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The International Court of Justice and the Georgia/Russia Dispute

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1. Introduction

On 1 April 2011, the International Court of Justice (ICJ or 'International Court') upheld Russia's preliminary objections in the case brought against it by the Republic of Georgia, bringing a swift and dramatic end to one of the most bizarre disputes to have come before the International Court.[1] The dispute was preceded by a public military confrontation between the two states, with both sides making claims and counterclaims about the alleged violations of the international law norms on the use of force.[2] It was therefore surprising that the dispute that finally found its way before the International Court was not about the international law norms on the use of force, but the alleged violations by Russia of the provisions of the International Convention on the Elimination of All Forms of Racial Discrimination 1965 (CERD).[3] Although the Court has now concluded, by ten votes to six, that it has no jurisdiction under

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1 *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)* Preliminary Objections, Judgment, 1 April 2011, available at: http://www.icj-cij.org/docket/files/140/16398.pdf [last accessed 17 October 2011].

2 Lee, *The History Guy - The Georgia-Russia War* (2008), available at: http://www.historyguy.com/georgia-russia-war.htm [last accessed 17 October 2011]; and Higgins and O'Reilly, 'The Use of Force, Wars of National Liberation and the Right of Self-Determination in the South Ossetian Conflict' (2009) 9 *International Criminal Law Review* 567.

3 660 UNTS 195.

CERD to give a judgment on the merits, the dispute nevertheless retains historical significance as the first dispute involving Russia that has come before the International Court. It was also the first time that the International Court was directly called upon to interpret the provisions of CERD.

From a litigant's perspective, the strategic decision to base the dispute on the jurisdictional provisions of CERD is not hard to fathom. As is well known, the International Court's jurisdiction is based on state consent, and none of the relevant instruments that were binding on the two states provided a jurisdictional basis for disputes on the use of force. CERD provided a convenient peg for the public articulation of Georgia's grievances, even if the substance of the dispute was only peripherally concerned with racial discrimination. It was in fact the culmination of a long line of cases where a jurisdictional clause under a convention was no more than a convenient tag for disputes that had very little to do with the substance of the conventions and where the parties were arguably more interested in drawing international attention to their plight than the settlement of the dispute that had arisen.[4]

The International Court has now ruled on the preliminary phase of the dispute and decided not to proceed to the merits. It did not, as was widely expected, rule that the jurisdictional basis was inappropriate, or that issues pertaining to racial discrimination were largely peripheral in the context of a dispute that was overwhelmingly about the use of force. Instead, it took the dispute resolution provisions of the Convention at their word, and held that Article 22 of CERD requires the parties to attempt a negotiated settlement before proceeding to adjudication and that, on the facts, this had not occurred.[5] The International Court has consistently been attentive to the consensual basis of its jurisdiction and it comes as no surprise that, having reached the conclusion that it had no jurisdiction to proceed to the merits, it did not express an opinion on any of the substantive issues that were central to the dispute and which had been put forward by the parties in their oral and written pleadings. Yet, despite its premature end, the dispute had raised,

4 See, for example, Nicaragua's reliance on a Treaty of Friendship with the United States (US) in order to bring a claim before the ICJ that was overwhelmingly about US use of force in support of armed insurgency in Nicaragua ostensibly on the grounds of collective self-defence. In its 1984 Judgment, the Court rejected US arguments that the dispute was about the use of force: see *Military and Para-Military Activities In and Against Nicaragua (Nicaragua v United States)* Merits, Judgment, ICJ Reports 1984 392 at paras 77–83; see also *Case Concerning the Aerial Incident of 3rd July 1988*, US Pleadings CR96/12; CR96/13; CR96/16. In the *Case Concerning Oil Platforms* (*Islamic Republic of Iran v United States of America*) Preliminary Objections ICJ Reports 1996 9, where Iran relied on a similar Treaty of Friendship to bring a claim based on the use of force, the International Court overwhelmingly rejected (at para 21) the US arguments that the 1955 Treaty of Friendship, Commerce and Navigation could not form the jurisdictional basis of a dispute about the use of force: see ICJ Reports 1996 803 at para 21.

5 *Georgia v Russian Federation*, supra n 1 at para 182.

both directly and indirectly, some of the most contested and important issues in public international law and, for that reason alone, it merits extended consideration.[6]

2. Background to the Dispute

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.[7] Cessation of hostilities was finally achieved on 16 August 2008 when both parties agreed to comply with the terms of a European Union (EU)-brokered ceasefire under the leadership of the French President—and then holder of the rotating EU presidency—Nicolas Sarkozy.[8] Although the immediate trigger of the legal dispute on which the International Court was called upon to give a judgment was the Russian invasion of Georgia, the conflict itself has a long and protracted history, dating back to the early 1990's and the events that followed the disintegration of the Soviet Union and the emergence of Georgia as an independent state. Both South Ossetia and Abkhazia had enjoyed the status of autonomous *oblastj* 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 territory including the two provinces. There followed a prolonged period of unhappy co-existence between Georgia and the two Republics, with both latter entities enjoying *de facto* autonomous status within Georgia, with the active support of the authorities in Moscow. The period following 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.[9] The tensions culminated in a ceasefire mediated by the Commonwealth of

6 Itami, 'ICJ Upholds Russian Preliminary Objection in Georgia' (2011) 2 *Harvard National Security Journal* 1, available at: http://harvardnsj.com/2011/04/icj-upholds-russian-preliminary-objections-in-dispute-with-georgia [last accessed 17 October 2011]; and Report of the Independent International Fact-Finding Mission on the Conflict in Georgia, Vol 1, September 2009 ('Georgia Report'), available at: www.ceiig.ch/pdf/IIFFMCG.Volume.I.pdf [last accessed 17 October 2011].

7 Georgia Report, ibid. See also *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation),* Application Instituting Proceedings, 12 August 2008, available at: http://www.icj-cij.org/docket/files/140/14657.pdf.

8 Georgia Report, supra n 6.

9 The alleged human rights violations of the rights of ethnic Georgians is the subject matter of proceedings before the European Court of Human Rights: see *Georgia v Russian Federation* Application No 38263/08, Heard on 22 September 2011.

Independent States (CIS) and the deployment of Russian-led CIS peacekeepers, although their neutrality in the conflict was consistently questioned.[10]

It has been suggested that the events in August 2008 were precipitated by Kosovo's declaration of independence and its subsequent recognition by other States including the United States, as well as Georgia's public declaration of its intention to seek North Atlantic Treaty Organisation (NATO) membership at the NATO summit in Bucharest in April 2008.[11] In its application before the International Court, Georgia argued that Russia had intended 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.

3. The Substantive Issues

Several controversial themes underlay the application and arguments of the parties, especially as developed in both the request for provisional measures and the preliminary objections submitted by Russia. The dispute brought to the fore the question of state complicity in the acts of armed rebel groups 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.[12] The Georgian application also indirectly raised the question of the legality of Russia's conferment of its nationality on the inhabitants of South Ossetia and Abkhazia. Had the Court given a judgment on the merits, it would conceivably have had to address 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 arguably *mala fides*.[13] The Russian Federation under a series of enactments from 1991 onwards had apparently extended its citizenship to South Ossetians and Abkhazians, relying on a Soviet definition

10 Documents annexed to Georgia's Memorial, Vol VI, Annexures 309 and 310.

11 German, 'David and Goliath: Georgia and Russia's Coercive Diplomacy' (2009) 9 *Defence Studies* 224 (2009); Cheterian, 'The August 2008 War in Georgia: From Ethnic Conflict to Border Wars' (2009) 28 *Central Asia Survey* 155 at 159; Higgins and O'Reilly, 'The Role of the Russian Federation in the Pridnestrovian Conflict: An International Humanitarian Law Perspective' (2008) 19 *Irish Studies in International Affairs* 57; and Nichol, 'Georgia (Republic) and NATO Enlargement Issues and Implications' (2008) *Congressional Research Service* RS 22829.

12 *Georgia v Russian Federation*, supra n 7 at para 81; see also Allison, 'Russia Resurgent? Moscow's Campaign to Coerce Georgia to Peace' (2008) 6 *International Affairs* 1145; Talmon, 'The Responsibility of Outside Powers for Acts of Secessionist Entities' (2009) 58 *International and Comparative Law Quarterly* 493; and Okowa, 'State and Individual Responsibility in International Conflicts: Contours of an Evolving Relationship' (2009) 20 *Finnish Year Book of International Law* 143.

13 Georgia Report, supra n 6 at 7; and Article 3(2) European Convention on Nationality 2009, ETS 166.

of citizenship based almost exclusively on the ability to speak the Russian language and in the absence of any formal ties of kinship or allegiance. As the EU sponsored international fact-finding mission noted in its report, extra-territorial collective naturalisation of this kind was clearly contrary to international law.[14] There were concerns too about conformity with domestic Russian law on citizenship, especially the formal requirements on residency.[15] In South Ossetia, the citizens on whose behalf the 2008 armed intervention was purportedly undertaken had in some cases been granted Russian citizenship just one month before the invasion.

The dispute also raised questions about 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.[16] In particular, it involved 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 remains problematic and has not been comprehensively examined in an international dispute settlement forum.[17]

In addition, the dispute presented the International Court with the opportunity to examine 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.

The case also involved the recognition of states. In the period between the application and delivery of a judgment on preliminary objections by the respondent state, Russia proceeded to extend recognition to the two breakaway Republics.[18] This has been met with protest and condemnation from the rest

14 Georgia Report, supra n 6 at 168–71.

15 Articles 13 and 14 of the Federal'nyi Zakon RF o Grazhdanstve Rossiiskoi Federatsii [Federal Law of the Russian Federation on Citizenship of the Russian Federation], Sobranie Zadonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation] 2002, No 62, available at: http://www.unhcr.org/refworld/docid/3ed72d64.html [last accessed 17 October 2011].

16 For the General Assembly's request on this question in connection with the unilateral declaration of independence by the provisional authorities in Kosovo, see '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', GA Res 63/3, 8 October 2008, A/RES/63/3; and for the ICJ's response, see *Accordance with International Law of Unilateral Declaration of Independence in Respect of Kosovo* Advisory Opinion, 22 July 2010, available at: http://www.icj-cij.org/docket/files/141/15987.pdf [last accessed 17 October 2011].

17 But see *Reference re Secession of Quebec* [1998] 2 SCR 217 (Canada). See generally, Crawford, 'State Practice and International Law in Relation to Secession' (1998) 68 *British Year Book of International Law* 85; and *Accordance with International Law of Unilateral Declaration of Independence in Respect of Kosovo* 22 July 2010, Declaration of Judge Simma, available at: www.icj-cij.org/docket/files/141/15993.pdf [last accessed 17 October 2011].

18 Drachev, 'Russia recognizes Abkhazian & South Ossetian independence', *Russia Today*, 26 August 2008, available at: http://rt.com/politics/russia-recognises-abkhazian-and-south-ossetian-independence [last accessed 17 October 2011].

of the international community, who have consistently treated the conflict as a matter internal to Georgia and in respect of which its territorial integrity was paramount.[19] Central to the dispute were the legal implications of secession and the related problems of precipitate recognition.[20] Although the separatist administrations in South Ossetia and Abkhazia have been largely autonomous from Georgia, their quest for formal independence has been contested and largely unsuccessful. Was the recognition by Russia premature in the face of overwhelming evidence that, since 1992, the central authorities in Tbilisi have exercised virtually no executive authority in the breakaway Republics?[21] 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.

Finally, 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. The dispute between Georgia and Russia directly raised the question of Russia's obligations under CERD, and the extent to which the obligations could be regarded as having extra-territorial application.[22] Central to this question was the largely unresolved issue of whether the treaty obligations under CERD were territorial in application, or whether they operated as effective constraints on the conduct of the States Parties irrespective of the *situs* of the violations. Georgia argued that the obligations under CERD did not have a spatial limitation and were equally applicable to Russia's conduct on Georgia's territory.

19 See Phillips, 'EU leaders condemn Russia in shadow of Kosovo', *EU Observer*, 26 August 2008, available at: http://euobserver.com/9/26644 [last accessed 17 October 2011].

20 Weller, *Escaping the Self-Determination Trap* (Leiden: Martinus Nijhoff, 2008) at 65 and 146.

21 Medvedev, 'Why I had to recognise Georgia's breakaway regions', *Financial Times*, 26 August 2008.

22 See Dennis, 'Non-Application of Civil and Political Rights Extra-Territorially During Times of International Armed Conflict' (2007) 40 *Israeli Law Review* 453 at 458–60; and Modirzadeh, 'The Dark Side of Convergence: A Pro-Civilian Critique of the Extraterritorial Application of Human Rights Law in Armed Conflict' (2010) 86 *US Naval War College International Legal Studies Series* 249 at 352, available at: http://papers.ssrn.com/so3/papers.cfm?abstract_id=1543482 [last accessed 17 October 2011]; and Wilde, 'The Applicability of International Human Rights Law to the Coalition Provisional Authority (CPA) and Foreign Military Presence in Iraq' (2005) 11 *ILSA Journal of International and Comparative Law* 485.

4. Parties Arguments at the Provisional Measures Phase of the Case

The parties' arguments at the provisional measures phase offered valuable insights into the substantive issues underpinning the dispute, including some of those raised in the preceding Section. Some of these were developed further at the preliminary objections stage but were barely distinguishable in substance from those made in the earlier provisional measures proceedings. As noted above, Georgia founded its application on the jurisdictional provisions in Article 22 of CERD, a treaty to which both Russia and Georgia were parties. Russia was regarded as a successor state to the Union of Soviet Socialist Republics (USSR) for the purposes of this treaty and Georgia was bound by virtue of its instrument of accession deposited in 1999. The Court was therefore not called upon to re-examine the question, which had so troubled it in the *Genocide Convention* case, on whether there was a rule of automatic succession to human rights treaties under general international law.[23]

Article 22, which formed the jurisdictional basis of the application, provides:

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

At the provisional measures phase, Russia put forward a number of substantive and procedural objections to the International Court's jurisdiction. It argued that its intervention in the first and second phases of the conflict had been in the nature of a peacekeeping operation at the behest of the CIS with the express consent of Georgia. Implicit in this argument was the suggestion that the circumstances and the justification for its intervention were in fact inconsistent with the deliberate violation of human rights.[24] Russia further argued that its obligations under CERD did not apply outside of its territory,

23 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* Preliminary Objections, Judgment, ICJ Reports 2008 412; *Application for Revision of Judgment of 11th July 1996 in Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia & Herzegovina v Yugoslavia*) Preliminary Objections, Judgment, ICJ Reports 2003 7, 18; and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* Judgment, ICJ Reports 2007 43. For a critical commentary, see Craven, *The Decolonization of International Law: State Succession and the Law of Treaties* (Oxford: Oxford University Press, 2007) at 7–12.

24 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation).* Oral pleadings, 8 September 2008, Mr Kolodkin, Agent of the Russian Federation, at paras 9 and 13, and arguments of Mr Wordsworth, at paras 7–9, available at: http://www.icj.cij.org/docket/files/140/14713.pdf [last accessed 21 October 2011].

and specifically that the provisions relied on in Articles 2 to 4 did not have extra-territorial application.[25] Russia claimed that the responsibility for the violations of the obligations under CERD rested primarily with the separatist authorities in Abkhazia and South Ossetia. This responsibility, it maintained, 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.[26] Referring specifically to the request for provisional measures, Russia maintained that the dispute in both form and substance fell outside the scope of CERD. The substance of the argument as developed by Russia during the oral hearings may be summarised as follows:

(a) [T]hat the dispute was evidently not a dispute under CERD. In the alternative, if there were a dispute, it would relate to the use of force, international humanitarian law and territorial integrity, but in any case not to racial discrimination;
(b) that even if breaches of CERD had occurred they could not, even *prima facie*, be attributable to Russia. It strenuously denied that it exercised the requisite degree of control, making it legally responsible for violations of human rights occurring in the two provinces; and
(c) that even if CERD were applicable, which it argued was not the case, the procedural requirements of Article 22 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 CERD Committee before referring the dispute to the International Court of Justice.

On the basis of these arguments, Russia asked the International 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.[27]

The parties differed on whether the conditions in Article 22 were obligatory, and the Court could not have jurisdiction unless they 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 Article 22 contained binding pre-conditions for the Court's *seisin* and until they had been exhausted the Court plainly had no jurisdiction.[28] Georgia too was conscious of the broad character of the dispute and the weight of Russia's objection that, on

25 Ibid., Professor Zimmermann at para 2.
26 Ibid. at paras 20–2.
27 Ibid., Mr Kolodkin at paras 7, 8, 15 and 17.
28 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)*, Request for the Indication of Provisional

the face of it, there was a disconnect between the declared basis of jurisdiction and the substance of the dispute. 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 Russia's obligations under CERD. It therefore emphasised that it was not making any claims under the applicable law of use of force or principles of international humanitarian law but was instead confining itself to breaches of rights owed to ethnic Georgians under Articles 2 and 5 of CERD.

To order provisional measures, the International Court only had to satisfy itself on a *prima facie* basis that its jurisdiction was well founded. In its order of 15 October 2008, the Court by the narrowest majority (8–7) rejected Russia's argument that CERD had a territorial application only. 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.[29] The Court also rejected Russia's argument that the processes outlined in Article 22 were indispensable prerequisites to the invocation of the Court's jurisdiction.[30] It noted that the 'phrase "any dispute . . . which is not settled by negotiation or by the procedure expressly provided for in this Convention" does not, in its plain meaning, suggest that formal negotiations in the framework of the Convention or recourse to the procedure referred to in Article 22 thereof constitute preconditions to be fulfilled before the seisin of the Court'.[31] Although only a provisional ruling, this at least raised the expectation that, non-compliance with the Article 22 requirements was not necessarily fatal to the assumption of jurisdiction and that the Court's ruling on this specific issue was determinative. It is true that the ruling as a whole did not foreclose the question of jurisdiction, but it did raise the expectation that, in the absence of some new or dramatically different facts, the ruling at the provisional measures stage on the specific issue of the effect of procedural pre-requisites in Article 22, which it had so carefully considered at that stage, was to be followed at subsequent stages of the case. In its previous jurisprudence, the Court has declined to order interim measures if, on the facts, it was manifestly without jurisdiction.[32] Although it did not directly refer to its previous jurisprudence, the Court noted that Article 22 of CERD was unlike other jurisdictional instruments of a similar nature, which contained binding pre-conditions for their application. In some

Measures of Protection submitted by the Republic of Georgia, 14 August 2008, available at: www.icj-cij.org/docket/files/140/14663.pdf [last accessed 17 October 2011]; and *Georgia v Russian Federation* Mr Kolodkin, supra n 24 at para 25.

29 *Case Concerning the Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)* Provisional Measures, Order of 15 October 2008, 1CJ Reports 2008 353.

30 Ibid. at 114–6.

31 Ibid. at 114.

32 *Case Concerning Legality of Use of Force* (*Yugoslavia v United States*) Provisional Measures, Order, ICJ Reports 1999 916.

cases, the relevant convention specified that a prescribed period must have lapsed before the dispute could be brought for judicial adjustment. In *Democratic Republic of the Congo v Rwanda*,[33] the Court had noted that the requirements 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 1979.[34]

In its provisional measures order, the International Court studiously avoided pronouncing on any issues that could conceivably be regarded as matters for the merits stage, but it implicitly accepted that the subject matter of the dispute extended beyond CERD and conceivably raised questions in other areas of international law. In ordering provisional measures, the Court concluded that the rights protected by CERD were of such a nature that prejudice to them would be irreparable. It noted that Georgian populations, as well as ethnic Ossetians and Abkhazian, populations in the areas affected by the conflict remained vulnerable and at imminent risk of suffering irreparable prejudice.[35] It noted also that the obligations under CERD were directed to all states parties and therefore ordered both Georgia and Russia to ensure that no further violations of Convention rights were 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 stage of the proceedings.

5. Decision on Preliminary Objections

A. The Essence of Russia's Objections to Jurisdiction

Russia submitted four preliminary objections, two of which are relevant to the present enquiry. First, it argued that there was no dispute between Russia and Georgia at the date of the application, which could be regarded as coming within the terms of CERD. In the alternative, in the event that there was a dispute, Georgia had made no attempt to settle the dispute by negotiation or by recourse to the special procedures provided for in CERD before the application was filed. The International Court rejected the first objection but upheld the second, and effectively reversed its decision at the provisional measures

33 *Armed Activities on the Territory of the Congo (New Application: 2002)* (*Democratic Republic of the Congo v Rwanda)* Jurisdiction and Admissibility, Judgment, ICJ Reports 2006 6, at paras 91–3.

34 1249 UNTS 13. Article 29 provides in part: 'Any dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration.'

35 *Georgia v Russian Federation*, supra n 29 at paras 143–4.

stage on the effect of the requirements set out in Article 22 on judicial proceedings.[36]

Before considering the Court's reasoning that led to these decisions, it may be asked why the International Court so radically departed from its interim findings at the preliminary measures stage on the question of jurisdiction. After all, it had with some degree of authority concluded that the conditions contained in Article 22 of CERD did not impose conditions pre-requisite to the exercise of its jurisdiction. It offers no explanation. In fact the judgment seems oblivious to the fact that, at least on the question of the binding effect of the procedures in Article 22, it had plainly contradicted itself, even if one accepts that the burden of proof to be discharged by an applicant at the two stages of the proceedings are radically different. The matter was well put in the Joint Dissent of President Owada, and Judges Simma, Abraham and Donoghue and Judge *ad hoc* Gaja:

> We take no issue with the validity of the Court's analysis in paragraph 129, where it merely points to a consistent jurisprudence: an order ruling on a request for provisional measures has no force as *res judicata*; it cannot prejudge any question to be decided by the Court in the subsequent proceedings, including the question of its jurisdiction to adjudicate the case on the merits.
>
> But it is one thing to deny the Order any binding force on the issue of jurisdiction and yet another to disregard it completely as a germane precedent, that is to say one apt to shed light on how the Court has previously treated clauses identical or comparable to Article 22. The very least that can be said is that the 2008 Order undeniably shows that the prior case law was not as clearly settled—in favour of the existence of a "pre-condition"—as the present Judgment would suggest. Had it been, the Court in 2008 would not have been able to assert, even *prima facie*, that Article 22 "in its plain meaning" did not appear to make prior negotiations a condition to the *seisin* of the Court (which it now says is the case).[37]

The International Court also took an excessively formalistic view of its role, confining itself to the specific issue of its mandate under Article 22 and not considering the wider questions that were implicit in Georgia's application.[38]

36 *Georgia v Russian Federation*, supra n 1.

37 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)* Preliminary Objections, Judgment, 1 April 2011, Joint Dissenting Opinion at paras 32-3, available at: http://www.icj-cij.org/docket/files/140/16422.pdf [last accessed 17 October 2011].

38 For the ICJ's discussion of its position that it will refuse to give a judgment on a dispute simply because it is a marginal aspect of a much wider dispute, see *United States Diplomatic and Consular Staff in Tehran (U.S. v Iran)* Judgment, ICJ Reports 1980 20, at 37.

It did not consider or make reference at all to any of the substantive issues that underpinned the dispute. On one view, it would have been inappropriate for a Court that has been consistently attentive to state consent as the basis of jurisdiction to give any consideration to the substantive issues before a definitive view on the question whether it was competent to give a judgment on the merits.[39] Yet, such formalism also raises questions about what ought to be the proper role of the judicial function and whether an expansive interpretation of its mandate is warranted in cases of public significance. The dispute had raised a number of issues of wider implication in the area of international peace and security and, on one view, it was inappropriate to treat it as a purely private matter between the two litigating states.

B. The Existence of a Dispute

Since Article 22 of CERD required there to have been a dispute which had not been resolved by negotiation, the judgment first deals with the question of what constitutes a dispute. The International Court referred to its previous case law on the matter and stated:

> The Court recalls it established case law...: "A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons"... Whether there is a dispute in a given case is a matter for "objective determination" by the Court... "It must be shown that the claim of one party is positively opposed by the other"... The Court's determination must turn on an examination of the facts. The matter is one of substance, not of form... [t]he existence of a dispute may be inferred from the failure of a State to respond to a claim in circumstances where a response is called for. While the existence of a dispute and the undertaking of negotiations are distinct as a matter of principle, the negotiations may help demonstrate the existence of the dispute and delineate its subject-matter. The dispute must in principle exist at the time the Application is submitted to the Court... Further, in terms of the subject-matter of the dispute, to return to the terms of Article 22 of CERD, the dispute must be "with respect to the interpretation or application of [the] Convention".[40]

After reviewing the evidence and the exchanges between the disputing parties, the Court concluded that a number of unilateral statements made by Georgia, which had been drawn to the attention of Russia, did definitively demonstrate that a dispute concerning Russia's obligations under CERD came into existence between 9 and 12 August 2008 but not earlier as contended by

39 See, for example, *Democratic Republic of the Congo v Rwanda*, supra n 33 at para 71.
40 *Georgia v Russian Federation*, supra n 1 at para 30.

Georgia. The documentary evidence provided by Georgia and dating as far back as 1992, the Court observed, was vague, demonstrating a general grievance without indicating that a concrete dispute had crystallised. The evidence could not therefore be regarded as legally determinative of the presence or absence of a dispute at the date of the application before the Court.[41] However, on the basis of the facts between 9 and 12 August 2008, the Court decisively rejected, by twelve votes to four, Russia's first preliminary objection on the alleged non-existence on the date the application was filed of a dispute between the two parties concerning the interpretation or application of CERD.[42] In their Joint Dissenting Opinion, President Owada, Judges Simma, Abraham and Donoghue and Judge *ad hoc* Gaja strongly disagreed with the methodology adopted by the majority of the International Court when evaluating the evidence relating to the existence of a dispute. In their view the record, when considered as a whole, showed that there was a dispute between the parties which concerned the application of CERD that arose way before hostilities broke out in August 2008. This was a much wider and more protracted dispute than that found by the majority. For the minority, it was pointless to pinpoint a specific date when the dispute arose; it was enough to take notice of the general deterioration in the parties relations and assess whether this was consistent with the presence or absence of a dispute.[43]

C. Procedural Prerequisites

The International Court then examined in detail whether Article 22 of CERD imposed conditions pre-requisite to the exercise of its jurisdiction. In particular, it considered whether that provision required that the dispute must not have been settled by negotiation or by the use of Convention procedures before reference to the Court.[44] As noted, the operative provisions of Article 22 provide that any party may unilaterally refer to the Court 'any dispute . . . 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.' There was no doubt that Georgia had made no attempt to employ the procedures outlined in Articles 11 to 13 of CERD, and the question for the International Court's determination was whether Georgia had attempted to settle the dispute by negotiation as outlined in Article 22. After referring to its most recent decision in the *Democratic Republic of the Congo v Rwanda*,[45] which had involved the interpretation of an equivalent provision of the Convention on the Elimination of all Forms of Discrimination Against

41 Ibid. at paras 103 and 105.
42 Ibid. at para 114.
43 Supra n 37 at para 4.
44 Supra n 1 at paras 132–41.
45 Supra n 33 at para 87.

Women, the Court emphasized the mandatory nature of those conditions, noting that the parties must have made an *attempt* at negotiation as outlined in Article 22 before recourse to judicial settlement. The Court took the view that whether those conditions had been fulfilled was a matter for objective determination, and that any other interpretation would deprive the provisions of their effectiveness. Yet, as the dissenting judges carefully and elaborately pointed out, the International Court had not treated Article 22 in the same way as equivalent provisions in other conventions which are regarded as imposing mandatory conditions. Moreover, although a finding at the provisional measures stage does not create a binding precedent, the Court could not have assumed jurisdiction even on a *prima facie* basis if negotiations were a condition prerequisite to the exercise of such jurisdiction. The decision to uphold the second preliminary objection, by ten votes to six, was arguably inconsistent with the position taken in its 2008 decision on provisional measures. It was also inconsistent with some of the International Court's earlier jurisprudence that was supportive of the view that all that was required of a party under equivalent provisions was to show that the dispute had in fact not been settled by negotiation.[46] The jurisprudence that the majority of the Court was now treating as dispositive was in fact diffuse and incoherent.[47]

At what point did the parties have to demonstrate that conditions pre-requisite to the exercise of jurisdiction had been fulfilled? The Court took the view that an applicant state had to demonstrate objectively that this had taken place before instituting proceedings. It therefore discounted evidence put forward by Georgia, which indicated that, whatever the position may have been before the dispute was instituted, it certainly did take steps to settle the dispute by negotiation after the application was filed and before the Court's decision on jurisdiction. This holding, as the dissenting Judges pointed out, was not entirely reconcilable with its previous jurisprudence. In *Croatia v Serbia*, for instance, the Court had taken the view that a previously unmet condition of negotiation could nevertheless be fulfilled if, in the interim period between the initiation of proceedings and a judgment on jurisdiction, such negotiations had taken place. The International Court's reasoning in that case was to the following effect:

> What matters is that, at the latest by the date when the Court decides on its jurisdiction, the applicant must be entitled, if it so wishes, to bring fresh proceedings in which the initially unmet condition would be fulfilled. In such a situation, it is not in the interests of the sound administration of justice to compel the applicant to begin the proceedings

46 *Georgia v Russian Federation* case, supra n 29 at para 114.

47 *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)* Judgment, ICJ Reports 2003 161, at para 107; and *Georgia v Russian Federation*, supra n 37 at para 31.

> anew—or to initiate fresh proceedings—and it is preferable, except in special circumstances, to conclude that the condition has, from that point on, been fulfilled.[48]

In their Joint Dissenting Opinion in *Georgia v Russian Federation* case, President Owada, Judges Simma, Abraham and Donoghue and Judge *ad hoc* Gaja noted that the rationale of the provision in CERD was not one of form but one of substance, the intention being to encourage the parties to have recourse to less formal means of dispute settlement before having recourse to adjudication. In their view, it was therefore of less significance at what precise point the negotiations had taken place; a party that had instituted proceedings without recourse to negotiations, may still be taken to have fulfilled conditions prerequisite if, by the time the matter comes to hearing, there has been an attempt at negotiation.[49]

Having taken the view that the applicant state had not fulfilled any of the conditions laid out in Article 22, the majority expressed no opinion on whether the conditions in question were *cumulative or alternative*. In their Joint Dissenting Opinion, President Owada, Judges Simma, Abraham and Donoghue and Judge *ad hoc* Gaja observed that it was sufficient for purposes of referring the dispute to the International Court if one of the two conditions mentioned in Article 22 were fulfilled. They observed:

> The point of this text cannot be to require a State to go through futile procedures solely for the purpose of delaying or impeding its access to the Court. The end sought is not purely one of form; if we look at it from the perspective taken by the Court, the rule has a reasonable aim, to reserve judicial settlement for those disputes which cannot be settled by an out-of-court means based on agreement between the parties. Still, for this condition to be met, the applicant must have made the necessary efforts to attempt to settle the dispute, if it seems reasonably possible, by recourse to means enabling the parties to reach agreement, leaving the Court to act as the last resort.
>
> If the text is understood in these terms, it becomes illogical to consider the two modes referred to in Article 22 as necessarily cumulative. Each mode ultimately depends on an understanding between the parties and their desire to seek a negotiated solution . . . Consequently, where a State has already tried, without success, to negotiate directly with another State against which it has grievances, it would be senseless to require it to follow the special procedures in Part II, unless a formalism inconsistent with the spirit of the text is to prevail. It would

48 Supra n 23 at para 85.
49 *Georgia v Russian Federation*, supra n 37 at paras 36–7.

make even less sense to require a State which has unsuccessfully pursued the intricate procedure under Part II to undertake direct negotiations destined to fail before seising the Court.[50]

D. What were the Necessary Elements of an Attempt to Settle the Dispute by Negotiation?

In its written and oral pleadings, Russia put forward the argument that negotiations required an exchange of points of view on law and facts, and mutual compromises in order to reach an agreement. The International Court was emphatic that negotiation did not impose on the parties an obligation to reach an agreement. However, more controversially, the Court observed that it was not enough for the parties to have had a go at negotiation; they must also demonstrate that negotiations concerned with the subject matter of the Convention had become futile or deadlocked.[51] The negotiations, the Court observed, must be distinguished from mere protests or disputations. Crucially it noted that they must entail 'more than the plain opposition of legal views or interests between two parties, or the existence of a series of accusations and rebuttals, or even the exchange of claims and directly opposed counterclaims. As such, the concept of 'negotiations' differs from the concept of 'dispute' and requires—at the very least—a genuine attempt by one of the disputing parties to engage in discussions with the other disputing party, with a view to resolving the dispute.'[52] In their Joint Dissenting Opinion, President Owada, Judges Simma, Abraham and Donoghue and Judge *ad hoc* Gaja took issue with what they saw as an intrinsically narrow approach. In their view, whether negotiations were no longer viable was a question of fact to be decided on a case-by-case basis, as supported by the Court's consistent jurisprudence on this point.[53] Georgia had for a long time accused Russia of ethnic cleansing allegedly committed against ethnic Georgians, and the disruption of relations through use of force was the culmination of a deeply entrenched dispute dating back before August 2008. Moreover, it was unrealistic of the Court, given the nature of the dispute, especially after the hostilities broke out in August 2008, to expect the parties to attempt to negotiate the dispute when there was not the slightest chance of the parties arriving at a settlement in light of those events. In other words, even assuming that Article 22 imposed a condition that the parties must have made an attempt at negotiation or that those negotiations must have proved futile, those conditions had been met.

50 Ibid. at para 43.
51 *Georgia v Russian Federation*, supra n 1 at para 159.
52 Ibid. at para 157.
53 Supra n 37 at paras 55–7.

On the facts, the International Court concluded that Georgia made no attempt at negotiations in the narrow period when, in its assessment of the facts, the dispute came into existence and before the filing of the application. As a result, there was no point in examining whether the negotiations with respect to substantive obligations under CERD had become futile or deadlocked.[54]

6. Conclusions

The *Georgia/Russia* case indicates the extent to which the parties will go to find a jurisdictional basis for bringing a claim even if *prima facie* the jurisdictional foundation seems rather far-fetched. In the *Georgia v Russian Federation* case, it seemed on the face of it that there was a very tenuous connection between the actual dispute that the parties were concerned with and the treaty on which the application for judicial settlement was based. It was clear in this case that the possibility of a judgment on the merits was unlikely and that the International Court was, at best, being used as a convenient platform for the public articulation of a political grievance, or to draw international attention to Georgia's plight, without any intention of engaging the judicial function in the actual settlement of the dispute. It is inconceivable that there were any international lawyers who would have characterised the dispute as one that was principally concerned with violations of the provisions under CERD. The dispute brought to the fore the question whether the International Court should assume jurisdiction under a treaty such as CERD, when the issue of racial discrimination was only a marginal aspect of a much larger dispute in another area of international law such as the legality of the use of force; or, more controversially, when a dispute about a completely different aspect of international law is carefully re-characterised, for the purpose of giving the Court jurisdiction. The International Court has taken the view that it will not refuse to hear a claim because the dispute has other aspects that are not being litigated before it.[55] It has not, however, been entirely consistent in its treatment of applications brought under a treaty instrument when the subject matter of the dispute is only peripherally governed by that instrument. In the *Genocide Convention* case,[56] the Court refused to hear self-defence claims in the context of a dispute based on the jurisdictional provisions of the Genocide Convention. However, in the *Oil Platforms* case,[57] the Court had no difficulty

54 Supra n 1 at para 182.
55 *U.S. Staff in Tehran,* supra n 38 at 3; and *Case Concerning Border and Transborder Armed Actions (Nicaragua v Honduras)* Admissibility, Judgment, ICJ Reports 1988 69.
56 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* Provisional Measures, Judgment, ICJ Reports 1993 3.
57 Supra n 4 at para 21.

in accepting jurisdiction in a dispute concerning the use of force where the jurisdiction was based on a Treaty of Friendship.[58] Even if it is accepted that disputes in international law are rarely concerned with one area of the law and that the majority involve a multiplicity of issues under general international law, there is a case for arguing that, in order to protect the integrity of the judicial process and the proper administration of international justice, the Court should adopt standards for weeding out those claims that are clearly unmeritorious and amount to abuse of the judicial process. This clearly involves a major revision of the International Court's attitude to cases brought before it and a greater role in evaluating the parties' motives. Until now, the International Court has taken the view that it will not concern itself with the motives of the parties in bringing cases before it. Yet it is precisely this kind of evaluation of motive that it will be called upon to undertake if it is to exclude disputes brought in bad faith. In other words, even where the provisions invoked on the face of it provide the Court with jurisdiction, it should be prepared to decline an application by appealing to considerations of propriety.[59] The *Georgia v Russian Federation* case, as formulated before the Court, it is suggested, fell precisely in the category of disputes that the Court should have struck out summarily as an abuse of process.[60] A second approach is to argue that the parties cannot limit the range of matters on which the International Court may pronounce once the latter's jurisdiction is properly founded. This gives the Court the latitude to expand on the range of issues, which it regards as coming within the scope of the dispute, without being constrained by the parties' arguments in the pleadings. The party bringing a claim is therefore properly forewarned that it is for the Court, and not the parties, to decide on the relevant issues.

Both the dissenting judges and the majority of the Court in *Georgia v Russian Federation* differed substantially on their evaluation of the facts and what legal consequences should follow from those facts. For the majority, the facts confirmed the existence of a dispute, although a very narrow one under the terms of CERD; but they denied that the applicant state had satisfied the procedural conditions imposed by the Convention before judicial proceedings could be commenced. For the dissenting judges, the facts supported the existence a more comprehensive dispute dating back to the 1990s and, that on the evidence, there was not much of a realistic chance that the parties could attempt a negotiated settlement before recourse to the Court. Yet, although they

58 See supra n 4.

59 For a discussion of the ICJ's inherent powers, including the competence to strike down cases summarily, see Brown, 'The Inherent Powers of International Courts and Tribunals' (2005) 76 *British Year Book of International Law* 195; and Byers, 'Abuse of Rights: An Old Principle, A New Age' (2002) 47 *McGill Law Journal* 389.

60 This argument is strengthened by the fact that Georgia had brought proceedings broadly on the same subject matter before the European Court of Human Rights, arguably a more suitable forum for the adjudication of human rights than the ICJ.

reached different conclusions from the facts, both positions shared the same limitations. They were not prepared to address the key issue that the centrality of this dispute had very little to do with racial discrimination; it was an incidental question in the context of a dispute that was overwhelmingly about the use of force. The International Court does not have jurisdiction over the use of force questions, and that finding should have disposed of the dispute once and for all. That is the logical outcome of an international dispute settlement system, which at present is firmly rooted in state consent and where the International Court's role is limited to settling actual disputes between states parties on a private rights model.