SEPARATE OPINION OF JUDGE SIMMA

The Court is wrong in concluding that the "dispute" between Georgia and the Russian Federation arose only between 9 and 12 August 2008, as a result of its rejection of all documentary evidence dated from 1992 to immediately before the filing of the Application in August 2008 — The Court assesses the documentary evidence before it in a methodologically questionable manner — The legal significance of documentary evidence ought to have been appreciated according to the degrees of probative value that this Court has long accepted in its jurisprudence — Alleged defects of documentary evidence as to formal designation, authorship, executive inaction, attribution, and notice have never been recognized in this Court's jurisprudence as factors diminishing legal significance or probative value — The Court's problematic identification of alleged defects in its assessment of documentary evidence adversely affects the future ability of parties to control and select the presentation of their evidence, as well as the future ability of the Court to discharge its fact-finding authority under the Statute — If the Court had made a proper assessment of the documentary evidence produced by Georgia, it would have had to reject not only the first but also the second of Russia's preliminary objections.

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A. The Rejection of Russia's First Preliminary Objection: The Right Result Obtained by Incorrect Reasoning

1. I agree with the conclusion reached in paragraph 113 of the Judgment, according to which the first preliminary objection of the Russian Federation is to be dismissed. However, what I cannot agree with is the reasoning provided for this conclusion particularly in paragraphs 64, 105 and 113 of the Judgment, according to which the legal "dispute" in the sense of Article 22 of CERD between Georgia and the Russian Federation did not arise before 9 August 2008, that is, immediately before Georgia brought its Application.

2. In my opinion, the relevant dispute had been under way long before the guns of August 2008. It commenced years before CERD entered into force between the Parties, as early as 1992, and concerned matters that already then could have fallen under the Convention. From 1999 onwards it continued as a dispute on subject-matters now actually governed by CERD because existing between two parties to the Convention, even though Georgia framed its claims *expressis verbis* as claims under CERD only at the last moment — a circumstance which cannot negate the fact that the dispute had become a CERD-related dispute long before. This so because the decisive criterion in this regard is not invocation *eo nomine* of the Convention conferring jurisdiction but reliance on the subject-matter of the dispute.

3. The Judgment reaches a different result, that is, the result preferred by the majority, through a very specific way of reviewing the documentary evidence submitted by the Applicant: the Judgment regards as irrelevant a vast amount of material submitted by Georgia, and confers legal significance to only two exchanges between Georgia and the Russian Federation, and thus arrives at the conclusion that the dispute arose only between 9 and 12 August 2008. These documents are, first, the statements of the two Parties, that is, of the Permanent Representative of Georgia to the United Nations and of his Russian counterpart, in the Security Council debate on 10 August 2008, and, secondly, the statement of 11 August 2008 of the President of Georgia, Mikhail Saakashvili, in a CNN interview and the reply of 12 August 2008 of the Foreign Minister of the Russian Federation, Sergey Lavrov, in a Joint Press Conference with the Minister for Foreign Affairs of Finland in the latter's capacity as Chairman-in-Office of the OSCE.

4. All documentary evidence dated earlier than 9-12 August 2008 is characterized in the Judgment as not being "legally significant" for purposes of showing the existence of a dispute. The Judgment reaches this conclusion by finding specific faults or defects with each piece of documentary evidence which is then rejected. These faults or defects can be grouped as follows: 1. *Formal defects*, like missing literal designations in

the documents of "racial discrimination", "ethnic cleansing", or the Russian Federation's specific CERD obligations, and in some instances, circulation of documents to the United Nations under agenda item headings other than "racial discrimination" (cf. paras. 53, 55-56, 59-60, 62, 65-66, 67-68, 70, 75-76, 78, 80-82, 84-87, 89, 91-103, 108); 2. *Defects relating to authorship*, such as where the document does not appear to show that the Georgian Executive authored, endorsed, or approved the document (cf. paras. 54-55, 71-73, 76, 80-81); 3. *Defects due to inaction*, where the Judgment alleges that the Georgian Executive did not act after complaints were articulated against the conduct and impartiality of Russian peacekeepers (more specifically, that the Georgian Executive failed to order the withdrawal of Russian peacekeeping troops from Georgian territory, or to reject or react to the contemporaneous passage of Security Council resolutions that commended Russian peacekeepers) (cf. paras. 55, 74, 77, 79, 83-84, 91); 4. *Defects relating to attribution*, like a lack of categorical attribution of violations to the Russian Federation, with documents instead referring to incidental claims or vague references of support for separatists in Abkhazia and South Ossetia (cf. paras. 51-53, 57-61, 81); and 5. *Defects relating to matters of notice*, or the lack of proof that Russia received, could have received, or had the opportunity to receive or be informed of the allegations contained in certain documentary evidence (cf. paras. 61, 104). In this manner, the Judgment simply does not ascribe any degree of probative value amounting to "legal significance" to the entirety of the documentary evidence dated before 9 August 2008.

5. If one wondered why an operation of such kind, unprecedented in the practice of this Court, was necessary even though Russia's first preliminary objection was rejected, the answer is to be found in the Judgment's acceptance of the Respondent's second preliminary objection: by excluding the entire factual material submitted by Georgia to prove the existence of a CERD-related dispute long before August 2008 and limiting the focus of the exercise to a few exchanges between the Parties during the chaos of a few days in August, communications understandably limited to urgent concerns arising from the ongoing armed conflict, the majority of the Court arrives at the conclusion that these communications, in the fog of war, as it were, did not amount to an attempt on the part of Georgia at negotiating a dispute on CERD-related matters with Russia. As I will show in Part B of my opinion, if the Judgment had accepted pre-August 2008 facts as relevant (also) for the purposes of dealing with Russia's second preliminary objection, it could not have upheld this objection. These pre-August 2008 facts clearly prove that a dispute about CERD-related matters had arisen long before.

6. I fully share — and base my more empirical approach to the *problématique* raised by Russia's first preliminary objection on — the views expressed in the separate opinions of President Owada and Judges Abraham and Donoghue on the legal threshold used by the Court for determining the existence of a dispute, as settled in the Court's Judgments in *Mavrommatis, South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Oil Platforms (Islamic Republic of Iran* v. *United States of America), Northern Cameroons (Cameroon* v. *United Kingdom)*, and *Land and Maritime Boundary (Cameroon* v. *Nigeria)*. In addition, however, I find it necessary to scrutinize how the Court determined the "legal significance" of documentary evidence in this Judgment, and concomitantly, to subject to a critical review the fact-finding methodology which the Court employed in order to accept or reject the probative value of such evidence before it. What the Court appears to have done is to refer only to the tip of the iceberg, so to speak, of the bulk of documentary material submitted by Georgia, select a few examples and then dismiss these as "irrelevant" by the application of criteria that are very problematic, to put it mildly. I note that a recent study published by the British Institute of International and Comparative Law dealing with the treatment of evidence in the International Court of Justice reported that the Court "has not always expressly noted in its judgments what items it has eliminated because of their limited value as evidence" (A. Riddell and B. Plant, *Evidence before the International Court of Justice*, 2009, p. 190). In the present case, the Court's assessment has led to the result that most of the evidence in the record before the Court has been eliminated from the process of deciding on the jurisdictional objections.

7. I share my colleagues' concern that the formalist approach adopted in the present Judgment straitjackets future cases, due to rigid requirements imposed now as to the existence of a dispute and the conduct of negotiations sufficient for the seisin of the Court. I find equally problematic the ways in which the Court discharged its fact-finding authority under the Statute. The Judgment does not clarify the concept of "legal significance", neither does it differentiate between degrees of significance or probative value (direct, indirect, corroborative, cumulative, supplementary) that could be attached to documentary evidence. The Judgment's assessment of the evidence thus fails to capture possible differences in the degrees of probative value that various documents may exemplify — some documentary evidence may indeed constitute the best, primary, and direct evidence, while other documents may still be taken into account as secondary, indirect, corroborative, or supplementary evidence. The Court has long acknowledged these differentiations when determin-

ing the weight of evidence (*Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 18; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, pp. 128-137, paras. 204-230; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992*, p. 455, para. 153, and p. 550, para. 316; *Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 583, para. 56). Thus, in the *Nicaragua* case, the Court did not reject, but rather accepted, limited corroborative value even of press reports:

> "[T]he Court regards them not as evidence capable of proving facts, but as material which can nevertheless contribute, in some circumstances, to corroborating the existence of a fact, i.e., as illustrative material additional to other sources of evidence." (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 40, para. 62.)

The Court also held that "public knowledge of a fact may nevertheless be established by means of these sources of information, and the Court can attach a certain amount of weight to such public knowledge" (*ibid.*, para. 63). Similarly, in *Tehran Hostages*, the Court acknowledged the corroborative value of media reports to establish matters of public knowledge, particularly where the respondent had not participated in the proceedings (*United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Judgment, I.C.J. Reports 1980*, p. 10, paras. 12-13). In contrast to these carefully differentiated approaches to the probative weight of evidence, the present Judgment dismisses wholesale the entire corpus of years of documentary evidence before 9-12 August 2008 for being altogether devoid of any probative weight — and thus "legally insignificant" to establish the existence of a dispute.

8. More importantly, the factors which the Court considers to be determinative of the absence of "legal significance" of all pre-August 2008 documentary evidence find no basis in the law. As I will show more extensively in Part B of my opinion, neither is their application justified considering the actual content of the documents themselves, read either singly or in relation to other documentary evidence in the record before the Court. In the Judgment before us, the presence of a single alleged defect — whether pertaining to formal designation, authorship, executive inaction, attribution, or notice — appears sufficient for the Court to deny any legal significance whatsoever to all documentary evidence dated long before 9 August 2008 and the filing of the instant Application before this Court.

1. Alleged Formal Defects

9. There is little that needs explanation or refutation concerning the alleged formal defects in various pieces of documentary evidence, such as the absence of literal reference in a document to "racial discrimination", "ethnic cleansing", the Russian Federation's specific CERD obligations, or even, in some circumstances, circulation of documents to the United Nations under agenda items other than "racial discrimination". I will not belabour this point further, other than to reaffirm, as did the joint dissenting opinion, that it is sufficient for purposes of determining the existence of a dispute in the present instance that the subject-matter of the dispute is capable of falling within the subject-matter of CERD, without need of invocation *eo nomine* of CERD or any of the specific provisions of this treaty. As I will show in Part B of my opinion, the documentary evidence considered in the Judgment did very well contain unambiguous references to subject-matters capable of falling within CERD, such as to alleged support, facilitation, or toleration by Russian Peacekeepers of ethnic cleansing being committed against Georgian civilians within these peacekeepers' areas of responsibility in Georgian territory; Russian conduct in relation to the right of return of refugees and IDPs to Georgian territory; and the failure of the Russian peacekeepers to prevent human rights violations being committed against Georgian civilians. However, for the reasons set out above, the Judgment makes use of only a miniscule part of such relevant material.

2. Alleged Defects relating to Authorship

10. In particular, the Judgment denies legal significance to documents such as resolutions and statements of the Parliament of Georgia, or statements of the Permanent Representative of Georgia to the United Nations, where these documents do not appear to show that the Georgian Executive authored, endorsed, or approved of the document. Such a stringent requirement of Executive approval, adoption, or endorsement of parliamentary resolutions has hitherto never been applied by the Court. In the *Genocide* case, while the Court acknowledged that the "significance" of official documents (such as the record of parliamentary bodies) which appear to have been produced "so that the Party may make use of its content" could thereby be "in doubt", the Court still did not summarily reject such documents by the mere fact of their provenance or authorship (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 134, para. 225). Rather, the Court was careful to stress that

> "[i]n some cases the account represents the speaker's own knowledge of the fact to be determined or evaluated. In other cases the account may set out the speaker's opinion or understanding of events after they have occurred and in some cases the account will not be based on direct observation but may be hearsay. In fact the Parties rarely disagreed about the authenticity of such material but rather about whether it was being accurately presented . . . and what weight or significance should be given to it." (*I.C.J. Reports 2007 (I)*, p. 135, para. 226.)

11. The statements of the Parliament of Georgia and the Permanent Representative of Georgia could have been admitted as "evidence of the intentions of a litigating State" (A. Riddell and B. Plant, *Evidence before the International Court of Justice, op. cit.*, p. 251). In the *Anglo-Iranian Oil Co.* case, the United Kingdom opposed the admissibility of Iranian legislation on the ground that this legislation was "a purely domestic instrument, unknown to other governments" (*Anglo-Iranian Oil Co. (United Kingdom* v. *Iran), Preliminary Objection, Judgment, I.C.J. Reports 1952*, p. 107). The Court rejected this view, stating that:

> "The Court is unable to see why it should be prevented from taking this piece of evidence into consideration. The law was published in the Corpus of Iranian laws voted and ratified during the period from January 15th, 1931, to January 15th, 1933. It has thus been available for the examination of other governments during a period of about twenty years. The law is not, and could not be, relied on as affording a basis for the jurisdiction of the Court. It was filed for the sole purpose of throwing light on a disputed question of fact, namely, the intention of the Government of Iran at the time when it signed the [optional clause] Declaration." *(Ibid.)*

12. In any case, as I will show in Part B of my opinion, the resolutions, decrees, and statements of the Parliament of Georgia were officially transmitted to the United Nations Security Council or the General Assembly by the Permanent Representative of Georgia. We cannot simply assume that the Permanent Representative of Georgia acted *ultra vires* or without the knowledge of the Georgian Executive. There being no showing in the record before the Court that the Permanent Representative of Georgia acted contrary to authority or in contravention of any instructions from the Georgian Executive, it cannot be inferred that his official transmittal of the resolutions and decrees of the Parliament of Georgia to the United Nations Security Council or General Assembly is not attributable to Georgia.

3. Alleged Defects of Inaction

13. The Judgment withholds legal significance from certain documentary evidence for the reason that the Georgian Executive did not act upon

or follow up complaints expressed in the parliamentary material. Specifically, the Judgment declares documents (such as resolutions, decrees, and statements of the Parliament of Georgia; statements of the Permanent Representative of Georgia; and press statements of the Foreign Ministry of Georgia) to be legally insignificant because the Georgian Executive did not actually order the withdrawal of Russian peacekeeping forces from Georgian territory despite their alleged misconduct. Similarly, the Judgment determines legal insignificance because the Georgian Executive did not call for the rejection of, or opposition to, the adoption of Security Council resolutions that contained standard clauses commending Russian peacekeepers or acknowledging Russia's role as a facilitator or guarantor of security in the armed conflicts within Georgia.

14. These speculations in the Judgment reach directly into the merits of the dispute. Furthermore, these alleged defects of inaction cannot be accepted as "inferences of fact" in the sense discussed by the Court in the *Corfu Channel* Judgment, where it stated that: "proof may be drawn from inferences of fact, provided that they leave *no room* for reasonable doubt" (*Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 18). In the present Judgment, there does appear room for such reasonable doubt. As I will demonstrate in Part B of my opinion, some of the contested, respectively rejected, documentary evidence such as resolutions of the Parliament of Georgia, adopted in 2005 and 2006, appear on their face to have envisaged a process of negotiation on the conduct of Russian peacekeepers, and not their automatic withdrawal. In any event, the underlying circumstances of Security Council voting on the resolutions identified in the Judgment are not evidenced in the record before the Court at this stage of the proceedings.

15. In my view, ascribing the above defects to documentary evidence when such factual questions properly belong to the merits phase of the proceedings is an unreasonable basis for the denial of any legal significance to this evidence for the purposes of merely establishing the existence of a dispute. These speculations deprive either Party of the opportunity to meet factual questions and lead the Court to rely on somewhat tenuous inferences.

16. Neither can the Georgian Executive's alleged inaction be seen as an implicit admission against interest by high-ranking officials, of the nature discussed by the Court in the *Nicaragua* Judgment. In the present Judgment, there is no positive act of acknowledgment involved that might be constitutive of such admissions:

> "[S]tatements of this kind, emanating from the high-ranking official political figures, sometimes indeed of the highest rank, are of particular probative value when they *acknowledge* facts or conduct unfavourable to the State represented by the person who made them. They may

then be construed as a form of admission." (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 41, para. 64; emphasis added.)

17. Lacking a positive act, the mere silence or alleged inaction of the Georgian Executive is in itself equivocal in meaning. It is not for this Court to supply such meaning to deprive documentary evidence of legal significance.

4. Alleged Defects relating to Attribution

18. In its findings under consideration here, the Judgment holds that certain documentary evidence does not categorically attribute violations to the Russian Federation, but refers only to incidental claims or vague references of support for separatists in Abkhazia and South Ossetia. In Part B of my opinion, I will show that relevant documentary evidence allows attribution to the Russian Federation through the conduct of Russian peacekeepers. The Russian peacekeepers were not troops placed at the disposal of an international organization (such as United Nations peacekeepers), whose conduct would then be attributable to this organization. In the present case, there is no such international organization involved in the deployment of Russian troops to Georgian territory, since those troops acted as the Joint Peacekeeping Forces (JPKF) and Law and Order Keeping Forces (LOKF) on the basis of an agreement between Georgia and the Russian Federation concluded in 1992. The conduct of these troops — particularly their failure to prevent, their support, toleration or facilitation of ethnic cleansing and other serious human rights violations against Georgian civilians — is undeniably the conduct of a State organ of the Russian Federation (see *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 242, para. 213).

5. Alleged Defects relating to Matters of Notice

19. Here I refer to the alleged lack of proof that Russia received, could have received, or had the opportunity to receive or be informed of the allegations contained in certain documentary evidence. I will not dwell on this point since our joint dissenting opinion already treats this issue of notice quite extensively, albeit in relation to the second preliminary objection. For purposes of determining the existence of a dispute, however, let me emphasize that this Court has never imposed a strict requirement of actual notice received by the respondent State in comparable circumstances. In the *Northern Cameroons* case, clearly no bilateral discussions were had between the Parties. Yet, and despite the United Kingdom's

insistence that the Republic of Cameroon did not have a dispute with it but with the General Assembly, the Court relied upon unilateral statements by the United Kingdom and Cameroon in multilateral fora such as the United Nations Trusteeship Council, and reached the conclusion that a "dispute" existed (*Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, pp. 32-34; see also *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 315, para. 89).

20. I am afraid that, through its resort to an amorphous usage of "legal significance" in the present Judgment, the Court disregards its own settled jurisprudence on assessment of evidence. In *Armed Activities on the Territory of the Congo*, the Court held that in examining the facts "relevant to each of the component elements of the claims advanced by the Parties . . . it will identify the documents relied on and make its own clear assessment of their weight, reliability and value" (see *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 200, para. 59). In the same case, the Court held that it "will also give weight to evidence that has not, even before this litigation, been challenged by impartial persons for the correctness of what it contains" (*ibid.*, p. 201, para. 61). In the present case, none of the documentary evidence from 1992 up to immediately before 9 August 2008 appears to have been challenged by impartial persons for correctness. Neither is there the slightest indication that this copious record of documentary evidence was generated on purpose in anticipation of the filing of the present Application. The summary dismissal of pre-August 2008 documentary evidence does not cohere with the rigour ascribed to the Court in the recent British Institute study on the treatment of evidence, which summarizes the factors that the Court has long clarified in assessing the relevance and probative value of documentary evidence, as follows:

> "*Sources:* The Court will consider the number of sources available, whether they are partisan or independent, and whether they are corroborated by other evidence;
> *Interest:* The Court identifies whether the source of the evidence has an interest in the conduct of proceedings, or is neutral and indifferent, following which the Court assesses whether the evidence contains any admissions against the interest of the party submitting it.
> *Relation to events:* The Court notes whether the evidence records direct observation or hearsay.
> *Method:* Close examination is given to the means and methodology by which the information presented has been collected.

> *Verification:* Evidence will be considered to be more valuable if it has been subject to cross-examination either during its compilation or subsequently. Again, the Court notes whether the evidence is corroborated by other sources.
> *Contemporaneity:* The Court's evaluation is influenced by the timing of a document's preparation, or of a statement. Generally the Court attaches less weight to evidence which was not prepared or given at a time close to the facts it purports to prove. Equally, it is cautious of documents which were prepared specifically for the purposes of ICJ litigation.
>
> *Procedure:* The Court assesses whether the evidence was correctly submitted in accordance with the procedural requirements embodied in the Rules." (A. Riddell and B. Plant, *Evidence before the International Court of Justice, op. cit.*, p. 192.)

21. My discussion of the Court's treatment of the "legal significance" standard is by no means intended to convey mere sterile differences in the application of facts and the evaluation of evidence between the majority and the dissenting Judges. In my view, there are serious policy consequences to the evidentiary assessment conducted by the Court in the present Judgment. The Judgment expressly introduces factors/reasons of formality, authorship, inaction, attribution, and notice that could be invoked in future cases to deny legal significance or probative value to documentary evidence. These reasons could also adversely affect the future ability of States to control the presentation of their evidence at the threshold of proceedings, potentially leading them to self-censor the submission of evidence. More importantly, the factual inferences drawn by the Court in the present Judgment undermine the Court's responsibility to discharge its judicial function in a thorough manner by making full use of its fact-finding powers under Articles 49 to 51 of the Statute to avoid having to resort to such inferences in the first place. As the Court rightly observed in *Nicaragua*, the Statute

> "obliges the Court to employ whatever means and resources may enable it to satisfy itself whether the submissions of the applicant State are well-founded in fact and law, and simultaneously to safeguard the essential principles of the sound administration of justice" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 40, para. 59).

22. Turning now to the second half of my opinion (Part B), I will set out the facts which I consider relevant, and sufficient, in order to prove that the preconditions for recourse to the Court in accordance with Article 22 CERD, that is, both the presence of a dispute and attempts at

negotiation undertaken by Georgia, were fulfilled well before August 2008. Most of the documentary evidence that I will adduce here has either been totally neglected or has only been referred to in an extremely superficial or in a selective way in the Judgment. I will take the opportunity to intersperse, on occasion, broader quotes or amplifications from the actual documents that the Judgment rejects for allegedly lacking "legal significance".

B. Evidence Establishing the Existence of a CERD-related Dispute and of Negotiations Well before 2008

23. For purposes of an organized presentation, I will discuss the documentary evidence establishing the existence of a dispute involving subject-matters falling within CERD and of attempts at a negotiated settlement before 9 August 2008 according to the following categories: (1) bilateral exchanges between Georgia and the Russian Federation; (2) Georgian statements made before international organizations of which the Russian Federation is a member; and (3) public statements of Georgia on other occasions.

24. My intention is not to enumerate the documentary evidence in a manner similar to that used in the Judgment, but rather to let the texts of these documents speak for themselves. The documentary evidence, taken individually and as a whole, appears in my view sufficient to lend probative weight (whether in the direct, primary, indirect, secondary, or corroborative degrees of proof) to Georgia's submission that a dispute between Georgia and Russia on CERD-related subject matters existed long before 9 to 12 August 2008, specifically with respect to allegations on: support or facilitation by Russian peacekeepers of ethnic cleansing or failure to prevent such acts; Russia's conduct in relation to the right of return of refugees/IDPs; and the failure of Russian peacekeepers to prevent human rights violations being committed against Georgian civilians within these troops' areas of responsibility. In the present jurisdictional phase of the proceedings, the Court does not need to establish with ultimate certainty that the violations complained of by Georgia actually took place.

1. Bilateral Exchanges between Georgia and the Russian Federation

25. Paragraph 78 of the Judgment does not give legal significance to the exchange of letters in July and August 2004 between the President of Georgia, Mikhail Saakashvili, and the President of the Russian Federation, Vladimir Putin, on the ground that "[t]he letters do not mention the

return of refugees and IDPs". However, the relevant texts of both letters, when juxtaposed, show that the two Presidents did deal with complaints brought against the conduct of Russian peacekeepers in the face of attacks being committed against Georgian civilians. Thus, the letter of 26 July 2004 of President Saakashvili stated, *inter alia*:

> "I would like to draw your kind attention Vladimer Vladimirovich to the fact that recently, from the beginning of the escalation of the situation in the region, *all cases of armed attacks were conducted by the illegal units of South-Ossetian side in the direction of villages settled with Georgian population*. Due to these gangster attacks, seven Georgian policemen were wounded. Neither international observers *nor Russian peacekeeping forces have reported any fact of attacks against villages or compact settlements of Ossetian population.* We are determined not to be a subject of provocations in order to avoid further escalation of tension in the region and transformation of crisis into armed conflict.
>
> I would like to inform you about the comments made by Commander of JPKF, the General Nabzdorov to a big number of journalists: 'There is no border of Russia and Georgia in the Roki tunnel' and 'very soon Georgia will ask for the acceptance in the composition of Russian Federation'. *It is not difficult after such statements to estimate the impartiality of Russian peacekeeping forces that are carrying out missions in the region*." (Memorial of Georgia, Vol. V, Ann. 309; emphasis added.)

In his letter of 14 August 2004, President Putin replied:

> "The propaganda launched by Tbilisi, the main target of which in the beginning was the Russian Peacekeeping Force and then Russia itself is regrettable. In February of the current year we said that overcoming of the prolonged crisis in our bilateral relations and their gradual normalization is only possible in terms of showing mutual restraint in public assessments.
>
> . . . . . .
>
> We believe that the following measures should be taken with the view of stabilization of the situation and creation of conditions for resumption of the political dialogue:
>
> *First:* Immediate achievement of ceasefire.
> *Second:* Starting without delay the realization of the arrangements on the withdrawal of illegal armed formations from the conflict zone, reached within the framework of the Joint Control Commission in June-July of this year and also during the meeting between the Ministers of Defense of Georgia and Russia in Moscow on 10-11 August of this year. In short, all the necessary measures should be taken to prevent this situation from growing into full-scale armed conflict.

> *Third:* Strict observance of the existing agreements on the conflict resolution principles; formation and operation of Joint Peacekeeping Forces; obligation of sides not to apply the measures of coercive pressure to solve any emerged problem; ensuring unhindered delivery of the humanitarian aid to the population of the region. Realization of the proposal on holding high-level meetings during the Joint Control Commission sessions would have positive reflection on the existing situation.
>
> . . . . . .
>
> I would like to emphasize that the most important aspect of the resolution of Georgian-Ossetian conflict should be the ensuring of protection of rights and interests of the population of South Ossetia the majority of which are Russian citizens. Taking into consideration the above-mentioned we will continue purposeful mediatory work for a peaceful settlement of the conflict." (Memorial of Georgia, Vol. V, Ann. 310; emphasis added.)

26. Two years after this exchange, on 24 July 2006, the Permanent Representative of Georgia to the United Nations wrote to the Secretary-General, requesting the circulation to the General Assembly of a resolution of 18 July 2006 adopted by the Parliament of Georgia (Judgment, para. 86). This resolution stated:

> "Instead of demilitarization, the drastic increase of military potential of those armed forces under subordination of *de facto* Autonomous District of South Ossetia, drastic activation of terrorist and subversive actions, complete collapse of security guarantees for peaceful population, *permanent attempts to legalize the results of ethnic cleansing the fact of which had been repeatedly recognized by the international community, massive violation of fundamental human rights and ever-increasing international criminal threats so characteristic of uncontrolled territories — this is a reality brought about as a result of peacekeeping operations*.
>
> . . . . . .
>
> Based on the above, *it is clear that actions undertaken by the Russian Federation's armed forces in Abkhazia and in the former Autonomous District of South Ossetia represent one of the major obstacles on the way to solving these conflicts peacefully*, which is a result of absence of political will on the part of the Russian Federation to foster conflict resolution and to change the current status quo." (Written Statement of Georgia, Vol. III, Ann. 82; emphasis added.)

27. The Russian Federation reacted to the resolution of 18 July 2006 of the Parliament of Georgia even before the Permanent Representative

of Georgia requested its circulation (Judgment, para. 87). In a letter dated 19 July 2006 addressed to the United Nations Security Council, the Permanent Representative of the Russian Federation stated the following:

> "*On 18 July 2006, the Parliament of Georgia adopted a decision on peacekeeping forces in conflict zones which obligates the Government to initiate steps to end peacekeeping operations in Abkhazia and South Ossetia as soon as possible, terminate the relevant agreements and arrangements and bring about the immediate withdrawal from Georgia of Russian peacekeeping contingents that are stationed there fully in accordance with international agreements currently in force. The decision provides for commencement of a process to change peacekeeping arrangements and deploy international police forces in Abkhazia and South Ossetia.*
>
> During the discussion of the draft decision, some deputies went so far as to say that, unless those conditions were accepted, the Russian peacekeepers would be declared unlawful and treated as occupying forces. The decision falsely claims that the actions of the Russian peacekeepers in Abkhazia and South Ossetia present one of the main obstacles to peaceful settlement of the conflicts.
>
> *The Russian Federation regards the decision as a provocative step designed to aggravate tension, destroy the existing format of negotiations and shatter the framework of legal agreements for the peaceful settlement of the Georgian-Abkhaz and Georgian-Ossetian conflicts. The accusations that the decision makes against the Russian Federation constitute a disgraceful attempt to shift the blame to others.*
>
> We consider that the language of ultimatums that Georgia is using with respect to Russian peacekeepers is counter-productive. Unilateral decisions cannot be allowed to lead to abrogation of the relevant international agreements. Our position remains unchanged: the adoption of parliamentary decisions on the withdrawal of Russian peacekeepers can only entail a fresh crisis and a humanitarian catastrophe. In recent years, Russia, in co-operation with foreign partners and international organizations, has exerted considerable efforts to maintain a fragile balance that has now been shattered by the bellicose rhetoric of Georgian politicians and their attempts to use provocation and military force to resolve the problems of Abkhazia and South Ossetia. It is only through existing peacekeeping mechanisms that it has been possible to keep the situation under control.
>
> It should not be forgotten that the format of the negotiation process, which, besides the Russian Federation, involves the United Nations, the Organization for Security and Co-operation in Europe and the member States of the Group of Friends of the Secretary-General on Georgia, was agreed upon by all parties to the conflicts.

> *The irresponsible actions of Tbilisi are capable of ruling out any possibility of peaceful settlement of the conflicts.*" (Written Statement of Georgia, Vol. III, Ann. 81; emphasis added.)

28. Notably, in the above-mentioned letter of 19 July 2006, the Russian Federation acknowledged that the resolution adopted by the Parliament of Georgia on 18 July 2006 called for the "commencement of a process to change peacekeeping arrangements", and not, as the Judgment indicates, procedures to "immediately suspend . . . peacekeeping operations and to have the armed forces of the Russian Federation withdrawn" (Judgment, para. 86). As I will show subsequently, the texts of the 2005 and 2006 resolutions of the Parliament of Georgia directed the Georgian Executive to undertake negotiations with the Russian Federation on the conduct and responsibilities of Russian peacekeeping forces, and not necessarily to effect the immediate suspension, much less outright withdrawal, of such forces.

29. Finally, in 2008, President Saakashvili and the new President of the Russian Federation, Dmitry Anatolyevich Medvedev, continued exchanges on the conduct of Russian peacekeepers as well as the issue of the return of IDPs and refugees to Abkhazia (*ibid.*, para. 100). In his letter of 24 June 2008, President Saakashvili stated:

> "*The essence of our proposals is the following:*
>
> . . . . . .
>
> The peacekeeping operation under the aegis of CIS will be continued with the reviewed mandate. The peacekeepers will be withdrawn from their current locations and will be stationed along the river Kodori.
>
> . . . . . .
>
> I propose drafting, signing and entering into force the agreements in which the above mentioned proposals are reflected. Along with the Russian Federation, other interested parties could also serve as guarantors of implementation of these agreements.
>
> Consequently, the parties to the conflict could also conclude a separate agreement about non-use of force *and return of IDPs and refugees to the entire territory of Abkhazia, Georgia*." (Memorial of Georgia, Vol. V, Ann. 308; emphasis added.)

In his letter dated 1 July 2008, President Medvedev replied (Judgment, para. 101):

> "In this situation, frankly speaking it is difficult to imagine, for example, creation of joint Georgian-Abkhaz administration or law-enforcement organs in any district of Abkhazia. *It is also apparently untimely to put the question of return of refugees in such a categorical manner.* Abkhazs perceive this as a threat to their national

survival in the current escalated situation and we have to understand them." (Memorial of Georgia, Vol. V, Ann. 311; emphasis added.)

30. The foregoing exchanges did not take place in a historical vacuum, but should be appreciated further in the context of the ongoing intergovernmental exchanges between Georgia and the Russian Federation concerning the issue of the return of refugees and IDPs. A series of meetings conducted since 1997 on the return of ethnic Georgians to their homes had culminated, on 7 June 2002, with the announcement of an Inter-State agreement entitled "Russian-Georgian Interstate Program for Return, Accommodation, Integration and Reintegration of Refugees, Internally Displaced Persons and Other Persons that Suffered as a Result of the Georgian-Ossetian Conflict" (Written Statement of Georgia, Vol. IV, Ann. 149). Although at this juncture the Russian Federation was not directly accused of actively denying the return of the ethnic Georgians, it is significant that it was treated as a party in resolving the issue.

31. Moreover, Georgia and the Russian Federation had already been discussing the issue of the return of refugees for some time as parties. In a 1992 meeting held in Moscow, the President of the Russian Federation, Boris Yeltsin, and the Chairman of the State Council of Georgia, Eduard Shevardnadze, had agreed on "the conditions for the return of refugees to their places of permanent residence" (Memorial of Georgia, Vol. III, Ann. 102; Judgment, para. 40), and in October 1993 the Russian Federation had specifically "condemn[ed] the facts of genocide, rude violation of human rights . . . from the zone of the Georgian-Abkhazian conflict" (Memorial of Georgia, Vol. III, Ann. 107). This process continued with a 1993 Protocol of Negotiations (*ibid.*, Vol. III, Ann. 105), culminating with the 1994 Quadripartite Agreement on the Voluntary Return of Refugees, signed by the Russian Federation, Georgia, South Ossetia and Abkhazia as parties (*ibid.*, Vol. III, Ann. 110; Judgment, para. 46).

32. The concluding statement of the meetings between the President of the Russian Federation, Vladimir Putin, and the President of Georgia, Eduard Shevardnadze, on 6-7 March 2003, was reported in a newspaper account of *Svobodnaya Gruzia*, which indicates that, "during the negotiations, the Presidents of the two countries addressed the issues of . . . comprehensive settlement of the conflict in Abkhazia, Georgia" (Memorial of Georgia, Vol. III, Ann. 136). Moreover, the two States emphasized "the importance of concrete steps to be taken aimed at the solution of the most burning problem dignified and safely return of refugees and internally displaced persons to their homes and economic rehabilitation of the conflict zone" *(ibid.)*. An Abkhaz representative was present at these meetings, but the text is clear that the agreement between the "parties" was one between Georgia and the Russian Federation.

33. Georgia's treatment of the Russian Federation as a negotiating party on the issue of the return of refugees/IDPs persisted. For example, on 20-23 January 2003, the Speaker of the Parliament of Georgia, Ms N. Burjanadze, spoke before the State Duma of the Russian Federation, and mentioned "the hard situation of refugees and internally displaced people" (Written Statement of Georgia, Vol. IV, Ann. 153; Judgment, para. 76). In relation to the Russian peacekeeping forces, the Georgian side noted that "a certain distrust was also observed, which in most cases is conditioned by the actions of 'blue helmets' in the conflict zone" *(ibid.)*. Thereafter, a meeting that was to be held on the matter of the return of the IDPs/refugees on 30-31 October 2003 had to be cancelled due to the differences between the parties on the mode of negotiations. Georgia insisted that it was necessary first to reach agreement between the Russian Federation and Georgia and that only after that could the Abkhaz side intervene, while the Russian Federation insisted on the presence of Abkhazia from the very beginning, since the solution of return of IDPs/refugees was to be based on the conditions presented by the Abkhaz side (Written Statement of Georgia, Vol. IV, Ann. 155).

2. Georgian Statements Made in International Organizations of which the Russian Federation Is a Member

34. The foregoing exchanges between Georgia and the Russian Federation should be seen in connection with statements made by Georgia in international organizations of which the Russian Federation is a member. Thus, on 26 January 2005, the Permanent Representative of Georgia wrote a letter to the President of the United Nations Security Council (Judgment, para. 79), stating, *inter alia*:

> "I have the honour to write to you and, through you, to draw the attention of the Security Council to the recent developments in the conflict-resolution process in Abkhazia, Georgia.
>
> . . . . . .
>
> I still have to recall that there is a category of people whom we all have to keep in our minds. *These are refugees and IDPs — victims of ethnic cleansing — who already for longer than a decade are waiting for their basic right — the right to live at home — to materialize. They still live in miserable conditions, totally insecure and vulnerable*. Events that took place in the Gali region this month have demonstrated once again the lawlessness that they face. I think that members of the Security Council are aware of abductions that happened on 'election' day. *Actually, these excesses were committed in front of CIS peacekeepers, who did nothing to protect peaceful civilian people — by the way, not for the first time. In fact, after the ceasefire in 1994, over 2,000 Georgians were killed in the Gali security zone, which falls under the respon-*

sibility of the CIS peacekeeping force. I have to state once more that the CIS peacekeeping force is rather far from being impartial and is often backing Abkhaz separatist paramilitary structures. I think it is high time to start thinking of a new form of peacekeeping operation, *as the activities of a Russian military contingent — which the CIS peacekeeping force, in fact, is — could hardly be considered a 'peacekeeping operation'.*" (Written Statement of Georgia, Vol. III, Ann. 71; emphasis added.)

35. On 27 October 2005, the Permanent Representative of Georgia again wrote to the President of the Security Council (Judgment, para. 81), as follows:

"It is impossible to avoid commenting on the behaviour of the facilitator — the Russian Federation, especially when several extremely alarming trends take place in Abkhazia, Georgia:

— The Russian Federation continues to maintain illegally its military base in Gudauta, which operates without the consent of Georgia and against international commitments undertaken by Russia;
— Positions in the separatist Governments are filled with people sent directly from public jobs in the Russian Federation, from as far away as Siberia;
— Legal entities of the Russian Federation acquire property and land in the secessionist regions;
— Military personnel of separatists are trained by the Russian military schools, without shying away from openly providing them quotas;
— Russian citizenship is granted to 80 per cent of the current population of those regions, as claimed by their leaders, who also vow to accomplish 100 per cent of such passportization of the residents in just a few months.

. . . . . .

Nevertheless, these Russian military forces are still referred to as peacekeepers or 'blue helmets', as the overall conflict-resolution in the region is structured as a United Nations-led peace process.

As a matter of fact, the report indicates that the number of internally displaced persons from Abkhazia has decreased from around 250,000 to little more than 200,000. This decrease happened, mostly because of the natural death of these people. Shall we suggest that this is a positive trend and just wait until they are all gone before the process of return starts?

What sort of 'peacekeeping' is the United Nations going to enhance? Whose rights will the Organization protect? Anybody but Georgian refugees and internally displaced persons?

In this regard *I have to inform the Security Council of the resolution of the Parliament of Georgia, adopted on 11 October 2005, regarding*

> *the Russian peacekeepers in Georgia*, both in the Tskhinvali region/former South Ossetia and Abkhazia. The resolution calls for them to improve their performance and truly facilitate the peace process and sets a deadline for the reassessment of their functioning, which in the case of Abkhazia is 1 July 2006. The resolution also envisages that, in case of negative reassessment, Georgia will oppose the peacekeeping operation and withdraw from all relevant agreements and bodies.
>
> *What this resolution is about, in fact, is that it calls upon the Russian leadership to review its approach. Unfortunately, the response of the Russian Foreign Ministry, calling the resolution of the Parliament of Georgia 'provocative' and 'counter-productive' indicates that there is no political will to 'defreeze' the conflict-resolution process*. It seems that the Russian-led peacekeeping operation has, in fact, exhausted its potential and the only effective way is to have a full-scale international, I would underline — truly international — United Nations-led peacekeeping operation." (Written Statement of Georgia, Vol. III, Ann. 75; emphasis added.)

I have reproduced this document at such length because paragraph 81 of the Judgment does not show the full text of this communication made by the Permanent Representative of Georgia, before the Judgment concluded that "[t]he Court is unable to see in this letter any claim against the Russian Federation".

36. A similar problem can be observed in paragraph 82 of the Judgment, which this time does not refer to the actual text of the documentary evidence that it assesses. I refer to the letter dated 9 November 2005, where the Permanent Representative of Georgia requested the United Nations Secretary-General to transmit and circulate to the General Assembly a resolution adopted by the Parliament of Georgia on 11 October 2005. This resolution states, *inter alia*, the following factual premises and calls for the following actions:

> "Under the criminal and clan-based governments of these regions one can witness massive kidnapping of citizens — including children, killings, unmitigated criminal gang activity, raids and robbery of the civilian population, creation and backing of terrorist and subversive groups with the help of the Russian special services, currency counterfeiting, drug transit, trafficking of arms and people, smuggling, *appropriating of assets initially belonging to the refugees, denial of the right of instruction at schools in the native language as well as of the right of IDPs and refugees to return to their homes.* And all of the listed above is an incomplete record of consequences resulting from the activities of these regimes.

Furthermore, *the separatist regimes continue their attempts to legitimize the results of ethnic cleansing* affirmed by the Budapest, Lisbon and Istanbul Summits of the OSCE — the latest illustration of which is the *en mass* appropriation of homes of forcibly exiled Georgian population.

Clearly, the aforementioned actions have nothing in common with the protection of the ethnic rights of the population residing today on the territories of Abkhazia and the former South Ossetian Autonomous District. The criminal dictatorships currently in place pose a threat to everyone, including those they allegedly try to protect. In this regard, it is enough to mention the repressive policy of the separatist governments against those Abkhaz and Ossetian citizens who have tried to move towards public diplomacy and confidence-building — among the punished and arrested are underage children, whose only 'guilt' was merely to get acquainted with Georgian kids.

Due to the existing information vacuum, repressions and anti-Georgian propaganda, the local population of both regions has no opportunity to receive and assess the information regarding the peace initiatives currently proposed by the central government of Georgia.

The fundamental rights and freedoms on the territory of Abkhazia and of the former South Ossetian Autonomous District are violated not only against internally displaced persons, but also against the remaining population. The separatist governments, manipulating issues of ethnic origins, attempt to monopolize the process of conflict regulation on behalf of their own clan-based interests, and against the fundamental interests of their population.

The question then arises — *with what or whose support do separatist regimes manage to ignore the position of respectful international organizations and violate the basic norms and principles of the international law*?

Regretfully, *the answer to this question unambiguously indicates the role of the Russian Federation in inspiring and maintaining these conflicts*, notwithstanding the fact that this country officially bears a heavy responsibility of facilitator for the conflict settlement.

. . . . . .

In view of the aforementioned, the Parliament of Georgia resolves:

. . . . . .

2. To instruct the Government of Georgia to intensify negotiations with the Russian Federation, international organizations and interested countries on issues regarding the fulfilment of obligations undertaken by the peacekeeping forces on the territory of the former South Ossetian Autonomous District and report to the Parliament on the situation by 10 February 2006;

> 3. *To instruct the Government of Georgia to intensify negotiations with the Russian Federation,* international organizations and interested countries *on issues regarding the fulfilment of obligations undertaken by peace-keeping forces* on the territory of Abkhazia and report to the Parliament on the situation by 1 July 2006 . . .” (Written Statement of Georgia, Vol. III, Ann. 76; emphasis added.)

37. Referring to this very resolution, on 27 October 2005, the Permanent Representative of Georgia to the United Nations also wrote a letter to the President of the Security Council (Judgment, para. 81), confirming the Russian Federation’s response and reaction to this act of the Georgian Parliament:

> “In this regard, I have to inform the Security Council of the resolution of the Parliament of Georgia, adopted on 11 October 2005, regarding the Russian peacekeepers in Georgia, both in the Tskhinvali region/former South Ossetia and Abkhazia. The resolution calls for them to improve their performance and truly facilitate the peace process and sets a deadline for the reassessment of their functioning, which in the case of Abkhazia is 1 July 2006.
>
> . . . . . .
>
> What this resolution is about, in fact, is that it calls upon the Russian leadership to review its approach. *Unfortunately, the response of the Russian Foreign Ministry, calling the resolution of the Parliament of Georgia ‘provocative’ and ‘counter-productive’, indicates that there is no political will to ‘defreeze’ the conflict-resolution process . . .*” (Written Statement of Georgia, Vol. III, Ann. 75; emphasis added.)

38. On 26 January 2006, the Special Representative of the President of Georgia to the Security Council also referred to the resolution of 11 October 2005 of the Parliament of Georgia (Judgment, para. 84) and further set out Georgia’s concerns about the conduct of Russian peacekeepers in relation to the endorsement of ethnic cleansing and inaction in the face of the killings of ethnic Georgians in the peacekeepers’ zone of responsibility:

> “Today we are facing rather unexpected and worrisome development of this very important question. One of the members of the Security Council, member of the Group of Friends and the facilitator of the peace process — namely the Russian Federation —, suddenly has decided to disassociate itself from supporting the basic principle — principle of territorial integrity of Georgia within its internationally recognized borders. That disassociation extends also to the so-called Boden paper “Basic Principles for the Distribution of the Competences between Tbilisi and Sokhumi” — which is the key

document for the political settlement of entire peace process. That is why for the first time in the history of Security Council deliberations we have no draft resolution prepared by the Group of Friends.

Mr. President,

This change of position of the one of the prominent members of P5 is not just a slight shift or correction. Renouncement of the principle of determining the status of Abkhazia within the State of Georgia does mean the following: support of the secessionism as a phenomenon; *endorsement of ethnic cleansing of more than 300,000 citizens of Georgia*; questioning the basic principle of the modern world architecture — the principle of territorial integrity and inviolability of internationally recognized borders.

Mr. President,

I am representing the people who were forcefully expelled from their homes and are not allowed to return. I am representing the people who count every day of their exile and who look with a hope to this Council for its work and resolutions. I am representing the community which follows very closely every move in the peace process in Abkhazia, Georgia.

How can I explain to my fellow citizens that the facilitator of the peace process, the conductor of the peace operation on the ground stands on this very dangerous position?

By the way, [a] couple of words on the peacekeeping operation — so-called CIS peacekeeping operation — which is in fact conducted solely by the Russian Federation. In October 2005, the Parliament of Georgia issued the special statement which assessed the performance of CIS PKF rather negatively — and rightly so. Yes, it is a burden on the Russian Federation and its troops. But there is the other side of the coin: little less than 2,000 Georgians have been killed in the zone of responsibility of CIS PKF since its deployment in 1994.

The mistrust of Georgian population towards the PKF is widening, especially in the region of their mandate. The population affected by the conflict does not see the peacekeepers as an impartial international force, but rather as a dividing wall between the two communities." (Written Statement of Georgia, Vol. IV, Ann. 163; emphasis added.)

39. The Permanent Mission of Georgia to the United Nations reflected similar views on the conduct and inaction of Russian peacekeepers, in identical letters dated 11 August 2006, addressed to the Secretary-General and the President of the Security Council (Judgment, para. 90):

"Additional armed troops, which were deployed by the Abkhazian side in the villages of the lower Gali district, force local Georgians to dig trenches for separatist armed formations, following the instructions of the Abkhazian administration in the Gali district.

It is a vivid example of forced labour banned unequivocally by all international human rights documents, including Article 8 of the Pact on Civil and Political Rights, Convention No. 105 of the International Labour Organization and Article 4 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

All these international agreements represent an integral part of the Georgian legislation and are legally binding throughout the entire territory of Georgia, including Abkhazia. Besides, the Protocol under paragraph 4 of the Moscow Agreement of 14 May 1994 stipulates that the CIS peacekeeping forces, while performing their functions, are obliged to comply with the requirements of Georgia's domestic laws and regulations.

However, Russian peacekeepers continue to act in defiance of their mandated obligations, turning a blind eye to gross violation of law and human rights taking place in their very presence.

We call upon the CIS peacekeeping forces and their leadership to employ all means at their disposal in order to put an immediate end to the use of forced labour on the territory of Abkhazia, Georgia." (Written Statement of Georgia, Vol. III, Ann. 83; emphasis added.)

40. The Permanent Representative of Georgia repeated the findings about the Russian peacekeeping forces in a statement on 3 October 2006 (Judgment, para. 92):

"It is crystal clear, *that the Russian peacekeeping force is not an impartial, nor international contingency. It failed to carry out the main responsibilities spelled out in its mandate — create favorable security environment for the return of ethnically cleansed hundreds of thousands of Georgian citizens*. It became the force that works to artificially alienate the sides from one another." (Written Statement of Georgia, Vol. IV, Ann. 171; emphasis added.)

41. In its Third Periodic Report of 7 November 2006 to the Human Rights Committee on its implementation of the International Covenant on Civil and Political Rights, Georgia deplored the continuing occurrence of torture and other grave human rights violations in areas of Georgian territory that were within the Russian Federation's effective control:

"22. *The most flagrant human rights violations still take place in the territory of Abkhazia and the Tskhinvali region/South Ossetia, Georgia,*

> *which are* de facto *out of the control of the Government of Georgia and where the Russian Federation exercises effective control instead. Many citizens of Georgia living there are subjected to torture and other ill-treatment; they are victims of other numerous, grave human rights violations*. The Government of Georgia is doing its best to guarantee their rights, but Georgia is apparently in need of urgent and strong assistance from the international community, in order to have their rights protected. In the present report, within the framework of the respective provisions of the Covenant, broader information in this regard is provided." (Written Statement of Georgia, Vol. III, Ann. 85; emphasis added.)

In the light of this text, it escapes me how paragraph 68 of the Judgment is able to state that the document "directed no criticism regarding racial discrimination against the Russian Federation".

42. When President Saakashvili addressed the United Nations General Assembly on 26 September 2007 (Judgment, para. 94), he likewise commented on the conduct and inaction of the Russian Federation's peacekeepers:

> "And, while *our most challenging relationship today remains with our neighbours in the Russian Federation*, my Government is committed to addressing this subject through diplomatic means, in partnership with the international community. I can say this with confidence, because Georgia is a nation that is rooted in justice, the rule of law and democracy. This is an irreversible choice made by the people of my country. For evidence of that, one merely has to look at *how Georgia has responded to the many provocations it has faced in the past year*, which range from missile attacks to full-scale embargoes and even *destructive pogroms*.
>
> . . . . . .
>
> Today, I regret to say that signs of hope are few and far between. The story of Abkhazia, where up to 500,000 men, women, and children were forced to flee in the 1990s, is of particular relevance — one of the more abhorrent, horrible and yet forgotten ethnic cleansings of the twentieth century. *In the time since Russian peacekeepers were deployed there, more than 2,000 Georgians have perished and a climate of fear has persisted.*
>
> . . . . . .
>
> *The continued ignorance of the ethnic cleansing in Abkhazia, Georgia*, is a stain on the moral account book of the international community. These disputes are no longer about ethnic grievances; they are about the manipulation of greed by a tiny minority of activists, militants, militias *and their foreign backers*, at the expense of the local popula-

> tion, the displaced and those who are deprived of their property and fundamental rights — even the right to speak and study in their own language.
>
> . . . . . .
>
> *As I speak before you today, elements from Russia are actively and illegally building a new, large military base* in the small town of Java, in South Ossetia, in the middle of Georgia, on the other side the Caucasian ridge, very far from Russian territory, hoping that arms and violence will triumph over the will of the people. And this dangerous escalation is taking place under the very noses of international monitors, whose job it is to demilitarize the territory." (Written Statement of Georgia, Vol. III, Ann. 88; emphasis added.)

It is interesting to note that, while the Judgment refers to this document in paragraph 94, it only does so in a conspicuously selective manner. The same paragraph is silent on the legal significance of this document.

43. In a letter dated 3 October 2007 to the President of the Security Council (Judgment, para. 95), the Permanent Representative of Georgia stated as follows:

> "In reference to the attack on the Georgian Interior Ministry police units that occurred on 6 September 2007, we would like to inform you of the following.
>
> Georgian law enforcement agencies have acquired credible information on the identity of one of the militants who were killed. Until recently, Vice-Colonel Igor Muzavatkin, an officer assigned to the Maikop (Russian Federation) Brigade, was a commanding officer of the 558th special infantry battalion, a segment of the highly regarded and decorated 131st special infantry brigade. During the past few years, the 558th battalion, under its commanding officer Muzavatkin, was fulfilling peacekeeping duties in Abkhazia, Georgia, particularly in the Gali district. After that assignment, Vice-Colonel Muzavatkin was transferred to the 19th brigade of the 58th Army, stationed in Vladikavkaz (Russian Federation).
>
> The Georgian side expresses its extreme concern about this fact, proving that separatist illegitimate armed forces are constantly receiving support from a party which is supposed to be a facilitator of the conflict resolution process. Regretfully, we have been witnessing such a pattern of behaviour for 14 years. *At the same time, high-ranking Russian officials consider ordinary support and training to so-called anti-terrorist units*, *which in reality by nature are illegitimate military formations of the* de facto *Abkhaz regime, and are responsible for ethnic cleansing that took place in Abkhazia, Georgia.*" (Written Statement of Georgia, Vol. III, Ann. 89; emphasis added.)

Again, I cannot understand how paragraph 95 of the Judgment can say that this document does not "make any reference to racial discrimination or ethnic cleansing . . . or to the Russian Federation's responsibility for such actions", more particularly that "the reference to ethnic cleansing is not stated as a claim against the Russian Federation regarding compliance with its obligations under CERD".

44. On 19 April 2008, the Ministry of Foreign Affairs of Georgia reacted to a statement of 18 April 2008 of the Ministry of Foreign Affairs of the Russian Federation (Judgment, para. 97):

> "*On 18 April 2008, the Ministry of Foreign Affairs of the Russian Federation* posted a press release on the approval by the President of the Russian Federation of a package of measures for the normalization of relations with Georgia. In this connection the Ministry of Foreign Affairs of Georgia states that, given Moscow's recent destructive steps with respect to the separatist regions of Georgia, it cannot consider the removal of trade, economic and transport restrictions that were unilaterally and out of political motivations imposed on Georgia by Russia itself as basis of any such co-operation.
>
> *Any reference by the Russian side to its intention of normalizing bilateral relations and to its readiness for co-operation, against the background of* de facto *annexation of Georgia's integral parts: Abkhazia and the Tskhinvali region and violations and neglect of human rights of an absolute majority of the regions' population — victims of ethnic cleansing, aims at creating an illusion of constructive co-operation with Georgia and is seen as an attempt to tone down the international community's sharp reaction concerning Russia's aggressive policy.*" (Written Statement of Georgia, Vol. IV, Ann. 177; emphasis added.)

This document is again not quoted in full in the Judgment, thus failing to show the actual position of the Ministry of Foreign Affairs of Georgia.

45. The above thread of consistent communications from Georgia to international organizations of which the Russian Federation is a member makes it hard to deny legal significance or probative weight (whether in the direct, primary, indirect, secondary, or corroborative degrees of such weight) to any of the foregoing documentary evidence for purposes of establishing the existence of a dispute between Georgia and the Russian Federation on CERD-related subject-matter well before 9-12 August 2008.

3. Public Statements of Georgia on other Occasions

46. In its practice, the Court has not hesitated to consider unilateral (for instance, ministerial or parliamentary) statements as part of the

documentary evidence before it, although it has attached different degrees of significance or probative weight to such material (see *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 269, para. 50; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 474, para. 52; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, pp. 249-252, para. 59; *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 454, para. 49). For this reason, I cannot disregard, for purposes of determining the existence of a dispute, various Georgian statements to the international press, as well as other official documents as part of the corpus of documentary evidence that could corroborate or supplement the existing material on bilateral exchanges and Georgian statements circulated to international organizations. From the contents of the following documents it is not clear whether they had been circulated to international organizations, but they may likewise be considered for their corroborative value. Most of this material is either not mentioned, or the actual texts are not reproduced, in the Judgment.

47. For example, in a resolution adopted on 11 October 2001 (Judgment, para. 71), the Parliament of Georgia reflected concerns regarding the conduct or inaction of Russian peacekeepers in relation to ethnic cleansing being committed against Georgians as early as 1994:

> "*Since the deployment of Russian peacekeepers under the auspices of the CIS to the conflict zone in Abkhazia in July 1994, the policy of ethnic cleansing against Georgians has not stopped. It is confirmed that during this period more than 1,700 persons were killed in the security zone. Peacekeeping Forces committed numerous crimes against the peaceful population*. Abkhazia has become an uncontrolled territory, where terrorists, drug and weapon smugglers and others involved in organized crime may freely act.
>
> An absence of constructive approach from the side of Russia brought to the deadlock and blocked the adoption and discussion of the project on Abkhazia's status, worked out by the United Nations and the representatives of Georgia's friend countries.
>
> It has become a matter of concern that biased and aggressive anti-Georgian declarations are made in Russian official circles, clearly showing the policy of dual standards of leadership still continuing large-scale military operations in Chechnya with the view of restoring the territorial integrity of Russia.
>
> As a result of recent numerous instances of bombings and violations of Georgia's air space, it has become evident that *Russia appears as the party involved in the conflict*; that the function of Peacekeeping Forces is limited to drawing "the border" and, instead of facilitating conflict settlement, they rather instigate it, which is confirmed by

deployment of additional military contingent and armaments in Abkhazia without the agreement of the Georgian Government." (Written Statement of Georgia, Vol. IV, Ann. 145; emphasis added.)

48. These concerns about the conduct or inaction of Russian peacekeepers were again expressed in a resolution adopted on 20 March 2002 by the Parliament of Georgia (Judgment, para. 74), which stated, *inter alia*:

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

In Abkhazia, on the occupied Georgian territory, *major human rights and freedoms' violation on the ethnic basis has been carried on by the assistance of external military force*. Such as: arbitrary deprivation of freedom, terror, murders, taking of hostages, kidnapping for money extortion, violation of the official status of the Georgian language, destruction and misappropriation of state, refugees and IDPs' properties. The monuments of Georgian culture and scientific and academic institutions have been destroyed and similar activities have been going on. The world community has not been appropriately informed of these actions. The policy of the separatists' leaders have posed a genuine threat to the existence of Abkhaz ethnos itself and to its unique culture." (Written Statement of Georgia, Vol. IV, Ann. 146; emphasis added.)

49. Neither was President Saakashvili unaware of such concerns regarding the Russian peacekeepers when he was elected into office. In an interview conducted on 25 February 2004 by BBC News (Judgment, para. 77), he declared:

"Well it is primarily the issue of our relations with Russia. The Russian generals are in command there [Abkhazia], they have a military contingent there which played a very negative role in the years of the war. They basically stirred up the war there and the Abkhazia separatists have a huge lobby in Moscow because it was like the Riviera for the former Soviet Union. It was the favourite resort place for Russian nomenklatura, including Russian generals.

So it was very painful for them to lose not only Georgia, because Georgia became independent of course in 1991, but also Abkhazia together with Georgia. But of course it is a Georgian territory, most of the population there is ethnically Georgian or was ethnically Georgian. *Those people were thrown out by Russian troops and local*

separatists and we need to change the situation. Of course primarily the way to change that is peaceful talks, offering them better alternatives in terms of Georgian economic development, Georgia's integration into Europe. Basically that is a lawless place." (Written Statement of Georgia, Vol. IV, Ann. 198; emphasis added.)

50. On 5 November 2005, the Ministry of Foreign Affairs of Georgia issued a statement regarding the conduct or inaction of Russian peacekeepers in the face of ongoing human rights violations being perpetuated against the Georgian civilian populations within their areas of responsibility:

"*Human rights violations continue to be committed in Abkhazia, especially Gali District, in the zone controlled by CIS peacekeeping forces. These violations have recently become massive and are mainly committed against ethnic Georgian population*.

On 2 November of the current year, a 21-year-old resident of village Gagida Daniel Tsurtsumia was arrested without any reason by the armed group of 60 Abkhazians and transferred to Sokhumi, where he was forced to join the so-called Abkhazian army. He was brutally beaten as he did not make an oath. As a result, Daniel Tsurtsumia died on 4 November.

The abovementioned fact once again confirms that CIS *peacekeeping forces are unable to or do not fulfill their duties under the mandate, in order to ensure security of the local population, and show their inaction with respect to serious human rights violations that occur in front of their eyes*." (Written Statement of Georgia, Vol. IV, Ann. 159; emphasis added.)

51. On 14 November 2005, the Ministry of Foreign Affairs of Georgia issued a statement that reported another incident involving such conduct or inaction by Russian peacekeepers:

"With the syndrome of impunity, the separatist government of Abkhazia and its so-called law enforcement agencies are resorting to terror towards the ethnic Georgian population, *in order to expel them from the region and conclude and legitimize ethnic cleansing*.

This totally outrageous situation in the conflict zone takes place in front of the eyes of peacekeeping forces and often with their secret consent. On November 13, there was another incident in Gali District, that unfortunately ended with murder. Particularly, during the morning hours in Chuburkhindzhi, unknown persons, allegedly Gali policemen, attacked the residents of this region, Kh. Arkania and G. Sichinava. Kh. Arkania was killed with firearms on [the] spot. G. Sichinava was wounded and was later transferred to the Gali

District Hospital." (Written Statement of Georgia, Vol. IV, Ann. 161; emphasis added.)

52. On 20 January 2006, the Ministry of Foreign Affairs of Georgia issued a statement to the press in reaction to statements of the Minister of Foreign Affairs of the Russian Federation (Judgment, para. 96):

"As for the conflicts on the Georgian territory and the activity of the Russian peacekeeping forces, it should be noted that we commend Mr. Lavrov for stating that it is necessary to comply fully with the reached agreements. This is exactly what we are aiming at. *However, what we often come across is in fact an absolutely reverse position*. A case in point is Mr. Lavrov's allegations that the Georgian side has several conflict settlement plans for the Tskhinvali region. It is a well-known fact that the plan drafted by the Georgian side on the basis of the President's initiatives was approved by the world community and supported by the OSCE Summit in Ljubljana, including the Russian Federation. *Regrettably, the Minister of Foreign Affairs of the Russian Federation seems oblivious to this fact when speaking of the meeting of the Joint Control Commission held in Moscow in December, where the negotiations reached an impasse due in large measure to the Russian side's rigid position. It is a worrisome fact that the Russian high-ranking officials constantly keep us warning of the expected provocations, military escalation and possible armed confrontations.* Keeping this issue in the foreground of attention indicates on the one hand that the threat of provocations does really exist, on the other — it shows that the scenario for such development of events may be suiting the interests of certain forces. These very forces stand behind the incidents in the Tskhinvali region in summer of 2004, including deployment from the Russian Federation of sizeable armed groups and concentration of Russian military formations near the Roki tunnel, which took place with the end of carrying out the abovementioned scenario.

. . . . . .

The culpable inaction of the peacekeeping forces and in many cases their overt support for separatists is what can be held responsible for the militarization of the conflict zones, uncontrolled raids of armed formations, every day occurrence of grave crimes and gross violation of human rights. It is the unrestrained actions and attacks of criminals that come in the way of the realization of economic projects, including Enguri power station rehabilitation works." (Written Statement of Georgia, Vol. IV, Ann. 162; emphasis added.)

53. On 19 June 2006, the Deputy Minister of Foreign Affairs of Georgia responded through the press to statements that had, on their part, been circulated to the press by the Minister of Foreign Affairs of the Russian Federation (Judgment, para. 96):

> "Question: *In his interview granted to the media outlets on 16 June 2006, Minister of Foreign Affairs of the Russian Federation Sergey Lavrov shifted the whole blame for deterioration of Georgian-Russian relations to the Georgian side, citing in particular the Georgian side's statements and threats against Russian peacekeepers during the last year and a half*. He also noted that Russian peacekeepers are faced with groundless claims concerning their visas, which are not provided for by the respective agreements. What will be your comments?
>
> Answer: *Notwithstanding my deep sense of respect for Mr. Minister, I can not share his opinions and feel compelled to differ with him on his assessments*. I will try to be coherent in giving my explanations of the issues and groundless accusations voiced in his interview and register once again the position we have stated earlier on more than one occasion.
>
> *To start with, let me underline that the Russian peacekeepers' activity in the conflict zone lasting for years has laid bare their inability to fulfill their mandated obligations, and in particular, their failure to contribute to peaceful resolution of the conflict and to provide the necessary conditions for the safe return of internally displaced persons. They are no longer in a position to act with impartiality* to which attest clearly the Russian side's official statements that the major goal of Russian peacekeepers is to protect rights and interests of the so-called Russian citizens in the conflict regions. Also causing concern is their active participation in the military parade to mark the so-called independence day of the Tskhinvali region/South Ossetia. *Furthermore, secretly from them and in many cases through their immediate involvement, one of the parties to the conflict carries out illegal and criminal acts against the ethnically Georgian peaceful population*, bringing in personnel and military equipment and concentrating them in the region through the illegal checkpoints, of which international observers report systematically. These are the acts that can be described as totally unacceptable and provocative.
>
> Against such background, it is increasingly clear that the peace operations of this style, rather than leading to a full-scale settlement of conflicts, aim definitely at preserving the existing situation. Peacekeepers have in fact assumed the role as protectors of separatists and border guards between the conflict regions and the rest of Georgia.
>
> . . . . . .
>
> *To the Russian side we suggest close co-operation*, with the participation of representatives of the South Ossetian side as well, which

envisages extension of the negotiation format and involvement of OSCE member states and other international organizations in the peace process. *However, all efforts of the Russian side, trying to hold on to its exclusive right of mediator, are concentrated on maintaining those outmoded mechanisms and agreements, which have not moved the peace process forward an inch. It gives us sufficient grounds to call into question the 'sincerity' of the Russian side's claims that its goal is to achieve the settlement of conflicts*. The Georgian side holds out hope that the Russian colleagues will assume a more constructive position.

With respect to the signing of a document on the non-use of force, our position is unequivocal. This obligation should become one of the key elements of the process, which should advance the goal of a full-scale and comprehensive settlement of the existing conflicts. It means granting the European model of broad autonomy to the Tskhinvali and Abkhazian regions within the internationally recognized borders. Besides, there have to be firm international guarantees to insure safety of the population and protection of their rights. In other case, the consequences that may follow will be harsh. *Georgia remembers vividly the bitter experience when the analogous agreement signed only under the guarantee of Russia remained on paper and the terrible tragedy that struck Gagra and Sukhumi ended in dislodgement of hundreds of thousands of people from their places of residence and was later appraised by OSCE as ethnic cleansing*." (Written Statement of Georgia, Vol. IV, Ann. 164; emphasis added.)

54. President Saakashvili again demonstrated his awareness of the problems regarding the right of return of refugees/IDPs and the continuing problems faced by victims of ethnic cleansing, when he addressed the (EU) European Parliament in 14 November 2006 (Judgment, para. 93):

"Unfortunately, there are many who continue to suffer from these conflicts.

Over 300,000 Georgians were ethnically cleansed from Abkhazia in the early 1990s as a result of war and violent separatism — along with hundreds of thousands of other nationalities who today cannot return to their homes.

Even now, we witness how the property of those expelled peoples is inhabited by others and in many cases sold illegally.

Indeed, just recently, one of the most famous Georgian-French film directors, Mr. Otar Iosseliani, while commenting on the current anti-Georgian campaign in Russia remarked that *history seems to be repeating itself — targeting the same victims for a second time — had this to say, and I quote*:

> 'The Russian administration first undertook ethnic cleansing in Abkhazia, from where 500,000 people became refugees. Those who could not escape by walking through the high mountains of Svaneti, Georgia, were massacred by the hands of mercenaries. They devastated and destroyed the country. And by the way, then everybody was silent too.'
>
> This is the painful legacy we have inherited. And this is the lawlessness and injustice that we confront.
>
> *And this time, let us not be silent*." (Written Statement of Georgia, Vol. IV, Ann. 172; emphasis added.)

55. On 2 March 2007, the Georgian State Minister on Conflict Regulation Issues released a statement (Judgment, para. 96) that reported actual incidents of conduct or inaction of Russian peacekeeping forces:

> "On 1 March of the current year, the so-called law enforcement authorities of Abkhazia opened fire at the local group of young people of Georgian and Abkhazian nationality, in the zone controlled by Russian peacekeeping forces between the posts No. 202 and No. 306 of Collective Peacekeeping Forces.
>
> The young people publicly expressed their personal opinions regarding the non-legitimate elections of *de facto* Parliament appointed on 4 March and violent politics of the separatist regime. As a result of this attack three peaceful citizens were kidnapped: Ghachava, Rogava and Korshia, who are kept in illegal imprisonment and, according to the statement of Abkhazian side, will not be released.
>
> The above-mentioned acts are directed against the right of peaceful assembly and freedom of expression and put obstacles to approachment and restoration of confidence between Abkhazian and Georgian societies. The mentioned incident poses direct threat to the peacekeeping initiative proposed by the Georgian side and once again reveals explicitly destructive approach towards the peacekeeping process.
>
> The Office of State Minister on Conflict Regulation Issues expressed its deep concern over the mentioned provocations. The incident that occurred in the lower zone of Gali District on March 1, by the *de facto* administration, once again underlines *the policy of intimidation of the local population that is established on the practice of gross human rights violation. It is mostly done against the background of criminal inaction of Russian peacekeepers*. The above described fact confirms the accuracy of our position with respect to the contingent of the Russian peacekeepers." (Written Statement of Georgia, Vol. IV, Ann. 174; emphasis added.)

56. The Ministry of Foreign Affairs of Georgia again confirmed its assessment of the conduct or inaction of Russian peacekeepers on 20 Sep-

tember 2007 (Judgment, para. 96), in a statement calling upon the Russian Federation for action:

> "As a country whose efforts are directed at the restoration, through peaceful settlement of the conflicts, of its territorial integrity, Georgia wants to see Russia as a partner focused on the establishment of peace and stability in the Caucasus region. We believe that should be in Russia's interests.
>
> Regrettably, such position of Georgia has not found understanding from the Russian side. The efforts of the Georgian authorities to build a democratic state based on the rule of law, which is to become a full-fledged democratic member of the international community, *are viewed by Russia's governing circles* as an action directed against the national interests of Russia. *The separatist regimes on the territory of Georgia continue to be at the receiving end of Russia's evident and undisguised backing, political, economic and — what is most alarming — military support*.
>
> Of particular concern, against such background, are continuous "warnings", voiced by the Ministry of Foreign Affairs and senior officials of the Russian Federation, concerning the allegedly high likelihood of provocations by the Georgian side, escalation of the situation and armed confrontation. It deserves to be noted that the contents of the statements and the time of their publication seem to synchronize perfectly with the analogous statements of the separatist regimes. It points to the real threat of provocations. *But this threat emanates from the separatists and their patrons*.
>
> . . . . . .
>
> *At the same time, militarisation of the conflict zones, raids of armed gangs, violations of fundamental human rights, gross infringement on the property right of IDPs/refugees, victims of ethnic cleansing, in particular seizure and illegal sale of their assets that has already acquired a mass character, daily incidence of grave offences involving peacekeepers take place amid the culpable inactivity of the peacekeeping forces and in many cases their open support of the separatists*.
>
> Armed confrontation is avoided mainly because of the Georgian Government's strong and principled position on peaceful resolution of the conflicts. At the same time, the Georgian side considers it necessary that the international community adopt a clear and unequivocal position on Russia's destructive actions against Georgia that will be an important deterrent factor for the aggressively disposed forces.
>
> *The Ministry of Foreign Affairs of Georgia calls on the Russian side to discontinue its actions aimed at escalation of the tension in the conflict zone and undertake the functions of a truly unbiased facilitator*. On

> our part, we would like to underline once again our readiness for constructive co-operation with Russia in this direction." (Written Statement of Georgia, Vol. IV, Ann. 175; emphasis added.)

57. In the face of apparent Russian silence or lack of an adequate or sufficient response to its public statements, the Ministry of Foreign Affairs of Georgia concluded on 22 November 2007 (Judgment, para. 96):

> "It should be noted that the activity of the Russian peacekeepers in Georgia's conflict zones is absolutely destructive and negative. *It is further attested by the fact that up to two thousand local residents have been killed in the area controlled by the so-called peacekeepers.* Russian peacekeepers do not comply with their mandated commitments and act as protectors of the separatist regimes . . .." (Written Statement of Georgia, Vol. IV, Ann. 176; emphasis added.)

C. Concluding Remarks

58. I would like to emphasize that, with this separate opinion, I do not intend to contradict in any way the joint dissenting opinion of which I am a co-author. Rather, the purpose of the preceding pages has been to present an account of the facts allowing a more informed conclusion on Russia's first preliminary objection, but also extending into the realm of the second preliminary objection and broadening the factual basis for our joint dissent. In my view, the way in which the present Judgment handles the issue of the relevance and legal significance of facts is unacceptable. The Judgment thus adds another chapter to the story of the Court's unsatisfactory handling of evidence. It embodies serious deficiencies in this regard.

(*Signed*) Bruno Simma.