

INTERNATIONAL COURT OF JUSTICE

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

GEORGIA
v.
RUSSIAN FEDERATION

WRITTEN STATEMENT OF GEORGIA
ON PRELIMINARY OBJECTIONS

VOLUME I

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CHAPTER I.
INTRODUCTION

1.1 In accordance with the Court's *Order* of 11 December 2009, Georgia submits this *Written Statement of Observations and Submissions on Preliminary Objections*, in response to Russia's *Preliminary Objections* of 1 December 2009. This *Written Statement* supplements the submissions on law and evidence put forward in Georgia's *Memorial* of 2 September 2009, which are maintained in full.

1.2 In its *Preliminary Objections* Russia has asked 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”¹. Russia's arguments generally mirror those it made at the provisional measures phase in September 2009, which did not find favour with the Court. Indeed, a number of arguments now maintained by Russia were rejected by all members of the Court. With the passage of time Georgia is now in a position to respond even more strongly to Russia's objections, which are without merit. Russia's arguments are not supported by this Court's jurisprudence or by other human rights bodies established under instruments of universal application. If accepted, Russia's claims would require the Court to depart from its settled practice, introducing uncertainty into significant areas of the law. To the extent that Russia invites the Court to abandon its established case-law, Russia has provided no legal or policy arguments that could possibly justify such radical steps. In short, Russia has identified no grounds that can prevent the Court from exercising jurisdiction under Article 22 of the Convention on the Elimination of All Forms of Racial Discrimination (the 1965 Convention).

¹ Preliminary Objections of the Russian Federation, Vol. I (1 December 2009) (hereinafter “RPO”).

Section I. Summary of Argument

1.3 This *Written Statement* consists of six Chapters, followed by Georgia's Submissions.

1.4 **Chapter 2**, which immediately follows this Introduction, responds to Russia's first preliminary objection, namely Russia's contention that there is no legal dispute between it and Georgia regarding the interpretation or application of the 1965 Convention. This objection is based on the untenable claim that – despite Georgia's longstanding claims and the overwhelming evidence before the Court that Russian forces committed or allowed or failed to prevent ethnic cleansing and other violent acts of ethnic discrimination, including killings, beatings and destruction of property, and that they forcibly denied the right to return of internally displaced persons – no dispute has arisen or been raised in respect of matters that fall under the 1965 Convention.

1.5 The evidence shows that Georgia repeatedly raised disputes with Russia, commencing long before the *Application* was filed on 12 August 2008, in which Georgia attributed responsibility to Russia for participating in ethnic cleansing campaigns against ethnic Georgians in South Ossetia and Abkhazia; for forcibly preventing ethnic Georgians expelled by means of these campaigns from exercising their right of return to those territories; for supporting, sponsoring and defending discrimination against ethnic Georgians by other parties; and for failing to take action to prevent such discrimination in areas of Georgia under its control. To be sure, Russia uniformly denied responsibility for these acts; but Russia's denials only serve to confirm the existence of disputes between the two States over these matters, which plainly fall under the 1965 Convention.

1.6 Russia's argument in support of its claim that no legal dispute under the Convention exists is based on a misconceived approach to the evidence and

provides no basis upon which to avoid the Court's exercise of jurisdiction. If accepted, given the clear conclusions of the CERD Committee as to the scope of the Convention and the matters falling thereunder, it is difficult to envision circumstances in which a dispute falling under an international human rights convention could ever be said to have arisen.

1.7 Chapter 2 demonstrates the falsity of Russia's attempt to purge all references to ethnic discrimination from the historical record. A small fraction of the pertinent evidence of Georgia's repeated attempts to raise with Russia disputes under the 1965 Convention was presented during the provisional measures phase; more was described in the *Memorial*. Still more is detailed in Chapter 2, which shows that Georgia, over a period of more than a decade prior to the filing of the *Application*, has consistently raised its serious concerns with Russia over unlawful acts of 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 the 1965 Convention. Indeed, the day after Russia renewed its acts of ethnic cleansing in South Ossetia and Abkhazia in August 2008, Georgia's President Mikheil Saakashvili publicly accused Russian military forces of perpetrating acts of ethnic discrimination, referring explicitly to "ethnic cleansing" by "Russian troops"². Russia has long known about Georgia's claims relating to matters falling under the 1965 Convention and has consistently denied them: its own Minister of Foreign Affairs specifically rejected President Saakashvili's accusation³. Many more such examples are provided in Chapter 2.

² Office of the President of Georgia, Press Briefing, "President of Georgia Mikheil Saakashvili met foreign journalists" (9 August 2008). Written Statement of Georgia on Preliminary Objections (hereinafter "GWS"), Vol. IV, Annex 184.

³ Ministry of Foreign Affairs of the Russian Federation, *Transcript of Remarks and Response to Media Questions by Russian Minister of Foreign Affairs Sergey Lavrov at Joint Press Conference After Meeting with Chairman-in-Office of the OSCE and Minister for Foreign Affairs of Finland Alexander Stubb, Moscow, August 12, 2008* (12 August 2008). GWS, Vol. IV, Annex 187.

1.8 **Chapter 3** responds to Russia’s second preliminary objection, which asserts that Georgia did not fulfil the procedural conditions necessary for the seisin of the Court under Article 22 of the Convention. The first part of Chapter 3 demonstrates that, contrary to Russia’s claims, the Convention does not require a party to the 1965 Convention to invoke and exhaust the conciliation mechanisms established by Articles 11 and 12 of the Convention in order to be able to invoke the jurisdiction of the Court under Article 22. In support of that claim Russia seeks to rewrite the plain terms of the Convention and depart from their ordinary meaning, claiming that the word “or” should be read to mean “and”. This approach finds no support in the Court’s jurisprudence and was not accepted by any judge at the provisional measures phase of this case. Russia has introduced no new material to enhance the force of this argument, and there is nothing in the negotiating history of the Convention to provide any additional support. The argument is hopeless.

1.9 Nor, despite Russia’s efforts to assert the contrary, does Article 22’s ordinary meaning impose any obligation on a party to the 1965 Convention to enter into negotiations before invoking the Court’s jurisdiction under Article 22; all that is required is for the Court to determine that the dispute has not already been settled by negotiations, as the Court has long and consistently made clear since 1984. Russia has provided no arguments that would justify the Court’s abandonment of its settled jurisprudence. Article 22 provides no material differences with the analogous provision in the 1956 Treaty that allowed the Court to justify its finding of jurisdiction in 1984 in the case brought by Nicaragua against the United States⁴.

⁴ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment, I.C.J. Rep. 1984, para. 83.

1.10 But even if the Court did now decide that evidence of attempts at negotiations were required, that standard has plainly been met. Since the mid-1990s there have been repeated diplomatic exchanges between Georgia and Russia over the very matters that fall under the 1965 Convention and are alleged in the *Application*. These matters have been raised bilaterally and channelled through multilateral organizations, and they plainly constitute attempts to negotiate on the part of Georgia, again in accordance with the settled jurisprudence of the Court. This was the finding of the Court at the provisional measures phase, on the basis of limited evidence then put forward, which has now been amply supplemented both in the *Memorial* and in this *Written Statement*.

1.11 In **Chapter 4**, Georgia addresses the third preliminary objection of Russia, which asserts that the Court lacks jurisdiction *ratione loci*. In essence, Russia's argument is that, contrary to the Court's well-established jurisprudence on the extraterritorial application of human rights law as reflected in universal instruments, Russia is free to engage in acts of racial discrimination that are prohibited by the Convention so long as they occur outside of the territory of Russia. In such circumstances, Russia claims, there can be no violation of the 1965 Convention. This unhappy claim is inconsistent with the jurisprudence of this Court and practice under international human rights instruments. General international law has long recognized the extraterritorial application of human rights obligations of the kind reflected in the 1965 Convention where they arise in human rights instruments of a universal character, as in the circumstances of this case. Moreover, contrary to Russia's alternative assertion, the grounds for extraterritorial application are not "exceptional": international jurisprudence recognizes the application of instruments such as the 1965 Convention in areas beyond the territory of the respondent State in circumstances where that State exercises power or authority over the victims of its own alleged human rights violations, wherever such victims are situated. Finally, and in the alternative, the

evidence shows that Russia has been in “effective control” of the territories of South Ossetia and Abkhazia at all relevant times, a standard that Russia accepts imposes obligations upon it in respect of the 1965 Convention.

1.12 **Chapter 5** responds to Russia’s fourth and final preliminary objection, namely that the Court’s jurisdiction is limited *ratione temporis*. As described in this Chapter, Russia’s effort to raise an issue of retrospectivity is without merit. Its desire to identify “a tension” between Georgia’s treatment of events in the 1990s and the relief sought with respect to continuing violations and acts occurring after 2 July 1999 is without any foundation. Russia’s arguments are inconsistent with the 1965 Convention and international case-law and practice, and it is plain that the Court can take cognizance of acts occurring prior to July 1999, not least because the effects of the violations for which Russia is responsible are continuing. Equally misconceived is Russia’s claim that the Court cannot deal with facts or events subsequent to the filing of the *Application*, especially as these facts and events form part of the same dispute which is the subject of the *Application* and do not introduce any new claims or disputes.

1.13 In **Chapter 6** Georgia addresses its obligation under Paragraph 149(D) of the Court’s *Order* of 15 October 2008 indicating provisional measures, which requires the Parties to update the Court regarding compliance with that *Order*. Georgia shows that since its most recent update in the *Memorial*, Russia has maintained its acts of ethnic discrimination in a manner that manifestly violates the provisional measures indicated in the *Order*, not least by continuing to support and failing to prevent ethnic discrimination and by refusing to allow the right of return of internally displaced persons on grounds of ethnic origin.

Section II. Observations on Russia's Approach

1.14 Before turning to a more detailed explication of the arguments set forth above, Georgia will pause briefly to comment on Russia's principal strategies in its *Preliminary Objections*. Russia expends much energy suggesting that Georgia has conjured an "artificial" dispute over racial discrimination where none exists, for the sole purpose of establishing a jurisdictional foothold with the Court. According to Russia, the disputes generated by the conflicts in South Ossetia and Abkhazia are many and varied, and include disputes related to the legal status of territory, the unlawful use of force and violation of international humanitarian law. Russia seems to accept that there may be many disputes, but denies that any of them relate to matters falling under the 1965 Convention.

1.15 Russia sought to buttress this demonstrably false claim in its *Preliminary Objections* by presenting the Court with a misleading description of the findings made in the Report of the European Union's Independent International Fact-Finding Mission on the Conflict in Georgia (the EU Report), which was publicly released in September 2009. In that regard, Russia chose to discuss only those parts of the Report that addressed the initiation of large-scale armed conflict during the night of 7 August 2008, despite the fact that this has no relevance to the present case, which concerns only Russia's responsibility for ethnic discrimination in breach of the 1965 Convention. Russia systematically excluded all discussion of any other part of the Report. This approach is consistent with Russia's treatment of the case-law of the Court, of the texts of international conventions, and of the negotiating history of the 1965 Convention: an extreme and selective approach. As with these other materials, Georgia invites the Court to treat Russia's claims and arguments with caution.

1.16 Russia’s reason for adopting this approach is clear: to create the false impression that Georgia’s dispute with Russia relates only to matters that are unconnected with obligations falling under the 1965 Convention, and that they relate only to legal issues concerning the use of force and humanitarian law. This is manifestly inaccurate, and reflects a serious distortion of the findings made by the EU Mission. It therefore falls to Georgia to present the Court with an accurate picture of its conclusions. As will be readily apparent, the EU Report confirms the evidence presented by Georgia in the *Memorial*: ethnic discrimination and matters falling under the 1965 Convention lie at the very heart of Georgia’s dispute with Russia.

1.17 *First*, the Report expressly confirms as fact that “ethnic cleansing was indeed practised against ethnic Georgians in South Ossetia both during and after the August 2008 conflict”⁵. Among other things, the EU Mission found compelling evidence of “widespread campaigns of looting and destruction of ethnic Georgian settlements” and that ethnic Georgians were subjected to serious human rights abuses, including “ill-treatment, gender-related crime including rape, assault, hostage-taking and arbitrary arrests”⁶. Indeed, the EU Report verified that much of the ethnically-targeted violence occurred after the cessation of hostilities on 10 August 2008, specifically concluding that such “acts were perpetrated after the ceasefire came into effect, raising serious concerns about the co-responsibility of those forces in control of the situation” – i.e., Russia – “whose duty it was to protect the civilian population”⁷.

1.18 The EU Mission also found even where Russian troops did not commit such violent acts of discrimination themselves, they failed to prevent Ossetian

⁵ Independent International Fact-Finding Mission on the Conflict in Georgia, *Report*, Vol. I (September 2009) (hereinafter “IIFFMCG Report, Vol. I”), para. 27. GWS, Vol. III, Annex 120.

⁶ *Ibid.*, para. 28.

⁷ *Ibid.*, para. 25. GWS, Vol. III, Annex 120.

forces from engaging in acts of ethnic discrimination, and that they did so even where those acts occurred in their own presence. In particular, the EU Report described the “failure by Russian forces to prevent and stop violations” both “before and after the ceasefire in South Ossetia and the adjacent territories”⁸. The failure of the Russian army to prevent Ossetian forces from committing these acts of violent ethnic discrimination is not surprising in light of the Mission’s further conclusion that Ossetian forces were under Russia’s *de facto* control: “the separatist governments and security forces were manned by Russian officials” who were “appointed” by “Russia”⁹.

1.19 *Second*, the EU Mission concurs with the evidence presented by Georgia in the *Memorial* regarding the pervasive discrimination against ethnic Georgians who remain under Russian occupation. Specifically, the EU fact-finders determined that the “rights as a minority” of the ethnic Georgian communities in the Gali District of Abkhazia continue to be “endangered”¹⁰, and that discrimination in Akhagori, located adjacent to South Ossetia but still under Russian occupation, “continues to be a matter of concern, as ethnic Georgians are still leaving the region”¹¹.

1.20 *Third*, the EU Mission’s findings confirm that Russia is blocking ethnic Georgians from exercising their lawful right of return. In that regard, the EU

⁸ *Ibid.*, para. 28. GWS, Vol. III, Annex 120.

⁹ Independent International Fact-Finding Mission On the Conflict in Georgia, Report Vol. II (September 2009) (hereinafter “IIFFMCG Report, Vol. II”), p. 19. GWS, Vol. III, Annex 121. The Report quoted with approval a Russian journalist who reported that the “power elite” of South Ossetia is a “joint business venture between KGB generals and Ossetian entrepreneurs using money allocated by Moscow for the fight against Georgia”. *Ibid.* See also *ibid.* at p. 132 (“Russian officials already had *de facto* control over South Ossetia’s institutions before the outbreak of the armed conflict, and especially over security institutions and security forces”); *ibid.* at p. 134 (concluding that the “policies and structures” of Abkhazia, “particularly its security and defence institutions, remain to a large extent under control of Moscow”).

¹⁰ IIFFMCG Report, Vol. I, para. 25. GWS, Vol. III, Annex 120.

¹¹ *Ibid.*, para. 27. GWS, Vol. III, Annex 120.

Report “stressed” that Russia “must take appropriate measures to ensure that IDP/refugees, including those from the conflicts of the early 1990s, are able to return to their homes with no conditions imposed other than those laid down in relevant international standards”¹².

1.21 In short, the EU Report undermines Russia’s central contention that ethnic discrimination is not a feature of the conflicts in South Ossetia and Abkhazia, and is not a matter in dispute between the two States. Indeed, the Report establishes the reverse: ethnic discrimination in relation to matters falling under the Convention is an essential element of those conflicts. The Mission’s conclusions in that regard are clear. In describing the massive campaign to burn ethnic Georgian homes, the Report “stressed” that “[t]he practice of burning reached such a level and scale that it is possible to state that it *characterised* the violence of the conflict in South Ossetia¹³. Accordingly, the EU Mission found that although the “conflict in Georgia” is not “solely related to ethnic and minority issues”, this “consideration [is] critical”¹⁴. That is Georgia’s position as well, and it aptly articulates why it was appropriate for Georgia to invoke the Court’s jurisdiction under the 1965 Convention.

1.22 Another misrepresentation that permeates the *Preliminary Objections* which merits comment is an attempt by Russia to portray the dispute over ethnic discrimination underlying this case as one between Georgia, on the one hand, and the separatist authorities in South Ossetia and Abkhazia on the other. Russia claims that, far from being a party to this dispute, it was actually a peacemaker. Typical of this approach is its contention at paragraph 1.29 of the *Preliminary*

¹² *Ibid.*, para. 28. GWS, Vol. III, Annex 120. Elsewhere, the Mission concluded that “serious obstacles have prevented IDPs from returning to their homes in South Ossetia,” and it therefore declared that Russia “should take all appropriate steps to ensure that IDPs can return to their homes”. *Ibid.*, p. 401. GWS, Vol. III, Annex 121.

¹³ *Ibid.*, p. 366 (emphasis added). GWS, Vol. III, Annex 121.

¹⁴ *Ibid.*, p. 405. GWS, Vol. III, Annex 121.

Objections that it was “perceived by all relevant actors, including Georgia, as being a facilitator and a State contributing stabilising peace-keeping forces”¹⁵. Elsewhere, Russia contends that “Georgia never alleged that the Russian Federation was a party” to the conflicts and that Georgia “frequently confirmed the internationally recognized role of the Russian Federation as a third-party facilitator to those conflicts”¹⁶.

1.23 This is a further example of Russia’s propensity to prefer form over substance. It is also inaccurate, and a serious distortion of history. Georgia has long made clear its view that Russia is a party to the disputes it has raised under the 1965 Convention, not a facilitator of their peaceful resolution. As early as October 2001, Georgia stated that “instead of facilitating conflict settlement, [Russian peacekeepers] rather instigate it”¹⁷. Georgia reiterated this position on numerous occasions and in many international fora. For example, in June 2006, Georgia reported to the United Nations that Russia is not a “facilitator in the settlement of conflict” and does not “exercise the impartiality which is an inherent part of this status”¹⁸. Georgia likewise informed the OSCE in September 2006 that “the Russian Federation is a side in conflicts, and not an impartial facilitator”¹⁹. Also in 2006, Georgia’s Ministry of Foreign Affairs publicly stated that the “Russian side’s strong assertions that it is not a party to the conflict, are

¹⁵ RPO, para. 1.29.

¹⁶ *Ibid.*, para. 1.8.

¹⁷ Resolution of the Parliament of Georgia, Concerning the Situation on the Territory of Abkhazia, (11 October 2001). GWS, Vol. IV, Annex 145.

¹⁸ U.N. General Assembly, *Letter dated 1 June 2006 from the Permanent Representative of Georgia to the United Nations addressed to the Secretary-General, Annex*, U.N. Doc. A/60/872 (2 June 2006). GWS, Vol. III, Annex 80.

¹⁹ OSCE, *Statement by the Delegation of Georgia*, PC.DEL/886/06 (18 September 2006). GWS, Vol. III, Annex 109.

unpersuasive, to put it in the mildest possible terms, and totally ungrounded”²⁰. The diplomatic record is replete with similar statements by Georgia²¹.

1.24 There is no justification for Russia’s false claim that it was considered by Georgia to be an impartial facilitator. Georgia repeatedly and specifically denounced Russia’s claimed status as a facilitator in the months preceding the filing of the *Application*. For example, on 24 March 2008, Georgia informed the UN Secretary-General and Security Council that “the Russian Federation has deprived itself of any political, legal or moral right to claim the role of a neutral and unbiased mediator in the conflict resolution process”²². On 12 May 2008, President Saakashvili stated: “It is absolutely clear that Russian peacekeepers are not legitimate participants of the process. Russia is a party in the process. Unfortunately, the Russian Federation and its officials are violating international

²⁰ Ministry of Foreign Affairs of Georgia, *Statement of the Ministry of Foreign Affairs of Georgia on the Situation in Tskhinvali district/South Ossetia* (14 July 2006). GWS, Vol. IV, Annex 165.

²¹ A few examples of the many that could be provided suffice to illustrate the point. See, e.g., Ministry of Foreign Affairs of Georgia, *Comments of the Department of the Press and Information on the statement by the Ministry of Foreign Affairs of the Russian Federation over the situation in the Kodori Gorge* (1 August 2006) (“Russia gives up on its role as an unbiased mediator facilitating a conflict resolution process, provides an increasingly active support for aggressive separatism and does all in its power to obstruct political settlement of the conflicts...”). GWS, Vol. IV, Annex 166; Ministry of Foreign Affairs of Georgia, *Comment of the Department of the Press and Information on the visit of Secretary of State and Deputy Minister for Foreign Affairs of the Russian Federation G. Karasin to Abkhazia, Georgia* (10 August 2006) (“Russia, rather than acting as an unbiased facilitator in the conflict settlement process, is an active supporter of aggressive separatism”, and “upholds only its own interests in the region and does all in its power to impede any progress towards resolution of the territorial conflicts and restoration of Georgia’s territorial integrity”). GWS, Vol. IV, Annex 167.

²² U.N. General Assembly, Security Council, *Identical letters dated 25 March 2008 from the Permanent Representative of Georgia to the United Nations addressed to the Secretary-General and the President of the Security Council*, Annex, U.N. Doc. A/62/765-S/2008/197 (26 March 2008). GWS, Vol. III, Annex 90. See also U.N. General Assembly, *Letter dated 28 April 2008 from the Permanent Representative of Georgia to the United Nations addressed to the Secretary-General*, Annex, U.N. Doc. A/62/824 (29 April 2008) (“It is absolutely clear that the Russian Federation has lost all legal, political and moral right to be a State facilitating the settlement of the conflict as it has already become a party to the conflict, which make the presence of its peacekeepers on the territory of Georgia extremely risky.”). GWS, Vol. III, Annex 93.

norms of conduct”²³. On 18 July 2008, Georgia’s State Minister for Reintegration stated that “Russia is not an impartial side in this conflict”²⁴. And on 25 July 2008, three weeks before filing the *Application*, Georgia told the Security Council that “the Russian Federation acts as a party to the conflict and has no will and ability to guarantee the peaceful settlement of disputes”²⁵.

1.25 This was also the conclusion of the European Union’s Fact-Finding Mission, which concluded that, contrary to its formal designation as a “facilitator”, in reality Russia was a party to the conflict:

Russia was given the role of facilitator in the Georgian-Abkhaz and the Georgian-Ossetian negotiation processes, and that of a provider of peacekeeping forces. This formula, while seemingly in line with the rules of *Realpolitik*, seriously affected the existing political equilibrium in the region. It meant in practice that these two conflicts could be settled not alone, when the sole interests of the Georgians, the Abkhaz and the Ossetians were duly reconciled, but that the interests of Russia had to be satisfied as well²⁶.

1.26 Accordingly, Russia’s protestations in the *Preliminary Objections* that “Georgia never alleged that the Russian Federation was a party” to the disputes in South Ossetia and Abkhazia and “frequently confirmed” Russia’s “role” as a

²³ Office of the President of Georgia, Press Release, “The President of Georgia met the representatives of EU countries” (12 May 2008). GWS, Vol. IV, Annex 179.

²⁴ “State minister: Georgia in ‘low-intensity conflict’”, *The Messenger* (11 July 2008). GWS, Vol. IV, Annex 199.

²⁵ U.N. Security Council, *Letter dated 25 July 2008 from the Permanent Representative of Georgia to the United Nations addressed to the President of the Security Council, Annex*, U.N. Doc. S/2008/497 (29 July 2008). GWS, Vol. III, Annex 95.

²⁶ IIFMCG Report, Vol. I, para. 33. GWS, Vol. III, Annex 120. *See also ibid.* (“The Russian peacekeepers were also regarded as being largely a protective ring behind which secessionist entities were developing their institutions”); IIFMCG Report, Vol. II, p. 8. GWS, Vol. III, Annex 121. (“Russia was engaged in these conflicts as the main peacekeeper, as facilitator ... but it was demonstrating a clear bias in favour of the ‘separatists’ to the conflict”).

“third-party facilitator in those conflicts”²⁷ do just as much violence to history as Russia’s attempt to erase ethnic discrimination from the dispute.

Section III. Structure of the *Written Statement*

1.27 Georgia’s *Written Statement* consists of 3 volumes. **Volume I** contains the main text. Volumes II and III contain supporting materials. Because Russia has chosen to present the Court with highly selective and misleading portions of the *travaux préparatoires* of the 1965 Convention, the entirety of **Volume II** consists of extensive portions of the relevant sections of the Convention’s preparatory works, so as to allow the Court the opportunity to review a complete set of the relevant material. These materials demonstrate clearly that Russia has made a selective and partial use of the negotiating history. The remaining Annexes, which are contained in **Volumes III** and **IV**, are presented in the following order: (i) United Nations documents, (ii) inter-governmental and multi-lateral organisation documents, (iii) government documents, (iv) non-governmental organisation reports, (v) academic articles, (vi) news articles, (vii) witness statements, and (viii) additional documents.

²⁷ RPO, para. 1.8.

CHAPTER II.

**RUSSIA'S FIRST PRELIMINARY OBJECTION:
WHETHER THERE IS A DISPUTE BETWEEN THE PARTIES
UNDER THE 1965 CONVENTION**

Section I. Introduction

2.1 This Chapter responds to Russia's first preliminary objection: that Georgia did not raise a dispute with Russia under the 1965 Convention prior to filing its *Application* on 12 August 2008.

2.2 Russia's objection is groundless. It is defeated by the voluminous evidence showing that Georgia repeatedly, during a period of more than 15 years leading up to the filing of its *Application*, raised disputes with Russia over multiple forms of ethnic discrimination carried out by the Respondent State against persons of Georgian ethnicity. Georgia's repeated complaints of ethnic discrimination by Russia were made in direct bilateral exchanges between the two States, before organs of the United Nations and the Organization for Security and Cooperation in Europe, in reports to the CERD Committee, and in a plethora of public statements by senior Georgian officials and state entities accusing Russia of deliberate acts of discrimination against ethnic Georgians – precisely the kinds of discrimination that fall under the 1965 Convention. To be sure, Russia has always denied its responsibility for these acts of ethnic discrimination. But that only goes to *confirm* the existence of a dispute between the Parties as to whether Russia has engaged in discriminatory conduct under the Convention. Georgia says “Yes”. Russia says “No”. A dispute exists. It predates the filing of the *Application*. Russia's first preliminary objection fails. It is no more complicated than that.

2.3 The specific complaints of ethnic discrimination made by Georgia and denied by Russia prior to the filing of the *Application* include the following, each of which was raised by Georgia on numerous occasions starting as far back as 1992 and continuing until the filing of the *Application* on 12 August 2008:

- a. Violent acts by Russian military forces against ethnic Georgians in areas of Georgia controlled by Russia – including killings, beatings, forced removals, and destruction of homes and property – for the purpose of “cleansing” these areas of persons of Georgian ethnicity;
- b. The use of violence and the threat of violence by Russian military forces to forcibly prevent ethnic Georgians previously expelled from parts of Georgia controlled by Russia from lawfully exercising their right of return to their native homes and villages;
- c. Support and defence of groups, organizations and individuals in areas of Georgia controlled by Russian military forces that were dedicated to and engaged in violent and non-violent forms of discrimination against persons of Georgian ethnicity, including killings, beatings, forced removals, destruction of homes and property, deprivation of cultural and educational rights including education in the Georgian language, and compulsory renunciation of Georgian nationality and acceptance of Russian passports; and
- d. Failure of Russian military forces to fulfil their obligation to prevent ethnic discrimination against persons of Georgian ethnicity in areas of Georgia that they controlled.

2.4 Much of the evidence of Georgia’s persistent claims against Russia and Russia’s equally persistent denials was presented in Georgia’s *Memorial*²⁸; a small part of it had been produced earlier at the oral hearings on provisional measures; additional evidence is produced here. It leaves no doubt that the two Parties had a vigorous and longstanding dispute over acts of ethnic cleansing,

²⁸ Memorial of Georgia, Vol. I, (2 September 2009) (hereinafter “GM”), Part E, Chapter VIII, Section II(B).

denial of the right of return, and other forms of ethnic discrimination attributed by Georgia to Russia, all of which fall plainly under the Convention. In the face of this evidence, summarized below, Russia's continued insistence that there was no legal dispute between the two Parties prior to the filing of the *Application* is entirely without merit.

2.5 The Court addressed this issue in its Order of 15 October 2008 in regard to Georgia's Request for Provisional Measures. Georgia's request, filed on 14 August 2008, was an urgent response to the specific campaign of ethnic cleansing undertaken by Russian military forces in South Ossetia and Abkhazia during the Russian Federation's military intervention commencing on 8 August 2008. As such, at the oral hearings on provisional measures, Georgia based its demonstration of the existence of a legal dispute between the Parties under the 1965 Convention solely on their statements and actions between 8 August and the filing of the *Application* four days later. Even this small microcosm of four days' worth of evidence, the totality of which – covering more than 15 years – has now been placed before the Court, was sufficient to allow the Court to conclude that Georgia had demonstrated *prima facie* the existence of a legal dispute with Russia under the 1965 Convention:

Whereas the Parties differ on the question of whether the events which occurred in South Ossetia and Abkhazia, in particular following 8 August 2008, have given rise to issues relating to legal rights and obligations under CERD; whereas Georgia contends that the evidence it has submitted to the Court demonstrates that events in South Ossetia and in Abkhazia have involved racial discrimination of ethnic Georgians living in these regions and therefore fall under the provisions of Articles 2 and 5 of CERD; whereas it alleges that displaced ethnic Georgians, who have been expelled from South Ossetia and Abkhazia, have not been permitted to return to their place of residence even though the right of return is expressly guaranteed by Article 5 of CERD; whereas Georgia claims in addition that ethnic Georgians have been subject to violent attacks in South Ossetia since the 10 August 2008

ceasefire even though the right of security and protection against violence or bodily harm is also guaranteed by Article 5 of CERD; whereas the Russian Federation claims that the facts in issue relate exclusively to the use of force, humanitarian law and territorial integrity and therefore do not fall within the scope of CERD;

Whereas, in the view of the Court, the Parties disagree with regard to the applicability of Articles 2 and 5 of CERD in the context of the events in South Ossetia and Abkhazia; whereas, consequently, there appears to exist a dispute between the Parties as to the interpretation and application of CERD; whereas, moreover, the acts alleged by Georgia appear to be capable of contravening rights provided for by CERD, even if certain of these alleged acts might also be covered by other rules of international law, including humanitarian law; whereas this is sufficient at this stage to establish the existence of a dispute between the Parties capable of falling within the provisions of CERD, which is a necessary condition for the Court to have *prima facie* jurisdiction under Article 22 of CERD...²⁹.

2.6 Russia states at paragraph 3.40 of its *Preliminary Objections* that the Court should determine whether there exists a dispute over the interpretation or application of the 1965 Convention by examining the “pertinent evidence”, which Russia states includes the Parties’ “diplomatic exchanges” and “public statements”³⁰. Georgia agrees. When the entirety of the pertinent evidence is considered – and not just the highly selective extracts that Russia has surgically removed and transplanted in its *Preliminary Objections*, or the evidence presented at the provisional measures phase, which was limited in scope to a four-day period in August 2008 – it is plain that Georgia, over a period of many years prior to the filing of its *Application*, consistently and publicly raised disputes with Russia regarding acts of ethnic discrimination that were covered by the Convention, and that Russia steadfastly opposed Georgia at every occasion.

²⁹ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Provisional Measures, Order, I.C.J. Rep. 2008 (hereinafter “Provisional Measures Order”), paras. 111-112.

³⁰ Preliminary Objections of the Russian Federation, Vol. I (1 December 2009) (hereinafter “RPO”), para. 3.40.

2.7 Russia's first preliminary objection, therefore, is no obstacle to the Court's exercise of jurisdiction in regard to Georgia's claims of ethnic discrimination in violation of the 1965 Convention.

2.8 This Chapter is organised into 8 sections. Section II, which immediately follows this Introduction, sets out the legal parameters, drawn from the jurisprudence of the Court, for determining the existence of a legal dispute over which the Court may exercise jurisdiction. Those parameters are easily satisfied here. They leave no doubt that there is a legal dispute between the Parties over Russia's alleged violations of the 1965 Convention, and that the elements of this dispute were raised by Georgia and opposed by Russia consistently starting long before the filing of the *Application* and throughout the 15-year period leading up to it.

2.9 Section III of this Chapter responds to Russia's argument that Georgia has invented or inflated a dispute about ethnic discrimination in order to create an artificial basis for the Court to exercise jurisdiction under Article 22 of the Convention. Russia argues in its *Preliminary Objections* that Georgia's "real" dispute with Russia is not about ethnic cleansing but the use of force and the violation of humanitarian law – matters outside the 1965 Convention. It is true that Georgia has publicly accused Russia of these other unlawful acts. But Russia's illegal use of force and violation of humanitarian law are legally different, and do not insulate the Respondent State against well-founded claims that it engaged in ethnic cleansing and other violent forms of discrimination against ethnic Georgians in violation of the 1965 Convention. The existence of disputes over the use of force and humanitarian law cannot negate or extinguish the dispute about ethnic discrimination. This is especially so where the evidence shows, as it does here, that the ethnic discrimination alleged by Georgia was not merely parallel or peripheral to the wider conflict between the two States (as

Russia would have the Court believe), but a central element of it. As Georgia demonstrated in its *Memorial*³¹, when Russia invaded its territory in August 2008, it deliberately carried out acts of violence against unarmed civilian noncombatants of Georgian ethnicity precisely to complete the ethnic cleansing of Georgians from South Ossetia and Abkhazia that it began over a decade earlier, and to render those areas Georgian-free and therefore ripe for separation from Georgia. The dispute over Russia's ethnic cleansing of Georgians from South Ossetia and Abkhazia is therefore at the heart of the conflict between the two States.

2.10 Section III also responds to Russia's attempt to portray the dispute over ethnic discrimination as one between Georgia and the *de facto* authorities of South Ossetia and Abkhazia, to which Russia itself is not a party. Here again, the existence of disputes between Georgia on the one hand, and the separatist leaders of South Ossetia and Abkhazia on the other, does not negate that there is a dispute between Georgia and Russia, or that the dispute between the two States is an important one. As elaborated in the *Memorial*, Georgia has directly accused Russia and Russian military forces of orchestrating and carrying out widespread ethnic cleansing and other forms of violent discrimination against ethnic Georgians in violation of the 1965 Convention³². Whatever other disputes may exist with any non-State parties, there is certainly a dispute between Georgia and Russia concerning acts falling under the 1965 Convention.

2.11 Sections IV through VII of this Chapter identify some of the many specific occasions when Georgia and Russia, by their opposing statements and conduct, manifested the existence of a dispute over matters falling under the 1965 Convention. The first part of Section IV presents evidence of the dispute

³¹ GM, paras. 3.3-3.34.

³² GM, Part E, Chapter IX.

between the Parties over the ethnic cleansing that Georgia denounced and Russia denied during the four days immediately prior to the filing of Georgia's *Application* in August 2008. The evidence discussed herein enlarges upon that which was presented at the provisional measures hearings. By way of example, Georgia's President declared on 9 August 2008, that is, the day after Russia commenced its campaign of ethnic cleansing and three days before Georgia filed the *Application*, that "Russian troops" were committing "ethnic cleansing" in "all areas they control in South Ossetia" and had "expelled ethnic Georgians living there"³³. Similar statements were made on each of the following days up to the filing of the *Application*. These statements were widely reported in the Russian news media³⁴, and were denied by Russian officials. Russia's Minister of Foreign Affairs, Sergey Lavrov, stated that 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 ... it was Russia that he accused of carrying out those ethnic cleansings"³⁵. This and other evidence described within expose the emptiness of Russia's protestations that Georgia never raised a dispute about ethnic discrimination before it came to this Court.

2.12 The second part of Section IV details the repeated occasions on which the Parties opposed one another in regard to ethnic discrimination falling under the 1965 Convention during the 15 year period prior to August 2008. The evidence shows that Georgia repeatedly challenged the participation of Russia's armed

³³ Press Briefing, Office of the President of Georgia, "President of Georgia Mikheil Saakashvili met foreign journalists" (9 August 2008). GWS, Vol. IV, Annex 184.

³⁴ "Lavrov: 'Russia is frustrated with the cooperation with the Western countries on South Ossetia'", *Pravda* (12 August 2008). GWS, Vol. IV, Annex 208. See also "Sergei Lavrov sent the US Secretary of State into a 'Knockout'", *Izvestia* (13 August 2008). GWS, Vol. IV, Annex 210.

³⁵ Ministry of Foreign Affairs of the Russian Federation, *Transcript of Remarks and Response to Media Questions by Russian Minister of Foreign Affairs Sergey Lavrov at Joint Press Conference After Meeting with Chairman-in-Office of the OSCE and Minister for Foreign Affairs of Finland Alexander Stubb, Moscow, August 12, 2008* (12 August 2008). GWS, Vol. IV, Annex 187.

forces and other state organs in acts of discrimination against ethnic Georgians in South Ossetia and Abkhazia between 1992 and 2008. The disputed conduct included complaints of Russia's direct participation in violent expulsions of entire ethnic Georgian communities from areas of South Ossetia in 1991-1992, and Abkhazia in 1992-1994 and 1998, as well as other acts of ethnic cleansing by Russian military forces in subsequent years, leading Georgia to accuse Russia in 2001, for example, of direct responsibility for "numerous crimes" against the "peaceful population" of ethnic Georgians in Abkhazia³⁶.

2.13 Section V presents evidence showing that the Parties had a longstanding and ongoing dispute in regard to Russia's responsibility for forcibly preventing the ethnic Georgian victims of ethnic cleansing campaigns in South Ossetia and Abkhazia from exercising their right of return, guaranteed by the 1965 Convention. The evidence establishes that there were numerous occasions both before and after Georgia's accession to the Convention in 1999 when Georgia formally or publicly complained of Russia's denial of the right of return of ethnic Georgian IDPs. In particular, Georgia repeatedly accused Russia of deploying its armed forces as "border guards"³⁷ for the *de facto* separatist authorities of South Ossetia and Abkhazia with the specific mission of preventing previously expelled ethnic Georgians from returning to their homes in those parts of Georgia. Georgia communicated its protests in direct bilateral communications with Russia, in a variety of international forums, and in widely-reported public statements by senior Georgian officials. Russia ignored or denied all of them; as of the filing of the *Application*, Russian troops still guarded the borders of South Ossetia and Abkhazia, and still prevented expelled Georgian IDPs from returning

³⁶ Resolution of the Parliament of Georgia, Concerning the Situation on the Territory of Abkhazia (11 October 2001). GWS, Vol. IV, Annex 145.

³⁷ Ministry of Foreign Affairs of Georgia, *Comments of Deputy Minister of Foreign Affairs of Georgia Merab Antadze Concerning the Answers of Minister of Foreign Affairs of the Russian Federation Sergey Lavrov to Journalists' Questions* (19 June 2006). GWS, Vol. IV, Annex 164.

to those regions. In fact, as shown in Chapter VI, nothing has changed in this regard up to the present day.

2.14 Section VI demonstrates that the Parties have also disputed Russia's support, sponsorship and defence of the human rights abuses directed against ethnic Georgians by third-parties, namely the *de facto* separatist authorities and militias of South Ossetia and Abkhazia. Those entities, Georgia repeatedly stated in diplomatic communications and public declarations, were not only aided and abetted by the Russian Federation, but were in fact under the effective command and control of the Respondent State, when they committed ethnic cleansing and other forms of discrimination against ethnic Georgians. In one of many protests in regard to Russia's actions, Georgia conveyed to the Security Council in 2007, by way of example, its "extreme concern" regarding Russia's "support and training" of the *de facto* authorities "responsible for ethnic cleansing"³⁸.

2.15 Georgia, further, formally and publicly maintained for years preceding its *Application* that Russia was responsible for the acts of discrimination committed by the *de facto* separatist authorities in South Ossetia and Abkhazia because their political, military, security and intelligence leaderships consisted of active duty Russian General Officers and other Russian state officials (whose names and positions were provided in paragraphs 4.49 to 4.57 and paragraphs 6.64 to 6.66 of the *Memorial*). As Georgia's Minister of Foreign Affairs complained to the OSCE Permanent Council in 2006, the *de facto* administration in South Ossetia is "staffed" by "representatives" of Russia's "law enforcement" and "military"³⁹. In 2007, President Saakashvili complained to the General Assembly that Russia was

³⁸ U.N. Security Council, *Letter dated 3 October 2007 from the Permanent Representative of Georgia to the United Nations addressed to the President of the Security Council, Annex*, U.N. Doc. S/2007/589 (4 October 2007). GWS, Vol. III, Annex 89.

³⁹ Statement by the Minister of Foreign Affairs of Georgia, PC.DEL/101/06 (9 February 2006), p. 2. GM, Vol. II, Annex 81.

responsible for the “morally repugnant politics of ethnic cleansing” in South Ossetia, where the *de facto* authority “basically consists of elements from security services from neighbouring Russia”⁴⁰. Russia, of course, opposed this charge – but its very opposition makes manifest the existence of a legal dispute over Russia’s responsibility for ethnic discrimination committed by separatist authorities and militias operating in areas under Russian control.

2.16 Section VII, the final substantive section in this Chapter, describes Georgia’s various diplomatic and public protests regarding Russia’s failure to use the means available to it to prevent ethnic discrimination by third-parties in areas of Georgia under its control, as distinguished from its active support for the ethnic discrimination practiced by those parties. Specifically, the evidence shows that Georgia repeatedly called into dispute Russia’s role in tolerating, allowing, and failing to prevent or punish violent acts of discrimination against ethnic Georgians in areas controlled by its military or “peacekeeping” forces, despite having the means to halt such discrimination and the obligation to do so. Russia’s failure to act in the face of violent attacks against ethnic Georgians residing in areas under its control led Georgia in 2006, for example, to dispute the “culpable inaction” of Russia’s military and “peacekeeping” forces in the face of “grave crimes and gross violation of human rights”⁴¹. Russia’s persistent denials of responsibility underscored the existence of a dispute between the two Parties in regard to duties imposed by the 1965 Convention.

2.17 Section VIII briefly sets forth the Conclusion of this Chapter, as demonstrated in the preceding sections, that there is undeniably a legal dispute

⁴⁰ U.N. General Assembly, *7th Plenary Meeting, Address by Mr. Mikheil Saakashvili, President of Georgia*, U.N. Doc. A/62/PV.7 (26 September 2007). GWS, Vol. III, Annex 88.

⁴¹ Ministry of Foreign Affairs of Georgia, *Comment of the Department of the Press and Information on the Statements of the Minister of Foreign Affairs of the Russian Federation* (20 January 2006). GWS, Vol. IV, Annex 162.

between the Applicant and Respondent States regarding ethnic discrimination under the 1965 Convention, which predates the filing of the *Application*. Russia's first preliminary objection is therefore unsustainable.

Section II. The Parameters for Determining the Existence of a Legal Dispute

2.18 According to the Court's well-established jurisprudence, "[w]hether there exists an international dispute is a matter for objective determination", which is made by the Court based on the evidence submitted to it by the Parties⁴². In making this determination, the Court examines both the statements and the conduct of the Parties prior to the commencement of legal proceedings; substance matters more than form.

2.19 In this case, the statements, conduct and pleadings of the Parties all reflect the existence of a legal dispute between Georgia and Russia over whether Russia's alleged ethnic discrimination against persons of Georgian ethnicity, committed over the course of 15 years leading up to the filing of the *Application*, constituted breaches of its legal obligations under the 1965 Convention. The pertinent evidence, summarized in the preceding section, is described in detail in Sections IV through VII below. It shows that Georgia repeatedly and continuously accused Russia of conduct that is prohibited by the Convention, including violent acts of ethnic cleansing to rid certain parts of Georgia of ethnic

⁴² *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion, I.C.J. Rep. 1950, p. 65, para. 74; *East Timor (Portugal v. Australia)*, Judgment, I.C.J. Rep. 1995, p. 100, para. 22; *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. Rep. 1998, p. 17, para. 22; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Preliminary Objections, Judgment, I.C.J. Rep. 1998, p. 275, para. 87; *Certain Property (Liechtenstein v. Germany)*, Preliminary Objections, Judgment, I.C.J. Rep. 2005, p. 18, para. 24; *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Judgment, I.C.J. Rep. 2006, p. 40, para. 90.

Georgians; forcible prevention of the exercise of the right of return; support and sponsorship of ethnic discrimination against Georgians by third-parties; and failure to act responsibly to prevent such discrimination despite the availability of reasonable means to do so. And it shows that Russia was not only made aware of Georgia's accusations, through bilateral negotiations, reports to the CERD Committee, the United Nations and other multilateral forums, and public declarations to the news media, but positively opposed them prior to the filing of the *Application*. Under the Court's jurisprudence, discussed below, this is more than sufficient to establish the existence of a legal dispute between the Parties to this case.

2.20 Russia's principal argument to avoid this conclusion is to point out that Georgia did not declare, prior to its *Application*, that the specific acts of discrimination by Russia that it identified and denounced, and which Russia denied, were in fact violations of the 1965 Convention; that is, according to Russia, there can be no dispute between the Parties under the Convention because Georgia did not expressly cite that instrument prior to the filing of its *Application* as the basis for its complaints regarding Russia's ethnic discrimination against ethnic Georgians⁴³.

2.21 Curiously, Russia appears to be of two minds as to whether Georgia was required to expressly incant the words "1965 Convention" at some point prior to filing its *Application* in order to establish a legal dispute under that Convention. It took precisely the opposite position at the oral hearings on provisional measures:

Of course, Madam President, '[i]t does not necessarily follow that, because a State has not expressly referred in negotiations with another State to a particular treaty as having been violated by conduct of that other State, it is debarred from invoking a

⁴³ RPO, para. 3.18.

compromissory clause in that treaty’, as you stated in Nicaragua (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). But the subject of the negotiations must nevertheless be a dispute regarding the interpretation or application of the convention and the parties must be aware of that fact⁴⁴.

2.22 And even in its *Preliminary Objections* Russia continued to express doubt that an explicit mention of the 1965 Convention by Georgia was required in order to establish a legal dispute under it, as long as Georgia complained about conduct going to the “object” of the Convention (which it plainly did):

In order to amount to a ‘negotiation’ over a CERD-related dispute *per se*, the contacts between the Parties to a dispute must expressly refer to the Convention or to its substantive provisions or, at least, to its object⁴⁵.

2.23 Russia’s argument, whatever it is, fails. To the extent that Russia argues that there can be no legal dispute under the 1965 Convention because Georgia did not expressly state that the ethnic discrimination of which it complained for more than 15 years violated that Convention, the same argument was rejected by the Court in *Military and Paramilitary Activities in and against Nicaragua*, as Counsel to Russia recognized at the provisional measures hearings. In the former case, the United States argued that:

Since... Nicaragua has never even raised in negotiations with the United States the application or interpretation of the Treaty [of Amity] to any of the factual or legal allegations in its Application, Nicaragua has failed to satisfy the Treaty’s own terms for invoking the compromissory clause⁴⁶.

⁴⁴ Verbatim Record, CR 2008/27 (10 September 2008), para. 15 (Pellet).

⁴⁵ RPO, para. 4.84

⁴⁶ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment, I.C.J. Rep. 1984, p. 427, para. 81.

2.24 The Court disagreed. It found that Nicaragua’s failure to expressly invoke the bilateral Treaty of Friendship, Commerce and Navigation prior to the commencement of legal proceedings neither barred it from raising claims against the United States for violation of the Treaty in its *Application*, nor prevented the Court from exercising jurisdiction in regard to Nicaragua’s claims pursuant to the Treaty’s compromissory clause:

it does not necessarily follow that, because a State has not expressly referred in negotiations with another State to a particular treaty as having been violated by conduct of that other State, it is debarred from invoking a compromissory clause in that treaty⁴⁷.

2.25 The Court ruled that jurisdiction could be exercised because “[t]he United States was well aware that Nicaragua alleged that its conduct was a breach of international obligations before the present case was instituted”. Nicaragua’s *Application* subsequently made it “aware that specific articles of the 1956 Treaty are alleged to have been violated”⁴⁸. That was sufficient to establish a legal dispute cognizable by the Court. The continuing force of this principle was evident in the Court’s Order of 15 October 2008 in regard to Georgia’s Request for Provisional Measures, where it was observed that “[t]he fact that CERD has not been specifically mentioned in a bilateral or multilateral context is not an obstacle to the seisin of the Court on the basis of Article 22 of the Convention”⁴⁹. Thus, the test is not whether Georgia expressly invoked the 1965 Convention in its communications with Russia or its public statements prior to filing its *Application*, but whether it alleged that Russia’s conduct “was a breach of international obligations before the present case was instituted” and subsequently made clear in the *Application* which “specific articles of the Treaty are alleged to

⁴⁷ *Ibid.*, p. 428, para. 83 (emphasis added).

⁴⁸ *Ibid.*

⁴⁹ Provisional Measures Order, *op.cit.*, para. 115.

have been violated”⁵⁰. The evidence shows that this is precisely what Georgia did.

2.26 As discussed in the following sections of this Chapter, the evidence also shows that prior to commencement of these proceedings Russia positively denied and opposed – disputed – each of Georgia’s accusations of ethnic discrimination. That constitutes an additional ground for determining that a legal dispute under the 1965 Convention exists between these two Parties. Even if Russia had made no statements opposing Georgia’s positions in regard to ethnic discrimination, its opposition to them could be inferred from its conduct, which continued unchanged despite Georgia’s protests. In *Land and Maritime Boundary*, Nigeria advanced a preliminary objection to jurisdiction based on its assertion that there was no “dispute” between the parties over the location of the international boundary. The Court observed that Nigeria had not explicitly challenged the location of the boundary with Cameroon, taking note that:

Nigeria has constantly been reserved in the manner in which it has presented its own position on the matter. Although Nigeria knew about Cameroon’s preoccupation and concerns, it has repeated, and has not gone beyond, the statement that there is no dispute concerning ‘boundary delimitation as such’⁵¹.

2.27 Nonetheless, the Court determined that it was entitled to infer the existence of a dispute over that issue. The Court explained:

[A] disagreement on a point of law or fact, a conflict of legal views or interests, or the positive opposition of the claim of one party by the other need not necessarily be stated *expressis verbis*. In the determination of the existence of a dispute, as in other

⁵⁰ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *op. cit.*, p. 428, para. 83.

⁵¹ *Land and Maritime Boundary (Cameroon v. Nigeria)*, *op. cit.*, p. 275, para. 91.

matters, the position or the attitude of a party can be established by inference, whatever the professed view of that party⁵².

2.28 Again, substance matters more than form. This has been the consistent view of the Court. In the *Certain Property* case, the Court held that the inquiry into whether a “claim of one party is positively opposed by the other” is undertaken “for the purposes of *verifying* the existence of a legal dispute”⁵³. The same formulation was repeated in the *East Timor* case⁵⁴. Express acknowledgement of a dispute confirms its existence, but is not a *sine qua non*, since the existence of a dispute may be inferred from the conduct of a party⁵⁵. In *Headquarters Agreement*, the Secretary-General informed the Court that a dispute within the meaning of the Headquarters Agreement existed between the United Nations and the United States. The dispute, he said, arose when the Anti-Terrorism Act was signed into law by the President of the United States and the United States failed to give adequate assurances to the United Nations that the Act would not be applied to the PLO Observer Mission to the United Nations. The United States raised a jurisdictional objection to the request for an advisory opinion on the ground that there was no “dispute” since “the United States in its public statements has not referred to the matter in issue as a ‘dispute’”⁵⁶. The Court rejected the United States’ objection:

[W]here one party to a treaty protests against the behaviour or a decision of another party, and claims that such behaviour or

⁵² *Ibid.*, p. 275, para. 89.

⁵³ *Certain Property (Liechtenstein v. Germany)*, *op.cit.*, p. 18, para. 25 (emphasis added).

⁵⁴ *East Timor (Portugal v. Australia)*, *op.cit.*, p. 100, para. 22 (“[f]or the purpose of *verifying* the existence of a legal dispute in the present case, it is not relevant whether the “real dispute” is between Portugal and Indonesia rather than Portugal and Australia”) (emphasis added).

⁵⁵ Neither case was cited in Russia’s *Preliminary Objections*. In that regard, Russia’s reliance on the *South West Africa* case is misplaced since the relatively rigid standard that one could interpret that case as adopting was subsequently clarified. See RPO, para. 3.17.

⁵⁶ *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, Advisory Opinion, I.C.J. Rep. 1988, p. 12, para. 39.

decision constitutes a breach of the treaty, the mere fact that the party accused does not advance any argument to justify its conduct under international law does not prevent the opposing attitudes of the parties from giving rise to a dispute concerning the interpretation or application of the treaty⁵⁷.

2.29 The Court cited to its decision in *United States Diplomatic and Consular Staff in Tehran*, where it had similarly determined the existence of a dispute despite Iran's failure to oppose the claims of the United States:

Iran had at no time claimed to justify its actions by advancing an alternative interpretation of the Conventions, on the basis of which such actions would not constitute such a breach. The Court saw no need to enquire into the attitude of Iran in order to establish the existence of a 'dispute'; in order to determine whether it had jurisdiction⁵⁸.

2.30 In the present case, Russia has issued numerous public statements opposing Georgia's claims that its military forces engaged in ethnic cleansing against persons of Georgian ethnicity, prevented them from exercising their right of return, supported third-parties (especially separatist Ossetian and Abkhaz militias) who committed acts of violence targeting ethnic Georgians, and deliberately failed to prevent such violent acts in such areas they controlled. This should leave no doubt that the Parties are in dispute over matters of ethnic discrimination falling within the 1965 Convention. However, Russia's opposition to Georgia's claims can also be inferred from its conduct, evidenced in great detail in the *Memorial*, by which it continued to engage in all of the discriminatory conduct protested by Georgia despite, and after, Georgia's repeated protests⁵⁹.

⁵⁷ *Ibid.*, p. 12, para. 38.

⁵⁸ *Ibid.*

⁵⁹ GM, Part B, Chapters III-VII.

Section III. Ethnic Discrimination Is Fundamental to Georgia's Dispute with Russia

2.31 Russia's *Preliminary Objections* attempt to characterize the dispute underlying this case as pertaining to anything but ethnic discrimination perpetrated by Russia. At paragraph 1.4, Russia asserts that the "real dispute in this case concerns the conflict, between Georgia on the one hand and Abkhazia and South Ossetia on the other, in relation to the legal status of Abkhazia and South Ossetia, a conflict that has on occasion erupted into armed conflict".⁶⁰ In other words, there is a dispute, but it is not between Georgia and Russia. Russia repeats this contention at paragraphs 2.3 and 3.41, where it again claims that that the "real dispute" concerns the "legal status" of South Ossetia and Abkhazia. Elsewhere, Russia claims that if there is a dispute between Georgia and Russia it relates not to ethnic discrimination but to "unlawful use of force" that was "born out of the allegations that Georgia has made as to the 'annexation' of its territory"⁶¹. Still elsewhere, Russia claims that the dispute between the two States, insofar as it involves harms inflicted on ethnic Georgians, is about alleged violations of international humanitarian law, not the 1965 Convention⁶². In Russia's view (or views, since several different ones are expressed), the present proceeding concerns many things, but it "is not a case about racial discrimination"⁶³. Thus, Georgia is guilty of attempting to "transform a case

⁶⁰ RPO, para. 1.4.

⁶¹ *Ibid.*, para. 3.79.

⁶² *Ibid.*, paras. 3.10, 3.33.

⁶³ *Ibid.*, paras. 2.3, 3.41. *See also ibid.* para. 3.76(b) ("Insofar as Georgia has been able to establish conflict, this concerns the conflict, between Georgia on the one hand and Abkhazia and South Ossetia on the other, in relation to the legal status of Abkhazia and South Ossetia").

turning on the use of force, and international humanitarian law, into a racial discrimination case”⁶⁴.

2.32 Russia is wrong. For Georgia, the case it has brought before the Court is *only* about ethnic discrimination, and more particularly it is only about discriminatory conduct prohibited by the 1965 Convention. Georgia’s *Application* raises only claims of ethnic discrimination by Russia in violation of the Convention. Its *Memorial* – all 408 pages of it plus over 2,340 pages of Annexes – is addressed only to claims of ethnic discrimination against Russia, and provides voluminous evidence of the extent and nature of Russia’s violations of the Convention, which had both the objective and effect of permanently removing the entire ethnic Georgian populations from nearly all of South Ossetia and Abkhazia. That is the only dispute Georgia has brought to this Court. The huge quantity of compelling evidence of widespread ethnic cleansing and related forms of violent discrimination against ethnic Georgians – much of it collected by highly qualified and unbiased multilateral institutions and international organizations – that was submitted with Georgia’s *Memorial* demonstrates the enormity and the gravity of this dispute, and its centrality to the broader conflict between the two Parties.

2.33 It is true, but beside the point, that Georgia’s conflict with Russia includes other disputes, including ones Russia has identified: Russia’s illegal use of force against Georgia on several occasions since 1992, including the armed invasion of Georgian territory by Russian military forces in August 2008; Russia’s repeated and ongoing violations of Georgia’s sovereignty, territorial integrity and political independence; and the violations of the laws of war during periods of armed

⁶⁴ RPO, para. 3.33(b).

conflict. Georgia has raised these disputes in other forums⁶⁵; but has not brought them to the Court; they do not form part of Georgia's claims against Russia in these proceedings. That they exist does not affect the existence of a dispute over ethnic cleansing or denial of the right of return in violation of the 1965 Convention, or prevent Georgia from bringing that dispute to the Court. To form a view on whether the Convention has been violated does not require the Court to form a view on these other matters.

2.34 Russia's argument is similar to the one that the Court rejected in the *Oil Platforms* case⁶⁶. Like Russia here, the United States made a preliminary objection (in that case to the assertion of jurisdiction under the US-Iran Treaty of

⁶⁵ On 6 February 2009, Georgia filed an application to institute proceedings against the Russian Federation before the European Court of Human Rights for violations of the European Convention of Human Rights and several of its Protocols. That action concerns Russia's indiscriminate and disproportionate attacks against civilians and their property in Abkhazia and South Ossetia. *Georgia v. Russian Federation*, Eur. Ct. H.R., App. No. 38263/08 (9 February 2009). On 9 September 2008, in a statement before the UN Conference on Disarmament, Georgia accused Russia of violating "the principles and rules of the United Nations Charter, including the prohibition of the use of force among states and respect for sovereignty and territorial integrity of Georgia". Conference on Disarmament, *Letter dated 26 August 2008 from the Permanent Representative of Georgia Addressed to the Secretary-General of the Conference on Disarmament Transmitting the Text on the Update of the Current Situation in Georgia*, U.N. Doc. CD/1850 (9 September 2008), p. 2. GWS, Vol. III, Annex 99. Georgia has raised these and other breaches of international law by Russia at the General Assembly and Security Council of the United Nations and the OSCE. See, e.g., U.N. General Assembly, Security Council, *Identical Letters dated 15 August 2008 from the Permanent Representative of Georgia to the United Nations addressed to the Secretary-General and the President of the Security Council*, Annex, U.N. Doc. A/62/935-S/2008/557 (18 August 2008) ("Russia is carrying out a full-scale occupation of Georgia. Encroachment of the sovereignty of an independent State and its military occupation represents a direct challenge to the security of Europe and the whole democratic community.") GWS, Vol. III, Annex 97; U.N. Security Council, *Provisional Record of the 5961st Meeting*, U.N. Doc. S/PV.5961 (19 August 2008) ("The Russian side continues to violate agreed ceasefire arrangements.") GWS, Vol. III, Annex 98; OSCE, *Statement of the Georgian Delegation at the Special Permanent Council Meeting*, PC.DEL/708/08 (15 August 2008) ("Russian Federation chose a path of war and occupation and did everything to make sure that Georgia ceased to exist ... In this war, Russian Federation showed that this is the country, which does not oblige itself with any international norm and regulation. Russian Federation toppled international law in front of our own eyes. They not only challenged the international order, as we know it today, but also challenged international law, including humanitarian law.") GWS, Vol. III, Annex 115.

⁶⁶ *Oil Platforms (Islamic Republic of Iran v. the United States of America)*, Preliminary Objections, Judgment, I.C.J. Rep. 1996, p. 803, para. 21.

Amity, Economic Relations and Consular Rights of 1955) on grounds that: “Iran’s claims raise issues relating to the use of force, and these do not fall within the ambit of the Treaty of 1955”⁶⁷. The Court found the United States’ objection without merit because:

The Treaty of 1955 imposes on each of the Parties various obligations on a variety of matters. Any action by one of the Parties that is incompatible with those obligations is unlawful, regardless of the means by which it is brought about. A violation of the rights of one party under the Treaty by means of the use of force is as unlawful as would be a violation by administrative decision or by any other means. Matters relating to the use of force are therefore not *per se* excluded from the reach of the Treaty of 1955. The arguments put forward on this point by the United States must therefore be rejected⁶⁸.

2.35 By the same logic, Russia’s ethnic cleansing of the Georgian population from South Ossetia and Abkhazia does not cease to be properly characterized as a dispute about discrimination in violation of the 1965 Convention because it was perpetrated by the use of force. Indeed, how else would the ethnic cleansing of an entire population be accomplished? To exclude ethnic cleansing or other forms of ethnic or racial discrimination from the coverage of the Convention by virtue of their execution by use of force would render the Convention meaningless in situations where it was obviously intended and understood to apply. The fact that Russia used force to carry out the ethnic discrimination alleged by Georgia in the *Application* cannot therefore convert the dispute raised by Georgia from one concerning ethnic discrimination to one about the use of force such that the Court would be deprived of jurisdiction under Article 22 of the Convention.

⁶⁷ *Ibid.*, p. 803, para. 18.

⁶⁸ *Ibid.*, p. 803, para. 21.

2.36 Russia's attempt to convert the dispute into one about humanitarian law, as distinguished from human rights law, also fails. This approach has also been tried before; and this too has been rejected by the Court, specifically in the Court's Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. Russia asserts that the claims presented by Georgia are derived from international humanitarian law, not human rights treaties like the 1965 Convention⁶⁹. Indeed, Russia goes so far as to assert that Georgia's claims are barred because the Geneva Conventions do not include compromissory clauses that allow for the referral of disputes to the Court. These arguments run directly counter to the Court's reasoning in the *Wall* case, where it observed that the same set of facts can give rise to breaches of multiple legal obligations, including violations of both international humanitarian law and human rights law. Where this occurs, the Court found, human rights conventions still apply:

...the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights...⁷⁰

2.37 The Court reaffirmed this position in *Democratic Republic of Congo v. Uganda*, at paragraph 216, where, after recalling that "it had occasion to address the issues of the relationship between international humanitarian law and international human rights law" in the *Wall* case, reaffirmed that "the protection offered by human rights conventions does not cease in case of armed conflict,

⁶⁹ RPO, para. 3.10.

⁷⁰ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Rep. 2004, p. 178, para. 106. The Court further noted: "As regards the relationship between international humanitarian law and human rights law there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law".

save through the effect of provisions for derogation...”⁷¹. The Court thus concluded in *DRC v. Uganda* that “both branches of international law, namely international human rights law and international humanitarian law, would have to be taken into consideration”⁷².

2.38 The Court took a similar approach in its 15 October 2008 Order regarding provisional measures, at paragraph 112: “[W]hereas, moreover, the acts alleged by Georgia appear to be capable of contravening rights provided for by CERD, even if certain of these alleged acts might also be covered by other rules of international law, including humanitarian law; whereas this is sufficient at this stage to establish the existence of a dispute between the Parties capable of falling within the provisions of CERD, which is a necessary condition for the Court to have prima facie jurisdiction under Article 22 of CERD”.

2.39 The CERD Committee has also found that the protections provided by the 1965 Convention do not disappear merely because ethnic discrimination is carried out in the context of armed conflict and violations of humanitarian law. After having insisted that “effective action should be taken to ensure that refugees and other displaced persons were allowed to return to their homes”⁷³, the Committee requested the Federal Republic of Yugoslavia and its successors to adhere to their obligations under the 1965 Convention and report, within four months, on their performance of these obligations⁷⁴. In so doing, the Committee:

⁷¹ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, p. 69, para. 216 (quoting *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Rep. 2004, p. 178, para. 106).

⁷² *Ibid.*, p. 69, para. 216.

⁷³ U.N. General Assembly, *Report of the Committee on the Elimination of Racial Discrimination*, Official Records, Forty-Eighth Session, Supplement No. 18, U.N. Doc. A/48/18 (1994) (hereinafter “CERD Report, 48th Session, Supp. No. 18”), paras. 453, 470. GM, Vol. V, Annex 412.

⁷⁴ *Ibid.*, para. 509.

expressed deep concern over reports of serious and systematic violations of the Convention occurring in the territory of the Federal Republic of Yugoslavia (Serbia and Montenegro). In that regard, the Committee considered that by not opposing extremism and ultranationalism on ethnic grounds, State authorities and political leaders incurred serious responsibility⁷⁵.

2.40 Accordingly, Russia cannot deprive the Court of jurisdiction over Georgia's claims of ethnic discrimination by labelling this a dispute about humanitarian law as distinguished from human rights law. The only relevant consideration is whether Georgia has presented a dispute about human rights law – specifically a dispute arising under the 1965 Convention – since, as the Court has already indicated, that is sufficient in itself to present a legal dispute over which the Court can exercise jurisdiction under Article 22.

2.41 Naturally, Russia tries to deny the existence of such a dispute, or at the very least to downplay its significance. It goes so far as to state:

In the present case, not only has Georgia never invoked CERD in its relations with Russia in the context of the situation in Abkhazia and South Ossetia prior to the filing of its Application, but also, as Chapter III of the present Objections demonstrates, the circumstances could not be interpreted as obliging Russia to infer a claim over racial discrimination from the various political disagreements it had had with Georgia over the recent years⁷⁶.

2.42 This is a remarkable statement: that the “various political disagreements [Russia] had with Georgia over the recent years” “could not be interpreted as obliging Russia to infer a claim over racial discrimination”! Russia cannot so easily erase 15 years of history, especially as it is replete with Georgia's complaints about Russia's discrimination against ethnic Georgians, both by direct means and by its support and sustenance of armed groups of Ossetian and Abkhaz engaged in ethnic violence against the Georgian population; and especially in

⁷⁵ *Ibid.*, para. 536.

⁷⁶ RPO, para. 4.32.

light of Georgia's ongoing protests about Russia's refusal to allow expelled Georgian IDPs from exercising their right of return, which is expressly guaranteed by the 1965 Convention.

2.43 Not only Georgia, but independent and reputable institutions and organizations expert in the investigation of racial discrimination have confirmed that ethnic cleansing lies at the heart of this dispute. As early as 1993, the Security Council, in Resolution 876, expressed concern over the "reports of 'ethnic cleansing' in Abkhazia"⁷⁷. This characterization was repeated in subsequent Security Council resolutions as well⁷⁸. Similarly, the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the UN Commission on Human Rights described the "large-scale ethnic cleansing" that occurred in both Abkhazia and South Ossetia⁷⁹.

2.44 The OSCE has also repeatedly characterized the anti-Georgian violence that underlies this case as "ethnic cleansing". In the immediate aftermath of the ethnic violence in the early 1990s, the OSCE Budapest Document noted its "deep concern over 'ethnic cleansing', the massive expulsion of people, predominantly Georgian, from their living areas and the deaths of large numbers of civilians"⁸⁰. Similarly, in 1996, the OSCE condemned the "ethnic cleansing" that had resulted

⁷⁷ U.N. Security Council, *Resolution 876*, U.N. Doc. S/RES/876 (19 October 1993), p. 1. GM, Vol. II, Annex 11.

⁷⁸ See, e.g., U.N. Security Council, *Resolution 1124*, U.N. Doc. S/RES/1124 (31 July 1997), paras. 9, 10 (reaffirming "the unacceptability of the demographic changes resulting from the conflict" in Abkhazia and condemning "killings, particularly those ethnically motivated, and other ethnically related acts of violence"). GM, Vol. II, Annex 23; U.N. Security Council, *Resolution 1524*, U.N. Doc. S/RES/1524 (30 January 2004) (reaffirming "the unacceptability of the demographic changes resulting from the conflict"), para. 15. GM, Vol. II, Annex 36.

⁷⁹ U.N. Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Possible ways and means of facilitating the peaceful and constructive solution of problems involving minorities*, Report submitted by Mr. Asbjorn Eide, U.N. Doc. E/CN.4/Sub.2/1993/34 (10 August 1993), para. 285. GM, Vol. II, Annex 9.

⁸⁰ OSCE, *Budapest Document 1994: Toward a genuine Partnership in a New Era* (6 December 1994), p. 7. GWS, Vol. III, Annex 104.

in “mass destruction and forcible expulsion of predominantly Georgian population in Abkhazia”⁸¹. The OSCE likewise reported on the ethnic cleansing that was carried out in 2008; its investigative fact-finders reported that “many villages” that had been “inhabited by ethnic Georgians” were “nearly completely destroyed” when they were “pillaged and then set afire” by perpetrators that included the “Russian armed forces”⁸².

2.45 The same findings were made by the Council of Europe. In 2007, the European Commission against Racism and Intolerance:

register[ed] its deep concern at reports of human rights violations in South Ossetia and Abkhazia. It is particularly worried about allegations from various sources that members of the non-Abkhaz population, including many people of Georgian origin who have spontaneously returned to their homes in the Gali region of Abkhazia, are victims of racial discrimination⁸³.

2.46 Fact-finders investigating the ethnic violations of 2008 on behalf of the Council’s Parliamentary Assembly (“PACE”) reported evidence of “systematic acts of ethnic cleansing of Georgian villages in South Ossetia” and that “entire villages have been bulldozed over and razed”⁸⁴. The PACE Rapporteur concluded, after visiting South Ossetia, that the “systematic destruction of every single house is a clear indication that there has been an intention to ensure that no

⁸¹ OSCE, Lisbon Summit, *Lisbon Document* (1996), para. 20 of the Summit Declaration. GM, Vol. II, Annex 69.

⁸² OSCE, Office for Democratic Institutions and Human Rights, *Human Rights in the War-Affected Areas* (2008), pp. 7, 25-26. GM, Vol. II, Annex 71.

⁸³ Council of Europe, European Commission against Racism and Intolerance, *Second Report on Georgia*, CRI(2007)2 (13 February 2007). GWS, Vol. III, Annex 110.

⁸⁴ Council of Europe, Parliamentary Assembly, *The situation on the ground in Russia and Georgia in the context of the war between those countries, Memorandum*, Doc. 11720 Addendum II (29 Sept. 2008), para. 20. GM, Vol. II, Annex 56.

Georgians have a property to return to in these villages” and that this “supports the accusation that these villages have been ‘ethnically cleansed’ of Georgians”⁸⁵.

2.47 The most recent finding that ethnic cleansing is a fundamental element of the dispute between Georgia and Russia is the Report of the European Union’s Independent International Fact-Finding Mission on the Conflict in Georgia, which was publically released in September 2009. According to the EU fact-finders:

the Mission found patterns of forced displacements of ethnic Georgians who had remained in their homes after the onset of hostilities. In addition, there was evidence of systematic looting and destruction of ethnic Georgian villages in South Ossetia. Consequently, several elements suggest the conclusion that ethnic cleansing was indeed practised against ethnic Georgians in South Ossetia both during and after the August 2008 conflict⁸⁶.

2.48 Ethnic discrimination, including Russia’s responsibility for ethnic cleansing and denial of the right of return, is not an ancillary or minor feature of the dispute between Georgia and Russia. Nor could it be given the seriousness of these offenses. In *Barcelona Traction*, the Court described racial discrimination as being among those legal obligations that are of such importance that they are obligations *erga omnes*⁸⁷. The General Assembly, “recalling” the 1965 Convention, “condemn[ed] unreservedly ‘ethnic cleansing’ and acts of violence arising from racial hatred” and “reaffirm[ed] that ‘ethnic cleansing’ and racial hatred are totally incompatible with universally recognized human rights and

⁸⁵ Council of Europe, Parliamentary Assembly, Committee on Migration, Refugees and Population, *Report, The humanitarian consequences of the war between Georgia and Russia: follow-up given to resolution 1648 (2009)*, Doc. 11859 (9 April 2009), para. 29. GM, Vol. II, Annex 62.

⁸⁶ Independent International Fact-Finding Mission on the Conflict in Georgia, Report Vol. I (September 2009) (hereinafter “IIFFMCG Report, Vol. I”), para. 27. GWS, Vol. III, Annex 120.

⁸⁷ *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgment, I.C.J. Rep. 1970, p. 32, para. 34.

fundamental freedoms”⁸⁸. As one respected commentator has noted, the “distinction between genocide” and “ethnic cleansing” is “insignificant in terms of both a duty to prevent and an obligation to punish”⁸⁹.

2.49 Russia’s argument that the dispute concerns only the legal status of South Ossetia and Abkhazia is unconvincing. Insofar as there is now a dispute over those territories’ legal status, that dispute is inextricably bound to issues of ethnic cleansing. As the evidence presented in the *Memorial* shows, the ethnic cleansing of South Ossetia and Abkhazia was an indispensable element of Russia’s drive to change their legal status; by removing the Georgian populations from these territories Russia created separate and ethnically homogeneous Ossetian and Abkhazian homelands which it then purported to convert into ostensibly “independent” States (albeit this ultimate objective is, so far, resolutely opposed by the international community as a whole)⁹⁰. In this regard, it is important to recall that among the principal concerns that led to the adoption of the 1965 Convention was the impermissible use of ethnic discrimination to construct states, specifically South Africa’s creation of “Bantustans”, ethnically-homogeneous pseudo-states to which certain racial and ethnic groups were confined⁹¹. In its Report, the EU Fact-Finding Mission recognized that the “status question” in regard to South Ossetia and Abkhazia is “interconnected with” the issue of “return of refugees/IDPs” because the “legitimacy” of any claims of “independence” is “undermined by the fact that a major ethnic group

⁸⁸ U.N. General Assembly, *Resolution Adopted by the General Assembly, “Ethnic Cleansing” and Racial Hatred*, U.N. Doc. A/RES/47/80 (15 March 1993). GWS, Vol. III, Annex 47.

⁸⁹ William A. Schabas, “Genocide, Crimes Against Humanity, and Darfur: The Commission of Inquiry’s Findings on Genocide,” *Cardozo Law Review*, Vol. 27, no. 4 (2006), p. 1707.

⁹⁰ GM, Part B, Chapters III-VII.

⁹¹ *Ibid.*, para. 9.4.

(i.e. the Georgians) were expelled from these territories and are still not allowed to return, in accordance with international standards”⁹².

2.50 The centrality of the dispute over ethnic cleansing to the conflict between Georgia and Russia is one of a number of compelling factors that distinguish this case from *Democratic Republic of Congo v. Rwanda*. In that case, the DRC’s claims under a potpourri of human rights conventions, including CEDAW, were incidental to its dispute with Rwanda, and were designed solely to create a basis for the Court’s jurisdiction⁹³. There was no prior history of complaints by the DRC of actions by Rwanda that would have constituted violations of CEDAW, or denials by Rwanda that it had committed such actions. Nor was there any evidence – or even argument – presented by the DRC that Rwanda’s actions in alleged violation of CEDAW were essential or inextricably linked to the achievement of its objectives in invading and occupying Congolese territory. Those facts established that there was no pre-existing legal dispute between the parties over conduct by Rwanda in violation of CEDAW.

2.51 In the present case, by contrast, Russia cannot seriously deny that there is a dispute between Georgia and Russia over ethnic cleansing and the denial of the right of return in violation of the 1965 Convention, or that this dispute is a central and fundamental aspect of the conflict between the two States. The most Russia can show is that the dispute over violations of the Convention is not the only one between these two Parties. But that does not prevent the Court from exercising jurisdiction over Georgia’s claims.

2.52 The Court has repeatedly found, as it did in *United States v. Iran*, that “no provision of the Statute or Rules contemplates that the Court should decline to

⁹² Independent International Fact-Finding Mission on the Conflict in Georgia, Report Vol. II (September 2009), pp. 82, 134. GWS, Vol. III, Annex 121.

⁹³ GWS, Chapter III, paras. 3.65- 3.66.

take cognizance of one aspect of a dispute merely because that dispute has other aspects, however, important”⁹⁴. Further elaborating on this point, the Court explained:

[N]ever has the view been put forward that, because a legal dispute submitted to the Court is only one aspect of a political dispute, the Court should decline to resolve for the parties the legal questions at issue between them. Nor can any basis for such a view of the Court’s functions or jurisdiction be found in the Charter or the Statute of the Court; if the Court were, contrary to its settled jurisprudence, to adopt such a view, it would impose a far-reaching and unwarranted restriction upon the role of the Court in the peaceful solution of international disputes⁹⁵.

2.53 Applying the same logic, the Court chose to exercise jurisdiction in the *Border and Transborder Armed Actions* case between Nicaragua and Honduras despite the fact that it was brought in the context of a broader, regional dispute involving other States that was mostly beyond the scope of the Court’s jurisdiction⁹⁶. And the Court exercised jurisdiction in the *Application of the Genocide Convention* case even though – as in the present case – the claim for breach of international human rights law (under Article IX of the Genocide Convention) arose in the context of a wider and more complex dispute over the legal status of territory and armed conflict⁹⁷. These cases make it clear that the

⁹⁴ *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment, I.C.J. Rep. 1980, p. 20, para. 36; *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, Jurisdiction and Admissibility, Judgment, I.C.J. Rep. 1988, p. 69, para. 54.

⁹⁵ *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, *op. cit.*, p. 20, para. 37.

⁹⁶ *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, *op. cit.*, p. 69, para. 96 (“Nor should it be thought that the Court is unaware that the Application raises juridical questions which are only elements of a larger political situation. Those wider issues are however outside the competence of the Court, which is obliged to confine itself to these juridical questions.”).

⁹⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Preliminary Objections, Judgment, I.C.J. Rep. 1996, p. 595, para. 34.

existence of other disputes between Georgia and Russia does not preclude the Court from taking seisin over the one presented in Georgia's *Application*.

2.54 Russia cannot prevail by arguing that Georgia's invocation of the 1965 Convention represents a "departure from the practice of States which have appeared as applicants before the Court in cases involving the allegations of inter-ethnic violence"⁹⁸. In effect, Russia argues that a Convention that plainly prohibits ethnic discrimination, and that includes a compromissory clause vesting the Court with jurisdiction, cannot be invoked as a basis of the Court's jurisdiction because it has not been done before. Georgia submits that such an argument can hardly be taken seriously. Russia's reliance on *Democratic Republic of Congo v. Uganda* is unavailing. While the Court did not list the 1965 Convention as among those that were applicable in that case, it is worth noting that the Applicant State, the DRC, never invoked the Convention anywhere in its pleadings or submissions to the Court. Moreover, as the Court has previously observed, a State has unfettered discretion to determine which violations of international legal obligations it will place before the Court⁹⁹.

2.55 Russia's claims regarding Georgia's motivation in bringing this case¹⁰⁰, and the manner in which it was brought¹⁰¹, have no relevance to its jurisdictional objection. The purpose of Georgia's recourse to the Court is the peaceful settlement of the existing dispute. Russia's allegations – even if true (which they are not) – provide no justification for avoiding the Court's jurisdiction. As the Court held in *Nicaragua v. Honduras*, "the Court's judgment is a legal pronouncement ... it cannot concern itself with the political motivation which

⁹⁸ RPO, para. 3.13.

⁹⁹ See, e.g., *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, *op. cit.*, p. 69, para. 52.

¹⁰⁰ RPO, paras. 1.11-1.16.

¹⁰¹ *Ibid.*, para. 3.12.

may lead a State at a particular time, or in particular circumstances, to choose judicial settlement”¹⁰². In the present case, Georgia has plainly placed before the Court a legal dispute under the 1965 Convention, especially in regard to ethnic cleansing in, and the denial of the right of return to, South Ossetia and Abkhazia. The sections that follow present the evidence that this legal dispute has existed since long before the filing of Georgia’s *Application*.

Section IV. Georgia’s Claims Regarding Ethnic Cleansing and Other Violent Acts of Discrimination by Russia’s Armed Forces

2.56 In the *Memorial*, Georgia demonstrated that Russia breached its obligations under the 1965 Convention through acts of ethnic discrimination committed by its military and security forces in and around South Ossetia and Abkhazia¹⁰³. In that regard, Georgia showed that Russian armed forces participated in ethnic cleansing and engaged in other violent abuses of ethnic Georgians.

2.57 Russia’s assertion that Georgia did not raise these issues prior to filing its *Application* is false. In fact, on numerous occasions in the years preceding the submission of the *Application* Georgia accused Russia of having engaged in acts of ethnic discrimination that fall under the 1965 Convention. In this Section, Georgia demonstrates that it raised these matters in its bilateral discussions with Russia, in various international fora, including the United Nations and the OSCE, in its reports to the CERD Committee, and in public statements by Georgia’s President and other State organs. In short, contrary to the inaccurate portrayal in Russia’s *Preliminary Objections*, Russia has been aware for many years of the complaints raised by Georgia over the commission of acts covered by the 1965

¹⁰² *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, *op. cit.*, p. 69, para. 52.

¹⁰³ GM, Part E, Chapter IX.

Convention, including among others, Russia's participation in ethnic cleansing and other violent acts of ethnic discrimination.

2.58 This section is divided into two parts. The first part focuses on the evidence pertaining to the period between the outbreak of armed hostilities between Georgia and Russia on 8 August 2008 and the filing of the *Application* four days later. The second part discusses the evidence covering the 15-year period prior to August 2008.

A. THE EVIDENCE PERTAINING TO 8-12 AUGUST 2008

2.59 Russia's argument that Georgia's *Application* was the first place it alleged that Russia was responsible for the ethnic cleansing that occurred between 8 and 12 August 2008 has no basis in fact¹⁰⁴. To the contrary, Georgia's highest authorities made repeated accusations of Russia's responsibility for ethnic cleansing in the opening days of the August 2008 conflict, and they did so *before* the filing of the *Application*.

2.60 As Georgia detailed in the *Memorial*, major hostilities between Georgia and Russia commenced during the night of 7 August 2008. Immediately thereafter, Russia's armed forces, in conjunction with separatist military units operating under Russia's command and control, began targeting the ethnic Georgian population of South Ossetia and adjacent areas, as well as ethnic Georgians in the Kodori Gorge region of Abkhazia¹⁰⁵. As the scale of these acts of violent ethnic discrimination became apparent, Georgia made every effort to invoke Russia's responsibility, and it repeatedly did so *prior* to filing its *Application*. When Russia persisted in its campaign of ethnic cleansing, Georgia chose to invoke the Court's jurisdiction under Article 22.

¹⁰⁴ See, e.g., RPO, paras. 1.7, 1.10, 3.3, 3.18, 3.45, 3.49, 3.76.

¹⁰⁵ GM, paras. 3.3-3.117.

2.61 On 9 August 2008, the day after major hostilities commenced, President Saakashvili issued a widely publicized statement declaring that the Russian Federation was acting in support of separatists in South Ossetia who were “engaged in massive violation of human rights and freedoms, armed assaults on peaceful population and violence”¹⁰⁶. He emphasized that the separatists committing these human rights abuses of ethnic Georgians had the “full” and “active” support of Russia¹⁰⁷. President Saakashvili specifically observed that Russia had supplied the separatists with military equipment and ammunition and that Russian officials held senior leadership positions in the *de facto* administration¹⁰⁸. He instructed that his statement be transmitted to “the U.N. Secretary-General, the General-Secretary of the Council of Europe, other International Organizations and Heads of Diplomatic Missions in Georgia”¹⁰⁹.

2.62 The same day, President Saakashvili held a press conference with the international news media during which he provided more details about the unfolding ethnic cleansing. He could not have been clearer in holding Russia responsible for perpetrating a campaign intended to expel ethnic Georgians from South Ossetia and Abkhazia:

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

¹⁰⁶ Press Release, Office of the President of Georgia, “Presidential Decree on Declaration of State of War and Full Scale Mobilization” (9 August 2008). GWS, Vol. IV, Annex 183. President Saakashvili’s statement was covered in Russia. *See, e.g.*, “Georgia imposes martial law as violence continues”, *RIA Novosti* (9 August 2008). GWS, Vol. IV, Annex 200.

¹⁰⁷ Press Release, Office of the President of Georgia, “Presidential Decree on Declaration of State of War and Full Scale Mobilization” (9 August 2008). GWS, Vol. IV, Annex 183.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.* *See also* U.N. General Assembly, Security Council, *Identical letters dated 11 August 2006 from the Chargé d’affaires A.I. of the Permanent Mission of Georgia to the United Nations addressed to the Secretary-General and the President of the Security Council, Annex*, U.N. Doc. A/60/976-S/2006/638 (14 August 2006). GWS, Vol. III, Annex 83.

expelled ethnic Georgians living there. Right now they are trying to set up the ethnic cleansing of ethnic Georgians from upper Abkhazia – Kodori Gorge¹¹⁰.

2.63 The next day, 10 August 2008, Georgia requested an emergency session of the Security Council. There, Georgia's Permanent Representative explicitly raised Russia's responsibility for violent acts of ethnic discrimination, accusing Russia of attempting to "exterminate the Georgian people" in South Ossetia and Abkhazia¹¹¹. The Representative of Georgia reported that President Saakashvili was urgently seeking to communicate with President Medvedev of Russia about this, to which Russia's Permanent Representative responded "what decent person would talk to him [*i.e.*, President Saakashvili] now"¹¹². The Russian Permanent Representative specifically denied the accusation made by President Saakashvili the previous day that Russian forces were committing ethnic cleansing¹¹³.

2.64 The following day, 11 August 2008, Georgia's Ministry of Foreign Affairs issued a public statement that also raised Russia's actions to forcibly remove ethnic Georgians from South Ossetia:

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

¹¹⁰ Press Briefing, Office of the President of Georgia, "President of Georgia Mikheil Saakashvili met foreign journalists" (9 August 2008). GWS, Vol. IV, Annex 184. For an example of reporting on President Saakashvili's statement, see "Russian bear goes for West's jugular", *Mail on Sunday (London)* (10 August 2008) (reporting President Saakashvili "said Russia was conducting ethnic cleansing of Georgians in Ossetia and Abkhazia's Kodori Gorge region"). GWS, Vol. IV, Annex 201.

¹¹¹ U.N. Security Council, *5953rd Meeting*, U.N. Doc. S/PV.5953 (10 August 2008), p. 16. GWS, Vol. III, Annex 96.

¹¹² U.N. Security Council, *5953rd Meeting*, U.N. Doc. S/PV.5953 (10 August 2008), p. 17. GWS, Vol. III, Annex 96. *See also*, "The Russian President refused to speak with Saakashvili" *Pravda* (11 August 2008). GWS, Vol. IV, Annex 206.

¹¹³ U.N. Security Council, *5953rd Meeting*, U.N. Doc. S/PV.5953 (10 August 2008), p. 17. GWS, Vol. III, Annex 96.

subsequently concentrate them on the territory of the village of Kurta¹¹⁴.

Georgia appealed to “the International Red Cross and other humanitarian and international organizations and the international community as a whole” to help end these human rights abuses perpetrated against ethnic Georgians¹¹⁵.

2.65 Also, on 11 August 2008, President Saakashvili said on CNN: “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*”¹¹⁶. President Saakashvili raised the same accusation of ethnic cleansing by the Russian army in regard to South Ossetia, stating that the Russian military “fully expelled a couple of days ago the whole Georgian population”¹¹⁷. Georgia’s accusations received extensive publicity worldwide¹¹⁸.

2.66 Russia unquestionably learned about, and denied, Georgia’s accusations that it was ethnically cleaning South Ossetia and Abkhazia. These claims were specifically acknowledged and disputed by Russia’s Minister of Foreign Affairs, Sergey Lavrov, who stated: “Mr. Saakashvili against the backdrop of ... the flag

¹¹⁴ Ministry of Foreign Affairs of Georgia, *Statement of the Ministry of Foreign Affairs of Georgia* (11 August 2008). GWS, Vol. IV, Annex 185.

¹¹⁵ *Ibid.*

¹¹⁶ “President Bush condemns Russian invasion of Georgia”, *CNN* (11 August 2008) (emphasis added). GWS, Vol. IV, Annex 205.

¹¹⁷ *Ibid.*

¹¹⁸ See, e.g., “Saakashvili: Russia committing ‘ethnic cleansing’ in Abkhazia”, *Deutsche Press-Agentur* (11 August 2008) (“Georgian President Mikheil Saakashvili remained defiant late Monday in the face of Russian attacks into Georgia and accused Moscow of committing ‘ethnic cleansing in Georgia’s breakaway region of Abkhazia.... ‘I directly accuse Russia of ethnic cleansing,’ he said.”). GWS, Vol. IV, Annex 204; “Saakashvili accused Russia of ‘ethnic cleansing’ plan,” *EuroNews* (11 August 2008) (“Saakashvili has called for international help, saying the goal of Russian soldiers is ‘ethnic cleansing’”). GWS, Vol. IV, Annex 202; “Georgia accuses Russia of ethnic cleansing,” *UPI*, (11 August 2008) (“Georgian President Mikheil Saakashvili Monday accused Russian forces of ‘ethnic cleansing’”). GWS, Vol. IV, Annex 203.

of either the EU or Council of Europe, 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 ... *it was Russia that he accused of carrying out those ethnic cleansings*”¹¹⁹.

2.67 On 12 August 2008, President Saakashvili made another public statement that described Russia’s acts of ethnic cleansing in both Abkhazia and South Ossetia. With regard to the expulsion of ethnic Georgians from the Kodori Gorge in Abkhazia, he stated: “several hundred pieces of Russian equipment, Russian airborne troops, commanded by head of airborne troops of Russia, with the rank of general, landed there and expelled and certainly killed part of the population; whole population from that place is gone. This is classical case of ethnic cleansing...”¹²⁰.

2.68 President Saakashvili was equally clear in holding Russia responsible for ethnic cleansing in South Ossetia:

The other development is around South Ossetia. As you know the enclaves of South Ossetia previously controlled by the Georgian government and by local administration headed by ethnic Ossetian Dimitri Sanakoev, *has been ethnically cleansed by intruding Russian troops* and I get very worrying reports, some of them look to be unfortunately credible, of point blank execution, on sight killings and some people are taken in some kind of camps or some internal places in Kurta and Vladikavkaz...¹²¹

¹¹⁹ Ministry of Foreign Affairs of the Russian Federation, *Transcript of Remarks and Response to Media Questions by Russian Minister of Foreign Affairs Sergey Lavrov at Joint Press Conference After Meeting with Chairman-in-Office of the OSCE and Minister for Foreign Affairs of Finland Alexander Stubb, Moscow, August 12, 2008* (12 August 2008) (emphasis added). GWS, Vol. IV, Annex 187. See also “Lavrov: ‘Russia is frustrated with the cooperation with the Western countries on South Ossetia’”, *Pravda* (12 August 2008). GWS, Vol. IV, Annex 208.

¹²⁰ Office of the President of Georgia, Press Briefing, “The President of Georgia Mikheil Saakashvili held press conference about situation in South Ossetia” (12 August 2008). GWS, Vol. IV, Annex 186.

¹²¹ *Ibid.*

2.69 Also on 12 August, President Saakashvili held a televised Joint Briefing with President Sarkozy of France, who was mediating negotiations between Georgia and Russia. President Saakashvili again raised Russia's acts of ethnic cleansing in parts of Georgia occupied by Russian forces:

There have been signs of ethnic cleansing in Upper Abkhazia as well. The entire population was forced out. People have died. ...

We need involvement of international monitors and internationalization of the entire process.... It is worse than what happened in Abkhazia when almost half a million persons were expelled¹²².

2.70 In another public statement on 12 August 2008, President Saakashvili said: "the result and the end game of this operation of Russian troop is to commit ethnic cleansing and annihilation of ethnic Georgian population in entire Abkhazia"¹²³.

2.71 Russia, unsurprisingly, denied its responsibility for ethnic cleansing in South Ossetia and Abkhazia. It also opposed Georgia's position by its conduct; as reported by independent international observers cited at paragraphs 3.13 to 3.16 of the *Memorial*, Russia's military forces continued to expel ethnic Georgians from their villages in these regions, to loot and burn their homes, to kill or beat those who refused to leave, and to incarcerate others¹²⁴.

2.72 The Joint Dissenting Opinion to the Order of 15 October 2008 takes the view that "Russia's armed activities after 8 August cannot, in and of themselves, constitute acts of racial discrimination in the sense of Article 1 of CERD *unless it is proven that they were aimed at establishing a 'distinction, exclusion,*

¹²² Transcript of the Joint Press Briefing of Presidents Saakashvili and Sarkozy, News Program "Kurier", *Rustavi 2* (12 August 2008). GWS, Vol. IV, Annex 209.

¹²³ "Russia advances into Georgia", *Australian Broadcasting Corporation* (12 August 2008). GWS, Vol. IV, Annex 207.

¹²⁴ *See also* GM, paras. 3.17-3.117.

restriction or preference based on race, colour, descent, or national or ethnic origin”¹²⁵. Georgia submits that the evidence described herein, and in the *Memorial*, which is far more voluminous than the limited proof made available to the Court at the hearings on provisional measures, plainly meets this standard. The presently available evidence shows that Georgia *did claim* prior to the filing of its *Application* that Russia’s armed activities after 8 August were aimed at discriminating against ethnic Georgians based on their ethnicity; these claims, all opposed by Russia, were: that there was a “massive violation of human rights and freedoms, armed assaults on peaceful population and violence”¹²⁶ with the “full” and “active” support of Russia¹²⁷ (9 August); 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...”¹²⁸ (10 August); that “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”¹²⁹ (11 August); that, in Abkhazia “several hundred pieces of Russian equipment, Russian airborne troops, commanded by head of airborne troops of Russia, with the rank of general, landed there and expelled and certainly killed part of the

¹²⁵ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Request for the Indication of Provisional Measures, Joint Dissenting Opinion, I.C.J Rep. 2008 (hereinafter “Joint Dissenting Opinion”), para. 9 (emphasis added).

¹²⁶ Press Release, Office of the President of Georgia, “Presidential Decree on Declaration of State of War and Full Scale Mobilization” (9 August 2008). GWS, Vol. IV, Annex 183. See e.g. “Georgia imposes martial law as violence continues”, *RIA Novosti* (9 August 2008). GWS, Vol. IV, Annex 200.

¹²⁷ Press Release, Office of the President of Georgia, “Presidential Decree on Declaration of State of War and Full Scale Mobilization” (9 August 2008). GWS, Vol. IV, Annex 183.

¹²⁸ Press Briefing, Office of the President of Georgia, “President of Georgia Mikheil Saakashvili Met Foreign Journalists” (9 August 2008). GWS, Vol. IV, Annex 184.

¹²⁹ Ministry of Foreign Affairs of Georgia, *Statement of the Ministry of Foreign Affairs of Georgia* (11 August 2008). GWS, Vol. IV, Annex 185.

population; whole population from that place is gone. This is classical case of ethnic cleansing...”¹³⁰ (12 August); that the Georgian-inhabited region of South Ossetia “*has been ethnically cleansed by intruding Russian troops [amid] very worrying reports... of point blank execution, on sight killings and some people are taken in some kind of camps...*”¹³¹ (12 August).

2.73 Of course, it remains for Georgia to prove these claims – all of which allege conduct by or attributable to Russia that is prohibited by the 1965 Convention – with persuasive evidence. But that is for the merits phase of the case. The only proper question here is whether prior to its *Application* Georgia took positions, opposed by Russia, with regard to acts of ethnic discrimination by Russia’s military forces falling under the 1965 Convention. Georgia submits that the evidence now before the Court, which is far greater and more compelling than what was submitted in September 2008, requires that the question be answered in the affirmative.

B. THE EVIDENCE PERTAINING TO THE PERIOD BEFORE AUGUST 2008

2.74 At the hearings on provisional measures, Georgia *did not* present the voluminous evidence of its repeated and ongoing protests against Russia’s participation and complicity in ethnic cleansing and other forms of discrimination against ethnic Georgians which it made over a period of 15 years prior to 8 August 2008. This was because, in Georgia’s view, the acts of the Russian Federation giving rise to an urgent need for provisional measures were those that commenced on 8 August, namely, the violent campaign of ethnic cleansing then being carried out by invading Russian military forces who were killing and

¹³⁰ Office of the President of Georgia, Press Briefing, “The President of Georgia Mikheil Saakashvili held press conference about situation in South Ossetia” (12 August 2008). GWS, Vol. IV, Annex 186.

¹³¹ *Ibid.*

beating ethnic Georgians, and destroying their homes and villages, in an effort to expel them from South Ossetia and Abkhazia. Accordingly, Georgia's evidence of the existence of a legal dispute under the 1965 Convention offered at that stage of the proceedings focused on the opposing positions expressed by Georgia and Russia between 8 and 12 August regarding activities by Russia then in progress.

2.75 In regard to the state of the evidence concerning the manifestation of a legal dispute under the Convention *prior to* 8 August 2008, the Joint Dissenting Opinion observes that: "the Court must consider whether the two Parties have opposing views with regard to the interpretation or application of the Convention. Admittedly, it is established that no such opposition was ever manifested before 8 August..."¹³² As indicated above, although there was little evidence presented at the provisional measures hearing that the Parties had opposing positions on issues falling under the Convention prior to 8 August 2008, it was not Georgia's intention to convey the impression that it regarded its legal dispute with Russia regarding ethnic discrimination under the Convention as having manifested itself only after that date. To the contrary, as the huge volume of evidence submitted *subsequent* to the provisional measures phase of the case establishes, legal disputes between Georgia and Russia regarding matters falling under the Convention manifested themselves many times over a period of more than 15 years preceding August of 2008.

2.76 Georgia began complaining about Russia's ethnic discrimination against Georgians in South Ossetia and Abkhazia – conduct that plainly comes within the 1965 Convention – in the early 1990s, and it continued to do so after it acceded to the Convention in 1999. For example, in December 1992, Georgia submitted a *note verbale* to the Security Council, annexing a letter from Mr. Eduard Shevardnadze, then serving as the Chairman of Georgia's Parliament and its Head

¹³² Joint Dissenting Opinion, para. 8.

of State. The note described the ongoing ethnic cleansing and emphasized that “[p]articularly disturbing is the *participation of Russian troops* stationed in Abkhazia on the side of Abkhaz extremists”¹³³. Georgia’s *note verbale* explicitly blamed Russia for the acts of ethnic discrimination described therein, stating that “[i]t is quite clear that all of this is being directed by the reactionary forces ensconced within the political circles of the Russian Federation”. It also stated that the “increasingly intensive interference on the part of the Russian military units” was generating “an inter-State conflict” between Georgia and Russia¹³⁴.

2.77 The targeting of ethnic Georgian civilians by the Russian military moved the Parliament of Georgia to blame Russia for its role in acts of ethnic cleansing. For example, on 17 December 1992, the Georgian Parliament issued a declaration holding Russia responsible for “the mass shooting of civilian Georgian population and the policy of ethnic cleansing”¹³⁵. This “tragedy”, it said, had been carried out jointly by “armed Abkhaz separatists together with Russian reactionary forces”, including the “*immediate involvement of Russian armed forces*” acting “on the side of the extremist separatists”¹³⁶. Russia, as it has always done, denied its complicity in ethnically-directed violence against Georgians. Thus, the evidence shows that a dispute existed between Georgia and Russia over Russia’s participation in ethnic cleansing operations, conduct well within the scope of the 1965 Convention, as far back as 1992.

2.78 On 1 April 1993, Georgia again declared that the Abkhazian “separatist grouping *with the support of Russian troops*” was carrying out “the policy of

¹³³ U.N. Security Council, *Note Verbale dated 25 December 1992 from the Ministry of Foreign Affairs of Georgia Addressed to the Secretary-General, Annex*, U.N. Doc. S/25026 (30 December 1992), p. 2 (emphasis added). GWS, Vol. III, Annex 46.

¹³⁴ *Ibid.*

¹³⁵ Statement of the Parliament of Georgia (17 December 1992). GWS, Vol. IV, Annex 124.

¹³⁶ *Ibid.* (emphasis added).

ethnic cleansing, acquiring the characteristics of genocide directed against the Georgian civilian population and civilians of other nationalities”¹³⁷. On the same date, Georgia also accused Russia of responsibility for the participation of its armed forces in what it again characterized as “ethnic cleansing” in an appeal to the United Nations and the OSCE:

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 has taken the form of apparent genocide against civilians of Georgian and other nationalities. Systematic mass murders, shootings, and unprecedented harassment force the Georgian population to leave their places of residence¹³⁸.

By these statements, Georgia made it clear that it had a dispute with Russia over these and similar violent acts of ethnic discrimination: “*Russia...bears full responsibility for the above mentioned policy*”¹³⁹. Russia, of course, has always opposed Georgia’s position in this regard.

2.79 On 27 April 1993, the Georgian Parliament repeated that the “ethnic cleansing of Georgian populations” was occurring in areas “*under control of Russian troops and the Abkhaz separatists*” and declared that the “root cause of the tragic events unfolding in Abkhazia” is “the Russian Federation’s attempt to

¹³⁷ Decree Issued by the Parliament of Georgia on Necessary Measures to be Taken to Protect Life and Ensure Security of Peaceful Population in the Armed Conflict Zone (1 April 1993)(emphasis added). GWS, Vol. IV, Annex 126. Foreshadowing the issue of forced displacement that would come to dominate the following years, Georgia emphasized the link between the expulsions of ethnic Georgians from their homes in Abkhazia and their right to return. “The Council of National Security and Defense and the Cabinet of Ministers of the Republic of Georgia to take all the necessary measures to ensure the return of the internally displaced persons to their homes and to create adequate conditions to this end”. *Ibid.*

¹³⁸ Appeal of the Parliament of Georgia to the United Nations, Conference on the Security and Cooperation in Europe, International Human Rights Organizations (1 April 1993) (emphasis added). GWS, Vol. IV, Annex 125.

¹³⁹ *Ibid.* (emphasis added). GWS, Vol. IV, Annex 125. Georgia therefore appealed to international organizations “to take effective measures” to “protect the Georgian population in the territories controlled by the Russian armed forces and the Gudauta formations”. *Ibid.*

annex a part of the territory of Georgia”¹⁴⁰. Georgia’s claim that Russia was responsible for the ethnic cleansing in Abkhazia during this period was recognized in a September 1993 report by the UN Special Rapporteur on the question of the use of mercenaries, who had investigated the events that occurred in Abkhazia. The Special Rapporteur acknowledged that Georgia held Russia responsible for the “thousands of Russian citizens, mercenaries and members of the regular armed forces” who “were directly involved in armed hostilities”, including the “Russian army troops” who participated in the ethnic cleansing¹⁴¹.

2.80 In 1998, Georgia again held Russia responsible for ethnic cleansing in Abkhazia, in this case the activities that occurred in the Gali District, in May and June of that year¹⁴². On 27 May 1998, the Parliament of Georgia formally and

¹⁴⁰ Decree Issued by the Parliament of Georgia on Withdrawal of Russian Military Units from the Conflict Zone in Abkhazia (27 April 1993). GWS, Vol. IV, Annex 127. Georgia also raised Russia’s responsibility for ethnic cleansing in a letter to the UN Security Council on 2 July 1993 that described the ethnic cleansing then taking place in and around Sukhumi. In that letter, President Shevardnadze reporting that “the number of casualties among the civilian population is spiralling at a catastrophic rate”, and blamed the Russian military for much of the violence being directed against ethnic Georgian civilians. U.N. Security Council, *Letter dated 2 July 1993 from the Head of State of the Republic of Georgia Addressed to the President of the Security Council*, U.N. Doc. S/26031 (2 July 1993). GM, Vol. II, Annex 8.

¹⁴¹ U.N. General Assembly, *Annex, Report on the question of the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, submitted by the Special Rapporteur of the Commission of Human Rights*, U.N. Doc. A/48/385 (23 September 1993), paras. 45, 47. GM, Vol. II, Annex 10.

¹⁴² The violence directed against ethnic Georgians in Gali in 1998 has been repeatedly recognised by the international community as an example of extreme ethnic discrimination. For example, at the Seventh Meeting of the Ministerial Council of the OSCE in December 1998, the “[Ministers] strongly condemn[ed] the violent acts in the Gali District of Abkhazia, Georgia, in May and June 1998, resulting in mass destruction and the forcible expulsion of Georgian population”. OSCE, Seventh Meeting of the Ministerial Council, *Decision on Georgia*, MC(7).DEC/1 (December 1998). GWS, Vol. III, Annex 105. The OSCE Ministers further acknowledged the right of those forcibly displaced ethnic Georgians to return to their homes in Gali: “[Ministers] stress the need to refrain from the use of force, the importance of the prompt, immediate, safe and unconditional return of the refugees to the Gali district” OSCE, Seventh Meeting of the Ministerial Council, *Decision on Georgia*, MC(7).DEC/1 (December 1998). GWS, Vol. III, Annex 105. See also U.N. Security Council, *Letter dated 26 May 1998 from the Permanent Representative of Georgia to the United Nations Addressed to the President of the Security Council*, U.N. Doc. S/1998/432 (26 May 1998), p. 2. (“Hundreds of civilians are reported dead and the villages of the Gali region levelled to earth. The renewed ethnic cleansing has already prompted the exodus of

publicly accused Russia of carrying out ethnic cleansing in that region, involving the killing of more than 1,500 ethnic Georgians and the burning of over 1,000 houses:

The recent tragedy in Gali District once again demonstrated that the Abkhaz separatists still resort to genocide and ethnic cleansing in the territory occupied by them. This policy, *i.e.* the crime against humanity and mankind, is aimed at forcible change of historically established demographic reality, taking away from Georgia its centuries-old, integral part, Abkhazia, involvement of Georgians in a wide-scale war, destruction of Georgia's statehood and provocation of chaos and anarchy¹⁴³.

The statement blamed Russian military forces for participating in the ethnic cleansing so described, and accused Russia of "helping separatists to conduct punitive operation against peaceful dwellers"¹⁴⁴. The existence of a dispute between Georgia and Russia over the latter's responsibility for ethnic cleansing in the Gali district of Abkhazia could not have been made clearer: "The Parliament of Georgia declares, that ... *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*"¹⁴⁵.

2.81 After 1999, when Georgia acceded to the 1965 Convention, its disagreements with Russia relating to discrimination against ethnic Georgian by Russian armed forces continued. In October 2001, Georgia's Parliament declared that since the deployment of "Russian Peacekeepers" to Abkhazia, the "ethnic

thousands of people"). GWS, Vol. III, Annex 55; U.N. Security Council, *Letter dated 16 June 1998 from the Chargé d'Affaires A.I. of the Permanent Mission of Georgia to the United Nations addressed to the President of the Security Council, Annex*, U.N. Doc. S/1998/516 (16 June 1998) ("The Ministry of Foreign Affairs of Georgia expresses its extreme indignation in connection with the developments in the Gali district of Abkhazia, Georgia, where the ethnic cleansing of the Georgian population is continuing openly"). GWS, Vol. III, Annex 56.

¹⁴³ Statement of the Parliament of Georgia (27 May 1998). GWS, Vol. IV, Annex 136.

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*

cleansing against Georgians has not stopped”¹⁴⁶. To the contrary, it stated that “more than 1,700 persons were killed in the security zone”. Georgia blamed the Russian forces for this anti-ethnic Georgian violence, publicly declaring that Russia’s “*Peacekeeping Forces committed numerous crimes against the peaceful population*”¹⁴⁷. Russia, as would be expected, disagreed.

2.82 Georgia similarly complained of ethnic cleansing against persons of Georgian ethnicity in Abkhazia in its first report to the CERD Committee following its accession to the 1965 Convention:

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 eliminated¹⁴⁸.

2.83 When the CERD Committee met to consider Georgia’s report, a member of the Committee, Mr. Valencia Rodriguez, observed that the submission “referred to the ‘policy of ethnic cleansing’ practised in the Abkhaz region. That situation deserved special consideration, even if the region was de facto outside

¹⁴⁶ Resolution of the Parliament of Georgia, Concerning the situation on the territory of Abkhazia (11 October 2001). GWS, Vol. IV, Annex 145.

¹⁴⁷ *Ibid.* (emphasis added).

¹⁴⁸ U.N. Committee on the Elimination of Racial Discrimination, *Reports Submitted by States Parties Under Article 9 of the Convention, Initial report of States parties due in 2000, Addendum, Georgia*, U.N. Doc. CERD/C/369/Add.1 (1 February 2001), para. 55. GWS, Vol. III, Annex 64.

Georgia's control”¹⁴⁹. Underscoring the centrality of these matters to the 1965 Convention, Mr. Valencia Rodriguez requested further information¹⁵⁰. In response, Georgia “confirmed that some 30[0],000 persons – 90 percent of them Georgian – had been driven from their homes in Abkhazia, in what could be considered to be a case of ethnic cleansing”¹⁵¹. Georgia further reported that “[t]he efforts of the international community had not managed to resolve the conflict and serious ethnically motivated human rights violations were still occurring”¹⁵². In its Concluding Observations, the CERD Committee took note of the fact that “Georgia has been confronted with ethnic and political conflicts in South Ossetia and Abkhazia” that had “resulted in discrimination”, including “a large number of internally displaced persons and refugees” who were unable to return despite “attention” having been repeatedly drawn to the “obstruction” of their right of return¹⁵³.

2.84 In January 2003, the Speaker of the Parliament of Georgia raised the same issue of ethnic discrimination by Russia in discussions with, among others, the Chairperson of the Council of the Russian Federation and the Chairperson of the Russian State Duma, placing blame on Russian peacekeeping forces which were viewed with “distrust” because of the “actions” they had taken in the “conflict zone”. When Georgia suggested that the Russian peacekeepers move out of the

¹⁴⁹ U.N. Committee on the Elimination of Racial Discrimination, *Summary Record of the 1453rd Meeting*, U.N. Doc. CERD/C/SR.1453 (15 March 2001), para. 22. GWS, Vol. III, Annex 65.

¹⁵⁰ *Ibid.*

¹⁵¹ U.N. Committee on the Elimination of Racial Discrimination, *Summary Record of the 1454th Meeting*, U.N. Doc. CERD/C/SR.1454 (16 March 2001), para. 8. GWS, Vol. III, Annex 67.

¹⁵² *Ibid.*, para. 21.

¹⁵³ U.N. Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Georgia*, U.N. Doc. CERD/C/304/Add. 120 (27 April 2001), paras. 3-4. GWS, Vol. III, Annex 66.

Gali District to “facilitate the process of refugee return”, the Russian side rejected the proposal¹⁵⁴.

2.85 In its periodic report to the CERD Committee submitted in 2004, Georgia stated: “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”¹⁵⁵. Appearing before the CERD Committee to discuss the report, the Georgian delegation stated:

The Government sought to protect the rights of national minorities and to promote their integration into Georgian institutions and administration. In particular, it attached great importance to peaceful resolution of the conflicts in South Ossetia and Abkhazia and wished to ensure that the people of Ossetia and Abkhazia could participate in the social, political and cultural life of Georgia. A conference on the peaceful resolution of the Georgia-Ossetia conflict had been opened by President Saakashvili on 10 July 2005. The Government was ready to extend its jurisdiction to the territory of South Ossetia, thereby granting that territory wide autonomy under the Georgian Constitution, including self-governance, cultural autonomy, a privileged border-crossing regime with the Russian Federation, a privileged economic and tax system, and representation in Parliament and the central Government.

A strategy had been formulated reflecting the president’s position on a number of key concerns relating to the situation in South Ossetia and Abkhazia, including security, economic rehabilitation, confidence-building measures and political issues. In the hope of

¹⁵⁴ Script of the Talks of delegation of the Parliament of Georgia to Moscow on January 20-23 [2003] Headed by Ms. N. Burjanadze, Speaker of the Parliament of Georgia, Taken Place at the Council and State Duma of the Russian Federation. GWS, Vol. IV, Annex 153.

¹⁵⁵ U.N. Committee on the Elimination of Racial Discrimination, *Third periodic reports of States parties due in 2004, Addendum, Georgia*, U.N. Doc. CERD/C/461/Add.1 (21 July 2004), para. 53. GWS, Vol. III, Annex 70.

facilitating a peaceful resolution of the conflict, the Government had offered far-reaching autonomy to South Ossetia. Respect for human rights and the integration of minorities would be placed at the heart of the peace process. *Her Government was gravely concerned about violations of the human rights of Georgian citizens in the Gali district of Abkhazia and called for the establishment of a United Nations human rights protection office in the city of Gali to monitor the situation...*¹⁵⁶.

2.86 The CERD Committee's Concluding Observations on Georgia's report acknowledged the "ethnic and political conflicts in Abkhazia and South Ossetia" that confronted Georgia, which made it "difficult" for Georgia to exercise "its jurisdiction with regard to the protection of human rights and the implementation of the Convention in those regions"¹⁵⁷.

2.87 In February 2004, President Saakashvili directly accused Russia and its forces of complicity in ethnic cleansing against ethnic Georgians in Abkhazia. In a public statement, the President of Georgia said that: "most 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"¹⁵⁸. President Saakashvili declared that Russia was responsible for blocking a resolution to this dispute: "[I]t's primarily the issue of our relations with Russia. The Russian generals are in command there, they have military contingent there which played a very negative role in the years of the war"¹⁵⁹. It strains credulity for Russia to claim, notwithstanding these statements by

¹⁵⁶ U.N. Committee on the Elimination of Racial Discrimination, *Summary Record of the 1706th Meeting*, U.N. Doc. CERD/C/SR.1706 (10 August 2005), paras. 23-24 (emphasis added). GWS, Vol. III, Annex 72.

¹⁵⁷ U.N. Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Georgia*, U.N. Doc. CERD/C/GEO/CO/3 (27 March 2007), para. 4, GWS, Vol. III, Annex 86.

¹⁵⁸ "Ask Georgia's President", *BBC News* (25 February 2004) (emphasis added). GWS, Vol. IV, Annex 198.

¹⁵⁹ *Ibid.*

Georgia's President, and all those that came before it (described above), that there was nothing that could "be interpreted as obliging Russia to infer a claim over racial discrimination from the various political disagreements it had had with Georgia over the recent years"¹⁶⁰.

2.88 Georgia made similar complaints in regard to Russia's discrimination against ethnic Georgians in South Ossetia. On 19 June 2006, Georgia's Deputy Foreign Minister, Mr. Merab Antadze, disputed the "immediate involvement" of Russian peacekeeping forces in "illegal and criminal acts against the ethnically Georgian peaceful population"¹⁶¹. These acts, he said, were "totally unacceptable and provocative"¹⁶². Still nothing "obliging Russia to infer a claim of racial discrimination"? Perhaps so, but only in the limited sense that Georgia's accusations of Russia's discrimination against ethnic Georgians were so direct and unmistakable that they left nothing "to infer".

2.89 In July 2006, Georgia drew the attention of the Secretary-General (and, of course, Russia as well) to the ethnic discrimination committed by Russian peacekeeping forces in both South Ossetia and Abkhazia. Georgia stated that the "reality" that had been "brought about" by Russia's "peacekeeping operations" was "permanent attempts to legalize the results of ethnic cleansing" and the "massive violation of fundamental human rights" of the ethnic Georgian population.¹⁶³ Russia disputed these claims in a statement by its Ministry of

¹⁶⁰ RPO, para. 4.32.

¹⁶¹ Ministry of Foreign Affairs of Georgia, *Comments of Deputy Minister of Foreign Affairs of Georgia Merab Antadze Concerning the Answers of Minister of Foreign Affairs of the Russian Federation Sergey Lavrov to Journalists' Questions* (19 June 2006). GWS, Vol. IV, Annex 164.

¹⁶² *Ibid.*

¹⁶³ U.N. General Assembly, *Letter dated 24 July 2006 from the Permanent Representative of Georgia to the United Nations addressed to the Secretary-General, Annex*, U.N. Doc. A/60/954 (25 July 2006). GWS, Vol. III, Annex 82

Foreign Affairs¹⁶⁴, leaving no doubt that it received the message loud and clear this time.

2.90 Georgia again accused Russia of engaging in ethnic cleansing against ethnic Georgians in President Saakashvili's address to the European Parliament in November 2006. In a statement that Russia could not have missed, Georgia's President observed that "[t]he Russian administration first undertook ethnic cleansing in Abkhazia" in the early 1990s, and that "history seems to be repeating itself", with Russia again "targeting the same victims for a second time"¹⁶⁵.

2.91 In September 2007, Georgia's Ministry of Foreign Affairs emphasized the "daily incidence of grave offences involving peacekeepers tak[ing] place amid the culpable inactivity of the [Russian] peacekeeping forces" in South Ossetia and Abkhazia "including with the participation of the representatives of [Russia's] peacekeeping forces"¹⁶⁶. Georgia therefore "call[ed]" on "the Russian side" to cease such activities and to "undertake the functions of a truly unbiased facilitator"¹⁶⁷.

2.92 In the months leading up to the filing of its *Application*, Georgia again complained of Russia's ethnic discrimination against ethnic Georgians, accusing Russia of acts that undeniably fall within the 1965 Convention. On 17 April 2008, Georgia informed the Secretary-General that "Russia justifies the ethnic cleansing of hundreds of thousands of peaceful citizens" by recognising the

¹⁶⁴ U.N. Security Council, *Letter dated 19 July 2006 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General, Annex*, U.N. Doc. A/2006/555 (20 July 2006). GWS, Vol. III, Annex 81.

¹⁶⁵ Office of the President of Georgia, Press Release, "Remarks by The President of Georgia Mikheil Saakashvili to the European Parliament, Strasbourg" (14 November 2006) (quoting Otar Ioseliani). GWS, Vol. IV, Annex 172.

¹⁶⁶ Ministry of Foreign Affairs of Georgia, *Statement of the Ministry of Foreign Affairs of Georgia* (20 September 2007). GWS, Vol. IV, Annex 175.

¹⁶⁷ *Ibid.*

“de facto authorities” that were “created through this very cleansing”¹⁶⁸. Two days later, the Georgian Foreign Ministry reiterated that Russia was responsible in South Ossetia and Abkhazia for “violations and neglect of human rights of an absolute majority of the regions’ population” who were “victims of ethnic cleansing”¹⁶⁹. On 21 April 2008, President Saakashvili issued a public statement in which he assigned responsibility to Russia for the “[e]thnic cleansing of territory” in Abkhazia, which he said had been carried out by “special units of [the] Russian Army” and “hired combatants which came from Russia”¹⁷⁰. All of these alleged acts come within the coverage of the 1965 Convention.

2.93 In sum, the evidence now before the Court shows Georgia and Russia have been engaged in a longstanding dispute over Georgia’s claims and Russia’s denials, regarding the participation of the Respondent State’s military forces in ethnic cleansing and other violent acts of ethnic discrimination, all of which constitutes conduct which falls under the 1965 Convention. Georgia began raising these disputes in the early 1990s, continued raising them in the years following Georgia’s 1999 accession to the Convention, and raised them again when Russia resumed and stepped up its ethnic cleansing activities from early in 2008 through the beginning of August of that year. Because all of this occurred *before* Georgia filed its *Application*, the existence of a legal dispute under the 1965 Convention prior to the invocation of the Court’s jurisdiction is well established.

¹⁶⁸ U.N. General Assembly, *Letter dated 17 April 2008 from the Chargé d’affaires a.i. of the Permanent Mission of Georgia to the United Nations addressed to the Secretary-General, Annex*, U.N. Doc. A/62/810 (21 April 2008). GWS, Vol. III, Annex 91.

¹⁶⁹ Ministry of Foreign Affairs of Georgia, *Statement of the Ministry of Foreign Affairs of Georgia* (19 April 2008). GWS, Vol. IV, Annex 177.

¹⁷⁰ Office of the President of Georgia, Speech, “The President of Georgia Mikheil Saakashvili made a special statement” (21 April 2008). GWS, Vol IV, Annex 178.

Section V. Georgia's Claims Regarding Russia's Forcible Prevention of the Exercise of the Right of Return by Georgian IDPs

2.94 Georgia and Russia disputed not only whether Russian military forces committed acts of ethnic cleansing and other violent forms of discrimination against ethnic Georgians; in addition, they disagreed about whether Russian troops, who served, in effect, as the border guards of South Ossetia and Abkhazia, physically prevented the Georgian victims of ethnic cleansing from returning to their homes and villages in those territories. Consistently between the mid-1990s and August of 2008, Georgia claimed, and Russia denied, that Russia's armed forces gave permanent effect to the physical expulsion of ethnic Georgians from South Ossetia and Abkhazia by denying them their right of return, and by doing so, turning those territories into separatist enclaves populated, with limited exceptions, only by ethnic Ossetians and Abkhaz, respectively. Obstruction of the right of return, based on ethnic discrimination, is unquestionably conduct that falls under the 1965 Convention.

2.95 Georgia consistently complained of Russia's use of its armed forces to block the return of ethnic Georgians IDPs to South Ossetia and Abkhazia. For example, on 30 May 1997, the Parliament of Georgia accused the Russian peacekeeping forces of preventing the return of ethnic Georgians to those territories. The Parliament observed that "no tangible progress" had been made with respect to the "return of refugees to their homes" despite the fact that the "Peacekeeping Forces of the Russian Federation" were required by their mandate to facilitate this process. To the contrary, the parliamentary statement concluded that Russia's "peacekeeping forces, in fact, carry out the functions of border guard". As a result, they were "supporting and strengthening the separatist

regime[’s]” efforts to “oppose[]” the “return of refugees and IDPs to their homes”¹⁷¹.

2.96 Georgia raised the same issue with Russia in October 2001 when it again complained that Russian forces were preventing the return of ethnic Georgians to South Ossetia and Abkhazia. Georgia emphasized that “Russia appears as the party involved in the conflict” and “the function of Peacekeeping Forces is limited to drawing ‘the border’”¹⁷².

2.97 In March 2002, Georgia similarly accused Russia’s military forces of obstructing the return of ethnic Georgians to Abkhazia:

The CIS Peacekeeping Forces, deployed on the territory of Abkhazia, in reality fulfil the functions of border guards between Abkhazia and the rest of Georgia and fail to perform the duties, envisaged by their mandate, namely, they cannot provide for the protection of population and creation of conditions for the secure return of internally displaced persons...¹⁷³

2.98 Russia’s policy and practice of rendering permanent the forced displacement of ethnic Georgians, and violating their right of return, was disputed again in June 2006, by Georgia’s Deputy Foreign Minister. “Peacekeepers have in fact assumed the role as protectors of separatists” and the “border guards between the conflict regions and the rest of Georgia”. The effect of Russia’s

¹⁷¹ Decree Issued By the Parliament of Georgia on Further Presence of Armed Forces of the Russian Federation Deployed in the Zone of Abkhaz Conflict under the Auspices of the Commonwealth of Independent States (30 May 1997). GWS, Vol. IV, Annex 132.

¹⁷² Resolution of the Parliament of Georgia, Concerning the Situation on the Territory of Abkhazia (11 October 2001). GWS, Vol. IV, Annex 145.

¹⁷³ Resolution of the Parliament of Georgia on the Situation in Abkhazia (20 March 2002). GWS, Vol. IV, Annex 146.

actions, the Deputy Foreign Minister said, was to prevent the return of ethnic Georgian victims of ethnic cleansing¹⁷⁴.

2.99 The dispute was raised again in October 2006 when Georgia's Permanent Representative to the United Nations stated:

It is crystal clear, that the Russian peacekeeping force is not an impartial, nor international contingency. 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 another¹⁷⁵.

2.100 Georgia again raised the issue with Russia in correspondence between the two States' Presidents in June-July 2008. When President Saakashvili pressed the issue of the return of ethnic Georgian IDPs to Abkhazia, Russian President Medvedev categorically rejected their return, stating that it was “untimely” even to consider¹⁷⁶. It is difficult to understand how, following this clear contradiction between the opposing positions of the two States, Russia could argue in its *Preliminary Objections* that there was no legal dispute between them concerning the return of ethnic Georgians to the regions of Georgia from which they had been expelled because of their ethnicity. Indeed, Russia pretends to be “shocked” by Georgia's *Application* accusing it of blocking the return of ethnic Georgian IDPs to South Ossetia and Abkhazia. Russia's feigned astonishment at this accusation is not credible. Georgia has been disputing Russia's role in forcibly

¹⁷⁴ Ministry of Foreign Affairs of Georgia, *Comments of Deputy Minister of Foreign Affairs of Georgia Merab Antadze Concerning the Answers of Minister of Foreign Affairs of the Russian Federation Sergey Lavrov to Journalists' Questions* (19 June 2006). GWS, Vol. IV, Annex 164.

¹⁷⁵ Ministry of Foreign Affairs of Georgia, *Statement of Mr. Irakli Alasania, Ambassador Extraordinary and Plenipotentiary, Permanent Representative of Georgia in the UN* (4 October 2006) (emphasis added). GWS, Vol. IV, Annex 171.

¹⁷⁶ Letter of President Mikheil Saakashvili of Georgia to President Dmitry Medvedev of the Russian Federation (24 June 2008). GM, Vol. V, Annex 308; Letter of President Dmitry Medvedev of the Russian Federation to President Mikheil Saakashvili of Georgia (1 July 2008). GM, Vol. V, Annex 311.

preventing the return of ethnic Georgian IDPs to South Ossetia and Abkhazia on a regular basis since at least 1997, and Russia has been disputing Georgia's claims for the entire time – covering more than eleven years prior to the filing of the *Application*.

2.101 In its *Preliminary Objections*, Russia seeks to portray its dispute with Georgia over the right of return of ethnic Georgian IDPs as falling *outside* the scope of the 1965 Convention. According to Russia, the dispute over the denial of the right of return based on the ethnicity of the IDPs cannot be “assimilated to a discussion of a claim of racial discrimination brought against Russia” under the Convention¹⁷⁷. Russia's argument is not only contrary to the text of Article 5 of the Convention, but also to the views expressed by the CERD Committee, especially in its General Recommendation 22, sub-titled “Article 5 and refugees and displaced persons”:

- (a) All such refugees and displaced persons have the right freely to return to their homes of origin under conditions of safety;
- (b) States parties are obliged to ensure that the return of such refugees and displaced persons is voluntary and to observe the principle of non-refoulement and non-expulsion of refugees;
- (c) All such refugees and displaced persons have, after their return to their homes of origin, the right to have restored to them property of which they were deprived in the course of the conflict and to be compensated appropriately for any such property that cannot be restored to them. Any commitments or statements relating to such property made under duress are null and void;
- (d) All such refugees and displaced persons have, after their return to their homes of origin, the right to participate fully and equally in

¹⁷⁷ RPO, para. 4.90(a)(1).

public affairs at all levels and to have equal access to public service and to receive rehabilitation assistance¹⁷⁸.

2.102 The CERD Committee applied this principle in relation to the ethnically-based forced displacement that occurred in Bosnia-Herzegovina:

219. The Committee expresses its grave concern and condemns the massive, gross and systematic human rights violations occurring in the territory of Bosnia and Herzegovina, most of which are committed in connection with the systematic policy of ‘ethnic cleansing’ and genocidal acts in the areas under the control of the self-proclaimed Bosnian Serb authorities. All these practices, which are still occurring, constitute a grave violation of all the basic principles underlying the International Convention on the Elimination of All Forms of Racial Discrimination. *The Committee urges the immediate reversal of ethnic cleansing which must begin with the voluntary return of displaced people*¹⁷⁹.

2.103 Indeed, the CERD Committee repeatedly recognized the relationship between the 1965 Convention and the right of return in the specific context of forced displacement of ethnic Georgians from South Ossetia and Abkhazia. The Committee’s Summary Record of its 1706th Meeting, on 4 August 2005, includes this statement by the Georgian delegation:

The situation of internally displaced persons who had been unable to return to Abkhazia was another cause for concern. Her Government was hopeful that an agreement could be reached with the Abkhaz authorities to the satisfaction of all parties. It had expressed its willingness to provide security guarantees and economic and political cooperation, including negotiations on the

¹⁷⁸ U.N. Office of the High Commissioner for Human Rights, CERD, *General Recommendation No. 22: Art. 5 and refugees and displaced persons*, Forty-Ninth Session, U.N. Doc. A/51/18 (1996), para. 2(a)-(d). GM, Vol. II, Annex 21.

¹⁷⁹ U.N. General Assembly, Committee on the Elimination of Racial Discrimination, *Report of the Committee on the Elimination of Racial Discrimination*, U.N. Doc A/50/18 (22 September 1995), para. 219 (emphasis added). GWS, Vol. III, Annex 50. *See also ibid.*, para. 26 (CERD Committed “demands” that “that persons be given the opportunity to return safely to the places they inhabited before the beginning of the conflict and that their safety be guaranteed, as well as their effective participation in the conduct of public life”).

political status of Abkhazia within the territory of Georgia, so as to facilitate the return of internally displaced persons¹⁸⁰.

The CERD Committee's Concluding Observations on Georgia's report acknowledged the "ethnic and political conflicts in Abkhazia and South Ossetia" that confronted Georgia, which made it "difficult" for Georgia to exercise "its jurisdiction with regard to the protection of human rights and the implementation of the Convention in those regions"¹⁸¹. The CERD Committee drew particular attention to the fact that such "discrimination" had manifested itself, among other things, in the "large number of internally displaced persons and refugees" whose "free movement" and right of return had been obstructed¹⁸².

2.104 Accordingly, there can be no doubt that each time Georgia raised a dispute with Russia over the denial of ethnic Georgians' right of return, it was raising a dispute under the 1965 Convention.

Section VI. Georgia's Claims of Russian Support, Sponsorship and Defence of Ethnic Discrimination by Third-Parties

2.105 As Georgia showed in paragraphs 9.54 to 9.62 of the *Memorial*, Russia's responsibility under the 1965 Convention is not confined to breaching the Convention through the acts of its armed forces, including their participation in violence against ethnic Georgians and their blocking the return of ethnic

¹⁸⁰ U.N. Committee on the Elimination of Racial Discrimination, *Summary Record of the 1706th Meeting*, U.N. Doc. CERD/C/SR.1706 (10 August 2005). GWS, Vol. III, Annex 72.

¹⁸¹ U.N. Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Georgia*, U.N. Doc. CERD/C/GEO/CO/3 (27 March 2007), para. 4. GWS, Vol. III, Annex 86.

¹⁸² U.N. Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Georgia*, U.N. Doc. CERD/C/GEO/CO/3 (27 March 2007), para. 5. GWS, Vol. III, Annex 86. *See also* U.N. Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Georgia*, U.N. Doc. CERD/C/304/Add. 120 (27 April 2001), para. 4. GWS, Vol. III, Annex 66.

Georgian IDPs. In addition, Russia has breached its obligations under Article 2(b) “not to sponsor, defend or support racial discrimination by any persons or organizations”. In the *Memorial*, Georgia demonstrated Russia’s responsibility for breaching this provision by virtue of its support, sponsorship and defence of discrimination against ethnic Georgians by the *de facto* separatist authorities and militias of South Ossetia and Abkhazia¹⁸³. The evidence shows that for more than a decade preceding the submission of its *Application* Georgia repeatedly complained of Russia’s support, sponsorship and defence of the *de facto* separatist authorities in regard to their discriminatory acts against ethnic Georgians, and Russia consistently opposed Georgia’s position.

2.106 Georgia began disputing Russia’s support, sponsorship and defence of the discriminatory activities of these parties in the early 1990s. In a letter dated 2 October 1992, the Vice-Chairman of the State Council of Georgia informed the Security Council that Russia was facilitating ethnic cleansing by, among other things, arming the Abkhaz separatists and allowing allied irregular armed forces to enter Abkhazia from Russian territory to attack ethnic Georgians. Georgia highlighted Russia’s support for the perpetrators of ethnic discrimination in the Gagra District of Abkhazia, where egregious acts of ethnic cleansing were committed:

The State Council of the Republic of Georgia would like to inform you that on 1 October the Abkhaz separatists in conjunction with mercenary terrorists, who had arrived from the north Caucasian regions of the Russian Federation, took the large-scale offensive against the town of Gagra aiming at reaching the Georgian-Russian border, thus cutting off the northern part of Abkhazia from the rest of Georgia¹⁸⁴.

¹⁸³ GM, Part E, Chapter IX.

¹⁸⁴ U.N. Security Council, *Letter dated 2 October 1992 from the First Deputy Foreign Minister of Georgia Addressed to the President of the Security Council*, U.N. Doc S/24626 (7 October 1992).

Georgia held Russia responsible for arming and supplying these perpetrators of ethnic cleansing. Its letter to the Security Council stated: “The attackers are armed with the state-of-art heavy tanks and other modern weaponry, the kind the Russian army is currently equipped with”¹⁸⁵.

2.107 In a subsequent statement to the Security Council, Georgia declared:

The conspiracy of the Abkhaz separatists and the reactionary forces in Russia is quite apparent. The Acts, adopted by the Parliament of the Russian Federation have fuelled the escalation of the conflict, encouraged the extremist forces and have directly provoked recent bloodshed¹⁸⁶.

2.108 On 20 September 1993, President Shevardnadze renewed Georgia’s appeal to the Security Council, emphasizing Russia’s support for those committing atrocities against ethnic Georgians. Decrying the “criminal intent of those who sponsor the Gudauta clique [the Abkhaz separatists]” that had “led to the forced exile of 150,000 Georgians”, President Shevardnadze stated that their “success” was “achieved with the direct support and complicity” of “forces in Russia”, including “some of the highest-ranking military personnel of the Russian Federation” as well as the “policy of the Russian Parliament”¹⁸⁷.

GM, Vol. II, Annex 5. For discussion of ethnic cleansing in Gagra, see GM, paras. 6.14, 6.15, 6.31.

¹⁸⁵U.N. Security Council, *Letter dated 2 October 1992 from the First Deputy Foreign Minister of Georgia Addressed to the President of the Security Council*, U.N. Doc S/24626 (7 October 1992), GM, Vol. II, Annex 5.

¹⁸⁶U.N. Security Council, *Annex II, Appeal of the State Council of the Republic of Georgia to the Committee of Senior Officials of the Conference on Security and Cooperation in Europe*. GM, Vol. II, Annex 5.

¹⁸⁷U.N. Security Council, *Letter dated 20 September 1993 from the Permanent Representative of Georgia to the United Nations Addressed to the President of the Security Council, Annex*, U.N. Doc. S/26472 (20 September 1993). GWS, Vol. III, Annex 48. President Shevardnadze specifically noted that negotiations with Russia had failed to achieve any results. He stated: “My talks with General Grachev, Minister of Defence of the Russian Federation, yielded no results. Although in themselves they were constructive, later that same day they were disavowed by statements by several subordinates of the Russian Minister of Defence and by the decision of the

2.109 In a further manifestation that Georgia considered itself in dispute with Russia over the latter's support for Abkhaz attacks on ethnic Georgians, President Shevardnadze directly appealed to Russian President Boris Yeltsin:

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 traditions¹⁸⁸.

2.110 Georgia's appeal to Russia fell on deaf ears, and the ethnic cleansing, with Russia's support, continued. On 12 October 1993, as the ethnic cleansing in the area around Sukhumi accelerated, President Shevardnadze addressed the Security Council regarding Russia's role in the ongoing anti-Georgian atrocities. He described the "ethnic cleansing and genocide of ethnic Georgians of the Abkhaz region" in which the perpetrators "showed mercy to no one, neither to child or woman, nor to the elderly". The "extermination of ethnic Georgians still continues", he reported¹⁸⁹. Georgia's President held Russia responsible for supporting these acts of ethnic discrimination, stating that "the Gudauta side has turned out to be well-prepared to wage a war, being equipped with state-of-the-art weapons, currently at the disposal of the Russian military forces"¹⁹⁰.

Russian Parliament". U.N. Security Council, *Letter dated 20 September 1993 from the Permanent Representative of Georgia to the United Nations Addressed to the President of the Security Council, Annex*, U.N. Doc. S/26472 (20 September 1993). GWS, Vol. III, Annex 48.

¹⁸⁸ U.N. Security Council, *Letter dated 20 September 1993 from the Permanent Representative of Georgia to the United Nations Addressed to the President of the Security Council, Annex*, U.N. Doc. S/26472 (20 September 1993). GWS, Vol. III, Annex 48.

¹⁸⁹ U.N. Security Council, *Letter dated 13 October 1993 from the Permanent Representative of Georgia to the United Nations Addressed to the President of the Security Council, Annex*, U.N. Doc. S/26576 (13 October 1993). GWS, Vol. III, Annex 49.

¹⁹⁰ *Ibid.* Georgia also highlighted Russia's responsibility for ethnic discrimination in a statement by the Parliament of Georgia on 26 June 1998, in which it stated that recent acts by the Russian State Duma were the "continuation" of an "ugly tradition" that "contributed" to the "ethnic cleansing and genocide of Georgian population in Abkhazia". Statement of the Parliament of

2.111 After Georgia acceded to the 1965 Convention in 1999, it continued to complain of Russia's support for the perpetrators of ethnic discrimination, conduct that was plainly within the scope of the Convention. For instance, in September 2000, Georgia's Ambassador in Moscow held bilateral discussions with the Deputy Chairperson of the State Duma of Russia, during which he accused Russia of providing "significant support and assistance" to the *de facto* authorities in Abkhazia responsible for ethnic cleansing of the Georgian population¹⁹¹. In March 2002, the Parliament of Georgia described the *de facto* authorities in Abkhazia as "an ethnocratic-discriminative regime" that had engaged in the "ethnic cleansing of the peace population" of ethnic Georgians. It criticised Russia for "continu[ing] to supply the separatist regime with heavy military equipment and armaments", which had been "carried out by the Russian military forces" in "breach of international law"¹⁹².

2.112 The Georgian Parliament described the dispute with Russia over support of discrimination against ethnic Georgians in the following terms:

In Abkhazia, on the occupied Georgian territory, major human rights and freedoms' violation on the ethnic basis has been carried on by the *assistance of external military force*. Such as: arbitrary deprivation of freedom, terror, murders, taking of hostages, kidnapping for money extortion, violation of the official status of the Georgian language, destruction and misappropriation of state,

Georgia on Resolution, "The Necessity of Normalization with Regard to Border and Customs regimes on the Abkhaz Segment of State Border" adopted by the Russian State Duma on 24 June 1998 (26 June 1998). GWS, Vol. IV, Annex 137. Continuing, Georgia stated that "the Russian State Duma supports separatism, justifies crimes against humanity committed by the Abkhaz separatist in the late May and makes Russia's commitment to the international law and fundamental principles of the United Nations and Organization for Security and Cooperation in Europe doubtful". *Ibid.*

¹⁹¹ Script of the Talks of Mr. Z. Abashidze, Ambassador Extraordinary and Plenipotentiary of Georgia to the Russian Federation with V. Lukin, Deputy Chairperson of the State Duma of Russia (14 September 2000). GWS, Vol. IV, Annex 143.

¹⁹² Resolution of the Parliament of Georgia on the Situation in Abkhazia (20 March 2002). GWS, Vol. IV, Annex 146.

refugees and IDPs' properties. The monuments of Georgian culture and scientific and academic institutions have been destroyed and similar activities have been going on¹⁹³.

2.113 Georgia's Ambassador in Moscow again raised Russia's unlawful supply of military equipment to the *de facto* authorities in Abkhazia engaged in ethnic cleansing of the Georgian population during bilateral discussions with Russia's Minister of Foreign Affairs, on 25 April 2002. The Russian Foreign Minister denied that Russia had done so¹⁹⁴. Here again, the evidence shows a direct conflict of opposing views held by the two Parties about conduct covered by the 1965 Convention, this time about Russia's alleged support and defence of ethnic discrimination perpetrated by Abkhaz separatists against ethnic Georgians.

2.114 In October 2005, the Parliament of Georgia described various offenses that the *de facto* regimes, with Russian State support, had committed against the ethnic Georgian populations of South Ossetia and Abkhazia¹⁹⁵. These offenses included, among other things: "killings", "raids and robbery of the civilian population", "appropriating of refugee assets", "denial of the right of instruction to citizens in their native language" and "denial of their right to return to their dwellings", all of which fall within the 1965 Convention¹⁹⁶. The Georgian Parliament made explicit its contention that Russia bore responsibility for these acts of ethnic discrimination via its support for the perpetrators:

The question then arises – through what or whose support do separatist regimes manage to ignore the position of authoritative

¹⁹³ Resolution of the Parliament of Georgia on the Situation in Abkhazia (20 March 2002) (emphasis added). GWS, Vol. IV, Annex 146.

¹⁹⁴ Script of the talks of Mr. Z. Abashidze, Ambassador Extraordinary and Plenipotentiary of Georgia to the Russian federation with Mr. I. Ivanov, Ministry of Foreign Affairs of the Russian Federation (25 April 2002). GWS, Vol. IV, Annex 147.

¹⁹⁵ Resolution of the Parliament of Georgia Regarding the Current Situation in the Conflict, Regions on the Territory of Georgia and Ongoing Peace Operations (11 October 2005). GWS, Vol. IV, Annex 158.

¹⁹⁶ *Ibid.*

international organizations and violate all basic norms of international law?

Regretfully the answer to this question unambiguously indicates the role of Russian Federation in inspiring and maintaining these conflicts, the exact country which is an official facilitator for conflict settlement....¹⁹⁷

Georgia's accusation that Russia itself was "inspiring and maintaining these conflicts" that "violate all the basic norms of international law" makes plain that a legal dispute existed between the two States regarding acts of ethnic discrimination falling within the 1965 Convention.

2.115 In January 2006, the dispute manifested itself again when Georgia's Ministry of Foreign Affairs complained that the Russian military forces' "overt support" for the *de facto* regime in South Ossetia made Russia "responsible for" the frequent "grave crimes" and "gross violation of human rights" perpetrated against the ethnic Georgian population¹⁹⁸. The same month, Georgia's Permanent Representative to the Security Council, referring to the systemic ethnic discrimination against the ethnic Georgian population of the Gali District of Abkhazia, reported:

There are not even minimal standards of security and safety in the conflict zone – especially in the Gali district. On a daily basis we witness severe violations of fundamental rights and direct threats to the lives of spontaneously returned population. Regrettably, since my last attendance at the UN Security Council meeting there has been little, if any, change. Efforts aimed at elimination of Georgian identity and cultural heritage continue. Georgian historical sites, temples and churches are still being ruined. Ban of

¹⁹⁷ *Ibid.*

¹⁹⁸ Ministry of Foreign Affairs of Georgia, *Comment of the Department of the Press and Information on the Statements of the Minister of Foreign Affairs of the Russian Federation* (20 January 2006). GWS, Vol. IV, Annex 162.

instruction in Georgian language is still not lifted and children are denied to study in their own language...¹⁹⁹

2.116 Georgia's Permanent Representative described this state of affairs as "one more clear demonstration of continuing ethnic cleansing of Georgians in Abkhazia"²⁰⁰. He specifically accused Russia of actively supporting these acts of ethnic discrimination, stating that Russia's policies constituted an "endorsement of ethnic cleansing of more than 300000 citizens of Georgia"²⁰¹. Russia, as shown, has always opposed Georgia's position in this regard. How then can it deny the existence of a legal dispute under the Convention?

2.117 In December 2006, Georgia's Ministry of Foreign Affairs stated that the "Russian side ... offers an open support and armaments to the separatist regimes widely known to have conducted an ethnic cleansing of Georgians"²⁰². Russia's support for groups and individuals engaged in discrimination against ethnic Georgians was denounced again by Georgia before the Security Council in August 2007:

The separatist regimes' illegal armed formations get their supply of arms and military equipment from the Russian Federation, while the guidance over their training, exercises and logistical support is an immediate task of the officers of the Russian armed forces....

The Georgian side calls on the Russian Federation to cease its support of the separatist regime, including military assistance, and actions uncoordinated with the Georgian authorities in the conflict

¹⁹⁹ Ministry of Foreign Affairs of Georgia, *Statement by Mr. Irakli Alasania Special Representative of the President of Georgia to UN Security Council* (26 January 2006). GWS, Vol. IV, Annex 163.

²⁰⁰ *Ibid.*

²⁰¹ *Ibid.*

²⁰² Ministry of Foreign Affairs of Georgia, *Reply of the Department of the Press and Information to the Georgia News Agency concerning the statements made by the Minister of Foreign Affairs of the Russian Federation* (22 December 2006). GWS, Vol. IV, Annex 173.

zones and undertake its functions as an unbiased mediator that will prevent a dangerous development of events²⁰³.

2.118 Georgia again raised its dispute with Russia regarding support for ethnic violence by the *de facto* regimes in South Ossetia and Abkhazia in a public statement issued by the Ministry of Foreign Affairs in September 2007. Georgia complained about the “obvious support” that Russia was giving to the “separatists” despite the fact that the *de facto* authorities were responsible for the violation of the “fundamental human rights” of ethnic Georgians and the “gross infringement on the property rights” of IDPs who were the “victims of ethnic cleansing”²⁰⁴.

2.119 In the same month, President Saakashvili complained to the General Assembly that Russia was responsible for “the morally repugnant politics of ethnic cleansing, division, violence and indifference” in South Ossetia where the “separatist regime” “basically consists of elements from security services from neighbouring Russia that have no historical ethnic or cultural links to the territory whatsoever”²⁰⁵. Russia’s support for the ethnic discrimination carried out by separatist forces was again disputed by Georgia in a statement to the Security Council on 3 October 2007. Georgia expressed “extreme concern” regarding the fact that separatist military forces, “responsible for ethnic cleansing”, were “receiving support” and “training” from Russia²⁰⁶.

²⁰³ U.N. Security Council, *Letter dated 5 September 2007 from the Permanent Representative of Georgia to the United Nations addressed to the President of the Security Council, Annex*, U.N. Doc. S/2007/535 (7 September 2007). GWS, Vol. III, Annex 87.

²⁰⁴ Ministry of Foreign Affairs of Georgia, *Statement of the Ministry of Foreign Affairs of Georgia* (20 September 2007). GWS, Vol. IV, Annex 175.

²⁰⁵ U.N. General Assembly, *7th Plenary Meeting, Address by Mr. Mikheil Saakashvili, President of Georgia*, U.N. Doc. A/62/PV.7 (26 September 2007), pp. 18-20. GWS, Vol. III, Annex 88.

²⁰⁶ U.N. Security Council, *Letter dated 3 October 2007 from the Permanent Representative of Georgia to the United Nations addressed to the President of the Security Council, Annex*, U.N. Doc. S/2007/589 (4 October 2007). GWS, Vol. III, Annex 89.

2.120 As shown in the *Memorial*, at paragraphs 4.49 through 4.57, by early 2008 the *de facto* agencies in South Ossetia responsible for defence, public security and intelligence were headed by active duty Russian General Officers. On 28 June 2008, President Saakashvili accused these Russian generals of supporting ethnic violence against the Georgian population in South Ossetia:

The Russian Generals that are sitting in Tskhinvali and are creators of many dirty provocations must return back to their locations in Russian Federation, because they do not have anything to do in Georgia. This situation is created artificially and it won't continue for long time, our Russian colleagues know this better than us, but some have difficulties in decision making. If law level officials are not able to make this happen, I hope that the President of Russian Federation will make sufficient decision²⁰⁷.

2.121 In a statement issued on 17 July 2008, a month before the *Application* was filed, Georgia's Ministry of Foreign Affairs declared that Russia's "true designs" in South Ossetia and Abkhazia were "to legalize results of the ethnic cleansing" that had been "*instigated by itself and conducted through Russian citizens*"²⁰⁸. Russia's denial that there was a legal dispute under the 1965 Convention prior to 12 August 2008 simply cannot stand in the face of such evidence.

Section VII. Georgia's Claims Regarding Russia's Deliberate Failure To Prevent Ethnic Discrimination

2.122 In the *Memorial*, Georgia demonstrated Russia's responsibility for breaching the 1965 Convention by its failure to make efforts to "prohibit and bring to an end, by all appropriate means" acts of "racial discrimination by any

²⁰⁷ Office of the President of Georgia, Press Briefing, "The President of Georgia Mikheil Saakashvili held a press conference" (28 June 2008). GWS, Vol. IV, Annex 181.

²⁰⁸ Ministry of Foreign Affairs of Georgia, *Comment of the Press and Information Department of the Ministry of Foreign Affairs of Georgia* (17 July 2008) (emphasis added). GWS, Vol. IV, Annex 182.

persons, group or organization”, including the *de facto* separatist authorities²⁰⁹. In that regard, Georgia showed that Russia’s military and “peacekeeping” forces refused to protect ethnic Georgians despite having both the means and the obligation to do so under the Convention²¹⁰.

2.123 Georgia began complaining about the failure of the Russian forces to prevent discrimination against ethnic Georgians soon after they were deployed in South Ossetia and Abkhazia. On 12 October 1994, the Parliament of Georgia stated that “the Georgian population” in Abkhazia continued to be “persecuted” even though they lived in the “security zone” that was “controlled by the peacekeepers of the Russian Federation”²¹¹. On 17 April 1996, the Georgian Parliament again complained of the failure of Russia’s forces to protect ethnic Georgians:

Peacekeeping Forces, designated by Russia in agreement with the CIS and the UN, to this day are unable to fulfil 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 homes²¹².

2.124 In more recent years, Georgia renewed its complaints that Russian forces were refusing to halt the abuse of ethnic Georgians. On 5 November 2005, Georgia’s Ministry of Foreign Affairs stated: “Human rights violations continue

²⁰⁹ GM, paras. 9.63-9.84.

²¹⁰ The ceasefire agreements that ended the hostilities in the early 1990s provided for Russian peacekeepers to be stationed in both South Ossetia and Abkhazia. In each case, the terms of the peacekeepers’ mandate expressly required that they “protect the population...from criminal invasion” of “armed groups and bands”. Provision on Joint Peacekeeping Forces (JPKF) and Law and Order Keeping Forces (LOKF) in the Zone of Conflict (12 July 1992). GM, Vol. III, Annex 104; Quadripartite Agreement on Voluntary Return of Refugees and Displaced Persons (4 April 1994). GM, Vol. III, Annex 110.

²¹¹ Statement of the Parliament of Georgia (12 October 1994). GWS, Vol. IV, Annex 129.

²¹² Resolution of the Parliament of Georgia on Measures of Conflict Settlement in Abkhazia (17 April 1996). GWS, Vol. IV, Annex 130.

to be committed in Abkhazia, especially Gali District, in the zone controlled by CIS peacekeeping forces. These violations have recently become massive and are mainly committed against ethnic Georgian population”²¹³. Five days later, Georgia’s Foreign Ministry reiterated that Russia was failing to protect ethnic Georgians from “human rights violations and violence” occurring “in the areas controlled by peacekeeping forces”²¹⁴. Georgia disputed Russia’s explanation that its peacekeepers’ failure to act was the result of their inability to do so, contending that it was instead the result of a decision to “ignore” abuses committed against ethnic Georgians:

The forementioned fact obviously demonstrates that the peacekeeping forces, in a better case, ignore the actions of armed criminal groups, under the patronage of the so-called law enforcement authorities of the separatist regime, are carrying out purposeful terror against ethnically Georgian population²¹⁵.

2.125 Later in the same month (November 2005), the Georgian Foreign Ministry complained that violent discrimination against ethnic Georgians was being committed not only because the Russian forces “ignore the actions of armed criminal groups”, but because they give these actions their “secret consent”:

With the syndrome of impunity, the separatist government of Abkhazia and its so-called law enforcement agencies, are resorting to terror towards ethnically Georgian population, in order to expel them from the region and conclude and legitimize ethnic cleansing. This totally outrageous situation in the conflict zone takes place *in front of the eyes of peacekeeping forces and often with their secret consent*. . .²¹⁶

²¹³ Ministry of Foreign Affairs, *Information concerning the death of the resident of Gali District, Daniel Tsurtsunia* (5 November 2005). GWS, Vol. IV, Annex 159.

²¹⁴ Ministry of Foreign Affairs, *The Comment concerning the Fact of Kidnapping of the Resident in Gali Region* (10 November 2005). GWS, Vol. IV, Annex 160.

²¹⁵ *Ibid.*

²¹⁶ Ministry of Foreign Affairs, *Statement of the Ministry of Foreign Affairs of Georgia concerning the current developments in Abkhazia, Georgia* (14 November 2005) (emphasis added). GWS, Vol. IV, Annex 161.

2.126 In January 2006, the Secretary-General recognised Georgia's dispute with Russia over the failure of Russia's peacekeeping forces to act to prevent ethnic discrimination, reporting that "[o]n a number of occasions, Tbilisi called on the international community to condemn what it referred to as human rights violations on the part of the de facto Abkhaz authorities and *lack of action by the collective peacekeeping forces of the Commonwealth of Independent States*"²¹⁷. Later in the same month, on 20 January 2006, Georgia's Ministry of Foreign Affairs complained of the "*culpable inaction of the peacekeeping forces*" in South Ossetia in the face of the "every day occurrence of grave crimes and gross violation of human rights" that were being committed against the ethnic Georgian population²¹⁸. On 21 February 2006, Georgia again raised with the Secretary-General the failure of Russian peacekeeping forces in South Ossetia to protect ethnic Georgians from human rights abuses. Georgia complained that it was compelled to "assess extremely negatively the fulfilment of the obligations under the mandate undertaken by the peacekeeping forces deployed in the former autonomous district of South Ossetia, as well as to assess actions of the Russian Federation as an ongoing attempt at annexation of this region of Georgia"²¹⁹.

2.127 On 10 August 2006, the Georgian Foreign Ministry informed the Secretary-General and Security Council that the "Russian peacekeepers continue to act in defiance of their mandated obligations, turning a blind eye to gross violation of law and human rights taking place in their very presence"²²⁰. While

²¹⁷ U.N. Security Council, *Report of the Secretary-General on the situation in Abkhazia, Georgia*, U.N. Doc. S/2006/19 (13 January 2006) (emphasis added), para. 9. GM, Vol. II, Annex 39.

²¹⁸ Ministry of Foreign Affairs of Georgia, *Comment of the Department of the Press and Information on the Statements of the Minister of Foreign Affairs of the Russian Federation* (20 January 2006) (emphasis added). GWS, Vol. IV, Annex 162

²¹⁹ U.N. General Assembly, *Letter dated 16 February 2006 from the Permanent Representative of Georgia to the United Nations addressed to the Secretary-General*, Annex, U.N. Doc. A/60/685 (21 February 2006), para. 1. GWS, Vol. III, Annex 78.

²²⁰ U.N. General Assembly, Security Council, *Identical letters dated 11 August 2006 from the Chargé d'affaires A.I. of the Permanent Mission of Georgia to the United Nations addressed to*

Georgia's specific reference was to the Russian forces' violation of their treaty obligations as "peacekeepers", the same conduct, insofar as it constitutes a failure to execute the duty to prevent ethnic discrimination, falls under the 1965 Convention. Three weeks later, on 31 August 2006, Georgia again reported to the Secretary-General about the continuing refusal of Russia's peacekeeping forces to take action to prevent ethnic discrimination against persons of Georgian ethnicity:

The so-called government of Abkhazia, without confining itself to ethnic cleansing of Georgians recognized and condemned repeatedly in the final documents of the summits of the Organization for Security and Cooperation in Europe in Budapest (1995), Lisbon (1997) and Istanbul (1999), remains relentless in its pursuit of its inhuman discriminatory policy and acts against the ethnic Georgian population of the region....

These violations take place within sight of the Commonwealth of Independent States (CIS) and in actual practice, *Russian peacekeeping forces that do nothing to suppress flagrant and mass violations of human rights*, as they are mandated to do under paragraph 6, chapter 2 of the regulations approved by the CIS Council of Heads of State on the collective peacekeeping forces in the Commonwealth of Independent States. Needless to say, Russian peacekeepers cannot, against this background, ensure the protection of the safety, dignity and human rights of the peaceful population, including internally displaced persons and refugees, as prescribed by Security Council resolutions 1524 (2004), 1582 (2005), 1615 (2005) and 1666 (2006)²²¹.

2.128 On 4 September 2006, Georgia's Ministry of Foreign Affairs again complained of the "Russian peacekeepers' culpable inaction, and in many cases, even encouragement" of human rights abuses against ethnic Georgians in

the Secretary-General and the President of the Security Council, Annex, U.N. Doc. A/60/976-S/2006/638 (14 August 2006). GWS, Vol. III, Annex 83.

²²¹ U.N. Security Council, *Letter dated 4 September 2006 from the Permanent Representative of Georgia to the United Nations addressed to the President of the Security Council, Annex, U.N. Doc. S/2006/709 (5 September 2006)*(emphasis added). GWS, Vol. III, Annex 84.

Abkhazia²²². In November 2006, Georgia's State Ministry for Conflict Resolution Issues further evidenced the existence of a dispute between Georgia and Russia over the role of the Russian peacekeepers in regard to ethnic violence against persons of Georgian ethnicity: "Unfortunately numerous protests of the Georgian side did not affect the traditional role of Russian 'peacekeepers'"²²³. As a result of Russia's refusal to act to prevent discrimination in the face of Georgian protests, he said, the "[l]ives and health of Georgian residents of Tskhinvali region are again sacrificed to the activities of armed formations" who were "inspired" by the "criminal inaction of Russian peacekeepers"²²⁴. Quite obviously, protests by Georgia followed by continued inaction by Russia evidences the existence of a dispute between the two States, in this case about conduct that plainly falls under the 1965 Convention.

2.129 On 1 March 2007, Georgia again complained that ethnic discrimination against Georgians in Abkhazia was occurring because the Russian forces refused to intervene despite being obligated to do so, noting ethnic violence "is mostly done against the background of criminal inaction of Russian peacekeepers"²²⁵. In September 2007, Georgia's Ministry of Foreign Affairs again disputed the "criminal inactivity" of Russia's "peacekeeping forces" in South Ossetia and Abkhazia, which made possible the violation of the "fundamental human rights" of the ethnic Georgian populations²²⁶. On 22 November 2007, the Georgian Foreign Ministry repeated that:

²²² Ministry of Foreign Affairs of Georgia, *Statement of the Ministry of Foreign Affairs of Georgia* (4 September 2006). GWS, Vol. IV, Annex 168.

²²³ Office of State Ministry on Conflict Regulation Issues, *Statement of State Ministry for Conflict Resolution Issues* (11 September 2006). GWS, Vol. IV, Annex 169.

²²⁴ *Ibid.*

²²⁵ Office of State Ministry on Conflict Regulation Issues, *Statement of State Ministry for Conflict Resolution Issues* (2 March 2007). GWS, Vol. IV, Annex 174.

²²⁶ Ministry of Foreign Affairs of Georgia, *Statement of the Ministry of Foreign Affairs of Georgia* (20 September 2007). GWS, Vol. IV, Annex 175.

the activity of the Russian peacekeepers in Georgia's conflict zones is absolutely destructive and negative. It is further attested by the fact that up to two thousand local residents have been killed in the area controlled by the so-called peacekeepers. Russian peacekeepers do not comply with their mandated commitments and act as protectors of the separatist regimes²²⁷.

2.130 Senior Georgian officials continued to dispute and decry Russia's failure to prevent ethnic discrimination against Georgians in areas controlled by Russian peacekeepers in the months leading up to the filing of the *Application*. On 21 May 2008, Georgia's Minister of Foreign Affairs issued a statement that:

On behalf of the Ministry of Foreign Affairs, I strictly insist on explanations as to what peacekeepers do in the conflict zone and why they don't perform the duties prescribed to them under their mandate, which serves as a legal basis for their presence on this territory, why they don't protect ethnic Georgians in the Gali district from physical violence and why they deny them the right, opportunity and guarantee to implement one of their fundamental constitutional rights – voting in elections²²⁸.

The Minister's statement concluded that "[t]he Ministry of Foreign Affairs of Georgia condemns this fact in the strongest terms and expects to receive relevant clarifications from both our colleagues and Russian peacekeepers"²²⁹. Notwithstanding Georgia's request, no clarifications were provided by Russia. In fact, nothing changed. In these circumstances, Russia's denial of the existence of a legal dispute between the two States under the 1965 Convention, regarding the failure of Russian military forces to prevent discrimination against ethnic Georgians, is simply not credible.

²²⁷ Ministry of Foreign Affairs of Georgia, *Reply by the Press and Information Department to the News Georgia Agency concerning the statement made by the Information and Press Department of the Russian Ministry of Foreign Affairs on the completion of the withdrawal of the Russian military bases from the Georgian territory* (22 November 2007). GWS, Vol. IV, Annex 176.

²²⁸ Ministry of Foreign Affairs of Georgia, *Transcript of the briefing of Minister of Foreign Affairs of Georgia Eka Tkeshelashvili* (21 May 2008). GWS, Vol. IV, Annex 180.

²²⁹ *Ibid.*

Section VIII. Conclusion

2.131 In sum, the evidence described in the preceding sections of this Chapter, especially in Sections IV through VII, demonstrates the existence of a legal dispute between Georgia and Russia under the 1965 Convention that predates the filing of Georgia's *Application*. Since the 1990s, and continuing from then into 2008, Georgia and Russia disputed whether Russia's military forces in Georgia and other organs of the Russian Federation: (i) carried out ethnic cleansing operations to expel ethnic Georgians from Abkhazia and South Ossetia; (ii) forcibly prevented expelled ethnic Georgian IDPs from returning to those territories; (iii) supported, sponsored and defended ethnic discrimination carried out by *de facto* authorities and militias in Abkhazia and South Ossetia; and (iv) failed to exercise the duty to prevent ethnic discrimination in areas where they had the capacity to do so. All of these are matters that fall under the 1965 Convention. And as regards each one of them Georgia and Russia had and maintained opposing positions. The parameters established by the Court for determining the existence of a legal dispute, set out in Section II of this Chapter, are plainly satisfied. The evidence supports only one conclusion: that a legal dispute under the 1965 Convention existed between Georgia and Russia as of 12 August 2008, when Georgia initiated proceedings in this case.

CHAPTER III.

**RUSSIA'S SECOND PRELIMINARY OBJECTION:
THE CONDITIONS FOR JURISDICTION UNDER ARTICLE 22**

3.1 This Chapter sets forth Georgia’s response to Russia’s *Preliminary Objections* on the scope and satisfaction of the conditions to the Court’s exercise of jurisdiction under Article 22 of the Convention. It develops the arguments made by Georgia in the provisional measures phase and in Georgia’s *Memorial*, which are adopted in full and will not be repeated.

3.2 In the 15 October 2008 *Order for Provisional Measures*, the Court ruled that it had *prima facie* jurisdiction under Article 22 of the Convention because the dispute “is not settled by negotiation”²³⁰. With respect to the applicable law, the Joint Dissenting Opinion observed similarly that an “attempt” at negotiation is sufficient, with the additional requirement that such negotiations be unsuccessful²³¹, and concurred that the reference in Article 22 to procedures provided for by the CERD Committee is an “alternative precondition”²³². Based on the limited evidence available to it at that phase of the proceedings, however, the Dissenting Opinion concluded that prior attempts at negotiations on Convention-related issues had not been established.

3.3 In this Chapter, Georgia presents additional evidence of the repeated attempts at negotiations between the Parties, in relation to matters falling under the 1965 Convention. The evidence includes, in particular, extensive documentation relating to discussions between Georgia and Russia *inter alia* on ethnic cleansing and the right of return of Georgians who have been displaced by ethnic discrimination in South Ossetia and Abkhazia, issues that fall within the terms of the 1965 Convention. Based on the applicable standard set forth by both the Majority and Dissenting Opinions, Georgia respectfully submits that the

²³⁰ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Provisional Measures, Order, I.C.J. Rep. 2008, paras. 115 and 117 (hereinafter “Provisional Measures Order”).

²³¹ Provisional Measures Order, Joint Dissenting Opinion, para. 13.

²³² *Ibid.*, para. 17.

evidence of negotiations now available to the Court can only lead to a conclusion that the requirements of Article 22 have been satisfied.

3.4 Contrary to the standard identified by the Court, Russia claims that the conditions in Article 22 are both extremely stringent and cumulative. Its approach is not supported by the ordinary meaning of Article 22 or by the object and purpose of the Convention. Russia ignores the Court's consistent jurisprudence and the clear evidence of negotiations between the Parties on issues that fall under the Convention. As discussed below, in disregard of the unambiguous terms of Article 22, Russia's assertion is largely based on a selective and distorted reading of the *travaux préparatoires*. Georgia responds to this with a detailed *Appendix* on the negotiating history that shows clearly that negotiations and the CERD Committee procedures are (a) not a prerequisite to the Court's exercise of jurisdiction, and (b) not cumulative requirements. Far from being conditional on those procedures being utilized, the drafters of the 1965 Convention appear to have been keen to ensure that unilateral seisin of the Court was wholly independent of the Conciliation Committee process. Furthermore, Russia's attempt to dismiss the extensive evidence of attempts at negotiations as well as actual negotiations is based on a combination of an unreasonably exacting standard of what constitutes "negotiations" that is manifestly inconsistent with the Court's jurisprudence and a misrepresentation of the extensive evidence submitted by Georgia.

3.5 This section reaffirms and elaborates Georgia's views set forth in the *Memorial* that: (1) the conditions in Article 22 are alternatives and not cumulative; and (2) to the extent that Georgia was required to attempt to negotiate prior to the Court's seisin, it has clearly satisfied this requirement. Specifically, this Chapter is divided into seven sections. Georgia begins by introducing Article 22 (Section I). It then addresses Article 22 in its context (Section II), before

explaining why the procedures referred to in Article 22 are not cumulative (Section III). In Section IV Georgia describes why Article 22 does not impose the preconditions claimed by Russia and that Georgia has met all the conditions of Article 22, and in Section V Georgia addresses the criteria for the attempt at negotiations, should they be required. In Section VI, Georgia provides further evidence to show that negotiations were attempted in the present dispute. Finally in Section VII, Georgia summarizes its conclusions. As already noted, a separate *Appendix* at the end of this *Written Statement*, addresses the Convention's *travaux préparatoires* in further detail.

Section I. Article 22 of CERD

3.6 Russia's second preliminary objection is that the Court lacks jurisdiction under Article 22 of the Convention. Russia's claim is premised on the argument that Article 22 of the Convention contains "procedural conditions" that must be fulfilled before a State Party may have recourse to the International Court of Justice to resolve any dispute, and that these conditions have not been fulfilled. Russia made similar arguments in the course of the provisional measures phase²³³. These were rejected by the Court²³⁴.

3.7 Article 22 provides:

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

²³³ Verbatim Record, CR 2008/23 (8 September 2008), paras. 24-35 (Pellet).

²³⁴ Provisional Measures Order, paras. 114-117.

3.8 Russia makes two arguments: first, it argues that the conditions provided for in Article 22 of the Convention are *preconditions* for the seisin of the Court²³⁵, and second, it argues that these conditions are *cumulative*²³⁶. In rejecting these and related arguments in its Order of 15 October 2008, the Court largely relied on the ordinary meaning of Article 22, as directed by Article 31(1) of the 1969 Vienna Convention on the Law of Treaties. The Court ruled that:

the phrase ‘any dispute ... which is not settled by negotiation or by the procedure expressly provided for in this Convention’ does not, on its plain meaning, suggest that formal negotiations in the framework of the Convention or recourse to the procedure referred to in Article 22 thereof constitute preconditions to be fulfilled before the seisin of the Court²³⁷.

3.9 Georgia submits that what was a “plain meaning” then is also a “plain meaning” now, and that on its face the text of Article 22 does not support Russia’s arguments. The “plain meaning” adopted by the Court is confirmed by the context of Article 22 and the object and purpose of the Convention, as well as the Court’s consistent jurisprudence. This is not a case in which the ordinary meaning in the context of the Convention leads to an interpretation that is “ambiguous or obscure” or that is “manifestly absurd or unreasonable” in the sense of Article 32 of the 1969 Vienna Convention, so that there is no need to have recourse to the preparatory work of the Convention. In any event, contrary to Russia’s contention, the *travaux préparatoires* do not support Russia’s interpretation. Indeed, as set forth in this Chapter and the accompanying *Appendix*, Russia has made selective use of the preparatory work. The negotiating history confirms that it was not the intention of the drafters of the Convention to establish preconditions, including those of the kind claimed by

²³⁵ Preliminary Objections of the Russian Federation, Vol. I (1 December 2009) (hereinafter “RPO”), paras. 4.6-4.56.

²³⁶ *Ibid.*, paras. 4.57-4.80.

²³⁷ *Ibid.*, para. 114.

Russia, before a party to the Convention may be able to seize the Court unilaterally to resolve any dispute. The Convention’s preparatory work confirms the ordinary meaning of Article 22.

3.10 Georgia submits that the requirements of Article 22 had been fully met by the time the *Application* was filed. Specifically, Georgia submits that:

- (i) Article 22 does not include any conditions that are preconditions to the seisin of the Court, and specifically that Georgia was not under any obligation to engage in formal negotiations with Russia to settle the dispute under the Convention, or to have recourse to the “procedures expressly provided for in [the] Convention”; and
- (ii) The “conditions” in Article 22 of the Convention are not cumulative; and
- (iii) Further or alternatively, if contrary to Georgia’s first submission Article 22 does impose a requirement of prior negotiations then such conditions have been fulfilled.

3.11 Georgia will deal with each of these arguments in turn. Before doing so, it is necessary to consider the scheme established by the Convention for resolving disputes, in its overall context, something that the Russian Federation has failed to do.

Section II. Article 22 in Context

3.12 Russia fails to consider Article 22 in its context. The Convention is composed of three parts. Part I (Articles 1 to 7) imposes substantive obligations. Part II (Articles 8 to 16) establishes a Committee on the Elimination of Racial Discrimination (the Committee) and defines its role. Part III of the Convention (Articles 17 to 25) contains the final clauses, including Article 22 on the settlement of disputes concerning the interpretation and application of the Convention. The location of Article 22 in a separate Part of the Convention from that which governs the functioning of the Committee is an important contextual element that the Russian Federation ignores.

3.13 This is not the only contextual element that it ignores. Part II of the Convention comprises nine Articles that govern the functioning of the Committee. Article 8 establishes the Committee. Article 9 enables it to receive reports from States Parties, providing *inter alia* that the Committee “shall report annually ... on its activities and may make suggestions and general recommendations based on the examination of the reports and information received from the States Parties”. Article 10 of the Convention deals with procedural and administrative matters.

3.14 Article 11 of the Convention then establishes a distinct procedure that allows a State Party to bring to the attention of the Committee its concerns as to the acts or omissions of another State Party, and defines the steps that are to be followed. This is a significant process, the details of which the Russian Federation has misconstrued or ignored. This is not a dispute settlement procedure (that is governed by Article 22), but rather a complaints procedure (as so referred to in Article 16 of the Convention, a further provision that Russia has chosen to ignore, and which is addressed in further detail below at paragraphs 3.20 to 3.22). Article 11(1) provides in relevant part that:

If a State Party considers that another State Party is not giving effect to the provisions of this Convention, it may bring the matter to the attention of the Committee. The Committee shall then transmit the communication to the State Party concerned. Within three months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.

3.15 It is noteworthy that this procedure, which is referred to by Russia as a “conciliation procedure”, is not mandatory: the language provides that a State Party “may” invoke this procedure if it wishes to do so (not “shall”), making it clear that it is not required to invoke this procedure for any purposes. Article

11(2) then deals with the right to return to the Committee “if the matter is not adjusted”. It provides:

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

3.16 A number of points are to be noted. First, the provision refers to a “matter”, not a “dispute”. Second, it refers to an “adjustment”, not a “settlement”. And third, unlike the right to initiate proceedings under Article 11(1), the right to return to the Committee under Article 11(2) is subject to two preconditions: (a) the right must be exercised within six months from the receipt by the receiving State of the initial communication to the Committee, and (b) the Committee must have determined that the matter has not been “adjusted to the satisfaction of both parties”, whether by “bilateral negotiations or by any other procedure open to them”. By including these preconditions to the exercise of any right to return to the Committee, it becomes clear that the right to file the initial communication is not dependent upon a determination by any body that the matter has not been settled or adjusted by negotiation, whether bilateral or other. The texts of Articles 11(1) and (2) confirm that when the drafters of the Convention wanted to establish preconditions to the exercise of any procedural rights they did so very clearly. Equally, if the drafters wanted to make any particular form of negotiation a precondition to the exercise of any procedural right, or to establish time limits, they chose to do so explicitly.

3.17 Moreover, it must be noted that Article 11(3) establishes an exhaustion of local remedies rule as another condition to admissibility of any right to return to the Committee under Article 11(2):

The Committee shall deal with a matter referred to it in accordance with paragraph 2 of this article after it has ascertained that all available domestic remedies have been invoked and exhausted in the case, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged.

3.18 Article 11 thus makes clear that where the drafters of the 1965 Convention wanted to incorporate particular preconditions they so stated in express language. In accordance with Article 12 of the Convention, assuming that the preconditions are satisfied, and after the Committee has obtained and collated all the information it deems necessary, the Chairman of the Committee “shall appoint an ad hoc Conciliation Commission ... comprising five persons who may or may not be members of the Committee”²³⁸. The *ad hoc* Conciliation Commission’s “good offices shall be made available to the States concerned with a view to an amicable solution of the matter on the basis of respect for this Convention”²³⁹. Under Article 13 the Conciliation Commission may also prepare “a report embodying its findings on all questions of fact relevant to the issue between the parties and containing such recommendations as it may think proper for the amicable solution of the dispute”²⁴⁰. Article 14 allows States Parties to recognize the competence of the Committee “to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by that State Party of any of the rights set forth in this Convention”²⁴¹. Article 15 allows the Committee to receive certain petitions in relation to the Declaration on the Granting of Independence to

²³⁸ Art. 12(1).

²³⁹ Art. 12(1).

²⁴⁰ Art. 13(1).

²⁴¹ Art. 14.

Colonial Countries and Peoples, contained in General Assembly resolution 1514 (XV) of 14 December 1960²⁴².

3.19 The requirements imposed by Articles 11(2) and (3) and 12 – which establish detailed preconditions to the exercise of procedural rights – stand in sharp contrast to the absence of any similar requirements in relation to the exercise of rights under Article 22. This becomes all the more apparent by reference to other treaties that made such preconditions clear and that were in the minds of the drafters of the Convention. Russia recognizes and refers to the fact, for example, that the drafters were well aware of the terms of the 1960 Protocol Instituting a Conciliation and Good Offices Commission to be responsible for seeking a settlement of any disputes which may arise between States Parties to the UNESCO Convention against Discrimination in Education, which was adopted on 10 December 1962²⁴³. Article 17 of the 1960 Protocol establishes a conciliation procedure, culminating in the preparation by the Commission of “a report on the facts and [indicating] the recommendations which it made with a view to conciliation”²⁴⁴. Article 25 then allows any State Party “to refer to the International Court of Justice, after the drafting of the report provided for in article 17, paragraph 3, any dispute covered by this Protocol on which no amicable solution has been reached in accordance with article 17, paragraph 1”²⁴⁵. This text explicitly establishes as a precondition to exercise the right of

²⁴² Art. 15.

²⁴³ RPO, para. 4.72.

²⁴⁴ 1960 Protocol, Art. 17(3).

²⁴⁵ The 1960 Protocol provides in relevant part:

Article 17

1. Subject to the provisions of article 14, the Commission, after obtaining all the information it thinks necessary, shall ascertain the facts, and make available its good offices to the States concerned with a view to an amicable solution of the matter on the basis of respect for the Convention.

recourse to the Court the prior preparation of a report. Having these provisions in mind the drafters of the Convention could have established a similar link between Articles 11(2) and 12 of the Convention, on the one hand, and Article 22, on the other. The fact that they decided not to do so supports Georgia's approach.

3.20 Against this background, Part II of the Convention contains a further clause that is of material significance but which again the Russian Federation has completely ignored, notwithstanding the fact that it was the subject of submissions in the provisional measures phase²⁴⁶. Article 16 of the Convention provides as follows:

The provisions of this Convention concerning the settlement of disputes or complaints shall be applied without prejudice to other procedures for settling disputes or complaints in the field of discrimination laid down in the constituent instruments of, or conventions adopted by, the United Nations and its specialized agencies, and shall not prevent the States Parties from having recourse to other procedures for settling a dispute in accordance

2. The Commission shall in every case, and in no event later than eighteen months after the date of receipt by the Director-General of the notice under article 12, paragraph 2, draw up a report in accordance with the provisions of paragraph 3 below which will be sent to the States concerned and then communicated to the Director-General for publication. When an advisory opinion is requested of the International Court of Justice, in accordance with article 18, the time-limit shall be extended appropriately.

3. If a solution within the terms of paragraph I of this article is reached, the Commission shall confine its report to a brief statement of the facts and of the solution reached. If such a solution is not reached, the Commission shall draw up a report on the facts and indicate the recommendations which it made with a view to conciliation. If the report does not represent in whole or in part the unanimous opinion of the members of the Commission, any member of the Commission shall be entitled to attach to it a separate opinion. The written and oral submissions made by the parties to the case in accordance with article 11, paragraph 2 (c), shall be attached to the report.

Article 25

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

²⁴⁶ Verbatim Record, CR 2008/22 (8 September 2008), paras. 53-54 (Crawford).

with general or special international agreements in force between them.

3.21 Article 16 is located in Part II of the Convention, indicating that its terms will exclude the scheme established by Article 11. The inclusion of Article 16, and its location in Part II of the Convention, undermine the Russian Federation's claim that reference to negotiation and/or the Article 11 complaint procedure are *necessary* preconditions to the exercise of rights under Article 22. The drafters inserted a clause which states in express terms that the provisions within the Convention are not mutually exclusive or dependent, and that these provisions "shall not prevent the States Parties from having recourse to other procedures for settling a dispute in accordance with general or special international agreements in force between them". Article 16 confirms that if other instruments provide for access to the Court, or to other courts or tribunals, or to arbitration, they may be relied upon to resolve disputes under the Convention without prior recourse to the arrangements envisaged by Articles 11 and 12. A party to the 1965 Convention is free to go to the Court to enforce its obligations by means arising elsewhere. In other words, if there were a clause in another instrument providing for a right of access to the International Court of Justice (such as the Pact of Bogotá), or a regional court such as the European Court of Human Rights or the African Court of Justice, a State Party is free to make use of that provision without prior recourse to the arrangements envisaged under Articles 11 or 12. The fact that these arrangements or the other procedures expressly provided for by the Convention are not a requirement for the exercise of the Court's jurisdiction in all cases brought under the Convention (or, Georgia submits, in any) confirms that Russia's approach is wrong. It simply makes no sense to read Article 22 as requiring exhaustion of the procedures set forth in Articles 11 and 12 as a precondition to the Court's jurisdiction, when Article 16 states that its jurisdiction can be invoked under similar dispute resolution clauses in other international instruments without prior recourse to those procedures. Article 16 is inconsistent

with the argument of the Russian Federation, which has provided no explanation of the purpose of that provision.

3.22 The language of Article 16, and its location in Part II of the Convention, are inconsistent with the claim that the Convention imposes a hierarchy of remedies or that the Court may only be reached once all other remedies have been exhausted. On Russia's approach, Article 16 would be meaningless. As one leading commentator has noted:

[I]t is apparent that no single machinery for the implementation of the several human rights instruments can at this stage be created. Different machineries do exist, on the double level of different fields covered and the regional and universal level. None of these machineries go far enough and it could not have been the intention of the United Nations members ... to impose a restrictive interpretation to Article 16²⁴⁷.

3.23 Moreover, on the logic of Russia's approach, if negotiation, access to the Committee and a right of return to the Committee together with the establishment of a Conciliation Commission are all required before a State Party may have access to the Court under Article 22, then it is inevitably also the case that a State Party must have exhausted local remedies, as required by Article 11(3) of the Convention. For the reasons set out below, that was not and cannot have been the intention of the drafters of the Convention when they created an inter-State dispute settlement mechanism providing for access to the Court.

Section III. The Modes of Dispute Settlement Identified in Article 22 are not Cumulative

3.24 Article 22 of the Convention refers to the absence of settlement of the dispute "by negotiation or by the procedures expressly provided for in this

²⁴⁷ Natan Lerner, *The U.N. Convention on the Elimination of All Forms of Racial Discrimination* (1980), p. 92.

Convention”. Notwithstanding the ordinary meaning of the text, and the use of the word “or” (as opposed to “and”), Russia asserts that the “conjunction ‘or’ does not express alternatives but rather cumulative conditions”²⁴⁸. This view was not accepted by any member of the Court in the provisional measures phase.

3.25 This argument is wholly without merit. It is not supported by the ordinary meaning of the word “or”, which plainly indicates that, whether or not they are preconditions to access to the Court, the drafters treated “negotiation” and “the procedures expressly provided for in this Convention” as alternatives. This is confirmed by the *Appendix on the travaux préparatoires*²⁴⁹. Negotiation is neither a precondition nor a cumulative precondition.

3.26 Russia’s argument is not supported by any practice. The CERD Committee has *never* been seized of a matter under the inter-State procedure in Article 11 of the Convention²⁵⁰. A few inter-State complaints have been

²⁴⁸ RPO, para. 4.59.

²⁴⁹ Appendix on Travaux Préparatoires, *infra*, paras. xxxi-xli.

²⁵⁰ Article 11 states:

1. If a State Party considers that another State Party is not giving effect to the provisions of this Convention, it may bring the matter to the attention of the Committee. The Committee shall then transmit the communication to the State Party concerned. Within three months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.

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

3. The Committee shall deal with a matter referred to it in accordance with paragraph 2 of this article after it has ascertained that all available domestic remedies have been invoked and exhausted in the case, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged.

4. In any matter referred to it, the Committee may call upon the States Parties concerned to supply any other relevant information.

5. When any matter arising out of this article is being considered by the Committee, the States Parties concerned shall be entitled to send a representative to take part in the proceedings of the Committee, without voting rights, while the matter is under consideration.

submitted under Article 9, but the CERD Committee has never taken a formal decision. The Russian Federation has adduced no evidence whatsoever to show that States Parties have resorted to Article 9 in order to satisfy any supposed precondition to the seisin of the Court under Article 22.

3.27 The argument is also unsupported by the negotiating history of the Convention. In paragraphs 4.63 to 4.72 of its *Preliminary Objections* Russia seeks to invoke the negotiating history of the Convention in support of its claim that the word “or” actually means “and”. Yet it is not able to identify even a single statement by any negotiator at any phase of the negotiations to support that proposition. It cannot do so. Georgia has been through the entirety of the negotiating history, which is summarized in the attached *Appendix*; there is nothing in it that supports Russia’s assertion.

3.28 In any event, as with the text of Article XXXIV(2) of the 1956 Treaty between Nicaragua and the United States, which was the subject of the Court’s 1984 judgment without any need for recourse to the negotiating history²⁵¹, the ordinary meaning of Article 22 is clear, as is its context and the object and purpose of the Convention. There is therefore no need to have any regard to supplementary means, such as the negotiating history of the Convention. Nevertheless, in view of Russia’s selective and misleading reference to the negotiating history to buttress an approach that destroys the ordinary meaning of Article 22, Georgia has reviewed the entirety of the negotiating history. Georgia has prepared an *Appendix* summarizing those negotiations on the key points, and made available by an additional volume of annexes all relevant materials. These indicate, in summary, the following conclusions:

²⁵¹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment, I.C.J. Rep. 1984.

- a. The *travaux préparatoires* make it clear that negotiation and the CERD procedures are (a) not a prerequisite to the Court’s exercise of jurisdiction, and (b) not cumulative requirements.
- b. The Conciliation Commission was envisaged as a useful addition to existing and other procedures for dispute settlement, including the ICJ, rather than as a mandatory process for complaints;
- c. ICJ jurisdiction was considered as a self-contained issue all the way from negotiations at the Sub-Commission through to the final drafting in the Third Committee;
- d. This was reflected in the location of the clause and machinery in separate parts of the final Convention, with balance provided by referring to the opportunity (in a non-mandatory or preconditional way) to resort to the conciliation process in the final compromissory clause.

3.29 Georgia notes that during the provisional measures phase of this case there was no support whatsoever for Russia’s assertion that the reference in Article 22 to “the procedures expressly provided for in this Convention” is properly to be treated as a “cumulative condition”. The seven judges who participated in a Joint Dissenting Opinion described these “procedures” as an “alternative precondition”²⁵².

3.30 Having regard to the case-law of the Court, there is no support for Russia’s contention. In the *United Nations Headquarters* case, for example, the Court did not rule that “negotiation or other agreed mode of settlement” (as referred to in Article 21 of the United Nations Headquarters Agreement) were

²⁵² Provisional Measures Order, Joint Dissenting Opinion, para. 17.

cumulative requirements²⁵³. In *Democratic Republic of the Congo v. Rwanda*, Rwanda argued that the conditions in Article 75 of the WHO Constitution were cumulative but the Court did not make a ruling in support of that submission²⁵⁴.

3.31 It is clear that “negotiation” and “the procedures expressly provided for in this Convention”, as referred to in Article 22, were treated by the drafters of the Convention as alternatives. Even if they are properly to be treated as preconditions to the exercise of the Court’s jurisdiction, which Georgia denies, once Georgia made attempts at negotiation in respect of matters falling under the Convention it could satisfy the requirements of Article 22. There was no requirement to have recourse to the procedures referred to in Article 11 and 12 of the Convention. The claim to the contrary ignores the ordinary meaning of Article 22, the negotiating history of the Convention, the approach taken by the entire Court in the provisional measures phase, and the approach taken by the Court in its prior jurisprudence.

Section IV. Article 22 Does Not Impose the Preconditions Claimed by Russia

3.32 Russia claims that Article 22 imposes three conditions that must be satisfied before Georgia is entitled to have access to the Court:

- first, Georgia must have complied with some general “duty to settle the dispute before seizing the Court”;
- second, Georgia must have complied with the obligation to negotiate with Russia; and

²⁵³ *Applicability the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, Advisory Opinion, I.C.J. Rep. 1988.

²⁵⁴ *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. Rep. 2006, pp. 41-42 (in relation to Article 75 of the WHO Constitution).

- third, Georgia must have had recourse to “the procedures expressly provided for in [the] Convention”, namely the procedures envisaged in Articles 11 and 12.

3.33 Yet none of these conditions or pre-conditions to have recourse to the Court are to be found in the actual text of Article 22, as drafted by the negotiators. Specifically:

- a. Article 22 says nothing – expressly or implicitly – about any general “duty to settle the dispute before seizing the Court”;
- b. Article 22 states that a State Party may unilaterally refer a dispute to the Court if that dispute “is not settled by negotiation”, but it does not establish any express (or other) obligation to engage in such negotiation and only requires the Court to make a factual determination;
- c. Article 22 provides that a State Party may unilaterally refer a dispute to the Court if that dispute “is not settled by ... the procedures expressly provided for in [the] Convention”, but does not establish any express (or other) obligation to have recourse to those procedures and only requires the Court to make a factual determination.

3.34 If the drafters of the Convention had intended to include the conditions that Russia now reads into the text they would have done so. Article 11(2), for example, includes as one condition the requirement that a renewed application to the Committee must be made within six months of the original application. Article 11(3) imposes a clear requirement to exhaust local remedies before filing a renewed application to the Committee. The drafters were therefore well aware of the possibility of incorporating specific obligations into the Convention as preconditions to the exercise of procedural rights. They were also well aware of the requirements of other conventions, such as the 1960 UNESCO Protocol. In the absence of corresponding language in Article 22, its plain terms can only be understood as expressing an intention of the drafters not to have imposed such conditions.

3.35 Moreover, there is nothing in the Convention's *travaux préparatoires* that supports Russia's contentions. A proper reading of the drafting history reveals that Article 22 had its roots in an entirely distinct process to that constructing the CERD Committee machinery. All reference to the ICJ was expressly removed from that section during the key debates of the Third Committee (despite the protest of some of the drafters). It was plainly intended to be applied without prejudice to other procedures for settling disputes (see what became Article 16). The CERD mechanism and ICJ are thus presented in two separate sets of provisions in the final draft. Contrary to the strained attempts of the Russian Federation to explain this division, it is clear from the negotiating history of the Convention that the separation between the CERD mechanisms on the one hand, and the ICJ on the other hand, were intended by the drafters. The detailed negotiating history is addressed in the *Appendix*.

3.36 Georgia will deal with the points made by Russia in turn. As regards the purported general "duty to settle the dispute before seizing the Court", Georgia notes that when States have wanted to establish an express duty to seek to resolve a dispute by negotiation or other means as a condition precedent to access to an international court or tribunal they have done so explicitly. Article 283(1) of the 1982 Convention on the Law of the Sea, for example, provides that:

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

The 1965 Convention contains no such requirement, whether in Article 22 or anywhere else. Equally, the drafters of the Convention agreed on the formulation that the dispute "is not settled by negotiation"; they did not agree on a different

formulation, for example, that the dispute “cannot be settled” by negotiation or other means, as drafters have done in other conventions²⁵⁵.

3.37 It is readily apparent that the words “cannot be settled” must have a different meaning from the words “is not settled” as used in Article 22 of the 1965 Convention; the former impose a requirement on a court or tribunal that is charged with interpreting the words to determine whether as a matter of fact and law a particular dispute “cannot be settled” by negotiation or other means (as happened in the *Case concerning Border and Transborder Armed Actions*, where the Court rejected a jurisdictional objection from Honduras that the requirement in Article II of the Pact of Bogotá – providing for a right of access to the Court “in the event that a controversy arises between two or more signatory states which, in the opinion of the parties, cannot be settled by direct negotiations through the usual diplomatic channels” – was a “condition precedent” that had not been met, concluding that the formulation required it to make “an objective evaluation by the Court of the possibilities for settlement of the dispute by direct negotiations”)²⁵⁶. That is a different exercise from determining whether a dispute “is not settled”. This point has been emphasized, for example by Judge Jessup in the *South West Africa* cases, where he said:

The phrase ‘cannot be settled’ clearly must mean something more than ‘has not been settled’²⁵⁷.

²⁵⁵ *Mavrommatis Palestine Concessions Case*, Jurisdiction, Judgment, P.C.I.J., Series A, No. 2, 1924, p.13; *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, Judgment, I.C.J. Rep. 1962, p. 435 (Sep. Op. Judge Jessup); *Case concerning the Northern Cameroons (Cameroon v. United Kingdom)*, Preliminary Objections, Judgment, I.C.J. Reports 1963, p. 15.

²⁵⁶ *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, Jurisdiction and Admissibility, Judgment, I.C.J. Rep. 1988, p. 94, paras. 62-63.

²⁵⁷ *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, Judgment, I.C.J. Rep. 1962, p. 435 (Sep. Op. Judge Jessup). See also *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29 (14 November 2005), para. 98, available at <http://www.worldbank.org/icsid/cases/awards.htm>.

He also recognized what the “more” is; since it cannot be known that a dispute “cannot be settled” by negotiation if no effort at negotiation has been made, this formulation necessarily implies a requirement to negotiate, while the formulation adopted in Article 22 does not.

3.38 Similarly, if the parties had wanted to include other essential preconditions, such as the need for a cooling off period, or a prior requirement to have recourse to arbitration, they would have done so. The Convention on the Elimination of Discrimination Against Women (CEDAW), for example, provides that:

Any dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court²⁵⁸.

3.39 Russia rightly points out that some compromissory clauses require prior recourse to arbitration before access to the Court is available. The Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, which was in issue in the *Lockerbie* cases, is another example²⁵⁹. That compromissory clause is significantly different from Article 22: first, there must

²⁵⁸ Convention on the Elimination of Discrimination Against Women, Art. 29, G.A. Res. 34/180, U.N. Doc. A/34/46 (1981), 1249 U.N.T.S. 13. *See also* Article 30 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, GA Res. 39/46, annex, U.N. Doc. A/39/51 (1984), 1465 U.N.T.S. 85.

²⁵⁹ Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 974 U.N.T.S. 177, 24 U.S.T. 564, 10 I.L.M. 1151 (1971). *See 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. Rep. 1998, p. 9; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, Preliminary Objections, Judgment, I.C.J. Rep. 1998, p. 115.

be a situation in which the dispute “cannot be settled” by negotiation (rather than “is not settled”); second, it is then necessary to go to arbitration; and third, a time element is imposed on access to the Court, namely an inability to agree on the organization of the arbitration within six months of the date of it having been requested²⁶⁰. The Court decided it had jurisdiction because the United Kingdom and United States refused to answer Libya’s requests for arbitration. Similarly, in the *Armed Activities on the Territory of the Congo* case, which also concerned Article 14 of the Montreal Convention²⁶¹, the Court ruled that it could not exercise jurisdiction because the Democratic Republic of Congo had failed to request arbitration proceedings as required by Article 14. A similar requirement was at issue in *Questions relating to the Obligation to Prosecute or Extradite*, where the Court was satisfied that a request for arbitration had properly been made²⁶². These decisions are based on material differences with the present situation, and are of no assistance to Russia. To the contrary, they bring into relief the limited nature of the requirements of Article 22.

²⁶⁰ Article 14(1) of the Montreal Convention states: “Any dispute between two or more Contracting States concerning the interpretation or application of this Convention which *cannot* be settled through negotiation, *shall, at the request of one of them, be submitted to arbitration*. If within six months of the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court” (emphasis added).

²⁶¹ *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. Rep. 2006, pp. 46-49 (in relation to Article 14, paragraph 1, of the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation).

²⁶² *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* Provisional Measures, Order, I.C.J. Rep. 2009, (Article 30, paragraph 1 of the Convention against Torture). Article 30(1) of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment 1984 states: “Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation, shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court”. *See also 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. Rep. 2006, pp. 35-41 (in relation to Article 29, paragraph 1, of CEDAW).

3.40 The point is a simple one: the language of Article 22 is specific and needs to be interpreted and applied on its own terms and in its own context. The ordinary meaning of Article 22 is different from that of analogous dispute settlement provisions in other international agreements. It falls to be interpreted and applied on its own merits.

3.41 The ordinary meaning of Article 22 does not impose any general duty to attempt to settle the dispute before seizing the Court. Nor does the ordinary meaning of that provision require the exhaustion of any particular means for the peaceful settlement of disputes before a State Party is entitled to have recourse to the Court. Nor does the context, including the separate location of Article 22 in part III of the Convention, as well as the adoption of Article 16 in part II of the Convention. The leading commentary on the Convention was published by Natan Lerner in 1980²⁶³. It concludes without ambiguity that there is no support for a restrictive interpretation of Article 22, of the kind now urged by Russia. The Lerner commentary merely notes that a dispute between the parties under the Convention may be referred to the Court at the request of either party “[w]hen such disputes are not settled by negotiation or by the procedures expressly provided for in the Convention”²⁶⁴. There is nothing in the text of Article 22, or in Lerner’s commentary, to support Russia’s view that the Court is a last resort. The same conclusion flows from the negotiating history of the Convention, to which reference was made above²⁶⁵.

3.42 What then is the meaning of Article 22? For the reasons set out above, the reference to “negotiation” is in alternative to “the procedure expressly

²⁶³ Natan Lerner, *The U.N. Convention on the Elimination of All Forms of Racial Discrimination* (1980).

²⁶⁴ *Ibid.*, p. 97.

²⁶⁵ Written Statement of Georgia on Preliminary Objections (hereinafter “GWS”), paras. 3.26-3.27.

provided for in this Convention”. The difference between the Parties turns on the meaning of the words “Any dispute ... which is not settled by negotiation”. As already noted, in the provisional measures phase the Court concluded that these words describe a state of fact, so that the function of the Court is limited to determining whether the dispute “is not settled”. As the Court put it in the provisional measures phase:

the phrase ‘any dispute ... which is not settled by negotiation or by the procedure expressly provided for in this Convention’ does not, on its plain meaning, suggest that formal negotiations in the framework of the Convention or recourse to the procedure referred to in Article 22 thereof constitute preconditions to be fulfilled before the seisin of the Court²⁶⁶.

3.43 This approach is consistent with the Court’s longstanding practice, which has been to reject preliminary objections raised by Respondents on the grounds of an alleged deficiency of negotiations preceding the institution of judicial proceedings. The objection has not enjoyed success and has been repeatedly rejected both by the Permanent Court of International Justice as well as this Court²⁶⁷.

3.44 The Court’s case-law overwhelmingly supports Georgia’s approach. The Court’s judgment in the *Military and Paramilitary Activities in and against Nicaragua* case relates to considerations that are not materially different from

²⁶⁶ Provisional Measures Order, para. 114.

²⁶⁷ *Mavrommatis Palestine Concessions*, pp. 13-15, *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, Judgment, pp. 319, 346; *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)* Judgment, I.C.J. Rep. 1980, p. 27, para. 51; *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, pp. 33-34, para. 55; *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. Rep. 1998, p. 17, para. 21; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, Preliminary Objections, Judgment, I.C.J. Rep. 1998, p. 122, para. 20; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment, I.C.J. Rep. 1984, pp. 428-429, para. 83.

those at issue in the present case²⁶⁸. The United States argued that Nicaragua had not raised in prior negotiations or diplomatic efforts the application or interpretation of the 1956 Friendship, Commerce and Navigation Treaty, with regard to the factual and legal allegations that were the subject of Nicaragua's Application. Article XXXIV(2) of that Treaty provided that:

Any dispute between the Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the Parties agree to settlement by some other pacific means²⁶⁹.

3.45 Russia has failed to explain any material difference between the language of the 1956 Treaty ("not satisfactorily adjusted by diplomacy") and that of Article 22 ("not settled by negotiation"). Having regard to the language of Article XXIV(2), the Court ruled decisively that, since there had in fact been no settlement of the dispute between the parties, the requirements of the compromissory clause were satisfied because the dispute was "clearly one which is not satisfactorily adjusted by diplomacy"²⁷⁰.

3.46 The Court's conclusion in 1984 was supported by an overwhelming majority of the sixteen judges who participated in the decision: only two judges dissented on this point²⁷¹. Although he dissented on other parts of the judgment, Sir Robert Jennings voted with the majority on the meaning and effect of Article XXXIV(2) of the 1956 Treaty. His opinion on this point is characteristically pithy and clear:

²⁶⁸ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment, I.C.J. Rep. 1984, p. 392.

²⁶⁹ Cited at *ibid.*, para. 81.

²⁷⁰ *Ibid.*, para. 83.

²⁷¹ Judges Schwebel and Ruda, *ibid.*, pp. 630 and 452.

In the present case, the United States claims that Nicaragua has made no attempt to settle the matters, the subject of the application, by diplomacy. But the qualifying clause in question merely requires that the dispute be one ‘not satisfactorily adjusted by diplomacy’. Expressed thus, in a purely negative form, it is not an exigent requirement. It seems indeed to be cogently arguable that all that is required is, as the clause precisely states, that the claims have not in fact already been ‘adjusted’ by diplomacy. In short it appears to be intended to do no more than to ensure that disputes that have already been adequately dealt with by diplomacy, should not be reopened before the Court²⁷².

3.47 Sir Robert’s words apply equally to the form of words that is found in Article 22. Like the text of Article XXXIV(2) of the 1956 Treaty that the Court was interpreting, Article 22 of the Convention is also expressed in “a purely negative form”. The words “not settled by negotiation or by the procedures expressly provided for in this Convention” are in all material purposes to the same effect as “not satisfactorily adjusted by diplomacy”. Article 22 – like Article XXIV(2) – does not, in Sir Robert’s words, express “an exigent requirement”. All that is required by Article 22, like Article XXXIV(2), is that the claims shall not have been settled by negotiation (or the procedures expressly provided for in the Convention). They have not been so settled. Russia does not argue otherwise.

3.48 Is there any reason for the Court to depart from its settled jurisprudence after more than a quarter of a century? Russia has provided no such reason. Indeed, such an approach would introduce uncertainty into the understanding of States as to the circumstances in which the Court will exercise jurisdiction. It is plain from its pleading that Russia recognizes the considerable difficulties it faces with the 1984 judgment in *Military and Paramilitary Activities in and against Nicaragua*: it devotes no less than five pages to its efforts to distinguish the 1984 judgment from the present case. It presents three arguments. First, it argues that

²⁷² *Ibid.*, Separate Opinion of Judge Sir Robert Jennings, p. 556.

the two compromissory clauses are differently worded²⁷³. But there is no material difference between the words “not settled by negotiation” and “not satisfactorily adjusted by diplomacy”. The key word in each provision is “not”, and the crucial factor, as Sir Robert Jennings has noted, is the “purely negative form” of the provision. The two texts are, on these crucial points, the same. Russia’s second argument concerns the issue of whether in fact there were negotiations: this is addressed below, and Georgia submits again that the two cases are not distinguishable. Russia’s third point is that the character of the treaties at stake in the two cases are “entirely different”: even if correct, which it is not, Russia fails to provide any meaningful explanation as to why the present Convention should be the subject of a different interpretation. In short, Russia’s arguments are unpersuasive²⁷⁴.

3.49 There is no reason why the Court should abandon its earlier jurisprudence or the approach it adopted in 1984²⁷⁵. Why should there be one rule for the United States in 1984 and another for Russia in 2010? The ordinary meaning of Article XXXIV(2) was clear to the Court in 1984 and did not require any reference to the negotiating history of the 1956 Treaty. This is equally the case for this Convention. As in 1984, the question for the Court is relatively simple:

²⁷³ RPO, paras. 4.29-4.35.

²⁷⁴ The Russian Federation cites the case of *North Sea Continental Shelf (Federal Republic of Germany v. Denmark; Federal Republic of Germany v The Netherlands)*, Judgment, I.C.J. Rep. 1969, p. 3, as some sort of authority evidencing the fundamental importance of the obligation to negotiate the exhaustion of the negotiation process. What it fails to mention is that the nature of that case cannot be compared to the present one. In *North Sea Continental Shelf*, the parties had entered into a special agreement to delimit the Continental Shelf. They then tried to resolve the issue of delimitation, but negotiations broke down because they could not agree on how to interpret the legal rule; therefore, they asked the Court to state what were the applicable principles and rules of law regarding delimitation. With the benefit of the Court’s ruling, the parties would take this into account in their renewed negotiations. Clearly, therefore, recourse to the Court was premised on an entirely different basis to the present case.

²⁷⁵ *United States Diplomatic and Consular Staff in Iran (United States of America v. Iran)* Judgment, I.C.J. Rep. 1980, p.3, is another, albeit extreme, example of a dispute “not satisfactorily adjusted by diplomacy”.

has the dispute between Georgia and Russia concerning ethnic cleansing and the right to return of internally displaced persons been settled by negotiation or by the procedures explicitly provided for in the Convention? The answer to that question is no, and plainly so. With this there is no need for additional analysis.

3.50 Yet Russia now seeks to reopen the Court's 1984 judgment, and to that end invokes a whole series of judgments of the Court, none of which provide any assistance to its case. Russia's reliance on the Court's judgment in *Armed Activities on the Territory of the Congo*, which concerned Article 75 of the WHO Constitution, is misconceived²⁷⁶. The Court ruled that the DRC had not demonstrated the existence of a question or dispute concerning the interpretation or application of the WHO Constitution, noting that the Democratic Republic of Congo had failed to specify any obligation of the WHO Constitution that might have been breached. The Court did not abandon the approach it took in *Military and Paramilitary Activities in and against Nicaragua*.

3.51 Russia invokes the *Oil Platforms* case²⁷⁷. Yet it fails to mention that in that case neither party contested the fact that there had been an effort to settle the dispute, so the Court did not need to elaborate on the meaning and effect of the dispute settlement clause. Rather, the main focus was on whether the "dispute" concerned violations of the treaty in question. The Court found that it did.

²⁷⁶ *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. Rep. 2006, pp. 41-43 (in relation to Article 75 of the WHO Constitution). Article 75 of the WHO Constitution states: "Any question or dispute concerning the interpretation or application of this Constitution *which is not settled by negotiation or by the Health Assembly* shall be referred to the International Court of Justice in conformity with the Statute of the Court, unless the parties concerned agree on another mode of settlement" (emphasis added).

²⁷⁷ *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment, I.C.J. Rep. 1996, p. 803.

Russia even cites the *ELSI* case²⁷⁸, despite the fact that the jurisdiction of the Court was not in dispute.

3.52 Russia also seeks to invoke linguistic differences in the various texts of Article 22. It is not immediately apparent that the French text provides Russia with any assistance. The use of the future perfect tense (“*qui n’aura pas été réglée*”) merely indicates that prior to the seisin of the Court the dispute between the Parties will not have been previously settled. The French text says nothing about any obligation to have engaged in prior negotiations (or to have invoked other procedures under the Convention) and, to the extent that any negotiations may be said to be required, does not indicate one way or the other anything as to their formality or scope. It appears that the use of the future perfect tense merely serves to connect an element of the past (the dispute) with an element of the future (the jurisdiction of the court). Similarly, the Russian words “*ne razreshen*” refer to the past participle in relation to the verb “to settle”, and only appear to characterize the dispute as one that has not previously been settled. And the Russian word “*putem*” may literally be translated to mean “*by way of*” in English (or “*par voie de*” in French) and merely refers to one way (amongst various ways) in which the dispute may be resolved. Again, there is nothing in the Russian text to indicate that negotiations or other procedures are required to have been followed as a matter of obligation, or that any particular form is to be followed amongst those various means.

3.53 Russia also claims that Georgia’s approach to the meaning of the words “which is not settled” renders them tautological and meaningless²⁷⁹. This is wrong. The inclusion of these words makes it clear that a dispute which has been

²⁷⁸ *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, Judgment, I.C.J. Rep. 1989, p. 15.

²⁷⁹ RPO, para. 4.11.

settled cannot be referred to the Court, so that it falls to the Court to determine whether (1) there is a dispute in relation to the Convention and (2) whether that dispute has been settled.

Section V. To the Extent that Article 22 Imposes any Prior Obligation to Negotiate, Georgia has Met that Condition

3.54 Georgia's primary submission is that Article 22 does not require negotiations to have taken place with Russia as a pre-condition to its right to bring the dispute to the Court under Article 22. Georgia recognizes, however, that in the provisional measures phase the Court ruled 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 CERD²⁸⁰.

3.55 To the extent that Georgia was required to attempt negotiations with Russia prior to the Court's seisin, the evidence presented in Georgia's *Memorial* clearly establishes extensive negotiations between the Parties concerning the subject matter of Georgia's claims under the Convention. The Court was already satisfied with the evidence at the time of the provisional measures phase. In its Order of 15 October 2008, the Court ruled:

Whereas it is apparent from the case file that such issues have been raised in bilateral contacts between the Parties, and, that these issues have manifestly not been resolved by negotiation prior to the filing of the Application; whereas, in several representations to the United Nations Security Council in the days before the filing of the Application, those same issues were raised by Georgia and commented upon by the Russian Federation; whereas therefore the Russian Federation was made aware of Georgia's position in that regard; and whereas the fact that CERD has not been specifically mentioned in a bilateral or multilateral context is not an obstacle to

²⁸⁰ Provisional Measures Order, para. 114.

the seisin of the Court on the basis of Article 22 of the Convention²⁸¹.

The judges participating in the Joint Dissenting Opinion did not feel able, at that time and on the basis of the evidence then available, to join that conclusion. This section addresses the meaning of “negotiations” within the context of Article 22 of the Convention, by reference to the Court’s jurisprudence. It demonstrates the manifest error of Russia’s contention that there were no negotiations whatsoever with Georgia. The following section provides further evidence that negotiations with respect to issues falling under the Convention took place between the Parties, supplementing the extensive evidence already set forth in Georgia’s *Memorial*²⁸².

A. THE MEANING OF “NEGOTIATIONS”

3.56 In its *Preliminary Objections*, Russia asserts an exacting definition of what constitutes “negotiations”, one that does not find support in the jurisprudence of the Court. Russia contends that “[w]hatever 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”²⁸³. Russia seeks to distinguish between “disputation” and “negotiation” – relying on the Separate Opinion of Sir Gerald Fitzmaurice in the *Northern Cameroons* case²⁸⁴ – and it invokes the *Armed Activities (2002)* case for the proposition that “mere protests cannot amount to negotiation”²⁸⁵. It then leaps to the conclusion that even if the Parties repeatedly discussed issues falling under the 1965 Convention – such as

²⁸¹ *Ibid.*, para. 115.

²⁸² Memorial of Georgia, Vol. I, (2 September 2009) (hereinafter “GM”), paras. 8.35-8.79.

²⁸³ RPO, p. 101, para. 4.37.

²⁸⁴ *Ibid.*, p. 103, para. 4.39.

²⁸⁵ *Ibid.*, p. 105, para. 4.40.

the return of ethnic Georgians displaced by ethnic cleansing – this did not amount to an “exchange” qualifying as “negotiations”.

3.57 Russia’s unreasonably stringent standard stands in marked contrast to the established jurisprudence of the Court. The standard identified by the Court in the provisional measures phase of this case – there must have been “some attempt ... to initiate ... discussions on issues that would fall under CERD” – is consistent with the case-law of the PCIJ and the Court, which makes it clear that any threshold is a low one, that it is for the parties to determine whether further negotiation is likely to be fruitful, that substance is more important than form, and that no purpose is to be served in the pursuit of hopeless or futile negotiations.

3.58 As noted above, in the *Mavrommatis* case the PCIJ decided that the question of what qualifies as negotiations “is essentially a relative one”²⁸⁶. The Court must determine in each case whether the evidence of discussions is sufficient to meet this requirement. The Court’s *Order on Provisional Measures* simply states that Article 22 requires 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”²⁸⁷. The Dissenting Opinion similarly adopts a flexible standard, stating simply that negotiations consist of “contacts between the Parties...regarding the subject of the dispute, either the interpretation or application of the Convention”²⁸⁸. This is a reasonable interpretation that stands in sharp contrast with Russia’s exacting and formalistic standard.

²⁸⁶ *Mavrommatis Palestine Concessions*, *op. cit.*, p. 13.

²⁸⁷ Provisional Measures Order, para. 114.

²⁸⁸ Joint Dissenting Opinion, para. 15.

B. THERE IS NO SPECIFIC PROCEDURE OR FORMAT FOR NEGOTIATIONS

3.59 There is no requirement of a specific procedure or format for negotiations. Such discussions may be very brief, involving a simple communication of protest to a silent or intractable party. As the Court indicated in an oft-quoted passage of the *Mavrommatis* case:

Negotiations do not of necessity always presuppose a more or less lengthy series of notes and despatches; it may suffice that a discussion should have been commenced, and this discussion may have been very short; this will be the case if a deadlock is reached, or if finally a point is reached at which one of the Parties definitely declares himself unable, or refuses, to give way, and there can therefore be no doubt that the dispute cannot be settled by diplomatic negotiation²⁸⁹.

Similarly, as stated in the *South West Africa* case, negotiations may take place in different forums and by different modes of communication:

It is, however, further contended by the Respondent that the collective negotiations in the United Nations are one thing and direct negotiations between it and the Applicants are another, and that no such direct negotiations have ever been undertaken by them. But in this respect it is not so much the form of negotiation that matters as the attitude and views of the Parties on the substantive issues of the question involved. So long as both sides remain adamant, and this is obvious even from their oral presentations before the Court, there is no reason to think that the dispute can be settled by further negotiations between the Parties²⁹⁰.

3.60 In the *South West Africa* cases, the Court concluded that “negotiations” do not have to be bilateral: they can also take place within the framework of an

²⁸⁹ *Mavrommatis Palestine Concessions*, *op. cit.* (emphasis in original). Cited in *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, Judgment, pp. 345-6; *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, Advisory Opinion, I.C.J. Rep. 1988, pp. 33-34, para. 55.

²⁹⁰ *South West Africa Cases*, *op. cit.*, p. 346.

international organization, such as the UN General Assembly²⁹¹. Judge Jessup highlighted the important role that international organizations can play as a forum for discussions and negotiations, in the context of compromissory clauses of the kind at issue. He rightly noted that:

The General Assembly, and indeed the whole of the United Nations complex with its permanent missions and its special committees, are today part of the normal processes of diplomacy, that is of negotiation²⁹².

The Court has confirmed the approach taken by the PCIJ in the *Mavrommatis Palestine Concessions* case to the effect that the chance of success of diplomatic negotiations was a relative one²⁹³. As Judge Jessup noted, States are in the best position to judge the political reasons that would prevent a dispute being settled by negotiations²⁹⁴. Other international courts and tribunals have adopted the approach taken by the PCIJ and the Court²⁹⁵.

3.61 In this regard, in the Order of 15 October 2008, the Court stated that Article 22 did *not* require “*formal* negotiations in the framework of the Convention” but only “discussions on issues that would fall under CERD”²⁹⁶. Similarly, the Dissenting Opinion only referred to “contacts between the Parties”²⁹⁷ requiring simply that “[f]or the condition of prior negotiation to be

²⁹¹ *Ibid.*, pp. 342-346.

²⁹² *Ibid.*, p. 434.

²⁹³ *Ibid.*, p. 345.

²⁹⁴ *Ibid.*, p. 345.

²⁹⁵ See e.g. *MOX Plant (Ireland v. United Kingdom)*, Provisional Measures, Judgment, I.T.L.O.S. Rep. 2001, p. 107, para. 60.

²⁹⁶ Provisional Measures Order, para.114 (emphasis added).

²⁹⁷ Provisional Measures Order, Joint Dissenting Opinion, para. 15.

fulfilled, it suffices for an attempt to have been made and for it to have become clear at some point that there was no chance of success”²⁹⁸.

3.62 Thus, contrary to Russia’s assertions, there is no requirement of an attempt at direct, sustained, bilateral negotiations²⁹⁹. Indeed, in contrast to Article 11(3), the text of Article 22 does not even refer to “bilateral negotiations”. Depending on the circumstances, negotiations may take place in a bilateral or multilateral context, and through diplomatic notes, informal communications, or any other form of direct or indirect exchange between the parties.

C. THE NEGOTIATIONS NEED NOT EXPRESSLY REFER TO THE CONVENTION

3.63 There is no requirement that the negotiations between Georgia and Russia include an express reference to the Convention. Russia falsely asserts that “[i]n order to amount to a ‘negotiation’ over a CERD-related dispute *per se*, the contacts between the Parties to a dispute must expressly refer to the Convention or to its substantive provisions or, at least, to its object”³⁰⁰. The Court’s judgment in the *Nicaragua* case leaves no doubt that the only requirement is that the *subject matter* of the dispute under the Convention – i.e. racial discrimination – must have been discussed:

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

²⁹⁸ *Ibid.*, para. 13.

²⁹⁹ This suggestion is implicit in Russia’s reliance on Sir Gerald Fitzmaurice’s statement that “[I]t would still not be right to hold that a dispute ‘cannot’ be settled by negotiation, when the most obvious means of attempting to do this, namely by direct discussions between the parties, had not even been tried since it could not be assumed that these would necessarily fail because there had been no success in what was an entirely different, and certainly not more propitious milieu”. *Northern Cameroons (Cameroon v. United Kingdom)*, Preliminary Objections, Judgment, Separate Opinion of Judge Sir Gerald Fitzmaurice, I.C.J. Rep. 1963, p. 123. Clearly, the Court has not abided by this Separate Opinion, as shown in the above cited *South West Africa* case.

³⁰⁰ RPO, p. 133, para. 4.84.

conduct of that other State, it is debarred from invoking a compromissory clause in that treaty. The United States was well aware that Nicaragua alleged that its conduct was a breach of international obligations before the present case was instituted; and it is now aware that specific articles of the 1956 Treaty are alleged to have been violated. It would make no sense to require Nicaragua now to institute fresh proceedings based on the Treaty, which it would be fully entitled to do³⁰¹.

3.64 Consistent with this earlier jurisprudence, the Court's *Order* of 15 October 2008 held that: "the fact that CERD has not been specifically mentioned in a bilateral or multilateral context is not an obstacle to the seisin of the Court on the basis of Article 22 of the Convention"³⁰². The Dissenting Opinion did not require specific mention of the Convention either. It simply required that the negotiations be on "the very substance of CERD", a criterion that it implies would be satisfied if "Georgia accused Russia of racial discrimination"³⁰³.

3.65 As noted above, Russia manifestly fails to distinguish the *Nicaragua* case from the present dispute³⁰⁴. Even more significant is Russia's disregard of the Court's *Order* in the present case. As set forth below, the evidence demonstrates that Georgia undoubtedly raised "the very substance of CERD" with Russia over the course of many years, in particular Russia's actions and omissions that constituted or supported ethnic cleansing, and that frustrated the right of return of persons displaced by ethnic discrimination in South Ossetia and Abkhazia.

3.66 In this regard it is also instructive to refer to the Court's approach to the issues adopted in *Democratic Republic of Congo v. Rwanda*, which concerned

³⁰¹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *op. cit.*, p. 392, para. 83.

³⁰² Provisional Measures Order, para. 115.

³⁰³ Provisional Measures Order, Joint Dissenting Opinion, para. 12.

³⁰⁴ GWS, paras. 3.43-3.47.

Article 29 of CEDAW³⁰⁵. The Court's decisions are invoked by Russia to support its claim that *formal* negotiations must have taken place before a party to that Convention can initiate proceedings. As noted by Georgia in the provisional measures phase, however, that case is easily distinguishable, not least because it is plain from the facts that the DRC was looking for any possible basis to argue for the Court's jurisdiction, irrespective even of whether the subject of the underlying dispute had any plausible connection with the treaty containing the compromissory clause (with the DRC even invoking the WHO Constitution amongst others)³⁰⁶. There are other material differences. First, unlike the 1965 Convention, CEDAW requires efforts to establish an arbitral tribunal to have failed as a precondition to access to the Court. Second, in sharp contrast to the present case, there were no negotiations of any kind in relation to the matters that fell under CEDAW and the DRC put no evidence of such negotiations before the Court.

3.67 In that case the Court concluded at the provisional measures phase in 2002 that it did not even have *prima facie* jurisdiction under Article 29, in the absence of any evidence to show attempts at negotiation³⁰⁷. Despite the clear ruling at the provisional measures phase, by the time the merits phase came around the Democratic Republic of Congo had still provided *no* evidence of negotiations or discussions on discrimination against women. Counsel for Rwanda rightly noted during the oral arguments of the merits phase:

It was open to the Congo to adduce fresh evidence in its Counter-Memorial (if, of course, such evidence existed) to show that the

³⁰⁵ *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. Rep. 2006*, pp. 35-41 (in relation to Article 29, paragraph 1, of CEDAW).

³⁰⁶ Verbatim Record, CR 2008/22 (8 September 2008), paras. 55-60 (Crawford).

³⁰⁷ *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Provisional Measures, Order, I.C.J. Rep. 2002*, p. 247, para. 79.

negotiations were in fact concerned with the application of that Convention. But it has made no attempt whatever to do so. The Congo has attached only a handful of documents to its Counter-Memorial. None of those documents gives even a hint that the negotiations between the Congo and Rwanda at any point concerned the application of the Convention on the Elimination of Discrimination Against Women. The Congo has, therefore, failed to adduce a single piece of evidence – a single piece – in support of its case beyond what it had already produced to the Court in 2002. The Court found that evidence insufficient and unconvincing then and I submit that it must reach the same conclusion on that same evidence now³⁰⁸.

The Court’s 2006 judgment found that the Democratic Republic of Congo “failed to prove any attempts on its part to initiate arbitration proceedings with Rwanda under [CEDAW]”³⁰⁹. In the absence of any evidence of negotiations of any matters falling under CEDAW the Court had no option but to reject that basis for jurisdiction³¹⁰.

D. A PARTY NEED NOT PROCEED WITH NEGOTIATIONS THAT ARE UNSUCCESSFUL

3.68 The *Order* of 15 October 2008 states that the term any dispute that “*is not settled by negotiation*” under Article 22 only requires evidence that Georgia has made an attempt at negotiations. As noted above, this may be contrasted with the terms “*cannot be settled by negotiation*” in other treaties that contain a further requirement that the negotiations be unsuccessful³¹¹. In asserting this further

³⁰⁸ Verbatim Record, CR 2005/17 (4 July 2005) para. 2.62 (Greenwood).

³⁰⁹ *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. Rep. 2006, para. 92.

³¹⁰ *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Provisional Measures, Order, I.C.J. Rep. 2006, para. 93.

³¹¹ For example, Article 14(1) of the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation 1971; Article 30(1) of the Convention Against Torture and Other Forms of Cruel, Inhuman and Degrading Treatment or Punishment 1984.

requirement that negotiations have reached a deadlock however³¹², Russia disregards the copious evidence of unsuccessful negotiations lasting many years. It also disregards that this proceeding was initiated at a time when Russian armed forces had attacked and occupied large parts of Georgia's territory and were engaged in acts of ethnic cleansing, and when the Russian authorities refused to negotiate or discuss these or any other matters with Georgia. On 11 August 2008, for example, *Pravda* reported that President Medvedev refused to speak with President Saakashvili³¹³. Many other examples of Georgia's attempts, and Russia's refusals, to negotiate regarding issues falling under the 1965 Convention and raised in the *Application* are provided in the following section of this Chapter. It is respectfully submitted that these circumstances would satisfy even the more exacting standard of the Dissenting Opinion that, "[f]or the condition of prior negotiation to be fulfilled, it suffices for an attempt to have been made and for it to have become clear at some point that there was no chance of success"³¹⁴.

E. CONCLUSION

3.69 In contrast, for example with the CEDAW case, in the present case the dispute between Georgia and Russia in relation to ethnic cleansing and the right to return of internally displaced persons under the Convention has been the subject of extensive discussions and negotiations over a period of more than fifteen years, and is plainly "not settled". These matters falling under the Convention have also been raised in private and public sessions of international

³¹² RPO, p. 101, para. 4.37.

³¹³ "The President of Russia has recently refused to speak with President Saakashvili over the phone. According to Georgia's representative in the UN Security Council the Russian President has refused to have any direct contact with the Georgian President. Churkin, Russia's Permanent Representative in the Security Council commented that "no decent man will speak with Saakashvili after what has occurred." "The Russian President refused to speak with Saakashvili", *Pravda* (11 August 2008). GWS, Vol. IV, Annex 206.

³¹⁴ Provisional Measures Order, Joint Dissenting, para. 13.

organizations with Russia, including the Security Council, the General Assembly, the CERD Committee, the United Nations Human Rights Committee, the Committee Against Torture, the OSCE and the European Commission against Racism and Intolerance. It is to the evidence on these attempts at negotiation that Georgia now turns.

Section VI. Georgia Attempted to Negotiate with Russia on Matters Falling Under the 1965 Convention: The Evidence

3.70 The evidence described below, which summarises and expands upon that presented in Georgia's *Memorial*, confirms that Georgia has far exceeded any standard that might reasonably be reflected in Article 22 as requiring attempts to negotiate with Russia in respect of matters falling under the 1965 Convention. To assist the Court, Georgia organizes the evidence under the same four headings as appear in Chapter II of this *Written Statement* (which describes the evidence that legal disputes exist between Georgia and Russia regarding matters falling under the Convention). The evidence confirms that Georgia repeatedly attempted to negotiate with Russia over extended periods in respect of *inter alia* the following matters:

- Russia's direct participation in ethnic cleansing and other acts of discrimination against ethnic Georgians in South Ossetia and Abkhazia;
- Russia's prevention of ethnic Georgian IDPs from exercising their right of return to their homes in South Ossetia and Abkhazia;
- Russia's support, sponsorship and defence of discrimination against ethnic Georgians by other parties; and
- Russia's failure to prevent discrimination against ethnic Georgians in areas under its control.

A. RUSSIA'S DIRECT PARTICIPATION IN ETHNIC CLEANSING AND OTHER FORMS OF ETHNIC DISCRIMINATION

3.71 Georgia attempted to negotiate with Russia over the latter's participation in ethnic cleansing starting as early as 1992, when the first ethnic cleansing campaign was carried out in South Ossetia. Georgia raised this matter with Russia in direct bilateral contacts and in various international fora. Negotiations between Georgia and Russia culminated in the conclusion on 24 June 1992 of an Agreement on Principles of Settlement of the Georgian-Ossetian Conflict (the "Sochi Agreement")³¹⁵. Signed by Georgia's and Russia's respective Heads of State, the agreement required the withdrawal of "the Russian side" from Tskhinvali "in order to secure demilitarization of the conflict region and to rule out the possibility of involvement of the armed forces of the Russian Federation in the conflict"³¹⁶. The preamble to the Sochi Agreement makes clear that this and other provisions were designed to safeguard some of the same rights that are protected by the 1965 Convention³¹⁷. To this day Russia has not complied with the requirements of the Sochi Agreement.

3.72 Three months later, on 3 September 1992, the President of Russia and the President of the State Council of Georgia entered into a further Agreement that "reaffirm[ed] the need to respect international standards in the area of human rights and national minorities, to prevent discrimination based on nationality, language or religion" and that obligated the Russian armed forces in Abkhazia to

³¹⁵ Agreement on Principles of Settlement of the Georgian-Ossetian Conflict (24 June 1992). GM, Vol. III, Annex 102.

³¹⁶ *Ibid.*, Art. 2.

³¹⁷ According to its preamble, the Sochi Agreement was executed while "acting in the spirit of respect for human rights and fundamental freedoms, *as well as rights of ethnic minorities*". *Ibid.* (emphasis added).

“remain strictly neutral” and “not take part in internal disputes”³¹⁸. Again Russia failed to abide by its obligations. Georgia presented a *note verbale* raising concerns about “the participation of Russian troops” in the ongoing ethnic cleansing³¹⁹, and later informing the United Nations and CSCE that “Russian troops” were implementing “a policy of ethnic cleansing”³²⁰.

3.73 In the ensuing years, Georgia repeatedly engaged Russia in negotiations concerning Russia’s involvement in violent ethnic discrimination by availing itself of various international negotiating fora³²¹. These attempts at resolving

³¹⁸ U.N. Security Council, *Letter dated 8 September 1992 from the Chargé D’Affaires A.I. of the Permanent Mission of the Russian Federation to the United Nations Addressed to the President of the Security Council, Annex*, U.N. Doc. S/24523 (8 September 1992). GWS, Vol. III, Annex 45.

³¹⁹ U.N. Security Council, *Note Verbale dated 25 December 1992 from the Ministry of Foreign Affairs of Georgia Addressed to the Secretary-General, Annex*, U.N. Doc. S/25026 (30 December 1992) (emphasis added). GWS, Vol. III, Annex 46.

³²⁰ Appeal of the Georgia Parliament to the United Nations, Conference on the Security and Cooperation in Europe, International Human Rights Organizations (1 April 1993). GWS, Vol. IV, Annex 125.

³²¹ In a 2 July 1993 letter to the Security Council, President Shevardnadze informed members of the Security Council that the Russian military was to blame for the “catastrophic” number of civilian Georgian casualties. U.N. Security Council, *Letter dated 2 July 1993 from the Head of State of the Republic of Georgia Addressed to the President of the Security Council*, U.N. Doc. S/26031 (2 July 1993) (“The shelling is being carried out by large-calibre mortars, howitzers and Grad rocket launchers with the use of wide-area shells. The shelling is controlled from the air by Su-25 planes. In the coastal area, controlled by frontier troops of the Russian Federation, assault forces are landing, consisting primarily of citizens of the Russian Federation”). GM, Vol. II, Annex 8. On 17 November 1999, Russia and Georgia appeared to reach an agreement on Russian military participation in Georgia. On that day, the two States issued a joint statement that they had agreed that Russia would “withdraw its military equipment and weaponry from the Russian military bases deployed in Vaziani [and] Gudauta” by 31 December 2000. Joint Statement of the Russian Federation and Georgia (17 November 1999). GWS, Vol. IV, Annex 142. On 7 December 2000, Georgia’s Permanent Representative to the UN informed Security Council members that “the majority of the so-called leadership of the separatists are citizens of the Russian Federation and hold Russian passports to move free on its territory and receive visas as Russian citizens to represent the separatist regimes abroad.” U.N. Security Council, *Letter dated 7 December 2000 from the Permanent Representative of Georgia to the United Nations addressed to the President of the Security Council, Annex*, U.N. Doc. S/2000/1163 (7 December 2000). GWS, Vol. III, Annex 62. In March 2001, Georgia informed the OSCE that, “despite the resistance from the Georgian side the unilateral introduction by the Russian Federation of simplified border crossing for the conflict regions in Georgia... cannot be viewed otherwise than discriminatory.” Statement by Minister of Special Affairs of Georgia at the Permanent Council of the OSCE, PC.DEL/207/01 (30 March 2001). GM, Vol. II, Annex 75.

issues arising under the 1965 Convention all failed. Thus, in its first periodic report to the CERD Committee, in 2001, Georgia complained about the “ethnic cleansing” that had been committed in Abkhazia³²². On 11 March 2002, Georgia informed the Security Council that, “with the direct participation of the destructive forces of [Russia], more than 300,000 civilians were forced to flee” Abkhazia³²³. Georgia engaged in direct bilateral diplomacy with Russia concerning the participation of its forces in violent discrimination against ethnic Georgians. In early 2003, the Speaker of the Parliament of Georgia met with the Chairpersons of the Council of the Russian Federation and the Russian State Duma³²⁴. The Georgian Speaker informed her Russian counterparts that the local Georgian population did not trust Russian peacekeepers due to their “actions” in the “conflict zone”³²⁵. Russia rejected Georgia’s proposal to withdraw Russian peacekeepers from the Gali District in an effort to “facilitate the process of refugee return”³²⁶. Once again, the negotiations on these issues under the 1965 Convention failed. This compelled Georgia, in its 2004 report to the CERD Committee, to emphasize that it was “gravely concerned about violations of the human rights of Georgian citizens in the Gali district of Abkhazia”³²⁷. In May 2006, Georgia renewed efforts to engage Russia, reporting to the UN Committee Against Torture that “Russian peacekeepers were in some instances aiding or abetting criminal separatists and were thereby, actively or by omission,

³²² GWS, para. 2.82.

³²³ U.N. Security Council, *Letter dated 8 March 2002 from the Permanent Representative of Georgia to the United Nations addressed to the President of the Security Council, Annex*, U.N. Doc. S/2002/250 (11 March 2002). GWS, Vol. IV, Annex 229. Georgia renewed this accusation before the UN General Assembly in October 2002. U.N. General Assembly, *First Committee, 10th Meeting*, U.N. Doc. A/C.1/57/PV.10 (10 October 2002) (accusing the Russian military of “directly participating in the conflict in Abkhazia”). GWS, Vol. III, Annex 68.

³²⁴ *Ibid.*

³²⁵ *Ibid.*

³²⁶ *Ibid.*

³²⁷ GWS, para. 3.85.

contributing to human rights violations in the region”³²⁸. Georgia specified that “[m]ost of the human rights violations in the territory affected ethnic Georgians...”³²⁹. In July 2006, Georgia again reported to the United Nations that Russian peacekeepers had “brought about” a “massive violation of fundamental human rights” and were attempting to “legalize the results of ethnic cleansing”³³⁰.

3.74 In the period immediately prior to filing the *Application*, Georgia once again sought to engage with Russia in negotiations regarding ethnic cleansing. In April 2008 negotiations were attempted with Russia at the United Nations regarding the latter’s acts of “ethnic cleansing” in Abkhazia³³¹. Later that month, Georgia again raised at the Security Council Russia’s “legitimiz[ing] the results of ethnic cleansing”³³². As before, Russia denied the allegation³³³.

3.75 Even direct approaches failed. On 6 June 2008 President Saakashvili wrote to President Medvedev requesting the “immediate withdrawal of all additional military units of the Russian Federation from Abkhazia, Georgia”³³⁴. President Saakashvili requested that the Russian peacekeeping forces, who were

³²⁸ U.N. Committee Against Torture, *Summary Record of the 699th Meeting*, U.N. Doc. CAT/C/SR.699 (10 May 2006), para. 11. GWS, Vol. III, Annex 79.

³²⁹ *Ibid.*

³³⁰ U.N. General Assembly, *Letter dated 24 July 2006 from the Permanent Representative of Georgia to the United Nations addressed to the Secretary-General, Annex*, U.N. Doc. A/60/954 (25 July 2006). GWS, Vol. III, Annex 82. Russia disputed these claims in a statement by its Ministry of Foreign Affairs to the UN Security Council. U.N. Security Council, *Letter dated 19 July 2006 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General, Annex*, U.N. Doc. A/2006/555 (20 July 2006). GWS, Vol. III, Annex 81.

³³¹ U.N. General Assembly, *Letter dated 17 April 2008 from the Chargé d'affaires a.i. of the Permanent Mission of Georgia to the United Nations addressed to the Secretary-General, Annex*, U.N. Doc. A/62/810 (21 Apr 2008). GWS, Vol. III, Annex 91.

³³² Elena Vapnitchnaia, “Security Council Discussed Situation in Georgia”, *United Nations Radio* (24 April 2008). GWS, Vol. III, Annex 92.

³³³ *Ibid.*

³³⁴ See Letter from President Mikheil Saakashvili to President Dmitry Medvedev (23 June 2008). GM, Vol. V, Annex 308.

responsible for continuing acts of violence against ethnic Georgians, be withdrawn from areas of Abkhazia inhabited by ethnic Georgians³³⁵. President Medvedev responded by refusing these requests³³⁶.

3.76 After 8 August 2008, when Russia commenced its campaign of ethnic cleansing against ethnic Georgians in South Ossetia and the Kodori Gorge region of Abkhazia, Georgia urgently attempted to engage with Russia to bring the violence against Georgian civilians to a halt. With diplomatic relations suspended, Georgia appealed to Russia for talks via the United Nations. On 10 August 2008, Georgia requested an emergency session of the Security Council and informed the Council, in an exchange with the Permanent Representative of Russia, of the gross human rights violations then being perpetrated against ethnic Georgians by Russia's armed forces that amounted to no less than the "process of exterminating the Georgian population"³³⁷. Indeed, Russia'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 Russia of perpetrating ethnic cleansing³³⁸. And, as indicated above at paragraph 2.63, in response to the Georgian Permanent Representative's communication of President Saakashvili's plea for talks to stop Russia's ethnic cleansing activities, *inter alia*, the representative of Russia replied that no "decent person" would agree to talk with Georgia's President. Russia's Minister of Foreign Affairs said much the same when he publically stated:

³³⁵ *See ibid.*

³³⁶ Letter from President Dmitry Medvedev of the Russian Federation to President Mikheil Saakashvili of Georgia (1 July 2008). GM, Vol. V, Annex 311.

³³⁷ U.N. Security Council, *5953rd Meeting*, U.N. Doc. S/PV.5953 (10 August 2008). GWS, Vol. III, Annex 96.

³³⁸ Office of the President of Georgia, Press Briefing, "President of Georgia Mikheil Saakashvili met foreign journalists" (9 August 2008). GWS, Vol. IV, Annex 184.

*I do not think that Russia will have any intention to conduct negotiations with Mr. M. Saakashvili, nor speak with him. He has committed a crime against our citizens and does not even think to repent of it... [O]ur position is that Mr. Saakashvili cannot be our partner and it would be better if he leaves...*³³⁹.

3.77 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 history of fifteen years of failed attempts to negotiate a solution to these issues, arising directly under the 1965 Convention, confirm that the dispute had not been settled by negotiation.

B. RUSSIA'S PREVENTION OF ETHNIC GEORGIAN IDPS FROM EXERCISING THEIR RIGHT OF RETURN

3.78 In the *Memorial*, Georgia detailed how Russia acted in conjunction with *de facto* separatist regimes under its command and control to expel over 200,000 ethnic Georgians from South Ossetia and Abkhazia and then threaten and use violence to prevent these victims of ethnic cleansing from returning to their homes³⁴⁰. In the preceding Chapter, Georgia showed that prior to filing the *Application* it raised this dispute with Russia on numerous occasions. Contrary to Russia's claims, the dispute was also the subject of repeated attempts at negotiations between Georgia and Russia, as well as actual negotiations, all of which failed³⁴¹.

³³⁹ Ministry of Foreign Affairs of the Russian Federation, *Transcript of Remarks and Response to Media Questions by Russian Minister of Foreign Affairs Sergey Lavrov at Joint Press Conference After Meeting with Chairman-in-Office of the OSCE and Minister for Foreign Affairs of Finland Alexander Stubb, Moscow, August 12, 2008* (12 August 2008) (emphasis added). GWS, Vol. IV, Annex 187.

³⁴⁰ GM, Parts B-D.

³⁴¹ GM, paras. 8.35-8.79.

3.79 In that regard, the diplomatic records attest to the fact that Georgia's negotiations with Russia placed a high premium on achieving the return of ethnic Georgians to South Ossetia and Abkhazia, and that these diplomatic initiatives were stymied by Russia's intransigence. In paragraphs 8.35 through 8.44 of the *Memorial*, for instance, Georgia described some, but not all, of these diplomatic records, which included:

- the Sochi Agreement, dated 24 June 1992 and signed by President Shevardnadze and President Yeltsin, which obligated the Parties to create the “proper conditions for the return of refugees”³⁴²;
- the Final Document of the Moscow Meeting between President Yeltsin and the President Shevardnadze, dated 3 September 1992, which required that: “Conditions shall be created for the return of refugees to their permanent homes. Refugees will be provided with the necessary relief and assistance.”³⁴³;
- the Protocol of Negotiations between the Government Delegations of the Republic of Georgia and the Russian Federation, dated 9 April 1993 and signed by Georgia's Prime Minister and Russia's Minister of Defence, which reflected the Parties' negotiations over “[c]reating the conditions for the return of refugees to the places of their permanent residence”³⁴⁴;

³⁴² Agreement on Principles of the Settlement of the Georgian-Ossetian Conflict between the Republic of Georgia and the Russian Federation (the “Sochi Agreement”) (24 June 1992), Art. 4. GM, Vol. III, Annex 102.

³⁴³ U.N. Security Council, *Letter dated 8 September 1992 From the Chargé D’Affaires A.I. of the Permanent Mission of the Russian Federation to the United Nations Addressed to the President of the Security Council, Annex*, U.N. Doc. S/24523 (8 September 1992). GWS, Vol. III, Annex 45.

³⁴⁴ Protocol of Negotiations between the Governmental Delegations of the Republic of Georgia and the Russian Federation (9 April 1993). GM, Vol. III, Annex 105; GM, para. 8.39.

- the Memorandum of Understanding dated 1 December 1993, which reflected agreement to “undertake to create conditions for the voluntary, safe and speedy return of refugees to the places of their permanent residence in all regions of Abkhazia”³⁴⁵; and
- the Quadripartite Agreement on the Voluntary Return of Refugees and Displaced Persons, dated 4 April 1994, which provided for the “safety of refugees and displaced persons in the course of the voluntary repatriation”³⁴⁶.

3.80 Georgia detailed in the *Memorial* its efforts to negotiate with Russia concerning the return of ethnic Georgians to South Ossetia through the diplomatic machinery of the Joint Control Commission (“JCC”)³⁴⁷. Achieving the return of forcibly displaced persons was an explicit part of the Commission’s terms of reference, which was tasked with “elaborating and realizing complex measures, affirmed by the parties, for the return, reception, and reestablishment of refugees (forcibly resettled persons) with the collaboration of the Office of the UN High Commissioner for Refugees”³⁴⁸. All these efforts failed.

³⁴⁵ Memorandum of Understanding between the Georgian and Abkhaz sides at the negotiations in Geneva (1 December 1993), Art. 4. GM, Vol. III, Annex 108.

³⁴⁶ Quadripartite Agreement on the Voluntary Return of Refugees and Displaced Persons (4 April 1994), Art. 1. GM, Vol. III, Annex 110. *See also* Declaration of the Participants of the Second Meeting of the Quadripartite Commission on the Issues of Voluntary Return of Refugees and Displaced Persons (27 April 1994) (“The draft project on registration procedures of refugees and displaced persons was heard”). GWS, Vol. IV, Annex 128.

³⁴⁷ GM, paras. 8.51-8.56. The JCC was established by the Sochi Agreement to oversee the cease-fire and maintain security in South Ossetia. Agreement on Principles of Settlement of the Georgian-Ossetian Conflict between the Republic of Georgia and the Russian Federation (24 June 1992). GM, Vol. III, Annex 102.

³⁴⁸ Regulation of the Joint Control Commission for the Settlement of the Georgian-Ossetian Conflict (31 October 1994). GM, Vol. III, Annex 113.

3.81 Georgia repeatedly used the JCC, consistent with this mandate, to negotiate with Russia regarding the return of ethnic Georgians, a matter that falls clearly under the 1965 Convention. For example, on 13 February 1997, at a meeting attended by Russia’s Deputy Minister for Cooperation with CIS Member States, negotiations took place over the return of ethnic Georgians and yielded approval of a procedure for their return³⁴⁹. On 23 July 1999, the JCC expressed dissatisfaction with the pace of return, observing that “insufficient work” was “hindering the return process”³⁵⁰.

3.82 Reflecting the centrality of negotiations related to the return of ethnic Georgians, the JCC created a Special Ad Hoc Committee on the Facilitation of the Voluntary Return of Refugees and IDPs to the Places of Former Residence³⁵¹. As noted in the *Memorial*, Georgia used the Ad Hoc Committee as a forum for negotiating with Russia during each of the 13 times it was convened between 1997 and 2002³⁵². By way of example, when the Committee met on 7 April

³⁴⁹ Protocol #7, Meeting of the JCC for the Georgian-Ossetian Conflict Settlement, Vladikavaz (13 February 1997). GM, Vol. III, Annex 119.

³⁵⁰ Protocol #10 of the Session of Joint Control Commission (JCC) for the Georgian-Ossetian Conflict Settlement, *Annex 3* (23 July 1999). GM, Vol. IV, Annex 129. The JCC was scheduled to take up the issue of refugees and IDPs at a meeting on 13 June 2003. See OSCE, *Mission to Georgia, Head of Mission Report to the Permanent Council*, PC.FR/18/03 (13 June 2003) (“The next session of the JCC is to be held in Moscow on 22-25 June. Further elaboration of the Georgian-Russian Program on return of refugees and IDPs will be one of the major items on the agenda”). GWS, Vol. III, Annex 108.

³⁵¹ Decision of the JCC, for the Georgian-Ossetian Conflict Settlement, on the process of implementation of the Procedure on Voluntary Return of Refugees and IDPs (26 September 1997). GM, Vol. III, Annex 123. The Ad Hoc Committee was specifically mandated that its work be “guided by the acting legislation and normative legal acts, norms of the International Law, decisions of the JCC, the present Statute and is an accountable body to the JCC.” *Ibid.*

³⁵² GM, para. 5.58. Protocol No. 1 of the Meeting of the Working Group of the JCC on the Resolution of the Problems Of Refugees and IDPs as a Result of the Georgian-Ossetian Conflict (17-18 April 1997). GWS, Vol. IV, Annex 131; (establishing the statute and regulations of the Ad Hoc Committee) Protocol No.1 of the Meeting of the Ad Hoc Committee on Facilitation of the Volunteer Return of Refugees and IDPs as a Result of the Georgian-Ossetian Conflict to the Places of Their Former Permanent Residence (21 October 1997). GWS, Vol. IV, Annex 133; Protocol No. 2 of the Meeting of the Ad Hoc Committee on Facilitation of the Voluntary Return of Refugees and IDPs as a Result of the Georgian-Ossetian Conflict to the Places of Their Former

1997, the agenda included problems that were “impeding” the “effective process of return”, and it was decided to “conduct bilateral and multilateral consultations on the issues of return of refugees and IDPs to the places of their former residence”³⁵³. Likewise, on 17 December 1998, it was resolved to intensify these negotiations by appointing working groups to find “solution[s] of the raised issues, related with the return of refugees and IDPs”³⁵⁴.

Permanent Residence (25 November 1997). GWS, Vol. IV, Annex 134; Protocol No. 3 of the Meeting of the Ad Hoc Committee of the JCC on Facilitation of the Volunteer Return of Refugees And IDPs as a Result of the Georgian-Ossetian Conflict to the Places of Their Former Permanent Residence (7 April 1998). GWS, Vol. IV, Annex 135; Protocol No. 4 of the Meeting of the Ad Hoc Committee on Facilitation of the Voluntary Return of Refugees and IDPs as a Result of the Georgian-Ossetian Conflict to the Places of Their Former Permanent Residence (30 September 1998). GWS, Vol. IV, Annex 138; Protocol No. 5 of the Meeting of the Ad Hoc Committee on Facilitation of the Voluntary Return of Refugees and IDPs as a Result of the Georgian-Ossetian Conflict to the Places of Their Former Permanent Residence (17 December 1998). GWS, Vol. IV, Annex 139; Protocol No. 6 of the Meeting of the Ad Hoc Committee of the JCC on Cooperation to the Volunteer Return of Refugees and IDPs as a Result of the Georgian-Ossetian Conflict to Places of Their Former Permanent Residence (30 March 1999). GWS, Vol. IV, Annex 140; Protocol No. 7 of the Meeting of the Ad Hoc Committee of the JCC on the Facilitation of the Voluntary Return of Refugees and IDPs, as a Result of the Georgian-Ossetian Conflict to Places of Their Former Residence (22 July 1999). GWS, Vol. IV, Annex 141; Protocol No. 8 of the Meeting of the Ad Hoc Committee of the JCC on Facilitation of Volunteer Return of Refugees and IDPs as a Result of the Georgian-Ossetian Conflict to the Places of Their Former Permanent Residence (20-21 April 2001). GWS, Vol. IV, Annex 144; Protocol No. 9 of the Meeting of the Ad Hoc Committee on Facilitation of Volunteer Return of Refugees and IDPs as a Result of the Georgian-Ossetian Conflict to the Places of Their Former Permanent Residence (14-15 May 2002). GWS, Vol. IV, Annex 148; Protocol No. 10 of the Session of the Specially Created Committee (Ad Hoc) of JCC for Promotion of Voluntary Repatriation of Refugees and Internally Displaced Persons as a Result of the Georgian-Ossetian Conflict to the Places of Their Former Residence (7 June 2002). GWS, Vol. IV, Annex 149; Protocol No. 11 of the Meeting of the Ad Hoc Committee on Facilitation of Volunteer Return of Refugees and IDPs as a Result of the Georgian-Ossetian Conflict to the Places of Their Former Residence (8-9 July 2002). GWS, Vol. IV, Annex 150; Protocol No. 12 of the Meeting of the Ad Hoc Committee on Facilitation of Voluntary Return of Refugees and IDPs as a Result of the Georgian-Ossetian Conflict to Places of Their Former Residence (18 October 2002). GWS, Vol. IV, Annex 152.

³⁵³ Protocol No. 3 of the Meeting of the Ad Hoc Committee of the JCC on Facilitation of the Volunteer Return of Refugees And IDPs as a Result of the Georgian-Ossetian Conflict to the Places of Their Former Permanent Residence (7 April 1998). GWS, Vol. IV, Annex 135;

³⁵⁴ Protocol No. 5 of the Meeting of the Ad Hoc Committee on Facilitation of the Voluntary Return of Refugees and IDPs as a Result of the Georgian-Ossetian Conflict to the Places of Their Former Permanent Residence (17 December 1998). GWS, Vol. IV, Annex 139.

3.83 Similarly, at a meeting held on 30 March 1999 that was attended by the Deputy Head of the Operational Division of Russia's Ministry of Foreign Affairs, negotiations resulted in a recommendation that the "sides [] enhance the legal protection of the refugees and IDPs, returning to the former residential places"³⁵⁵. Negotiations held on 20-21 April 2001, attended by the Head of the Fourth Division of the CIS Department of Russia's Ministry of Foreign Affairs, confirmed that the "[r]egulations on volunteer return of refugees and IDPs" were not being implemented effectively³⁵⁶. It was agreed to provide the JCC with a "working draft program" to improve the conditions for the return of refugees and IDPs who had been forcibly expelled from South Ossetia³⁵⁷. Once again, these

³⁵⁵ Protocol No. 6 of the Meeting of the Ad Hoc Committee of the JCC on Cooperation to the Volunteer Return of Refugees and IDPs as a Result of the Georgian-Ossetian Conflict to Places of Their Former Permanent Residence (30 March 1999). GWS, Vol. IV, Annex 140.

³⁵⁶ Protocol No. 8 of the Meeting of the Ad Hoc Committee of the JCC on Facilitation of Volunteer Return of Refugees and IDPs as a Result of the Georgian-Ossetian Conflict to the Places of Their Former Permanent Residence (20-21 April 2001). GWS, Vol. IV, Annex 144. *See also* Protocol No. 7 of the Meeting of the Ad Hoc Committee of the JCC on the Facilitation of the Voluntary Return of Refugees and IDPs, as a Result of the Georgian-Ossetian Conflict to Places of Their Former Residence (22 July 1999) (same). GWS, Vol. IV, Annex 141.

³⁵⁷ *Ibid.* In July 2002, the Ad Hoc Committee agreed on a final draft of such an agreement and decided to submit it to the Co-Chairmen of the JCC with the recommendation that an "intergovernmental body on development and realization of the Program on return of refugees" be created quickly as a "mechanism of realization of [the] Program on return of refugees." Protocol No. 11 of the Meeting of the Ad Hoc Committee on Facilitation of Volunteer Return of Refugees and IDPs as a Result of the Georgian-Ossetian Conflict to the Places of Their Former Residence (8-9 July 2002). GWS, Vol. IV, Annex 150. The Ad Hoc Committee held its last meeting on October 18, 2002. At that meeting participants discussed "information of the Russian and Georgian sides" regarding a "draft of the Russian-Georgian interstate program on return, settlement, integration and re-integration of refugees, IDPs and others, as a result of the Georgian-Ossetian conflict." Protocol No. 12 of the Meeting of the Ad Hoc Committee on Facilitation of Voluntary Return of Refugees and IDPs as a Result of the Georgian-Ossetian Conflict to Places of Their Former Residence (18 October 2002). GWS, Vol. IV, Annex 152. *See also* Protocol No. 10 of the Session of the Specially Created Committee (Ad Hoc) of JCC for Promotion of Voluntary Repatriation of Refugees and Internally Displaced Persons as a Result of the Georgian-Ossetian Conflict to the Places of Their Former Residence (7 June 2002) (agreeing to submit the proposal for a the project of the Russian-Georgian Interstate Program of Return, Accommodation, Integration and Reintegration of Refugees, Internally Displaced Persons and Other Persons Suffered as a Result of the Georgian-Ossetian Conflict to the JCC co-chairman in Moscow in early 2002). GWS, Vol. IV, Annex 149. In May 2002, Georgia submitted its draft program on "return, settlement, integration and re-integration of refugees, IDPs and others, as a result of the Georgian-Ossetian conflict" to the Ad Hoc Committee. Protocol No. 9 of the Meeting of the Ad

attempts produced no changes to the situation, and those entitled to return in accordance with the requirements of the 1965 Convention were prevented from doing so.

3.84 Georgia's *Memorial* also detailed its efforts to negotiate with Russia through international organizations, including the CERD Committee, the United Nations, the Group of Friends, the OSCE and the Commonwealth of Independent States, regarding Russia's obstruction of ethnic Georgians attempting to exercise their lawful right of return³⁵⁸. In its periodic report to the CERD Committee in 2000, Georgia underscored the plight of the "[h]undreds of thousands of displaced persons, a large majority of whom are women, elderly persons and children" who "lost their homes and means of survival and became exiles in their own country" after being ethnically cleansed³⁵⁹. In March 2002, Georgia utilized the CIS to secure a decision of the Council of the CIS Heads of State directing the Foreign Ministries of Russia and Georgia to elaborate "additional security measures for return of refugees and IDPs"³⁶⁰. When this failed to achieve results, Georgia informed the CERD Committee in 2005 that "[t]he situation of internally displaced persons who had been unable to return to Abkhazia" remained "cause

Hoc Committee on Facilitation of Volunteer Return of Refugees and IDPs as a Result of the Georgian-Ossetian Conflict to the Places of Their Former Permanent Residence (14-15 May 2002). GWS, Vol. IV, Annex 148.

³⁵⁸ GM, paras. 8.59-8.79.

³⁵⁹ U.N. Committee on the Elimination of Racial Discrimination, *Reports Submitted by States Parties Under Article 9 of the Convention, Initial report of States parties due in 2000, Addendum, Georgia*, U.N. Doc. CERD/C/369/Add.1 (1 February 2001), para. 55. GWS, Vol. III, Annex 64.

³⁶⁰ Decision of the Council of the CIS Heads of States on the Presence of Collective Peacekeeping Forces in the Conflict Zone of Abkhazia, Georgia, Art. 3 (signed by Georgia 1 March 2002, signed by Russia 8 February 2002). GM, Vol. III, Annex 117. *See also* Decision of the Council of Heads of States of the Commonwealth of Independent States on Prolongation of the Peacekeeping Operation in the Conflict Zone in Abkhazia, Georgia, Art. 2 (2 October 2002) ("The Ministries of Foreign Affairs of Georgia and the Russian Federation ... shall continue to work on the issues mentioned in Clause 3 of the Decision of the Council of Heads of States of the CIS of March 22, 2002"). GM, Vol. III, Annex 133.

for concern”³⁶¹. The efforts at a negotiated solution continued up to 2008, and they all failed. By 17 April 2008, Georgia’s frustration was clear for all to see, as it informed the OSCE that “instead of absorbing the Georgian territories, it would be better for the Russian side to engage more actively in the process of safe and dignified return of IDPs/refugees – victims of ethnic cleansing, as provided by a number of UNSC resolutions”³⁶².

3.85 In regard to the issue of right of return of Georgian IDPs, Georgia also approached Russia directly on numerous occasions³⁶³. Negotiations between Georgia and Russia yielded yet another unimplemented agreement, signed in December 2000 by Georgia’s State Minister and Russia’s Deputy Prime Minister. This was intended to “create conducive conditions for return of refugees and internally displaced persons to the places of their permanent residence” by establishing an “Inter-Governmental program of repatriation, accommodation, integration and re-integration of refugees”³⁶⁴. Ten years on, it plainly did not achieve that result. When this failed to achieve meaningful results, Georgia continued to press the issue in further negotiations with Russia. In July 2002, the Secretary of the National Security Council of Georgia held negotiations with the Secretary of the National Security Council of Russia during which “[t]he sides stressed the importance” of “agreeing on measures for secure return of the

³⁶¹ GWS, para. 2.103.

³⁶² OSCE, *Statement by the Delegation of Georgia on Developments in Georgia*, PC.DEL/306/08 (17 April 2008). GWS, Vol. III, Annex 112. See also OSCE, *709th Plenary Meeting of the Council, Annex 1, Statement by the Delegation of Georgia*, PC.JOUR/709 (17 April 2008). GWS, Vol. III, Annex 113.

³⁶³ GM, paras. 8.35-8.50.

³⁶⁴ Agreement between the Government of Georgia and the Government of the Russian Federation on Cooperation in Restoration of Economy in the Georgian-Ossetian Conflict Zone and Return of Refugees, Tbilisi (23 December 2000). GM, Vol. III, Annex 131.

refugees to their prior places of residence, on the first stage to Gali region [in Abkhazia]”³⁶⁵.

3.86 Similarly, Russia has itself recognized that there were negotiations on this issue. The Concluding Statement of efforts conducted by President Shevardnadze and President Putin on 6-7 March 2003 confirmed that “[d]uring the *negotiations* the presidents of the two countries addressed ... topical issues of international and regional dimensions,” including the “importance of concrete steps to be taken aimed at the solution of the most burning problem – dignified and safe[] *return of refugees and internally displaced persons* to their homes”³⁶⁶. The Presidents of Georgia and Russia agreed that “all the efforts should be devoted” to the “return of refugees and internally displaced persons, first of all to the Gali region [of Abkhazia]”³⁶⁷. In follow-on negotiations held in June 2003, Georgia emphasized once again the need for “the issue of refugee return to Abkhazia” to be resolved³⁶⁸. All this has been to no avail.

3.87 Instead Russia continued to obstruct the right of return, requiring further attempts on the part of Georgia at diplomatic initiatives. On 16 June 2003 and 31 July 2003, representatives of Georgia and Russia met to negotiate resolution of disputes related to the return of ethnic Georgians IDPs³⁶⁹. The Georgian

³⁶⁵ Joint Statement, Secretary of the National Security Council of Georgia, T. Japaridze and Secretary of the National Security Council of the Russian Federation, V. Rushailo (11 July 2002) (emphasis added). GWS, Vol. IV, Annex 151.

³⁶⁶ Concluding Statement on the meetings between Mr. Vladimir Putin-President of the Russian Federation and Mr. Eduard Shevardnadze-President of Georgia, *Svobodnaya Gruzia*, #60 (12 March 2003). GM, Vol. III, Annex 136.

³⁶⁷ Concluding Statement on the meetings between Mr. Vladimir Putin-President of the Russian Federation and Mr. Eduard Shevardnadze-President of Georgia, *Svobodnaya Gruzia*, #60 (12 March 2003) (emphasis added). GM, Vol. III, Annex 136.

³⁶⁸ Memorandum of the Georgian-Russian Working Group Meeting for Sochi-Tbilisi Through Railway Traffic Rehabilitation (26 June 2003). GWS, Vol. IV, Annex 154.

³⁶⁹ Information Note prepared by the Ministry of Foreign Affairs of Georgia (20 January 2004). GWS, Vol. IV, Annex 155. (This document was incompletely annexed to Georgia’s *Memorial* as

delegation indicated its willingness “to compromise” by agreeing to a “Joint Provisional Administration” in the Gali District of Abkhazia under the aegis of international organizations, precisely in order to facilitate the safe and dignified return of refugees. Russia refused on the purported ground that this arrangement was “unacceptable” to the Abkhaz *de facto* regime³⁷⁰. Further negotiations were conducted in April 2004 between Georgia’s State Minister and Russia’s Deputy Minister of Foreign Affairs. Georgia emphasised once again that “it is necessary to begin the process of return of refugees”, but this too failed to achieve any progress on this issue that falls under the 1965 Convention³⁷¹. A meeting of Georgia’s Ambassador in Moscow with Russia’s Deputy Foreign Minister in October 2004, at which Georgia stated that “real progress concerning the return of IDP’s is essential”, likewise achieved no results³⁷².

3.88 Faced with this impasse, Georgia elevated negotiations to the Presidential level in the months preceding the filing of the *Application*. After President Saakashvili met with President Medvedev in June 2008, Georgia’s President reminded his Russian counterpart that they had agreed to organise the “[s]afe and dignified return of refugees and IDPs to Gali and Ochamchire Districts” in

Annex 137. The complete document is properly annexed to these Written Submissions as Annex 155). Indeed, a Georgian-Russian working group meeting concerning refugees and IDPs that had been scheduled for 30-31 October 2003 did not take place because Russia insisted on representatives of the Abkhazian *de facto* regime being present at that meeting despite their destructive position, Russia rejected Georgia’s proposal that Georgia and Russia first agree to conditions for the safe return of refugees and then entertain Abkhazian participation.

³⁷⁰ *Ibid.*

³⁷¹ Minutes of the Meeting Between the State Minister, Mr. G. Khaindrava and the Deputy Minister of Foreign Affairs of the Russian Federation, Mr. V. Loshinin held on 27 April 2004 (27 April 2004). GWS, Vol. IV, Annex 156.

³⁷² Information Note: Concerning the meeting of Ambassador of Georgia in Russian Federation - Valeri Chechelashvili and the First Deputy Foreign Affairs Minister of the Russian Federation - Mr. V. Loshinin (21 October 2004). GWS, Vol. IV, Annex 157.

Abkhazia³⁷³. President Saakashvili proposed “drafting, signing and entering into force” agreements addressing the right of return³⁷⁴. A month before Georgia filed the *Application*, the Russian President refused³⁷⁵.

3.89 In sum, Georgia consistently sought to negotiate with Russia regarding the dispute over the denial of the right of return of ethnic Georgians. There can be no doubt that this matter arises under the 1965 Convention. Actual negotiations took place, and occasionally interim arrangements were agreed, although they never resolved the problem.

C. RUSSIA’S SUPPORT, SPONSORSHIP AND DEFENCE OF DISCRIMINATION
AGAINST ETHNIC GEORGIANS BY OTHER PARTIES

3.90 As Georgia demonstrated in the previous Chapter, it repeatedly disputed Russia’s support, sponsorship and defence of discrimination of ethnic Georgians in South Ossetia and Abkhazia. Georgia did this on numerous occasions by publicly accusing Russia of providing financial and military support to the separatist regimes despite their responsibility for ethnic cleansing and other acts of discrimination³⁷⁶. Contrary to Russia’s assertion that Georgia did not engage in negotiations to resolve this dispute, the evidence demonstrates that the two Parties to the 1965 Convention repeatedly exchanged views in both bilateral negotiations and through multilateral fora.

3.91 These exchanges began soon after ethnic cleansing commenced in Abkhazia in 1992. Georgia made vigorous efforts to negotiate with Russia

³⁷³ Letter from President Mikheil Saakashvili to President Dmitry Medvedev (23 June 2008). GM, Vol. V, Annex 308.

³⁷⁴ *Ibid.*

³⁷⁵ Letter from President Dmitry Medvedev of the Russian Federation to President Mikheil Saakashvili of Georgia (1 July 2008). GM, Vol. V, Annex 311.

³⁷⁶ GWS, Chapter II, Section VI.

regarding its support for those committing discriminatory acts against ethnic Georgians. These efforts resulted in the 3 September 1992 Agreement entered into by the Presidents of Georgia and Russia. Article 1 of the Agreement, reflecting the Parties' negotiations over Russia's facilitation of the transfer of armed bands from Russia into Abkhazia, where they then engaged in ethnic cleansing, required Russia to "prevent" the "penetration" of armed groups from entering Abkhazia. Similarly, Article 11 required:

The authorities and administrative entities of the North Caucasian republics, regions and territories which form part of the Russian Federation shall take effective measures to halt and prevent all acts waged from their territory that are in violations of the provisions of this agreement. They shall promote respect for this agreement and the restoration of peace in the region. They shall take all necessary steps to explain the provisions of this agreement to the population³⁷⁷.

3.92 This attempt to negotiate a resolution of Russia's support for ethnic discrimination failed. As a consequence, in October 1992 Georgia approached the Security Council regarding Russia's continued contribution to the ongoing ethnic cleansing through its arming of the perpetrators and its facilitation of the transfer of irregular forces from Russia³⁷⁸. One week later, Georgia returned to the Security Council because "organized units" armed with Russian military equipment continued to enter Georgia from Russian territory and commit ethnic cleansing³⁷⁹. In a *note verbale*, Georgia reiterated that Russia was impermissibly

³⁷⁷ U.N. Security Council, *Letter dated 8 September 1992 From the Chargé D'Affaires A.I. of the Permanent Mission of the Russian Federation to the United Nations Addressed to the President of the Security Council, Annex*, U.N. Doc. S/24523 (8 September 1992). GWS, Vol. III, Annex 45.

³⁷⁸ U.N. Security Council, *Letter dated 2 October 1992 from the First Deputy Foreign Minister of Georgia Addressed to the President of the Security Council*, U.N. Doc S/24626 (7 October 1992). GM, Vol. II, Annex 5.

³⁷⁹ U.N. Security Council, *Letter dated 2 October 1992 from the First Deputy Foreign Minister of Georgia Addressed to the President of the Security Council*, U.N. Doc S/24626 (7 October 1992). GM, Vol. II, Annex 5. Georgia's statement to the Security Council referred to bilateral negotiations that had taken place between Russian President Boris Yeltsin and Georgian President Eduard Shevardnadze in September 1992. Those consultations produced a Georgian-Russian

allowing irregular forces to cross the international border into Abkhazia, where they were perpetrating gross human rights abuses against ethnic Georgians³⁸⁰.

3.93 Georgia also sought to negotiate these issues directly with Russia. In April 1993, negotiations between Georgia and Russia yielded an agreement signed by Georgia's Prime Minister and Russia's Minister of Defence that Russia would "undertake additional effective measures in order to prevent infiltration into the conflict zone [in Abkhazia] of illegal military formations, individuals and weapons and ammunitions"³⁸¹. This was an effort to prevent discrimination. The Agreement acknowledged that this and other issues "need to be addressed in detail by representatives of Georgia, Abkhazia and Russia in the course of negotiations"³⁸².

agreement to prevent cross-border infiltration. Nonetheless, in October 1992, Georgia was compelled to inform the Security Council of Russia's breach of that agreement based on "the influx of the organized armed groups from the territory of the Russian Federation has increased, both via land and sea routes, controlled by the Armed Forces of the Russian Federation". U.N. Security Council, *Letter dated 2 October 1992 from the First Deputy Foreign Minister of Georgia Addressed to the President of the Security Council*, U.N. Doc S/24626 (7 October 1992). GM, Vol. II, Annex 5. Georgia returned to the UN with Russia's failure to comply with this agreement in December 2000. U.N. Security Council, *Letter dated 20 December 2000 from the Permanent Representative of Georgia to the United Nations addressed to the President of the Security Council, Annex*, U.N. Doc. S/2000/1221 (20 December 2000) ("...the Russian side maintains a simplified border crossing with those territories that are temporarily out of the control of Georgia's central authorities. In these regions of Georgia, gross violations of human rights by separatist regimes have been taking place... It is also noteworthy that groups of mercenaries have repeatedly entered the territory of Georgia from the Russian Federation through these very segments of the border to support separatist regimes.... Subsequently, there are serious grounds for presuming that the unilateral introduction by the Russian side of a simplified border crossing on some segments of the State border between Georgia and the Russian Federation is an attempt to support apparently separatist regimes"). GWS, Vol. III, Annex 63.

³⁸⁰ U.N. Security Council, *Note Verbale dated 25 December 1992 from the Ministry of Foreign Affairs of Georgia Addressed to the Secretary-General, Annex*, U.N. Doc. S/25026 (30 December 1992) (emphasis added). GWS, Vol. III, Annex 46. The letter specifically noted that "trains loaded with arms and ammunition pass unhindered from the Russian Federation into the conflict zone". *Ibid.*

³⁸¹ Protocol of Negotiations between the Governmental Delegations of the Republic of Georgia and the Russian Federation (9 April 1993). GM, Vol. III, Annex 105.

³⁸² Protocol of Negotiations between the Governmental Delegations of the Republic of Georgia and the Russian Federation (9 April 1993). GM, Vol. III, Annex 105.

3.94 This agreement, however, failed to resolve the dispute as Russia continued to provide support to those forces engaged directly in acts of ethnic cleansing. In September 1993, President Shevardnadze engaged the United Nations' diplomatic machinery, informing it that the expulsion of some 150,000 ethnic Georgians had been "achieved with the direct support and complicity" of "forces in Russia", including the Russian military³⁸³. President Shevardnadze specifically stated that Georgia's direct negotiations with Russia had failed to resolve the dispute: "My talks with General Grachev, Minister of Defence of the Russian Federation, yielded no results. Although in themselves they were constructive, later that same day they were disavowed by statements by several subordinates of the Russian Minister of Defence and by the decision of the Russian Parliament"³⁸⁴. Georgia used this statement to the United Nations to appeal directly to Russian President Boris Yeltsin: "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"³⁸⁵.

3.95 Over the course of the next ten years, Georgia continued its efforts to achieve a negotiated end to Russia's support for ethnic discrimination in South Ossetia and Abkhazia in numerous diplomatic communications with international bodies; these attempts at negotiation with Russia are described in Georgia's *Memorial* and are referred to in detail in the footnote below³⁸⁶. All these efforts failed.

³⁸³ U.N. Security Council, *Letter dated 20 September 1993 From the Permanent Representative of Georgia to the United Nations Addressed to the President of the Security Council, Annex*, U.N. Doc. S/26472 (20 September 1993). GWS, Vol. III, Annex 48.

³⁸⁴ *Ibid.*

³⁸⁵ *Ibid.*

³⁸⁶ See, e.g., GM, para. 8.73 (citing OSCE, *Statement of the Georgian Delegation on the Situation in the Tskhinvali Region*, PC.DEL/654/04 (13 July 2004). GM, Vol. II, Annex 77. ("Under the circumstances we can not but express our concern at the position of the Russian Federation which has launched a massive anti-Georgian campaign in its media and openly supports the separatist

mood in the Region”.); GM, para. 8.72 (citing Statement by the Minister of Foreign Affairs of Georgia, PC.DEL/0101/06 (9 February 2006). GM, Vol. II, Annex 81. *See also* U.N. Security Council, *Letter dated 20 September 1993 from the Permanent Representative of Georgia to the United Nations addressed to the President of the Security Council, Annex*, U.N. Doc. S/26472 (20 September 1993). GWS, Vol. III, Annex 48; U.N. Economic and Social Council, *Letter dated 24 March 1997 from the Minister for Foreign Affairs of Georgia addressed to the Chairman of the Commission on Human Rights, Annex*, U.N. Doc. E/CN.4/1997/132 (2 April 1997). (“[B]acked by the regular troops of Russia, deployed in Abkhazia since the existence of the USSR, the Abkhaz separatists have managed to seize the whole of Abkhazia successfully forcing the Georgian Government troops to withdraw from the region. Their advancement have been matched with barbaric violence endured by the separatists upon the Georgian population of Abkhazia that led effectively reducing the latter, constituting 46% of the population of the region prior to the conflict, to zero”). GWS, Vol. III, Annex 52. *See also* U.N. General Assembly, *Report on the policy of ethnic cleansing/genocide conducted in the territory of Abkhazia, Georgia, and the necessity of bringing to justice the persons who committed these crimes in accordance with international principles of due process*, U.N. Doc. S/1997/317 (16 April 1997) (same). GM, Vol. II, Annex 22; U.N. Security Council, *Letter dated 17 July 1998 from the Permanent Representative of Georgia to the United Nations addressed to the President of the Security Council, Annex*, U.N. Doc. S/1998/660 (17 July 1998). GWS, Vol. III, Annex 57. (“The Abkhaz separatist authorities, backed by a number of leaders of the collective Peacekeeping Forces, are carrying out an anti-Georgian campaign, aimed at convincing the public that the above-mentioned and earlier incidents have been carried out by the Georgian side.”); U.N. General Assembly, *Measures to Eliminate International Terrorism*, U.N. Doc. A/55/179 (26 July 2000). GWS, Vol. III, Annex 61. (“Georgia further explained that an Abkhaz aggressive separatist regime supported by certain forces of the Russian Federation and foreign mercenaries had seized the whole territory of Abkhazia, forcing the Government troops to withdraw from the region. The seizure of the territory was accompanied by the systematic extermination of the Georgian civilian population.”); U.N. Security Council, *Letter dated 22 July 1999 from the Permanent Representative of Georgia to the United Nations addressed to the President of the Security Council*, U.N. Doc. S/1999/814 (22 July 1999), Annex III. GWS, Vol. III, Annex 60. (“Separatists actively prepared for the war through the purchase of arms and military equipment. In this they were greatly assisted by the corrupt leadership of the Russian troops located in Abkhazia, who sold them arms and ammunition from their arsenals.”); U.N. Security Council, *Letter dated 23 December 1998 from the Permanent Representative of Georgia to the United Nations addressed to the President of the Security Council, Annex*, U.N. Doc. S/1998/1213 (23 December 1998). GWS, Vol. III, Annex 58; U.N. Security Council, *Letter dated 22 July 1999 from the Permanent Representative of Georgia to the United Nations addressed to the President of the Security Council*, U.N. Doc. S/1999/814 (22 July 1999), Annex I. GWS, Vol. III, Annex 60. (“With the support and participation of anti-democratic, reactionary political and military forces of Russia, Abkhazian separatists carried out aggressive acts against the statehood and territorial integrity of Georgia, which resulted in the violation of the integrity of the country, the occupation of Abkhazia – an integral part of Georgia, the formation of a criminal, separatist regime and the ethnic cleansing of Georgians”).); U.N. Security Council, *Letter dated 8 March 2002 from the Permanent Representative of Georgia to the United Nations addressed to the President of the Security Council, Annex*, U.N. Doc. S/2002/250 (11 March 2002). GWS, Vol. IV, Annex 229. (declaring that “the Duma is ready to discuss other ways of furthering the formation of the statehood of Abkhazia and South Ossetia’ — from which, through the efforts of the separatists, and with the direct participation of the destructive forces of a neighbouring State, more than 300,000 civilians were forced to flee, ‘true patriots’ from the State Duma openly encourage aggressive separatism...”).

3.96 In parallel with these efforts to negotiate a resolution of the dispute through the machinery of multilateral organisations, Georgia engaged in direct bilateral contacts with Russia. For example, on 14 September 2000, Georgia’s Ambassador in Moscow held bilateral discussions with the Deputy Chairperson of the State Duma of Russia, regarding Russia’s significant “support and assistance” to the *de facto* authorities in Abkhazia engaged in discrimination against ethnic Georgians³⁸⁷. Similarly, in April 2002, Georgia’s Ambassador in Moscow raised Russia’s unlawful supply of military equipment to the *de facto* authorities in Abkhazia in a meeting with Russia’s Minister of Foreign Affairs. The talks did not achieve a resolution, because Russian Foreign Minister denied that Russia had provided the separatists with such assistance³⁸⁸.

3.97 The failure of bilateral discussions compelled Georgia to refocus its diplomatic efforts to resolve the dispute in the United Nations and other international organisations. Thus, in October 2002, Georgia informed the General Assembly:

Just three days ago, South Ossetia’s separatist regime received yet another shipment from Russia through the border checkpoint controlled solely by Russian border guards. I have to add that these kinds of shipments have never stopped crossing the Russian-Georgian border into Abkhazia either. These shipments, which in Russian terms would be called humanitarian aid, are in reality a clear case of unabated proliferation of firearms and ammunition³⁸⁹.

³⁸⁷ Script of the Talks of Mr. Z. Abashidze, Ambassador Extraordinary and Plenipotentiary of Georgia to the Russian Federation with V. Lukin, Deputy Chairperson of the State Duma of Russia (14 September 2000). GWS, Vol. IV, Annex 143.

³⁸⁸ Script of the talks of Mr. Z. Abashidze, Ambassador Extraordinary and Plenipotentiary of Georgia to the Russian federation with Mr. I. Ivanov, Ministry of Foreign Affairs of the Russian Federation (25 April 2002). GWS, Vol. IV, Annex 147.

³⁸⁹ U.N. General Assembly, *First Committee, 10th Meeting*, U.N. Doc. A/C.1/57/PV.10 (10 October 2002). GWS, Vol. III, Annex 68. Several months later, on 23 January 2003, Georgia attempted to resolve the same issue—Russia’s military assistance to the separatists—in another international forum, the OSCE. Georgia’s Permanent Mission to the OSCE stated: “Part of the garrison and some weaponry has been withdrawn from Gudauta to Russia, but no one really

3.98 In September 2005, Georgia again engaged the United Nations as a conduit for negotiating with Russia, communicating that “despite Georgia’s numerous protests, the Russian side continues providing armaments and ammunition to the separatists”³⁹⁰. In February 2006, Georgia made a similar

knows, how much weaponry remains in place and what arms may have been handed to the Abkhaz by the remaining garrison”. OSCE, *Statement by the Georgian Delegation on the Georgian-Russian relations Permanent Council, January 23, 2003*, PC.DEL/52/03 (24 January 2003). GWS, Vol. III, Annex 106. One week later, Georgia reiterated its claim when it recounted a South Ossetian Independence Day parade that had taken place in Tshkinvali in September 2002. The Russian military contingent of the JPKF had participated in the parade, displaying heavy military armament. Georgia informed the OSCE that “there is no doubt that the heavy military equipment I mentioned above were introduced in the conflict zone from the Russian Federation”. OSCE, *Statement of the Georgian Delegation on the situation in the Tskhinvali Region*, PC.DEL/63/03 (30 January 2003). GWS, Vol. III, Annex 107. *See also* U.N. General Assembly, *First Committee, 9th Meeting*, U.N. Doc. A/C.1/58/PV.9 (15 October 2003). GWS, Vol. III, Annex 69. (“Both the Abkhazia and South Ossetia regions of Georgia, territories nurtured by Russia, have as a result developed into terrorist enclaves with an increasingly aggressive process of militarization. Huge amounts of armaments, antipersonnel mines and ammunition have accumulated in these territories. Unprotected borders of these separatist regions with the Russian Federation have turned into a regular route for illegal arms trafficking. Despite our repeated calls, the problem of the proliferation of small arms in Abkhazia continues unabated due, in no small part, to the illegal operation there of a Russian military base. Despite our numerous requests for the expeditious and transparent removal of the base, the Russian Federation refuses to uphold the commitments made under the Treaty on Conventional Armed Forces in Europe”).

³⁹⁰ U.N. General Assembly, Security Council, *Identical letters dated 23 September 2005 from the Permanent Representative of Georgia to the United Nations addressed to the Secretary-General and to the President of the Security Council, Annex*, U.N. Doc. A/60/379-S/2005/606 (28 September 2005). GWS, Vol. III, Annex 73. *See also* U.N. General Assembly, *7th Meeting*, U.N. Doc. A/C.1/60/PV.7 (7 October 2005). GWS, Vol. III, Annex 74. (And one month later, Georgia informed the General Assembly that, “[d]espite the Russian Federation’s commitment to playing the role of principal mediator in the settlement of the conflict in South Ossetia, it continues to arm separatists....”); U.N. General Assembly, Security Council, *Letter dated 9 November 2005 from the Permanent Representative of Georgia to the United Nations addressed to the Secretary-General, Annex*, U.N. Doc. A/60/552-S/2005/718 (10 November 2005). GWS, Vol. III, Annex 76. (“Nevertheless, the Russian Federation does nothing to promote the process of conflict settlement on the territory of Georgia – quite the contrary. Steps made by the Russian Federation presently strengthens the separatist regimes and de facto annexation of a part of Georgia’s territory ... The Parliament of Georgia demands answer to the question: from where and how did numerous pieces of new Russian heavy military equipment appear on the territory of the former South Ossetian Autonomous District, the entire administrative perimeter of which borders only rest of Georgia and of the Russian Federation? Obviously, not from the Georgian side. This equipment, as well as the frequent military exercises, is a visible part of the hidden arms race carried out by the Russian Federation in the conflict regions of Georgia”); U.N. Security Council, *Letter dated 27 October 2005 from the Permanent Representative of Georgia to the United Nations addressed to the President of the Security Council*, U.N. Doc. S/2005/678 (27 October 2005). GWS, Vol. III, Annex 75. (“we have no doubt in our mind that financing and equipment for [Abkhaz military]

overture through the OSCE, complaining that Russia was unlawfully supporting ethnic discrimination in South Ossetia by staffing the *de facto* regime's security agencies with Russian citizens who served under Russian State direction³⁹¹.

3.99 In May 2007, Georgia returned to the OSCE as a vehicle for negotiating with Russia regarding the Respondent State's support for military actions in favour of forces that were engaged in acts of ethnic discrimination:

We think that welcoming separatist leaders and treating them as 'presidents', channelling unilateral assistance to them should be abandoned and separatist regimes should get right messages that there is no chance for them neither to turn into a part of the Russian Federation nor to become independent states³⁹².

3.100 In September 2007, Georgia launched a similar diplomatic initiative with the United Nations, informing the Security Council that Russia continued to unlawfully arm and train the separatists' military, who were supervised by "officers of the Russian armed forces"³⁹³. Georgia used this occasion to insist

exercises came from the Russian Federation. ... Military personnel of separatists are trained by the Russian military schools, without shying away from openly providing them quotas).

³⁹¹ OSCE, Statement of the Minister of Foreign Affairs of Georgia, PC.DEL/101/06 (9 February 2006). GM, Vol. III, Annex 81. See also U.N. Security Council, *Letter dated 27 October 2005 from the Permanent Representative of Georgia to the United Nations addressed to the President of the Security Council*, U.N. Doc. S/2005/678 (27 October 2005). GWS, Vol. III, Annex 75. ("It is impossible to avoid commenting on the behaviour of the facilitator — the Russian Federation, especially when several extremely alarming trends take place in Abkhazia, Georgia: – Positions in the separatist Governments are filled with people sent directly from public jobs in the Russian Federation, from as far away as Siberia"); U.N. General Assembly, Security Council, *Letter dated 9 November 2005 from the Permanent Representative of Georgia to the United Nations addressed to the Secretary-General, Annex*, U.N. Doc. A/60/552-S/2005/718 (10 November 2005). GWS, Vol. III, Annex 76. ("In violation of the principles of international law, agreements reached in the CIS framework, and the Georgian legislation, citizens of Russia have been appointed to the high-level positions (i.e. Prime-Minister, Ministers of Defense and Law Enforcement, commanders of military units etc.) in Tskhinvali and Sukhumi – individuals who simultaneously continue to work in law enforcement and the special services of the Russian Federation...").

³⁹² OSCE, *Statement by the Delegation of Georgia*, FSC-PC.DEL/23/07 (24 May 2007). GWS, Vol. III, Annex 111.

³⁹³ U.N. Security Council, *Letter dated 5 September 2007 from the Permanent Representative of Georgia to the United Nations addressed to the President of the Security Council, Annex*, U.N. Doc. S/2007/535 (7 September 2007). GWS, Vol. III, Annex 87.

that Russia “cease its support of the separatist regime, including military assistance”³⁹⁴.

3.101 In the months preceding the filing of the *Application*, Georgia intensified its efforts to resolve the dispute, especially after Russia announced that its support to the separatists in South Ossetia and Abkhazia would henceforth be “not declarative, but essential assistance”³⁹⁵. Georgia went to the OSCE to object to Russia taking such “unequivocal steps to directly support separatism, including through military means”³⁹⁶. On 6 June 2008, President Saakashvili discussed these issues with President Medvedev in St. Petersburg³⁹⁷.

3.102 On 23 June 2008, President Saakashvili followed up with a letter to President Medvedev requesting “cancellation of the Order of the President of the Russian Federation to the Government of the Russian Federation dated April 16, 2008 on establishment of direct contacts with Abkhazia and Tskhinvali Region of Georgia”³⁹⁸. President Saakashvili further proposed “regular consultations between Ministries of Foreign Affairs of our states and also to create the joint

³⁹⁴ U.N. Security Council, *Letter dated 5 September 2007 from the Permanent Representative of Georgia to the United Nations addressed to the President of the Security Council, Annex*, U.N. Doc. S/2007/535 (7 September 2007). GWS, Vol. III, Annex 87. See also U.N. Security Council, *Letter dated 3 October 2007 from the Permanent Representative of Georgia to the United Nations addressed to the President of the Security Council, Annex*, U.N. Doc. S/2007/589 (4 October 2007). GWS, Vol. III, Annex 89. (Georgia expressed “extreme concern” regarding the fact that separatist military forces were “receiving support” and “training” from Russia even though they were “responsible for ethnic cleansing.”).

³⁹⁵ OSCE, *Statement by the Delegation of Georgia on Developments in Georgia*, PC.DEL/306/08 (17 April 2008). GWS, Vol. III, Annex 112. See also OSCE, *709th Plenary Meeting of the Council, Annex 1, Statement by the Delegation of Georgia*, PC.JOUR/709 (17 April 2008). GWS, Vol. III, Annex 113.

³⁹⁶ OSCE, *Statement by the Delegation of Georgia*, PC.DEL/345/08 (30 April 2008). GWS, Vol. III, Annex 114.

³⁹⁷ See Letter from President Mikheil Saakashvili to President Dmitry Medvedev (23 June 2008). GM, Vol. V, Annex 308.

³⁹⁸ *Ibid.*

working group that is to prepare our meeting so that we are able to make specific decisions”³⁹⁹. Russia refused⁴⁰⁰.

3.103 In these circumstances Russia’s claim that Georgia never attempted to negotiate with Russia a resolution of the dispute regarding Russia’s support for ethnic discrimination in South Ossetia and Abkhazia cannot stand. It is defeated by the evidence, which shows that Georgia repeatedly sought by diplomatic means, both bilateral and multilateral, to end Russia’s funding, training and arming of the those responsible for ethnic discrimination in the two territories.

D. RUSSIA’S FAILURE TO PREVENT DISCRIMINATION AGAINST ETHNIC GEORGIANS IN AREAS IT CONTROLLED

3.104 As Georgia demonstrated in Chapter II, it repeatedly complained of the failure of Russian “peacekeepers” and other Russian military forces in South Ossetia and Abkhazia to use the means at their disposal to prevent violent acts of ethnic discrimination against ethnic Georgians. Georgia made many attempts to negotiate a resolution of this problem; all were unsuccessful.

3.105 Georgia began making diplomatic overtures soon after it became clear that the Russian peacekeepers were refusing to prevent acts of ethnic discrimination. In February 1996, Georgia brought to the United Nations the persistent inaction of Russian peacekeepers in the face of violence against ethnic Georgians.

³⁹⁹ Letter from President Mikheil Saakashvili to President Dmitry Medvedev (23 June 2008). GM, Vol. V, Annex 308. Just two months before Georgia filed its *Application*, President Saakashvili again complained to the General Assembly that Russian military officers were “sitting in Tskhinvali and are creators of many dirty provocations.” President Saakashvili demanded that the Russian President recall Russian military leadership from South Ossetia. Office of the President of Georgia, Press Briefing, “The President of Georgia Mikheil Saakashvili held a press conference” (28 June 2008). GWS, Vol. IV, Annex 181.

⁴⁰⁰ Letter from President Dmitry Medvedev of the Russian Federation to President Mikheil Saakashvili of Georgia (1 July 2008). GM, Vol. V, Annex 311.

Recounting a recent attack on ethnic Georgian civilians, Georgia stated: “Harassment of the Georgian population by the Abkhaz separatists in this region continues, despite the deployment of the Russian peace-keeping forces here”⁴⁰¹.

3.106 After Russian peacekeepers refused to aid ethnic Georgians in January 1998, Georgia again invoked the diplomatic machinery of the United Nations when it informed the Secretary-General of an attack on two ethnic Georgian villages in the Gali District during which “40 civilians were taken hostage, among them women, children and elderly persons”⁴⁰². Georgia drew attention to the “especially worrisome” fact that “this barbaric act took place in the immediate vicinity of the deployed peacekeeping forces of the Russian Federation”⁴⁰³. It made a similar approach to the United Nations later that year when it informed the Secretary-General that:

a well-armed group of 50 to 60 Abkhazians easily passed a checkpoint of Commonwealth of Independent States (CIS) peacekeepers and made an unspeakable inroad into the village of Gudava, ransacking the houses of innocent civilians and remorselessly killing three Georgian teenagers. The assailants left the theatre of carnage just as unhampered as they had moved in and returned to Ochamchira, taking the bodies of the killed and about 20 hostages⁴⁰⁴.

⁴⁰¹ U.N. Security Council, *Letter dated 15 February 1996 from the Permanent Representative of Georgia to the United Nations addressed to the President of the Security Council, Annex*, U.N. Doc. S/1996/114 (15 February 1996). GWS, Vol. III, Annex 51.

⁴⁰² U.N. Security Council, *Letter dated 12 January 1998 from the Permanent Representative of Georgia to the United Nations addressed to the Secretary-General, Annex*, U.N. Doc. S/1998/25 (12 January 1998). GWS, Vol. III, Annex 53.

⁴⁰³ *Ibid.*

⁴⁰⁴ U.N. Security Council, *Letter dated 14 April 1998 from the Permanent Representative of Georgia to the United Nations addressed to the Secretary-General*, U.N. Doc. S/1998/329 (15 April 1998). GWS, Vol. III, Annex 54. *See also, e.g.*, U.N. Security Council, *Letter dated 20 July 1999 from the Permanent Representative of Georgia to the United Nations addressed to the President of the Security Council*, U.N. Doc. S/1999/806 (21 July 1999). GWS, Vol. III, Annex 59. (noting that since the deployment of Russian peacekeepers, 1,5000 people had died, “thus displaying a consistent pattern of progressing ethnic cleansing.”).

3.107 In July 2004, Georgia sought to negotiate directly with Russia a resolution of the dispute over Russia's failure to act to prevent discrimination against ethnic Georgians. At that time, President Saakashvili wrote to President Putin complaining about public comments made by the Russian Commander of the Joint Peace-Keeping Force, General Nabzdorov, and the lack of "impartiality of Russian peacekeeping forces that are carrying out mission in the region"⁴⁰⁵. President Putin responded by dismissing Georgia's concerns as "propaganda"⁴⁰⁶.

3.108 Having achieved no success through this and similar direct approaches, Georgia returned to international venues. In January 2005, Georgia's Permanent Representative to the United Nations informed the Security Council of several recent "abductions" that were "committed in front of CIS peacekeepers, who did nothing to protect peaceful civilian people - by the way, not for the first time"⁴⁰⁷. The Georgian Representative recalled that over 2,000 ethnic Georgians had been killed since Russian peacekeepers were deployed⁴⁰⁸. In November 2005, Georgia reminded the Security Council that "the Georgian authorities have repeatedly sought to focus the attention of the world community on the escalating situation in Abkhazia" where the "gravest violations are reported in the field of human

⁴⁰⁵ Letter of President Saakashvili of Georgia to President Putin of the Russian Federation (26 July 2004) p. 3. GM, Vol. V, Annex 309.

⁴⁰⁶ Letter of President Putin of the Russian Federation to President Saakashvili of Georgia (14 August 2004). GM, Vol. V, Annex 310.

⁴⁰⁷ U.N. Security Council, *Letter dated 26 January 2005 from the Permanent Representative of Georgia to the United Nations addressed to the President of the Security Council*, U.N. Doc. S/2005/45 (26 January 2005). GWS, Vol. III, Annex 71.

⁴⁰⁸ U.N. Security Council, *Letter dated 26 January 2005 from the Permanent Representative of Georgia to the United Nations addressed to the President of the Security Council*, U.N. Doc. S/2005/45 (26 January 2005). GWS, Vol. III, Annex 71. Georgia also approached Russia before the OSCE concerning Russian peacekeepers' failure to protect ethnic Georgians from violence and discrimination in South Ossetia and Abkhazia. On 9 February 2006, the Minister of Foreign Affairs of Georgia informed the OSCE about Georgia's "concern[s] about the effectiveness of the JPKF" and stated that the implementation of the peace plan "does not depend on the presence of the peacekeepers." Statement by Minister of Foreign Affairs of Georgia, PC.DEL/101/06 (9 February 2006). GM, Vol. II, Annex 81.

rights and freedoms”⁴⁰⁹. Specifically, Georgia stated that the “separatist government of Abkhazia and its so-called law enforcement authorities acting with apparent immunity are waging a campaign of terror against the ethnically Georgian population, with the goal of expelling it from the region, completing the process of ethnic cleansing and eventually having its legitimacy recognized”. In that connection, Georgia stressed that these “[f]lagrant acts ... take place in the very presence of the peacekeeping forces and in many cases with their latent consent”⁴¹⁰.

3.109 Similarly, in August 2006, Georgia informed the United Nations that the Russian peacekeepers were “turning a blind eye” to gross violations of the human rights of ethnic Georgians⁴¹¹. President Saakashvili himself used the United Nations as a forum to discuss Russia’s refusal to take steps to prevent violent ethnic discrimination, informing the General Assembly in September 2006 that since Russian troops had been deployed in Abkhazia, and due to their inaction “more than 2,000 Georgian citizens have lost their lives and more than 8,000 Georgian homes have been destroyed”⁴¹². Again, in November 2006, Georgia

⁴⁰⁹ U.N. Security Council, *Letter dated 18 November 2005 from the Permanent Representative of Georgia to the United Nations addressed to the President of the Security Council, Annex*, U.N. Doc. S/2005/735 (23 November 2005). GWS, Vol. III, Annex 77.

⁴¹⁰ U.N. Security Council, *Letter dated 18 November 2005 from the Permanent Representative of Georgia to the United Nations addressed to the President of the Security Council, Annex*, U.N. Doc. S/2005/735 (23 November 2005). GWS, Vol. III, Annex 77.

⁴¹¹ U.N. General Assembly, Security Council, *Identical letters dated 11 August 2006 from the Chargé d’affaires A.I. of the Permanent Mission of Georgia to the United Nations addressed to the Secretary-General and the President of the Security Council, Annex*, U.N. Doc. A/60/976-S/2006/638 (14 August 2006). GWS, Vol. III, Annex 83. *See also, e.g.*, U.N. Security Council, *Letter dated 4 September 2006 from the Permanent Representative of Georgia to the United Nations addressed to the President of the Security Council, Annex*, U.N. Doc. S/2006/709 (5 September 2006) (human rights violations against ethnic Georgians “take place within sight of the Commonwealth of Independent States (CIS) and in actual practice, Russian peacekeeping forces that do nothing to suppress flagrant and mass violations of human rights.”). GWS, Vol. III, Annex 84.

⁴¹² Office of the President of Georgia, “Remarks of H.E. Mikheil Saakashvili, President of Georgia to the 61st Annual United Nations General Assembly” (23 September 2006). GWS, Vol. IV, Annex 170. *See also* Ministry of Foreign Affairs of Georgia, *Statement of Mr. Irakli*

attempted to bring attention to the continuing abuses in the territory under Russia's control by informing the UN Human Rights Committee that:

The most flagrant human rights violations still take place in the territory of Abkhazia and the Tskhinvali region/South Ossetia, Georgia, which are de facto out of the control of the Government of Georgia and where the Russian Federation exercises effective control instead. Many citizens of Georgia living there are subjected to torture and other ill-treatment; they are victims of other numerous, grave human rights violations⁴¹³.

3.110 Russia did not respond to any of these Georgian initiatives, all of which produced no end to the acts of ethnic discrimination in relation to matters falling under the 1965 Convention. Over the course of the ten years immediately preceding the filing of the *Application*, none of Georgia's repeated attempts to engage Russia in dialogue over the persistent refusal of its military forces in South Ossetia and Abkhazia to use the means at their disposal to prevent discrimination against ethnic Georgians bore fruit. The evidence shows that, during this period, Russia consistently manifested a lack of interest in discussing the matter with Georgia, let alone resolving it.

Section VII. Conclusions

3.111 The evidence described above shows that Georgia repeatedly attempted to negotiate with Russia over the Respondent State's involvement directly or indirectly in acts that violate obligations falling under the 1965 Convention. These acts include ethnic cleansing operations against ethnic Georgians in South

Alasania, Ambassador Extraordinary and Plenipotentiary, Permanent Representative of Georgia in the UN (3 October 2006) (Georgia's Permanent Representative to the UN informed the organization that the Russian peacekeeping operation "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".) (emphasis added). GWS, Vol. IV, Annex 171.

⁴¹³ U.N. Human Rights Committee, *Third periodic report of State parties due in 2006*, U.N. Doc. CCPR/C/GEO/3 (7 November 2006), para. 22. GWS, Vol. III, Annex 85.

Ossetia and Abkhazia, over its forcible prevention of ethnic Georgian IDPs, displaced from these territories by ethnic cleansing and other forms of ethnic discrimination, from exercising their right of return to these territories, over its support, sponsorship and defence of ethnic discrimination carried out against ethnic Georgians by separatist authorities and militias, and over its failure to carry out its responsibility to prevent acts of ethnic discrimination in areas under its control. The evidence shows that Georgia attempted to negotiate with Russia over these matters, all of which plainly fall under the 1965 Convention, both directly and in a variety of multilateral fora over the course of many years. Although agreements were reached between the two States over some of these issues in the early and mid-1990s, none of these agreements were respected by Russia. Georgia repeatedly brought to the attention of Russia its persistent violation of its commitments and sought renewed negotiations to address the same matters. For at least the past 10 years, Georgia has not succeeded in any of its attempts at negotiation with Russia; despite Georgia's efforts, Russia's conduct during this period has not changed. The provisions of the 1965 Convention continue to be violated. Indeed, in the most recent period prior to the filing of the *Application*, Russia refused even to meet with Georgia, rendering negotiations impossible.

3.112 In these well-documented circumstances, Georgia has more than met the standards of Article 22, whether they require that it demonstrate simply as a factual matter that its dispute with Russia "is not settled by negotiation", or that it made an "attempt to settle the dispute" prior to seisin of the Court, or even that it demonstrate, as a result of its unsuccessful attempts at settlement, that the matter "cannot be settled by negotiation". No more can be required for the Court to exercise jurisdiction under Article 22. In this Chapter, Georgia has shown that, under the plain language of Article 22 and its context within the 1965 Convention, as confirmed by the preparatory works: (1) the conditions in Article

22 are alternatives and not cumulative; and (2) to the extent that Georgia was required to attempt to negotiate prior to the Court's seisin, it has clearly satisfied this requirement. Both conclusions are fully consistent with, if not compelled by, the prior decisions of this Court and the PCIJ, as well as the evidence on negotiations submitted by Georgia as part of this pleading and in the *Memorial*. For these reasons, Georgia submits that Russia's second preliminary objection should be rejected by the Court.

CHAPTER IV.

**RUSSIA'S THIRD PRELIMINARY OBJECTION: LACK OF
JURISDICTION *RATIONE LOCI***

Section I. Introduction

4.1 In its *Order on Provisional Measures* of 15 October 2008, the Court held that, in the absence of a provision in the 1965 Convention limiting the spatial scope of the obligations contained therein, the Convention, as a human rights instrument, applies to the conduct of a State Party outside its own territory:

109. Whereas the Court observes that there is no restriction of a general nature in CERD relating to its territorial application; whereas it further notes that, in particular, neither Article 2 nor Article 5 of CERD, alleged violations of which are invoked by Georgia, contain a specific territorial limitation; and whereas the Court consequently finds that these provisions of CERD generally appear to apply, like other provisions of instruments of that nature, to the actions of a State party when it acts beyond its territory⁴¹⁴.

4.2 As the issue of the spatial scope of the obligations under the 1965 Convention was not addressed in the Joint Dissenting Opinion it may be concluded that paragraph 109 of the Court's Order represents the unanimous view of the Court, albeit on a *prima facie* basis given that the Court was exercising its incidental jurisdiction to order provisional measures.

4.3 Russia has advanced two arguments in the alternative to the effect that the Court lacks jurisdiction *ratione loci* over the subject matter of this dispute in Chapter V of its *Preliminary Objections*:

1. Contrary to Georgia's assertion, obligations under CERD as a general matter only apply on the territory of the State parties. This is in line with the position of general international law, which provides that, unless specifically indicated, treaty obligations apply only territorially.

⁴¹⁴ *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Provisional Measures, Order, I.C.J. Rep. 2008 (hereinafter "Provisional Measures Order"), para. 109.

2. In the alternative, should this Court hold that even in the absence of a special clause to this effect, general international law provides for the extraterritorial application of treaty obligations, instances of such extraterritoriality would be exceptional, and the present case would not be covered by any of the exceptions⁴¹⁵.

4.4 In addition to these general objections to the Court's jurisdiction *ratione loci*, Russia has also engaged in a purported analysis of each of the obligations relied upon by Georgia in the 1965 Convention in support of its submission that the spatial scope of each is limited in application to Russia's national territory.

4.5 This Chapter responds to Russia's objections, which are plainly inconsistent with the jurisprudence of this Court and practice under international human rights instruments. Section II demonstrates, by reference to a wealth of international authorities, that general international law recognizes the extraterritorial application of human rights obligations of the kind reflected in the 1965 Convention where they arise in human rights instruments of a universal character in the circumstances of this case. Section III refutes Russia's alternative argument that the grounds for extraterritorial application are "exceptional" and refers to the pertinent international jurisprudence that recognizes application beyond the territory of the respondent State in circumstances where it exercises power or authority over the victims of that State's alleged human rights violations, wherever such victims are situated. In the alternative, Georgia submits in Section III that one of the grounds of extraterritorial application of the 1965 Convention acknowledged by Russia, *viz.*

⁴¹⁵ Preliminary Objections of the Russian Federation, Vol. I (1 December 2009) (hereinafter "RPO"), para. 5.9.

“the effective control of a territory”⁴¹⁶, was plainly satisfied in respect of Russia’s conduct in South Ossetia and Abkhazia during the relevant times. Section IV sets out a rebuttal to Russia’s textual analysis of the spatial scope of the individual obligations invoked by Georgia for its claims against Russia. Finally, Section V contains a summary of Georgia’s principal conclusions in this Chapter.

4.6 Before Russia’s objections are addressed in detail, Georgia would refer to and adopt the consistent practice of the CERD Committee. Like the other treaty bodies established by international human rights instruments, the practice of the CERD Committee is to apply the obligations of the 1965 Convention extraterritorially to anyone within the power or authority of a State Party. In its *Memorial*⁴¹⁷, Georgia quoted extensively from the CERD Committee’s reports on Israel in respect of the Occupied Territories and the Golan Heights, where it said:

The Committee reaffirms its position of principle that, since Israel is a party to the International Convention on the Elimination of All Forms of Racial Discrimination, the Committee is competent to examine the manner in which Israel is fulfilling its obligations under the Convention with respect to everyone falling under the jurisdiction of Israel, including all persons living in the territories occupied by Israel⁴¹⁸.

In 2007, the CERD Committee repeated this position:

The Committee reiterates its concern at the position of the State party to the effect that the Convention does not apply in the Occupied Palestinian Territories and the Golan Heights. *Such a position cannot be sustained under the letter and spirit of the*

⁴¹⁶ RPO, para. 5.50.

⁴¹⁷ Memorial of Georgia, Vol. I, (2 September 2009) (hereinafter “GM”), paras. 8.19-8.23.

⁴¹⁸ U.N. General Assembly, *Report of the Committee on the Elimination of Racial Discrimination*, Supplement No. 18, U.N. Doc A/49/18 (1995), para. 83. GM, Vol. II, Annex 19.

*Convention, or under international law, as also affirmed by the International Court of Justice*⁴¹⁹.

4.7 The “affirm[ation]” from the International Court of Justice referred to in the final sentence of this passage was the Court’s recent opinion in *Construction of a Wall*, which is considered below in more detail. In addition to taking an extraterritorial approach with respect to Israel’s conduct, the CERD Committee has also exercised its competence in respect of Turkey’s conduct in Northern Cyprus and the United States’ conduct in Panama and Guantanamo Bay⁴²⁰. Russia’s approach is inconsistent with that of the CERD Committee.

Section II. Russia’s First Argument: “The Principle of Territorial Application”

4.8 According to Russia, there is a general principle of international law requiring the territorial application of treaty obligations so that, in the absence of a provision prescribing the spatial scope of the 1965 Convention, the Court must interpret Russia’s obligations in the Convention as limited to acts or omissions of Russian officials taking place *within* the territorial borders of the Russian Federation.

4.9 Russia’s alleged general principle is contradicted by the jurisprudence of this Court and by the decisions of other international courts and supervisory

⁴¹⁹ U.N. General Assembly, *Report of the Committee on the Elimination of Racial Discrimination*, Official Records, Sixty-Second Session, Supplement No. 18, U.N. Doc. A/62/18 (2007), para. 225 (emphasis added). GM, Vol. II, Annex 43.

⁴²⁰ U.N. Committee on the Elimination of Racial Discrimination, *Summary Record of the 1914th Meeting*, U.N. Doc. CERD/C/SR.1914 (2 March 2009), paras. 31, 52. GWS, Vol. III, Annex 101; U.N. Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America*, U.N. Doc. CERD/C/USA/CO/6 (8 May 2008), para. 24. GWS, Vol. III, Annex 94; U.N. General Assembly, *Report of the Committee on the Elimination of Racial Discrimination*, Supplement No. 18, U.N. Doc. A/9618 (1974). GWS, Vol. III, Annex 41; U.N. General Assembly, *Report of the Committee on the Elimination of Racial Discrimination*, Supplement No. 18, U.N. Doc. A/31/18 (1976). GWS, Vol. III, Annex 42; GM, paras. 8.19-8.23; RPO, para. 5.60.

bodies established pursuant to human rights treaties. In the human rights field, if Russia's principle were to be accepted it would permit a State to perpetrate violations of human rights on the territory of another State, where such violations would attract the international responsibility of the perpetrating State if the acts were committed on its own territory. This goes directly against the policy and practice of the CERD Committee, as well as the jurisprudence of this Court.

4.10 The leading judicial statement on the extraterritorial application of human rights treaties is the Court's Advisory Opinion in *Construction of a Wall*. In considering whether human rights treaties applied to Israel's conduct in the Occupied Palestinian Territories, the Court held:

109. The Court would observe that, while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions.

The constant practice of the Human Rights Committee is consistent with this. Thus, the Committee has found the Covenant applicable where the State exercises its jurisdiction on foreign territory. It has ruled on the legality of acts by Uruguay in cases of arrests carried out by Uruguayan agents in Brazil or Argentina (case No. 52/79, *López Burgos v. Uruguay*; case No. 56/79, *Lilian Celiherti de Cusariego v. Uruguay*). It decided to the same effect in the case of the confiscation of a passport by a Uruguayan consulate in Germany (case No. 106181, *Montero v. Uruguay*).

The *travaux préparatoires* of the Covenant confirm the Committee's interpretation of Article 2 of that instrument. These show that, in adopting the wording chosen, the drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory. They only intended to prevent persons residing abroad from asserting, vis-à-vis their State of origin, rights that do not fall within the competence of that State, but of that of the State of residence (see the discussion of the preliminary draft in the Commission on Human Rights, E/CN.4/SR.194, para. 46; and

United Nations, *Official Records of the General Assembly, Tenth Session, Annexes, A/2929, Part II, Chap. V, para. 4 (1955)*⁴²¹.

4.11 Remarkably, this paragraph of the Court’s Opinion in the *Construction of a Wall* is one of the two authorities relied upon by Russia in support of its argument that there is an inherent territorial restriction to the application of human rights obligations. Russia cites only two words of this paragraph from the first sentence – “primarily territorial” – for its alleged proposition of law:

In the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories Advisory Opinion, the Court confirmed that human rights obligations apply “primarily territorial[ly]”⁴²².

4.12 When the two words on which Russia relies are placed in their proper context in paragraph 109 of the Court’s Opinion, it is difficult to overstate just how far Russia’s position is undermined by the Court’s interpretation and application of the relevant principle. The Court states in unequivocal terms that, to the extent that a State acts outside its national territory, it is bound to comply with its obligations in the International Covenant on Civil and Political Rights (the Covenant). This follows, according to the Court, “natural[ly]” from the “object and purpose” of the Covenant as a universal human rights instrument. Far from supporting Russia’s thesis that the spatial scope of human rights obligations ends at the territorial borders of the State, the Court found that it is only “natural” that such obligations bind the State wherever it may act.

4.13 Contrary to Russia’s position advocating some sort of inherent spatial restriction for the obligations in human rights instruments, the Court’s approach in *Construction of a Wall* is consistent with the broad principle recognizing the extraterritorial effect and application of universal human rights instruments. The

⁴²¹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Rep. 2004, p. 179, para. 109.

⁴²² RPO, para. 5.28.

Court's reference to the UN Human Rights Committee's decisions in *López Burgos v. Uruguay* and *Lilian Celiberti de Casariego v. Uruguay* is significant. The UN Human Rights Committee affirmed that Uruguay had violated its obligations under the Covenant when its security forces had abducted and tortured a Uruguayan citizen living in Argentina and found that:

[I]t would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory⁴²³.

The same principle applies in the present case in respect of the 1965 Convention. Russia cannot perpetrate violations of the 1965 Convention on the territory of Georgia.

4.14 The UN Human Rights Committee has given the broadest possible interpretation of the spatial scope of obligations in the Covenant in General Comment No. 31:

States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party⁴²⁴.

4.15 The UN Human Rights Committee thus endorsed, for instruments of universal application, a conception of jurisdiction that covers both power over

⁴²³ U.N. Human Rights Committee, *Sergio Euben Lopez Burgos v. Uruguay*, Communication No. R.12/52, U.N. Doc. A/36/40 (1981), p. 176, para. 12.3. GWS, Vol. III, Annex 43; U.N. Human Rights Committee, *Lilian Celiberti de Casariego v. Uruguay*, Communication No. R.56/1979, U.N. Doc. CCPR/C/13/D/56/1979 (1981), p. 185, para. 10.3. GWS, Vol. III, Annex 44.

⁴²⁴ U.N. CCPR, *General Comment No. 31, Nature of the General Legal Obligation Imposed on State Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (26 May 2004), para. 10. GM, Vol. II, Annex 37.

individuals or control over geographic areas not within the territory of the State Party.

4.16 The principle of unconscionability that informed the UN Human Rights Committee's approach to the spatial scope of the obligations under the Covenant is echoed in many judicial statements. For instance, Judge Sir Elihu Lauterpacht made the point powerfully in respect of another human rights instrument of global application, the Genocide Convention, in his Separate Opinion in the provisional measures phase of *Bosnian Genocide*:

114. Obviously, an absolutely territorial view of the duty to prevent genocide would not make sense since this would mean that a party, though obliged to prevent genocide within its own territory, is not obliged to prevent it in territory which it invades and occupies. That would be nonsense. So there is an obligation, at any rate for a State involved in a conflict, to concern itself with the prevention of genocide outside its territory⁴²⁵.

4.17 In addition to the principle of unconscionability, the principle of equal human rights protection for nationals and non-nationals would be infringed if jurisdiction were to be conceived strictly on a territorial basis, as Russia seeks. The majority of persons affected by a State's conduct within its own national territory are nationals or citizens of that State, whereas the opposite is generally true in respect of those persons affected by a State's extraterritorial conduct. If the State's human rights obligations were not extended to its extraterritorial conduct, there would be an asymmetry in the protection of nationals and non-nationals. This would undermine the very notion of human rights based on humanity rather than nationality. As was stated by the Inter-American Commission of Human Rights in *Coard v. USA*: “[g]iven that individual rights

⁴²⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Provisional Measures, Order, I.C.J. Rep. 1993, p. 444, para. 114.

inhere simply by virtue of a person's humanity, each American State is obliged to uphold the protected rights of any person subject to its jurisdiction"⁴²⁶.

4.18 Russia's efforts to undermine the Court's jurisprudence and the UN Human Rights Committee's pronouncements on the spatial scope of the obligations in the Covenant are manifestly ill-founded. Russia asserts that their relevance is confined to the interpretation of a particular treaty provision, *viz.* the general jurisdictional provision in Article 2(1) of the Covenant. Russia says:

Thus, in the advisory opinion on the *Israeli Wall*, this Court recognised that provisions of the International Covenant on Civil and Political Rights governed Israeli conduct within the Occupied Palestinian Territories, but arrived at this result through an interpretation of Article 2(1) ICCPR. Hence the Court's treatment of questions of extraterritoriality is preceded by a reference to Article 2(1) ICCPR and draws on the crucial notion of 'jurisdiction' used in that provision, which is interpreted to be 'primarily territorial', but 'may sometimes be exercised outside the national territory'⁴²⁷.

4.19 Again Russia mischaracterizes the Court's opinion. The extraterritorial application of the Covenant, according to the Court, followed "natural[ly]" from the "object and purpose" of the Covenant as a universal human rights instrument. The Court did not limit its view to that particular provision. The Court has, moreover, adopted precisely the same position in respect of other human rights instruments without a general jurisdictional provision like Article 2(1) of the Covenant.

4.20 In *Application of Genocide Convention*, Yugoslavia (later Serbia and Montenegro) raised an objection to the Court's jurisdiction on the basis that the alleged acts of genocide occurred outside its territory, and Yugoslavia "did not

⁴²⁶ *Coard et al. v. United States of America*, Case 10.951, Report No. 109/99, Inter-Am.Ct. H.R. (29 September 1999) (hereinafter "*Coard v. United States of America*"), para. 37.

⁴²⁷ RPO, para. 5.34.

exercise jurisdiction over that territory at the time in question”⁴²⁸. The Court first noted that the only provision of the Genocide Convention expressly dealing with the spatial scope of the obligations is Article VI which, the Court noted, “merely provides for persons accused of one of the acts prohibited by the Convention to ‘be tried by a competent tribunal of the State in the territory of which the act was committed...’”⁴²⁹. The Court decided that, in the absence of a general provision regulating the spatial scope of the obligations in the Genocide Convention, the spatial scope of the obligations is identified by reference to the object and purpose of the treaty as a universal human rights instrument. Before the relevant passage of the Court’s judgment is set out in full, it is important to note that the 1965 Convention adopts the very same approach as the Genocide Convention in this respect: there is no general provision in that Convention regulating the spatial scope of the obligations.

4.21 Having noted that the express terms of the Genocide Convention do not regulate the spatial scope of the obligations (save in respect of Article VI), the Court continued:

It would also recall its understanding of the object and purpose of the Convention, as set out in its Opinion of 28 May 1951, cited above:

‘The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as ‘a crime under international law’ involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96 (1) of the General Assembly, December 11th 1946). The first consequence arising from this conception is that the principles underlying the Convention are principles which

⁴²⁸ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections, Judgment, I.C.J. Rep. 1996, p. 16, para. 30.

⁴²⁹ *Ibid.*, p. 16, para. 31.

are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the co-operation required ‘in order to liberate mankind from such an odious scourge’ (Preamble to the Convention).’ (*I.C.J. Reports 1951*, p. 23.)

It follows that the rights and obligations enshrined by the Convention are rights and obligations *erga omnes*. *The Court notes that the obligation each State thus has to prevent and to punish the crime of genocide is not territorially limited by the Convention*⁴³⁰.

4.22 These observations apply, *mutandis mutandis*, to the 1965 Convention. As was noted in the *Memorial*, the prohibition of racial discrimination has attained the status of a peremptory norm of international law⁴³¹. The obligation not to engage in racial discrimination undoubtedly binds all States regardless of their participation in the 1965 Convention. A territorial limitation to the spatial scope of the obligations in the 1965 Convention is no less inimical to the object and purpose of the 1965 Convention than for the Genocide Convention. As a treaty obligation, it applies irrespective of where the State party acts.

4.23 In its Judgment on the merits in *Application of Genocide Convention*, the Court affirmed its previous finding that, in the absence of an express limiting provision, the obligations in the Genocide Convention extend to a State’s conduct wherever it might occur:

The substantive obligations arising from Articles I and III are not on their face limited by territory. They apply to a State wherever it may be acting or may be able to act in ways appropriate to meeting the obligations in question⁴³².

⁴³⁰ *Ibid.* (emphasis added).

⁴³¹ GM, para. 9.10.

⁴³² *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Rep. 2007, p. 68, para. 183.

4.24 The obligation to prevent genocide in Article I, which the Court classified as an obligation of conduct, is engaged depending on the “capacity to influence effectively the action of persons likely to commit, or already committing, genocide”⁴³³. In respect of the prohibited acts in Article III of the Genocide Convention, the Court found that the attribution of the conduct to the respondent State was the only link required for the obligation to be engaged⁴³⁴. Exactly the same principle applies in respect of the 1965 Convention. Russia has identified no principle of law or policy that would support a different approach to ethnic cleansing or ethnic discrimination in respect of a right to return. There is no such principle of law or policy within or without the 1965 Convention to assist Russia.

4.25 Apart from the Court’s opinion in *Construction of a Wall*, the only other authority relied upon by Russia to support its argument that “obligations under CERD as a general matter only apply on the territory of the State parties” is the Judgment of the European Court of Human Rights in *Banković*⁴³⁵. The situation in *Banković* is, however, readily distinguishable from the present case in a number of important respects.

4.26 First, the European Convention on Human Rights is a regional human rights instrument that forms an essential part of the broader project for European integration. The regional aspect of the European Convention is emphasized in its preamble: “Being resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideas, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration”. In *Banković*, the impugned conduct of the seventeen respondent States was the military air strikes carried out

⁴³³ *Ibid.*, p. 154, para. 430.

⁴³⁴ *Ibid.*, p. 136, para. 379.

⁴³⁵ *Banković et al. v. Belgium et al.*, Eur. Ct. H.R. Application. No. 52207/99 (2001), 41 ILM. 517.

by NATO forces on the building in Belgrade that housed the studios of Radio Television Serbia. This attack caused the death and injury of many civilians. The Federal Republic of Yugoslavia, as it was referred to in the Judgment, was not and never had been a Contracting Party to the European Convention. It was not, therefore, part of the “*espace juridique*” of the European Convention. Understandably, the European Court in *Banković* interpreted the reference to “jurisdiction” in Article 1 of the European Convention by reference to its object and purpose as a regional instrument for the collective enforcement of certain human rights by countries with a “common heritage”. Consistent with this approach is the express stipulation, in Article 54 of the European Convention, that the Convention is not automatically applicable to all of the territories for whose international relations a Contracting Party is responsible. That extension must be upon the express election of the Contracting Party in question.

4.27 In contrast to the European Convention, the 1965 Convention was designed to have universal application. There is no underlying geographical limitation to the object and purpose of the 1965 Convention. There is no equivalent to Article 54 of the European Convention in respect of the extension of the 1965 Convention to overseas territories and the like, and such a provision in a universal instrument such as the 1965 Convention would be nonsensical. There is no equivalent to the preambular language.

4.28 Second, in cases where a Contracting Party to the European Convention has committed human rights violations on the territory of another Contracting Party (and thus within the “*espace juridique*” of the European Convention), the European Court has interpreted the reference to “jurisdiction” in Article 1 to extend to such violations. The key part of the judgment in *Banković* was overlooked by Russia in its *Preliminary Objections*:

It is true that, in its above-cited *Cyprus v. Turkey* judgment [] the Court was conscious of the need to avoid ‘a regrettable vacuum in the system of human-rights protection’ in Northern Cyprus. However, and as noted by the Governments, that comment related to an entirely different situation to the present: the inhabitants of northern Cyprus would have found themselves excluded from the benefits of the Convention safeguards and system which they had previously enjoyed, by Turkey’s ‘effective control’ of the territory and by the accompanying inability of the Cypriot Government, as a contracting state, to fulfil the obligations it had undertaken under the Convention.

In short, the Convention is a multilateral treaty operating, subject to Art. 56 of the Convention, in an essentially regional context and notably in the legal space (*espace juridique*) of the contracting states. The FRY clearly does not fall within this legal space. The Convention was not designed to be applied throughout the world, even in respect of the conduct of contracting states. Accordingly, the desirability of avoiding a gap or vacuum in human rights’ protection has so far been relied on by the Court in favour of establishing jurisdiction only when the territory in question was one that, but for the specific circumstances, would normally be covered by the Convention⁴³⁶.

4.29 The situation in the present case is analogous to the position facing the European Court in *Cyprus v. Turkey*, and not the facts of *Banković*: Georgia was a State Party to the 1965 Convention at the relevant time and has been prevented from upholding its obligations under the 1965 Convention in respect of the areas of Abkhazia and South Ossetia by virtue of Russia’s interventions. If Russia does not answer for the unlawful practices of ethnic discrimination taking place in Abkhazia and South Ossetia then there will, in the words of the European Court, be “*a regrettable vacuum in the system of human-rights protection*”. Indeed, the CERD Committee has repeatedly recognized that Georgia’s lack of control in South Ossetia and Abkhazia has prevented it from implementing the 1965 Convention in those territories:

⁴³⁶ *Ibid.*, para. 80.

The Committee acknowledges that Georgia has been confronted with ethnic and political conflicts in Abkhazia and South Ossetia since independence. Due to the lack of governmental authority, the State party has difficulty in exercising its jurisdiction with regard to the protection of human rights and the implementation of the Convention in those regions⁴³⁷.

4.30 Third, as has been noted in academic commentary, the applicants in *Banković* were in effect arguing that the victims in Belgrade were simultaneously within the jurisdiction of all seventeen respondent States. A finding by the European Court to that effect would, in the words of one author, “have deprived Article 1 of the Convention of all substance”⁴³⁸. No such situation exists in the present case in respect of Russia’s actions in South Ossetia and Abkhazia.

4.31 Russia makes extensive reliance on *Banković* for the obvious reason that the other authorities do not assist it. It also invoked that authority in support of the proposition that, in so far as it was not lawfully exercising jurisdiction in South Ossetia and Abkhazia during the relevant periods, the obligations under the 1965 Conventions were not applicable to its conduct. Thus, for instance, Russia maintains in respect of Article 5 of the 1965 Convention:

Given that a State may not, under international law, exercise sovereign rights on foreign territory, unless specifically authorized to do so, any such State is thus not in a position to either prohibit or eliminate racial discrimination occurring abroad. Accordingly, the text of Article 5 of CERD necessarily implies that the scope of

⁴³⁷ U.N. Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Georgia*, U.N. Doc. CERD/C/GEO/CO/3 (27 March 2007), para. 4. GWS, Vol. III, Annex 86. See also U.N. Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Georgia*, U.N. Doc. CERD/C/304/Add. 120 (27 April 2001). GWS, Vol. III, Annex 66.

⁴³⁸ Christopher Greenwood, “Jurisdiction, NATO and the Kosovo Conflict” in Patrick Capps, Malcolm Evans & Stratos Konstadinidis (eds), *Asserting Jurisdiction: International and European Legal Perspectives* (2003), p. 167. GWS, Vol. IV, Annex 196.

application of Article 5 of CERD was thought to be limited to the territory of a given contracting party...⁴³⁹.

4.32 The purpose of the doctrine of prescriptive or legislative jurisdiction is to determine whether a State's claim to regulate conduct is lawful. It would be extraordinary if human rights obligations could be avoided if the State disavows a legal right to regulate the conduct of persons outside its national territory but *in fact* takes action that infringes the human rights of those persons.

4.33 The Federal Republic of Yugoslavia advanced an argument similar to Russia's in *Bosnian Genocide*. According to the Federal Republic of Yugoslavia's pleading: "the Genocide Convention can only apply when the State concerned has territorial jurisdiction in the areas in which the breaches of the Convention are alleged to have occurred"⁴⁴⁰. As has been noted, the Court rejected this submission. In his oral submissions to the Court, the late Professor Thomas Franck responded to this argument in the following terms on behalf of Bosnia and Herzegovina:

Article IX nowhere suggests that the Convention's obligations, and this Court's jurisdiction, arise only when genocide is committed within the perpetrator's territorial jurisdiction. States are well-known to trespass where they have no jurisdiction, fish in troubled waters, and by stealth, subterfuge or outright intervention commit illegal acts, in this instance the very acts prohibited by the Genocide Convention. The International Court of Justice has jurisdiction over disputes arising out of allegations of such violations perpetrated beyond the perpetrator's jurisdiction. Were it otherwise, the Convention would not be a relevant answer to most of Hitler's holocaust, which was carried out primarily outside the borders of Germany⁴⁴¹.

⁴³⁹ RPO, para. 5.106.

⁴⁴⁰ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Preliminary Objection Submission (June 1996), p. 129, para. C-1.

⁴⁴¹ Verbatim Record, CR 1996/9 (1 May 1996), pp. 52-53 (Franck).

The Court did not accept the proposition advanced by the Federal Republic of Yugoslavia.

4.34 Finally, for sake of completion, Russia’s reliance on the drafting history of the 1965 Convention is also to no avail⁴⁴². As Russia concedes, “‘Territorial issues’ were discussed mainly with respect to non-self-governing territories”⁴⁴³. It is impossible to understand how a failed attempt by representatives of former colonies to include an express provision to the effect that the 1965 Convention applies to non-self-governing territories assists Russia’s position in this case. The reason for the absence of a “colonial clause” in the final text of the 1965 Convention, as the references to the *travaux préparatoires* cited by Russia make clear, was that the obligations under the 1965 Convention applied to “colonial territories” administered by a State Party as a matter of general international law. No express stipulation to that effect was required. Russia has provided no evidence to show that the drafters of the 1965 Convention intended to limit its spatial application in the sense proposed by Russia.

Section III. Russia’s Second Argument: “An Exceptional Basis for Extraterritorial Application Does Not Apply to the Present Case”

A. THE EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES IS NOT “EXCEPTIONAL” OR CONFINED TO THE TWO GROUNDS CITED BY RUSSIA

4.35 Russia’s second argument is stated as follows:

In the alternative, should this Court hold that even in the absence of a treaty provision extending the spatial scope of obligations, general international law provides for the extraterritorial application of treaty obligations, instances of such

⁴⁴² RPO, paras. 5.39-5.46.

⁴⁴³ *Ibid.*, para. 5.39.

extraterritoriality would be exceptional, and the present case would not be covered by any of the exceptions⁴⁴⁴.

4.36 According to Russia, the extraterritorial application of treaty obligations must be viewed as “exceptional” for two reasons. The first is that “[i]nternational practice, insofar as it is said to support a more liberal approach to the question, is typically treaty-specific, i.e. it interprets the specific jurisdictional clause of a given treaty”⁴⁴⁵. Given that there is no international court with compulsory jurisdiction over customary international human rights obligations, it is hardly surprising that “international practice” is focused upon the spatial scope of treaty obligations in specific human rights instruments. But the reasoning of the UN Human Rights Commission, the Inter-American Commission of Human Rights, the European Court of Human Rights and this Court to justify an expansive spatial interpretation of such treaty obligations, as has been previously shown, does not simply rest upon a textual analysis of the particular treaty provision that invokes the concept of jurisdiction. Rather, the Court and these other bodies have relied upon the object and purpose of the relevant treaty as a universal human rights instrument applying universal values; they have invoked the unconscionability of allowing State parties to commit violations of human rights abroad where such violations would engage their international responsibility at home; and they have eschewed an approach to interpreting the spatial scope of human rights obligations that would inevitably accentuate the distinction between citizens and non-citizens in the international protection of human rights.

4.37 The second reason given by Russia to interpret the extraterritorial application of treaty obligations as “exceptional” is that “even instances of international practice or jurisprudence frequently cited in support of some form of extraterritoriality almost inevitably qualify extraterritoriality as the exception to

⁴⁴⁴ *Ibid.*, para. 5.48.

⁴⁴⁵ *Ibid.*, para. 5.49(a).

the recognised rule⁴⁴⁶. Once again, the only authority that Russia can provide for this proposition is *Banković* and this Court's opinion in *Construction of a Wall*. As was previously noted, Russia's reliance on these decisions is misconceived.

4.38 Russia has articulated what it considers to be two bases for extraterritorial application of human rights obligations:

As for potential general exceptions, two types of extraterritoriality are commonly discussed: first, acts taken by a State's diplomatic and consular authorities on foreign soil, and second the effective control of a territory⁴⁴⁷.

4.39 In its *Preliminary Objections*, Russia has also asserted by reference to the Court's opinion in *Construction of a Wall* and Judgment in *Congo v. Uganda* that: "A glance at the Court's jurisdiction reveals that it has accepted arguments based on 'effective control' only in very narrowly defined scenarios, and, in particular, in situations of belligerent occupation"⁴⁴⁸. If one is prepared to take more than a "glance" at the Court's jurisprudence, however, this assertion is shown to be fallacious. Writing extra-judicially, and addressing the same jurisprudence of the Court invoked by Russia, Judge Buergenthal summarised the Court's position as follows:

[I]t should be emphasized that the Court's approach in interpreting Art. 2(1) [of the ICCPR in the *Wall* Opinion] recognizes, albeit *obiter dictum*, that the provision would also apply to certain extraterritorial measures properly speaking, that is, to those not involving occupied territories.

That conclusion finds support, in the first place, in the Court's language. Thus, when the Court in *Congo v. Uganda* concludes that international human rights instruments are applicable to acts

⁴⁴⁶ *Ibid.*, para. 5.49.

⁴⁴⁷ *Ibid.*, para. 5.50.

⁴⁴⁸ *Ibid.*, para. 5.51.

done by a State in the exercise of its jurisdiction outside its own territory, it emphasizes that this is so ‘particularly in occupied territories’. It is readily apparent that the Court would not have resorted to this formulation unless it believed that an extraterritorial exercise of jurisdiction can fall under Art. 2(1), even if it takes place elsewhere than in occupied territories.

It is also clear from the manner in which the Court interprets Art. 2(1) that it proceeded on the assumption that the exercise of extraterritorial jurisdiction under that provision is not limited to occupied territories. Thus, in the *Wall Opinion*, in which the Court first addressed this issue, it relied on the object and purpose of the Covenant and the “constant practice” of the Human Rights Committee. For that practice, the Court cited three early Committee rulings. Two of the cases concerned arrests of Uruguayan nationals carried out by Uruguayan agents in Argentina and Brazil. The third case involved the confiscation by the Uruguayan consulate in Germany of a passport belonging to one of its nationals. In analyzing the Committee’s rulings that Art. 2(1) applied to these cases, the Court noted that “the *travaux préparatoires*” of the Covenant confirm the Committee’s interpretation of that instrument. That interpretation, of course, did not involve occupied territories; it concerned the exercise of governmental powers by one State in the territory of another State⁴⁴⁹.

4.40 There is simply no authority to support Russia’s argument that the only grounds for the extraterritorial application of human rights obligations are “acts taken by a State’s diplomatic and consular authorities on foreign soil” or “the effective control of a territory”⁴⁵⁰.

4.41 Neither ground was satisfied for the extraterritorial application of the Covenant in *Lopez v. Uruguay* or *Celiberti de Casariego v. Uruguay* (decisions referred to by the Court in *Construction of a Wall*). Neither ground was satisfied

⁴⁴⁹ Thomas Buergenthal, “The ICJ, Human Rights and Extraterritorial Jurisdiction” in S. Breitenmoser, et al., (eds), *Human Rights, Democracy and the Rule of Law: Liber Amicorum Luzius Wildhaber* (2007), pp. 147-8. GWS, Vol. IV, Annex 197.

⁴⁵⁰ RPO, para. 5.50.

in *Bosnian Genocide* in respect of the application of the Genocide Convention to Serbia's conduct on the territory of Bosnia and Herzegovina. Neither ground was satisfied in *Coard v. USA*; indeed the Inter-American Court of Human Rights was careful to avoid defining "presence within a particular geographical area" as a necessary condition for the extraterritorial application of the American Convention on Human Rights. According to the Inter-American Court, all that is required is that the victim is subject to the respondent State's "authority and control"; hence the concept of jurisdiction was capable of...

refer[ing] to conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state – usually through the acts of the latter's agents abroad. In principle, the inquiry turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control⁴⁵¹.

4.42 The European Court of Human Rights has adopted a very similar approach, including in decisions after *Banković*. In *Issa v. Turkey*, it was alleged that the Turkish armed forces were responsible for killing Kurdish civilians in an area of Northern Iraq. The European Court ultimately held that the applicants could not establish the presence of the Turkish forces in the area in question beyond reasonable doubt and hence that there was no jurisdiction pursuant to Article 1 of the European Convention⁴⁵². But before so deciding, the European Court endorsed a very wide conception of extraterritorial jurisdiction that goes well beyond the two exclusive grounds asserted by Russia:

[A] State may also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's

⁴⁵¹ *Coard v. United States of America*, para. 37.

⁴⁵² *Issa and Others v. Turkey*, Eur. Ct. H.R., Application No. 31821/96, Judgment (6 November 2004) paras. 76, 81, 82.

authority and control through its agents operating – whether lawfully or unlawfully – in the latter State (see, *mutatis mutandis*, *M. v. Denmark*, application no. 17392/90, Commission decision of 14 October 1992, DR 73, p. 193; *Illich Sanchez Ramirez v. France*, application no. 28780/95, Commission decision of 24 June 1996, DR 86, p. 155; *Coard et al. v. the United States*, the Inter-American Commission of Human Rights decision of 29 September 1999, Report No. 109/99, case No. 10.951, §§ 37, 39, 41 and 43; and the views adopted by the Human Rights Committee on 29 July 1981 in the cases of *Lopez Burgos v. Uruguay* and *Celiberti de Casariego v. Uruguay*, nos. 52/1979 and 56/1979, at §§ 12.3 and 10.3 respectively). Accountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory (*ibid.*)⁴⁵³.

4.43 Likewise, neither of Russia’s two “exceptional” grounds for the extraterritorial application of an international human rights instrument would have been satisfied in *Öcalan v. Turkey*, where Turkey had conceded before the European Court of Human Rights that Mr. Öcalan was within its jurisdiction and thus its obligations under the European Convention were engaged when he was handed over to Turkish officials by Kenyan authorities at Nairobi Airport in Kenya⁴⁵⁴.

4.44 To conclude, there is no authority to support Russia’s position that there are only two “exceptional” grounds for the extraterritorial application of the obligations under the 1965 Convention. To the contrary, the leading decisions of the International Court of Justice, the European Court of Human Rights, the Inter-American Court of Human Rights, the UN Human Rights Commission and the CERD Committee itself all recognize that human rights obligations are capable of

⁴⁵³ *Ibid.*, para. 71.

⁴⁵⁴ *Öcalan v. Turkey*, Eur. Ct. H.R., Application No. 46221/99, Decision as to Admissibility (14 December 2000).

extending to any situation where a State party exercises power or authority over victims outside the national territory of that State party.

B. IN THE ALTERNATIVE: RUSSIA EXERCISED “EFFECTIVE CONTROL” OVER SOUTH OSSETIA AND ABKHAZIA AT ALL MATERIAL TIMES

4.45 In the alternative, Russia *did* exercise “effective control” over Abkhazia and South Ossetia during the relevant periods in respect of which Georgia advances claims against Russia under the 1965 Convention. In the *Memorial*, Georgia presented voluminous and very detailed evidence establishing Russia’s effective control over Abkhazia and South Ossetia during these periods. The pertinent passages in the *Memorial* are cross-referenced in this subsection, together with an analysis of the relevant jurisprudence on the test for “effective control”. Georgia submits that the evidence already presented is more than sufficient to establish “effective control” by Russia under the applicable legal standards. The test of “effective control” is a fact-intensive exercise and, as matters stand, Russia has not provided a response in its *Preliminary Objections* to the voluminous evidential materials concerning its control over the *de facto* governments in South Ossetia and Abkhazia and those areas of Georgian sovereign territory. This alone defeats Russia’s third preliminary objection.

4.46 If Russia were to come forward at the oral hearings on preliminary objections with evidence to challenge the evidence submitted by Georgia in regard to its “effective control” in South Ossetia and Abkhazia, its third preliminary objection to the Court’s jurisdiction would still fail. In such circumstances, it would require the Court to engage in detailed fact-finding and thereby cease to have an exclusively preliminary character; pursuant to Article 79(7) of the Court’s Rules, Russia’s objection would have to be joined to the merits and reserved for decision at that stage.

4.47 Where international courts have applied the test of effective control to extend human rights obligations to areas outside the national territory of the respondent State, they have done so in the merits phase of the proceedings. Thus, for instance, in *Ilașcu v. Moldova and Russia*⁴⁵⁵, where the modalities of Russia’s control over the Transdniestrian area of Moldova bear a striking resemblance to those employed in respect of Abkhazia and South Ossetia⁴⁵⁶, the extensive findings of fact leading to the conclusion that Transdniestria was within Russia’s effective control for the purposes of Article 1 of the European Convention were set out in the European Court’s judgment on the merits in meticulous detail. In determining the questions of fact on this issue, the European Court even appointed four of its judges to conduct an on-the-spot investigation in Moldova over five days⁴⁵⁷. According to the Court, the purpose of that investigation was, *inter alia*, “directed towards ascertaining the relevant facts in order to be able to determine whether Moldova and the Russian Federation had jurisdiction, particularly over the situation in Transdniestria...”⁴⁵⁸.

4.48 Russia contends that its objection to the Court’s jurisdiction *ratione loci* “does not require an analysis of disputed facts and may accordingly be decided without considering the merits of the case”⁴⁵⁹. But if this is true, it is only because the facts presented by Georgia establishing Russia’s “effective control” in South Ossetia and Abkhazia have not yet been disputed by Russia; thus, if the matter were to be decided at this stage, it would have to be decided against Russia’s jurisdictional objection. Alternatively, if Russia were to come forward with evidence to dispute its “effective control” over South Ossetia and Abkhazia

⁴⁵⁵ *Ilașcu v. Moldova and Russia*, Eur. Ct. H.R., Application No. 48787/99 (2004-VII) (hereinafter “*Ilașcu v. Moldova and Russia*”).

⁴⁵⁶ See GM, paras. 9.36-9.38.

⁴⁵⁷ *Ilașcu v. Moldova and Russia*, para. 12.

⁴⁵⁸ *Ibid.*

⁴⁵⁹ RPO, para. 5.14.

at the relevant time, then this would most certainly “require an analysis of disputed facts” suitable for the merits phase. There is nothing to the contrary in the excerpt from the Court’s statement in *Nicaragua v. Colombia* quoted by Russia:

In principle, a party raising preliminary objections is entitled to have these objections answered at the preliminary stage of the proceedings unless the Court does not have before it all the facts necessary to decide the questions raised or if answering the preliminary objection would determine the dispute, or some elements thereof, on the merits⁴⁶⁰.

4.49 This is the correct statement of principle. Contrary to Russia’s submission, however, it is the proviso to the general principle identified by the Court in this passage that applies to Russia’s objection to the Court’s jurisdiction *ratione loci*. If Russia were to come forward with evidence disputing its “effective control” in South Ossetia and Abkhazia, it would be impossible to make the detailed findings of fact required to dispose of the question in this preliminary phase of the proceedings.

1. Russia’s Effective Control Over South Ossetia

4.50 As was set out in detail in Georgia’s *Memorial*, prior to August 2008, Russia exercised control over South Ossetia through the appointment of Russian security and military officials to key posts in the *de facto* government of South Ossetia (including the Minister of Defence, the Secretary of the Security Council, the Minister of Internal Affairs, the Chairman of the KGB, the Commander of the State Border Guard and the Chairman of the Committee on State Control and Economic Security). This control was reinforced by the total dependence of the

⁴⁶⁰ RPO, para. 5.15; *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, I.C.J. Rep. 2007, para. 51.

de facto government on economic and military aid from Russia, as well as Russian control of the South Ossetian military forces⁴⁶¹.

4.51 The European Union’s Fact-Finding Mission confirmed that South Ossetia was under Russia’s “*de facto* control” prior to the commencement of the ethnic cleansing in August 2008. It concluded: “Russia’s influence on and control of the decision-making process in South Ossetia concerned a wide range of matters with regard to the internal and external relations of the entity”⁴⁶². This was especially the case with regard to the “security institutions and security forces”, where the Mission found that Russia had installed “Russian representatives” to leadership positions. Russia’s “influence”, the Mission concluded, was not only “decisive”, it was “systematic, and exercised on a permanent basis”⁴⁶³.

4.52 Notwithstanding the fact that Russia is currently in occupation of South Ossetia, it is well established that effective control over an area by a foreign State can be established by means other than by sustained military occupation. The European Court of Human Rights has, for instance, determined that “a State’s responsibility may be engaged where, *as a consequence of military action* – whether lawful or unlawful – it exercises in practice effective control of an area situated outside its national territory”⁴⁶⁴.

4.53 In this situation, according to the European Court:

⁴⁶¹ GM, paras. 4.16-4.67. Russia intensified its control of South Ossetia even further following the Court’s indication of provisional measures. GM, paras. 7.3-7.12.

⁴⁶² Independent International Fact-Finding Mission On the Conflict in Georgia, Report Vol. II (September 2009) (hereinafter “IIFFMCG Report, Vol. II”), p. 133. GWS, Vol. III, Annex 121.

⁴⁶³ *Ibid.*, pp. 132-133.

⁴⁶⁴ *Loizidou v. Turkey*, Eur. Ct. H.R., Application No. 1531/89 (1996-VI) (hereinafter “*Loizidou v. Turkey*”), pp. 2234-35, para. 52 (emphasis added); *Ilaşcu v. Moldova and Russia* (2004), para. 314.

The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control, whether it be exercised directly, through its armed forces, *or through a subordinate local administration...*⁴⁶⁵.

4.54 In such a case, the foreign State's human rights obligations are not engaged merely in respect of the acts of its armed forces stationed in the areas of the other State, or the acts of its officials who are exercising authority in those areas, but also extend "to acts of the local administration which survives by virtue of its military and other support"⁴⁶⁶.

4.55 The European Court of Human Rights has further clarified that the foreign State's obligations might be engaged by reason of the "acquiescence or connivance of the authorities of a Contracting State in the acts of private individuals which violate the Convention rights of other individuals within its jurisdiction"⁴⁶⁷. According to the European Court:

That is particularly true in the case of recognition by the State in question of the acts of self-proclaimed authorities which are not recognised by the international community⁴⁶⁸.

4.56 As the European Court has noted, it is not necessary to establish that a State "actually exercises detailed control over the policies and actions of the authorities in the area situated outside its national territory" because "even overall control of the area" may engage that State's obligations under international human rights law⁴⁶⁹.

⁴⁶⁵ *Ilaşcu v. Moldova and Russia*, para. 314 (emphasis added).

⁴⁶⁶ *Ibid.*, p. 74, para. 316; *Cyprus v. Turkey*, Eur. Ct. H.R., Application No. 25781/94 (2001-IV) (hereinafter "*Cyprus v. Turkey*"), p. 21, para. 77.

⁴⁶⁷ *Cyprus v. Turkey*, p. 21, para. 81; *Ilaşcu v. Moldova and Russia*, p. 74, para. 318.

⁴⁶⁸ *Ilaşcu v. Moldova and Russia*, p. 74, para. 318.

⁴⁶⁹ *Loizidou v. Turkey*, pp. 2234-35, para. 56; *Ilaşcu v. Moldova and Russia*, p. 74, para. 315.

2. *Russia's Effective Control Over Abkhazia*

4.57 As documented in Georgia's *Memorial*, the means by which Russia has exercised effective control over Abkhazia are very similar to the situation in South Ossetia. Russia has exercised decisive influence over the *de facto* government in Abkhazia both before and after the August 2008 military hostilities: key posts in the administration have been held by Russian officials; there is a total dependence of the *de facto* government upon Russia for economic aid and supply of military equipment; and the vast majority of the population have been granted Russian citizenship⁴⁷⁰. This has intensified since August 2008⁴⁷¹.

4.58 As with South Ossetia, the EU Fact-Finding Mission confirmed that the *de facto* authorities in Abkhazia are dominated by Russia, finding that its "policies and structures, particularly its security and defence institutions" are "to a large extent under control of Moscow"⁴⁷². Likewise, the International Crisis Group, recently assessing Russia's dominance over Abkhazia, observed that Abkhazia is "more dependent than ever on Moscow", including in the "military and economic" spheres, and that "Russia is open about its overwhelming control"⁴⁷³.

⁴⁷⁰ GM, paras. 6.58-6.80.

⁴⁷¹ GM, paras. 7.3-7.12.

⁴⁷² IIFMCG Report, Vol. II, p. 134. GWS, Vol. III, Annex 121.

⁴⁷³ International Crisis Group, *Abkhazia: Deepening Dependence* (26 February 2010), p. 16. GWS, Vol. IV, Annex 194.

3. *Russia's Response to the Evidence Presented in Georgia's Memorial on Russia's Effective Control Over South Ossetia and Abkhazia*

4.59 Against the detailed evidence of Russia's control over South Ossetia⁴⁷⁴ and Abkhazia⁴⁷⁵ set out in Georgia's *Memorial*, Russia has responded with a single self-serving statement:

[T]he number of troops deployed in Abkhazia and South Ossetia, when compared to other instances such as the northern part of Cyprus, was at all relevant times, *i.e.* prior to the seising of the Court on 12 August 2008, so limited that no effective control could be exercised, and indeed no such control was ever exercised over the two territories by the Russian Federation. Besides, those troops that entered the territory on 8 August 2008, were actively involved in combat activities against the illegal Georgian offensive which again excludes any ability to exercise effective control and even less be an occupying power⁴⁷⁶.

4.60 Russia has not, therefore, taken issue with the evidence presented in Georgia's *Memorial* on its control over the relevant areas of Georgia. Instead, it asks the Court to conclude, purely on the basis of a comparison of the numbers of Turkish troops in Northern Cyprus, on the one hand, and Russian troops in Abkhazia and South Ossetia, on the other, that Russia had no effective control over those areas. In the second sentence of this quotation, Russia carefully sidesteps a central allegation made against it by Georgia; *viz.* immediately after the cessation of hostilities on 10 August 2008, Russian forces engaged in ethnic cleansing and other acts of ethnic discrimination against Georgians in South Ossetia and Abkhazia.

⁴⁷⁴ GM, paras. 4.16-4.57, 7.3-7.12.

⁴⁷⁵ GM, paras. 6.58-6.80, 7.3-7.12.

⁴⁷⁶ RPO, para. 5.71.

4.61 That Russia has sought to deflect attention from the conduct of its military forces immediately after the cessation of hostilities is evident from the opening sentences of the very next paragraph of its pleading:

Immediately after the end of hostilities, all the additional forces started to withdraw. Both Abkhazia and South Ossetia requested the continued presence of a limited number of Russian troops on their territory, on which issue bilateral agreements have been concluded, circumscribing the limited functions those troops may exercise⁴⁷⁷.

4.62 The assertion in the first sentence is completely contradicted by the contemporaneous evidence presented in Georgia's *Memorial*⁴⁷⁸. The assertion in the second sentence is surely irrelevant to the question of Russia's effective control. No doubt Turkey, as the only country that has recognised the independence of the Turkish Republic of Northern Cyprus (TRNC), has a series of bilateral agreements with the TRNC including in relation to the Turkish forces situated there. The fact that Russia has resorted to the same fig leaf of legitimacy has no bearing upon the question of *fact* as to whether it is exercising effective control over South Ossetia and Abkhazia and indeed the European Court had scant regard to Turkey's formal justifications relating to the presence of its troops in Northern Cyprus in *Cyprus v. Turkey*. The so-called bilateral agreements between Russia and South Ossetia and Abkhazia cannot define the functions of the Russian troops for the purposes of the Court's adjudication of the *reality* of their impact upon Russia's control over South Ossetia and Abkhazia.

4.63 Russia's pleading continues:

The number (approximately 2500 in each Republic), functions and role of the Russian troops present exclude any ability of the

⁴⁷⁷ RPO, para. 5.72.

⁴⁷⁸ See GM, paras. 3.17-3.117, 5.18-5.23, 6.81-6.87, and Chapter VII.

Russian Federation to exercise overall effective control in either Abkhazia or South Ossetia...⁴⁷⁹

4.64 Leaving to one side the formal “functions and role” assigned to the Russian troops in Abkhazia and South Ossetia, Russia does not explain why “approximately 2500” troops in each of these areas would not be sufficient to secure control in circumstances where (a) there is no other military force; (b) the local militias of the *de facto* governments are subordinate to Russian command, serving under Russian General Officers; and (c) those militias are totally dependent on Russia for armament, training and funding⁴⁸⁰. The fact that South Ossetia and Abkhazia have small populations – no more than 80,000 in South Ossetia and just over 200,000 in Abkhazia that are relatively concentrated since large swaths of territory are uninhabited mountains – makes Russia troop strength all the more adequate to achieve control.

4.65 In fact, there is good reason to believe that the Russian forces in South Ossetia and Abkhazia are much stronger than Russia suggests in the *Preliminary Objections*. For example, the Chief of the Russian General Staff, General Nikolai Makarov, stated that the “Russian military bases” in Abkhazia and South Ossetia “already have full contingents of 3,700 personnel each”⁴⁸¹. And military analysis of satellite imagery suggests that Russian troop strength in Abkhazia is actually in the range of 4,000-5,000⁴⁸². Of course, it is impossible to obtain an accurate number of Russian forces since Russia has barred all international monitors from accessing South Ossetia and Abkhazia⁴⁸³.

⁴⁷⁹ RPO, para. 5.72.

⁴⁸⁰ See *infra*, paras. 6.7-6.10; GM, paras. 4.16-4.57, 6.58-6.80, 7.3-7.12.

⁴⁸¹ GM, para. 7.4.

⁴⁸² International Crisis Group, *Abkhazia: Deepening Dependence* (26 February 2010), p. 3.

⁴⁸³ See *infra*, paras. 6.40-6.43.

4.66 In sum, Russia has submitted nothing of substance to challenge the extensive evidence presented by Georgia establishing Russia's effective control in South Ossetia and Abkhazia during the periods that the breaches of obligations under the 1965 Convention that Georgia attributes to Russia are alleged to have occurred⁴⁸⁴.

Section IV. Russia's Analysis of Its Obligations Under the 1965 Convention

4.67 In Sections III, IV and V of Chapter 5 of its *Preliminary Objections*, Russia has purported to provide an analysis of the individual obligations upon which Georgia's claims are founded in order to demonstrate that they are limited in application to Russia's national territory. In the main, these sections present little more than unsupported assertions about the alleged inherent spatial scope of the individual obligations, and no purpose would be served in providing a rebuttal to each and every point made by Russia. Russia's attempt to extract limitations on this Court's jurisdiction *ratione loci* from a highly artificial and selective textual analysis of the individual obligations is entirely refuted by Georgia's submissions in Sections II and III of this Chapter concerning the spatial scope of the 1965 Convention generally. The ordinary meaning of the 1965 Convention, having regard to its object and purpose, is clearly supportive of Georgia's approach.

4.68 To the limited extent that Russia has sought to refer to materials such as the *travaux préparatoires* in support of its arguments, such references have been made, without exception, to words in those materials taken out of context. There

⁴⁸⁴ Even if "effective control" were held to be a requirement for the extraterritorial application of the 1965 Convention, such a requirement would only make sense in relation to the positive obligations contained therein. A positive obligation requires the State to "assure" or "guarantee" certain rights for all those within its jurisdiction against violation by the State and non-State actors. A negative obligation requires the State to respect human rights: its organs and agents must not commit human rights violations. Hence Georgia's claims based on the negative obligations of the 1965 Convention would be preserved even if the Court were to find that: (i) effective control is a jurisdictional requirement; and (ii) Russia did not exercise effective control in South Ossetia and Abkhazia on the facts of the case.

is nothing in the negotiating history that supports Russia's approach. Georgia will confine its present submissions to a rebuttal of Russia's reliance upon such materials.

A. ARTICLE 2(1)(A) OF THE 1965 CONVENTION

4.69 Russia states that:

The very purpose of this provision, as demonstrated by its drafting history, was to bring autonomous entities such as (for example State) railways, power or port authorities and local cultural institutions within reach of the Convention. Any such entities, however, are by their very nature, of a localized nature... This confirms that Article 2 of CERD was meant to cover acts within the territory of the respective State⁴⁸⁵.

4.70 In support of this assertion, Russia refers to a statement by Mr. Caportorti at the Sixteenth Session of the Sub-Commission on Prevention of Discrimination and Protection of Minorities. That statement is at Annex 2 to Russia's *Preliminary Objections* and it is clear that Mr. Caportorti was addressing the distinction between "*public institutions*" and "*private organizations*", not the spatial scope of Article 2. The full statement by Mr. Capotorti, which is not reproduced in Russia's pleading, reads as follows:

Mr. CAPORTORTI assured Mr. Abran that the "public institutions" referred to in sub-paragraph (a) were quite different from private organizations which were dealt with in sub-paragraph (c). Indeed, sub-paragraph (a) was intended to cover all public activities and sub-paragraph (c), all private activities. Sub-paragraph (a) encompassed not only organs which depended directly on the central Government, but also such autonomous entities such as State railways, public power authorities and local institutions⁴⁸⁶.

⁴⁸⁵ RPO, para. 5.82 (citations omitted).

⁴⁸⁶ *Ibid.*, Vol. II, Annex 2.

4.71 Once again, Russia’s submission is based on a selective reading of words taken out of context. It inaccurately records the examples of public institutions given by Mr. Caportorti (he does not refer to “*port authorities*” or “*local cultural institutions*”), and it distorts the context in which those examples were given, which was to ensure the drafting committee that the reference to “*public authorities*” and “*public institution*” was broad enough to encompass “*not only organs which depended on the central Government*”.

B. ARTICLE 2(1)(B) OF THE 1965 CONVENTION

4.72 Russia quotes the following sentence from an academic commentary on the 1965 Convention:

... sub-paragraph (b) simply intends to prevent persons or organizations from getting the official support *of the State*⁴⁸⁷.

Russia then adds its own clarification to this commentary:

which State is the territorial State where the persons or organizations to be supported are located⁴⁸⁸.

As Russia’s clarification does not appear in the commentary, it is difficult to understand the basis upon which Russia makes the claim it does.

4.73 Russia again relies upon a statement by Mr. Caportorti, and again takes his words out of context⁴⁸⁹. In this instance, he was discussing the meaning of “*organizations*” in the draft text of Article 2(1)(b). The full statement of Mr. Caportorti, which once again was not extracted in Russia’s pleading, reads as follows:

⁴⁸⁷ *Ibid.*, para. 5.86 (emphasis by RPO; citation omitted).

⁴⁸⁸ *Ibid.*, para. 5.86.

⁴⁸⁹ *Ibid.*, para. 5.88.

Mr. CAPORTORTI said that even with Mr. Ivanov's amendment, sub-paragraph (b), which dealt with organizations, could also include State organizations. Sub-paragraph (c) concerning officials or agencies of the State should come before the present sub-paragraph (b) to bring it into line with the decision taken by the Sub-Commission at the beginning of its debate to consider the problem of discrimination from two basis aspects: first, the prohibition placed on the State not to practise discrimination, and secondly, the obligation assumed by the State to take the necessary steps to prevent individuals and institutions within its territory from practising such discrimination⁴⁹⁰.

This statement can hardly be taken as an endorsement of Russia's position on the spatial scope of Article 2(1)(b).

4.74 Finally, Russia places importance upon the substitution of the word "advocate" for "defend" in the draft text of Article 2(1)(b):

This lack of extraterritorial reach of Article 2, para. 2, lit. b) of CERD is also brought out by the usage of the term "defend/*defender*". This term, which was used to replace the broader term "advocate" in an earlier Brazilian proposal for what was to become Article 2, para. 1, lit. b) of CERD...⁴⁹¹.

4.75 According to the *travaux préparatoires* relied upon by Russia, the Brazilian amendment read:

Each State Party undertakes not to encourage, advocate or support racial discrimination by any persons or organisations⁴⁹².

In the *travaux préparatoires* it is recorded, without further explanation, that the Brazilian amendment was withdrawn in favour of the following amendment tabled by eighteen Latin American States, which is reflected in the final text of the 1965 Convention:

⁴⁹⁰ *Ibid.*, Vol. II, Annex 3.

⁴⁹¹ *Ibid.*, para. 5.89.

⁴⁹² *Ibid.*, Vol. II, Annex 23, para. 45.

Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organisations⁴⁹³.

4.76 Georgia fails to understand how the discrepancy between the wording in each amendment can lead Russia to the conclusion that the final text is consistent with a limited spatial scope for the obligation in Article 2(1)(b) of the 1965 Convention. Russia provides no explanation.

C. ARTICLE 5 OF THE 1965 CONVENTION

4.77 Russia refers to the CERD Committee's "General Recommendation 20: Non-discriminatory implementation of rights and freedoms (Article 5)" in support of its argument that the scope of Article 5 is limited to the national territory of the State party. It quotes from paragraph 3 of the Recommendation, which reads as follows:

3. Many of the rights and freedoms mentioned in article 5, such as the right to equal treatment before tribunals, are to be enjoyed by all persons living in a given State; others such as the right to participate in elections, to vote and to stand for election are the rights of citizens⁴⁹⁴.

4.78 Russia's makes the following deduction from this paragraph:

While the main point addressed in para. 3 of General Recommendation 20 is possible distinctions between citizens and non-citizens, its reference to individuals present in a given territory nevertheless confirms that Article 5 of CERD is to be applied solely to 'all persons *living in a given State*', i.e. the rights guaranteed by Article 5 of CERD are to be guaranteed by the territorial State concerned and those individuals that are living on the territory of this State⁴⁹⁵.

⁴⁹³ *Ibid.*, para. 46.

⁴⁹⁴ RPO, para. 5.114.

⁴⁹⁵ RPO, para. 5.115.

4.79 Russia's deduction is not merely tenuous: it is simply wrong. It is impossible to interpret the words "*living in a given State*" in a paragraph addressing the distinction between citizens and non-citizens (as Russia concedes), as a statement by the CERD Committee that Article 5 as a whole only applies within the national territory of the State Party. Against this deduction stands, of course, the actual practice of the CERD Committee, which has not hesitated to examine the compliance of State Parties with their obligations under the 1965 Convention in respect of conduct outside their own national territories.

4.80 In conclusion, Russia's reliance on the *travaux préparatoires*, the CERD Committee's General Recommendation 20 and academic commentary exposes the poverty of its arguments in respect of the spatial scope of the individual obligations in the 1965 Convention.

Section V. Conclusion

4.81 In conclusion, general international law recognizes the extraterritorial application of human rights obligations of the kind reflected in the 1965 Convention where they arise in human rights instruments of a universal character in the circumstances of this case. The pertinent international jurisprudence has consistently recognized that human rights obligations apply to a State's extraterritorial conduct whenever it exercises power or authority over the victims of that State's alleged human rights violations. In the alternative, Georgia submits that one of the grounds of extraterritorial application of the 1965 Convention acknowledged by Russia, *viz.* "the effective control of a territory", was plainly satisfied in respect of Russia's conduct in South Ossetia and Abkhazia during the relevant times.

CHAPTER V.

**RUSSIA'S FOURTH PRELIMINARY OBJECTION: LACK OF
JURISDICTION *RATIONE TEMPORIS***

Section I. Introduction

5.1 In Chapter VI of its *Preliminary Objections*, the Russian Federation deals with what is described as its fourth preliminary objection. As presented, this has three elements or strands:

- “[t]o alert the Court to a tension”, viz. the tension between Georgia’s emphasis on events in the 1990s and the fact that it “is seeking relief from the Court only with respect to acts occurring after – or with continuing effect from” 2 July 1999, the date when the 1965 Convention entered into force with respect to Georgia⁴⁹⁶;
- “[t]o identify to the Court” the alleged fact that Georgia seeks remedies with respect to events prior to 2 July 1999⁴⁹⁷;
- “to recall” that the Court cannot deal with facts or events subsequent to the filing of the *Application*⁴⁹⁸.

5.2 This is more properly described as a series of observations as to the alleged scope of the remedies sought by Georgia. Strictly speaking it is not a preliminary objection at all. In calling on the Court to record “tensions”, to “identify” pretended insights, and to “recall” matters more or less relevant or accurate is to treat the Court as a therapist rather than an adjudicator.

5.3 Before dealing with the individual points made by the Russian Federation, the legal position under the 1965 Convention must be identified.

5.4 The Convention was adopted by General Assembly resolution 2106 (XX) of 21 December 1965 – only the second universal human rights treaty in history,

⁴⁹⁶ Preliminary Objections of the Russian Federation, Vol. I (1 December 2009) (hereinafter “RPO”), para. 6.2(a).

⁴⁹⁷ *Ibid.*, para. 6.2(b).

⁴⁹⁸ *Ibid.*, para. 6.2(c).

after the Genocide Convention⁴⁹⁹. Of the Genocide Convention, it will be recalled, the Court said:

The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality. In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions⁵⁰⁰.

The Court's approach applies *mutatis mutandis* to the 1965 Convention, with all that implies for the force of Russia's fourth preliminary objection⁵⁰¹.

5.5 The Russian Federation (*sub. Nom.* the USSR) became a party to the 1965 Convention by ratification on 4 February 1969, just a month after the Convention entered into force. The Russian reservation to Article 22 was withdrawn on 8 March 1989. It follows that as from 4 February 1969, conduct by the Russian Federation contrary to its obligations under the Convention was unlawful *erga omnes*, and not merely on a bilateral basis *vis-à-vis* individual States. Unlike a multilateral convention on extradition or consular relations, the 1965 Convention

⁴⁹⁹ The 1951 Refugee Convention is arguably a human rights treaty (although generally not expressed in terms of rights). But until the adoption of the Refugee Protocol in 1967, it was not universal in scope.

⁵⁰⁰ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, I.C.J. Rep. 1951, pp. 15, 23.

⁵⁰¹ As the Court effectively acknowledged in its famous dictum in *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, I.C.J. Rep. 1970, pp. 3, 32, paras. 33-35.

is not just a delivery vehicle for bundles of bilateral relations. It is a treaty of constitutional significance in terms of the values it enacts.

5.6 Thus if it is true that Georgia was not qualified as a party to the 1965 Convention, prior to its accession on 2 June 1999, to invoke the responsibility of the Russian Federation for conduct which was contrary to the terms of the 1965 Convention, that conduct remained objectively unlawful. This is quite different from the ordinary case of temporal application of a new treaty, where conduct which was previously perfectly lawful becomes unlawful for the first time by virtue of the entry into force of the treaty. The Russian Federation was not entitled to discriminate against ethnic Georgians merely because Georgia's status viz-à-viz the 1965 Convention was still unsettled.

5.7 But even in the ordinary case of a new treaty obligation, it is established that a State which becomes a party to a treaty at a later date has standing to complain of conduct in breach of the treaty which occurs or continues to occur after that date. The 1965 Convention contains no reservation – such as that in *Phosphates in Morocco*⁵⁰² – precluding consideration of events prior to its entry into force, either in general or for a given Applicant State. That would be true even if these events were at first perfectly lawful; unless the treaty otherwise provides, such conduct if persisted in or maintained after the entry into force of the treaty is now prohibited. The position is *a fortiori* if the conduct when it first occurred was unlawful under the very same treaty.

5.8 Fundamentally, the Parties disagree as to the characterisation of ethnic cleansing, ethnically-motivated violence aimed at the displacement of whole populations from their homes and lands. For Georgia, the “disappearance” of a

⁵⁰² *Phosphates in Morocco (Italy v. France)*, Preliminary Objections, Judgement, 1938, P.C.I.J. Series A/B, No. 74. The jurisdictional reservation there referred to “any disputes which may arise after the ratification of the present declaration with regard to situations or facts subsequent to this ratification”.

whole population (or many members of one) is no less a continuing wrongful act than the disappearance of an individual has been held to be⁵⁰³. The 1965 Convention does not make neat distinctions between conduct which began prior to its entry into force for a given State Party and conduct performed subsequently. For example a person expelled on racial grounds prior to the entry into force of the 1965 Convention for the expelling State is still entitled under Article 5(d)(ii) to return if the 1965 Convention has since entered into force for that State: his “country” did not cease to be such just because he was expelled from it at a time when the 1965 Convention was not yet in force⁵⁰⁴. Precisely the same consideration applies if what has been expelled is a population, a large group of people. The 1965 Convention is as protective of ethnic groups as it is of individuals.

5.9 The situation Georgia faced on 2 July 1999 was that many Georgians, long-time residents of Abkhazia and South Ossetia, had been driven out of their homes and towns solely on grounds of their ethnicity. In consequence they were being denied many of the rights referred to in Article 5 of the 1965 Convention. Georgia says that this situation, present and pressing on 2 July 1999, is the responsibility of the Respondent State, which at all relevant times has been a party to the 1965 Convention and thus bound not to discriminate against these people. The Russian Federation, through its own conduct as well as that of others under its direction or control, has discriminated on prohibited grounds in securing the exclusion of these people and continues to do so in preventing their return. It is as simple as that.

⁵⁰³ On disappearance as a continuing wrongful act, see, e.g., *Cyprus v. Turkey*, no. 25781/94, Eur. Ct. HR. (2001), 120 ILR 12, pp. 57- 59, paras. 150, 157-8.

⁵⁰⁴ Cf. *Loizidou v. Turkey*, no. 1531/89, Eur. Ct. HR. (1996), 108 ILR 433, pp. 460-461, paras. 41-42.

5.10 Against this essential background, Georgia will comment briefly on each of the observations maintained as part of the fourth preliminary objection.

Section II. Failure to Implement the Right of Return and Otherwise to Comply with the 1965 Convention

5.11 The first of these observations concerns the implications for the case of a conclusion that the 1965 Convention has no retrospective effect. According to the Russian Federation:

It follows that CERD can have no application as between Russia and Georgia in respect of conduct relied on by Georgia taking place before 2 July 1999...⁵⁰⁵

Georgia agrees that the 1965 Convention, which entered into force for the Respondent State in 1969, has no retrospective effect. But the issue of retrospectivity does not arise in this case: at all material times the 1965 Convention was in force for the Respondent State⁵⁰⁶. Georgia also accepts, for the purposes of these proceedings, that it was not in a position to invoke the 1965 Convention in respect of breaches completed prior to its entry into force for Georgia on 2 July 1999. But it is not doing so. Rather it asserts a continuing violation by the Russian Federation of its obligations under the 1965 Convention, including Article 5, in relation to a situation which in no way was completed or resolved prior to 2 July 1999. In fact it remained uncompleted and unresolved – that is to say, it continued – right up through the filing of the *Application* on 12 August 2008, and beyond. The violations of the Convention in respect of enforced expulsion or the prevention of a right to return on grounds of ethnicity are continuing violations, in the same way that, as the Inter-American Court of

⁵⁰⁵ RPO, para. 6.4, citing Vienna Convention on the Law of Treaties, Art. 28.

⁵⁰⁶ Cf. International Law Commission, *Articles on State Responsibility of State for Internationally Wrongful Acts*, *Yearbook of the International Law Commission, with Commentaries*, Vol. I, Part One (2001), Art. 13.

Human Rights put it in the case of *Velasquez Rodriguez v. Honduras*, the “forced disappearance of human beings is a multiple and continuous violation of many rights under the Convention that the States Parties are obligated to respect and guarantee”.⁵⁰⁷ The same tens of thousands of ethnic Georgians who were collectively expelled from the territories in question prior to July 1999 were prevented by the Russian Federation from returning thereafter, and these same victims of ethnic discrimination continue to be prevented from exercising their right of return to the present day.

5.12 There is no “tension”⁵⁰⁸ between a historical account of how ethnic cleansing occurred – paraphrased by the Respondent as “events in the 1990s” – and a request for remedies for the future. The position of Georgians expelled from the territories in question and denied the right of return is not a mere function of history; it was, in Georgia’s submission, the result of conduct attributable to the Respondent, contrary to the 1965 Convention, and which the Respondent continues to commit and/or condone. That submission has to be proved, of course, if the Applicant State is to succeed. But that is a matter that can only be addressed at the merits stage of this case. For the purposes of these preliminary objections, the factual record set out in the *Application*, amplified in the *Memorial* and summarised in Chapters II to IV above is sufficient of itself to warrant the conclusion that the conduct in question “falls within” or “falls under” the 1965 Convention, as in force for the parties at relevant times⁵⁰⁹.

⁵⁰⁷ *Case of Velasquez Rodriguez*, Judgment, IACHR, Series C, No. 4 (29 July 1988), para. 155.

⁵⁰⁸ RPO, para. 6.2(a).

⁵⁰⁹ *Cf. Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment, I.C.J. Rep. 1996, pp. 803, 810, para. 16; *ibid.*, p. 855, para. 30 (Judge Higgins, sep. op.).

Section III. The Remedies Sought by Georgia

5.13 The Russian Federation's second observation involves "identifying to the Court" the alleged fact that Georgia seeks remedies with respect to events prior to 2 July 1999⁵¹⁰. In fact Georgia does not do so.

5.14 Five submissions, each of them remedial, are set out in the *Memorial*. They are as follows:⁵¹¹

(1) First, Georgia seeks a declaration:

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;

This must be read alongside the statement in the Introduction to the *Memorial* that Georgia "is seeking relief from the Court only with respect to acts occurring after – or with continuing effect from – the date when Georgia itself became a State party to the 1965 Convention, 2 June 1999"⁵¹². On that basis an award of, for example, compensation in respect of pre-1999 injuries is not being claimed.

(2) The second declaration sought by Georgia concerns breaches by the Respondent State of the Court's Provisional Measures Order of

⁵¹⁰ RPO, para. 6.2(b).

⁵¹¹ Memorial of Georgia (2 September 2009) (hereinafter "GM"), p. 407.

⁵¹² *Ibid.*, para. 1.13.

15 October 2008, and obviously presents no *ratione temporis* difficulty.

- (3) The third declaration sought by Georgia concerns cessation of breaches, as well as assurances and guarantees of non-repetition. Both remedies are forward looking, and again present no *ratione temporis* problem.
- (4) The fourth declaration is concerned about restitution of the *status quo ante*, in particular, the obligation to take “prompt and effective measures to secure the return of the internally displaced Georgians to their homes in South Ossetia and Abkhazia”. The Convention expressly imposes such an obligation, viz., not to discriminate against persons on racial (including ethnic) grounds in respect, *inter alia*, of their right to return to their homeland; in this respect it too is forward-looking.
- (5) The fifth and final declaration sought concerns compensation for the above breaches; if items (1)-(4) create no *ratione temporis* difficulties, then neither does item (5) which merely refers back to them.

5.15 For these reasons, the remedies sought fall well within the scope of the dispute submitted to the Court and present no *ratione temporis* problem for the exercise of the Court’s jurisdiction.

Section IV. Facts or Events Subsequent to the *Application*

5.16 The third strand of the Russian Federation’s fourth preliminary objection takes the form of a reminder: the Russian Federation seeks “to recall” that the Court cannot deal with facts or events subsequent to the filing of the *Application* unless those facts or events are connected to facts or events already falling within the Court’s jurisdiction, and then only if consideration of the later facts or events would not transform the character of the dispute⁵¹³. The Russian Federation regards the first of these conditions as “particularly relevant” here, and it denies

⁵¹³ RPO, para. 6.15.

that Georgia has established that facts or events in existence prior to 12 August 2008 trigger the Court's jurisdiction under Article 22 of the 1965 Convention⁵¹⁴.

5.17 An initial comment is that, at the preliminary objections stage, Georgia does not have to prove the facts on which its *Application* is based; it is sufficient that these are credibly asserted; questions of proof are for the merits.

5.18 In fact the principle stated by the Russian Federation is too restrictive. The position is that where the Court's jurisdiction is based on a treaty, there is no particular constraint on the Court's dealing with facts and events occurring after the *Application*, provided that they too fall within the scope of the Court's jurisdiction and do not involve the introduction of an entirely new claim in the sense of the Court's jurisprudence. The new facts must be related to the facts pleaded in the *Application*: if they were unrelated they would not be part of the same dispute. But the requirement of "continuity" or "connexity" is interpreted rather flexibly and not – as the Russian Federation implies – rigidly.

5.19 The Russian Federation cites as its main authority for its restrictive principle paragraph 87 of the Court's Judgment of 4 June 2008 in *Djibouti v. France*. The relevant passage reads as follows:

87. Although the Court has not found that France's consent is limited to what is contained in paragraph 2 of Djibouti's Application, it is clear from France's letter that its consent does not go beyond what is in that Application. Where jurisdiction is based on *forum prorogatum*, great care must be taken regarding the scope of the consent as circumscribed by the respondent State. The arrest warrants against the two senior Djiboutian officials, having been issued after the date the Application was filed, are nowhere mentioned therein. When the Court has examined its jurisdiction over facts or events subsequent to the filing of the application, it has emphasized the need to determine whether those facts or events were connected to the facts or events already falling

⁵¹⁴ *Ibid.*, para. 6.16.

within the Court’s jurisdiction and whether consideration of those later facts or events would transform the ‘nature of the dispute’ (see *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, *Merits, Judgment*, *I.C.J. Reports 1974*, p. 203, para. 72; *LaGrand (Germany v. United States of America)*, *Judgment*, *I.C.J. Reports 2001*, pp. 483-484, para. 45; see also *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, *Preliminary Objections, Judgment*, *I.C.J. Reports 1992*, pp. 264-267, paras. 69-70; and *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, *Judgment*, *I.C.J. Reports 2002*, p. 16, para. 36)⁵¹⁵.

But the Court in that case declined to apply these flexible principles; instead it took a strict view of the scope of the dispute, and did so explicitly on the ground that the case was one of *forum prorogatum*; jurisdiction existed only as a result of France’s voluntary submission and was therefore limited to the exact terms of that submission. As the Court said, in none of the cases cited:

was the Court’s jurisdiction founded on *forum prorogatum*... [W]hat is decisive is that the question of its jurisdiction over the claims relating to these arrest warrants is not to be answered by recourse to jurisprudence relating to “continuity” and “connexity”, which are criteria relevant for determining limits *ratione temporis* to its jurisdiction, but by that which France has expressly accepted in its letter of 25 July 2006.

5.20 In any event, the present claim fulfils both the criteria for admissibility which the Russian Federation has identified.

5.21 As to the first, it was demonstrated in Chapter 2 above that there existed a dispute between the parties as to Russia’s responsibility for breaches of the 1965 Convention prior to 12 August 2008. It is true that those breaches relate to a course of Russian conduct stretching back to the early 1990s, but the conduct was continuing, and it produced consequences – in terms especially of ethnic

⁵¹⁵ *Case concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, *Judgment*, *I.C.J. Rep. 2008*, p. 31, para. 87.

cleansing – which themselves triggered continuing obligations under the 1965 Convention which Russia conspicuously failed to observe. That being so (as Georgia has shown), the Court has jurisdiction.

5.22 The Russian Federation accepts that, on this basis, the Court is entitled to take into account, and to grant remedies with respect to, conduct attributable to it which occurred *after* the filing of the *Application* and which is a breach of the 1965 Convention. It is right to do so. Thus for example in *Cameroon/Nigeria (Request for Interpretation)*, the Court said:

The Court indicated, in its Judgment of 11 June 1998, that the limit of the freedom to present additional facts and legal considerations is that there must be no transformation of the dispute brought before the Court by the application into another dispute which is different in character. Whether that is the case ultimately has to be decided by the Court in each individual case in which the question arises. With regard to Nigeria's sixth preliminary objection, the Judgment of 11 June 1998 has concluded that '[i]n this case, Cameroon has not so transformed the dispute' (*ibid.*, p. 319, para. 100) and that Cameroon's Application met the requirements of Article 38 of the Rules. Thus, the Court made no distinction between 'incident' and 'facts'; it found that additional incidents constitute additional facts, and that their introduction in proceedings before the Court is governed by the same rules⁵¹⁶.

5.23 The second limitation is that the subsequent facts must form part of the same dispute which is the subject of the Application, and must not introduce an entirely new claim or dispute. Nauru's claim with respect to the distribution of the assets of the British Phosphate Commissioners was held to be a new claim which was not part of the dispute concerning rehabilitation of the phosphate lands

⁵¹⁶ *Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Preliminary Objections, Judgment, I.C.J. Rep. 1999, p. 31.

mined by the Commissioners; hence inadmissible⁵¹⁷. But it should be stressed, again, that the Court has applied this condition flexibly. Thus in a dispute of principle about fisheries jurisdiction, Germany could claim compensation for post-Application harassment of its trawlers⁵¹⁸. In a dispute over an arrest warrant issued against a serving Minister of Foreign Affairs, the subsequent dismissal of the Minister did not affect the Court's jurisdiction over the dispute⁵¹⁹. And a claim for breach of a provisional measures order may be dealt with along with the merits of the original claim, even though it will by definition involve important new facts and even a new source of obligation⁵²⁰. The latter point is highly relevant here, given the Russian Federation's continuous breaches of the Court's provisional measures order, catalogued in Chapter VI.

5.24 In the present case, there has been no such transformation in the character of the dispute by reason of Georgia's reliance on events subsequent to its *Application*. Although the intensity of the conflict increased markedly, its character did not change. Ethnic discrimination, denial of rights including the right of residence and the right to enjoyment of property, etc., were features before and after. Any other view would place a premium on post-Application aggravation or escalation of the dispute.

⁵¹⁷ *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment, I.C.J. Rep. 1992, pp. 264-267, paras. 69-70.

⁵¹⁸ *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, Merits, Judgment, I.C.J. Rep. 1974, p. 203, para. 72.

⁵¹⁹ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, I.C.J. Rep. 2002, p. 16, para. 36.

⁵²⁰ *LaGrand (Germany v. United States of America)*, Judgment, I.C.J. Reports 2001, p. 466; *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and other Mexican Nationals (Mexico v. United States of America)*, Judgment, I.C.J. Rep. 2009, p. 16, paras. 52-54.

Section V. Conclusion

5.25 To summarise, the facts and events on which Georgia relies fall within the scope of the Court's jurisdiction, as do the remedies it seeks. For these reasons the fourth preliminary objection of the Russian Federation should be dismissed.

CHAPTER VI.

**RUSSIA'S ONGOING DISCRIMINATION AGAINST ETHNIC
GEORGIANS NOTWITHSTANDING THE COURT'S *ORDER ON
PROVISIONAL MEASURES***

Section I. Introduction

6.1 In this Chapter, Georgia provides new information, covering the period since the filing of the *Memorial* on 2 September 2009, regarding Russia's responsibility for ethnic discrimination in South Ossetia and Abkhazia in violation of the Court's *Order* of 15 October 2008, as well as the 1965 Convention⁵²¹. This evidence shows that discrimination against ethnic Georgians by Russia itself and the *de facto* regimes under its control has continued and even increased.

6.2 In its *Order* of 15 October 2008, the Court indicated the following provisional measures, in paragraph 149, sections A through D:

- A. Both Parties, within South Ossetia and Abkhazia and adjacent areas in Georgia, shall
- (1) refrain from any act of racial discrimination against persons, groups of persons or institutions;
 - (2) abstain from sponsoring, defending or supporting racial discrimination by any persons or organizations;
 - (3) do all in their power, whenever and wherever possible, to ensure, without distinction as to national or ethnic origin,
 - (i) security of persons;
 - (ii) the right of persons to freedom of movement and residence within the border of the State;

⁵²¹ Georgia submits this Chapter in compliance with Paragraph 149(D) of the Order. *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Provisional Measures, Order, I.C.J. Rep. 2008 (hereinafter "Provisional Measures Order").

- (iii) the protection of the property of displaced persons and of refugees;
 - (4) do all in their power to ensure that public authorities and public institutions under their control or influence do not engage in acts of racial discrimination against persons, groups of persons or institutions;
- B. Both Parties shall facilitate, and refrain from placing any impediment to, humanitarian assistance in support of the rights to which the local population are entitled under the International Convention on the Elimination of All Forms of Racial Discrimination;
- C. Each Party shall refrain from any action which might prejudice the rights of the other Party in respect of whatever judgment the Court may render in the case, or which might aggravate or extend the dispute before the Court or make it more difficult to resolve;
- D. Each Party shall inform the Court as to its compliance with the above provisional measures⁵²².

6.3 The evidence presented below shows that Russia has continued to discriminate against ethnic Georgians, in the period between the filing of Georgia's *Memorial* and this pleading, in the following specific respects:

1. Russia has continued to use its own military forces to prevent ethnic Georgians, previously expelled from South Ossetia and Abkhazia, from exercising their right of return to those territories, in violation of

⁵²² Provisional Measures Order, para. 149(A)-(D).

paragraph 149(A)(3)(ii) of the *Order* of 15 October 2008 and Articles 2, 3 and 5 of the 1965 Convention.

2. Russia has continued to use its military forces to prevent ethnic Georgians still living in the Akhalkgori District of South Ossetia and the Gali District of Abkhazia from freely crossing the *de facto* administrative boundary with other parts of Georgia, in violation of paragraph 149(A)(3)(ii) of the *Order* of 15 October 2008 and Articles 2, 3 and 5 of the 1965 Convention.
3. Russia has continued to support, sponsor and defend discrimination against ethnic Georgians in South Ossetia and Abkhazia by parties under its control and influence, in violation of paragraph 149(A)(1), (2) and (4) of the *Order* of 15 October 2008 and Article 2(1)(b) of the 1965 Convention.
4. Russia has refused to protect the property of displaced persons and refugees from South Ossetia and Abkhazia, and has even appropriated some of their property for its own use without offering compensation of any kind, in violation of paragraph 149(A)(3)(iii) of the *Order* of 15 October 2008 and Articles 2 and 5 of the 1965 Convention.
5. Russia has continued to place impediments to access of ethnic Georgians in South Ossetia and Abkhazia to humanitarian assistance by blocking the entry into those territories of humanitarian and international monitoring organizations, in violation of paragraph 149(B) of the *Order* of 15 October 2008.

Section II. Russia’s Use of Its Military Forces to Deny Ethnic Georgian IDPs from Exercising Their Right of Return to South Ossetia and Abkhazia

6.4 In the *Memorial*, Georgia presented evidence showing that Russian military forces serve as the border guards in South Ossetia and Abkhazia, and exercise control over all entry to and exit from those territories⁵²³. Russia itself informed the Court in April 2009 that South Ossetia and Abkhazia formally ceded control over their administrative borders to Russia⁵²⁴. In the period since the filing of the *Memorial*, Russia has enhanced its control over these administrative boundaries and has used it, *inter alia*, to prevent the return of ethnic Georgians who were expelled from those regions during previous ethnic cleansing campaigns.

6.5 Because of the restrictions imposed by Russian border guards, the Parliament of the Council of Europe (PACE) found in its most recent report that “the return of IDPs (internally displaced persons) to ethnic Georgian villages in South Ossetia and Abkhazia is extremely difficult if not impossible...”⁵²⁵. The PACE explained:

... The situation is compounded by the restrictions on freedom of movement over the ABL [administrative boundary lines], which has become increasingly more difficult since the deployment of [Russian] FSB Border guards in the framework of the co-operation agreements that were signed between Russia and the de facto authorities of these two regions⁵²⁶.

⁵²³ See Memorial of Georgia (2 September 2009) (hereinafter “GM”), paras. 5.18-5.22, 6.83-6.86, 7.4-7.6, 7.36-7.51.

⁵²⁴ *Ibid.*, para. 7.5.

⁵²⁵ Council of Europe, Parliamentary Assembly, *The war between Georgia and Russia: one year after*, Doc. No. 12010 (14 September 2009) (hereinafter, “PACE, Doc. No. 12010”), p. 8. Written Statement of Georgia on Preliminary Objections (hereinafter “GWS”), Vol. III, Annex 117.

⁵²⁶ *Ibid.*, p. 8. GWS, Vol. III, Annex 117.

The PACE report concluded by urging Russia to grant freedom of movement to Georgian civilians over the administrative boundaries of the two regions and to recognize the right of return of internally displaced persons⁵²⁷.

6.6 Unfortunately, instead of recognizing the right of return of ethnic Georgian IDPs, Russia has effectively eliminated it. An investigation by the Special Representative of the UN Secretary-General on Internally Displaced Persons confirmed in January 2010 that “[o]nly very few [ethnic Georgian] IDPs have been able to return to the Tskhinvali region/South Ossetia”⁵²⁸.

6.7 The return of ethnic Georgian IDPs to South Ossetia and Abkhazia has been blocked by Russia itself. Since the end of 2009, Russia has consolidated its control over South Ossetia and Abkhazia’s borders. In January 2010, President Medvedev announced that Russia will henceforth help South Ossetia to reinforce its boundaries⁵²⁹. He further stated that the reinforcement of South Ossetia’s borders was “a priority goal of the border patrol agency in light of the obligations Russia has undertaken”⁵³⁰. A former Russian FSB officer in South Ossetia explained Russia’s actual role in “reinforc[ing]” these boundaries:

[t]he border is controlled only by Russian border-guards. There are no Ossetians at the border. ... [T]he Ossetians, in fact, do not have their own FSB. The only FSB functioning in South Ossetia is the Russian one and the existence of any South Ossetian security

⁵²⁷ *Ibid.*, p. 8 and para. 11. GWS, Vol. III, Annex 117.

⁵²⁸ U.N. General Assembly, Human Rights Council, *Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, Walter Kälin, Addendum, Follow up to the Report on the Mission to Georgia (A/HRC/10/13/Add.2)*, U.N. Doc. A/HRC/13/21/Add.3 (14 January 2009) (hereinafter “Report of the Representative of the Secretary-General on Internally Displaced Persons”), p. 1. GWS, Vol. III, Annex 100.

⁵²⁹ “Medvedev: The Russian Federation will continue strengthening the boundaries of Abkhazia and South Ossetia”, *Vzgliad Dlovaya Gazeta* (28 January 2010). GWS, Vol. IV, Annex 223.

⁵³⁰ *Ibid.*

service is a mere formality. In reality, everything is controlled by the Russian FSB⁵³¹.

6.8 He described the command structure as follows:

There are border sub-divisions in specific directions, in each of the four districts of South Ossetia. Each sub-division is led by a Russian FSB Commandant to whom commanding officers of the bases are subordinated. ... [The Russian] border guards are given specific instructions from the head of the base who is directed by the Russian FSB Commandant responsible for the specific sub-division of the Russian FSB Border Service in South Ossetia⁵³².

6.9 The Chair of South Ossetia's *de facto* Commission on Delimitation and Demarcation confirmed that Russia's State agencies instruct the *de facto* administration on matters related to the border⁵³³.

6.10 Russia controls the administrative borders of Abkhazia as well. In late 2009, Russian Prime Minister Putin announced that Russia intends to spend 15-16 billion rubles (approximately US\$470-546 million) in 2010 to reinforce the administrative border and to build a Russian military base in Abkhazia⁵³⁴. On 17 February 2010, Russia signed a collaboration agreement with the *de facto* Abkhazian authorities relating to managing and restricting what it termed "illegal migration" across the administrative boundary⁵³⁵. Russia is finalizing a similar agreement with the South Ossetian *de facto* authorities, also to more clearly

⁵³¹ Witness Statement of Vitaliy Khripun (4 March 2010), p. 2. GWS, Vol. IV, Annex 228.

⁵³² *Ibid.*, pp.1-2.

⁵³³ "Work on the establishment of state borders has begun", *OS Inform* (14 Aug. 2009). GWS, Vol. IV, Annex 212.

⁵³⁴ Mikhail Fomichev, "Russia will direct 15-16 billion rubles for ensuring security of Abkhazia", *RIA Novosti* (12 August 2009). GWS, Vol. IV, Annex 211.

⁵³⁵ President of the Republic of Abkhazia, Press Release, "Russia, Abkhazia Signed Agreement on Joint Russian Military Base on Abkhaz Territory" (17 February 2010). GWS. Vol. IV, Annex 192.

enable Russian forces to prevent “illegal migration”⁵³⁶. The agreement will confirm Russia’s role “in the organisation of the immigration control, registration of persons illegally crossing the states’ borders, exchange of information about exposed illegal migration channels, about citizens involved in the organisation of illegal migration that are staying in the territory of the two countries”⁵³⁷.

6.11 “Illegal migration” is Russia’s Orwellian terminology for ethnic Georgian IDPs seeking to exercise their internationally-recognised right of return to South Ossetia and Abkhazia. Russia makes clear that this is not to be allowed. According to the Russian Federation’s Minister of Foreign Affairs, ethnic Georgian IDPs “can return *only when all conditions for that exist*, when the legal and economic aspects of their return are agreed upon”⁵³⁸. Russia’s “conditions”, which have no foundation in international law and which breach the *Order* of 15 October 2008 and the 1965 Convention, led the Council of Europe’s monitoring committee to report that “the return of IDPs to ethnic Georgian villages in South Ossetia and Abkhazia is extremely difficult if not impossible”⁵³⁹. The UN Representative on IDPs reported that “the *de facto* authorities in Tskhinvali *attach conditions to the right to return that are not in accordance with international human rights* or the Guiding Principles on Internal Displacement since *they tie exercise of the right to return to political demands*”⁵⁴⁰. The Report

⁵³⁶ “RF, S Ossetia to agree on visa free travel of citizens”, *ITAR-TASS* (17 December 2009). GWS, Vol. IV, Annex 216.

⁵³⁷ *Ibid.*

⁵³⁸ “Lavrov: Refugees will return to Abkhazia after legal issues are regulated” *Rosbalt* (24 December 2009) (emphasis added). GWS, Vol. IV, Annex 217; Ministry of Foreign Affairs of the Russian Federation, *Transcript of the Statement and Answers to the Questions of the Mass Media by Sergey Lavrov, Minister of Foreign Affairs of the Russian Federation, at the Joint Press Conference on the Outcome of the Negotiations with Sergey Shamba, Minister of Foreign Affairs of Abkhazia, Moscow, 24 December 2009* (24 December 2009). GWS, Vol. IV, Annex 190.

⁵³⁹ PACE, Doc. No. 12010, *op. cit.*, p. 8. GWS, Vol. III, Annex 117.

⁵⁴⁰ Report of the Representative of the Secretary-General on Internally Displaced Persons, *op. cit.*, para. 27 (emphasis added). GWS, Vol. III, Annex 100.

by the European Union's Independent International Fact-Finding Mission on the Conflict in Georgia similarly stated: "It needs to be stressed that both South Ossetia and Abkhazia, together with Russia, must take appropriate measures to ensure that IDPs/refugees, including those from the conflicts of the early 1990s, are able to return to their homes *with no conditions imposed other than those laid down in relevant international standards...*"⁵⁴¹.

6.12 The *de facto* authorities do not hide the fact that it is their official policy, enforced by Russian FSB border guards, to prohibit the return of ethnic Georgian IDPs. Abkhazia's *de facto* President expressed the policy bluntly in December 2009: "I do not think that so many refugees ought to be permitted to return to Abkhazia." He ruled out the return of the refugees because in his view, it will lead to a new conflict. He continued: "For the people who are currently in Georgia, conditions for their social-economic adaptation must be established by Georgia itself"⁵⁴². He reaffirmed the policy during an official trip to Moscow in February 2010⁵⁴³.

6.13 In implementation of this policy, ethnic Georgians attempting to return to their villages have been repeatedly detained by the Russian border guards, incarcerated and abused. Typical is the case of four Georgian teenagers arrested and jailed for months after attempting to reach the home of one of the boys in South Ossetia. In these particular cases, the international community responded

⁵⁴¹ Independent International Fact-Finding Mission on the Conflict in Georgia, Report Vol. I (September 2009) (hereinafter, "IIFFMCG Report, Vol. I"), pp. 27-28 (emphasis added). GWS, Vol. III, Annex 120.

⁵⁴² "Bagapsh: Georgia should take care of the refugees from Abkhazia", *Rosbalt* (25 December 2009). GWS, Vol. IV, Annex 219. *De facto* Abkhazian Foreign Minister Sergey Shamba further confirmed the position that there is no obligation to allow Georgians their right of return. "Lavrov: Refugees will return to Abkhazia after legal issues are regulated", *Rosbalt* (24 December 2009), *op. cit.* GWS, Vol. IV, Annex 217.

⁵⁴³ President of the Republic of Abkhazia, Press Release, "Abkhazia Is Not Going To Return All Georgian Refugees – Bagapsh" (16 February 2010). GWS, Vol. IV, Annex 191.

to the arrests. The European Union Monitoring Mission in Georgia (EUMM) expressed its “profound concern” over the detention of the young Georgians and the Council of Europe’s Commissioner for Human Rights, Thomas Hammarberg, directly intervened in December 2009 to secure their release⁵⁴⁴. All four of the Georgian boys were accused of having illegally crossed the administrative border. One of them recounted his experience after Mr. Hammarberg secured his release.

6.14 Giorgi Romelashvili, 14 years old, was arrested after reaching his house in Kheiti village, which he reports “was almost completely burnt down in order to avoid the return of the Georgian population”⁵⁴⁵. Once there, 15 armed men in uniform and civilian clothes arrived at his home, beat and arrested him: “They tied our hands, were physically abusing us and asking where we had hidden weapons. One of them put a pistol into my mouth and threatened that if I did not tell him where I had hidden the gun, he would kill me. I kept answering that I did not have any weapon and that we just came to see my house”⁵⁴⁶. He was then taken to a detention centre in Tskhinvali where he was forced to sign Russian language documents he did not understand. While there, he was “beaten about 20 times that night. During the beatings, they were saying ‘this land is ours and Georgians have nothing to do here’”⁵⁴⁷. He was later taken to a court where: “They talked to each other in Ossetian and Russian – I did not understand their conversation and nobody translated it to us. They told us that we were sentenced to 2 months detention. Then they brought us back to the prison”⁵⁴⁸.

⁵⁴⁴ European Union Monitoring Mission in Georgia, Press Release, “EUMM expresses profound concern over the detention of four under aged Georgian citizens by the de facto South Ossetian authorities” (8 November 2009). GWS, Vol. III, Annex 123.

⁵⁴⁵ Witness Statement of Giorgi Romelashvili (27 February 2010), p. 1. GWS, Vol. IV, Annex 227.

⁵⁴⁶ *Ibid.*, pp. 1-2.

⁵⁴⁷ *Ibid.*, p. 2.

⁵⁴⁸ *Ibid.*, p. 3.

6.15 During detention Giorgi Romelashvili met another Georgian boy, Giorgi Archuadze, whose whereabouts were previously unknown, as he had been arrested several months earlier and prohibited from contacting anyone, including his family. He was arrested after attempting to visit his house in the village of Beloti in South Ossetia. As he found his entire village empty and all houses, including his own, “burnt and destroyed”, he slept in a neighbouring village. “Since it is an ethnic Ossetian village, it had not been harmed as our village had been. The houses were all still intact there”⁵⁴⁹. The next morning he was arrested. He reported:

They brought me to the Police Station in Tskhinvali and started to interrogate me. I was asked who I was and why I had entered the territory controlled by them. I asked for a lawyer, but they did not bring one. I tried to explain that the only thing I wanted was to see my house ... While I was providing the testimony, one of them physically abused me; in particular he was hitting my knees with a ruler and forcing me to tell them who had sent me to their territory.

Then they opened a safe in the room and took out 2 hand grenades. Then they took me to another building located in Tskhinvali, where we met some other people. They were forcing me to say that the mentioned hand grenades were mine. In particular, a stranger hit me in the face and threatened to kill me, if I did not say that those hand grenades were mine. Despite the threats, I agreed to nothing.

They tried to influence me for one more hour. Then they made me sign some documents that were drawn up in Russian. I am not aware of the contents of the documents they made me sign, since they did not let me read them...⁵⁵⁰.

He was later sentenced to six months of detention⁵⁵¹.

⁵⁴⁹ Witness Statement of Giorgi Archuadze (27 February 2010), p. 1. GWS, Vol. IV, Annex 226.

⁵⁵⁰ *Ibid.*, pp. 1-2.

⁵⁵¹ *Ibid.*, p. 2.

6.16 In the face of Russia’s refusal to allow ethnic Georgians to cross the administrative boundaries and return to South Ossetia and Abkhazia, the Council of Europe passed a resolution in September 2009 calling on “Russia and the *de facto* authorities of South Ossetia and Abkhazia to fully and unconditionally ensure the right of return of internally displaced persons (IDPs), who fled following the August 2008 hostilities”⁵⁵².

6.17 A similar call was made by the UN Secretary-General’s Representative on IDPs, who urged all “parties [to] take all necessary steps to ensure persons displaced by the recent and past conflicts are able to enjoy their right to return voluntarily to their former homes in safety and dignity, and to guarantee recovery of their property and possessions, or where this is impossible, obtain compensation or other just reparation”⁵⁵³.

6.18 The General Assembly responded to Russia’s continuing refusal to allow displaced ethnic Georgians to exercise their right of return, calling for “the development of a timetable to ensure the voluntary, safe, dignified and unhindered return of all internally displaced persons and refugees affected by the conflicts in Georgia to their homes”⁵⁵⁴. Russia rejected the Resolution⁵⁵⁵, as did Abkhazia’s *de facto* Minister of Foreign Affairs, who stated: “the Resolution...

⁵⁵² Council of Europe, Parliamentary Assembly, *Resolution 1683, The war between Georgia and Russia: one year after* (29 September 2009) (hereinafter “PACE, Resolution 1683”), para. 6.2. GWS, Vol. III, Annex 119.

⁵⁵³ Report of the Representative of the Secretary-General on Internally Displaced Persons, *op. cit.*, para 47. GWS, Vol. III, Annex 100.

⁵⁵⁴ U.N. General Assembly, *Resolution 63/307, Status of internally displaced persons and refugees from Abkhazia, Georgia, and the Tskhinvali region/South Ossetia, Georgia*, U.N. Doc. A/RES/63/307 (30 September 2009). GWS, Vol. III, Annex 102.

⁵⁵⁵ Pursuant to rule 74 of the rules of procedure of the General Assembly, Russia unsuccessfully moved a no-action motion on the draft resolution.

that does not take into account our position is not viable”⁵⁵⁶. The General Assembly Resolution that Russia rejected, and that the *de facto* authorities declared “not viable”, called for no more from Russia than that which was already required by this Court’s *Order* of 15 October 2008 and the 1965 Convention. Russia’s rejection of it, in the circumstances, is especially disturbing.

Section III. Russia’s Use of Its Military Forces to Deny Ethnic Georgians Living in South Ossetia and Abkhazia the Right to Freely Cross the Administrative Boundaries

6.19 Russia has not only denied ethnic Georgian IDPs their right of return, it has also used its control over the administrative boundaries to discriminate against the ethnic Georgians who remain in South Ossetia and Abkhazia and who wish to cross the administrative boundary into other parts of Georgia. Thus, the Council of Europe has condemned “Russia and the breakaway regions of Abkhazia and South Ossetia” for continuing to place “undue restrictions on the local population wishing to cross the administrative boundary line”⁵⁵⁷. In regard to Russia’s discriminatory actions along the border, the Council of Europe’s Rapporteur on Migration, Refugees and Population, who visited the region, reported that:

The Administrative boundary line is becoming increasingly difficult for local people to cross, primarily due to the attitude of the *de facto* Abkhaz and South Ossetian authorities and the support and steps taken by the Russian authorities to strengthen and control the administrative boundary line. The impact of these restrictions can be devastating for the local population and affects, *inter alia*, their ability to obtain medical treatment, their possibility to maintain family contacts, the opportunity of carrying out economic activities, their access to pension payments and other

⁵⁵⁶ President of the Republic of Abkhazia, Press Release, “Return of Refugees According To Georgia’s Plan May Lead to New Conflicts and Bloodshed -- Sergey Shamba” (11 September 2009). GWS, Vol. IV, Annex 188.

⁵⁵⁷ PACE, Resolution 1683, *op. cit.*, para. 7. GWS, Vol. III, Annex 119.

benefits, access to education, etc. While the situation is bad, it is clear the situation could get worse. If the administrative boundary closes completely, there is every prospect that there will be a further wave of IDPs in particular from the Gali region and from the Akhagori district⁵⁵⁸.

6.20 Similarly, the UN Secretary-General's Representative on IDPs reported that he was "particularly concerned about the hardships caused by the almost total closure of the administrative boundary line"⁵⁵⁹. According to his report: "The closure of the administrative boundary line affects internally displaced persons, but even more so those elderly and vulnerable persons who could not flee and stayed behind. They face enormous difficulties in the absence of their displaced relatives or neighbours on whose support they had relied in the past"⁵⁶⁰.

6.21 The Russian border guards enforce the administrative boundary closure by arresting ethnic Georgians who attempt to cross it. In one week in October 2009, Russian troops arrested 16 ethnic Georgians from the border village of Gremiskhevi for trying to cross into a neighbouring part of Georgia⁵⁶¹. The EUMM expressed its concern over their detention, pointing out that the arrests "seriously affect[ed] the daily life of this village"⁵⁶². The head of the Russian FSB border guard operation in Abkhazia confirmed that 433 people were

⁵⁵⁸ Council of Europe, Parliamentary Assembly, Committee on Migration, Refugees and Population, *The war between Georgia and Russia: one year after*, Doc. No. 12039 (28 September 2009) (hereinafter "PACE, Doc. No. 12039"), para. 19. GWS, Vol. III, Annex 118.

⁵⁵⁹ Report of the Representative of the Secretary-General on Internally Displaced Persons, p. 2, *op. cit.* GWS, Vol. III, Annex 100.

⁵⁶⁰ *Ibid.*, para. 32.

⁵⁶¹ "Russian Forces Arrest More Georgians Near South Ossetia", *Radio Free Europe/Radio Liberty* (30 October 2009). GWS, Vol. IV, Annex 215.

⁵⁶² European Union Monitoring Mission in Georgia, Press Release, "EUMM expresses concern about the recent incident involving 16 Georgian citizens" (26 October 2009). GWS, Vol. III, Annex 122.

detained for “border offences” from May to December 2009⁵⁶³. In the Gali District alone, Russian arrests of Georgian residents are too numerous to list here; however several are detailed in the Abkhazian IDP Service Report at Annex 193.

6.22 Ethnic Georgians attempting to cross the administrative border are often abused because of their ethnicity by the Russian border guards. The treatment given to them was described by one of the former Russian border guards in South Ossetia:

For example, you have a citizen of Georgia with a Georgian passport. Almost all of them have Georgian documents. Our side wants to humiliate them, so we tell them they have to go somewhere and make a translation [into Russian] and certify it at a notary’s. If they don’t, starting from the 1st of the next month, they’ll be barred from crossing the border at all. If you look where this Perevi is situated, it’s far away from Tbilisi or Gori. If this person comes from a village, he hardly has any experience with a notary.

Another example was a ban on flour. Nobody is allowed to take flour out of Ossetia. They consider this the territory of South Ossetia, so it is forbidden to take flour out, even though villages are [located right on the border], practically divided into two parts. That means one part of the village has flour and the other part doesn’t. And people have nothing to eat⁵⁶⁴.

6.23 The Russian FSB officer explained that discrimination against ethnic Georgians was instigated by his superior officers: “I was told that my duty was to control the so-called ‘state’ border of South Ossetia. ... Furthermore, I was instructed that Georgians were committing genocide against the Ossetian people

⁵⁶³ International Crisis Group, *Abkhazia: Deepening Dependence*, Europe Report No. 202 (26 February 2010), p. 4. GWS, Vol. IV, Annex 194.

⁵⁶⁴ “FSB Defector Describes ‘Amoral’ Conditions in South Ossetia”, *Radio Free Europe/Radio Liberty* (24 December 2009). GWS, Vol. IV, Annex 218.

and our duty was to protect Ossetian people and suppress terrorist acts by Georgians”⁵⁶⁵. As a result:

Russian border-guards humiliate Georgians at every opportunity. During my service in South Ossetia, I witnessed such incidents every day. They were forcing Georgian passengers passing through the checkpoint to get off the buses, always treating them rudely, swearing and otherwise humiliating them; creating unnecessary, artificial barriers through deliberately prolonging the procedure of search; sometimes in the absence of any suspicion, asking bus drivers to remove wheels from the buses, so that they could check whether there was an explosive device. In the meantime, the passengers of the buses were forced to wait at the checkpoint until the procedure of checking the bus was completed. This was done just in order to have fun by watching how Georgians were humiliated and oppressed.

...

Only Georgians were treated so negatively by Russian border guards. There has been no negative and rude attitude towards Ossetians⁵⁶⁶.

6.24 No exceptions are made for Georgians crossing the administrative boundaries for medical treatment or education⁵⁶⁷. On 15 September 2009, Russian soldiers arrested school children crossing the administrative line in order to attend Georgian schools in the neighbouring Tsalenjinka District. The soldiers took their textbooks and bags, and threatened them with expulsion if they tried

⁵⁶⁵ Witness Statement of Vitaliy Khripun (4 March 2010), *op. cit.*, p. 1. GWS, Vol. IV, Annex 228.

⁵⁶⁶ *Ibid.*, p. 3.

⁵⁶⁷ Cases of Russian border guards barring ill Gali residents from crossing the boundary line for medical attention abound: “As an example, during the winter holiday, Russian border guards stopped the teacher at the Saberio school who was taking his elderly father to Zugdidi hospital. Before that, during the flu epidemic in December, Russian border guards did not allow parents to take their children to Zugdidi to get medical treatment. At the Nabakevi-Khurcha road, Russians stopped the car heading to Zugdidi, transporting women and 2 ill children. Disregarding numerous requests to let them go, Russians told the passengers that they would not be allowed to cross the border and that they were to go to the Gali hospital”. Report of Gali Educational Resource Centre (March 2010), pp. 6-7. GWS, Vol. IV, Annex 195.

again to attend the school⁵⁶⁸. On 20 January 2010, Russian border guards arrested 42 school children for “illegal crossing of the border” en route to attend Georgian schools in the same Tsalenjinka District⁵⁶⁹. This time the students were held until their parents appeared, but the parents were placed under arrest before both groups were released⁵⁷⁰. Their release was contingent on “the condition that from the next day on, they would not cross the border to attend the classes at Tsalenjinka District schools”⁵⁷¹. In defending such abuses, the *de facto* Abkhaz President’s representative in the Gali District stated: “[I]f children from Gali want to study in Zugdidi schools [in western Georgia adjacent to the Gali District], let them move and live there”⁵⁷².

6.25 In Akhgori, which the *de facto* authorities claim as part of South Ossetia and where the remaining ethnic Georgians under Russian control are concentrated, they may only cross the boundary if they carry notarized documents in Russian and a foreign passport⁵⁷³. Georgian language documents and identification cards, which are held by most ethnic Georgians, are not accepted⁵⁷⁴.

⁵⁶⁸ Service for the Protection of Rights of Internally Displaced Population from Abkhazia, Under the Supreme Council of Abkhazia, *Report (September 2009-February 2010)* (12 March 2010), p. 7. GWS, Vol. IV, Annex 193.

⁵⁶⁹ Report of Gali Educational Resource Centre (March 2010), *op. cit.*, p. 6. GWS, Vol. IV, Annex 195.

⁵⁷⁰ Natia Mskhiladze, “Path closed for the pupils”, *24 Hours* (21 January 2010). GWS, Vol. IV, Annex 222.

⁵⁷¹ Report of Gali Educational Resource Centre (March 2010), *op. cit.*, p. 6. GWS, Vol. IV, Annex 195.

⁵⁷² “Kishmaria offers children from Gali district to move to Zugdidi”, *RIA Novosti* (23 September 2009). GWS, Vol. IV, Annex 214.

⁵⁷³ “South Ossetia To Require Georgian IDs Translated Into Russian”, *Radio Free Europe/Radio Liberty* (8 January 2010). GWS, Vol. IV, Annex 220; George Dvali and Zaur Farniev, “South Ossetia demands foreign passports from Georgia”, *Kommersant* (11 January 2010). GWS, Vol. IV, Annex 221. *See also* Witness Statement of Vitaliy Khripun (4 March 2010), *op. cit.*, p. 2. GWS, Vol. IV, Annex 228.

⁵⁷⁴ “South Ossetia To Require Georgian IDs Translated Into Russian”, *Radio Free Europe/Radio Liberty* (8 January 2010), *op. cit.* GWS, Vol. IV, Annex 220; George Dvali and Zaur Farniev, “South Ossetia demands foreign passports from Georgia”, *Kommersant* (11 January 2010), *op. cit.*

However, to obtain a Russian passport, Georgians must give up their Georgian citizenship⁵⁷⁵. The head of the *de facto* administration in Akhgori explained the reason: “[L]ocal residents living at the administrative boundary should decide if they want to live in Georgia or in South Ossetia”⁵⁷⁶. In other words, to continue living in South Ossetia and crossing into Georgia ethnic Georgians must stop being Georgians.

6.26 The Council of Europe’s Parliament warned that if Russia does not cease its discriminatory actions, it will cause another mass departure of those ethnic Georgians who still remain in South Ossetia and Abkhazia. “With the departure of UNOMIG and the increasing restriction of movement of civilians over the ABL [administrative boundary line], as well as the mounting pressure to obtain South Ossetian or Abkhazian passports, there is a serious risk of a new exodus of ethnic Georgians from the Gali and Akhgori districts”⁵⁷⁷.

6.27 Thus, the Parliament of the Council of Europe, using language similar to that used by the Court in paragraph 149(A)(3)(ii) of its provisional measures Order, called on “Russia and the *de facto* authorities of South Ossetia and Abkhazia to remove any impediments to the freedom of movement of Georgian citizens across the administrative boundary lines”⁵⁷⁸. The PACE urged “the Russian authorities, before the end of [2009], to grant freedom of movement for Georgian civilians across the administrative boundary lines and lift restrictions, including with regard to the point of entry, of international and humanitarian

GWS, Vol. IV, Annex 221. *See also* Witness Statement of Vitaliy Khripun (4 March 2010), *op. cit.*, p. 2. GWS, Vol. IV, Annex 228.

⁵⁷⁵ “South Ossetia To Require Georgian IDs Translated Into Russian”, *Radio Free Europe/Radio Liberty* (8 January 2010). GWS, Vol. IV, Annex 220.

⁵⁷⁶ “South Ossetia To Require Georgian IDs Translated Into Russian”, *Radio Free Europe/Radio Liberty* (8 January 2010), *op. cit.* GWS, Vol. IV, Annex 220.

⁵⁷⁷ PACE, Doc. No. 12010, *op. cit.*, p. 9. GWS, Vol. III, Annex 117.

⁵⁷⁸ PACE, Resolution 1683, *op. cit.*, para. 5, GWS, Vol. III, Annex 119.

organisations and humanitarian aid to the two regions”⁵⁷⁹. Russia has heeded neither the Council of Europe nor the Court.

Section IV. Russia’s Ongoing Support, Sponsorship and Defence of Discrimination against Ethnic Georgians in South Ossetia and Abkhazia

6.28 Russia continues to be in breach of the Court’s *Order on Provisional Measures* for refusing to take action to prevent discrimination against the ethnic Georgians who remain in South Ossetia and Abkhazia. Nor has Russia taken action to remedy prior discriminatory acts, including acts of ethnic cleansing committed by its own State organs. Indeed, Russia persists in denying that ethnic cleansing occurred in South Ossetia or Abkhazia, and it continues to deny its obligation to investigate those human rights violations.

6.29 In September 2009, the Monitoring Committee of the Council of Europe’s Assembly reported that “the ethnic Georgian villages in the Tskhinvali region have been razed to the ground, bulldozed over and no longer exist. This systematic destruction of ethnic Georgian villages, combined with the effective impossibility for ethnic Georgian IDPs to return, confirm that this region was ethnically cleansed of ethnic Georgians”⁵⁸⁰. The Committee considered “unacceptable” the “failure of Russia and the de facto authorities to bring these practices to a halt and their perpetrators to justice, as demanded by the Assembly”⁵⁸¹.

6.30 Numerous international organizations have called on Russia to fulfil its obligation to investigate and prosecute those responsible for the ethnic cleansing and destruction of property inflicted on ethnic Georgians in South Ossetia and

⁵⁷⁹ *Ibid.*, para. 12.2.

⁵⁸⁰ PACE, Doc. No. 12010, *op. cit.*, p. 8. GWS, Vol. III, Annex 117.

⁵⁸¹ *Ibid.*, p. 8.

Abkhazia. For example, on 24 November 2009, the UN Human Rights Committee called on Russia to:

conduct a thorough and independent investigation into all allegations of involvement of members of Russian forces and other armed groups under their control in violations of human rights in South Ossetia. The State party should ensure that victims of serious violations of human rights and international humanitarian law are provided with an effective remedy, including the right to compensation and reparations⁵⁸².

6.31 The Human Rights Committee reminded Russia that:

the territory of South Ossetia was under the de facto control of an organized military operation of the State party [Russia], which therefore bears responsibility for the actions of such armed groups. The Committee notes with concern that, to date, the Russian authorities have not carried out any independent and exhaustive appraisal of serious violations of human rights by members of Russian forces and armed groups in South Ossetia and that the victims have received no reparations⁵⁸³.

6.32 Likewise, the Parliament Assembly of the Council of Europe “condemn[ed] Russia and the *de facto* authorities of South Ossetia for not having brought resolutely to a halt and seriously investigated the ethnic cleansing of ethnic Georgians that by all accounts took place in South Ossetia during and after the war and for not having brought the perpetrators to justice”⁵⁸⁴. Like the UN Human Rights Committee, the PACE: “recall[ed] that, under international law, Russia bears responsibility for violations of human rights and humanitarian law in those areas that fall under its de facto control”⁵⁸⁵. Hence, “it strongly urg[ed] the

⁵⁸² U.N. Human Rights Committee, *Concluding observations of the Human Rights Committee, Russian Federation*, U.N. Doc. CCPR/C/RUS/CO/6 (24 November 2009) (hereinafter “Concluding observations of the Human Rights Committee, Russian Federation”), para. 13. GWS, Vol. III, Annex 103.

⁵⁸³ *Ibid.*, para. 13.

⁵⁸⁴ PACE, Resolution 1683, *op. cit.*, para. 9. GWS, Vol. III, Annex 119.

⁵⁸⁵ *Ibid.*, para. 9.

Russian authorities, before the end of [2009], to initiate a credible investigation into acts of alleged ethnic cleansing committed by the South Ossetian forces allied to it, or by civilians under its *de facto* jurisdiction, and control and implement measures to reverse or, if not possible, to remedy those acts”⁵⁸⁶.

6.33 Russia has defied these calls for compliance with its international obligations and refused to investigate the ethnic cleansing and other crimes committed against ethnic Georgians in South Ossetia or Abkhazia. In particular, Russian officials have confirmed that Russia will not investigate acts of ethnic cleansing and anti-Georgian discrimination committed by Russian or South Ossetian forces⁵⁸⁷. In stark and cynical contrast, however, Russia has indicated that it *will investigate* allegations of offences committed by Georgian troops during the opening days of the August 2008 conflict⁵⁸⁸.

6.34 Russia not only defends the perpetrators of past discrimination against ethnic Georgians in South Ossetia and Abkhazia; it continues to support and sponsor those responsible for ongoing ethnic discrimination. The discrimination against the remaining ethnic Georgians in South Ossetia, concentrated in the

⁵⁸⁶ *Ibid.*, para. 12.4.

⁵⁸⁷ PACE, Doc. No. 12010, *op. cit.*, para. 40. GWS, Vol. III, Annex 117. The Co-Rapporteurs for the Council of Europe’s Monitoring Committee have responded to Russia’s attempt to shirk its responsibilities under international law, the 1965 Convention and the Court’s provisional measures order, by explaining: “Even if we were to accept Russia’s argument that the two break-away regions are now independent entities, we note that a large number of alleged human rights violations against ethnic Georgians by South Ossetian militia took place before the recognition of independence of the two break-away regions by Russia, during which time Russia recognised it was in control, as clear from its acceptance of the ceasefire agreement. Moreover, the ongoing investigation in South Ossetia by the Investigative Committee of the General Prosecutor’s Office of Russia into genocide committed by Georgian troops against Russian citizens, as well as into crimes committed against the Russian military, clearly shows that Russia has the capacity and possibility to conduct such an investigation in that region. The status argument is in our view used merely to mask the underlying lack of political will to effectively investigate any alleged human rights abuses by the South Ossetian forces allied to it, in areas under its control.” PACE, Doc. No. 12010, *op. cit.*, para. 43. GWS, Vol. III, Annex 117.

⁵⁸⁸ *Ibid.*, para. 40.

Akhalgori District, including the requirement that they renounce their Georgian nationality and obtain foreign passports to continue living in South Ossetia, was described above, in paragraphs 6.25 and 6.26. The EU's Fact-Finding Report addressed this as a continuing tactic designed to depopulate the area of ethnic Georgians:

[S]everal elements suggest the conclusion that ethnic cleansing was indeed practised against ethnic Georgians in South Ossetia both during and after the August 2008 conflict. Even at the time of the writing of this Report [in September 2009], the situation in the Akhalgori district at the southeast end of South Ossetia continues to be a matter of concern, as ethnic Georgians are still leaving the region⁵⁸⁹.

6.35 The ongoing discrimination against the ethnic Georgians who remain in Abkhazia, in the Gali District, is no less severe. In Gali, Georgian language education has been targeted for extinction by the *de facto* authorities and their Russian sponsors. As reported by the Gali Educational Resource Centre (a unit of the *de jure* Abkhazian Ministry of Education and Culture that receives reports from local school officials), since the beginning of the 2009-2010 academic year the pressure on the few Gali schools that still retain Georgian language instruction has become especially intense:

According to the headmaster's information, the school is under constant control and surveillance. Pressure is applied daily by the Abkhazian authorities and a pretext is sought in order to transfer the schools of the Lower Zone of the Gali District to Russian language instruction.

In September 2009, the schools of the Lower Zone of the Gali District were required to open primary classes with Russian language instruction, but the teachers protested and declared that

⁵⁸⁹ IIFMCG Report, Vol. I, *op. cit.*, para. 27. GWS, Vol. III, Annex 120. *See also* Independent International Fact-Finding Mission On the Conflict in Georgia, Report Vol. II (September 2009), pp. 379, 381 (“there is a clear indication that Georgians are continuing to leave the region, contrary to claims by the administration in Akhalgori that they are ‘slowly returning’”). GWS, Vol. III, Annex 121.

they would leave if they were forced to do so. As a result, Georgian language instruction was retained in primary classes. However, the teachers are told that from September 2010 on, education will fully be conducted in the Russian language⁵⁹⁰.

6.36 On 16 October 2009, Russian soldiers entered a school in Tagiloni village. When they discovered Georgian books in the school, they assaulted the teachers. One teacher was severely beaten and had to be taken to the Gali hospital, since the Russian soldiers prohibited his transport to the nearby Zugdidi hospital across the boundary line⁵⁹¹. Russian military officers “visit schools every day ... The heads of the military headquarters demand from the schools to give them the lists of teachers and pupils”,⁵⁹².

6.37 As of 6 January 2010, teachers with Georgian diplomas have been prohibited from teaching in Abkhazia. In order to remain teachers they must attain a diploma from a Russian university, Sukhumi University, or Gali Pedagogical College⁵⁹³. These discriminatory practices and their consequences for ethnic Georgians residing in the region compelled the OSCE High Commissioner on National Minorities, Mr. Knut Vollebaek, to express during his most recent visit: “[I am] not satisfied with their attitude towards Georgian schools. I am also deeply concerned that they are not willing to allow pupils to be educated in the Georgian language”⁵⁹⁴. He reminded the *de facto* authorities that “[a]ccording to international practice and COE [Council of Europe]

⁵⁹⁰ Report of Gali Educational Resource Centre (March 2010), *op. cit.*, p. 5. GWS, Vol. IV, Annex 195.

⁵⁹¹ Service for the Protection of Rights of Internally Displaced Population from Abkhazia, Under the Supreme Council of Abkhazia, *Report (September 2009-February 2010)* (12 March 2010), *op. cit.*, p. 7. GWS, Vol. IV, Annex 193.

⁵⁹² Report of Gali Educational Resource Centre (March 2010), *op. cit.*, p. 7. GWS, Vol. IV, Annex 195.

⁵⁹³ *Ibid.*, p. 7. GWS, Vol. IV, Annex 195.

⁵⁹⁴ “Knut Vollebaek, OSCE High Commissioner for national minorities met with representative of Abkhazian separatist regime yesterday”, *24 Hours* (5 February 2010). GWS, Vol. IV, Annex 224.

standards, the parents have the right to choose the language of education for their children”⁵⁹⁵.

Section V. Russia’s Failure to Protect the Property of Displaced Persons and Refugees

6.38 In the *Memorial* and Georgia’s update on compliance with provisional measures dated 26 January 2009, Georgia described how Russian forces directly participated in, and acquiesced to, the systematic destruction of property belonging to ethnic Georgians⁵⁹⁶. As a result, very little property remains to be protected, as required by Paragraph 149(A) of the Court’s *Order* of 15 October 2008. Where ethnic Georgian property has not already been destroyed, Russian forces have often misappropriated it for themselves. In that regard, throughout South Ossetia and Abkhazia, Russian troops have taken over houses and other properties belonging to ethnic Georgians⁵⁹⁷. All evidence of Georgian ownership has been erased. Even road signs indicating the names of villages in Georgian have been removed⁵⁹⁸.

6.39 The situation was described by the UN Secretary-General’s Representative on IDPs. While construction is evident elsewhere, he reported, he saw “[n]o efforts” to “reconstruct the ethnic Georgian villages and settlements that were deliberately destroyed in the aftermath of the fighting,” despite the fact that “[a]ll IDPs from the recent and past conflicts are entitled to restitution or

⁵⁹⁵ *Ibid.*

⁵⁹⁶ See GM, paras. 3.6-3.34, 3.35-3.105. See also Report of Georgia to the Court in Compliance with Paragraph 149(D) of the Order of 15 October 2008 (26 January 2009), paras. 15, 19.

⁵⁹⁷ Service for the Protection of Rights of Internally Displaced Population from Abkhazia, Under the Supreme Council of Abkhazia, *Report (September 2009-February 2010)* (12 March 2010), *op. cit.*, pp. 5-6. GWS, Vol. IV, Annex 193; Witness Statement of Vitaliy Khripun (4 March 2010), *op. cit.*, p. 1. GWS, Vol. IV, Annex 228; “Local residents: they actively construct military bases in the Gali District” *Ekho Kavkaza* (16 February 2010). GWS, Vol. IV, Annex 225.

⁵⁹⁸ Olga Allenova, “Losing the war on the front of works”, *Kommersant* (31 August 2009). GWS, Vol. IV, Annex 213.

compensation for their property, regardless of whether they choose to return, integrate locally or resettle”⁵⁹⁹. He concluded that “[t]heir property needs to be protected against unlawful appropriation, occupation and use by the relevant authorities”⁶⁰⁰. Indeed, the Court’s *Order* of 15 October 2008 requires this. Nevertheless, Russia has refused to comply.

Section VI. Russia’s Obstruction of Access to Humanitarian Assistance and International Monitoring

6.40 Russian troops have continued to restrain international monitors and humanitarian assistance from crossing the administrative borders into South Ossetia and Abkhazia to, among other things, observe the circumstances of and provide assistance to ethnic Georgians and others. As stated by the Parliament of Europe’s Rapporteur in September 2009:

In the last year, the OSCE Mission in Georgia, along with its OSCE military observation mission, has been wound up. The same fate applies to the United Nations Observer Mission in Georgia (UNOMIG). As the report of the Monitoring Committee points out, this is due to the refusal of Russia to allow the extension of these mandates. Furthermore Russia has refused to allow access of the EUMM monitors to the regions of South Ossetia and Abkhazia and the occupied territories⁶⁰¹.

6.41 Russia’s role in impeding international monitoring in these territories was described in Georgia’s *Memorial* in paragraphs 7.52 to 7.58. Since then, the international community has renewed its call for Russia to allow monitoring access. In September 2009, the European Union called for “unhindered access of

⁵⁹⁹ Report of the Representative of the Secretary-General on Internally Displaced Persons, *op. cit.*, paras. 27 & 41. GWS, Vol. III, Annex 100.

⁶⁰⁰ *Ibid.*, para. 41. GWS, Vol. III, Annex 100.

⁶⁰¹ PACE, Doc. No. 12039, *op. cit.*, para. 17. GWS, Vol. III, Annex 118.

EUMM to Abkhazia and South Ossetia, which has so far been denied”⁶⁰². The European Union’s statement explained that “[s]uch access is of paramount importance, since the security, human rights and humanitarian situation on the ground, including the situation of IDPs and refugees, remains fragile”⁶⁰³. The Council of Europe’s Parliamentary Assembly also expressed its concern regarding Russia’s refusal to permit international monitoring, stating that it:

3.1. deplores the continued refusal of Russia and the *de facto* authorities to allow European Union monitors access to Abkhazia and South Ossetia and calls upon them to give the monitors immediate and unconditional access to the territories under their *de facto* control;

3.2. deplores the closure of the United Nations Observation Mission in Georgia (UNOMIG) as a result of the veto by Russia in the United Nations Security Council;

3.3. deeply regrets that the proposal presented by the Greek chairmanship of the Organisation for Security and Co-operation in Europe (OSCE) or a continued OSCE presence, including a military monitoring component, did not achieve consensus and calls upon Russia to reconsider its objections to this proposal⁶⁰⁴.

⁶⁰² OSCE, Permanent Council No. 772, *Swedish Presidency of the European Union, EU statement on Georgia*, PC.DEL/678/09 (3 September 2009). GWS, Vol. III, Annex 116.

⁶⁰³ *Ibid.*

⁶⁰⁴ PACE, Resolution 1683, *op. cit.* GWS, Vol. III, Annex 119. The Report of the PACE explains the context and actions leading to the Russia’s continuing rejection of the OSCE Mission in Georgia’s presence in the occupied territories:

On 22 December 2008, Russia blocked the extension of the mandate of the OSCE Mission in Georgia, as a result of which the mission started to close down. However, on 12 February 2009, the OSCE Permanent Council extended the mandate of the OSCE Military Observers until 30 June 2009, although this did not affect the mandate of the OSCE Mission itself. Convinced about the importance of a continued OSCE Presence in the region, including a military monitoring component, the Greek Chairmanship of the OSCE continued to search for a status-neutral formula for an OSCE presence that would be acceptable to all sides. On 8 May 2009, the Greek Chairmanship presented a proposal to the Permanent Council that foresaw the establishment of an ‘OSCE Office in Tbilisi’ that, in relation to the conflict, would be responsible for implementing humanitarian projects, including those identified in the second working group of the Geneva talks, as well as for facilitating the exchange of

The PACE “strongly urge[ed] the Russian authorities, before the end of this year [2009], to give unrestricted access to European Union monitors to both Abkhazia and South Ossetia...”⁶⁰⁵.

6.42 Russia responded to these appeals by continuing to restrict international monitoring. In line with Russia’s position, Abkhazia’s Foreign Minister confirmed: “Our position will change only when the EU has a true understanding of the reality on the ground ... Only when the EU has a reasonable and wise approach towards Abkhazia, then we shall talk how to cooperate with them on this issue. So far, there is no reason to talk about this”⁶⁰⁶.

6.43 In parallel with Russia’s restrictions on international monitoring, it has impeded entry of and access to international humanitarian assistance. It therefore continues to be in breach of its obligation under the Court’s Order of 15 October 2008 to “facilitate, and refrain from placing any impediment to, humanitarian assistance” within South Ossetia and Abkhazia⁶⁰⁷. Russia also flouts General Assembly Resolution 63/307, which underscored “the urgent need for unimpeded

information with the OSCE co-chair of the Geneva talks. In addition, the proposal of the Greek chairmanship included the deployment of ‘OSCE Monitors in the framework of the implementation of the six-point agreement of 12 August 2008’. These monitors would be based in both Karaleti and Tskhinvali, and report directly to the Director of the Conflict Prevention Centre of the OSCE based in Vienna. Regrettably, on 14 May 2009, the Greek Chairman-in-Office announced that it suspended the negotiations for a continued OSCE presence in Georgia until further notice, as a result of the lack of consensus on the proposal. In an official statement, the European Union expressed its regret over the suspension of the negotiations and called on Russia in particular to ‘show the necessary political will and urgently reconsider their position in a constructive spirit’. In the meanwhile, the proposal of the Greek Chairmanship of the OSCE remains formally on the table.

PACE, Doc. No. 12010, *op. cit.*, para. 25. GWS, Vol. III, Annex 117.

⁶⁰⁵ PACE, Resolution 1683, *op. cit.*, para. 12.1. GWS, Vol. III, Annex 119.

⁶⁰⁶ President of the Republic of Abkhazia, Press Release, “Sergey Shamba: The Position of Abkhazia On The Issue of Admitting EU Observers Into The Republic's Territory Is Unchangeable” (30 September 2009). GWS, Vol. IV, Annex 189.

⁶⁰⁷ Provisional Measures Order, para. 149(B).

access for humanitarian activities to all internally displaced persons, refugees and other persons residing in all conflict-affected areas throughout Georgia”⁶⁰⁸.

Section VII. Conclusion

6.44 In sum, the evidence shows that Russia continues to ignore its obligations under the Court’s Order of 15 October 2008. It continues to use its military forces to control the borders of South Ossetia and Abkhazia in a manner that prevents ethnic Georgian IDPs from exercising their right of return to those territories, and that prevents ethnic Georgian who reside there from crossing the administrative boundaries separating the territories from neighbouring parts of Georgia. It continues to support, sponsor and defend ethnic discrimination against Georgians residing in the territories, especially by forcing them to abandon their Georgian nationality, language and education. It continues to neglect its duty to protect their property and the property of expelled Georgian IDPs and refugees. And it refuses to comply with its obligation to allow unimpeded humanitarian access to and within the territories it controls. The Court may wish to address these issues of noncompliance with its Order at an appropriate stage in these proceedings⁶⁰⁹.

⁶⁰⁸ U.N. General Assembly, *Resolution 63/307, Status of internally displaced persons and refugees from Abkhazia, Georgia, and the Tskhinvali region/South Ossetia, Georgia*, U.N. Doc. A/RES/63/307 (30 September 2009), *op. cit.* GWS, Vol. III, Annex 102.

⁶⁰⁹ *Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, I.C.J. Rep. 2009, paras. 50-55, 61(2).

SUBMISSIONS

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.

1 April 2010

Ms. Tina Burjaliani
Agent of Georgia

APPENDIX ON THE *TRAVAUX PRÉPARATOIRES*

i. The Russian Federation seeks to present the *travaux préparatoires* of the Convention as supporting its contention that Article 22 of the 1965 Convention conditions the jurisdiction of the Court on previous attempts to settle the dispute through negotiations *and* the Convention's conciliation procedures.

ii. That presentation is misleading and based on a selective and partial reading of the negotiating history. Rather, the *travaux préparatoires* reveal that Article 22 on dispute settlement (in Part III of the Convention) emerged from an entirely separate process to that which gave birth to the CERD implementation measures in Article 9 and in particular Articles 11 and 12, located in Part II of the Convention. The *travaux préparatoires* make it clear that negotiations and the CERD procedures are (a) not a prerequisite to the Court's exercise of jurisdiction, and (b) they are not cumulative requirements. Far from being conditional on those procedures being utilised, the drafters of the Convention appear to have been keen to ensure that unilateral seisin of the Court was wholly independent of the Conciliation Commission process.

Section I. There Are No Preconditions to the Jurisdiction of the Court

iii. Russia seeks to portray the compromissory clause in Article 22 (part III) as an end product of the development of the implementation (or Conciliation Commission) procedures provided for in Part II of the final Convention. In insisting that the clause be seen as a part of that process, Russia suggests that the introduction of unilateral seisin into the Convention was contingent upon the parties' acceptance of mandatory CERD conciliation procedures as a safeguard against abuse. This is quite wrong.

iv. A proper reading of the drafting history reveals that Article 22 had its roots in an entirely distinct process to that constructing the CERD conciliation machinery. All reference to the ICJ was expressly removed from that mechanism during the key debates of the Third Committee (despite the protest of some of the drafters). It was plainly intended to be applied without prejudice to other procedures for settling disputes (see what became Article 16).

v. The CERD conciliation mechanism and ICJ are thus presented in two separate sets of provisions in the final draft. Contrary to the strained attempts of the Russian Federation to explain this division, it is clear from the negotiating history of the Convention that the separation between CERD conciliation mechanisms and the ICJ were intended by the drafters. The detailed negotiating history is attached as Annexes in Volume II.

Section II. The Drafting History

vi. The Russian Federation is correct in one respect: the Third Committee of the General Assembly actually drafted the compromissory clause. However, the supposed course of the negotiations over that clause set out in paragraph 4.68 of Russia's *Preliminary Objections* misleadingly elides two separate processes in an attempt to portray them as contingent – to the extent of presenting the text produced by one working group as that in fact produced by another. In order to ascertain the correct relationship between the CERD conciliation machinery and the clause providing for the Court's jurisdiction, it is necessary to accurately trace their evolution, first through the Sub-Commission, then to the Commission on Human Rights, and finally through the lengthy debates of the Third Committee.

A. THE SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES

vii. Most States within the Sub-Commission were anxious to ensure that the Convention should have some effective means of implementation or enforcement. This had been missing from the original bare declaration that served as the inspiration for the Convention. The possibility of a compromissory clause was, however, viewed from the start as an enforcement measure that was in all respects distinct from the development of an additional special mechanism within the Convention. This is particularly clear from the comments of the representative of the consultative council of Jewish organisations:

[the] failure of the drafts before the Sub-Commission to provide for recourse to the ICJ *or* for appropriate enforcement machinery raised serious questions concerning their *effectiveness*⁶¹⁰.

viii. Indeed at that stage the form of the potential internal enforcement procedure was by no means a foregone conclusion. The primary proposal from Mr. Ingles of the Philippines⁶¹¹ envisaged a Conciliation Commission, while that of Mr. Mudawi⁶¹² preferred some kind of regional supervisory organisation system. Due to lack of time, these proposals were not discussed at any length. Instead, both proposals were considered together under the heading “measures of implementation”. They were only briefly debated.

ix. Mr. Ingles suggested the creation of a Conciliation Commission as an enabling measure because, as he put it, “the settlement of disputes involving

⁶¹⁰ U.N. Economic and Social Council, *Summary Record of the 410th Meeting*, U.N. Doc. E/CN.4/Sub.2/SR.410 (7 February 1964), p. 5 (emphasis added). GWS, Vol. II, Annex 2.

⁶¹¹ U.N. Economic and Social Council, *Draft International Convention on the Elimination of All Forms of Racial Discrimination, Mr. Ingles: Proposed Measures of Implementation*, U.N. Doc. E/CN.4/Sub.2/L.321 (17 January 1964). GWS, Vol. II, Annex 1.

⁶¹² U.N. Economic and Social Council, *Summary Record of the 427th Meeting*, U.N. Doc. E/CN.4/Sub.2/SR.427 (12 February 1964), p. 11. GWS, Vol. II, Annex 7.

human rights did not always lend itself to strictly judicial procedure”⁶¹³. He envisaged that if the Conciliation Commission procedure failed to settle the dispute, then either party would be able to bring the case before the ICJ. However, he was keen to emphasise to the Sub-Commission that “direct appeal to the International Court of Justice ... *was also envisaged* in his draft”⁶¹⁴. It is clear from this that even the proponents of the Conciliation Commission saw it as entirely distinct from recourse to the ICJ, and was in no way a pre-condition to the right of recourse to the ICJ.

x. The draft made it clear that the conciliation mechanism was not intended to be the only way in which such disputes could be resolved. Mr. Ingles emphasised that under Article 18 of the draft Convention (which survived every re-draft until it became, in amended form, what is now Article 16 of the final Convention), parties were “entirely free to resort to ‘other procedures’”⁶¹⁵. This might even include recourse to regional organisations as envisaged by Mr. Mudawi:

Article. 18: The provisions of this Convention shall not prevent the States Parties to the Convention from submitting to the ICJ any dispute arising out of the interpretation or application of the Convention in a matter within the competence of the Committee; or from resorting to other procedures for settling the dispute, in accordance with general or special international agreements in force between them⁶¹⁶.

xi. Many concerns were expressed about the conciliation process in the Sub-Commission. Some felt that as “*an additional body*”, it would be of no practical

⁶¹³ *Ibid.*, p. 12.

⁶¹⁴ *Ibid.*, (emphasis added).

⁶¹⁵ *Ibid.*

⁶¹⁶ U.N. Economic and Social Council, *Draft International Convention on the Elimination of All Forms of Racial Discrimination, Mr. Ingles: Proposed Measures of Implementation*, U.N. Doc. E/CN.4/Sub.2/L.321 (17 January 1964). GWS, Vol. II, Annex 1.

use (a prescient comment by Mr. Ostrovsky of the USSR⁶¹⁷), precisely because States would be “free to resort to other procedures”⁶¹⁸. One of the main concerns appeared to be that there might be other procedures more suited to a specific dispute:

[it is] impossible to decide beforehand what would be the most suitable procedure in any dispute that might arise in connexion with the elimination of racial discrimination. In some cases negotiation might be sufficient; in others arbitral or judicial procedures might be necessary; in yet others action by the Security Council might be called for.⁶¹⁹ (Remarks of Mr. Soltysiak, Poland)

xii. Mr. Ingles was anxious to stress that the CERD conciliation mechanism was not intended to be mandatory in any dispute of any kind over the Convention. It would absolutely not “prevent recourse to *any other procedures* ... which might be considered appropriate”⁶²⁰. This makes it clear that Russia’s claim that the conciliation procedure was “mandatory”⁶²¹ is entirely wrong.

xiii. Thus, in its earliest form, the CERD conciliation machinery was designed as an optional alternative, an additional method for resolving disputes under the Convention. It was never proposed or viewed as the mandatory mechanism as the Russian Federation suggests⁶²². The draft was transmitted to the Commission for Human Rights as the general view of the Sub-Commission, despite misgivings about the limited debate or opportunity to study the details of the proposals.

⁶¹⁷ U.N. Economic and Social Council, *Summary Record of the 428th Meeting*, U.N. Doc. E/CN.4/Sub.2/SR.428 (12 February 1964), p. 8. GWS, Vol. II, Annex 8.

⁶¹⁸ U.N. Economic and Social Council, *Summary Record of the 428th Meeting*, U.N. Doc. E/CN.4/Sub.2/SR.428 (12 February 1964), p. 6. GWS, Vol. II, Annex 9.

⁶¹⁹ U.N. Economic and Social Council, *Summary Record of the 427th Meeting*, U.N. Doc. E/CN.4/Sub.2/SR.427 (12 February 1964), p. 15. GWS, Vol. II, Annex 7.

⁶²⁰ *Ibid.*, p. 16 (emphasis added).

⁶²¹ Preliminary Objections of the Russian Federation, Vol. I (1 December 2009) (hereinafter “RPO”), para. 4.77.

⁶²² *Ibid.*, para. 4.46.

xiv. Moreover, and very crucially, as a detailed study of the negotiating history shows, it was undoubtedly not the only way in which effective enforcement of the Convention was envisaged. Discussion of Mr. Mudawi's amendment was postponed until the measures of implementation and the accompanying "final clauses" could be taken up⁶²³. The Chairman of the Sub-Commission, with the agreement of the members, requested that the UN Secretary-General submit to the Commission on Human Rights alongside the draft implementation measures a working paper of alternative forms for final clauses⁶²⁴.

xv. The preliminary draft prepared by Mr. Ingles of the measures of implementation of the Convention was passed on to the Commission on Human Rights towards the end of January 1964⁶²⁵. Alongside that text the Commission was also provided with a copy of a working paper prepared by the UN Secretary-General, on 17 February 1964, addressing the final clauses of the Convention⁶²⁶.

xvi. It is in that separate working paper – and not in the draft measures of implementation prepared by Mr. Ingles – that the elements of what became Article 22 are to be found.

xvii. There is therefore no basis whatsoever for Russia's contention that ICJ jurisdiction was initially considered as part of a single "implementation" text⁶²⁷, in a package together with negotiation and Committee procedures. Russia is

⁶²³ U.N. Economic and Social Council, *Report on the Twentieth Session*, U.N. Doc. E/CN.4/874 (17 February - 18 March 1964), p. 10. GWS, Vol. II, Annex 16.

⁶²⁴ *Ibid.*

⁶²⁵ U.N. Economic and Social Council, *Addendum to the Report of the 16th Session of the Sub-Commission on Prevention of Discrimination and Protection of Human Rights*, U.N. Doc. E.CN.4/Sub.2/L.345/Add.4 (30 January 1964), pp. 13-18. GWS, Vol. II, Annex 11.

⁶²⁶ U.N. Economic and Social Council, *Draft International Convention on the Elimination of All Forms of Racial Discrimination, Final Clauses, Working paper prepared by the Secretary-General*, U.N. Doc. E/CN.4/L.679 (17 February 1964) (hereinafter "Secretary-General Working Paper"). GWS, Vol. II, Annex 13.

⁶²⁷ RPO, para. 4.64.

equally wrong to claim that these elements were only formally and inconsequentially split off into a different section at a later stage by the Third Committee. The negotiating history shows that they were always treated as separate elements.

B. THE COMMISSION ON HUMAN RIGHTS

xviii. Article VIII of the working document on final clauses, prepared by the Commission on Human Rights, was entitled “Settlement of Disputes”⁶²⁸. It put forward suggestions for four alternative drafts of what became the compromissory clause. Contrary to the claim by the Russian Federation⁶²⁹, this article stood alone and apart from the conciliation mechanism long before it reached the Third Committee. Proposals 8A and B were identical in stating that “any dispute ... which *is not settled* by negotiation shall at the request of [any/all] parties to the dispute, be referred to the International Court of Justice”⁶³⁰. Proposal 8A, however, provided that *any* party might choose to engage the Court (unilateral seisin), while Proposal 8B envisaged seisin of the Court only through common consent (by the use of the word “all” instead of “any”).

xix. Notably, Article 8D envisaged a mandatory process of dispute resolution, with strict preconditions for the jurisdiction of the Court. The parties to a dispute were required (by use of the word *shall*) first to consult together to settle the dispute by a peaceful means of their choice (including recourse to regional bodies or negotiation). Subsequently, by clause 2, any dispute which could not be settled “in the manner prescribed” was to be compulsorily referred to the ICJ for decision.

⁶²⁸ Secretary-General Working Paper, *op. cit.*

⁶²⁹ RPO, para. 4.64.

⁶³⁰ Secretary-General Working Paper, *op. cit.*, p. 15 (emphasis added).

xx. Attention was drawn (in comments appended to the articles) to the preliminary measures of implementation proposed to the Commission, perhaps as an example of an optional protocol for dispute resolution⁶³¹. In the Commission itself these were not discussed at length. Only the method of transmission to the Third Committee was debated. Mr. Quimbao stressed the usefulness of the machinery envisaged by Mr. Ingles's draft⁶³², but that draft was submitted alongside the record of the debates to ensure it was not being passed on as if it was an approved document of the Commission (since it had not been debated), and also together with the Secretary-General's separate working paper on final clauses.

C. THE THIRD COMMITTEE OF THE GENERAL ASSEMBLY

xxi. The Third Committee of the General Assembly devoted 43 meetings to consideration of the draft Convention. In the first of those meetings, the 1299th meeting, it was agreed that the Officers of the Committee should produce suggestions for final clauses based upon the working paper document submitted by the Secretary-General⁶³³. Discussion of those articles was thus postponed until that document was produced at the 1358th meeting.

xxii. Before then, the Committee considered alternative drafts of articles relating to measures of implementation. The primary substantive texts were a

⁶³¹ *Ibid.*, p. 16.

⁶³² U.N. Economic and Social Council, *Summary Record of the 810th Meeting*, U.N. Doc No. E/CN.4/SR.810 (15 May 1964), pp. 6-7. GWS, Vol. II, Annex 15.

⁶³³ See U.N. General Assembly, *Draft International Convention on the Elimination of all Forms of Racial Discrimination, Report of the Third Committee*, U.N. Doc. A/6181 (18 December 1965), p. 35, paras. 173-174. GWS, Vol. II, Annex 40.

revised proposition from the Philippines⁶³⁴ and another from Ghana⁶³⁵, together with various minor amendments and proposals from other States.

xxiii. The proposal from the Philippines reflected its earlier drafts before the Commission on Human Rights, recommending a Conciliation Commission process after which, if no solution had been reached through those procedures, either of the parties to the dispute might choose to bring the case before the ICJ (now presented as Article 18). Unilateral seisin was thus conditional upon such procedures having been followed. However, Article 19 again made clear that these provisions were not to prevent the submission to the ICJ of any dispute involving the interpretation or application of the Convention or from resorting to other procedures.

xxiv. By contrast, the Ghanaian proposal suggested an *ad hoc* Conciliation Commission (to be appointed by a Committee) available to the parties of a dispute concerning the Convention, but did not then propose to permit unilateral seisin contingent upon those procedures being exhausted. Instead, the draft proposed seisin of the Court *only* by common consent, and “whether it has been dealt with by the Commission of Conciliation or not”⁶³⁶.

⁶³⁴ U.N. General Assembly, *Draft International Convention on the Elimination of All Forms of Racial Discrimination, Philippines: Proposed articles relating to measures of implementation*, U.N. Doc. A/C.3/L.1221 (11 October 1965). GWS, Vol. II, Annex 20.

⁶³⁵ U.N. General Assembly, *Draft International Convention on the Elimination of All Forms of Racial Discrimination, Ghana: revised amendments to document A/C.3/L.1221*, U.N. Doc. A/C.3/L.1274/Rev.1 (12 November 1965). GWS, Vol. II, Annex 22.

⁶³⁶ See U.N. General Assembly, *Draft International Convention on the Elimination of All Forms of Racial Discrimination, Ghana: revised amendments to document A/C.3/L.1221*, U.N. Doc. A/C.3/L.1274/REV.1 (12 November 1965), p. 9. GWS, Vol. II, Annex 22. See also U.N. General Assembly, *Official Record of the Third Committee, 1344th Meeting*, U.N. Doc. A/C.3/SR.1344 (16 November 1965), p. 317. GWS, Vol. II, Annex 24.

xxv. It did not prove possible “despite intensive efforts” to reconcile these two drafts⁶³⁷. Contrary to the argument of the Russian Federation, these two documents did not both envisage the jurisdiction of the Court to be subject to the conclusion of a compromis⁶³⁸. The Philippine text *expressly envisaged* unilateral seisin if the Conciliation Commission procedure failed. Consequently, a working group was set up to prepare a combined text.

xxvi. That text was presented to the 1349th meeting with the aim of satisfying as many States as possible. The joint text of the working group⁶³⁹, as the representative from Ghana stressed when presenting it to the Committee, “did not contain any clause concerning intervention by the International Court of Justice, for which provision could be made in the final clauses”⁶⁴⁰. It had thus removed the Philippines’ specific proposal that if the conciliation procedure failed, unilateral recourse could then be had to the ICJ, preferring to leave this (as was more natural) to the final clauses rather than clash with what was included in those proposals.

xxvii. This proposal must not be confused with the final clauses text later produced by the working group of the Officers of the Third Committee⁶⁴¹. However, the Russian Federation has fallen into precisely that confusion, as is

⁶³⁷ U.N. General Assembly, *Official Record of the Third Committee, 1345th Meeting*, U.N. Doc. A/C.3/SR.1345 (17 November 1965), p. 323, para. 1. GWS, Vol. II, Annex 25.

⁶³⁸ RPO, para. 4.67.

⁶³⁹ U.N. General Assembly, *Draft International Convention on the Elimination of All Forms of Racial Discrimination, articles, addenda and amendments relating to measures of implementation submitted by various States Parties*, U.N. Docs. A/C.3/L.1291 (18 November – 13 December 1965). GWS, Vol. II, Annex 23.

⁶⁴⁰ U.N. General Assembly, *Official Record of the Third Committee, 1349th Meeting*, U.N. Doc. A/C.3/SR.1349 (19 November 1965), p. 348, para. 29 (emphasis added). GWS, Vol. II, Annex 28.

⁶⁴¹ U.N. 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*, U.N. Doc. A/C.3/L.1237 (15 October 1965). GWS, Vol. II, Annex 17.

reflected in paragraph 4.28 of its *Preliminary Objections*. The final clauses text was intended – as the conciliation measures were not – to provide separately for involvement of the ICJ. It was particularly noted in the final clauses text that those articles were “self-contained and referred to articles within themselves”⁶⁴². This provides further support for Georgia’s view that the conciliation mechanisms provided for under the Convention, on the one hand, and the right of recourse to the ICJ, are separate and distinct. In particular, the exhaustion of the former is not a precondition to the exercise of the latter.

xxviii. Indeed, it is clear that a conscious decision was taken by the drafters of the new implementation measures text to keep the conciliation process wholly *separate* from the question of ICJ jurisdiction. That these were seen as separate issues is explicitly underscored by the comments of the Belgian delegate in that meeting, to the effect that he “supported both the idea of setting up a Committee such as had been advocated by the Philippines... *and* the idea of allowing recourse to the International Court of Justice”⁶⁴³.

xxix. Thus, the Third Committee underlined the distinction already apparent from the wholly separate consideration of the final clauses on dispute settlement from the provisions concerning the CERD conciliation machinery.

xxx. The suggestion implicit in paragraph 4.67 of the Russian Federation’s *Preliminary Objections* that it was only at this late stage that the Secretary-General was ordered to prepare final clauses is incorrect. As shown above, the two sets of provisions were already in train as distinct processes, from the birth of

⁶⁴² U.N. General Assembly, *Draft International Convention on the Elimination of all Forms of Racial Discrimination, Report of the Third Committee*, U.N. Doc. A/6181 (18 December 1965), p. 35. GWS, Vol. II, Annex 40.

⁶⁴³ U.N. General Assembly, *Official Record of the Third Committee, 1349th Meeting*, U.N. Doc. A/C.3/SR.1349 (19 November 1965), p. 346, para. 6 (emphasis added). GWS, Vol. II, Annex 28.

the final drafts. The removal of any reference to the ICJ from the CERD conciliation machinery simply served to make the distinction even clearer.

D. CUMULATIVE CONDITIONS?

xxxi. No *quid pro quo* can be drawn from the *travaux* to the effect that recourse to the Court was to be subjected to the conciliatory phase. The two sets of provisions emerged, and were then considered and developed, separately; and clear steps were taken by the sponsors to remove any suggestion that the two sets of provisions were linked in any cumulative or other way. When the representative of Ghana came under pressure to reintroduce reference to the ICJ as a factor in the conciliation process⁶⁴⁴, the effort was rebuffed. The representative of Ghana refused this effort, stressing the completeness of the procedure and that the final clauses provided in any event for unilateral seisin⁶⁴⁵ so that a direct link between the two was unnecessary.

xxxii. Article by Article, the implementation measures were then considered and voted upon. At its 1358th meeting, the Third Committee turned to the self-contained final clauses. In the draft submitted by the Officers of the Third Committee, clause VIII almost exactly mirrored the first of the proposals that were put forward by the UN Secretary-General (what had been article 8A):

Any dispute between two or more Contracting States with respect to the interpretation or application of this Convention, which *is not settled by negotiation*, shall at the request of *any* of the parties to the dispute, be referred to the International Court of Justice for

⁶⁴⁴ U.N. General Assembly, *Official Record of the Third Committee, 1354th Meeting*, U.N. Doc. A/C.3/SR.1354 (25 November 1965), p. 379, para. 53. GWS, Vol. II, Annex 33.

⁶⁴⁵ *Ibid.*, p. 379, para. 54 and p. 376, para. 20. GWS, Vol. II, Annex 33.

decision, unless the disputants agree to another mode of settlement⁶⁴⁶.

xxxiii. Thus, the Officers of the Committee clearly decided to reject Proposal 8D of the Secretary-General's draft as a model, with its cumulative approach. Instead, they chose to adopt a simple compromissory clause that was wholly separate from and unconnected to the conciliation process, in distinction from other conventions (such as Articles 17 and 25 of the 1960 Protocol Instituting a Conciliation and Good Offices Commission to be responsible for seeking a settlement of any disputes which may arise between States Parties to the UNESCO Convention against Discrimination in Education).

xxxiv. Two amendments were then proposed. The first was put forward by Poland, seeking to replace the word "any" with the word "all"; this would have transformed a system of unilateral seisin of the ICJ with seisin by compromis.

xxxv. This was rejected by the majority. The Canadian representative pointed out that while some countries might be reluctant to accept the Court's jurisdiction, "in view of the latitude allowed under clause VIII, which did not require reference to the Court unless it was requested, he had hoped that all delegations could accept the clause as drafted"⁶⁴⁷.

xxxvi. Nowhere was it stated that recourse to the Court was conditional upon previous attempts to settle the dispute through the CERD conciliation machinery or negotiation, and nowhere was it stated that negotiation and recourse to the conciliation procedures under the Convention were cumulative. Instead, it was

⁶⁴⁶ U.N. 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*, U.N. Doc. A/C.3/L.1237 (15 October 1965), article VIII (emphasis added). GWS, Vol. II, Annex 17.

⁶⁴⁷ U.N. General Assembly, *Official Record of the Third Committee, 1367th Meeting*, U.N. Doc. A/C.3/SR.1367 (7 December 1965), p. 453, para. 23. GWS, Vol. II, Annex 38.

simply stressed that unilateral seisin was very important for effective enforcement, but that there were also many opportunities for alternative dispute resolution open to the parties⁶⁴⁸. Reference to the Court was not mandatory, it was optional at the instance of a single party to a dispute.

xxxvii. The amendment put forward by Ghana, Mauritania and the Philippines, referred to by the Russian Federation at paragraph 4.68 of its *Preliminary Objections*, simply called for the deletion of the comma after “negotiation” and then instead the insertion of new text between the words “negotiation” and “shall”, namely “or by the procedures expressly provided for in this Convention”.

xxxviii. Rather than support its contention that jurisdiction of the ICJ is contingent upon the CERD conciliation procedure, the statements of the States Parties quoted at 4.69 and 4.71 of the Russian Federation’s *Preliminary Objections* simply describe again the mechanism envisaged by Mr. Ingles of the Philippines at the earliest stage of Third Committee deliberations, where the ICJ was indeed the last step in a separate process. That proposal had (as stated then) been based upon the Protocol to the Convention against discrimination in education adopted by UNESCO, but it was not then incorporated into the final draft, because, as the Russians stressed, it was wholly unnecessary. The reliance placed by Russia on the statement of Mr. Lamptey (Ghana) that the conciliation procedure must be used before recourse to the ICJ is misconceived: Ghana’s own explicit proposal to that effect was not accepted, and Mr. Lamptey’s intervention only suggested that the CERD conciliation machinery “should be used”, not that it had to be used⁶⁴⁹.

⁶⁴⁸ See, e.g., *ibid.*, paras. 39, 40.

⁶⁴⁹ RPO, para. 4.69.

xxxix. The following interrelated conclusions may be drawn from the negotiating history:

- a. The *travaux préparatoires* make it clear that negotiation and the CERD conciliation procedures are (a) not a prerequisite to the Court's exercise of jurisdiction, and (b) not cumulative requirements.
- b. The Conciliation Commission was envisaged as a useful addition to existing and other procedures for dispute settlement, including the ICJ, rather than as a mandatory process for complaints;
- c. ICJ jurisdiction was considered as a self-contained issue all the way from negotiations at the Sub-Commission through to the final drafting in the Third Committee;
- d. This was reflected in the location of the disputes resolution clause on the one hand, and the conciliation machinery on the other, in separate parts of the final Convention, with balance provided by referring to the opportunity (in a non-mandatory or preconditional way) to resort to the conciliation process in the final compromissory clause.

xl. It is thus plainly not the case that the conciliation procedure or negotiations are a prerequisite or cumulative condition to the exercise by the Court of jurisdiction.

CERTIFICATION

I certify that the annexes are true copies of the documents referred to and that the translations provided are accurate.

Ms. Tina Burjaliani

Agent of Georgia

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