This article from Hague Justice Journal is published by Eleven international publishing and made available to anonieme bezoeker

COMMENTARY

The *Georgia v. Russia* Case: A Commentary

Application of the International Convention on the Elimination of All forms of Racial Discrimination, Request for the Indication of Provisional Measures (Georgia *v.* Russia Federation)*

Dr. Phoebe Okowa**

1. BACKGROUND

This is the first dispute involving Russia that has been brought before the International Court of Justice since the Court's establishment in 1945. For that reason alone, it must be regarded as a landmark even if the Court ultimately decides that it is unable to give a judgment on the merits.[1]

On 8 August 2008 Russia launched a full-scale military operation in Georgia ostensibly to protect its peacekeepers and nationals who were facing attacks and persistent persecution in Georgia's breakaway republics of Abkhazia and South Ossetia.[2] Although the immediate trigger of the current legal dispute was that invasion, the conflict itself has a long and protracted history, dating back to the early 1990s and the events that followed the disintegration of the Soviet Union and the emergence of Georgia as an independent state. Although both South Ossetia and Abkhazia had enjoyed the status of autonomous *oblast* or districts of Georgia under the Soviet Union, their attempts to unilaterally secede from Georgia during the early 1990s were unsuccessful and the international recognition of Georgia which accompanied its Declaration of Independence extended to the whole

* Order of 15 October 2008, General List No. 140.

** Reader in Public International Law at Queen Mary, University of London.

1 The Soviet Union had remained hostile to the International Court throughout its existence and never had any meaningful contact with its institutions (despite having a permanent seat on the Bench, along with China, the United Kingdom, the United States and France).

2 Permanent Mission of the Russian Federation at the United Nations, Situation Around Abkhazia and Ossetia: Historical overview" available at: http://www.un.int/russia/new/MainRoot/docs/warfare/statement051208en.htm; Oral pleadings 8 September 2008, p. 9-13.

HAGUE JUSTICE JOURNAL / JOURNAL JUDICIAIRE DE LA HAYE, VOL. 3, NO. 3 (2008), PP 215-225.
© HAGUE JUSTICE JOURNAL / JOURNAL JUDICIAIRE DE LA HAYE 2008.

This article from Hague Justice Journal is published by Eleven international publishing and made available to anonieme bezoeker

territory including the two provinces. There followed a prolonged period of unhappy co-existence between Georgia and the two republics, with both entities enjoying *de facto* autonomous status within Georgia, with the active support of the authorities in Moscow. The period since Georgian independence was also marked by violence on both sides, with much hostility directed at ethnic Georgians living in the two republics who were frequently subjected to forcible expulsion and destruction of property.[3] The tensions culminated in a ceasefire mediated by the Commonwealth of Independent States (CIS) and the deployment of Russian-led CIS peacekeepers[4], although their neutrality in the conflict was consistently questioned.[5]

It has been suggested that the events in August 2008 which triggered the present dispute were precipitated by Kosovo's declaration of independence and subsequent recognition by the US and other states, as well as Georgia's public declaration of its intention to seek NATO membership at the NATO summit in Bucharest in April 2008.[6] Russia, it has been argued, was keen to create ethnically homogenous client states in South Ossetia and Abkhazia that would be politically, economically and socially allied and dependent upon it, and act as a buffer against NATO's expansion eastwards.[7] Cessation of hostilities was finally achieved when both parties agreed to comply with the terms of an EU-brokered ceasefire under the leadership of French President – and then holder of the rotating EU Presidency – Nicolas Sarkozy.

On 12 August 2008, Georgia instituted proceedings in the International Court of Justice against the Russian Federation. The dispute had been widely perceived as grounded in the international law norms prohibiting the use of force. The Russian invasion had been condemned in the Security Council by the European Union and Russia's neighbours, who characterised the invasion as an act of aggression. Georgia's decision to base its Application on Article 22 of the *Convention on the Elimination of all forms of Racial Discrimination* (CERD) may seem to be an anomaly, but as is argued below, it was a deliberate tactical move designed to give the Court jurisdiction which it would not otherwise have had, as neither Russia nor Georgia had accepted the Court's jurisdiction as compulsory under the optional clause.

In its Application, Georgia alleged that the attack on its citizens was perpetrated in concert with separatist militia as well as Cossack and Chechen mercenaries under the direction and control of the Russian authorities. Georgia further maintained that joint Russian forces and the separatists in South Ossetia

---

3 See US Department of State, Georgia Human Rights Practices 1993, 31 January 1994; Security Council Resolution 876 of 19 October 1993.

4 See "Decision of the Council of the CIS Heads of State on Usage of Collective Force to maintain peace and security in Georgia-Abkhazia zone of conflict", 22 August 1994.

5 International Crisis Group, "Russia v. Georgia: The Fallout", Europe Report No. 195, http://www.crisisgroup.org/home/index.cfm?id=5636; European Parliament resolution of 5 June 2008 on the situation in Georgia.

6 See UK delegation to NATO, NATO Summit Bucharest, 2-4 April 2008, http://uknato.fco.gov.uk/en/newsroom/events/bucharest-summit.

7 See Application Instituting Proceedings submitted by Georgia, 12 August 2008, p. 25 and 26 para. 76.

This article from Hague Justice Journal is published by Eleven international publishing and made available to anonieme bezoeker

had engaged in a campaign of ethnic cleansing, including murder and forced displacement of ethnic Georgians. In the days that followed the initial attacks, the military operations extended beyond the two breakaway republics into areas under the control of Georgia's government. Although there are conflicting accounts of the casualties, it was widely reported that the invasion resulted in hundreds of civilian deaths, extensive destruction of property, and massive displacement of ethnic Georgians. In justifying its invasion, the Russian Federation put forward the argument that Georgia had committed acts of genocide against South Ossetians and other citizens of Russia.[8] The position of Georgia at the time was that this was an unprovoked act of Russian aggression, and in the days immediately after the attacks, Georgia invoked its right of self-defence under the Charter of the United Nations, in sending its troops to repel the Russian aggression. The international community, including the European Union, was almost unanimous in condemning what was seen as an unprovoked act of Russian aggression and supported Georgia's claim that it had a right to defend itself.[9]

Against this background, the decision to base the dispute within the confines of the Convention on Racial Discrimination appears as an anomaly and a marginal issue in relation to a conflict that was overwhelmingly about the legality of the use of force. Furthermore, the detailed catalogue of allegations made by Georgia against Russia amounted to significant violations of international humanitarian law as found in the Hague Conventions on the Laws and Customs of War, the Geneva Conventions and applicable customary law. These allegations included summary execution of Georgian civilians, widespread and systematic pillage and destruction of homes and forcible transfer of ethnic Georgians into civilian camps.[10]

2. THE SUBSTANTIVE ISSUES

The substantive issues raised by the dispute potentially involve a consideration of some of the most contested and difficult issues in contemporary international law. It has brought to the fore the question of state complicity in the acts of armed rebel groups actors, and the circumstances under which the activities of such groups can be attributed to a state or its institutions, as well as the consequences of such attribution.[11] By challenging the legality of Russia's conferment of its nationality on the inhabitants of South Ossetia and Abkhazia, the dispute has also indirectly raised the question of succession in matters of nationality, and whether international law imposes any constraints on the conferment of nationality under a state's municipal law, especially in circumstances where such conferment is

8 See Application Instituting Proceedings, p. 25.

9 European Parliament, Resolution of 5 June 2008 on the situation in Georgia.

10 Georgian Villages in South Ossetia Burnt, Looted, Human Rights Watch, 13 August 2008, http://www.hrw.org/en/news/2008/08/12/georgian-villages-south-ossetia-burnt-looted; See Request for the Indication of Provisional Measures of Protection submitted by the Government of the Republic of Georgia, 14 August 2008.

11 Application Instituting Proceedings, para. 81.

This article from Hague Justice Journal is published by Eleven international publishing and made available to anonieme bezoeker

arguably *mala fides*.[12] The Russian Federation under a series of enactments from 1991 onwards had reportedly extended its citizenship to South Ossetians and Abkhazians, on a Soviet definition of citizenship based almost exclusively on the ability to speak the Russian language and in the absence of any other formal ties.[13] In other cases, nationality was liberally granted to all former citizens of the Soviet Union if they so desired. In South Ossetia, the citizens on whose behalf the intervention was purportedly undertaken had in some cases been granted Russian citizenship just one month before the invasion.[14] This dispute also involves a consideration of the vexed question of the application of the law on self-determination in the context of secession, and whether the enforceable content of international law contains workable criteria applicable to breakaway republics.[15] In particular, it involves an examination of the legal consequences of providing armed support to such separatist groups in the face of protest from the parent state. The issue of self determination has in general only been considered in the context of peoples under colonial or foreign military occupation; its application outside those contexts is pregnant with limitations that have not been properly examined in an international dispute settlement forum.[16] An examination of the issues in their context potentially also involves the question of the extent to which international law entitles a state to use force in the protection of its nationals in another country, and the limitations (if any) placed on the exercise of such a right. Since the Application was instituted, Russia has proceeded to extend recognition to the two breakaway republics.[17] This has been met with protest and condemnation from the rest of the international community, who have consistently treated the conflict as a matter internal to Georgia and in respect of which its

[12] At the end of hostilities that resulted in Georgia's independence from Russia, it was agreed by the Commonwealth of Independent States that Russian Peacekeepers would be stationed in Georgia to mediate on the on-going tensions with its breakaway republic of South Ossetia. It was at this time that Russia extended its citizenship to ethnic Ossetians; Application Instituting Proceedings, para. 53.

[13] See P. Goble, *Russian Passportization*, 9 September 2008, http://topics.blogs.nytimes.com/2008/09 /09/russian-passportization/. It should be noted in this context that for nationality to be valid on the international plane, it must be based on a genuine link between the subject and the state extending its nationality, *Nottebohm Case*, (Liechtenstein v. Guatemala), 1955 ICJ Reports, p.4; On the exclusion of nationality granted in violation of international law, See J. Dugard, First Report on Diplomatic Protection, UN DOC A/CN.4/506 2000, para. 104.

[14] On Russia's Right to protect its nationals, see "Russian Ministry of Foreign Affairs, Statement by Vladimir Voronkov, Acting Representative of the Russian Federation at the Special Meeting of the OSCE Permanent Council", 8 August 2008.

[15] The Court has also been specifically asked to rule on this question in relation to the unilateral declaration of independence by the provisional authorities in Kosovo. See General Assembly Resolution 63/3 (A/63/L2) "Request for an Advisory Opinion of the International Court of Justice on whether the Unilateral Declaration of Independence of Kosovo is in Accordance with International Law".

[16] But see the decision of the Canadian Supreme Court in Reference re Secession of Quebec, [1998] 2 S.C.R. 217; See generally J. Crawford, "State Practice and International Law in Relation to Secession" (1998) 69 *British Yearbook of International Law*, p. 85-117.

[17] See http://www.russiatoday.com/news/29521.

This article from Hague Justice Journal is published by Eleven international publishing and made available to anonieme bezoeker

territorial integrity was paramount.[18] Although the separatist administrations in South Ossetia and Abkhazia have been largely autonomous from Georgia, their quest for formal independence has been far from successful. It is also suggested that the Court will also be implicitly called upon to examine the legal implications of such precipitate recognition. Was the recognition premature in the face of overwhelming evidence that since 1992 the central authorities in Tbilisi had exercised virtually no governmental authority in the breakaway republics? Both provinces are very small in both size and population (100,000 people in the case of South Ossetia and 450,000 in the case of Abkhazia). Assuming that all the other conditions of statehood are met, the putative recognition of these provinces raises the question whether there are circumstances when international law must accept that statehood is not a viable option in respect of small entities that are unlikely to function as members of the international community because of their limited size. There has been much discussion in the literature and in the case law of national courts as to the potential reach of human rights obligations, and in particular whether fundamental human rights obligations have an extra-territorial reach.[19] In so far as the case is based on the alleged breaches by the Russian Federation of its obligations under the *Convention on the Elimination of All forms of Racial Discrimination* (CERD), the Court has been called upon to examine the extent to which human rights obligations could be regarded as having an extra-territorial application.[20] It of course remains highly speculative whether the Court will pronounce on all or any of these issues. The narrow jurisdictional basis, focusing as it does on violations of the CERD, has clearly circumscribed the range of matters upon which the Court can realistically pronounce, even if it interprets the dispute in its widest context. Courts of law in almost all jurisdictions only pronounce the law in respect of those issues that they have specifically been called upon to decide by the parties.

3. JURISDICTION

Georgia argues that the jurisdiction of the Court is founded on Article 22 of the 1965 *International Convention on the Elimination of All Forms of Racial Discrimination*, (CERD) a treaty to which both the Russian Federation and Georgia are party. In the case of Russia it was deemed a successor state of the USSR for purposes of the continuation of obligations under the treaty, the USSR having ratified the treaty in 1969. Georgia had deposited an instrument

---

[18] See http://euobserver.com/9/26644.

[19] See the Decisions of the English Courts in *Al-Skeini and others v. Secretary of State for Defence* (2008 UKHL 26); See also the decision of the European Court of Human Rights in *Issa and Others v. Turkey*, App. No. 3182/96' judgment of 16 November 2004, F63 [75]; See also S. Wills, "Occupation, Law and Multinational Operations, problems and perspectives," 2006 *BYBIL*, p. 256 at 265.

[20] R. Wilde, "The Applicability of International of International Human Rights Law to the Coalition Provisional Authority (CPA) and the Foreign Military Presence in Iraq", 11 (2005) *ILSA Journal of International and Comparative Law* 485.

This article from Hague Justice Journal is published by Eleven international publishing and made available to anonieme bezoeker

of accession in 1999. The Court was therefore not called upon to re-examine the question which had so troubled it in the *Genocide Convention Case (Bosnia and Herzegovina v. Yugoslavia)*, of whether there was a rule of automatic succession to human rights treaties under general international law, and therefore binding on successor states.[21]

Article 22 of the CERD, which proved critical in establishing the Court's jurisdiction provides that:

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

Central to the application of the Convention was the largely unresolved question of whether the treaty obligations under it were territorial in application or whether they operated as effective constraints on the conduct of the state parties irrespective of the situs of the violations. Georgia argued that the obligations under the CERD did not have a spatial limitation and were equally applicable to Russia's conduct on Georgia's territory.[22]

Russia challenged Georgia's reliance on this provision on three main grounds. It argued that its intervention in the first and second phases of the conflict had been in the nature of a peace-keeping operation at the behest of the Commonwealth of Independent States (CIS) with the express consent of Georgia. It was implicit in the argument that the legal basis of its intervention was in fact inconsistent with the deliberate violation of human rights.[23] In relation to Abkhazia, Russia argued that the case for violation of human rights was based on innuendo and was totally unsubstantiated. It further maintained that the obligations assumed under the Convention, in particular those under Article 2 to 4, did not have an extraterritorial application, arguing that Russian responsibility under the CERD applies only within the confines of its borders.[24] Russia argues that the responsibility for the violations of the obligations under the CERD rested primarily with the separatist authorities in Abkhazia and South Ossetia, responsibility which could not under any circumstances be attributed to it, since these authorities were not its *de facto* organs nor were they acting under its direction and control.[25] In the alternative, it argued that no such violations which could be attributed to it had taken place. It

---

[21] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Preliminary Objections, Judgment, ICJ Rep 1996, 595, pp. 604-9; *Application for Revision of the Judgment of 11th July 1996*, ICJ Reports 2003, p. 7, para 18; *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Yugoslavia) Judgment, 26 February 2007. For a critical commentary see, M. Craven, *The Decolonization of International Law*, Oxford University Press, 2007, p. 7-12.

[22] Request for the Indication of Provisional Measures of Protection Submitted by the Government of the Republic of Georgia, 14 August 2008.

[23] Oral pleadings, Monday 8 September 2008, arguments of Mr Kolodkin, Agent of the Russian Federation, paras 9 and 13 and arguments of Mr. Wordsworth, paras. 7-9.

[24] Oral hearings, see in particular arguments of Professor Zimmermann, para. 2 ff.

[25] Oral pleadings of 8 September 2008, arguments of Prof. Zimmermann, paras. 20-22.

This article from Hague Justice Journal is published by Eleven international publishing and made available to anonieme bezoeker

maintained that any orders issued by the Court against it would be legally futile as it was not and would not be in a position to enforce the requested measures vis-à-vis South Ossetia and Abkhazia – autonomous regions not subject to its jurisdictional control. Russia also maintained that the dispute in both form and substance fell outside the scope of the CERD. The substance of the argument as developed during the oral hearings may be summarised as follows.

(a) That the dispute was evidently not a dispute under the 1965 Convention. In the alternative, if there were a dispute, it would relate to the use of force, international humanitarian law and/or territorial integrity, but in any case not to racial discrimination.

(b) That even if such breaches occurred they could not, even *prima facie*, be attributable to Russia. It strenuously denied that it exercised the requisite degree of control for purposes of attributing state responsibility in the two provinces.

(c) That even if the 1965 Convention were applicable, which it argued was not the case, the procedural requirements of Article 22 of the 1965 Convention had not been met. It argued that Georgia had failed to provide evidence that it had attempted to negotiate, as required by the provision, nor had it positively indicated that it had employed in some form the mechanisms provided for by the Committee on Racial Discrimination before referring the dispute to the International Court of Justice.

Russia therefore asked the Court to declare that it lacked jurisdictional competence to hear the dispute and that as a result the request for provisional measures ought to be rejected and the case removed from the list.[26]

The parties also differed on whether Article 22 imposed a mandatory requirement that jurisdiction of the Court could only be invoked if the procedures under the CERD or negotiation had been pursued to no avail. Georgia maintained that Article 22 was merely descriptive of a process that the parties could avail themselves of without making it an indispensable requirement. Russia, on the other hand, asserted that the article contained binding pre-conditions for the Court's *seisin* and until they had been exhausted the court plainly had no jurisdiction.[27]

The fact that the dispute was overwhelmingly dominated by the use of force, as well as the applicable legal and policy issues in that context, was not lost on Georgia. It was therefore keen that the *jus ad bellum* aspects of the dispute, such as they were, did not trump those aspects of the dispute that were arguably violations of obligations under the CERD. In a move that must have surely been intended to be pre-emptive, Georgia emphasised that it was not making any claims under the

[26] Oral pleadings of 8 September 2008, para. 7, 8, and 15-17.

[27] Request for Indication of Provisional Measures submitted by the Republic of Georgia; Oral pleadings submitted by the Russian Federation, Oral arguments of 8 September 2008, para. 25.

This article from Hague Justice Journal is published by Eleven international publishing and made available to anonieme bezoeker

applicable law of *jus ad bellum* or principles of international humanitarian law, but was instead confining itself to breaches of rights owed to ethnic Georgians under Article 2 and 5 of the Convention on Racial Discrimination.

In its Order of 15 October 2008 the Court overwhelmingly rejected Russia's argument that the CERD had a territorial limitation. It noted that the provisions of the Convention were of a general nature and applied equally to a state party when it acted beyond its borders.[28] The Court also rejected the argument that the processes outlined in Article 22 were indispensable pre-requisites to the invocation of the Court's jurisdiction.[29] Although it did not directly refer to its previous jurisprudence in *DRC v. Rwanda*,[30] the Court noted that the CERD was unlike other instruments of a similar nature, which contained binding pre-requisites, subject to a defined time limit, and which therefore circumscribed the conditions for the Court's *seisin*. In the *Rwanda* Case, the Court had noted that the requirement that the parties must have referred a dispute to arbitration, and that a period of six months must have lapsed, were mandatory pre-conditions for *seisin* under the terms of Article 29 of the *Convention on the Elimination of all Forms of Discrimination Against Women*.

The Court accepted that some aspects of the dispute raised questions of international humanitarian law. However, it observed that just because the dispute raised issues under other areas of international law that were not directly pleaded by the applicant, this did not preclude it from hearing those aspects of the dispute that fell squarely within the provisions of the CERD. It was also apparently not troubled by the fact that the serious violations of human rights had resulted from acts of armed aggression perpetrated by Russia on the territory of Georgia. Yet it is immediately apparent that characterising a dispute in a manner most favourable to a finding of jurisdiction, may in fact distort the real nature of the dispute, with the Court being asked to pass judgement on issues which, in the overall context of the dispute, must surely be regarded as peripheral to the substantive claim.

4. REQUEST FOR PROVISIONAL MEASURES

In its request for provisional measures, Georgia sought orders to compel the Russian Federation and separatist authorities under its direction and control to:

(i) "Refrain from any further act or practice of ethnic discrimination against Georgian citizens". It also asked for such protection to be extended to civilians under the occupation or effective control of Russian forces.

(ii) "Refrain from any further acts resulting in the recognition of or rendering permanent the ethnic segregation of Georgian citizens

---

28 Judgment para. 109.

29 Judgment para. 114-116.

30 *Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002)* Judgment of 3 February 2006, General List No. 126, para. 91-93.

This article from Hague Justice Journal is published by Eleven international publishing and made available to anonieme bezoeker

through forced displacement or denial of the right of IDPs to return to their homes in South Ossetia, Abkhazia and adjacent territories.

(iii) That the Russian Federation and separatist authorities under its control refrain from any further acts violating the enjoyment by Georgian citizens of fundamental human rights, including in particular the right to security of the person and protection against violence or bodily harm.

(iv) That the Russian Federation and separatist authorities under its direction and control refrain from any acts denying to Georgian citizens under their jurisdiction effective protection and remedies against ethnic discrimination and violations of human rights.[31]

The request was made under Article 41 of the Court's statute, in order to preserve the respective rights of the parties pending a decision on the merits. The Court referred to its previous jurisprudence[32] and noted that before such a request could be granted a link had to be established between the interim measures sought and the subject matter of the proceedings on the merits. The Court also noted that it had to be satisfied that irreparable prejudice would be caused to rights which are the subject of a dispute in legal proceedings.[33] On the facts, the Court concluded that the rights protected by the CERD were of such a nature that prejudice to them could be irreparable. It noted that both Georgian populations as well as ethnic Ossetian and Abkhazian populations in the areas affected by the conflict remained vulnerable and at imminent risk of suffering irreparable prejudice.[34]

Russia's principal objection to the request for provisional measures was that it would require the Court to compel it to take steps to ensure or prevent acts occurring in a territory not under its jurisdiction and control. Moreover it implicitly involved an obligation to compel other actors (separatist authorities) who are not its agents or answerable to it to take measures that would ensure compliance with conventional obligations.[35]

The Court accepted that the situation on the ground in Abkhazia and South Ossetia remained fluid, and that the lines of authority could not be stated with

---

[31] Request for the Indication of Provisional Measures of Protection Submitted by the Government of the Republic of Georgia, 14 August 2008.

[32] *Application of the Convention on the Prevention and Punishment of the Crime of the Crime of Genocide* (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro), Provisional Measures, Order of 8 April 1993, ICJ Reports 1993, p. 19, para. 34; *Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon v. Nigeria), Provisional Measures, order of 15 March 1996, ICJ Reports 1996 (i), p. 22, para. 35.

[33] *LaGrand* (Germany v. United States of America), Provisional Measures, Order of 3 March 1999 (I), pp. 14-15, para. 22; *Passage through the Great Belt* (Finland v. Denmark), Provisional Measures, Order of 29 July 1991, ICJ Reports, p. 17, para. 23; *Certain Criminal Proceedings in France* (Republic of the Congo v. France), Provisional Measure, Order of 17 June 2003, ICJ Reports 2003, p. 107, para. 22; *Pulp Mills on the River Uruguay* (Argentina v. Uruguay), Preliminary Objections, Order of 23 January 2007, p. 11, para. 32.

[34] Order of 15 October 2008, para. 143-144.

[35] Arguments of the Russian Federation, Oral pleadings, 8 September 2008, in particular, arguments of Professor Zimmerman para. 11-12; 17-18; and 20-22.

This article from Hague Justice Journal is published by Eleven international publishing and made available to anonieme bezoeker

certainty. Nevertheless, as there had been no overall settlement of the conflict in the region, the populations concerned remained vulnerable, and the concerns of refugees and other displaced persons had not been resolved in their entirety.[36] It therefore accepted that there was an imminent risk that the rights of the populations concerned could suffer irreparable prejudice. It noted that the obligations under the CERD were directed to all state parties and therefore ordered both Georgia and Russia to ensure that no further violations of conventional rights are committed, irrespective of whether previous acts could also be legally attributable to them. In ordering provisional measures, the Court stressed that this was without prejudice to the rights of the parties at the jurisdictional, admissibility or merits stages of the proceedings. Both parties, within South Ossetia and Abkhazia and adjacent areas in Georgia were ordered to:

> 1. refrain from any act of racial discrimination against persons, groups of persons or institutions;
>
> 2. abstain from sponsoring, defending or supporting racial discrimination by any persons or organisations, and;
>
> 3. do all in their power, whenever and wherever possible, to ensure, without distinction as to national or ethnic origin:
>
> (i) security of persons.
>
> (ii) the right of persons to freedom of movement and residence within the border of the state.
>
> (iii) the protection of the property of displaced persons.
>
> 4. to stop all public authorities or institutions under their control or influence from engaging in acts of racial discrimination against persons, groups of persons or institutions.

5. CONCLUSION

The procedural stand taken by the applicant in specifically asking the Court to pronounce only on those aspects of the dispute that involved violations of the CERD could potentially limit the Court's contribution to this very significant dispute should it decide to proceed to the merits of the case. The judgment on provisional measures has only temporarily disposed of the question of whether the Court has jurisdiction. In keeping with its previous jurisprudence on provisional measures, the Court only had to satisfy itself on a *prima facie* basis that the application was well-founded. This leaves open the possibility that the Court may well conclude at the next phase of the proceedings that it lacks competence to proceed to the merits. The Court could also conceivably reach the conclusion that the legal dispute was primarily about use of force and

[36] Judgment, para. 143.

This article from Hague Justice Journal is published by Eleven international publishing and made available to anonieme bezoeker

not violations of fundamental rights under the CERD and therefore outside its jurisdictional competence. Either way it is unlikely that the Court will deliver a judgment that will definitively resolve the central issues underlying the dispute.