Provisional Measures: Georgia v. Russia

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15 October 2008
CASE CONCERNING 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

Present: President HIGGINS; *Vice-President* AL-KHASAWNEH; *Judges* RANJEVA, SHI, KOROMA, BUERGENTHAL, OWADA, SIMMA, TOMKA, ABRAHAM, KEITH, SEPÚLVEDA-AMOR, BENNOUNA, SKOTNIKOV; *Judge* ad hoc GAJA; *Registrar* COUVREUR.

The International Court of Justice,

Composed as above,

After deliberation,

Having regard to Articles 41 and 48 of the Statute of the Court and to Articles 73, 74 and 75 of the Rules of Court,

Makes the following Order:

1. Whereas by an Application filed in the Registry of the Court on 12 August 2008, the Government of Georgia instituted proceedings against the Russian Federation for alleged violations of the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter "CERD");

2. Whereas Georgia, in order to found the jurisdiction of the Court, relied in its Application on Article 22 of CERD which provides that:

> "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";

3. Whereas in its Application Georgia states that:

> "The Russian Federation, acting through its organs, agents, persons and entities exercising elements of governmental authority, and through South Ossetian and Abkhaz separatist forces under its direction and control, has practised, sponsored and supported racial discrimination through attacks against, and mass-expulsion of, ethnic Georgians, as well as other ethnic groups, in the South Ossetia and Abkhazia regions of the Republic of Georgia",

and that the Russian Federation seeks to consolidate changes in the ethnic composition of South Ossetia and Abkhazia resulting from its actions "by preventing the return to South Ossetia and Abkhazia of forcibly displaced ethnic Georgian citizens and by undermining Georgia's capacity

to exercise jurisdiction in this part of its territory"; whereas Georgia contends that "[t]he changed demographic situation in South Ossetia and Abkhazia is intended to provide the foundation for the unlawful assertion of independence from Georgia by the *de facto* South Ossetian and Abkhaz separatist authorities";

4. Whereas Georgia explains the origin of the conflict in South Ossetia as follows:

* * *

13. Whereas Georgia asserts that "the de facto separatist authorities of South Ossetia and Abkhazia enjoy unprecedented and far-reaching support from the Russian Federation in the implementation of discriminatory policies against the ethnic Georgian population" and that this support "has the effect of denying the right of self-determination to the ethnic Georgians remaining in South Ossetia and Abkhazia and those seeking to return to their homes in South Ossetia and Abkhazia since the ceasefires of 1992 and 1994, respectively"; and whereas it claims that "by recognizing and supporting South Ossetia's and Abkhazia's separatist authorities, the Russian Federation is also preventing Georgia from implementing its obligations under CERD, by assuming control over its territory";

14. Whereas in its Application Georgia claims that "the Russian Federation has also systematically attempted to undermine Georgia's territorial sovereignty" by taking steps to recognize the independence of South Ossetia and Abkhazia; and whereas it adds that these acts have "significantly escalated tensions in South Ossetia and Abkhazia, and opened the door to further conflict";

15. Whereas Georgia claims that, as from April 2008, in addition to the measures designed to strengthen the legitimacy of the de facto institutions of the separatist authorities, "the Russian Federation [has] also increased its military activities in both regions as a prelude to its invasion of Georgia in August 2008"; and whereas, according to Georgia, "Russia's military build-up was accompanied by a campaign of discrimination against ethnic Georgians and others who might be opposed to the extension of Russian influence in South Ossetia and Abkhazia";

16. Whereas Georgia asserts that, "in contrast to Russian attempts to nurture the creation of ethnically homogeneous States that are politically, economically, socially and militarily beholden to it", Georgia has consistently "strived for the integration of multi-ethnic Abkhaz and South Ossetian societies into a democratic Georgian State" and offered both regions "unlimited autonomy"; and whereas Georgia contends that "it has also steadfastly pressed for the right of all IDPs (regardless of ethnicity) to return to their homes";

17. Whereas Georgia contends that the third phase of "the Russian Federation's intervention in South Ossetia and Abkhazia began on 8 August 2008, when Russian forces invaded Georgian territory";

18. Whereas Georgia alleges that, "in response to the persistent shelling of ethnic Georgian villages in South Ossetia by separatist forces, Georgian military forces launched a limited operation into territory held by ethnic separatists on 7 August 2008 for purposes of putting a stop to the attacks"; whereas it explains that the Russian Federation responded to Georgia's actions "with a full-scale invasion" of Georgian territory on 8 August 2008, "occupied more than half of Georgia and attacked civilians and civilian objects" throughout the country, "resulting in significant casualties and destruction";

19. Whereas, according to Georgia, at the same time the situation in Abkhazia quickly began to deteriorate, with attacks against Georgian villages in the Kodori valley, bombing of Georgia's Black Sea port of Poti and deployment of Russian ground troops and armoured vehicles in Abkhazia;

20. Whereas Georgia claims, "in its own right and as *parens patriae* of its citizens", that the Russian Federation,

> "through its State organs, State agents, and other persons and entities exercising governmental authority, and through the South Ossetian and Abkhaz separatist forces and other agents acting on the instructions of, and under the direction and control of the Russian Federation, is responsible for serious violations of its fundamental obligations under CERD, including Articles 2, 3, 4, 5 and 6";

21. Whereas Georgia further claims that these violations include, but are not limited to:

> "*(a)* widespread and systematic discrimination against South Ossetia's and Abkhazia's ethnic Georgian population and other groups during the conflicts of 1991-1994, 1998, 2004 and 2008, reflected in acts including murder, unlawful attacks against civilians and civilian objects, torture, rape, deportation and forcible transfer, imprisonment and hostage-taking, enforced disappearance, wanton destruction and unlawful appropriation of property not justified by military necessity, and plunder;
>
> *(b)* widespread and systematic denial on discriminatory grounds of the right of South Ossetia's and Abkhazia's ethnic Georgian and other refugees and IDPs to return to their homes;
>
> *(c)* widespread and systematic unlawful appropriation and sale of homes and other property belonging to South Ossetia's and Abkhazia's ethnic Georgians and other groups forcibly displaced during the conflicts of 1991-1994, 1998, 2004 and 2008 and denied the right to return to the South Ossetian and Abkhaz regions;
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> *(d)* the continuing discriminatory treatment of ethnic Georgians in South Ossetia and in the Gali District of Abkhazia, including but not limited to pillage, hostage-taking, beatings and intimidation, denial of the freedom of movement, denial of their right to education in their mother tongue, pressure to obtain Russian citizenship and/or Russian passports, and threats of punitive taxes and expulsions for maintaining Georgian citizenship;
>
> *(e)* the sponsoring, defending, and supporting of ethnic discrimination by the *de facto* South Ossetian and Abkhaz separatist authorities and the recognition as lawful of a situation created by a serious breach of Russia's obligations under CERD and of its obligations *erga omnes*, namely recognition in whole or in part of the South Ossetian and Abkhaz separatist entities amounting to recognition of a situation created by 'ethnic cleansing' constituting the crime against humanity of persecution and systematic discrimination on ethnic grounds;

(f) preventing the Republic of Georgia from exercising jurisdiction over its territory in the regions of South Ossetia [and] Abkhazia in order to implement its obligations under CERD; and

(g) the launching of a war of aggression against Georgia with the aims of (i) securing ethnically homogeneous allies in South Ossetia and Abkhazia free from Georgian political, social and cultural influence; (ii) permanently denying the right of displaced ethnic Georgians to return to their homes in South Ossetia and Abkhazia; and (iii) permanently denying all the people of Georgia their right to self-determination in accordance with CERD";

22. Whereas, at the end of its Application, Georgia asks the Court to adjudge and declare that:

"the Russian Federation, through its State organs, State agents, and other persons and entities exercising governmental authority, and through the South Ossetian and Abkhaz separatist forces and other agents acting on the instructions of or under the direction and control of the Russian Federation, has violated its obligations under CERD by:

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

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

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

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

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

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

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

23. Whereas Georgia also asks the Court

"to order the Russian Federation to take all steps necessary to comply with its obligations under CERD, including:

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

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

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

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

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

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

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

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

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

24. Whereas, on 14 August 2008, Georgia, referring to Article 41 of the Statute of the Court and to Articles 73, 74 and 75 of the Rules of Court, submitted a Request for the indication of provisional measures, pending the Court's judgment in the proceedings instituted by Georgia against the Russian Federation, in order to preserve its rights under CERD "to protect its citizens against violent discriminatory acts by Russian armed forces, acting in concert with separatist militia and foreign mercenaries", including

> "unlawful attacks against civilians and civilian objects, murder, forced displacement, denial of humanitarian assistance, and extensive pillage and destruction of towns and villages, in South Ossetia and neighbouring regions of Georgia, and in Abkhazia and neighbouring regions, under Russian occupation";

25. Whereas Georgia observes that "[t]he continuation of these violent discriminatory acts constitutes an extremely urgent threat of irreparable harm to [its] rights under CERD in dispute in this case";

* * *

28. Whereas Georgia claims that, on 8 August 2008, the Russian Federation "launched a full-scale military invasion against Georgia in support of ethnic separatists in South Ossetia and Abkhazia", which has resulted in "hundreds of civilian deaths, extensive destruction of civilian property, and the displacement of virtually the entire ethnic Georgian population in South Ossetia"; and whereas it further claims that the withdrawal of the Georgian armed forces and the unilateral declaration of a ceasefire did not prevent the Russian Federation from continuing its military operations beyond South Ossetia into territories under the control of the Georgian Government;

29. Whereas Georgia contends that, on 13 August 2008, the

> "Russian armed forces, acting together with South Ossetian separatist militia and foreign mercenaries, have engaged in a campaign of ethnic cleansing involving murder and forced displacement of ethnic Georgians, and the pillage and extensive destruction of villages adjacent to South Ossetia";

30. Whereas Georgia alleges that the following facts constitute "discriminatory human rights abuses against Georgian citizens in and around South Ossetia":

> "
> - Russian forces and separatist militia have summarily executed Georgian civilians and persons *hors de combat* after verifying their ethnicity in the villages of Nikosi, Kurta, and Armarishili;
> - Russian forces and separatist militia have engaged in widespread pillage and burning of homes in the villages of Karbi, Mereti, Disevi, Ksuisi, Kitsnisi, Beloti, Vanati, and Satskheneti and have executed elderly civilians;
> - Russian forces have forcibly transferred the remaining ethnic Georgians in South Ossetia to Kurta detention camp;
> - in Gori, Russian forces bombed the hospital, university, market place, and post-office, even though this is an undefended town without any Georgian military presence";

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34. Whereas Georgia accordingly requests the Court "as a matter of utmost urgency" and "in order to prevent irreparable prejudice to the rights of Georgia and its citizens under CERD", to order the following measures:

> "*(a)* the Russian Federation shall give full effect to its obligations under CERD;
>
> *(b)* the Russian Federation shall immediately cease and desist from any and all conduct that could result, directly or indirectly, in any form of ethnic discrimination by its armed forces, or other organs, agents, and persons and entities exercising elements of governmental authority, or through separatist forces in South Ossetia and Abkhazia under its direction and control, or in territories under the occupation or effective control of Russian forces;

(c) the Russian Federation shall in particular immediately cease and desist from discriminatory violations of the human rights of ethnic Georgians, including attacks against civilians and civilian objects, murder, forced displacement, denial of humanitarian assistance, extensive pillage and destruction of towns and villages, and any measures that would render permanent the denial of the right to return of IDPs, in South Ossetia and adjoining regions of Georgia, and in Abkhazia and adjoining regions of Georgia, and any other territories under Russian occupation or effective control";

* * *

N.B. In paragraphs 35 –40 the court discusses procedural matters, including the appointment of a ad hoc judge of Georgian nationality.

41. Whereas, on 25 August 2008, Georgia, referring to "the rapidly changing circumstances in Abkhazia and South Ossetia", submitted an "Amended Request for the Indication of Provisional Measures of Protection" (hereinafter the "Amended Request");

42. Whereas in the Amended Request Georgia claims that, "following its invasion commencing on 8 August 2008", the Russian Federation assumed control over all of South Ossetia and Abkhazia as well as "adjacent areas within the territory of Georgia"; whereas, according to Georgia, in these territories ethnic Georgians have been subjected to systematic discriminatory acts, including physical violence and the plunder and destruction of their homes; and whereas it is stated that "[t]he manifest objective of this discriminatory campaign is the mass-expulsion of the ethnic Georgian population from South Ossetia, Abkhazia, and other neighbouring areas of Georgia";

43. Whereas Georgia submits that in a number of specific areas of Georgia allegedly under Russian control, "widespread and systematic acts of violent racial discrimination" have been committed against ethnic Georgians; and whereas it adds that "[a] particular cause for concern is the Russian occupation of [the] Akhalgori District, outside and to the east of South Ossetia, and previously under Georgian Government control";

44. Whereas it is contended in the Additional Request that the Russian Federation has consolidated its "effective control" over the occupied "Georgian regions of South Ossetia and Abkhazia, as well as adjacent territories" which are situated within "Georgia's internationally recognized boundaries"; and whereas therefore, for the purposes of the fulfilment by the Russian Federation of its obligations under CERD, "South Ossetia, Abkhazia, and relevant adjacent regions, fall within the Russian Federation's jurisdiction";

45. Whereas Georgia asserts in its Amended Request that it requests the Court to indicate provisional measures in order to prevent irreparable prejudice "to the right of ethnic Georgians to be free from discriminatory treatment, in particular violent or otherwise coercive acts . . . and other acts intended to expel them from their homes in South Ossetia, Abkhazia, and adjacent regions located within Georgian territory" and "to the right of return of ethnic Georgians to South Ossetia and Abkhazia";

46. Whereas Georgia alleges that, owing to the Russian Federation's continuing discrimination against ethnic Georgians in Abkhazia, South Ossetia and neighbouring areas,

> "the remaining ethnic Georgians in South Ossetia, Abkhazia, and adjacent regions, are at imminent risk of violent expulsion, death or personal injury, hostage-taking and unlawful detention, and damage to or loss of their homes and other property";

and whereas it adds that "the prospects for the return of those ethnic Georgians who have already been forced to flee are rapidly deteriorating";

47. Whereas Georgia states that it urgently requests the indication of provisional measures

> "to avert a situation whereby the implementation of a judgment of the Court upholding the rights of Georgian citizens under Articles 2 and 5 of CERD to remain in South Ossetia, Abkhazia, or adjacent regions, or to return to their homes in these territories, is rendered impossible";

48. Whereas in its Amended Request

> "Georgia respectfully requests the Court as a matter of urgency to order the following provisional measures, pending its determination of this case on the merits, to prevent irreparable harm to the rights of ethnic Georgians under Articles 2 and 5 of CERD to be secure in their persons and to be protected against violence or bodily harm in the areas of Georgian territory under the effective control of the Russian Federation:
>
> *(a)* the Russian Federation shall take all necessary measures to ensure that no ethnic Georgians or any other persons are subject to violent or coercive acts of racial discrimination, including but not limited to the threat or infliction of death or bodily harm, hostage-taking and unlawful detention, the destruction or pillage of property, and other acts intended to expel them from their homes or villages in South Ossetia, Abkhazia and/or adjacent regions within Georgia;
>
> *(b)* the Russian Federation shall take all necessary measures to prevent groups or individuals from subjecting ethnic Georgians to coercive acts of racial discrimination, including but not limited to the threat or infliction of death or bodily harm, hostage-taking and unlawful detention, the destruction or theft of property, and other acts intended to expel them from their homes or villages in South Ossetia, Abkhazia and/or adjacent regions within Georgia;
>
> *(c)* the Russian Federation shall refrain from adopting any measures that would prejudice the right of ethnic Georgians to participate fully and equally in the public affairs of South Ossetia, Abkhazia and/or adjacent regions of Georgia.
>
> Georgia further requests the Court as a matter of urgency to order the following provisional measures to prevent irreparable injury to the right of return of ethnic Georgians under Article 5 of CERD pending the Court's determination of this case on the merits:
>
> *(d)* the Russian Federation shall refrain from taking any actions or supporting any measures that would have the effect of denying the exercise by ethnic Georgians and any other persons who have been expelled from South Ossetia, Abkhazia, and adjacent regions on the basis of their ethnicity or nationality, their right of return to their homes of origin;

(e) the Russian Federation shall refrain from taking any actions or supporting any measures by any group or individual that obstructs or hinders the exercise of the right of return to South Ossetia, Abkhazia, and adjacent regions by ethnic Georgians and any other persons who have been expelled from those regions on the basis of their ethnicity or nationality;

(f) the Russian Federation shall refrain from adopting any measures that would prejudice the right of ethnic Georgians to participate fully and equally in public affairs upon their return to South Ossetia, Abkhazia, and adjacent regions";

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52. Whereas Georgia claimed that "the discrimination against the ethnic Georgian communities in Abkhazia, South Ossetia and the Gori district gained momentum" following 8 August 2008; and whereas it asserted that "in the last month, more than 158,000 ethnic Georgians have been added to the number of internally displaced persons in Georgia" which meant that "10 per cent of the Georgian population is now living in exile in their own country";

53. Whereas Georgia asserted that "there is no sign that the Russian Federation and the *de facto* separatist authorities in South Ossetia and Abkhazia intend to cease" a campaign of "sustained and violent discrimination being waged" against ethnic Georgians in Abkhazia, South Ossetia and the Gori district before its objective, namely "the creation of two territories that are cleansed of ethnic Georgians and placed under the authority of separatists loyal to the Russian Federation", has been achieved; and whereas, according to Georgia, "the violent discrimination has continued since the so-called 'ceasefire', since Georgia filed its Application, and since the Request for provisional measures was put before the Court";

54. Whereas Georgia contended that "the obligations under the Convention are evidently engaged in relation to Russia's treatment of ethnic Georgians in Abkhazia, South Ossetia, and other areas of Georgia under Russian control" and reaffirmed that, for the purposes of its request for the indication of provisional measures, the rights at issue before the Court are the rights of Georgia and ethnic Georgians guaranteed under Articles 2 and 5 of CERD;

55. Whereas Georgia stressed that its Request for the indication of provisional measures is directed specifically at the protection of the ethnic Georgian population who are at grave risk of imminent violence against their person and property in the Gali district of Abkhazia, the Akhalgori district of South Ossetia and the adjacent Gori district; and whereas Georgia claimed that "Russia exercises significant control over the Georgian territories under its occupation, and also controls the separatist régimes in Abkhazia and South Ossetia" and thus "has the power to stop ongoing acts of discrimination";

56. Whereas Georgia stated that the question of attribution would have to be dealt with on the merits of the case; whereas it contended however that "the evidence already available indicates on a *prima facie* basis that acts and omissions which form the basis of Georgia's complaint have been committed and continue to be committed by persons for whose conduct Russia is responsible";

57. Whereas at the end of the first round of oral observations Georgia reiterated its requests made in the Amended Request for the indication of provisional measures and in addition asked the

Court "to order the respondent State to permit and facilitate, and to refrain from obstructing, the delivery of urgently needed humanitarian assistance to ethnic Georgians and others remaining in territory that is under the control of Russian forces";

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58. Whereas, in its first round of oral argument the Russian Federation presented a brief account of the history of the region since the eighteenth century; whereas, regarding the first period referred to by Georgia in its Application (see paragraphs 7-8 above), the Russian Federation explained that ethnic tensions in the Georgian autonomous regions, in particular in Abkhazia and South Ossetia, had been exacerbated in the late 1980s with the coming to power in Georgia of nationalists seeking independence, such as Zviad Gamsakhurdia, the first President of Georgia, who launched a political programme with the slogan "Georgia for Georgians"; whereas the Russian Federation contended that Georgia took steps to deprive Abkhazia and South Ossetia of their respective autonomous status, which actions "provoked a reaction on the part of the Abkhazians and Ossetians"; whereas the Russian Federation claimed that "Tblisi responded by sending military and paramilitary forces to Tskhinvali, the capital of South Ossetia, in January 1991" leading to a state of civil war; whereas, according to the Russian Federation, while on 9 April 1991 Georgia declared its independence, it denied the right of self-determination to Abkhazia and South Ossetia; and whereas, the Russian Federation added that a civil war broke out in 1992 in Abkhazia, with "the clashes between the Georgian forces and the Abkhaz militia caus[ing] many deaths on both sides";

* * *

64. Whereas the Russian Federation contended that the situation in the Ossetian-Georgian conflict zone was suddenly aggravated on 1 and 2 August 2008 "when Georgian military forces bombarded residential areas of Tskhinvali, causing a number of casualties"; whereas it claimed that on the evening of 2 August and in the night of 3 August 2008, "Georgia openly manoeuvred its troops in the area of Tskhinvali, moving its forces and heavy armour towards the zone of conflict, which caused the civilian population to take flight" and that, on 7 August 2008, Georgian military units launched a massive attack on Tskhinvali, using heavy weapons in an indiscriminate way and bombarding "residential areas of Tskhinvali, the hospital, schools and children's nurseries"; whereas, according to the Russian Federation, "much of the South Ossetian capital was destroyed, and many other villages in South Ossetia virtually razed to the ground"; whereas the Russian Federation asserted that "the Georgian venture . . . has caused a real humanitarian disaster", as a result of which, in just two days, 34,000 refugees (a figure which represents half the entire Ossetian population) were forced to flee towards North Ossetia and across the Russian border;

* * *

70. Whereas the Russian Federation contended that, until the present crisis, it merely played the role of an impartial mediator in the ethnic conflicts in the Caucasus, acting as a guarantor of peace and security in the region, and had never "practised, encouraged or supported racial discrimination in South Ossetia and Abkhazia"; and whereas it asserted that "the present dispute between Georgia and Russia has nothing to do with racial or ethnic discrimination";

71. Whereas the Russian Federation stressed that, as was apparent from the factual context of the case, the dispute brought by Georgia before the Court did not relate to racial discrimination; and whereas the Russian Federation claimed that, in the absence of a dispute between the Parties relating to the interpretation or application of CERD, the Court manifestly lacked jurisdiction to deal with the merits of the proceedings and thus the Request for the indication of provisional measures should be rejected;

72. Whereas the Russian Federation argued that Articles 2 and 5 of CERD did not apply extraterritorially and therefore the alleged acts invoked by Georgia could not be governed by the Convention; and whereas the Russian Federation asserted that in any event the preconditions for seisin of the Court laid down in Article 22 of CERD had not been satisfied;

73. Whereas the Russian Federation contended that Georgia had failed to demonstrate that the criteria for the grant of provisional measures under Article 41 of the Statute had been met, namely, "irreparable prejudice to the rights of Georgia" under CERD and urgency in the adoption of such provisional measures;

74. Whereas the Russian Federation submitted that, in any event, the requested provisional measures would not be justified since the Respondent had not in the past, "does not at present, nor will it in the future, exercise effective control over South Ossetia or Abkhazia"; whereas it explained that the Russian Federation was not an occupying Power in South Ossetia and Abkhazia, that it had never assumed the role of the existing Abkhazian and South Ossetian authorities, "recognized as such by Georgia itself", which "have always retained their independence and continue to do so"; and whereas the Russian Federation added that "the Russian presence, apart from its participation in limited peace-keeping operations, has been restricted in time and stretches only for a few weeks";

75. Whereas the Russian Federation stated that "the conduct of South Ossetian and Abkhazian authorities is not conduct by organs of the Russian Federation" and explained that "South Ossetian or Abkhazian entities can neither be qualified as *de facto* organs of the Respondent, nor does the Respondent effectively direct and control them"; whereas it contended that, although the situation had evolved since 7 August 2008, "there [were] no indications that, as regards effective control, the relationship between the Respondent on the one hand, and South Ossetia and Abkhazia on the other, had changed in any legally relevant manner";

76. Whereas, according to the Russian Federation, the Georgian Request for the indication of provisional measures presupposes "*a priori* determinations as to the role of the Russian Federation in the recent conflict"; whereas the Russian Federation stated that the requested measures also presupposed that the Russian Federation "had been and continued to be involved in the acts enumerated in the Request"; whereas it further contended that, were the Court to adopt these measures, "it would have to share the underlying assumption" that the Russian Federation is indeed committing such acts and is legally responsible for them, "without the Court previously having had any chance to verify the underlying alleged facts in an orderly procedure and with a full evidentiary hearing"; and whereas the Russian Federation added that the requested measures, if adopted, "would impose upon the Respondent very ambiguous and unclear obligations, which, in any case, it [could not] comply with given that it is not . . . exercising effective control with regard to the territory in question and besides, is also legally not in a position to enforce the requested measures vis-à-vis South Ossetia respectively Abkhazia";

77. Whereas, finally, the Russian Federation argued that the provisional measures requested by Georgia "may not be indicated since they would necessarily prejudge the final outcome of the case"; whereas it asserted that, according to the Court's jurisprudence, "a major purpose of the proceedings under Article 41 is to avoid prejudging in any manner whatsoever the outcome of the claim on the merits"; and whereas the Russian Federation added that "the very purpose of Article 41 is to preserve the respective rights of both parties";

78. Whereas the Russian Federation requested the Court "to declare that it has no jurisdiction to adjudicate upon the Application of Georgia, to reject the Request for provisional measures and to remove this case from the General List";

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79. Whereas, in its second round of oral argument, Georgia restated its position that "Georgia's claims in its Application and the rights it asserts in both the initial and amended Requests are grounded in the 1965 Convention and in that Convention alone" and that "Georgia makes no claim here under international humanitarian law or the *jus ad bellum*"; and whereas Georgia affirmed its position that "the evidence that has been submitted is more than sufficient to establish the facts of ongoing ethnic cleansing for the purposes of a provisional measures hearing" and that "the risk of irreparable harm to the ethnic Georgians who still remain in the Akhalgori district of South Ossetia, the Gali district of Abkhazia, and the portion of the Gori district that Russian military forces still occupy as their so-called 'buffer zone'", is real and grave;

80. Whereas at the end of its second round of oral observations Georgia requested the Court

> "as a matter of urgency, to order the following provisional measures, pending its determination of this case on the merits, in order to prevent irreparable harm to the rights of ethnic Georgians under Articles 2 and 5 of the Convention on Racial Discrimination:
>
> *(a)* The Russian Federation shall take all necessary measures to ensure that no ethnic Georgians or any other persons are subject to violent or coercive acts of racial discrimination, including but not limited to the threat or infliction of death or bodily harm, hostage-taking and unlawful detention, the destruction or pillage of property, and other acts intended to expel them from their homes or villages in South Ossetia, Abkhazia and/or adjacent regions within Georgia;
>
> *(b)* The Russian Federation shall take all necessary measures to prevent groups or individuals from subjecting ethnic Georgians to coercive acts of racial discrimination, including but not limited to the threat or infliction of death or bodily harm, hostage-taking and unlawful detention, the destruction or theft of property, and other acts intended to expel them from their homes or villages in South Ossetia, Abkhazia and/or adjacent regions within Georgia;
>
> *(c)* The Russian Federation shall refrain from adopting any measures that would prejudice the right of ethnic Georgians to participate fully and equally in the public affairs of South Ossetia, Abkhazia and/or adjacent regions of Georgia.

Georgia further requests the Court as a matter of urgency to order the following provisional measures to prevent irreparable injury to the right of return of ethnic Georgians under Article 5 of the Convention on Racial Discrimination pending the Court's determination of this case on the merits:

(d) The Russian Federation shall refrain from taking any actions or supporting any measures that would have the effect of denying the exercise by ethnic Georgians and any other persons who have been expelled from South Ossetia, Abkhazia, and adjacent regions on the basis of their ethnicity or nationality, their right of return to their homes of origin;

(e) The Russian Federation shall refrain from taking any actions or supporting any measures by any group or individual that obstructs or hinders the exercise of the right of return to South Ossetia, Abkhazia, and adjacent regions by ethnic Georgians and any other persons who have been expelled from those regions on the basis of their ethnicity or nationality;

(f) The Russian Federation shall refrain from adopting any measures that would prejudice the right of ethnic Georgians to participate fully and equally in public affairs upon their return to South Ossetia, Abkhazia, and adjacent regions";

and whereas Georgia also requested the Court to order that:

"The Russian Federation shall refrain from obstructing, and shall permit and facilitate, the delivery of humanitarian assistance to all individuals in the territory under its control, regardless of their ethnicity";

*

81. Whereas, in its second round of oral argument, the Russian Federation reiterated its position that there is no dispute between the Parties that falls within the scope of CERD;

* * *

83. Whereas at the end of its second round of oral observations the Russian Federation summarized its position as follows:

"First: The dispute that the Applicant has tried to plead before this Court is evidently not a dispute under the 1965 Convention. If there were a dispute, it would relate to the use of force, humanitarian law, territorial integrity, but in any case not to racial discrimination.

Second: Even if this dispute were under the 1965 Convention, the alleged breaches of the Convention are not capable of falling under the provisions of the said Convention, not the least because Articles 2 and 5 of the Convention are not applicable extraterritorially.

> Third: Even if such breaches occurred, they could not, even prima facie, be attributable to Russia that never did and does not now exercise, in the territories concerned, the extent of control required to overcome the set threshold.
>
> Fourth: Even if the 1965 Convention could be applicable, which . . . is not the case, the procedural requirements of Article 22 of the 1965 Convention have not been met. No evidence that the Applicant proposed to negotiate or employ the mechanisms of the Committee on Racial Discrimination prior to reference to this Court, has been nor could have been produced.
>
> Fifth: With these arguments in mind, the Court manifestly lacks jurisdiction to entertain the case.
>
> Sixth: Should the Court, against all odds, find itself prima facie competent over the dispute, we submit that the Applicant has failed to demonstrate the criteria essential for provisional measures to be indicated. No credible evidence has been produced to attest to the existence of an imminent risk of irreparable harm, and urgency. The circumstances of the case definitely do not require measures, in particular, in the light of the ongoing process of post-conflict settlement. And the measures sought failed to take account of the key factor going to discretion: the fact that the events of August 2008 were born out of Georgia's use of force.
>
> Finally: Provisional measures as they were formulated by the Applicant in the Requests cannot be granted since they would impose on Russia obligations that it is not able to fulfil. The Russian Federation is not exercising effective control vis-à-vis South Ossetia and Abkhazia or any adjacent parts of Georgia. Acts of organs of South Ossetia and Abkhazia or private groups and individuals are not attributable to the Russian Federation. These measures if granted would prejudge the outcome of the case";

and whereas the Russian Federation requested the Court "to remove the case introduced by the Republic of Georgia on 12 September 2008 from the General List";

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* *

84. Whereas the Court, under its Statute, does not automatically have jurisdiction over legal disputes between States parties to that Statute or between other States entitled to appear before the Court; whereas the Court has repeatedly stated that one of the fundamental principles of its Statute is that it cannot decide a dispute between States without the consent of those States to its jurisdiction; and whereas the Court therefore has jurisdiction only between States parties to a dispute who have accepted the jurisdiction of the Court, either in general form or for the individual dispute concerned;

85. Whereas, on a request for the indication of provisional measures, the Court need not finally satisfy itself, before deciding whether or not to indicate such measures, that it has jurisdiction on

the merits of the case, yet it may not indicate them unless the provisions invoked by the Applicant appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded;

86. Whereas Georgia at the present stage of the proceedings seeks to found the jurisdiction of the Court solely on the compromissory clause contained in Article 22 of CERD; and whereas the Court must now proceed to examine whether the jurisdictional clause relied upon does furnish a basis for prima facie jurisdiction to rule on the merits such as would allow the Court, should it think that the circumstances so warranted, to indicate provisional measures;

87. Whereas Georgia asserts that, as regards the Court's jurisdiction *ratione personae*, both Georgia and the Russian Federation are Members of the United Nations and parties to the Statute of the Court; whereas it further states that both Georgia and the Russian Federation are parties to CERD, Georgia having deposited its instrument of accession on 2 June 1999 and the Russian Federation "by virtue of its continuation of the State personality of the USSR" which has been a party to CERD since 1969; and whereas Georgia adds that "neither party maintains any reservation to article 22 of the Convention";

88. Whereas Georgia contends that, as regards the Court's jurisdiction *ratione materiae*, the object and purpose of CERD is to eliminate racial discrimination in "all its forms and manifestations"; whereas it states that the principle of non-discrimination on racial, including ethnic, grounds is "concerned not merely with discrimination against individuals but with collective discrimination against communities and with fundamental issues relating to the composition of territorial communities, including the granting and withdrawal of nationality"; whereas Georgia points out that Article 22 of CERD confers upon the Court jurisdiction over "any dispute . . . with respect to the interpretation or application of this Convention"; whereas it stresses that the term "any dispute" concerns either the "interpretation or application" of the Convention; whereas it concludes that the Court has therefore "jurisdiction to pronounce on the scope of the rights and responsibilities set out in the Convention but also upon the consequences of breach of those rights and responsibilities";

* * *

91. Whereas Georgia asserts that, as regards the Court's jurisdiction *ratione loci* under Article 22 of CERD, it is necessary to distinguish between two categories of claims advanced by Georgia in its Application: first, "claims founded upon the acts or omissions of Russia's State organs within Russia itself", and second,

> "claims founded upon the acts or omissions of persons exercising Russia's governmental authority or other persons acting on the instructions or under the control of Russia within Georgian territory, particularly in Abkhazia and South Ossetia, as well as other areas of Georgia under *de facto* occupation by Russian military forces";

whereas, according to Georgia, no question concerning the spatial scope of the obligations under the Convention arises in respect of the first category of claims; and whereas Georgia contends that, in relation to the second category of claims,

> "the Court needs to be satisfied on a prima facie basis that Russia's obligations under the Convention extend to acts and omissions attributable to Russia which have their locus within Georgia's territory and in particular in Abkhazia and South Ossetia";

92. Whereas Georgia argues that CERD "does not contain a general provision imposing a spatial limitation on the obligations it creates"; whereas Georgia notes, in particular, that no spatial limitation is included in Articles 2 and 5 which stipulate the "obligations of Russia and the corresponding rights of Georgia" that are in issue before the Court for the purposes of the Request for the indication of provisional measures; whereas Georgia observes that even if the Convention were to be construed as containing a general limitation limiting the spatial scope of its obligations, "this would not preclude the claims asserted by Georgia in this Application and in this Request" because "Abkhazia and South Ossetia have been within the power or effective control of Russia since Georgia lost control over those regions following the hostilities"; and whereas Georgia adds that the Russian invasion and deployment of additional military forces within Abkhazia and South Ossetia in August 2008 "has only served to consolidate further its effective control over those regions";

* * *

96. Whereas the Russian Federation asserts that the object of the dispute which Georgia seeks to have adjudicated by the Court "is not at all alleged violations by Russia of its obligations under the 1965 Convention", but rather solely "allegations of unlawful actions in violation of international humanitarian law in South Ossetia and Abkhazia";

97. Whereas the Russian Federation stresses that, in the Applicant's presentation of the supposedly relevant facts, the latter deals only with the various phases "of Russia's intervention" in South Ossetia and Abkhazia and that "it is indeed this 'intervention' which Georgia seeks to have condemned by the Court"; and whereas the Russian Federation adds that Georgia's "Observations" concern only armed attacks, indiscriminate attacks on civilians, the use of cluster bombs, declarations and recognition of independence and the plight of refugees and displaced persons, but not issues of racial discrimination; and whereas, according to Russia, the dispute between the Parties relates to "the intervention that Georgia blames the Russian Federation for undertaking in response to its own action with respect to Abkhazia and South Ossetia and the alleged violations of the rules of humanitarian law on that occasion";

98. Whereas the Russian Federation asserts that, while "there is unquestionably a dispute (or more than one dispute) between the Parties", this dispute does not concern the interpretation or application of CERD; whereas, according to the Russian Federation, this follows from "the pleadings submitted by Georgia and the file it has produced" as well as from "the attitude taken by the Respondent since the very early 1990s"; whereas the Russian Federation claims that, despite Georgia's contention that a dispute relating to CERD has existed between Georgia and the Russian Federation since 1991, the Georgian Government has failed to mention this dispute for 18 years in its relations with Russia, in the Security Council or the OSCE, in the organ established under the Convention to deal with it (the Committee on the Elimination of Racial Discrimination) as well as in its recent request for interim measures, of 11 and 12 August 2008, to the European Court of Human Rights, "which does not refer to Article 14 of the Convention"; whereas the Russian Federation claims that "this failure to act, this silence consistently maintained over so many years, indisputably attests to the absence in the view of Georgia's leaders . . . of any dispute relating to the interpretation and application of the Convention";

99. Whereas the Russian Federation notes that, since Georgia ratified CERD in 1999 it has submitted three periodic reports to the Committee but that, in none of these, did Georgia invoke any breaches by the Russian Federation of its obligations under CERD, nor did it refer to any

dispute with the Russian Federation "no such dispute being mentioned either in the periodic reports or during examination of them in the discussions between Committee members and Georgia's representatives"; whereas the Russian Federation stresses that

> "it is particularly telling that no mention whatsoever was made of any dispute between Georgia and Russia over the application of the Convention during the CERD's most recent session, which concluded in Geneva on 15 August 2008, one week after the armed conflict broke out . . . at the very time the Committee was formulating its concluding observations on the Russian Federation's eighteenth and nineteenth periodic reports";

and whereas the Russian Federation observes that Georgia could have seised the Committee pursuant to Article 11 while it was in session and could have brought "its grievances to the Committee's attention" in order to make use of the "early warning procedure in place in the CERD since 1993, enabling the Committee to react in urgent situations by seeking explanations from the State party concerned or by requesting intervention by other United Nations organs, including the Security Council or Secretary-General";

100. Whereas the Russian Federation contends that the wording of Articles 2 and 5 of CERD demonstrates that the different obligations listed therein "are clearly phrased as obligations to be implemented within each member State" and that therefore these provisions "do not apply extraterritorially"; whereas it states that "Articles 2 and 5 of CERD upon which Georgia relies do not bind the Respondent outside its own territory"; whereas, the Russian Federation maintains that, accordingly, "Russia's extraterritorial conduct is not governed by Articles 2 and 5 of CERD, hence those provisions cannot form the basis for the requested interim order either";

101. Whereas the Russian Federation argues that Article 22 of CERD lays down procedural preconditions for the seisin of the Court, namely that only if the dispute in question "is not settled by negotiation or by the procedures expressly provided for in this Convention" can it be referred to the Court; whereas the Russian Federation claims that "failing negotiation and/or recourse to the procedures laid down by the Convention" the Court cannot be seised of a dispute; and whereas, according to the Russian Federation, this interpretation is endorsed by the *travaux préparatoires*, which show that "referral to the Court was seen by those who drafted the Convention . . . as a last resort when all other possibilities have proved ineffective";

102. Whereas the Russian Federation claims that, in the present case, "there has never been the slightest negotiation between the Parties on the interpretation or application of the Convention on the elimination of racial discrimination", that the procedures laid down by CERD have not been initiated either by the Russian Federation or by Georgia and that "even after the start of hostilities, Georgia did not refer the matter to the [Committee on the Elimination of Racial Discrimination] under Article 11 of the Convention"; whereas, according to the Russian Federation, the question of whether the negotiations and recourse to the Committee are cumulative or alternative preconditions is irrelevant because "there has been neither negotiation nor recourse to the procedure in Article 11 (or Article 14)" of CERD; and whereas the Russian Federation asserts consequently that, as the preconditions in Article 22 have not been met, Georgia has "no possibility of unilaterally seising the Court" and that the Court thus has no jurisdiction;

103. Whereas the Russian Federation concludes that, in the absence of a dispute relating to CERD, the Court manifestly lacks jurisdiction and that, even if such a dispute existed, in view of the fact that "it has in any case never given rise to the slightest attempt to reach a settlement between the Parties" and that "before Georgia filed its Application with the Court, on 12 August last, the Russian Federation never even suspected its existence", the lack of jurisdiction would also be manifest since the preconditions for the seisin of the Court laid down in Article 22 have not been met;

* * *

105. Whereas, according to the information available from the Secretary-General of the United Nations as depositary, Georgia and the Russian Federation are parties to CERD; whereas Georgia deposited its instrument of accession on 2 June 1999 without reservation; whereas the Union of Soviet Socialist Republics deposited its instrument of ratification on 4 February 1969 with a reservation to Article 22 of the Convention; whereas, by a communication received by the depositary on 8 March 1989, the Government of the Union of Soviet Socialist Republics notified the Secretary-General that it had decided to withdraw the reservation relating to Article 22; and whereas the Russian Federation, as the State continuing the legal personality of the Union of Soviet Socialist Republics, is a party to CERD without reservation;

* * *

108. Whereas the Parties disagree on the territorial scope of the application of the obligations of a State party under CERD; whereas Georgia claims that CERD does not include any limitation on its territorial application and that accordingly "Russia's obligations under the Convention extend to acts and omissions attributable to Russia which have their locus within Georgia's territory and in particular in Abkhazia and South Ossetia"; whereas the Russian Federation claims that the provisions of CERD cannot be applied extraterritorially and that in particular Articles 2 and 5 of CERD cannot govern a State's conduct outside its own borders;

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 territory;

110. Whereas Georgia claims that the dispute it brings to the Court concerns the interpretation and application of CERD; whereas the Russian Federation contends that the dispute really relates to the use of force, principles of non-intervention and self-determination and to violations of humanitarian law; and whereas it is for the Court to determine prima facie whether a dispute within the meaning of Article 22 of CERD exists;

111. 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;

112. 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;

113. Whereas the Court, having established that such a dispute between the Parties exists, still needs to ascertain whether the procedural conditions set out in Article 22 of the Convention have been met, before deciding whether or not it has prima facie jurisdiction to deal with the case and accordingly has also the power to indicate provisional measures if the circumstances are found so to require; whereas it is recalled that Article 22 provides that a dispute relating to the interpretation or application of CERD may be referred to the Court if it "is not settled by negotiation or by the procedure expressly provided for in this Convention"; whereas Georgia claims that this phrase is descriptive of the fact that a dispute has not so been settled and does not represent conditions to be exhausted before the Court can be seized of the dispute; and whereas, according to Georgia, bilateral discussions and negotiations relating to the issues which form the subject-matter of the Convention have been held between the Parties; whereas, for its part, the Russian Federation argues that pursuant to Article 22 of CERD, prior negotiations or recourse to the procedures under CERD constitute an indispensable precondition for the seisin of the Court; and whereas it stresses that no negotiations have been held between the Parties on issues relating to CERD nor has Georgia, in accordance with the procedures envisaged in the Convention, brought any such issues to the attention of the Committee on the Elimination of Racial Discrimination;

114. Whereas the structure of Article 22 of CERD is not identical to that in certain other instruments which require that a period of time should have elapsed or that arbitration should have been attempted before initiation of any proceedings before the Court; whereas 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 Court; whereas however Article 22 does suggest that some attempt should have been made by the claimant party to initiate, with the respondent party, discussions on issues that would fall under CERD;

115. 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 the seisin of the Court on the basis of Article 22 of the Convention;

116. Whereas Article 22 of CERD refers also to "the procedures expressly provided for" in the Convention; whereas, according to these procedures, "if a State Party considers that another State Party is not giving effect to the provisions of this Convention" the matter may properly be brought to the attention of the Committee on the Elimination of Racial Discrimination; whereas the Court notes that neither Party claims that the issues in dispute have been brought to the attention of the Committee;

117. Whereas the Court, in view of all the foregoing, considers that, prima facie, it has jurisdiction under Article 22 of CERD to deal with the case to the extent that the subject-matter of

the dispute relates to the "interpretation or application" of the Convention; and whereas the Court may accordingly address the present Request for the indication of provisional measures;

* *

118. Whereas the power of the Court to indicate provisional measures under Article 41 of the Statute of the Court has as its object the preservation of the respective rights of the parties pending the decision of the Court, in order to ensure that irreparable prejudice shall not be caused to rights which are the subject of dispute in judicial proceedings; and whereas it follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by the Court to belong either to the Applicant or to the Respondent (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro)), Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993,* p. 19, para. 34; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Provisional Measures, Order of 15 March 1996, I.C.J. Reports 1996 (I)*, p. 22, para. 35); whereas a link must therefore be established between the alleged rights the protection of which is the subject of the provisional measures being sought, and the subject of the proceedings before the Court on the merits of the case;

119. Whereas, according to Georgia's Application, the rights that Georgia and its nationals may have on the basis of Articles 2, 3, 4, 5 and 6 of CERD constitute the subject of the proceedings pending before the Court on the merits of the case;

120. Whereas the legal rights which Georgia seeks to have protected by the indication of provisional measures are enumerated in the Request of Georgia for the indication of such measures filed on 14 August 2008 as follows:

> "*(a)* the right to ensure that the Russian Federation and separatist authorities under its direction and control refrain from any further act or practice of ethnic discrimination against Georgian citizens and that civilians are fully protected against such acts in territories under the occupation or effective control of Russian forces, pursuant to Article 2 (1);
>
> *(b)* the right to ensure that the Russian Federation and separatist authorities under its direction and control refrain from any further acts resulting in the recognition of or rendering permanent the ethnic segregation of Georgian citizens through forced displacement or denial of the right of IDPs to return to their homes in South Ossetia, Abkhazia, and adjacent territories under the occupation or effective control of Russian forces, pursuant to Article 3;
>
> *(c)* the right to ensure that the Russian Federation and separatist authorities under its direction and control refrain from any further acts violating the enjoyment by Georgian citizens of fundamental human rights including in particular the right to security of the person and protection against violence or bodily harm, the right to freedom of movement and residence within the borders of Georgia, the right of IDPs to return to their homes under conditions of safety, and the right to protection of homes and property against pillage and destruction, pursuant to Article 5; and

(d) the right to ensure that the Russian Federation and separatist authorities under its direction and control refrain from any acts denying to Georgian citizens under their jurisdiction effective protection and remedies against ethnic discrimination and violations of human rights pursuant to Article 6";

121. Whereas in its Amended Request (see paragraph 41 above), Georgia, referring to Articles 2 and 5 of CERD, states that it seeks to protect "the right to security of person and protection against violence or bodily harm" and "the right of return" provided for in the above-mentioned Articles of the Convention;

* * *

124. Whereas the Russian Federation contends that the required connection between the rights which Georgia seeks to protect by its Request for the indication of provisional measures and the subject of the proceedings on the merits is lacking;

125. Whereas, in particular, it explains that "the measures listed in subparagraphs *(a)* and *(b)* of the Request, if ever adopted, would require Russia to take active steps to ensure or to prevent certain results from happening in the areas concerned" thereby presupposing that Articles 2 and 5 of CERD contain an obligation to prevent racial discrimination; whereas the Russian Federation argues that, as is apparent from the wording of Articles 2 and 5 of CERD, nowhere in these provisions "do States undertake to prevent breaches of the Convention" and that thus there is "no duty to prevent racial discrimination by other actors"; whereas, according to the Russian Federation, owing to this fact, a duty to prevent racial discrimination or specific, positive measures said to flow from such duty cannot form the subject of the proceedings on the merits; and whereas, therefore, any related right cannot be protected by the indication of provisional measures;

126. Whereas the Court notes that Articles 2 and 5 of CERD are intended to protect individuals from racial discrimination by obliging States parties to undertake certain measures specified therein; whereas the Court considers that it is not appropriate, in the present phase, for it to pronounce on the issue of whether Articles 2 and 5 of CERD imply a duty to prevent racial discrimination by other actors; whereas States parties to CERD have the right to demand compliance by a State party with specific obligations incumbent upon it under Articles 2 and 5 of the Convention; whereas there is a correlation between respect for individual rights, the obligations of States parties under CERD and the right of States parties to seek compliance therewith; whereas in the view of the Court the rights which Georgia invokes in, and seeks to protect by, its Request for the indication of provisional measures have a sufficient connection with the merits of the case it brings for the purposes of the current proceedings; and whereas it is upon the rights thus claimed that the Court must focus its attention in its consideration of Georgia's Request for the indication of provisional measures;

127. Whereas the Court, having established the existence of a basis on which its jurisdiction might be founded, ought not to indicate measures for the protection of any disputed rights other than those which might ultimately form the basis of a judgment in the exercise of that jurisdiction; whereas accordingly the Court will confine its examination of the measures requested by Georgia, and of the grounds asserted for the request for such measures, to those which appear to fall within the scope of CERD (cf. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro)), Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 19);

* *

128. Whereas the power of the Court to indicate provisional measures under Article 41 of its Statute "presupposes that irreparable prejudice shall not be caused to rights which are the subject of a dispute in judicial proceedings" (*LaGrand (Germany* v. *United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999 (I)*, pp. 14-15, para. 22);

129. Whereas the power of the Court to indicate provisional measures will be exercised only if there is urgency in the sense that there is a real risk that action prejudicial to the rights of either party might be taken before the Court has given its final decision (see, for example, *Passage through the Great Belt (Finland* v. *Denmark), Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991*, p. 17, para. 23; *Certain Criminal Proceedings in France (Republic of the Congo* v. *France), Provisional Measure, Order of 17 June 2003, I.C.J. Reports 2003*, p. 107, para. 22; *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Preliminary Objections*, Order of 23 January 2007, p. 11, para. 32); and whereas the Court thus has to consider whether in the current proceedings such urgency exists;

*

130. Whereas Georgia argues that, in view of the conduct of the Russian Federation in South Ossetia, Abkhazia, and adjacent regions, provisional measures are urgently needed because the ethnic Georgians in these areas "are at imminent risk of violent expulsion, death or personal injury, hostage-taking and unlawful detention, and damage to or loss of their homes and other property" and "in addition, the prospects for the return of those ethnic Georgians who have already been forced to flee are rapidly deteriorating";

131. Whereas Georgia contends that reports of international and non-governmental organizations and witness statements, which are consistent with and corroborate these reports, provide evidence of "the ongoing, widespread and systematic abuses of rights of ethnic Georgians under the Convention" in South Ossetia, Abkhazia and other parts of Georgia "presently occupied by Russian forces" and allegedly show that ethnic Georgians who remain in these areas "are at imminent risk of violent attack and forced expulsion"; whereas, according to Georgia, there is evidence of a "real risk of continued ethnic cleansing by Russian military forces and separatist militias operating behind Russian lines, especially in those areas that still have significant Georgian populations"; and whereas Georgia asserts that this evidence also "shows a present failure, and a risk of continuing failure, on the part of the Russian authorities to ensure that rights for ethnic Georgians under the Convention are respected", particularly the rights of Georgians who still live in South Ossetia, Abkhazia and other regions of Georgia "presently occupied by Russian forces", and the rights of Georgians who wish to return to their homes in those regions;

132. Whereas Georgia claims that "the rights in dispute are threatened with harm that by its very nature is irreparable" because "no satisfaction, no award of reparations, could ever compensate for the extreme forms of prejudice" to those rights in the current proceedings; whereas it states that the risk of irreparable prejudice "is not necessarily removed by a suspension or cessation of the military hostilities that initially provided the context in which the risk was generated"; and whereas Georgia contends that "the widespread violations of the rights of ethnic Georgians under the Convention grew even worse after military engagements ceased, that they have continued unabated since then, and that they are continuing still";

133. Whereas Georgia claims that "the risk of irreparable prejudice to the rights at issue in this case is not only imminent, [but] is already happening", which is evidenced by the fact that "the ethnic cleansing and other forms of prohibited discrimination carried out against Georgians in Abkhazia, South Ossetia and other regions occupied by Russian forces are still occurring, and that they are likely to continue to occur and to recur";

134. Whereas, for its part, the Russian Federation states that "the criteria of Article 41 are not met in this case"; whereas it submits that "Georgia has not established that any rights opposable to Russia under Articles 2 and 5 of CERD however broadly drawn are exposed to 'serious risk' of irreparable damage";

135. Whereas, with reference to the period characterised by Georgia as "the first and second phases of Russia's intervention in South Ossetia and Abkhazia", the Russian Federation draws attention to the documents in the case file, in particular "statements of Georgian Ministers, decisions and international agreements to which Georgia is a party, in which Russia's role and the role of the peacekeeping forces are consented to and recognized as wholly beneficial";

136. Whereas, with reference to the events of August 2008, the Russian Federation argues that "the facts that can be relied on with reasonable certitude" go against the existence of a serious risk to the rights Georgia now claims, for the reasons that, first, armed actions have led to "deaths of the armed forces of all parties concerned, deaths of civilians of all ethnicities, and a mass displacement of persons of all ethnicities", and, second, that "the armed actions have now ceased, and civilians of all ethnicities are returning to some, although not yet all, of the former conflict zones"; and whereas, so far as concerns the principle of return, the Russian Federation refers to the fact that "on 15 August, in discussions with the United Nations High Commissioner for Refugees, the Russian Foreign Minister stated his agreement on the principle of the non-discriminatory nature of the right of return for all civilians forced to flee";

137. Whereas the Russian Federation asserts that "the case on urgency can only be built on the events subsequent to 7 August 2008" in light of the fact that before this date there was "evidently no urgency of the requisite degree as Georgia had never even raised complaints of violations of the CERD with Russia"; whereas it further argues that any urgency to be found in the events occurring after 7 August 2008 relates to "the armed actions and their repercussions since that date"; whereas the Russian Federation explains that "major developments within the course of that period . . . tell against the case for urgency"; whereas it refers to the ceasefire announced by the Russian Federation on 12 August 2008 and to the six principles for the peaceful settlement of the conflict adopted by the Presidents of the Russian Federation and France on the same day and subsequently signed on 13-16 August 2008 by the President of Georgia and leaders of South Ossetia and Abkhazia, "through the intermediary of Russia and in the presence of the OSCE and the European Union"; and whereas the Russian Federation claims that since then "the armed actions are at an end and large numbers of IDPs have in fact already returned to Gori and villages nearby";

138. Whereas the Russian Federation contends that Georgia's assertions that the Russian Federation is continuing to discriminate against ethnic Georgians in Abkhazia, South Ossetia and neighbouring areas by threatening the rights of ethnic Georgians to security and the right of return, and that Russia is actively supporting groups or individuals that continue to perpetrate acts of violence against ethnic Georgians, are not supported by the documents submitted by Georgia itself;

139. Whereas the Russian Federation argues that "the case on urgency in relation to Abkhazia is built almost exclusively on inference, and that [this] is not a sound basis for a provisional measures award";

140. Whereas the Russian Federation claims that its "positive démarches before the OSCE . . . with the European Union and President Sarkozy, are addressing precisely the problem that is being put before [the Court] as the basis for urgent provisional measures"; whereas the Russian Federation notes that, in accordance with the further principles announced on 8 September 2008, 200 European Union monitors will be deployed "into the South Ossetian and Abkhaz buffer zones, and Russian peacekeeping troops [will] make a full withdrawal ten days later"; whereas the Russian Federation asserts that "the plan provides that the United Nations and OSCE observers will also continue to carry out their mandates"; whereas the Russian Federation states that further security and stability issues and the question of the return of refugees are to be addressed in international talks, "which are imminent and are obviously to be at a very high level"; whereas the Russian Federation contends that the facts "contradict Georgia's assertion of an ongoing worsening crisis"; and whereas it points out that, while "there has been a humanitarian crisis to be sure . . . it is part of the recent armed conflict and is being addressed in that context at the highest levels";

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141. Whereas the Court is not called upon, for the purpose of its decision on the Request for the indication of provisional measures, to establish the existence of breaches of CERD, but to determine whether the circumstances require the indication of provisional measures for the protection of rights under CERD; whereas it cannot at this stage make definitive findings of fact, nor finding of attribution; and whereas the right of each Party to submit arguments in respect of the merits remains unaffected by the Court's decision on the Request for the indication of provisional measures;

142. Whereas, nevertheless, the rights in question in these proceedings, in particular those stipulated in Article 5, paragraphs *(b)* and *(d)* (i) of CERD, are of such a nature that prejudice to them could be irreparable; whereas the Court considers that violations of the right to security of persons and of the right to protection by the State against violence or bodily harm (Article 5, paragraph *(b)*) could involve potential loss of life or bodily injury and could therefore cause irreparable prejudice; whereas the Court further considers that violations of the right to freedom of movement and residence within a State's borders (Article 5, paragraph *(d)* (i)) could also cause irreparable prejudice in situations where the persons concerned are exposed to privation, hardship, anguish and even danger to life and health; and whereas the Court finds that individuals forced to leave their own place of residence and deprived of their right of return could, depending on the circumstances, be subject to a serious risk of irreparable prejudice;

143. Whereas the Court is aware of the exceptional and complex situation on the ground in South Ossetia, Abkhazia and adjacent areas and takes note of the continuing uncertainties as to where lines of authority lie; whereas, based on the information before it in the case file, the Court is of the opinion that the ethnic Georgian population in the areas affected by the recent conflict remains vulnerable;

Whereas the situation in South Ossetia, Abkhazia and adjacent areas in Georgia is unstable and could rapidly change; whereas, given the ongoing tension and the absence of an overall

settlement to the conflict in this region, the Court considers that the ethnic Ossetian and Abkhazian populations also remain vulnerable;

Whereas, while the problems of refugees and internally displaced persons in this region are currently being addressed, they have not yet been resolved in their entirety;

Whereas, in light of the foregoing, with regard to these above-mentioned ethnic groups of the population, there exists an imminent risk that the rights at issue in this case mentioned in the previous paragraph may suffer irreparable prejudice;

144. Whereas States parties to CERD "condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms"; whereas in the view of the Court, in the circumstances brought to its attention in which there is a serious risk of acts of racial discrimination being committed, Georgia and the Russian Federation, whether or not any such acts in the past may be legally attributable to them, are under a clear obligation to do all in their power to ensure that any such acts are not committed in the future;

145. Whereas the Court is satisfied that the indication of measures is required for the protection of rights under CERD which form the subject-matter of the dispute; and whereas the Court has the power, under its Statute, when a request for provisional measures has been made, to indicate measures that are in whole or in part other than those requested, or measures that are addressed to the party which has itself made the request; whereas Article 75, paragraph 2, of the Rules of Court specifically refers to this power of the Court; and whereas the Court has already exercised this power on several occasions in the past (*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Provisional Measures, Order of 1 July 2000, I.C.J. Reports 2000*, p. 128, para. 43; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Provisional Measures, Order of 15 March 1996, I.C.J. Reports 1996 (I)*, p. 24, para. 48; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro), Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 22, para. 46);

146. Whereas the Court, having found that the indication of provisional measures is required in the current proceedings, has considered the terms of the provisional measures requested by Georgia; whereas the Court does not find that, in the circumstances of the case, the measures to be indicated are to be identical to those requested by Georgia; whereas the Court, having considered the material before it, considers it appropriate to indicate measures addressed to both Parties;

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147. Whereas the Court's "orders on provisional measures under Article 41 [of the Statute] have binding effect" (*LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 506, para. 109) and thus create international legal obligations which both Parties are required to comply with (*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 258, para. 263);

* * *

149. For these reasons,

THE COURT, reminding the Parties of their duty to comply with their obligations under the International Convention on the Elimination of All Forms of Racial Discrimination,

Indicates the following provisional measures:

A. By eight votes to seven,

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;

(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;

IN FAVOUR: *President* Higgins; *Judges* Buergenthal, Owada, Simma, Abraham, Keith, Sepúlveda-Amor, *Judge* ad hoc Gaja;

AGAINST: *Vice-President* Al-Khasawneh; *Judges* Ranjeva, Shi, Koroma, Tomka, Bennouna, Skotnikov;

B. By eight votes to seven,

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;

IN FAVOUR: *President* Higgins; *Judges* Buergenthal, Owada, Simma, Abraham, Keith, Sepúlveda-Amor; *Judge* ad hoc Gaja;

AGAINST: *Vice-President* Al-Khasawneh; *Judges* Ranjeva, Shi, Koroma, Tomka, Bennouna, Skotnikov;

C. By eight votes to seven,

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;

IN FAVOUR: *President* Higgins; *Judges* Buergenthal, Owada, Simma, Abraham, Keith, Sepúlveda-Amor; *Judge* ad hoc Gaja;

AGAINST: *Vice-President* Al-Khasawneh; *Judges* Ranjeva, Shi, Koroma, Tomka, Bennouna, Skotnikov;

D. By eight votes to seven,

Each Party shall inform the Court as to its compliance with the above provisional measures;

IN FAVOUR: *President* Higgins; *Judges* Buergenthal, Owada, Simma, Abraham, Keith, Sepúlveda-Amor; *Judge* ad hoc Gaja;

AGAINST: *Vice-President* Al-Khasawneh; *Judges* Ranjeva, Shi, Koroma, Tomka, Bennouna, Skotnikov.

JOINT DISSENTING OPINION OF VICE-PRESIDENT AL-KHASAWNEH AND JUDGES RANJEVA, SHI, KOROMA, TOMKA, BENNOUNA AND SKOTNIKOV

1. We have regretfully been obliged to vote against the Order granting provisional measures, persuaded as we are that the conditions for the adoption of such measures laid down in Article 41 of the Statute and by the jurisprudence of the Court are not met in the present case. Needless to say, our vote should not be construed as support for exonerating the Parties from their obligations either under the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) or under international law more generally. On the contrary, we consider that the Parties are under a continuing duty to conduct themselves in conformity with their international obligations.

2. The power of the Court to indicate provisional measures is inherent in its judicial function, as it enables the Court to ensure, in accordance with the circumstances, that the very subject of the dispute submitted to it be preserved before the Court renders its judgment. It is for this reason that the Court has full scope to indicate provisional measures exceeding those requested or to decide *proprio motu*. As these measures are binding on both Parties (*LaGrand (Germany* v. *United States), Judgment, I.C.J. Reports 2001*, p. 506, para. 109), the Court must be all the more vigilant in assessing whether the conditions required for their indication have been met.

* * *

6. It is not disputed that both Georgia and the Russian Federation are parties to the said Convention without reservations and are bound by Article 22 thereof. However, regarding jurisdiction under Article 22 of the Convention, the Parties differ on two questions:

(1) whether there is a dispute between them "with respect to the interpretation or application of this Convention";

(2) whether the precondition that the dispute "is not settled by negotiation or the procedures expressly provided for in this Convention" has been met in the present case.

7. We shall turn to the first point of disagreement between the Parties as regards the jurisdiction of the Court in the present case, namely, the existence of a dispute concerning the interpretation or application of CERD.

8. Such a dispute must exist prior to the seisin of the Court. It is for this reason that the Court must consider whether the two Parties have opposing views with regard to the interpretation or application of the Convention. Admittedly, it is established that no such opposition was ever manifested before 8 August; but was it manifested after 7-8 August and the outbreak of hostilities between the two States? In other words, are the violent acts which Georgia imputes to Russia likely to "com[e] within the provisions" of CERD, to reprise the terminology which the Court employed to decline jurisdiction prima facie in its Order of 2 June 1999 on the *Legality of Use of Force (Yugoslavia* v. *Belgium) (Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (I),* p. 138, para. 41)? The Court there considered that "the threat or use of force against a State cannot in itself constitute an act of genocide within the meaning of Article II of the Genocide Convention" (*ibid.*, para. 40).

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

10. Moreover, the majority, unable to find any evidence that the acts alleged by Georgia fall within the provisions of CERD, has been content to observe merely that a dispute appears to exist as to the interpretation and application of CERD because the two Parties have manifested their disagreement over the applicability of Articles 2 and 5 of the Convention. In other words, an argument expounded during oral proceedings has mutated into evidence of the existence of a dispute between the Parties (Order, paragraph 112)! Further, to conclude on this point, the majority has affirmed peremptorily that "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" *(ibid.)*.

11. Even if one accepts, for the sake of argument, that a dispute likely to fall within the provisions of CERD existed between Georgia and Russia before the seisin of the Court, it must be asked whether this constitutes a dispute, in the express terms used in Article 22 of CERD, "which is not settled by negotiation or by the procedures expressly provided for in this Convention".

12. With regard to negotiations, the Court begins by seeking the literal meaning of Article 22, which "does not, on its plain meaning, suggest that formal negotiations . . . or recourse to the procedure referred to in Article 22 thereof constitute preconditions to be fulfilled before the seisin of the Court" (Order, paragraphs 114 and 115); this would amount to denying any legal effect and useful scope to the mention thereof. The Court then admits that the questions concerning CERD should have been raised between the Parties, referring specifically in this regard to the bilateral contacts between the Parties and certain representations made to the Security Council, even

though nowhere in these has Georgia accused Russia of racial discrimination. Thus, in our opinion, the very substance of CERD was never debated between the Parties before the filing of a claim before the Court.

13. It is very surprising that the Court has chosen to disregard this precondition to any judicial action when Georgia itself has recognized that "even where an obligation to negotiate prior to seising the Court does exist, it is well established that it does not require the parties to continue with negotiations which show every sign of being unproductive" (CR 2008/25, p. 19 (Crawford)). Indeed, this is what emerges from the jurisprudence of the Court and its predecessor, the Permanent Court of International Justice. For the condition of prior negotiation to be fulfilled, it suffices for an attempt to have been made and for it to have become clear at some point that there was no chance of success. In any event, it is clear that when negotiation is expressly provided for by a treaty, the Court cannot ignore this prior condition without explanation; nor can the Court dispose of this condition merely by observing that the question has not been resolved by negotiation. The judgment in *Mavrommatis Palestine Concessions* has often been quoted on this point in later decisions:

> "The true value of this objection will readily be seen if it be remembered that the question of the importance and chances of success of diplomatic negotiations is essentially a relative one. 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 dead lock 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 negotiation*." *(Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 3; emphasis in the original).

* * *

15. Thus, it is not sufficient that there have been contacts between the Parties (see para. 12 above); these contacts must have been regarding the subject of the dispute, either the interpretation or application of the Convention. Even so, this precedent may not be dismissed in the present case, given that the two compromissory clauses are different, in that Article 29 of the Convention on Discrimination against Women requires arbitration after negotiation and before filing suit in the Court. In fact, when it rendered its judgment on 3 February 2006 on jurisdiction, the Court concluded that Article 29 established cumulative conditions and that it "must therefore consider whether the preconditions on its seisin . . . have been satisfied in this case" (*Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction of the Court and Admissibility of the Application, Judgment, I.C.J. Reports 2006,* p. 39, para. 87).

16. The very least that the Court should have done was to ask itself whether negotiations had been opened and whether they were likely to lead to a certain result, but it did not do so. Thus, it is understandable why a State party to CERD, in this case Russia, finds it unacceptable for an action to be brought against it before the Court without having been first advised of Georgia's grievances with regard to this Convention.

17. We now come to the alternative precondition stipulated in Article 22 of CERD, namely, that the dispute has not been settled by "the procedures expressly provided for in this Convention".

18. As was the case for negotiation, the Court is content here to observe that "neither Party claims that the issues in dispute have been brought to the attention of the Committee" (Article 11 of the Convention) (Order, paragraph 116), and to conclude from this that the dispute has not been resolved by way of the procedures provided for in the Convention. One cannot but be puzzled by this interpretation, which confirms neither the ordinary meaning of Article 22 nor its object and purpose which is to encourage the maximum number of countries to submit to the jurisdiction of the Court, with the assurance that the procedures provided for in the Convention will first be exhausted; nor does it refer to the *travaux préparatoires* for this Article when it was drafted by the Third Committee of the General Assembly of the United Nations.

The Court could have considered that the seriousness of the situation when armed conflict broke out on 7-8 August did not allow recourse to these procedures, but this would set little store by the procedure for urgency and rapid alert established by the Committee for the Elimination of Racial Discrimination in 1993 to allow it to intervene more effectively in cases of possible violations of the Convention (Report of the Committee for the Elimination of Racial Discrimination, doc. A/48/18, Ann. III).

19. Therefore, we consider that the majority has wrongly decided that the Court has jurisdiction prima facie to hear this case under Article 22 of CERD, in so far as it has neither succeeded in establishing the existence of a dispute over the interpretation or application of that Convention nor demonstrated that the precondition for the seisin of the Court has been satisfied.

20. Even if jurisdiction prima facie were established, according to the jurisprudence of the Court two further conditions, namely the existence of a risk of irreparable harm to the rights in dispute and urgency, have to be met.

21. In our opinion, the Order nowhere demonstrates the existence of any risk of irreparable harm to Georgia's rights under CERD. The Court confines itself to a *petitio principii* when it states that "the rights in question in these proceedings . . . are of such a nature that prejudice to them could be irreparable" (Order, paragraph 142), defining neither the precise manner in which they are threatened nor the irreparable harm which they might suffer. The Court thus appears to suggest that certain rights may automatically fulfil the irreparable harm criterion, without analysing the real facts on the ground or the actual threat against the said rights. With regard to the expulsions alleged by Georgia and attributed by it to Russia, they cannot in and of themselves be considered to constitute irreparable harm, since the Court, if it arrives at the merits stage in this case, can always order that the expelled individuals be allowed to return to their homes and be granted appropriate compensation. It is even more difficult to claim irreparable harm to the rights in dispute when the appropriate organs of the United Nations have reported that thousands of persons have, since the cessation of hostilities, returned to their homes in Abkhazia and South Ossetia, and when the ceasefire agreement of 12 August 2008 provides that negotiations will soon open in Geneva, on 15 October 2008, between all the parties, concerning, *inter alia*, the progressive return of the displaced persons.

22. With regard to urgency, there simply is none, since after conclusion of the ceasefire agreement, European Union observers have now been deployed to monitor the ceasefire and the return of troops of both countries to their positions before 7 August 2008, and the observers from the United Nations Mission in Georgia and those from the Organization for Security and Co-operation in Europe will continue their missions in Abkhazia and South Ossetia respectively.

23. Therefore, one has no choice but to observe not only that the Court does not have jurisdiction prima facie to pronounce on the merits in this case, but that the conditions established in the jurisprudence for the indication of provisional measures are obviously not met.

24. This weakness in the Order has not completely escaped the attention of the majority and is echoed in the operative clause, which ultimately asks both Parties to respect the Convention, which they are in any event obliged to do, with or without provisional measures.

25. Thus, even though we are in agreement with this obvious conclusion, we have had to vote against this Order of the Court which is not well founded in law.

(Signed) Awn Shawkat AL-KHASAWNEH.
(Signed) Raymond RANJEVA.
(Signed) SHI Jiuyong.
(Signed) Abdul G. KOROMA.
(Signed) Peter TOMKA.
(Signed) Mohamed BENNOUNA.
(Signed) Leonid SKOTNIKOV.