

INTERNATIONAL DECISIONS

EDITED BY DAVID J. BEDERMAN

*Application of the International Convention on the
Elimination of All Forms of Racial Discrimination
(Georgia v. Russian Federation)*

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International Court of Justice—jurisdiction—provisional measures—Convention on the Elimination of All Forms of Racial Discrimination

APPLICATION OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (Georgia v. Russian Federation). Order (Provisional Measures). At <<http://www.icj-cij.org>>.

International Court of Justice, October 15, 2008.

In early August 2008, armed conflict broke out between the Russian Federation and Georgia in the Georgian region of Ossetia. In response, Georgia instituted proceedings (Application) against the Russian Federation at the International Court of Justice (ICJ) on August 12, 2008, alleging that Russia violated its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination¹ (CERD) by engaging in widespread and systematic discrimination against ethnic Georgians.² Two days later, Georgia went back to the ICJ to request the indication of provisional measures against Russia (Request), alleging an “extremely urgent threat of irreparable harm.”³ In October 2008, the ICJ issued an order (Order) finding that it has jurisdiction under CERD and indicating provisional measures against both parties.⁴ That order paves the way for the Court to issue its first-ever decision interpreting and applying the provisions of CERD.

According to Georgia’s application to the ICJ, the August 2008 armed hostilities continued a dispute that predated the break-up of the former Soviet Union in 1991 (Application, paras. 22–27). Georgia formally declared its independence from the Soviet Union on April 9, 1991 (*id.*, para. 26). From 1989 onward, however, the Georgian regions of South Ossetia and Abkhazia had been openly advocating for autonomous status, which was refused by the Georgian authorities (*id.*, paras. 24–25). Violent conflict broke out beginning in 1991, resulting in thousands of deaths and the flight of tens of thousands of ethnic Georgians from South Ossetia and Abkhazia (*id.*, para. 31). Russia sympathized with the separatist movements and provided

¹ International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 UNTS 195 [hereinafter CERD].

² Application Instituting Proceedings, Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Geor. v. Russ.) (Int’l Ct. Justice Aug. 12, 2008). Basic ICJ documents, as well as materials concerning its cases, are available at <<http://www.icj-cij.org>>.

³ Request for the Indication of Provisional Measures of Protection Submitted by the Government of the Republic of Georgia, Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Geor. v. Russ.) (Int’l Ct. Justice Aug. 14, 2008).

⁴ Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Geor. v. Russ.), Order (Provisional Measures) (Int’l Ct. Justice Oct. 15, 2008).

support to them by sending Russian troops to those regions "to maintain order" and by providing weapons and supplies (*id.*). In 1992 and 1994, respectively, Georgia reached settlements with the Ossetia and Abkhazia separatist forces and the Russian Federation, pursuant to which Russia agreed to participate in a joint peacekeeping force in the region (*id.*, paras. 32, 52).

Georgia contended that despite its settlement with Russia, the latter—both through its own organs and through South Ossetian and Abkhaz separatist forces under Russia's direction and control—has improperly interfered in these regions by engaging in widespread and systematic discrimination, including attacks against, and mass expulsion of, South Ossetia's and Abkhazia's ethnic Georgian populations, in violation of CERD Articles 2, 3, 4, 5, and 6 (Order, para. 20). These articles generally prohibit all forms of discrimination based on race, color, nationality, or ethnicity. Russia's alleged acts of discrimination include murder, torture, rape, deportation and forcible transfer, imprisonment, hostage taking, enforced disappearance, plunder, and wanton destruction and unlawful appropriation of property not justified by military necessity (*id.*). Georgia further alleged that Russia seeks to consolidate changes in the ethnic composition of South Ossetia and Abkhazia resulting from its actions "by preventing the return to South Ossetia and Abkhazia of forcibly displaced ethnic Georgian citizens and by undermining Georgia's capacity to exercise jurisdiction in this part of its territory" (*id.*, para. 3). Georgia contended that the "changed demographic situation in South Ossetia and Abkhazia is intended to provide the foundation for the unlawful assertion of independence from Georgia by the *de facto* South Ossetian and Abkhaz separatist authorities" (*id.*). Georgia asked the ICJ to order Russia to comply with its obligations under CERD and to pay compensation for its actions.

Two days after submitting its original application, Georgia submitted an urgent request pursuant to Article 41 of the ICJ Statute for the indication of provisional measures against Russia (Request, para. 1). Georgia alleged that the indication of provisional measures was necessary

to protect its citizens against violent discriminatory acts by Russian armed forces, acting in concert with separatist militia and foreign mercenaries, including unlawful attacks against civilians and civilian objects, murder, forced displacement, denial of humanitarian assistance, and extensive pillage and destruction of towns and villages, in South Ossetia and neighboring regions of Georgia, and in Abkhazia and neighboring regions, under Russian occupation. (Request, para. 1)

In response to Georgia's allegations, Russia contended that Georgia has failed to respect the peoples' right of self-determination in the regions of Ossetia and Abkhazia and that Georgian President Saakashvili has impeded the peace process (Order, paras. 58, 62). Russia further alleged that Georgia suddenly aggravated the situation by bombing Tskhinvali, the South Ossetian capital, during the first week of August 2008 (*id.*, para. 64).

Russia denied that it has engaged in discrimination within the meaning of CERD. Instead, Russia claimed that it has acted as a mediator and a guarantor of peace and security in the region as part of a collective peacekeeping force. Russia further claimed that this case is not really about racial discrimination; rather, the dispute relates to the use of force, humanitarian law, and territorial integrity (Order, para. 83). In Russia's view, the fact that Georgia has never complained to the Committee on the Elimination of Racial Discrimination (Committee) despite multiple opportunities demonstrates that Georgia never viewed this matter as a violation of CERD (*id.*, para. 99).

Russia contended that CERD does not apply to this dispute because the Convention is phrased as obligations to be implemented within each member state and not extraterritorially (Order, para. 100). Russia also contended that CERD does not impose a duty to prevent racial discrimination by others (*id.*, para. 125). In this regard, Russia argued that provisional measures against Russia were not warranted because Russia does not and will not in the future exercise effective control over South Ossetia or Abkhazia (*id.*, para. 74). Finally, Russia claimed that the preconditions for the exercise of jurisdiction under CERD Article 22 have not been met. For these reasons, Russia argued that the ICJ does not have jurisdiction over this dispute.

In a closely divided, 8-7 vote, the ICJ rejected Russia's position and determined that the ICJ does have jurisdiction pursuant to CERD. In its order, the ICJ first determined that it has jurisdiction pursuant to the dispute resolution clause (Article 22) of CERD because both Georgia and Russia are parties to CERD and there is a dispute between states parties to CERD as to the interpretation and application of the Convention (Order, paras. 105, 117). Russia had argued that the preconditions for bringing the matter to the ICJ had not been met because Georgia had not first brought the matter to the attention of the Committee pursuant to CERD Article 11, and because Georgia had not attempted to resolve the matter through negotiations with Russia prior to filing its ICJ application. The ICJ disagreed, stating that the record showed that the matter had been raised in bilateral contacts between the parties and had not been resolved (*id.*, para. 115). The ICJ then held that the plain language of CERD does not require that a matter be brought to the Committee before the ICJ may be seized of jurisdiction (*id.*, para. 114).⁵ With respect to Russia's last jurisdictional objection, the ICJ observed that there is no restriction of a general nature in CERD relating to its territorial application; thus, the provisions of CERD "generally appear to apply . . . to the actions of a State party when it acts beyond its territory" (*id.*, para. 109).

The ICJ then indicated provisional measures against *both* parties—the respondent, Russia, and the applicant, Georgia.⁶ The ICJ stated that its "power to indicate provisional measures . . . has as its object the preservation of the respective rights of the parties pending the decision of the Court, in order to ensure that irreparable prejudice shall not be caused to rights which are the subject of dispute" (Order, para. 118). The Court further stated that it was not called upon to establish breaches of CERD, but to determine whether the circumstances required the indication of provisional measures for the protection of rights under CERD. In this context the Court stated that the rights in question in these proceedings—in particular, those stipulated in CERD Article 5(b) regarding security of the person against violence or bodily harm and Article 5(d)(i) regarding freedom of movement—are of such a nature that prejudice to them could

⁵ While the Court did not expressly state what language it relied on in reaching this conclusion, it is likely that the Court viewed Article 11's language as permissive rather than mandatory because the article states that a party "may" bring a dispute before the Committee, and not that it must do so. CERD, *supra* note 1, Art. 11.

⁶ Parties have frequently successfully requested the indication of provisional measures at the ICJ. *See, e.g.*, Request for Interpretation of the Judgment of 31 March 2004 in the *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America)* (Mex. v. U.S.) (July 16, 2008); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo.), 2003 ICJ REP. 3 (Apr. 8); Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Rwanda), 2002 ICJ REP. 219 (July 10) (all provisional measures orders). And while not as common, it is not unprecedented for the ICJ to order provisional measures against both parties. *See, e.g.*, Anglo-Iranian Oil Co. (UK v. Iran), Order (Interim Measures of Protection), 1951 ICJ REP. 89, 93 (July 5).

be irreparable (*id.*, para. 142). Therefore, the Court determined that the indication of provisional measures was required for the protection of CERD rights. The ICJ called on both parties to refrain from any acts of racial discrimination and to ensure, without distinction as to national or ethnic origin, the security of all persons, the right of freedom of movement and residence, and the protection of property of displaced persons and refugees (*id.*, para. 149).

In a joint dissenting opinion, seven judges agreed with Russia that the ICJ did not have jurisdiction for several reasons. (1) The dispute is not over the interpretation or application of CERD; rather, it is a case potentially involving violations of international humanitarian law. (2) The preconditions for alternative dispute resolution set forth in Article 22 had not been met. (3) Georgia did not demonstrate a risk of irreparable harm to its CERD rights since a ceasefire was in place and ethnic Georgians were returning to their homes. There was thus no basis to indicate provisional measures.

It is difficult to analyze this dispute without taking into account questions concerning the legality both of Russia's intervention into Georgian territory and of the parties' use of force under the UN Charter and principles of customary international law.⁷ That international humanitarian law may have been violated, however, does not imply that human rights laws, such as CERD, are inapplicable. In times of armed conflict, human rights law and international humanitarian law may operate in tandem.⁸ In such times, as the ICJ stated in its advisory opinion on the construction of a wall in the Occupied Palestinian Territories, human rights law is not entirely displaced by humanitarian law.⁹ Therefore, both may be applicable.¹⁰ In this case, however, Russia was most likely correct that the primary reason Georgia brought this case under CERD rather than alleging violations of international humanitarian law is that CERD was the only basis for establishing ICJ jurisdiction over the dispute.

This case does not represent the first attempt by parties to use CERD to establish ICJ jurisdiction in a case involving serious issues relating to the use of force. For example, in *Armed Activities on the Territory of the Congo*, the Democratic Republic of the Congo (DRC) alleged that Rwanda had engaged in "massive, serious, and flagrant violations of human rights and

⁷ See, e.g., C. J. Chivers & Ellen Barry, *Accounts Undercut Claims by Georgia on Russia War*, N.Y. TIMES, Nov. 7, 2008, at A1; Christopher Waters, *Russia, Georgia and the Use of Force*, JURIST FORUM (Aug. 14, 2008), at <<http://jurist.law.pitt.edu/forumy/2008/08/russia-georgia-and-use-of-force.php>>; *Russia Recognises Georgian Rebels* (Aug. 26, 2008), at <http://news.bbc.co.uk/2/hi/in_depth/7582181.stm>.

⁸ See Rebecca M. Wallace & Diego Quiroz, *Refugees and Internally Displaced: A Challenge to Nation-Building*, 60 ME. L. REV. 409, 417 (2008).

⁹ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, 2004 ICJ REP. 136, para. 106 (July 9).

¹⁰ During the drafting of the Convention, the United States proposed that states be prohibited from encouraging, advocating, or supporting discrimination "through police action or otherwise." 1963 U.N.Y.B. 333, 334. The initial vote was overwhelmingly in favor of the United States' proposal, indicating that the drafters thought that the Convention could apply to the use of force. See *id.* However, it appears from the comments of the delegates to the Sub-commission on Prevention of Discrimination and Protection of Minorities that the proposed language was later dropped not because the delegates thought the use of force should not be covered, but because they did not want to include any language that could be limiting or confusing. UN Econ. & Soc. Council [ECOSOC], Subcomm'n on Prevention of Discrimination & Prot. of Minorities, Summary Records of the 412th Mtg. at 7, UN Doc. E/CN.4/Sub.2/SR.412 (1964). The final CERD language regarding states' obligations in Article II is the broadest possible: "Each State Party undertakes to engage in *no act or practice* of racial discrimination" (emphasis added).

international humanitarian law" on the territory of the DRC in violation of several international treaties, including CERD.¹¹ The ICJ found that it lacked jurisdiction to hear the claim under CERD Article 22 because Rwanda had made a valid reservation to that particular provision. To date, all other similar attempts to base jurisdiction on CERD have also failed,¹² making Georgia's application the first one to succeed in establishing jurisdiction on the basis of CERD. Thus, despite the obvious issues raised by this dispute with respect to international humanitarian law, the Court will be limited to interpreting and applying the provisions of CERD since jurisdiction is founded exclusively on that Convention.

Turning now to the merits of the dispute, CERD Article 1 defines "racial discrimination" broadly as

any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

The intent of the drafters was to cover all types of discrimination in the broadest sense of the word.¹³

Georgia alleged that the most relevant treaty provisions to this dispute were Articles 2 through 6 of CERD. The pertinent language of Article 2 provides that "Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions" and that "Each State Party undertakes not to *sponsor, defend or support* racial discrimination by any persons or organizations" (emphasis added). The latter quoted language may support Georgia's argument that Russia does have an affirmative obligation to refrain from supporting racially discriminatory acts by persons in South Ossetia and Abkhazia.¹⁴

By contrast, both Articles 3 and 6 may support Russia's position that CERD is not intended to apply extraterritorially. Article 3 provides that "States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature *in territories under their jurisdiction*" (emphasis added). Similarly, Article 6 provides that "States Parties shall assure to everyone *within their jurisdiction* effective protection and remedies . . . against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention" (emphasis added). Nevertheless, if Georgia establishes that Russia exercised effective jurisdiction and control over persons in South Ossetia

¹¹ See, e.g., *Armed Activities on the Territory of the Congo (New Application: 2002)* (Dem. Rep. Congo v. Rwanda), para. 1 (Int'l Ct. Justice Feb. 3, 2006).

¹² See, e.g., *South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.)*, 1966 ICJ REP. 6 (July 18).

¹³ See NATAN LERNER, *THE U.N. CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION* 28 (1980).

¹⁴ Georgia's position may also find support in the Convention's *travaux préparatoires*. Of the three draft texts considered by the Sub-commission on Prevention of Discrimination and Protection of Minorities, two contained multiple references to a state's obligations "within its territory" in Articles II and III. Compare ECOSOC, Sub-comm'n on Prevention of Discrimination & Prot. of Minorities, Summary Records of the 409th Mtg., UN Docs. E/CN.4/Sub.2/L.308 (1964) (Abram draft), E/CN.4/Sub.2/L.309 (Calvocoressi draft), & E/CN.4/Sub.2/L.314 (Ivanov/Ketrzynski draft). However, the text of Article II as ultimately adopted contained no reference to a state's territory, and Article III was altered to refer to a state's jurisdiction rather than its territory. The U.S. delegate suggested that the deletion of the words "within its territory" would "have the advantage of implying that the responsibility of the State extended to all areas in which it exercised authority." ECOSOC, Sub-comm'n on Prevention of Discrimination & Prot. of Minorities, Summary Records of the 416th Meeting at 5, UN Doc. E/CN.4/Sub.2/SR.416 (1964).

through its participation in collective peacekeeping operations or other activities, Articles 3 and 6 may be applicable.

CERD Article 5 contains no such limiting language and will likely constitute the heart of Georgia's argument on the merits. It provides that "States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law," including the "right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution;" as well as the "right to freedom of movement and residence within the border of the State." The Committee on the Elimination of Racial Discrimination has already issued a report (in 2001) recognizing that

the situations in South Ossetia and Abkhazia have resulted in discrimination against people of different ethnic origins, including a large number of internally displaced persons and refugees. On repeated occasions, attention has been drawn to the obstruction by the Abkhaz authorities of the voluntary return of displaced populations, and several recommendations have been issued by the Security Council to facilitate the free movement of refugees and internally displaced persons.¹⁵

As the ICJ observed in its order, if Georgia's allegations regarding Russia's actions prove true, Russia likely will have violated its obligations under CERD by engaging in and supporting attacks against, as well as mass expulsions of, ethnic Georgians from the South Ossetia and Abkhazia regions. The ICJ's resolution of these issues at the merits stage will likely provide important and novel guidance regarding the scope and application of CERD.¹⁶

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