council resolution 934 (1994); see also Security Council resolutions 901 (1994) and 937 (1994)).

48. Over the following years, until 15 April 2008, the Security Council adopted a series of resolutions regarding the situation in Abkhazia, Georgia, with recurring elements. It is convenient at this point to quote passages addressing those recurring elements from resolutions adopted in 1994 and 1996. In resolution 937 (1994), the Security Council:

> "*Reaffirming* its commitment to the sovereignty and territorial integrity of the Republic of Georgia, and the right of all refugees and displaced persons affected by the conflict to return to their homes in secure conditions, in accordance with international law and as set out in the Quadripartite Agreement . . .,
>
> . . . . . .
>
> *Stressing* the crucial importance of progress in the negotiations under the auspices of the United Nations and with the assistance of the Russian Federation as facilitator and with the participation of representatives of the Conference on Security and Cooperation in Europe (CSCE) to reach a comprehensive political settlement of the conflict, including on the political status of Abkhazia, respecting fully the sovereignty and territorial integrity of the Republic of Georgia, based on the principles set out in its previous resolutions,
>
> . . . . . .
>
> 2. *Calls upon* the parties to intensify their efforts to achieve an early and comprehensive political settlement under the auspices of the United Nations with the assistance of the Russian Federation as facilitator and with the participation of representatives of the CSCE, and *welcomes* the wish of the parties to see the United Nations continue to be actively involved in the pursuit of a political settlement;

3. *Commends* the efforts of the members of the CIS directed towards the maintenance of a cease-fire in Abkhazia, Republic of Georgia, and the promotion of the return of refugees and displaced persons to their homes in accordance with the Agreement signed in Moscow on 14 May 1994 in full cooperation with the United Nations High Commissioner for Refugees (UNHCR) and in accordance with the Quadripartite Agreement;

4. *Welcomes* the contribution made by the Russian Federation, and indications of further contributions from other members of the CIS, of a peace-keeping force, in response to the request of the parties, pursuant to the 14 May Agreement, in coordination with UNOMIG . . . and in accordance with the established principles and practices of the United Nations;

. . . . . .

9. *Reaffirms* its support for the return of all refugees and displaced persons to their homes in secure conditions, in accordance with international law and as set out in the Quadripartite Agreement . . .”

Similarly, in resolution 1036 (1996), the Security Council:

“*Stressing* the need for the parties to intensify efforts, under the auspices of the United Nations and with the assistance of the Russian Federation as facilitator, to achieve an early and comprehensive political settlement of the conflict, including on the political status of Abkhazia, fully respecting the sovereignty and territorial integrity of Georgia, . . .

Reaffirming also the right of all refugees and displaced persons affected by the conflict to return to their homes in secure conditions in accordance with international law and as set out in the Quadripartite Agreement of 14 April 1994 . . .

. . . . . .

Noting that the Moscow Agreement of 14 May 1994 on a Cease-fire and Separation of Forces (S/1994/583, annex I) has generally been respected by the parties with the assistance of the Commonwealth of Independent States (CIS) peace-keeping forces and the United Nations Observer Mission in Georgia (UNOMIG),

Expressing its satisfaction with the close cooperation and coordination between UNOMIG and the CIS peace-keeping force in the performance of their respective mandates and *commending* the contribution both have made to stabilize the situation in the zone of conflict,

. . . . . .

3. *Reaffirms* its full support for the efforts of the Secretary General aimed at achieving a comprehensive political settlement of the conflict, including on the political status of Abkhazia, respecting fully the sovereignty and territorial integrity of Georgia, as well as for the efforts that are being undertaken by the

Russian Federation in its capacity as facilitator to intensify the search for a peaceful settlement of the conflict, and *encourages* the Secretary-General to continue his efforts, with the assistance of the Russian Federation as facilitator, and with the support of the Organization for Security and Cooperation in Europe (OSCE), to that end;

. . . . . .

8. *Calls upon* the parties to improve their cooperation with UNOMIG and the CIS peace-keeping force in order to provide a secure environment for the return of refugees and displaced persons and *also calls upon* them to honour their commitments with regard to the security and freedom of movement of all United Nations and CIS personnel and with regard to UNOMIG inspections of heavy weapons storage sites;

9. *Welcomes* the additional measures implemented by UNOMIG and the CIS peace-keeping force in the Gali region aimed at improving conditions for the safe and orderly return of refugees and displaced persons, and all appropriate efforts in this regard."

As appropriate, the Court refers back to these standard paragraphs and highlights particular elements later in this part of the Judgment.

49. In September 2003 the Council of Heads of States of the CIS, expressing its gravest concern over unsettled problems resulting from the conflict in Abkhazia (Georgia), decided to extend the term of stay and the mandate of the collective peacekeeping forces until a conflicting party requested that the operation should be discontinued, in which event the withdrawal was to be effected within a month; the concluding statement on the meetings between President Putin and President Shevardnadze, held on 6 and 7 March 2003, was essentially to the same effect. It was only after the armed conflict of August 2008 that Georgia made such a request, on 1 September 2008.

4. Documents and statements from the period before CERD entered into force between the Parties on 2 July 1999

50. The Court recalls that it is examining the documents and statements issued before 2 July 1999 and invoked by Georgia in light of Georgia's contention that its dispute with the Russian Federation "over ethnic cleansing is long-standing and legitimate and not of recent invention" (paragraph 34 above). These earlier documents and statements may help to put into context those documents or statements which were issued or made after the entry into force of CERD between the Parties.

51. The earliest document invoked by Georgia as supporting its submission that it has a dispute with the Russian Federation about racial discrimination is a letter of 2 October 1992 from the Vice-Chairman of the State Council of Georgia to the President of the Security Council (United Nations doc. S/24626). That letter and a related appeal to the CSCE described aspects of the "large-scale offensive" in Abkhazia by "Abkhaz separatists in conjunction with mercenary terrorists", and continued that "[t]he conspiracy of the Abkhaz separatists and the reactionary forces in Russia is quite apparent". Both documents also claimed that the attackers were armed

with "tanks and other modern weaponry, the kind the Russian army is currently equipped with". The appeal added that the influx of organized armed groups from the territory of the Russian Federation had increased, by land and sea routes, controlled by the Armed Forces of the Russian Federation. Contrary to the submission made by Georgia to the Court, the statements do not claim the Russian Federation was facilitating ethnic cleansing. Accordingly, the Court does not consider that they are evidence that the Russian Federation was participating in support, sponsorship and defence of the discriminatory activities of the separatist authorities in the early 1990s, as Georgia has alleged.

52. On 17 December 1992 the Georgian Parliament adopted a statement which referred to "the mass shooting of civilian Georgian population and the policy of ethnic cleansing" and to "armed Abkhaz separatists together with Russian reactionary forces apparently follow[ing] a violent way of disrupting Georgia's territorial integrity". It continued by listing alleged "immediate involvement of Russian armed forces in the conflict on the side of the extremist separatists". The emphasis throughout is on the alleged use by the Russian Federation of armed force and disruption of Georgia's territorial integrity and sovereignty. The Georgian Parliament does not claim that the Russian Federation had engaged in ethnic cleansing. Accordingly, the Court cannot take the Parliamentary statement into account for the purposes of the present case.

53. In a Note Verbale to the Secretary-General of 25 December 1992, Georgia forwarded a letter from Mr. Shevardnadze, Chairman of the Georgian Parliament and Head of State, about "[t]he illegal penetration of the Georgian territory by foreign nationals fighting for the Abkhaz military units against Georgia . . . Particularly disturbing is the participation of the Russian troops stationed in Abkhazia on the side of Abkhaz extremists." (United Nations doc. S/25026.) Again the emphasis was on the alleged use of armed force and the violation of Georgia's territorial integrity as well as on the peaceful settlement of what was referred to as "the Abkhaz problem". While the letter referred to the bombing of civilian targets by "the reactionary forces ensconced within the political circles of the Russian Federation", the letter distinguishes these forces and circles from the Government of the Russian Federation. Further, it does not mention racial discrimination. For those reasons, the Court does not consider that this letter demonstrates the existence of a dispute between the two Parties about racial discrimination.

54. On 1 April 1993 the Parliament of Georgia, in an appeal to the United Nations, the CSCE and international human rights organizations, stated that a "policy of ethnic cleansing is being implemented in a part of the Georgian territory, Abkhazia, that is controlled by the separatist group of Gudauta, by means of Russian troops". This "policy" it evaluated as a continuation of aggression, aimed at Georgia's territorial integrity and independence. The Georgian Parliament added that "Russia . . . bears full responsibility for the . . . policy." The Georgian Parliament on the same day issued a Decree to the same effect and called on the Council of National Security and Defence of Georgia to take all measures necessary to ensure the return of IDPs to their homes. There is no evidence that this statement and Decree were endorsed by the Georgian Executive. The Court accordingly cannot give them any legal significance for the purposes of the present case.

55. On 27 April 1993 the Georgian Parliament, in a Decree on the withdrawal of Russian Military Units from the conflict zone in Abkhazia, expressed its belief "that the root cause of the tragic events in Abkhazia, Georgia is the Russian Federation's attempt to annex, in fact, a part of the territory of Georgia" and decreed that "[t]he Head of State of Georgia shall appeal to the President of the Russian Federation to withdraw the Russian troops from Abkhazia". It recited that "[g]enocide and ethnic cleansing of the Georgian population is taking place in the territory under the control of the Russian troops and Abkhaz separatists". The recital to the Decree alleged that the Russian Federation had violated the Moscow Agreement of 3 September 1992 (see paragraph 44 above). On the record before the Court, the Georgian Government did not make the appeal which the Parliament had decreed. What the record does show is that Russian Federation armed forces remained in Georgia under the various agreements reached in the early 1990s until the time of the armed conflict in August 2008 (paragraph 49 above). Taking account of the Parliamentary character of the Decree, the fact that it was not followed up by the Georgian Executive, and its emphasis on withdrawal of the troops rather than on ethnic cleansing, the Court cannot give it any legal significance for the purposes of the present case.

56. On 20 September 1993, President Shevardnadze in a letter forwarded to the President of the Security Council wrote from "besieged Sukhumi". He said that "[t]his land has been a cradle to both Georgians and Abkhaz" but that the Moscow Agreement of 3 September 1992 "was trampled by the boots of the mercenaries". He did not doubt the sincerity of the efforts of the President of the Russian Federation to promote a settlement to the conflict; "in this, however, he is impeded by the same force which is trying to crush us". He continued:

> "That notwithstanding, I appeal once again to Boris Nikolaevich Yeltsin, to the United Nations Security Council and Mr. Boutros-Ghali, to the entire progressive and democratic Russian nation and to all the peoples of the world: do not allow this monstrous crime to be committed, halt the execution of a small country and save my homeland and my people from perishing in the fires of imperial reaction. The world must not condone the annihilation of one of its most ancient nations, the creator of a great culture and heir to exalted spiritual traditions." (United Nations doc. S/26472.)

Given that appeal and the reference in the letter to Abkhazia being "the fuse with which [the Abkhaz separatists] intend to blow up not only Shevardnadze's Georgia but also Yeltsin's Russia", the Court does not consider that this letter can be read as Georgia making a claim regarding racial discrimination against the Government of the Russian Federation.

57. In a letter of 12 October 1993, the Georgian President requested a meeting of the Security Council. The letter began with a reference to the "savage massacre of the civilian population [by the Gudauta armed groups]". It declared the belief of the Georgian Republic that the facts about ethnic cleansing and genocide of the peaceful population in Abkhazia required a severe condemnation by the Council. "If we take into consideration multiple statements by Abkhaz separatists, we need to acknowledge that there is a serious threat placed upon the territorial integrity of the Georgian Republic." He expected the Council to use its authority "to coerce Abkhaz leaders to cease their abominable violations of human dignity and the heartless slaughter of

these persecuted ethnic Georgians", and expressed the hope that the Council would instruct all United Nations members to desist in their support of Abkhaz separatists. The only reference to the Russian Federation was to the fact that the Gudauta side was "equipped with state-of-the-art weapons, currently at the disposal of the Russian military forces" (United Nations doc. S/26576). Given that the only reference to the Russian Federation in the letter was an incidental one, and that the letter emphasized the responsibility of Abkhaz separatists, the Court does not consider that the letter makes a relevant claim against the Russian Federation.

58. On 12 October 1994, the Georgian Parliament in a statement about the situation in the Georgian-Abkhaz conflict zone said it had become "extremely tense again". The statement made various allegations against "the Abkhaz separatists", in particular relating to their impeding the return of thousands of refugees. All the "facts ha[d] taken place in the 'security zone', which must be controlled by the peacekeepers of the Russian Federation". The statement concludes by rejecting any separation of Abkhazia from Georgia and calling on the international organizations involved in the peace process and the Russian Federation for the release of kidnapped people and the suppression of any attempt of disrupting the peace process. The Court is unable to see any claim against the Russian Federation of a breach of its obligations relating to the elimination of racial discrimination in that Parliamentary statement.

59. The Georgian Parliament on 17 April 1996 adopted a resolution on measures for the settlement of the conflict in Abkhazia. It stated that "separatist forces", using the most severe methods, through ethnic cleansing and genocide, had separated Abkhazia from Georgia for the time being. It continued:

> "Despite long-standing negotiations between the sides participating in the conflict of Abkhazia under the auspices of the UN and mediated by Russia, the intransigent stand of separatists obstructed compromise on the questions of the repatriation of hundred thousands of refugees and the determination of the status of Abkhazia within the territory of Georgia. The separatist regime uses every means to strengthen its military potential, to set up independent state structures and attributes, to distort history, and to spread misanthropic racist ideology. The CIS Heads of States decisions taken in Almaaty, Minsk and Moscow are not implemented. The separatists with the support of external forces purposefully and unilaterally violate these agreements. Peacekeeping Forces, designated by Russia in agreement with the CIS and the UN, to this day are unable to fulfill their function. They failed to secure the safety of the population, to prevent ethnic cleansing and genocide of the Georgian population, to render a real assistance to return refugees and internal displaced people to their homes."

The Parliamentary resolution referred to the Russian Federation "as an interested side", along with the United Nations, and not as a participant in the conflict. The only other references to the Russian Federation were to the mandate and to the withdrawal of the peacekeeping forces:

> "As the Russian Peacekeeping Forces under the CIS mandate cannot provide the safe return of internally displaced persons and refugees and the protection of their lives and dignity, and in the event that the current mandate is retained and Georgian proposals are not considered in a new mandate, then the peacekeeping operations shall be considered as having no prospects and Peacekeeping Forces shall be withdrawn within two month's time."

Again there is no claim regarding the Russian Federation's compliance with its obligations relating to the elimination of racial discrimination. Rather, the claim is that the peacekeeping forces are unable to fulfil their functions. Accordingly, the Court sees this Parliamentary resolution as having no legal significance for the purposes of the present case.

60. On 30 May 1997 the Georgian Parliament issued a "Decree on the Further Presence of Armed Forces of the Russian Federation deployed in the zone of Abkhaz Conflict under the Auspices of the Commonwealth of Independent States". Like the Decree described in paragraph 55, it dealt with the withdrawal of the Russian Federation troops, but only in certain circumstances. It notes in its first sentence that "no tangible progress has been achieved, either in terms of return of refugees and IDPs to their homes or in terms of restoration of jurisdiction of Georgia in Abkhazia". The peacekeeping forces, it continued, "carr[ied] out the function of border forces, thereby substantially supporting and strengthening the separatist regime of Abkhazia, which . . . opposes . . . step by step return of refugees and IDPs to their homes". But those Parliamentary statements provide arguments for the proposed actions relating to the withdrawal of troops and do not expressly allege breaches by the Russian Federation. In the opinion of the Court, they provide no basis for finding that a dispute exists between the two Parties concerning the Russian Federation's compliance with its obligations owed to Georgia relating to the elimination of racial discrimination.

61. The Georgian Parliament on 27 May 1998 made a statement that: "The recent tragedy in Gali District once again demonstrated that the Abkhaz separatists continue implementation of the policy of genocide and ethnic cleansing in the territory occupied by them." It continued with references to "the Abkhaz separatists" and the "armed separatists", and stated that

> "[t]he Russian peacekeeping forces, deployed in the region under the auspices of the Commonwealth of Independent States, did nothing to confront the actions of the Abkhaz side. Instead, in a number of cases, they assisted separatists in conducting punitive operations against peaceful population.
>
> The conduct of peacekeepers during the 20-26 May events in Gali District, amounted to a gross violation of bilateral and multilateral agreements, total ignorance of Decisions by the Council of CIS Heads of States and of the UN Security Council.
>
> The Parliament of Georgia declares that together with the separatist leaders, the CIS peacekeeping forces are to a large extent responsible for the tragedy in Gali District, as they in fact facilitated raids against peaceful population and destruction of villages in their entirety."

There is no evidence that this Parliamentary statement, directed at "separatists" and alleging violations of agreements which could not at that time have included CERD, was known to the authorities of the Russian Federation. Those authorities would, by contrast, have known that on 26 May 1998 Georgia had written to the President of the Security Council referring to "the recent tragic events that have taken place in the Gali region of Abkhazia, Georgia". That letter discussed the actions of "the armed Abkhaz military units" and, referring to one situation, stated that "the interference of the Commonwealth of Independent States (CIS) peacekeepers averted the massacre of the Georgian population" (United Nations doc. S/1998/432). The letter continues that the CIS peacekeepers "have so far been unable to prevent the carnage", not that they were supporting or participating in it.

62. On 16 June 1998, the Georgian Permanent Mission again wrote to the President of the Security Council expressing Georgia's "extreme indignation in connection with the developments in the Gali district . . . where the ethnic cleansing of the Georgian population is continuing openly". All the actions described in the statement are attributed to "so-called Abkhaz militia forces" and "Abkhaz separatist leaders". The statement concluded by expressing the Government's "confidence in the ability of international political organizations, first of all, the United Nations and the Commonwealth of Independent States, to assess the situation that has come about and take urgent measures" (United Nations doc. S/1998/516). Again, the Court observes the lack of any allegation directed at the Russian Federation regarding compliance with its international obligations. On the contrary, Georgia was looking to the Russian Federation, in its role within the Security Council and the CIS, to address the situation. Accordingly, the Court cannot give any legal significance to this letter for the purposes of this case.

63. The Court has now reviewed the documents and statements which Georgia invokes to demonstrate that in the period before it became bound by CERD it had a dispute with the Russian Federation about racial discrimination by the latter, especially Russian Federation forces, against ethnic Georgians. The Court concludes that none of the documents or statements provides any basis for a finding that there was such a dispute by July 1999. The reasons appear in the foregoing paragraphs in respect of each document or statement. They relate to the author of the statement or document, their intended or actual addressee, and their content. Several of the documents and statements emanated from the Georgian Parliament or Parliamentary Officers and were neither endorsed nor acted upon by the Executive. Finally, so far as the subject-matter of each document or statement is concerned, it complains of actions by the Abkhaz authorities, often referred to as "separatists", rather than by the Russian Federation; or the subject-matter of the complaints is the alleged unlawful use of force, or the status of Abkhazia, rather than racial discrimination; and, where there is a possibly relevant reference, usually to the impeding of return of refugees and IDPs, it is as an incidental element in a larger claim — about the status of Abkhazia, the withdrawal of the Russian Federation troops or the alleged unlawful use of force by them.

64. It follows from this general finding of the Court and the specific findings made in earlier paragraphs that Georgia has not, in the Court's opinion, cited any document or statement made before it became party to CERD in July 1999 which provides support for its contention that "the

dispute with Russia over ethnic cleansing is long-standing and legitimate and not of recent invention" (paragraph 34 above). The Court adds that even if this were the case, such dispute, though about racial discrimination, could not have been a dispute with respect to the interpretation or application of CERD, the only kind of dispute in respect of which the Court is given jurisdiction by Article 22 of that Convention.

5. Documents and statements from the period after CERD entered into force between the Parties and before August 2008

65. It is convenient first of all to consider as a group the reports made after 1999 by the two Parties to treaty monitoring committees. These reports relate to CERD, the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR), and the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). Georgia in its first report to the Committee on the Elimination of Racial Discrimination, submitted in 2000, said this:

> "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 been to 'cleanse' the region of Georgians and — in many cases — representatives of other nationalities as well. Georgia firmly believes that a policy founded on racial hatred is a fundamental infringement of human rights and should be unconditionally proscribed, condemned and eliminated." (United Nations doc. CERD/C/369/Add.1.)

The Court observes that this passage — the only one invoked by Georgia — directs no criticism against the Russian Federation, nor was such criticism made by the Georgian representative before the Committee, by any member of the Committee or by the Committee in its concluding observations (United Nations docs. CERD/C/SR.1453, CERD/C/304/Add.120, CERD/C/SR.1454). Indeed, the Georgian representative before the Committee said that her Government was currently involved in negotiations to resolve the complicated situation and that the Russian Federation might have an important part to play in that regard.

66. Georgia quotes this passage from its combined second and third reports to the Committee on the Elimination of Racial Discrimination submitted on 21 July 2004:

> "Under this article of the Convention, it must be reiterated that, owing to the continuing political crisis in Abkhazia and South Ossetia, during the reporting period Georgia was not in a position to protect citizens of these regions from criminal acts. In this connection, it should be stressed that Georgia does not absolve itself of responsibility for the situation in this part of its territory, which includes its responsibility to safeguard human rights and freedoms." (United Nations doc. CERD/C/461/Add.1.)

Again, the Court observes that the passage directs no criticism against the Russian Federation, nor did the Georgian representative appearing before the Committee or any member of the Committee or the Committee itself (United Nations doc. CERD/C/SR.1706).

67. In reporting in 2006 to the Committee against Torture (United Nations doc. CAT/C/SR.699), Georgia stated that:

> "A particular problem arose in Abkhazia, where Russian peacekeepers were in some instances aiding or abetting criminal separatists and were thereby, actively or by omission, contributing to human rights violations in the region. Most of the human rights violations in the territory affected ethnic Georgians, and the de facto authorities in Abkhazia bore a heavy responsibility for such violations."

Although there was some criticism of the Russian Federation here, this did not amount to an allegation against the Russian Federation regarding the latter's compliance with its obligations relating to the elimination of racial discrimination under CERD.

68. The Russian Federation in its submissions calls attention to the fact that Georgia, in reporting on its implementation of the two International Covenants on human rights, including in its report on the ICCPR in 2006 (United Nations doc. CCPR/C/GEO/3), similarly directed no criticism regarding racial discrimination against the Russian Federation; Georgia did not contest this submission. The Russian Federation also notes that under CERD, Georgia had available to it the procedure for State to State complaints provided in Articles 11 to 13.

69. The Court observes that a State may claim that another State is in breach of its obligations under CERD without initiating that process. It also observes that in general the process under which States report on a regular basis to the monitoring committees operates between the reporting State and the committee in question; it is a process in which the State reports on the steps which it has taken to implement the treaty. The process is not designed to involve other States and their obligations. Taking account of those features and of the actual reports referred to in this case, the discussions of and the observations on them, the Court does not consider that in this particular case the reports to the committees are significant in determining the existence of a dispute.

70. In respect of other post-July 1999 statements, Georgia begins by referring to a meeting on 14 September 2000 at which its Ambassador in Moscow observed to the Deputy Chairperson of the State Duma of the Russian Federation that representatives of the legislative and executive bodies and other bodies of the Russian Federation had established active contacts with the separatist régime of Abkhazia. The Georgian notes of that meeting, contrary to Georgia's submission to the Court, make no reference to ethnic cleansing but do refer to the deadlock in negotiations caused by the Abkhazian separatist administration.

71. The next document invoked by Georgia is a resolution adopted by the Georgian Parliament in October 2001. This resolution begins with a reference to the suffering arising "from the tragic results of separatism, international terrorism and aggression". It alleged that since the deployment of Russian Federation peacekeepers under the auspices of the CIS, the policies of ethnic cleansing had not stopped. In this resolution, the Russian Federation now appeared as a party involved in the conflict. Since its peacekeeping forces had failed to carry out their mission, the Parliament considered the further presence of the CIS collective peacekeeping forces inexpedient and proposed to the President of Georgia (1) to implement the procedures for the withdrawal of those forces and (2) to appeal to the United Nations, the OSCE and governments of friendly countries to deploy international peacekeeping forces in the conflict zone. The Georgian Government took no action at that time to have the peacekeeping forces withdrawn and in terms of point (2), as noted above (paragraph 47), it had, with the Russian Federation, earlier called for an international peacekeeping force possibly including a Russian Federation contingent.

72. This Parliamentary resolution is to be seen in the context of the unanimous Security Council resolutions 1339 and 1364 adopted earlier in 2001, in January and July. Those Council resolutions again welcomed the important contributions that UNOMIG and the CIS peacekeeping forces continued to make in stabilizing the situation in the zone of conflict, and strongly supporting 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 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 settlement. A Georgian representative attended the January 2001 meeting of the Security Council. In his speech he expressed Georgia's "appreciation to the Secretary-General and his Special Representative for Georgia . . . as well as the Group of Friends of the Secretary-General, for their tireless efforts in the process of achieving a comprehensive settlement of the conflict in Abkhazia, Georgia". He emphasized the upcoming meetings between Abkhaz and Georgian representatives and, while he was critical of one paragraph of the draft resolution before the Council, he made no reference at all to the paragraphs about CIS peacekeepers and the role of the Russian Federation as facilitator. Without further discussion, the resolution was adopted (United Nations doc. S/PV.4269).

73. The Court, in assessing the October 2001 Parliamentary resolution, as with the other documents and statements invoked by the Parties, must have regard, among other matters, to the distinct roles of the Russian Federation, in the CIS peacekeeping forces, as facilitator and as one of the Friends of the Secretary-General. In that context and given that the Parliamentary resolution had not been endorsed by the Georgian Government, the Court cannot give it any legal significance for the purposes of the present case.

74. Security Council resolution 1393 (2002), containing the standard paragraphs, had been adopted on 31 January 2002, when the Georgian Parliament on 20 March 2002 adopted a resolution which noted that its October 2001 resolution had not been acted on and resolved that it was necessary to implement its requirements. The new Parliamentary resolution criticized the CIS

peacekeeping forces: in reality, it said, they fulfilled the functions of border guards between Abkhazia and the rest of Georgia and failed to perform the duties envisaged by their mandate of providing protection of the population and creation of conditions for the secure return of IDPs. Further, major violations of human rights and freedoms on an ethnic basis had been carried out with the assistance of external military force. Once again, the Georgian Executive did not act upon this resolution, and it is to be seen in the context of the series of Security Council resolutions and the actions taken under, and by reference to, them. Accordingly the Court gives the Parliamentary resolution no legal significance for the purposes of the present case.

75. In April 2002, the Minister for Foreign Affairs of the Russian Federation in talks with the Georgian Ambassador in Moscow denied that the Russian Federation had supplied arms and ammunition to Abkhazia. It does not appear from the Georgian record of the talks that any claims which were made in those talks related to ethnic or racial discrimination.

76. In January 2003 a delegation of the Georgian Parliament, led by its Speaker, had discussions in Moscow with a group of Russian Federation parliamentarians including the Chairperson of the Council of the Federation and the Chairperson of the State Duma. In its submissions, Georgia called attention to a statement by the Georgian side, when talking about the CIS peacekeeping forces, suggesting the Russian Federation peacekeepers move out of the Gali District to facilitate the process of refugee return which, it said, the Russian Federation side rejected. The Georgian record of the discussion continued in this way:

> "While discussing the possibility of withdrawal of peacekeeping forces from Abkhazia, the Russian side was expressing a clearly negative attitude. However, it has been pointed out many times that if there is relevant request from the Georgian side, the Russian peacekeeping forces will leave the territory of Georgia. According to the statement of Russia, if the 'blue helmets' are pulled out of Abkhazia, the UN observers will also leave the region. The Russian colleagues expressed doubt about how the Georgian party would be able to control the situation independently and avoid the threat of renewing the hostilities."

This is an exchange between parliamentarians and no claim of racial discrimination against the Russian Federation appears in that exchange. Accordingly, the Court can give it no legal significance for the purposes of the present case.

77. In January 2004, Mikhail Saakashvili, shortly after his election as President of Georgia but before he assumed office, in a radio interview in answering a question about Abkhazia, said:

> "it is primarily the issue of our relations with Russia. The Russian generals are in command there, they have a military contingent there which played a very negative role . . . [M]ost of the population there is ethnically Georgian or was ethnically Georgian. Those people were thrown out by Russian troops and local separatists and we need to change the situation."

Georgia submits that this statement directly accused the Russian Federation and its forces of complicity in ethnic cleansing against ethnic Georgians in Abkhazia. While there may be some force in that contention, the President-elect immediately followed the passage emphasized by Georgia by saying that "primarily the way to change that [the situation in Abkhazia] is peaceful talks, offering them [the people in Abkhazia] better alternatives in terms of Georgian economic development, Georgia's integration into Europe". He said of Abkhazia "[b]asically that is a lawless place . . . it's really a black hole . . . Of course Russia doesn't want to give up the control over it so we have to talk to them and make them realise that we're an independent state . . . But on the other hand we want to be on good terms with them." The statement has to be seen in the immediate context of the wide-ranging and informal character of the interview and in the broader context of the relationship between the two countries in relation to Abkhazia. Security Council resolution 1524 (2004) adopted two weeks after the interview contained the standard paragraphs commonly included in Security Council resolutions, relating among other things to the various roles of the Russian Federation (see paragraphs 48 and 71). Further, the record does not include any specific follow-up by the new President or under his instructions to whatever claim might have been made against the Russian Federation in the interview.

78. The next relevant document in the record is a letter of 26 July 2004 by President Saakashvili to President Putin. It primarily concerns contingents of "illegal armed formations" in South Ossetia, beyond the numbers agreed in 2003; armed attacks; the granting of Russian Federation citizenship there; criminal activity; and the resulting need for political dialogue at a plenipotentiary level and an increased role for the OSCE. Regarding Abkhazia, the Georgian President raised issues about the territorial integrity of Georgia. The President of the Russian Federation in his reply proposed measures which should be taken with a view to the stabilization of the situation and the creation of conditions for the resumption of the political dialogue. The letters do not mention the return of refugees and IDPs.

79. On 26 January 2005, the Georgian Permanent Representative to the United Nations in a letter to the President of the Security Council wrote about "the recent developments in the conflict-resolution process in Abkhazia, Georgia" (United Nations doc. S/2005/45) including the "self-styled presidential elections" there, characterized as "illegal and illegitimate"; the fact that nearly 80 per cent of the current population has Russian citizenship; and the ignoring by the Russian Federation of the basic visa régime. Despite those developments, the Ambassador continued, the central authorities of Georgia were ready to resume negotiations with the Abkhaz side. The letter then referred to "refugees and IDPs — victims of ethnic cleansing — who already for longer than a decade are waiting for their basic right — the right to live at home — to materialize". Referring to abductions which allegedly occurred on "election" day, the letter claimed that "these excesses were committed in front of CIS peacekeepers, who did nothing to protect peaceful civilian people . . . I have to state once more that the CIS peacekeeping force is rather far from being impartial and is often backing Abkhaz separatist paramilitary structures." Two days later the Security Council at a meeting which had that letter before it and which was attended by a Georgian representative adopted, without any debate (United Nations doc. S/PV.5116), a resolution which included the standard references to the CIS peacekeeping forces and the Russian Federation's role as a facilitator (resolution 1582 (2005)).

80. On 11 October 2005 the Georgian Parliament in a resolution "condemn[ed] the recent developments in the conflict regions existing on the territory of Georgia (Abkhazia, and the former South Ossetian Autonomous District)". The resolution assessed as "extremely negative" the activity and the fulfilment of the current mandate by the peacekeeping forces in Abkhazia and the former South Ossetian Autonomous District and it contemplated the cessation of those peacekeeping operations and the denunciation of the relevant international agreements in certain circumstances starting from February 2006 in South Ossetia and July in Abkhazia.

81. This Parliamentary resolution was referred to in a letter of 27 October 2005 by the Permanent Representative of Georgia to the President of the Security Council. That letter did not contain any endorsement of the Parliamentary resolution. The Permanent Representative's letter mentioned one positive development (a 4 August 2005 meeting on security guarantees) which, he said, had been marred by a large-scale Abkhaz military exercise in the zone of responsibility of the Russian Federation peacekeeping forces. The letter also mentioned the banning of instruction in the Georgian language in Gali schools — a claim which, in the Court's assessment, is not directed at the Russian Federation. It was impossible, the letter continued, to avoid commenting on the behaviour of the facilitator — the Russian Federation — especially when several alarming trends, which were listed, had taken place. Annexation was being carried out against a small and friendly neighbouring country. The Permanent Representative, after referring to the Parliamentary resolution, said this:

> "It seems that the Russian-led peacekeeping operation has, in fact, exhausted its potential and the only effective way is to have a full-scale international, I would underline — truly international — United Nations-led peacekeeping operation.
>
> The Georgian leadership is firmly committed to a peaceful settlement of the conflict on its territory, weighing ethnic inclusiveness and integration, safeguarding human rights and freedoms. Despite all of the above-mentioned we still believe that there is no military solution — on the contrary, we are confident that it is counterproductive. Our policy of proactive engagement has long-term goals to get Abkhaz society out of isolation, to expose them to democratic values and beliefs, recognizing fundamental human rights of internally displaced persons and refugees, first of all the right to return to their homes, regardless of their ethnicity, to establish an environment of trust and mutual respect." (United Nations doc. S/2005/678.)

The Court is unable to see in this letter any claim against the Russian Federation by the Georgian Government of breaches of obligations under CERD.

82. On 9 November 2005 the Georgian Permanent Representative transmitted the 11 October Parliamentary resolution to the United Nations Secretary-General. He asked that the resolution be circulated as a General Assembly document under agenda items concerning the prevention of armed conflict (item 12) and the review of peacekeeping (item 32), but made no reference to other items on that session's agenda, including racial discrimination (item 69) and displaced persons (item 39) (United Nations doc. A/60/552).

83. The official position of the Georgian Executive in this period was further illustrated in comments made by the Georgian Prime Minister in a December 2005 press conference, and which were subsequently circulated at a meeting of the JCC. Here the Prime Minister described the "extraordinarily constructive position of the Russian diplomacy in the matter [of the peace process in South Ossetia]", noted that "Russia is a guarantor of long-term peace in the Caucasus" and stated his belief that "the recent steps of Russia will bring positive momentum into the relations between the two countries".

84. On 26 January 2006, the Security Council held a private meeting on the situation in Georgia. The Official Communiqué of the meeting records only that a Georgian representative, the Special Envoy of the President of Georgia, made a statement and that a representative of the Russian Federation made a statement, without giving any indication of the content of the statements (United Nations doc. S/PV.5358). Georgia includes in its pleadings a "Statement by . . . [the] Special Representative . . .". That statement is very critical of various actions of the Abkhaz side. The statement contains this passage about the role of the Russian Federation:

> "One of the members of the Security Council, member of the Group of Friends and the facilitator of the peace process — namely the Russian Federation — suddenly has decided to disassociate itself from supporting the basic principle — principle of territorial integrity of Georgia within its internationally recognized borders . . . That is why for the first time in the history of Security Council deliberations we have no draft resolution prepared by the Group of Friends.
>
> Mr. President,
>
> This change of position of the one of the prominent members of P5 is not just a slight shift or correction. Renouncement of the principle of determining the status of Abkhazia within the State of Georgia does mean the following: support of the secessionism as a phenomenon; endorsement of ethnic cleansing of more than 300,000 citizens of Georgia; questioning the basic principle of the modern world architecture — the principle of territorial integrity and inviolability of internationally recognized borders.
>
> Mr. President,
>
> I am representing the people who were forcefully expelled from their homes and are not allowed to return. I am representing the people who count every day of their exile and who look with a hope to this Council for its work and resolutions. I am representing the community which follows very closely every move in the peace process in Abkhazia, Georgia."

The Court observes that the reference to "ethnic cleansing" does not include an allegation that the Russian Federation participated in, or facilitated, that action. After some delay, at the end of March 2006, the Security Council, with a Georgian representative present and without debate (United Nations doc. S/PV.5405), adopted resolution 1666 (2006) including standard paragraphs about the CIS peacekeeping forces and the role of the Russian Federation as facilitator, as well as a reaffirmation of the territorial integrity of Georgia.

85. On 15 February 2006, in a resolution forwarded to the Secretary-General by the Georgian Permanent Representative, the Georgian Parliament in terms of its resolution of 11 October 2005 assessed "extremely negatively" the fulfilment of the obligations by the peacekeeping forces in the former autonomous district of South Ossetia and assessed the actions of the Russian Federation as an ongoing attempt at annexation of this region of Georgia. It accordingly instructed the Government of Georgia to start the implementation of the provisions of that earlier resolution. Again, there is nothing in the record to show that the Georgian Government took those steps. As with the October 2005 Parliamentary resolution (paragraph 82 above), the 16 February 2006 letter of transmittal from the Georgian Permanent Representative to the Secretary-General requested that the letter and the February 2006 Parliamentary resolution be circulated as a General Assembly document under agenda items relating to armed conflict and peacekeeping, but not racial discrimination or displaced persons (United Nations doc. A/60/685).

86. On 18 July 2006 the Georgian Parliament adopted a resolution in terms of its resolutions of 11 October 2005 and 15 February 2006 about both regions. It said that, unfortunately, no progress had been achieved in terms of the settlement of the conflicts within the time frame defined by those resolutions. It continued:

> "Instead of demilitarization, the drastic increase of military potential of those armed forces under subordination of de facto authorities of Abkhazia and the former Autonomous District of South Ossetia, drastic activation of terrorist and subversive actions, complete collapse of security guarantees for peaceful population, permanent attempts to legalize the results of ethnic cleansing the fact of which had been repeatedly recognized by the international community, massive violation of fundamental human rights and ever-increasing international criminal threats so characteristic of uncontrolled territories — this is a reality brought about as a result of peacekeeping operations."

The resolution then said that the rejection by the Russian Federation of a peace plan "can be assessed as support for separatists and as a permanent attempt to annex Georgia's territory". The Parliament resolved to entrust the Government of Georgia with the task of launching necessary procedures to immediately suspend the so-called peacekeeping operations and to have the armed forces of the Russian Federation withdrawn.

87. In this case the authorities of the Russian Federation were plainly aware of the Georgian Parliament's action since on 19 July 2006, the day after it was adopted, the Permanent Representative of the Russian Federation to the United Nations transmitted to the Secretary-General a statement by their Foreign Ministry critical of the resolution. The statement includes the following passages:

> "The Russian Federation regards the decision as a provocative step designed to aggravate tension, destroy the existing format of negotiations and shatter the framework of legal agreements for the peaceful settlement of the Georgian-Abkhaz

and Georgian-Ossetian conflicts. The accusations that the decision makes against the Russian Federation constitute a disgraceful attempt to shift the blame to others.

. . . . . .

It should not be forgotten that the format of the negotiation process, which, besides the Russian Federation, involves the United Nations, the Organization for Security and Cooperation in Europe, the Commonwealth of Independent States and the member States of the Group of Friends of the Secretary-General on Georgia, was agreed upon by all parties to the conflicts. The irresponsible actions of Tbilisi are capable of ruling out any possibility of peaceful settlement of the conflicts.

The Russian Federation will take such measures as are necessary to ensure compliance with existing international agreements, prevent the destabilization of the situation in the region and protect the rights and interests of Russian citizens living there." (United Nations doc. S/2006/555.)

88. The Permanent Representative of Georgia transmitted the text of the 18 July 2006 resolution of the Georgian Parliament to the Secretary-General on 24 July 2006, again asking for it to be circulated to the General Assembly under the same agenda items as for the Parliamentary resolutions of October 2005 and February 2006 (see paragraphs 82 and 85 above) (United Nations doc. A/60/954). According to the record, the Georgian Government took no action in terms of the resolution.

89. The Court recalls Georgia's emphasis on those Parliamentary resolutions which were transmitted to the United Nations (paragraph 36 above), and sees it as significant that on all those occasions when the Georgian Government transmitted Parliamentary resolutions to the Secretary-General to be circulated as official United Nations documents, that Government did not refer to those agenda items which relate to the subject-matter of CERD, such as racial discrimination, or, as the case may be, refugees and IDPs, or, indeed, human rights instruments more generally.

90. On 11 August and 4 September 2006 the Georgian Permanent Representative transmitted to the Secretary-General and President of the Security Council Foreign Ministry statements about abuses of human rights in Abkhazia (United Nations docs. A/60/976-S/2006/638, S/2006/709). The primary allegations were against "the Abkhazian side", but it was also said that the Russian Federation (CIS) peacekeepers continued to "[turn] a blind eye to gross violation of . . . human rights". The Foreign Ministry stated that the "existing situation . . . leads us to register once more the incapability (or the absence of will) of the CIS peacekeeping forces to duly perform their functions, which points yet again to the necessity of modifying the existing format of peace operations . . .". According to the 4 September statement of the Ministry, the "Russian peacekeepers cannot . . . ensure the protection of the safety, dignity and human rights of the

peaceful population, including internally displaced persons and refugees, as prescribed by [four] Security Council resolutions". This fact "provide[d] an added proof of the correctness of the Georgian Parliament's decision to withdraw Russian peacekeepers . . .". The 11 August statement made specific reference to three conventions but not to CERD and neither of the two documents made direct claims against the Russian Federation of racial discrimination.

91. In October the Security Council, with no reference to the two documents, adopted resolution 1716 (2006) with standard provisions about the Russian Federation as a facilitator and the role of the CIS peacekeeping forces. Again, the Georgian representative who was present made no comment regarding the paragraphs in the draft resolution relating to the CIS peacekeepers and the role of the Russian Federation as facilitator, and the resolution was adopted without debate (United Nations doc. S/PV.5549). In view of these considerations, the Court does not consider that the Foreign Ministry statements have any legal significance for the purposes of the present case.

92. On 3 October 2006 the Georgian Permanent Representative to the United Nations in a statement at a press conference said this:

> "It is crystal clear, that the Russian peacekeeping force is not an impartial, nor international [contingent]. It failed to carry out the main responsibilities spelled out in its mandate — create favorable security environment for the return of ethnically cleansed hundreds of thousands of Georgian citizens. It became the force that works to artificially alienate the sides from one another."

Georgia in its submissions cites this statement as raising the dispute again — the Court presumes that this means the dispute about racial discrimination by the Russian Federation — but the Permanent Representative's next sentence was this:

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

Particularly taking into account this clarification by the Permanent Representative, the Court concludes that it cannot give any legal significance to the statement made at the press conference for the purposes of the present case.

93. On 14 November 2006 President Saakashvili, in an address to the European Parliament, which as an organ of the European Union contains no representatives from either Georgia or the Russian Federation, said that "over 300,000 Georgians were ethnically cleansed from Abkhazia in the early 1990s". President Saakashvili noted that "the Russian administration" had been accused of responsibility for these earlier events. His only reference, in a wide-ranging address, to disputes

was in the context of Georgia's "separatist problems": "[o]ur disputes continue because they are based on recidivist territorial claims . . ." President Saakashvili's statement demonstrates that the primary dispute concerned territorial claims and the references to ethnic cleansing by the Russian Federation were with respect to events which took place in the early 1990s. These events were not current at the time of the President's address, and pre-dated Georgia's accession to CERD. As such the Court does not see President Saakashvili's statement as evidence of a dispute between the Parties on matters under CERD. The Court takes the same view of the press statement made by the Georgian Foreign Ministry on 22 December 2006.

94. The President of Georgia in his address of 26 September 2007 to the General Assembly referred to the majority of residents of the two regions as "prisoners of the morally repugnant politics of ethnic cleansing, division, violence and indifference". He continued:

> "The story of Abkhazia, where up to 500,000 men, women, and children were forced to flee in the 1990s, is of particular relevance — one of the more abhorrent, horrible and yet forgotten ethnic cleansings of the twentieth century. In the time since Russian peacekeepers were deployed there, more than 2,000 Georgians have perished and a climate of fear has persisted." (United Nations doc. A/62/PV.7.)

Near the end of his address, he stated that "[t]he only obstacle to the integration of South Ossetia [into Georgia] is a separatist regime that basically consist of elements from security services from neighbouring Russia that have no historical, ethnic or cultural links to the territory". In respect of Abkhazia he had earlier said that "these disputes are no longer about ethnic grievances".

95. In September and October 2007, March and April 2008, the Georgian Permanent Representative to the United Nations sent statements by the Georgian Ministries of Foreign Affairs and Internal Affairs to the Secretary-General and President of the Security Council (United Nations docs. S/2007/535; S/2007/589; A/62/765-S/2008/197; A/62/810). The first, third and fourth are concerned with the status of the regions, the actions of separatists, and military activities. None make any reference to racial discrimination or ethnic cleansing (except for the last) or to the Russian Federation's responsibility for such actions. The last does refer to ethnic cleansing but only in the context of the Russian Federation "planning to recognize" the documents of authorities which were created through ethnic cleansing. Its call on the Russian Federation to engage more actively in the safe return of IDPs cannot, in the Court's opinion, be understood as a claim against the Russian Federation regarding compliance with its obligations under CERD, for instance a claim of impeding return of IDPs on racial grounds. Two other features of that document might be noted: first, it alleges breaches by the Russian Federation of three named conventions, but not CERD; secondly, when Georgia transmitted this statement to the Secretary-General on 17 April 2008, it requested that it be circulated as a General Assembly document under an agenda item relating to protracted conflicts in the region and the implications for international peace, security and development (United Nations doc. A/62/810).

The second statement contains this passage:

> "The Georgian side expresses its extreme concern about this fact [the identity of a militant who had been killed], proving that separatist illegitimate armed forces are constantly receiving support from a party which is supposed to be a facilitator of the conflict resolution process. Regretfully, we have been witnessing such a pattern of behaviour for 14 years. At the same time high-ranking Russian officials consider [sic] ordinary support and training to so-called anti-terrorist units, which in reality by nature are illegitimate military formations of the de facto Abkhaz regime, and are responsible for ethnic cleansing that took place in Abkhazia, Georgia.
>
> The Georgian Government once again reminds all States of paragraph 8 of Security Council resolution 876 (1993), in which the Council called on all States to prevent the provision from their territories or by persons under their jurisdiction of all assistance, other than humanitarian assistance." (United Nations doc. S/2007/589.)

Again the reference to ethnic cleansing is not stated as a claim against the Russian Federation regarding compliance with its obligations under CERD.

96. Georgia referred the Court to six further statements made between January 2006 and September 2007 by its Foreign Ministry and by its Ministry for Conflict Resolution Issues. The complaints against the Russian Federation are limited to the Russian peacekeepers' "culpable inaction", "criminal inaction" and "even encouragement" of the actions of the separatist authorities, and are not related to racial discrimination. Accordingly, the Court gives the statements no legal significance for the purposes of the present case. (See similarly the statement of 22 November 2007.)

97. On 19 April 2008 the Georgian Foreign Ministry in a press statement referred to the "*de facto* annexation of Georgia's integral parts . . . and neglect of human rights of an absolute majority of the regions' population — victims of ethnic cleansing". The statement is primarily about the status of the two regions and Russian Federation policies and practices relevant to those regions and makes no claim against the Russian Federation about racial discrimination.

98. On 21 April 2008 the Georgian President made a "special statement" about "aggressive steps taken" by the Russian Airforce. The only reference to racial discrimination was to past events which occurred before CERD entered into force between the Parties and related to the 1992-1993 Russian Federation bombing: "[e]thnic cleansing . . . took place [at] that time and [a] new aggressive regime was established".

99. On 12 May 2008 the President of Georgia addressed representatives of five European Union member States who were visiting Georgia, about what he referred to as the peace plan relating to Abkhazia, avoiding conflict, securing territorial integrity and return of refugees, alleged breaches of norms of international conduct by the Russian Federation, relating to incursions into

Georgian airspace, illegal movement of Russian Federation peacekeeping forces, the status of the regions and the issuing by the Russian Federation of passports. The European Union, he said, must state that it will never recognize any kind of breakaway of Georgian territory and will never recognize the results of ethnic cleansing. Again there is no claim against the Russian Federation of breaches of its obligations under CERD.

100. The final exchange between Georgia and the Russian Federation before armed conflict broke out in August 2008 consists of a letter of 24 June 2008 from President Saakashvili to President Medvedev and President Medvedev's reply of 1 July. The Georgian President offered a number of proposals for the President of the Russian Federation to consider "directed at the substantial decrease of tension, restoration of trust and assistance in peaceful settlement of the conflict in Abkhazia, Georgia". Two of the proposals refer to refugees and IDPs.

> "Free Economic Zone will be created in the territory of Gali and Ochamchire Districts of Abkhazia, where the population is practically absent at present. Mixed Georgian-Abkhazian Administrations and mixed Georgian-Abkhazian law enforcement organs will be created in both districts. Safe and dignified return of refugees and IDPs to Gali and Ochamchire Districts will be organized. The Georgian side undertakes to provide social welfare fully for the population of these districts.
>
> . . . . . .
>
> [T]he parties to the conflict could also conclude a separate agreement about non-use of force and return of IDPs and refugees to the entire territory of Abkhazia, Georgia."

An additional proposal was for the continuation of the peacekeeping operation of the CIS with a reviewed mandate. The Georgian President proposed that the Russian Federation be one of the guarantors of the agreements which he was to negotiate in line with these proposals.

101. The President of the Russian Federation in his reply said that he had attentively reviewed the proposals on the problems of regulation of the Georgian-Abkhazian conflict, noting that "[m]ost of the elements can be relevant at different stages of regulation" and that "[y]our principal partner must be Abkhazia" which would presume a full-scale negotiation process. Having stated that "[u]nfortunately, the sides [to the conflict] feel deep mutual mistrust as of today", the President of the Russian Federation continued:

> "In this situation, frankly speaking it is difficult to imagine, for example, creation of joint Georgian-Abkhaz administration or law-enforcement organs in any district of Abkhazia. 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.

> Because of this, I propose to concentrate on the initial and most important for today — the real measures directed towards decreasing the tensions and restoration of trust that will allow resuming the process of Georgian-Abkhaz regulation which was ceased in July 2006."

He then went on to address other matters in the Georgian list, and concluded with reference to two of them in this way:

> "We are also ready to discuss your proposal regarding the creation of Russian-Georgian intergovernmental commission on the issues of economic rehabilitation of Abkhazia. As far as I understand that would mean cancellation of sanction introduced in January 1996 on the basis of the Decision of the CIS Heads of States on the Sanctions against Abkhazia. By the way, in terms of directions, this would have been consonant with the measures taken by Russian side within the framework of the April Order of the President of the Russian Federation.
>
> And of course we will welcome Georgia to join the process of preparation for 2014 Olympic Games in Sochi.
>
> In sum, quite a specific and positive agenda of our joint actions is being emerged."

102. Georgia sees the response on the issue of the return of IDPs as "a categorical rejection" of their return, and evidence of a legal dispute between Georgia and the Russian Federation "concerning the return of ethnic Georgians to the regions of Georgia from which they had been expelled because of their ethnicity".

103. As the Parties have said, this exchange is important, given its timing, the position and responsibility of the authors of the letters and the contents of the letters. The Court finds that the letters do not evidence a dispute between the Parties about the obligations of the Russian Federation in respect of the impeding of the return of refugees and IDPs for reasons of racial discrimination: Georgia is approaching the Russian Federation as a facilitator, as a potential guarantor and in terms of its role in the CIS peacekeeping forces. The Abkhaz side (the other "party to the conflict") is the party which under the proposals would, with Georgia, have the role of facilitating the return of the IDPs and refugees. No proposal was made by Georgia to the Russian Federation for the latter to take action with respect to the return of IDPs and refugees.

104. The final document on which Georgia relies, before those issued at the time of the armed conflict in August 2008, is a press release of its Foreign Ministry issued on 17 July 2008. In answer to a question relating to a statement by the Foreign Minister of the Russian Federation about the signing of a non-use of force agreement between Georgia and Abkhazia and the return of refugees, the Ministry said that the statement was completely at variance with the mandate of the CIS collective peacekeeping forces: they were to create conditions for the unconditional and dignified return of refugees and IDPs. Moscow's true design it said, was

> "to legalize results of the ethnic cleansing instigated by itself and conducted through Russian citizens in order to make easier annexation of the integral part of Georgia's internationally recognized territory, which the Russian Federation tries to achieve via military intervention in Abkhazia, Georgia. Moscow's insistence on the signing of another treaty on the non-use of force serves the same immoral goal as well."

The Court considers that the reference to ethnic cleansing may again be read as relating to the events of the early 1990s. This reference is to be understood in the context of the principal theme of the press release, that is, the concern of Georgia in relation to the status of Abkhazia and the territorial integrity of Georgia. In light of the record it remains unclear whether the press release came to the attention of the Russian Federation. In any case, the press release raised the issue of the proper fulfilment of the mandate of the CIS peacekeeping force, and not the Russian Federation's compliance with its obligations under CERD.

105. The Court, on the basis of its review of the documents and statements issued by the Parties and others between 1999 and July 2008 concludes, for the reasons given in relation to each of them, that no legal dispute arose between Georgia and the Russian Federation during that period with respect to the Russian Federation's compliance with its obligations under CERD.

6. August 2008

106. Armed hostilities began in South Ossetia during the night of 7 to 8 August 2008. According to the Report of the Independent International Fact-Finding Mission on the Conflict in Georgia established by the Council of the European Union, on that night:

> "a sustained Georgian artillery attack struck the town of Tskhinvali. Other movements of the Georgian armed forces targeting Tskhinvali and the surrounding areas were under way, and soon the fighting involved Russian, South Ossetian and Abkhaz military units and armed elements. It did not take long, however, before the Georgian advance into South Ossetia was stopped. In a counter-movement, Russian armed forces, covered by air strikes and by elements of its Black Sea fleet, penetrated deep into Georgia, cutting across the country's main east-west road, reaching the port of Poti and stopping short of Georgia's capital city, Tbilisi. The confrontation developed into 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." (Report, Vol. 1, para. 2.)

107. The conflict continued for five days. On 12 August the President of the French Republic (which held the rotating Presidency of the European Union) took the initiative and, following discussions with the President of the Russian Federation, proposed six principles "to bring about a permanent ceasefire in the Ossetian-Georgian zone of the conflict". Following negotiations, the plan was signed by Abkhazia and South Ossetia on 14 August, by Georgia on 15 August, and by the Russian Federation on 16 August 2008. The agreed principles were:

> (1) non-use of force; (2) the absolute cessation of hostilities; (3) free access to humanitarian assistance; (4) withdrawal of the Georgian armed forces to their permanent positions; (5) withdrawal of the Russian armed forces to the line where they were stationed prior to the beginning of hostilities; pending the establishment of international mechanisms, the Russian peacekeeping forces will take additional security measures; (6) an international debate on ways to ensure security and stability in the region.

108. The first statement cited by Georgia from this period is its Presidential Decree on the Declaration of a State of War and Full Scale Mobilization of 9 August 2008. The Decree begins by referring to "[s]eparatists [who] are engaged in massive violation of human rights and freedoms, armed assaults on peaceful population and violence". The Russian Federation armed attack, it continues, provided "full support of the separatist forces". The Russian Federation "military aggression" required the exercise of the right of self-defence as provided in Article 51 of the Charter and other documents. The Court observes that this decree does not allege that the Russian Federation was in breach of its obligations relating to the elimination of racial discrimination. Its concern is with the allegedly unlawful use of armed force.

109. In a press conference with foreign journalists held on 9 August 2008, President Saakashvili made a statement which began with allegations about "Russia . . . launch[ing] a full scale military invasion of Georgia". The President said that he also had to indicate:

> "that Russian troops, Russian tanks that moved in, into South Ossetia on their way expelled the whole ethnically Georgian population of South Ossetia. This morning they've committed the ethnic cleansing in all areas they control in South Ossetia, they have expelled ethnic Georgians living there. Right now they are trying to set up the ethnic cleansing of ethnic Georgians from upper Abkhazia — Kodori Gorge."

On the following day, 10 August 2008, the Georgian representative, at a meeting of the Security Council called at Georgia's request, in his initial statement referred to "the process of exterminating the Georgian population", but the first explicit reference to racial discrimination came in the initial statement by the representative of the Russian Federation:

> "What legal terms can be used to describe what has been done by the Georgian leadership? Can we use 'ethnic cleansing', for example, when, over a number of days, nearly 30,000 of the 120,000 people of South Ossetia have become refugees who have fled to Russia: more than a quarter of the population. They went across the border from South Ossetia to the North at great risk to their lives. Is that ethnic cleansing or is it not?" (United Nations doc. S/PV.5953, 10 August 2008, p. 8.)

The Georgian representative responded that "[w]e cannot [turn a blind eye] now because that is exactly Russia's intention: to erase Georgian statehood and to exterminate the Georgian people" (*ibid.*, p. 16). The representative of the Russian Federation in the next statement in the debate

countered that "the intention of the Russian Federation in this case is to ensure that the people of South Ossetia and Abkhazia not fear for their lives or for their identity" ((United Nations doc. S/PV.5953, 10 August 2008, p. 17). The Court observes that civilians in regions directly affected by ongoing military conflict will in many cases try to flee — in this case Georgians to other areas of Georgia and Ossetians to the Russian Federation.

110. On 11 August 2008 the Georgian Ministry of Foreign Affairs released a statement to the effect that:

> "According to the reliable information held by the Ministry of Foreign Affairs of Georgia, Russian servicemen and separatists carry out mass arrests of peaceful civilians of Georgian origin still remaining on the territory of the Tskhinvali region and subsequently concentrate them on the territory of the village of Kurta.
>
> Georgia appeals to the International Red Cross and other humanitarian and international organizations and the international community as a whole to immediately take decisive and effective measures for the evacuation of this population from the conflict zone."

111. On that same day, 11 August, President Saakashvili in a CNN interview stated the following:

> "And what was left of upper Abkhazia has been bitterly attacked for the last two days. And right now, as we speak, there is an ethnic cleansing of whole ethnic Georgian population of Abkhazia taking place by Russian troops. I directly accuse Russia of ethnic cleansing there. And it's happening now.
>
> The other thing is that, if you go down to South Ossetia, where also being held from half of the South Ossetia, which we always controlled, they fully expelled a couple of days ago the whole Georgian population. Russian troops have moved first to occupy the town of Gori, which is around 40 kilometres from Tskhinvali, the original capital of South Ossetia."

112. On the following day, 12 August 2008, the Foreign Minister of the Russian Federation in a Joint Press Conference with the Minister for Foreign Affairs of Finland in his capacity as Chairman-in-Office of the OSCE, said the following:

> "A couple of days after [US Secretary of State] Rice had urgently asked me not to use such expressions, Mr. Saakashvili . . . claimed hysterically that the Russian side wanted to annex the whole of Georgia and, in general, he did not feel shy of using the term ethnic cleansings, although, true, it was Russia that he accused of carrying out those ethnic cleansings."

113. The Court observes that while the Georgian claims of 9 to 12 August 2008 were primarily claims about the allegedly unlawful use of force, they also expressly referred to alleged ethnic cleansing by Russian forces. These claims were made against the Russian Federation directly and not against one or other of the parties to the earlier conflicts, and were rejected by the Russian Federation. The Court concludes that the exchanges between the Georgian and Russian representatives in the Security Council on 10 August 2008, the claims made by the Georgian President on 9 and 11 August and the response on 12 August by the Russian Foreign Minister establish that by that day, the day on which Georgia submitted its Application, there was a dispute between Georgia and the Russian Federation about the latter's compliance with its obligations under CERD as invoked by Georgia in this case.

7. Conclusion

114. The first preliminary objection of the Russian Federation is accordingly dismissed.

III. SECOND PRELIMINARY OBJECTION — PROCEDURAL CONDITIONS IN ARTICLE 22 OF CERD

1. Introduction

115. The Court will now turn to consider the Russian Federation's second preliminary objection.

116. The essence of this objection is that Article 22 of CERD, the sole jurisdictional basis invoked by Georgia to found the Court's jurisdiction, contains two procedural preconditions, namely, negotiations and referral to procedures expressly provided for in CERD that must both be fulfilled before recourse to the Court is had. The Russian Federation contends that, in the present instance, neither precondition was met.

117. Article 22 reads:

> "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."

118. There is much in this compromissory clause on which the two Parties hold different interpretations. First they disagree on the meaning of the phrase "[a]ny dispute . . . which is not settled by negotiation or by the procedures expressly provided for". The Russian Federation

maintains that the phrase imposes a precondition to the jurisdiction of the Court, in that it requires that an attempt must have been made to resolve the dispute by the means specified in Article 22 and that that attempt must have failed before the dispute can be referred to the Court. Georgia on the other hand interprets the phrase as imposing no affirmative obligation for the Parties to have attempted to resolve the dispute through negotiation or through the procedures established by CERD. According to Georgia, all that is required is that, as a matter of fact, the dispute has not been so resolved.

119. Secondly, the two Parties also offer different interpretations of the co-ordinate conjunction "or" in the phrase "[a]ny dispute . . . which is not settled by negotiation *or* by the procedures expressly provided for". The Russian Federation maintains that the two preconditions are cumulative, and that fulfilment of only one or the other would not therefore be sufficient. Georgia takes the opposite view arguing, as a matter of textual exegesis, that the two preconditions — assuming them to be so — are alternative.

120. Thirdly, assuming that negotiations are a precondition for the seisin of the Court, the two Parties disagree as to what constitutes negotiations including the extent to which they must be pursued before it can be concluded that the precondition under Article 22 of CERD has been fulfilled. Additionally, they disagree as to the format of negotiations and the extent to which they should refer to the substantive obligations under CERD.

121. The Court will begin by presenting the arguments of the Parties regarding the above-mentioned issues concerning the interpretation of Article 22 of CERD. It will then give its interpretation of the Article and determine whether the second preliminary objection of the Russian Federation is well based in law and in fact.

2. Whether Article 22 of CERD establishes procedural conditions for the seisin of the Court

122. The Parties deploy a number of arguments in support of their respective interpretations of Article 22 of CERD, relating to: *(a)* the ordinary meaning of its terms in their context and in light of the object and purpose of the Convention, invoking, in support of their respective positions, the Court's jurisprudence dealing with compromissory clauses of a similar nature; and *(b)* the *travaux préparatoires* of CERD.

(a) *Ordinary meaning of Article 22 of CERD*

123. Starting with the ordinary meaning of Article 22, the Russian Federation argues that the present tense in the English expression "which is not settled" is not used merely to describe a state of fact but requires that a previous attempt to settle the dispute has been made bona fide. According to the Russian Federation, this is all the more evident in the French version ("qui n'aura

pas été réglé"), where the future perfect tense signifies that a previous action (i.e., an attempt to settle the dispute) must have taken place before the next stage can be embarked upon (i.e., referral to the Court). This is, in its view, the only possible common sense interpretation of Article 22 confirmed by the textual analysis of other authentic texts of CERD.

124. The Russian Federation further invokes the principle of effectiveness of interpretation in order to reject Georgia's interpretation of the phrase "which is not settled" in Article 22 as a mere observation of facts. It points out that such interpretation not only runs against the ordinary meaning of this provision, but also deprives it of any effect: it renders it tautological and meaningless since it would merely state the obvious and leave a key phrase of the provision without appropriate *effet utile*. To underline this argument, the Russian Federation asks rhetorically what would be 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? In its view, this phrase must *add* something to the word "dispute": the only disputes which fall within the ambit of the clause are those that cannot be settled by the means indicated therein. Consequently, according to the Russian Federation, 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.

125. In addition, the Russian Federation relies on the Permanent Court's dictum in the *Mavrommatis Palestine Concessions* case: "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" (*Judgment No. 2, 1924, P.C.I.J., Series A, No. 2,* p. 15). Taking this position into account, it contends that 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.

*

126. Georgia adopts a different interpretation. Referring to the ordinary meaning of the words in their context and in light of the object and purpose of CERD, it maintains that Article 22 does not establish any express obligation to negotiate nor does it establish any obligation to have recourse to the procedures provided for in Articles 11 and 12 of CERD. It points out that none of these conditions or pre-conditions are to be found in the actual text of Article 22; more specifically, Article 22 says nothing — expressly or implicitly — about any general duty to attempt to settle the dispute before seising the Court.

127. Georgia seeks support for this interpretation of Article 22 in the Court's Order of 15 October 2008 in the present case, where the Court held that:

> "the phrase 'any dispute . . . which is not settled by negotiation or by the procedure expressly provided for in this Convention' does not, in its plain meaning, suggest that formal negotiations in the framework of the Convention or recourse to the procedure

> referred to in Article 22 thereof constitute preconditions to be fulfilled before the seisin of the Court" (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008*, p. 388, para. 114).

Suggesting that what was "a plain meaning" then must be a "plain meaning" now, Georgia contends that the text of Article 22 does not support the Russian Federation's position that it contains preconditions to the seisin of the Court.

128. Georgia further maintains that the phrase "[a]ny dispute . . . which is not settled" is merely a statement of fact. This assertion is buttressed by the fact that the drafters of CERD refrained from using any express language of priority or the phrase "cannot be settled" (as has been done in many other conventions), which in Georgia's view clearly means something more than the phrase "is not settled". It maintains that this was a deliberate choice of the drafters of CERD: if they had intended to include the conditions that the Russian Federation now reads into the text they would have done so. Consequently, according to Georgia, the ordinary meaning of the terms of Article 22 of CERD can only be interpreted as expressing "an intention of the drafters" not to impose any preconditions to the seisin of the Court.

* *

129. Before providing its interpretation of Article 22 of CERD, the Court wishes, as a preliminary matter, to make three observations.

First, the Court recalls that in its Order of 15 October 2008 it stated that "the phrase 'any dispute . . . which is not settled by negotiation . . .' does not, in its plain meaning, suggest that formal negotiations in the framework of the Convention . . . constitute preconditions to be fulfilled before the seisin of the Court" (*ibid.*, para. 114). However, the Court also observed that "Article 22 does suggest that some attempt should have been made by the claimant party to initiate, with the Respondent Party, discussions on issues that would fall under CERD" *(ibid.)*.

The Court further recalls that, in the same Order, it also indicated that this provisional conclusion is without prejudice to the Court's definitive decision on the question of whether it has jurisdiction to deal with the merits of the case, which is to be addressed after consideration of the written and oral pleadings of both Parties. It stated that:

> "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, or relating to the merits themselves" (ibid., para. 148; see also *Anglo-Iranian Oil Co. (United Kingdom* v. *Iran), Preliminary Objection, Judgment*, *I.C.J. Reports 1952*, pp. 102-103; *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*, p. 249, para. 90).

130. Secondly, the Court is called upon to determine whether a State must resort to certain procedures before seising the Court. In this context, it notes that the terms "condition", "precondition", "prior condition", "condition precedent" are sometimes used as synonyms and sometimes as different from each other. There is in essence no difference between those expressions save for the fact that, when unqualified, the term "condition" may encompass, in addition to prior conditions, other conditions to be fulfilled concurrently with or subsequent to an event. To the extent that the procedural requirements of Article 22 may be conditions, they must be conditions precedent to the seisin of the Court even when the term is not qualified by a temporal element.

131. Thirdly, it is not unusual in compromissory clauses conferring jurisdiction on the Court and other international jurisdictions to refer to resort to negotiations. Such resort fulfils three distinct functions. In the first place, it gives notice to the respondent State that a dispute exists and delimits the scope of the dispute and its subject-matter. The Permanent Court of International Justice was aware of this when it stated in the *Mavrommatis* case that "before a dispute can be made the subject of an action in law, its subject-matter should have been clearly defined by means of diplomatic negotiations" (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 15).

In the second place, it encourages the Parties to attempt to settle their dispute by mutual agreement, thus avoiding recourse to binding third-party adjudication.

In the third place, prior resort to negotiations or other methods of peaceful dispute settlement performs an important function in indicating the limit of consent given by States. The Court referred to this aspect reflecting the fundamental principle of consent in the *Armed Activities* case in the following terms:

> "[The Court's] 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*." (*Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 39, para. 88; emphasis added.)

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132. The Court will now proceed to examine the reference in Article 22 of CERD to "negotiation or [to] the procedures expressly provided for" in CERD, with a view to ascertaining whether they constitute preconditions to be met before the seisin of the Court.

133. Leaving aside the question of whether the two modes of peaceful resolution are alternative or cumulative, the Court notes that Article 22 of CERD qualifies the right to submit "a dispute" to the jurisdiction of the Court by the words "which is not settled" by the means of peaceful resolution specified therein. Those words must be given effect.

In the *Free Zones of Upper Savoy and the District of Gex* case, the Permanent Court of International Justice had occasion to apply the well-established principle in treaty interpretation that words ought to be given appropriate effect. It stated that:

> "in case of doubt the clauses of a special agreement by which a dispute is referred 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" (*Free Zones of Upper Savoy and the District of Gex, Order of 19 August 1929, P.C.I.J., Series A, No. 22*, p. 13).

The International Court of Justice also emphasized the importance of the same principle in the *Corfu Channel* case, where it said:

> "It would indeed be incompatible with the generally accepted rules of interpretation to admit that a provision of this sort occurring in a special agreement should be devoid of purport or effect." (*Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 24; see also *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 25, para. 51.)

By interpreting Article 22 of CERD to mean, as Georgia contends, that all that is needed is that, as a matter of fact, the dispute had not been resolved (through negotiations or through the procedures established by CERD), a key phrase of this provision would become devoid of any effect.

134. Moreover, it stands to reason that if, as a matter of fact, a dispute had been settled, it is no longer a dispute. Therefore, if the phrase "which is not settled" is to be interpreted as requiring only that the dispute referred to the Court must in fact exist, that phrase would have no usefulness. Similarly, the express choice of two modes of dispute settlement, namely, negotiations or resort to the special procedures under CERD, suggests an affirmative duty to resort to them prior to the seisin of the Court. Their introduction into the text of Article 22 would otherwise be meaningless and no legal consequences would be drawn from them contrary to the principle that words should be given appropriate effect whenever possible.

135. The Court also observes that, in its French version, the above-mentioned expression employs the future perfect tense ("[t]out différend . . . qui n'aura pas été réglé par voie de négociation ou au moyen des procédures expressément prévues par la convention"), whereas the simple present tense is used in the English version. The Court notes that the use of the future perfect tense further reinforces the idea that a previous action (an attempt to settle the dispute) must have taken place before another action (referral to the Court) can be pursued. The other three authentic texts of CERD, namely the Chinese, the Russian and the Spanish texts, do not contradict this interpretation.

136. The Court further recalls that, like its predecessor, the Permanent Court of International Justice, it has had to consider on several occasions whether the reference to negotiations in compromissory clauses establishes a precondition to the seisin of the Court.

As a preliminary matter, the Court notes that, though similar in character, compromissory clauses containing a reference to negotiation (and sometimes additional methods of dispute settlement) are not always uniform. Some contain a time-element for negotiations, the expiry of which would trigger a duty to arbitrate or to have recourse to the Court. Furthermore, the language used contains variations such as "is not settled by" or "cannot be settled by". Sometimes, especially in older compromissory clauses, the expression used is "which is not" or "cannot be adjusted by negotiation" or "by diplomacy".

The Court will now consider its jurisprudence concerning compromissory clauses comparable to Article 22 of CERD. Both Parties rely on this jurisprudence as supportive of their respective interpretations of the ordinary meaning of Article 22.

137. In the *Armed Activities* case, the Democratic Republic of the Congo (DRC) invoked *inter alia* Article 29, paragraph 1, of the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) which used the formula "which is not settled by negotiation". The DRC denied that the compromissory clause in question contained four preconditions. According to the DRC, the clause contained only two conditions, namely that the dispute must involve the application or interpretation of the Convention and that it must have proved impossible to organize arbitration (*Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 37, para. 85). The Court, noting that the DRC had made "numerous protests against Rwanda's actions in alleged violation of international human rights law", went on to say: "[w]hatever 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" (*ibid*., pp. 40-41, para. 91).

138. In the same case, the Court, after having found that there was no dispute within the ambit of Article 75 of the World Health Organization (WHO) Constitution, went on to note, 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" (*ibid*., p. 43, para. 100).

139. Similarly, in its Advisory Opinion on the *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, the Court was asked to determine whether the United States was obliged to enter into arbitration procedure with the United Nations under Section 21, paragraph *(a)*, of the United Nations Headquarters Agreement, which provides that

> "*[a]ny dispute* between the United Nations and the United States concerning the interpretation or application of this 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" (*Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, I.C.J. Reports 1988*, p. 14, para. 7; emphasis added).

The Court noted that in order to be able to answer that question, it must, upon determination that there exists a dispute between the United Nations and the United States concerning the interpretation or application of the Headquarters Agreement, "satisfy itself that [that dispute] is one 'not settled by negotiation or other agreed mode of settlement'" (*ibid.*, p. 27, para. 34).

140. The Court observes that in each of the above-mentioned cases where the compromissory clause was comparable to that included in CERD, the Court has interpreted the reference to negotiations as constituting a precondition to seisin.

141. Accordingly, the Court concludes that in their ordinary meaning, the terms of Article 22 of CERD, namely "[a]ny dispute . . . which is not settled by negotiation or by the procedures expressly provided for in this Convention", establish preconditions to be fulfilled before the seisin of the Court.

(b) Travaux préparatoires

142. In light of this conclusion, the Court need not resort to supplementary means of interpretation such as the *travaux préparatoires* of CERD and the circumstances of its conclusion, to determine the meaning of Article 22.

However, the Court notes that both Parties have made extensive arguments relating to the *travaux préparatoires*, citing them in support of their respective interpretations of the phrase "a dispute which is not settled . . .". Given this and the further fact that in other cases, the Court had resorted to the *travaux préparatoires* in order to confirm its reading of the relevant texts (see, for example, *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 27, para. 55; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1995*, p. 21, para. 40; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002*, p. 653, para. 53), the Court considers that in this case a presentation of the Parties' positions and an examination of the *travaux préparatoires* is warranted.

* *

143. The Russian Federation contends that the compromissory clause contained in Article 22 was a result of a compromise reached during the CERD negotiations between the supporters and the opponents of the possibility of unilateral seisin of the Court. In its view, the discussions in the

Third Committee of the United Nations General Assembly reveal that even the supporters of the unilateral seisin acknowledged that recourse to the Court should be conditioned by previous attempts to settle the dispute through other means. Moreover, the Russian Federation asserts that the compromissory clause was a stumbling block in the CERD negotiations and was eventually accepted only due to the introduction of such conditions designed to address the concerns that various States had in submitting themselves to the jurisdiction of the Court. This was achieved through the adoption of "the Three-Power" amendment proposed by Ghana, Mauritania and the Philippines, which added after the phrase "is not settled by negotiation" the reference to the "procedures expressly provided for in CERD".

144. In the Russian Federation's view, the discussions in the Third Committee and the unanimous adoption of the "Three-Power" amendment confirm that the drafters considered the seisin of the Court as a last resort, after the settlement procedures referred to in Article 22, including negotiations, had been attempted and exhausted.

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145. Georgia, for its part, contends that the clause providing for the Court's jurisdiction and the clauses introducing the CERD conciliation mechanism were considered as separate and distinct by the drafters throughout the drafting process. According to Georgia, the CERD mechanism was thus intended to be applied without prejudice to other procedures for the settlement of disputes.

146. Moreover, Georgia asserts that no statements were made during the final discussions at the Third Committee to the effect that recourse to the Court was conditional upon previous attempts to settle the dispute through the CERD conciliation machinery or through negotiation, or that these two modes of dispute settlement were cumulative. In Georgia's view, the reference to the CERD mechanism and to negotiations was included in the compromissory clause in Article 22 merely to point out the existence of a non-mandatory opportunity to resort to alternative settlement procedures before seising the Court, and was not intended to establish preconditions to such seisin.

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147. The Court notes that at the time when CERD was being elaborated, the idea of submitting to the compulsory settlement of disputes by the Court was not readily acceptable to a number of States. Whilst States could make reservations to the compulsory dispute settlement provisions of the Convention, it is reasonable to assume that additional limitations to resort to judicial settlement in the form of prior negotiations and other settlement procedures without fixed time-limits were provided for with a view to facilitating wider acceptance of CERD by States.

Beyond this general observation relating to the circumstances in which CERD was elaborated, the Court notes that the usefulness of the *travaux préparatoires* in shedding light on the meaning of Article 22 is limited by the fact that there was very little discussion of the expression "a dispute which is not settled".

A notable exception and one to which some significance must be attached is the statement by the Ghanaian delegate, one of the sponsors of the "Three-Power" amendment on the basis of which the final wording of Article 22 of CERD was agreed. He stated: "[T]he 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*." (United Nations, *Official Records of the General Assembly, Twentieth Session, Third Committee*, 1367th Meeting, doc. A/C.3/SR.1367, 7 December 1965, p. 485, para. 29; emphasis added.) It should be borne in mind that this machinery encompassed negotiation which was already mentioned expressly in the text proposed by the Officers of the Third Committee (United Nations Economic and Social Council, Draft International Convention on the Elimination of All Forms of Racial Discrimination, suggestions for final clauses submitted by Officers of the Third Committee, United Nations doc. A/C.3/L.1237, 15 October 1965, Art. VIII).

The Court notes that whilst no firm inferences can be drawn from the drafting history of CERD as to whether negotiations or the procedures expressly provided for in the Convention were meant as preconditions for recourse to the Court, it is possible nevertheless to conclude that the *travaux préparatoires* do not suggest a different conclusion from that at which the Court has already arrived through the main method of ordinary meaning interpretation.

3. Whether the conditions for the seisin of the Court under Article 22 of CERD have been fulfilled

148. Having thus interpreted Article 22 of CERD to the effect that it imposes preconditions which must be satisfied before resorting to the Court, the next question is whether these preconditions were complied with.

149. First of all, the Court notes that Georgia did not claim that, prior to seising the Court, it used or attempted to use the procedures expressly provided for in CERD. The Court therefore limits its examination to the question of whether the precondition of negotiations was fulfilled.

(a) *The concept of negotiations*

150. Regarding negotiations, the Russian Federation refers to several factors that were taken into consideration by the Court in its jurisprudence when evaluating whether or not negotiations have been attempted and have reached a deadlock, such as the duration of negotiations and the authenticity of efforts to reach a negotiated conclusion. Based on its review of the Court's case law in this regard, it concludes that 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. In this regard, it refers to the decision of the Permanent Court of International Justice in the *Free Zones of Upper Savoy and the District of Gex* case, in which the judicial settlement of

international disputes was considered to be "simply an alternative to the direct and friendly settlement of such disputes between the parties" (*Order of 19 August 1929, P.C.I.J., Series A, No. 22*, p. 13). The Russian Federation further points to the Permanent Court's Advisory Opinion on *Railway Traffic between Lithuania and Poland*, where the obligation to negotiate was defined as an obligation "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 does not imply an obligation to reach agreement (*Advisory Opinion, 1931, P.C.I.J., Series A/B, No. 42*, p. 116).

151. In addition, relying on the separate opinion of Judge Sir Gerald Fitzmaurice in the *Northern Cameroons* case, the Russian Federation contends that the threshold to find the existence of negotiations is high; that it excludes mere disputations, such as in the form of exchange of arguments between States "across the floor of an international assembly, or circulating statements of their complaints or contentions to its member States" (*Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 123, separate opinion of Judge Sir Gerald Fitzmaurice). Moreover, on the basis of Judge Fitzmaurice's opinion, the Russian Federation contends that a dispute certainly cannot be considered as "settled by negotiation", when there was no attempt at "direct discussions between the parties" *(ibid.)*. Furthermore, the Russian Federation cites the Judgment in the *Armed Activities* case as supporting its contention that mere protests cannot amount to negotiations (*Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, pp. 40-41, para. 91).

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152. For its part, Georgia rejects the Russian Federation's definition of what constitutes negotiations (particularly its differentiation between "disputation" and "negotiation" and its contention that mere protests cannot amount to negotiation), as unreasonably stringent and departing from the established jurisprudence of the Court. According to Georgia, the case law of this Court and of its predecessor, the Permanent Court of International Justice, demonstrates that the threshold for negotiations is low; that substance is more important than form; that it is for the parties to determine whether further negotiations are likely to be fruitful; and that no purpose is to be served in the pursuit of hopeless or futile negotiations. In short, as per Georgia's submissions, the determination of the existence of negotiations is a relative and flexible one.

153. In particular, Georgia suggests that there is no requirement to follow a specific procedure or format of negotiations. It further contends that even very brief informal discussions in either bilateral or multilateral settings involving, for example, a simple communication of protest to a silent or intractable party, would constitute negotiations. In sum, according to Georgia, any indirect exchange between the parties to a dispute would constitute negotiations.

154. Furthermore, Georgia contends that negotiations between the Parties in this case need not expressly refer to CERD or its substantive provisions. Relying on the Court's Judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (*(Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, pp. 428-429, para. 83) and on its Order of 15 October 2008 in the present case, Georgia concludes that the only requirement is that the subject-matter of the dispute under CERD — i.e., racial discrimination — must have been discussed.

155. Finally, Georgia contends that the ordinary meaning of the phrase "*is not* settled by negotiation", as opposed to "*cannot* be settled by negotiation", only requires evidence that Georgia has made an attempt at negotiations and not that such negotiations have reached a deadlock (emphasis added by Georgia in its Written Statement).

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156. The Court must first address a series of issues involving the nature of the precondition of negotiations, namely: assessing what constitutes negotiations; considering their adequate form and substance; and determining to what extent they should be pursued before it can be said that the precondition has been met.

157. In determining what constitutes negotiations, the Court observes that negotiations are distinct from mere protests or disputations. Negotiations entail more than the plain opposition of legal views or interests between two parties, or the existence of a series of accusations and rebuttals, or even the exchange of claims and directly opposed counter-claims. As such, the concept of "negotiations" differs from the concept of "dispute", and requires — at the very least — a genuine attempt by one of the disputing parties to engage in discussions with the other disputing party, with a view to resolving the dispute.

158. Clearly, evidence of such an attempt to negotiate — or of the conduct of negotiations — does not require the reaching of an actual agreement between the disputing parties. In this regard, in its Advisory Opinion on *Railway Traffic between Lithuania and Poland*, the Permanent Court of International Justice characterized the obligation to negotiate as an obligation "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 does not imply an obligation to reach agreement . . ." (*Railway Traffic between Lithuania and Poland, Advisory Opinion, 1931, P.C.I.J., Series A/B, No. 42*, p. 116; see also *North Sea Continental Shelf (Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 48, para. 87; *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)*, Judgment of 20 April 2010, para. 150).

159. Manifestly, in the absence of evidence of a genuine attempt to negotiate, the precondition of negotiation is not met. However, where negotiations are attempted or have commenced, the jurisprudence of this Court and of the Permanent Court of International Justice clearly reveals that the precondition of negotiation is met only when there has been a failure of negotiations, or when negotiations have become futile or deadlocked (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 13); *South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, pp. 345-346; *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Judgment, I.C.J. Reports 1980*, p. 27, para. 51; *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, I.C.J. Reports 1988*, p. 33, para. 55; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 122, para. 20).

160. Furthermore, ascertainment of whether negotiations, as distinct from mere protests or disputations, have taken place, and whether they have failed or become futile or deadlocked, are essentially questions of fact "for consideration in each case" (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 13). Notwithstanding this observation, the jurisprudence of the Court has outlined general criteria against which to ascertain whether negotiations have taken place. In this regard, the Court has come to accept less formalism in what can be considered negotiations and has recognized "diplomacy by conference or parliamentary diplomacy" (*South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 346).

161. Concerning the substance of negotiations, the Court has accepted that the absence of an express reference to the treaty in question does not bar the invocation of the compromissory clause to establish jurisdiction (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 428, para. 83). However, to meet the precondition of negotiation in the compromissory clause of a treaty, these negotiations must relate to the subject-matter of the treaty containing the compromissory clause. In other words, the subject-matter of the negotiations must relate to the subject-matter of the dispute which, in turn, must concern the substantive obligations contained in the treaty in question.

162. In the present case, the Court is therefore assessing whether Georgia genuinely attempted to engage in negotiations with the Russian Federation, with a view to resolving their dispute concerning the Russian Federation's compliance with its substantive obligations under CERD. Should it find that Georgia genuinely attempted to engage in such negotiations with the Russian Federation, the Court would examine whether Georgia pursued these negotiations as far as possible with a view to settling the dispute. To make this determination, the Court would ascertain whether the negotiations failed, became futile, or reached a deadlock before Georgia submitted its claim to the Court.

(b) ***Whether the Parties have held negotiations on matters concerning the interpretation or application of CERD***

163. Against the background of these criteria, the Court now turns to the evidence submitted to it by the Parties to determine whether this evidence demonstrates, as stated by Georgia, that at the time it filed its Application on 12 August 2008, there had been negotiations between itself and the Russian Federation concerning the subject-matter of their legal dispute under CERD, and that these negotiations had been unsuccessful.

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164. As previously noted (see paragraph 33), the Parties referred the Court to several documents and statements relating to events in Abkhazia and South Ossetia from 1990 to the time of filing by Georgia of its Application. On the specific issue of the existence of negotiations on matters falling under CERD, Georgia submits evidence which in its view demonstrates that negotiations involving delegations from Georgia and the Russian Federation concerning the subject-matter of the present dispute have progressed, unsuccessfully, in numerous fora, including but not limited to: (i) the United Nations Geneva Process and the Coordinating Council for Georgia and Abkhazia, and the Group of Friends of Georgia; (ii) the Joint Control Commission for the Georgian-Ossetian Conflict Settlement; (iii) the Organization for Security and Co-operation in Europe; and (iv) the Council of the Heads of State of the Commonwealth of Independent States.

Georgia further alleges that the evidence which it submitted demonstrates the existence and subsequent failure of high-level bilateral negotiations between Georgia and the Russian Federation relating to various aspects of the present dispute.

165. Such negotiations are considered by Georgia to have dealt with specific matters falling under CERD, namely, the Russian Federation's direct participation in ethnic cleansing and other acts of discrimination against ethnic Georgians in South Ossetia and Abkhazia; the Russian Federation's prevention of ethnic Georgian IDPs from exercising their right of return to their homes in South Ossetia and Abkhazia; the Russian Federation's support, sponsorship and defence of discrimination against ethnic Georgians by other parties; and the Russian Federation's failure to prevent discrimination against ethnic Georgians in areas under its control.

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166. For its part, the Russian Federation, in addressing the above claims, essentially contends that the bilateral and multilateral contacts between itself and Georgia have not dealt with the question of racial discrimination, and thus cannot constitute negotiations on matters falling under

CERD. Precisely, the Russian Federation, upon commenting on the facts in the record, submits that, "[a]t 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". Similarly, the Russian Federation puts forth that the contacts between Georgia and the Russian Federation within the framework of international organizations, or in other multilateral fora, call for the same conclusion as the one made in respect of bilateral negotiations, namely that there have never been negotiations on the dispute alleged by Georgia on the application of CERD.

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167. The Court recalls its conclusions regarding the Russian Federation's first preliminary objection, as it is directly connected to the Russian Federation's second preliminary objection. After examination of the evidence submitted by the Parties, the Court concluded that a dispute between Georgia and the Russian Federation falling within the ambit of CERD arose only in the period immediately before the filing of the Application. Specifically, the evidence put forth by Georgia which pre-dates the beginning of armed hostilities in South Ossetia during the night of 7 to 8 August 2008 failed to demonstrate the existence of a legal dispute between Georgia and the Russian Federation on matters falling under CERD.

168. It stands to reason that it was only possible for the Parties to be negotiating the matters in dispute, namely, the Russian Federation's compliance with its obligations relating to the elimination of racial discrimination, between 9 August 2008 and the date of the filing of the Application, on 12 August 2008, i.e., the period during which the Court found that a dispute capable of falling under CERD had arisen between the Parties.

169. The Court's task at this point is therefore twofold: first, to determine whether the facts in the record show that, during this circumscribed period, Georgia and the Russian Federation engaged in negotiations with respect to the matters in dispute concerning the interpretation or application of CERD; and secondly, if the Parties did engage in such negotiations, to determine whether those negotiations failed, therefore enabling the Court to be seised of the dispute under Article 22.

170. Before the Court considers the evidence bearing on the answers to those two questions, it observes that negotiations did take place between Georgia and the Russian Federation before the start of the relevant dispute. These negotiations involved several matters of importance to the relationship between Georgia and the Russian Federation, namely, the status of South Ossetia and Abkhazia, the territorial integrity of Georgia, the threat or use of force, the alleged breaches of international humanitarian law and of human rights law by Abkhaz or South Ossetian authorities and the role of the Russian Federation's peacekeepers. However, in the absence of a dispute relating to matters falling under CERD prior to 9 August 2008, these negotiations cannot be said to have covered such matters, and are thus of no relevance to the Court's examination of the Russian Federation's second preliminary objection.

171. The Court begins its examination of the relevant evidence by recalling Georgia's factual narrative of the alleged failed negotiations which it contends took place between the night of 7 to 8 August and 12 August 2008. According to Georgia, after 8 August 2008, when it alleges the Russian Federation commenced its campaign of ethnic cleansing against ethnic Georgians in South Ossetia and Abkhazia, the former urgently attempted to engage with the latter to bring the violence against Georgian civilians to a halt. With diplomatic relations suspended, Georgia claims it appealed to the Russian Federation for talks via the United Nations. On 10 August 2008, Georgia explains that it requested an emergency session of the Security Council, during which it informed the Council of the gross human rights violations then being perpetrated against ethnic Georgians by the Russian Federation's armed forces that amounted to a process of exterminating the Georgian population. According to Georgia, the Russian Federation's Permanent Representative used the Security Council session to acknowledge, and deny, the public address President Saakashvili had made the previous day in which he explicitly accused the Russian Federation of perpetrating ethnic cleansing. Finally, Georgia submits that the Russian Federation's Minister for Foreign Affairs publicly made clear that further contacts between Georgia and the Russian Federation were impossible.

172. Georgia seeks to support this presentation of facts, which in its view demonstrates how it attempted to negotiate with the Russian Federation, and how these attempts were unsuccessful, by submitting certain documents and statements to the Court. These documents and statements are of relevance both to the first and the second preliminary objection raised by the Russian Federation and the Court has therefore already addressed them in its consideration of the first preliminary objection (see paragraphs 109 to 113). The first statement cited by Georgia from this period is a press briefing dated 9 August 2008 from the Office of the President of Georgia. In this statement made during a meeting with foreign journalists, President Saakashvili declared that:

> "Russian troops, Russian tanks that moved in, into South Ossetia on their way expelled the whole ethnically Georgian population of South Ossetia. This morning they've committed the ethnic cleansing in all areas they control in South Ossetia, they have expelled ethnic Georgians living there. Right now they are trying to set up the ethnic cleansing of ethnic Georgians from upper Abkhazia — Kodori Gorge."

173. The second document submitted by Georgia as evidencing negotiations during the relevant period is the *procès-verbal* of the Security Council meeting convened upon Georgia's request (United Nations doc. S/PV.5953, 10 August 2008), during which the Georgian representative described at length the armed activities taking place on Georgian territory. Accusing the Russian Federation of misconduct, the Georgian representative declared that "[t]he process of exterminating the Georgian population and annihilating Georgian statehood is in full swing".

174. In his subsequent statement before the Security Council, the Russian Federation's representative placed the blame on Georgia for the outbreak of armed activities. In doing so, he accused Georgian authorities of ethnically cleansing a portion of its own population:

> "So how can we describe this action by the Georgian leadership? It has been said that aggression is only when one party attacks another. But if the aggression is carried out against your own people, is that in any way better? What legal terms can be used to describe what has been done by the Georgian leadership? Can we use 'ethnic cleansing', for example, when, over a number of days, nearly 30,000 of the 120,000 people of South Ossetia have become refugees who have fled to Russia: more than a quarter of the population. They went across the border from South Ossetia to the North at great risk to their lives. Is that ethnic cleansing or is it not? Should we describe that as genocide or not? When out of that population of 120,000, 2,000 innocent civilians die on the first day, is that genocide or is it not? How many people, how many civilians must die before we describe it as genocide?"

175. During the same meeting, both Georgia's and the Russian Federation's representatives made additional comments to the Security Council members. The Georgian representative urged the members to take action by declaring that "Russia's intention [is] to erase Georgian statehood and to exterminate the Georgian people". Responding to the Georgian representative's allegation as to the Russian Federation's intention, the latter's representative asserted that "the intention of the Russian Federation in this case is to ensure that the people of South Ossetia and Abkhazia not fear for their lives or for their identity".

176. Finally, Georgia also submits the transcript of a press conference held in Moscow on 12 August 2008 — the date of Georgia's filing of its Application — by the Russian Federation's Minister for Foreign Affairs and the Minister for Foreign Affairs of Finland and Chairman-in-Office of the OSCE.

177. The Court takes note of certain significant elements of the content of this press conference. First, the Russian Federation places the blame for the outbreak of armed activities on the present Georgian leadership. Secondly, the Russian Federation asserts that it has "no trust in Mikhail Nikolayevich Saakashvili," and that "mov[ing] to mutually respectful relations . . . is hardly possible with the present Georgian leadership". Thirdly, the Russian Federation announces that its "approaches toward the negotiation process will undergo substantial change". Fourthly, the Russian Federation proposes its view of the essential next steps in the restoration of peace, including the cessation of armed activities, and the "signing of a legally binding agreement on the non-use of force" between Georgia, Abkhazia and South Ossetia. Fifthly, the Russian Federation has received confirmation from the Chairman-in-Office of the OSCE that Georgia is ready for the conclusion of such a pledge on the non-use of force. Additionally, the Russian Federation's Foreign Minister declared that:

> "As a matter of fact, it will be no exaggeration to say that the talk is about ethnic cleansings, genocide and war crimes [committed by Georgia].
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> . . . . . .
>
> Mr. Saakashvili . . . claimed hysterically that the Russian side wanted to annex the whole of Georgia and, in general, he did not feel shy of using the term ethnic cleansings, although, true, it was Russia that he accused of carrying out those ethnic cleansings."

178. The Court makes two observations on the basis of the Russian Federation's Foreign Minister's remarks. First, with regard to the subject-matter of CERD, the Court notes that the topic of ethnic cleansing had not become the subject of genuine negotiations or attempts at negotiation between the Parties. The Court is of the view that although the claims and counter-claims concerning ethnic cleansing may evidence the existence of a dispute as to the interpretation and application of CERD, they do not constitute attempts at negotiations by either Party.

179. Secondly, the Court observes that the issue of negotiations between Georgia and the Russian Federation is complex. On the one hand, the Russian Federation's Foreign Minister manifested his discontent with regard to President Saakashvili personally, and stated that he "do[es] not think that Russia will have the mindset not only to negotiate, but even to speak with Mr. Saakashvili" and that "Mr. Saakashvili can no longer be our partner and it would be best if he left". On the other hand, the Foreign Minister did not make his desire to see President Saakashvili "repent" for his "crime against our citizens" a "condition for ending this stage of the military operation", and for resuming talks on the non-use of force. He further stated that:

> "As to Georgia, we have always treated and continue to treat the Georgian people with deep respect. We continue to want to live with them in friendship and harmony and are convinced that the Georgian people will yet display their wisdom."

180. Notwithstanding the tone of certain remarks made by the Foreign Minister of the Russian Federation about President Saakashvili, the Court considers that overall the Russian Federation did not dismiss the possibility of future negotiations on the armed activities in which it was engaged at the time, and on the restoration of peace between Georgia, Abkhazia and South Ossetia. However, the Court considers that the subject-matter of such negotiations was not the compliance by the Russian Federation with its obligations relating to the elimination of racial discrimination. Therefore, regardless of the Russian Federation's ambiguous and perhaps conflicting statements on the subject of negotiations with Georgia as a whole, and President Saakashvili personally, these negotiations did not pertain to CERD-related matters. As such, whether the Russian Federation wanted to end or to continue negotiations with Georgia on the matter of the armed conflict is of no relevance for the Court in the present case. Consequently, remarks by the President and by the Foreign Minister of the Russian Federation regarding the prospects of talks with the Georgian President did not terminate the possibility of CERD-related negotiations, as those were never genuinely or specifically attempted.

181. In sum, the Court is unable to consider these statements — whether in the Georgian presidential press briefing or at the Security Council meeting — as genuine attempts by Georgia to negotiate matters falling under CERD. As outlined in detail with regard to the Russian Federation's first preliminary objection, the Court considers that these accusations and replies by both Parties on the issues of "extermination" and "ethnic cleansing" attest to the existence of a dispute between them on a subject-matter capable of falling under CERD. However, they fail to demonstrate an attempt at negotiating these matters.

182. The Court is thus also unable to agree with Georgia's submission when it claims that "Russia's refusal to negotiate with Georgia in the midst of its ethnic cleansing campaign, and two days prior to the filing of the Application is sufficient to vest the Court with jurisdiction under Article 22". The Court concludes that the facts in the record show that, between 9 August and 12 August 2008, Georgia did not attempt to negotiate CERD-related matters with the Russian Federation, and that, consequently, Georgia and the Russian Federation did not engage in negotiations with respect to the latter's compliance with its substantive obligations under CERD.

183. The Court has already observed (see paragraph 149) the fact that Georgia did not claim that, prior to the seisin of the Court, it used or attempted to use the other mode of dispute resolution contained at Article 22, namely the procedures expressly provided for in CERD. Considering the Court's conclusion, at paragraph 141, that under Article 22 of CERD, negotiations and the procedures expressly provided for in CERD constitute preconditions to the exercise of its jurisdiction, and considering the factual finding that neither of these two modes of dispute settlement was attempted by Georgia, the Court does not need to examine whether the two preconditions are cumulative or alternative.

184. The Court accordingly concludes that neither requirement contained in Article 22 has been satisfied. Article 22 of CERD thus cannot serve to found the Court's jurisdiction in the present case. The second preliminary objection of the Russian Federation is therefore upheld.

IV. THIRD AND FOURTH PRELIMINARY OBJECTIONS

185. Having upheld the second preliminary objection of the Russian Federation, the Court finds that it is required neither to consider nor to rule on the other objections to its jurisdiction raised by the Respondent and that the case cannot proceed to the merits phase.

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186. The Court in its Order of 15 October 2008 indicated certain provisional measures. This Order ceases to be operative upon the delivery of this Judgment. The Parties are under a duty to comply with their obligations under CERD, of which they were reminded in that Order.

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187. For these reasons,

THE COURT,

(1) *(a)* by twelve votes to four,

Rejects the first preliminary objection raised by the Russian Federation;

IN FAVOUR: *President* Owada; *Judges* Al-Khasawneh, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Cançado Trindade, Yusuf, Greenwood, Donoghue; *Judge* ad hoc Gaja;

AGAINST: *Vice-President* Tomka; *Judges* Koroma, Skotnikov, Xue;

(b) by ten votes to six,

Upholds the second preliminary objection raised by the Russian Federation;

IN FAVOUR: *Vice-President* Tomka; *Judges* Koroma, Al-Khasawneh, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Yusuf, Greenwood, Xue;

AGAINST: *President* Owada; *Judges* Simma, Abraham, Cançado Trindade, Donoghue; *Judge* ad hoc Gaja;

(2) by ten votes to six,

Finds that it has no jurisdiction to entertain the Application filed by Georgia on 12 August 2008.

IN FAVOUR: *Vice-President* Tomka; *Judges* Koroma, Al-Khasawneh, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Yusuf, Greenwood, Xue;

AGAINST: *President* Owada; *Judges* Simma, Abraham, Cançado Trindade, Donoghue; *Judge* ad hoc Gaja.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this first day of April, two thousand and eleven, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of Georgia and the Government of the Russian Federation, respectively.

(Signed) Hisashi OWADA,
President.

(Signed) Philippe COUVREUR,
Registrar.

President OWADA and Judges SIMMA, ABRAHAM, DONOGHUE and Judge *ad hoc* GAJA append a joint dissenting opinion to the Judgment of the Court; President OWADA appends a separate opinion to the Judgment of the Court; Vice-President TOMKA appends a declaration to the Judgment of the Court; Judges KOROMA, SIMMA and ABRAHAM append separate opinions to the Judgment of the Court; Judge SKOTNIKOV appends a declaration to the Judgment of the Court; Judge CANÇADO TRINDADE appends a dissenting opinion to the Judgment of the Court; Judges GREENWOOD and DONOGHUE append separate opinions to the Judgment of the Court.

(Initialled) H. O.

(Initialled) Ph. C.

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