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Summary
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Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)
Request for the indication of provisional measures
Summary of the Order

The Court begins by recalling that, on 12 August 2008, Georgia filed an Application instituting proceedings against the Russian Federation for alleged violations of the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter the "CERD").

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

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

The Court observes that, in its Application, Georgia contends inter alia that

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

The Court states that, on 14 August 2008, Georgia submitted a Request for the indication of provisional measures, pending the Court's judgment in the proceedings, in order to preserve its rights under CERD "to protect its citizens against violent discriminatory acts by Russian armed forces, acting in concert with separatist militia and foreign mercenaries".

It recalls that, on 15 August 2008, the President of the Court, referring to Article 74, paragraph 4, of the Rules of Court, addressed a communication to the two Parties, urgently calling upon them "to act in such a way as will enable any order the Court may take on the request for provisional measures to have its appropriate effects".

The Court observes that, on 25 August 2008, Georgia, referring to "the rapidly changing circumstances in Abkhazia and South Ossetia", submitted an "Amended Request for the Indication of Provisional Measures of Protection".

The Court then summarizes the arguments put forward by the Parties during the public hearings held on 8, 9 and 10 September 2008.

The Court observes that, at the end of the hearings, Georgia requested it

"as a matter of urgency, to order the following provisional measures, pending its determination of this case on the merits, in order to prevent irreparable harm to the rights of ethnic Georgians under Articles 2 and 5 of the Convention on Racial Discrimination:

(a) The Russian Federation shall take all necessary measures to ensure that no ethnic Georgians or any other persons are subject to violent or coercive acts of racial discrimination, including but not limited to the threat or infliction of death or bodily harm, hostage-taking and unlawful detention, the destruction or pillage of property, and other acts intended to expel them from their homes or villages in South Ossetia, Abkhazia and/or adjacent regions within Georgia;

(b) The Russian Federation shall take all necessary measures to prevent groups or individuals from subjecting ethnic Georgians to coercive acts of racial discrimination, including but not limited to the threat or infliction of death or bodily harm, hostage-taking and unlawful detention, the destruction or theft of property, and other acts intended to expel them from their homes or villages in South Ossetia, Abkhazia and/or adjacent regions within Georgia;

(c) The Russian Federation shall refrain from adopting any measures that would prejudice the right of ethnic Georgians to participate fully and equally in the public affairs of South Ossetia, Abkhazia and/or adjacent regions of Georgia."

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

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

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

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

Georgia also requested the Court to order that:

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

The Court indicates that, at the end of the hearings, the Russian Federation summarized its position as follows:

> "First: The dispute that the Applicant has tried to plead before this Court is evidently not a dispute under the 1965 Convention. If there were a dispute, it would relate to the use of force, humanitarian law, territorial integrity, but in any case not to racial discrimination.
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> Second: Even if this dispute were under the 1965 Convention, the alleged breaches of the Convention are not capable of falling under the provisions of the said Convention, not the least because Articles 2 and 5 of the Convention are not applicable extraterritorially.
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> Third: Even if such breaches occurred, they could not, even prima facie, be attributable to Russia that never did and does not now exercise, in the territories concerned, the extent of control required to overcome the set threshold.
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> Fourth: Even if the 1965 Convention could be applicable, which . . . is not the case, the procedural requirements of Article 22 of the 1965 Convention have not been met. No evidence that the Applicant proposed to negotiate or employ the mechanisms of the Committee on Racial Discrimination prior to reference to this Court, has been nor could have been produced.
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> Fifth: With these arguments in mind, the Court manifestly lacks jurisdiction to entertain the case.
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> Sixth: Should the Court, against all odds, find itself prima facie competent over the dispute, we submit that the Applicant has failed to demonstrate the criteria essential for provisional measures to be indicated. No credible evidence has been produced to attest to the existence of an imminent risk of irreparable harm, and urgency. The circumstances of the case definitely do not require measures, in particular, in the light of the ongoing process of post-conflict settlement. And the measures sought failed to take account of the key factor going to discretion: the fact that the events of August 2008 were born out of Georgia's use of force.
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> Finally: Provisional measures as they were formulated by the Applicant in the Requests cannot be granted since they would impose on Russia obligations that it is not able to fulfil. The Russian Federation is not exercising effective control vis-à-vis South Ossetia and Abkhazia or any adjacent parts of Georgia. Acts of organs of South Ossetia and Abkhazia or private groups and individuals are not attributable to the Russian Federation. These measures if granted would prejudge the outcome of the case."

The Court notes that the Russian Federation thus requested it to remove the case from the General List.

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The Court begins its reasoning by observing that, under its Statute, it does not automatically have jurisdiction over legal disputes between States parties to that Statute or between other States entitled to appear before it. Indeed, one of the fundamental principles of its Statute is that it cannot decide a dispute between States without the consent of those States to its jurisdiction.

The Court goes on to recall that, on a request for the indication of provisional measures, it need not finally satisfy itself, before deciding whether or not to indicate such measures, that it has jurisdiction on the merits of the case, yet it may not indicate them unless the provisions invoked by the Applicant appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded.

Since Georgia, at that stage, has sought to found the jurisdiction of the Court solely on the compromissory clause contained in Article 22 of CERD, the Court explains that it must proceed to examine whether the jurisdictional clause relied upon does furnish a basis for prima facie jurisdiction to rule on the merits such as would allow the Court, should it think that the circumstances so warranted, to indicate provisional measures.

The Court first ascertains that both Georgia and the Russian Federation are parties to CERD. It observes that Georgia deposited its instrument of accession on 2 June 1999 without reservation and that the Union of Soviet Socialist Republics (USSR) deposited its instrument of ratification on 4 February 1969 with a reservation to Article 22 of the Convention but that this reservation was withdrawn by the USSR on 8 March 1989. The Court adds that the Russian Federation, as the State continuing the legal personality of the USSR, is a party to CERD without reservation.

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

The Court observes that there is no restriction of a general nature in CERD relating to its territorial application and further notes that, in particular, neither Article 2 nor Article 5 of CERD contain a specific territorial limitation. The Court consequently finds that these provisions of CERD generally appear to apply, like other provisions of instruments of that nature, to the actions of a State party when it acts beyond its territory.

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

Having reviewed the arguments of the Parties, the Court comes to the conclusion that they disagree with regard to the applicability of Articles 2 and 5 of CERD in the context of the events in South Ossetia and Abkhazia. Consequently, there appears to exist a dispute between the Parties as to the interpretation and application of CERD. The Court notes, moreover, that the acts alleged by Georgia appear to be capable of contravening rights provided for by CERD, even if certain of these alleged acts might also be covered by other rules of international law, including humanitarian law. The Court believes that this is sufficient to establish the existence of a dispute between the Parties capable of falling within the provisions of CERD, which is a necessary condition for the Court to have prima facie jurisdiction under Article 22 of CERD.

The Court then turns to the question whether the procedural conditions set out in Article 22 of the Convention have been met. It recalls that Article 22 provides that a dispute relating to the interpretation or application of CERD may be referred to the Court if it "is not settled by negotiation or by the procedure expressly provided for in this Convention". The Court observes that Georgia claims that this phrase does not represent conditions to be exhausted before the Court can be seised of the dispute and that, according to Georgia, bilateral discussions and negotiations relating to the issues which form the subject-matter of the Convention have been held between the Parties. It also notes that the Russian Federation argues that pursuant to Article 22 of CERD, prior negotiations or recourse to the procedures under CERD constitute an indispensable precondition for the seisin of the Court, and that no negotiations have been held between the Parties on issues relating to CERD nor has Georgia, in accordance with the procedures envisaged in the Convention, brought any such issues to the attention of the Committee on the Elimination of Racial Discrimination.

The Court states that the phrase "any dispute . . . which is not settled by negotiation or by the procedure expressly provided for in this Convention" in Article 22 does not, on its plain meaning, suggest that formal negotiations in the framework of the Convention or recourse to the procedure referred to in Article 22 thereof constitute preconditions to be fulfilled before the seisin of the Court. It however finds that Article 22 does suggest that some attempt should have been made by the claimant party to initiate, with the respondent party, discussions on issues that would fall under CERD. The Court notes that it is apparent from the case file that such issues have been raised in bilateral contacts between the Parties and that these issues have manifestly not been resolved by negotiation prior to the filing of the Application. It adds that, in several representations to the United Nations Security Council in the days before the filing of the Application, those same issues were raised by Georgia and commented upon by the Russian Federation and that, therefore, the Russian Federation was made aware of Georgia's position in that regard. It goes on to say that the fact that CERD has not been specifically mentioned in a bilateral or multilateral context is not an obstacle to the seisin of the Court on the basis of Article 22 of the Convention.

The Court, in view of all the foregoing, considers that, prima facie, it has jurisdiction under Article 22 of CERD to deal with the case to the extent that the subject-matter of the dispute relates to the "interpretation or application" of the Convention.

The Court points out that its power to indicate provisional measures under Article 41 of the Statute has as its object the preservation of the respective rights of the parties pending the decision of the Court, in order to ensure that irreparable prejudice shall not be caused to rights which are the subject of dispute in judicial proceedings. It further states that, when considering such a request, it must be concerned to preserve the rights which may subsequently be adjudged by the Court to belong either to the Applicant or to the Respondent. The Court adds that a link must be established between the alleged rights the protection of which is the subject of the provisional measures being sought, and the subject of the proceedings before the Court on the merits of the case.

After recalling the arguments of the Parties thereon, the Court notes that Articles 2 and 5 of CERD are intended to protect individuals from racial discrimination by obliging States parties to undertake certain measures specified therein; that States parties to CERD have the right to demand compliance by a State party with specific obligations incumbent upon it under Articles 2 and 5 of the Convention; and that there is a correlation between respect for individual rights, the obligations of States parties under CERD and the right of States parties to seek compliance therewith. The Court finds that the rights which Georgia invokes in, and seeks to protect by, its request for the indication of provisional measures (namely the rights provided for in Articles 2 and 5 of CERD) have a sufficient connection with the merits of the case it brings for the purposes of the proceedings. The Court adds that it is upon the rights thus claimed that it must focus its attention in its consideration of Georgia's Request for the indication of provisional measures.

The Court goes on to say that its power to indicate provisional measures under Article 41 of its Statute "presupposes that irreparable prejudice shall not be caused to rights which are the subject of a dispute in judicial proceedings" and that it will be exercised only if there is urgency in the sense that there is a real risk that action prejudicial to the rights of either party might be taken before the Court has given its final decision.

The Court notes that Georgia claims that, "in view of the conduct of the Russian Federation in South Ossetia, Abkhazia, and adjacent regions, provisional measures are urgently needed" because the ethnic Georgians in these areas "are at imminent risk of violent expulsion, death or personal injury, hostage-taking and unlawful detention, and damage to or loss of their homes and other property" and "in addition, the prospects for the return of those ethnic Georgians who have already been forced to flee are rapidly deteriorating". Georgia also contends that "the rights in dispute are threatened with harm that by its very nature is irreparable" because "no satisfaction, no award of reparations, could ever compensate for the extreme forms of prejudice" to those rights.

The Court indicates that, for its part, the Russian Federation submits that "Georgia has not established that any rights opposable to Russia under Articles 2 and 5 of CERD — however broadly drawn — are exposed to 'serious risk' of irreparable damage". With reference to the events of August 2008, the Russian Federation argues that "the facts that can be relied on with reasonable certitude" go against the existence of a serious risk to the rights Georgia claims, for the reasons that, first, armed actions have led to "deaths of the armed forces of all parties concerned, deaths of civilians of all ethnicities, and a mass displacement of persons of all ethnicities", and, second, that "the armed actions have now ceased, and civilians of all ethnicities are returning to some, although not yet all, of the former conflict zones". The Russian Federation refers to the ceasefire announced on 12 August 2008 and to the six principles for the peaceful settlement of the conflict adopted by the Presidents of the Russian Federation and France on the same day and subsequently signed on 13-16 August 2008 by the President of Georgia and leaders of South Ossetia and Abkhazia, "through the intermediary of Russia and in the presence of the OSCE and the European Union". It also mentions the "positive démarches before the OSCE . . . with the European Union and President Sarkozy" and notes that, in accordance with the further principles announced on 8 September 2008, 200 European Union monitors will be deployed into the South Ossetian and Abkhaz buffer zones, and Russian peacekeeping troops will subsequently make a full withdrawal.

The Court insists that it is not called upon, for the purpose of its decision on the Request for the indication of provisional measures, to establish the existence of breaches of CERD, but to determine whether the circumstances require the indication of provisional measures for the protection of rights under CERD. The Court observes that nevertheless, the rights in question, in particular those stipulated in Article 5, paragraphs (b) and (d) (i) of CERD, are of such a nature that prejudice to them could be irreparable.

The Court indicates that it is aware of the exceptional and complex situation on the ground in South Ossetia, Abkhazia and adjacent areas and takes note of the continuing uncertainties as to where lines of authority lie. Based on the information before it in the case file, the Court is of the opinion that the ethnic Georgian population in the areas affected by the recent conflict remains vulnerable. The Court also notes that the situation in South Ossetia, Abkhazia and adjacent areas in Georgia is unstable and could rapidly change. Given the ongoing tension and the absence of an overall settlement to the conflict in this region, it considers that the ethnic Ossetian and Abkhazian populations also remain vulnerable. The Court adds that, while the problems of refugees and internally displaced persons in this region are currently being addressed, they have not yet been resolved in their entirety.

In light of the foregoing, with regard to these above-mentioned ethnic groups of the population, the Court finds that there exists an imminent risk that the rights at issue in the case may suffer irreparable prejudice.

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

The Court explains that it is satisfied that the indication of measures is required for the protection of rights under CERD which form the subject-matter of the dispute. It states that it has the power, under its Statute, when a request for provisional measures has been made, to indicate measures that are in whole or in part other than those requested, or measures that are addressed to the party which has itself made the request.

Having considered the terms of the provisional measures requested by Georgia, the Court explains that it does not find that, in the circumstances of the case, the measures to be indicated are to be identical to those requested by Georgia. On the basis of the material before it, the Court considers it appropriate to indicate measures addressed to both Parties.

The Court recalls that its orders on provisional measures under Article 41 of the Statute have binding effect and thus create international legal obligations which both Parties are required to comply with.

It concludes by pointing out that the decision given on the Request for the indication of provisional measures in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case or any questions relating to the admissibility of the Application, or relating to the merits themselves.

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The full text of the operative paragraph (para. 149) reads as follows:

"For these reasons,

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

Indicates the following provisional measures:

A. By eight votes to seven,

Both Parties, within South Ossetia and Abkhazia and adjacent areas in Georgia, shall

(1) refrain from any act of racial discrimination against persons, groups of persons or institutions;

(2) abstain from sponsoring, defending or supporting racial discrimination by any persons or organizations,

(3) do all in their power, whenever and wherever possible, to ensure, without distinction as to national or ethnic origin,

(i) security of persons;

(ii) the right of persons to freedom of movement and residence within the border of the State;

(iii) the protection of the property of displaced persons and of refugees;

(4) do all in their power to ensure that public authorities and public institutions under their control or influence do not engage in acts of racial discrimination against persons, groups of persons or institutions;

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

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

B. By eight votes to seven,

Both Parties shall facilitate, and refrain from placing any impediment to, humanitarian assistance in support of the rights to which the local population are entitled under the International Convention on the Elimination of All Forms of Racial Discrimination;

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

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

C. By eight votes to seven,

Each Party shall refrain from any action which might prejudice the rights of the other Party in respect of whatever judgment the Court may render in the case, or which might aggravate or extend the dispute before the Court or make it more difficult to resolve;

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

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

D. By eight votes to seven,

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

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

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

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Vice-President Al-Khasawneh and Judges Ranjeva, Shi, Koroma, Tomka, Bennouna and Skotnikov append a joint dissenting opinion to the Order of the Court; Judge ad hoc Gaja appends a declaration to the Order of the Court.

Joint dissenting opinion of Vice-President Al-Khasawneh and Judges Ranjeva, Shi, Koroma, Tomka, Bennouna and Skotnikov

1. Vice-President Al-Khasawneh and Judges Ranjeva, Shi, Koroma, Tomka, Bennouna and Skotnikov voted against the Order, as they consider that the requisite conditions for the indication of provisional measures have not been met in the present case.

2. While the power to indicate provisional measures is inherent in the judicial function, the judges note that the Court must satisfy itself that the conditions necessary for their indication have been met. They observe that the Court must ensure that it has jurisdiction prima facie at least and that the criteria as to a risk of irreparable harm and urgency have been met. They point out that the Parties differ on two questions: i.e., whether there is a dispute between them "with respect to the interpretation or application" of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD); and whether the precondition that the dispute must not have been settled "by negotiation or by the procedures expressly provided for in [the] Convention" has been satisfied.

3. The authors of the joint dissenting opinion are of the view that a dispute with respect to the application of CERD must be in existence prior to the seisin of the Court. They consider however that the acts which Georgia attributes to the Russian Federation are not necessarily likely to fall within the provisions of the Convention. They express their disagreement on this point with the majority, which, in their view, was content to observe merely that a dispute appeared to exist, without any showing having been made that the acts alleged by Georgia fell within the scope of CERD.

4. On the subject of the precondition of negotiations laid down in Article 22 of CERD, the authors of the joint dissenting opinion take issue with the majority's conclusion that bilateral contacts between the Parties and representations made by Georgia to the Security Council fulfilled that precondition. They explain that such contacts needed to regard the very substance of CERD, that is to say its interpretation or application, and that the Court should have asked itself whether negotiations had been opened and, if so, whether they were likely to yield a result.

5. As for the precondition concerning recourse to the procedures referred to in Article 22 of CERD, the authors of the joint dissenting opinion point out that the Court has confined itself to observing that neither Georgia nor the Russian Federation claimed that the questions in dispute had been brought to the attention of the Committee on the Elimination of Racial Discrimination. They consider that the majority's interpretation in respect of this question confirms neither the ordinary meaning of Article 22 nor its object and purpose, which is to encourage the maximum number of States to submit to the jurisdiction of the Court, with the assurance that the procedures provided for in the Convention will first be exhausted.

6. Finally, the seven judges state their view that the Order fails to demonstrate the existence of either any risk of irreparable harm to Georgia's rights under CERD or an urgent situation. They infer that this weakness is echoed in the operative clause, in so far as the Court ultimately asks both Parties to respect the Convention, which they are in any event obliged to do, with or without provisional measures.

Declaration of Judge ad hoc Gaja

In his declaration Judge ad hoc Gaja explains that, while he voted in favour of all the provisional measures, including those under A, he cannot share the view that the conditions have been met for addressing the latter measures also to the applicant State. The respondent State did not allege that in Abkhazia, South Ossetia or adjacent areas the conduct of Georgian authorities or of individuals, groups or institutions under their control or influence may cause the risk of irreparable harm to rights conferred under CERD. Nor does the Court provide an adequate explanation when appraising that risk (see para. 143).