**Human rights — Treaties — Interpretation of human rights treaties — Compromissory clauses — Convention on the Elimination of All Forms of Racial Discrimination, Article 22 — Whether imposing preconditions on the seisin of the International Court of Justice — Scope of application of Convention — Whether applicable extraterritorially — Conflict between Georgia and Russian Federation in 2008 — Allegations of ethnic cleansing in Abkhazia and South Ossetia — Whether dispute regarding the interpretation or application of the Convention**

**International Court of Justice — Provisional measures of protection — Criteria for indication of measures — Prima facie basis for jurisdiction — Application by Georgia against Russian Federation — Convention on the Elimination of All Forms of Racial Discrimination, Article 22 — Whether prima facie basis for jurisdiction — Measures must be designed to protect rights which might form the subject-matter of a judgment — Requirement of urgency**

**International Court of Justice — Jurisdiction — Consent of States as basis of jurisdiction — Dispute — Definition of dispute — Convention on the Elimination of All Forms of Racial Discrimination, Article 22 — Types of dispute covered by Article 22 — Conflict between Georgia and Russian Federation in 2008 — Whether dispute between the Parties regarding the interpretation or application of the Convention — Date on which dispute came into existence — Whether Article 22 imposing preconditions on seisin of the Court — Requirement of negotiations — Relationship between decision on prima facie basis of jurisdiction at provisional measures stage and definitive ruling on jurisdiction — Whether compromissory clauses in human rights treaties requiring different approach to interpretation**

**International organizations — United Nations — Security Council — Exchanges between States in meetings of Security Council — Whether capable of establishing existence of dispute — Whether capable of constituting attempt to resolve dispute by negotiation**

**Treaties — Interpretation — Principles of interpretation — Principle of *effet utile* — Role within framework of treaty interpretation — Human rights treaties — Compromissory clauses — Convention on the Elimination of All Forms of Racial Discrimination, Article 22 — Approach to interpretation**

**War and armed conflict — International armed conflict — Conflict between Georgia and Russia in 2008 — Conflicts in Abkhazia and South Ossetia — Ethnic cleansing — Whether giving rise to dispute within Convention on the Elimination of All Forms of Racial Discrimination, Article 22**

## Application of the International Convention on the Elimination of all Forms of Racial Discrimination

## (Georgia *v.* Russian Federation)[1]

*International Court of Justice*[2]

*Order on Provisional Measures of Protection.* 15 *October* 2008

(Higgins, *President*; Al-Khasawneh, *Vice-President*; Ranjeva, Shi, Koroma, Buergenthal, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna and Skotnikov, *Judges*; Gaja, *Judge ad hoc*)

*Judgment on Preliminary Objections.* 1 *April* 2011

(Owada, *President*; Tomka, *Vice-President*; Koroma, Al-Khasawneh, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue and Donoghue, *Judges*; Gaja, *Judge ad hoc*)

[1] A list of counsel who appeared for the Parties at the provisional measures hearings is set out in para. 50 of the Order.

At the preliminary objections hearings, Georgia was represented by Ms Tina Burjaliani, First Deputy Minister of Justice, and HE Mr Shota Gvineria, Ambassador of Georgia to the Kingdom of the Netherlands, as Agents; Professors Payam Akhavan, James Crawford SC and Philippe Sands QC and Mr Paul Reichler, as Counsel; Ms Nino Kalandadze, Mr Giorgio Mikeladze, Ms Khatuna Salukvadze, Ms Nino Tsereteli, Mr Zachary Douglas, Mr Andrew Loewenstein, Ms Clara Brillembourg and Ms Amy Senier, as Advisers. The Russian Federation was represented by HE Mr Kirill Gevorgian, Director of the Legal Department, Ministry of Foreign Affairs, and HE Mr Roman Kolodkin, Ambassador of the Russian Federation to the Kingdom of the Netherlands, as Agents; Professors Alain Pellet and Andreas Zimmermann and Mr Samuel Wordsworth, as Counsel and Advocates; Mr Evgeny Raschevsky, Mr M. Kulakhmetov, Mr V. Korchmar, Mr Grigory Lukyantsev, Mr Ivan Volodin, Mr Maxim Musikhin, Ms Diana Taratukhina, Mr Arsen Daduani, Mr Sergey Leonidchenko, Ms Svetlana Shatalova, Ms Daria Golubkova, Mr M. Tkhostov, Ms Amy Sander, Professor Christian Tams, Ms Alina Miron, Ms Elena Krotova, Ms Anna Shumilova and Mr Sergey Usoskin, as Advisers.

[2] For related proceedings in the European Court of Human Rights, see 161 ILR 333 and 487 below.

SUMMARY: *The facts*:—Until 1991 the Georgian Soviet Socialist Republic (the "GSSR") was one of the constituent republics of the Union of Soviet Socialist Republics (the "USSR"). In December 1991 the USSR was dissolved. The GSSR, which had declared independence in April 1991, became the independent State of Georgia. During the period immediately prior to, and that immediately following, the dissolution of the USSR, fighting broke out in South Ossetia and Abkhazia, two regions within Georgia, between supporters of secession or greater autonomy for the regions and the Georgian authorities. Georgia alleged that during these hostilities, the Russian Federation provided assistance to separatist forces. The initial hostilities in South Ossetia were brought to an end by the Agreement on the Settlement of the Georgian–Ossetian Conflict, concluded in June 1992 between Georgia, the South Ossetian separatist forces and the Russian Federation. The initial hostilities in Abkhazia ended with the conclusion in 1994 of the Moscow Agreement on a Ceasefire and Separation of Forces between Georgia, the Abkhaz separatist forces and the Russian Federation. Both agreements provided for the deployment of peacekeeping forces, the largest components of which were troops from the Russian Federation.

Georgia maintained that during the hostilities there was extensive ethnic cleansing in both South Ossetia and Abkhazia, with large numbers of persons of Georgian ethnic origin forced to flee their homes, and that, following the conclusion of the two agreements, Russian forces colluded with separatists to prevent these displaced persons from returning. In addition, Georgia contended that ethnic Georgians remaining in the two regions were persecuted and in some cases attacked by military forces. Georgia alleged that between 1994 and 2008 the Russian Federation supported moves towards secession by separatists in the two regions and colluded in, or gave active support to, the persecution of ethnic Georgians and other minorities in South Ossetia and Abkhazia.

In August 2008 extensive fighting broke out between Georgian and Russian forces in and around both South Ossetia and Abkhazia. According to Georgia, on 7 August 2008 Georgian forces commenced limited operations in South Ossetia in response to extensive shelling of ethnic Georgian villages and the Russian Federation responded with "a full-scale invasion" of Georgian territory. At the same time, fighting broke out in Abkhazia as a result of Russian deployment there. Georgia maintained that the hostilities involved large-scale discrimination by Russian and separatist forces against persons of Georgian ethnicity and other minority groups. The Russian Federation denied this account and contended that Georgian forces had launched a major offensive in South Ossetia at the start of August 2008, during which members of the Russian contingent in the peacekeeping force had been deliberately targeted, and that the Russian Federation had been obliged to respond to this offensive for humanitarian reasons and to protect its personnel. The Russian Federation maintained that it had been a neutral intermediary and peacekeeper. Major hostilities came to an end with the conclusion of a fresh agreement on 12 August 2008.

On 12 August 2008, Georgia filed an Application commencing proceedings against the Russian Federation. The Application gave, as the basis for the jurisdiction of the Court, Article 22 of the Convention on the Elimination of All Forms of Racial Discrimination, 1965 ("CERD"), which 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.

CERD entered into force between Georgia and the Russian Federation on 2 July 1999. The Application accused the Russian Federation of committing multiple violations of CERD in Georgia.

*Request for the Indication of Provisional Measures of Protection (15 October 2008)*

Georgia also submitted a Request for the indication of provisional measures of protection under Article 41 of the Statute of the International Court of Justice. The Russian Federation maintained that there was no prima facie basis for the jurisdiction of the Court and that, accordingly, no provisional measures could be indicated. According to the Russian Federation, there was no dispute falling within the scope of CERD between itself and Georgia. Russia contended that the real dispute between the Parties did not relate to racial discrimination, that the relevant provisions of CERD did not apply extra-territorially and that the preconditions for seisin of the Court under Article 22 had not been satisfied.

*Held* (by eight votes to seven, Vice-President Al-Khasawneh and Judges Ranjeva, Shi, Koroma, Tomka, Bennouna and Skotnikov dissenting):—Both Parties should comply with the provisional measures indicated in paragraph 149 of the Order.

(1) The Court could indicate provisional measures only if it was satisfied that the provisions invoked by the Applicant appeared, prima facie, to afford a basis on which the jurisdiction of the Court might be founded. In the present case, Article 22 of CERD appeared, prima facie, to afford a basis for the jurisdiction of the Court (Order, paras. 84-117).

(a) There was no restriction of a general nature in CERD relating to its territorial application, nor did Articles 2 and 5 of CERD,[3] on which Georgia relied, contain a specific territorial limitation. The provisions of CERD generally appeared to apply, like other provisions of instruments

[3] The texts of these provisions are set out in para. 107 of the Order on Provisional Measures.

of that nature, to the actions of a State party when it acted beyond its territory (Order, paras. 108-9).

(b) There appeared to be a dispute between the Parties relating to the interpretation or application of Articles 2 and 5 of CERD, even though the acts on which Georgia relied might also have been covered by other rules of international law, in particular international humanitarian law (Order, paras. 110-12).

(c) Article 22 of CERD was not identical to the dispute settlement provisions of many other treaties. It did not expressly require that an attempt be made to resolve the dispute by negotiation before the Court was seised but required only that the dispute had not been so settled. Article 22 did not, on its plain meaning, suggest that formal negotiations in the framework of the Convention or recourse to the procedures under the Convention were preconditions to be fulfilled before the seisin of the Court. Nevertheless, Article 22 suggested that some attempt should have been made by the claimant party to initiate discussions on issues that would fall under CERD. That had been done in the present case (Order, paras. 113-16).

(2) The purpose of provisional measures was to preserve rights which might subsequently be adjudged to belong to either the Applicant or the Respondent. The Court should not indicate measures for the protection of any other rights. Articles 2 and 5 of CERD were intended to protect individuals from racial discrimination by requiring States to undertake certain measures specified therein. There was a correlation between the respect for individual rights, the obligations of States parties under CERD and the right of other States parties to seek compliance therewith. The rights which Georgia sought to protect by provisional measures had a sufficient connection with the merits of the case (Order, paras. 118-27).

(3) The power of the Court to indicate provisional measures presupposed that irreparable prejudice should not be caused to rights which were the subject of dispute in the proceedings. That power was to be exercised only in cases of urgency in the sense that there was a real risk that action prejudicial to the rights of either party might be taken before the Court had given its final decision. While the Court could not make definitive findings of fact or attribution at the provisional measures stage, in the present case the evidence suggested that the indication of provisional measures was required for the protection of the rights which formed the subject-matter of the dispute (Order, paras. 128-46).

(4) Orders on provisional measures had binding effect and created international legal obligations with which both Parties were required to comply (Order, para. 147).

*Joint Dissenting Opinion of Vice-President Al-Khasawneh and Judges Ranjeva, Shi, Koroma, Tomka, Bennouna and Skotnikov:* (1) The armed acts which occurred on and after 7 August 2008 did not fall within the ambit of CERD and there had been no opposition of view between the Parties regarding

CERD until the hearings on provisional measures. It had not, therefore, been shown that there was a dispute regarding the interpretation or application of CERD (Joint dissent, paras. 1-10).

(2) Even if such a dispute did exist, it did not fall within Article 22 of CERD. To interpret the reference in Article 22 to the dispute not having been settled by negotiation or by recourse to the procedures in the Convention as not imposing preconditions on the seisin of the Court was to deprive those words of all legal effect and was contrary to the jurisprudence of the Court. Georgia had made no attempt to engage in negotiations on a CERD dispute or to employ the procedure for rapid alert established by the Committee on the Elimination of Racial Discrimination (Joint dissent, paras. 11-20).

(3) The Order did not demonstrate the existence of a risk of irreparable harm to Georgia's rights under CERD and there was no urgency in light of the ceasefire agreement and the deployment of European Union observers (Joint dissent, paras. 21-5).

*Judge ad hoc Gaja* appended a brief declaration that the conditions were not met for addressing the provisional measures to Georgia. The Russian Federation had not even alleged that the conduct of the Georgian authorities involved violations of CERD (p. 64).

### *Preliminary Objections (1 April 2011)*

Following the deposit of Georgia's Memorial, the Russian Federation advanced four preliminary objections:

(1) that there was no dispute regarding the interpretation or application of CERD between the Parties prior to the submission of the Application;
(2) that, if there were such a dispute, the requirements of Article 22 CERD had not been met;
(3) that since Georgia's case rested upon allegations of acts said to have taken place outside Russian territory, CERD was not applicable and the Court therefore lacked jurisdiction *ratione loci*. The Russian Federation conceded that this objection did not possess an exclusively preliminary character;
(4) that the Court lacked jurisdiction *ratione temporis* with regard to events said to have occurred before CERD entered into force between Georgia and the Russian Federation on 2 July 1999.

Georgia maintained that a dispute regarding the interpretation or application of CERD had existed between the Parties for many years and that it had complied with the requirements of Article 22, which it denied were as exacting as the Russian Federation claimed. Georgia contended that the provisions of CERD were applicable to acts performed by one State in the territory of another. With regard to the fourth objection, Georgia accepted

that a dispute under Article 22 could have arisen only after 2 July 1999 but maintained that it could nevertheless refer to events before that date in so far as they cast light upon events following it. Georgia submitted that the Court possessed jurisdiction over the entirety of the claim advanced in the Application.

*Held* (by ten votes to six, President Owada, Judges Simma, Abraham, Cançado Trindade and Donoghue and Judge ad hoc Gaja dissenting):— The Court had no jurisdiction to entertain the Application.

(1) (by twelve votes to four, Vice-President Tomka and Judges Koroma, Skotnikov and Xue dissenting) The first preliminary objection was rejected (Judgment, paras. 114 and 187(1)(a)).

(a) The provisions of CERD were not such as to require that the word "dispute" in Article 22 be given a narrower meaning than was normal in international law. What was required was that there was a disagreement on a point of law or fact, a conflict of legal views or of interests between the Parties. Whether or not a dispute existed was a matter for objective determination and was one of substance, not form. The existence of a dispute could be inferred from the failure of a State to respond to a claim in circumstances where a response was called for. The dispute must in principle have existed at the time that the Application was submitted. Under Article 22 CERD, the dispute had to be one regarding the interpretation or application of CERD. While it was not necessary that a party referred to the specific treaty by name, the exchanges between the parties had to refer to the subject-matter of that treaty with sufficient clarity to enable the State against which a claim was made to identify that there was, or might be, a dispute regarding that subject-matter (Judgment, paras. 26-30).

(b) A range of disputes regarding Abkhazia and South Ossetia on subjects such as the status of those two areas, the use of force and alleged violations of international humanitarian law and human rights law undoubtedly existed between the Parties. One situation might contain disputes which related to more than one body of law and which were subject to different disputes procedures. In examining the evidence of the existence of a dispute, the Court would consider only official statements emanating from the Parties and not those from unofficial bodies or individuals. While statements from other organs of State might be pertinent, in international law and practice it was the Executive of the State which spoke for the State in international affairs and primary attention would therefore be given to statements made or endorsed by the Executives of the Parties (Judgment, paras. 31-9).

(c) The Court could also take account of relevant resolutions of the United Nations Security Council (Judgment, paras. 40-9).

(d) The Court had been invited to examine documents issued and statements made before 2 July 1999 in so far as they might help to put into context those documents issued or statements made after the entry into force of CERD between the Parties. None of the documents and statements put

forward from this period, however, provided support for Georgia's contention that its dispute with Russia over ethnic cleansing was long-standing. Even if it had been otherwise, such dispute, though about racial discrimination, could not have been a dispute regarding the interpretation or application of CERD (Judgment, paras. 50-64).

(e) No dispute came into existence between the Parties regarding the interpretation or application of CERD between 2 July 1999 and July 2008. The documents and statements from that period did not refer to the subject-matter of CERD with sufficient clarity to enable the Russian Federation to identify that there was, or might be, a dispute regarding that subject-matter between itself and Georgia (Judgment, paras. 51-105).

(f) The exchanges between Georgian and Russian representatives in the Security Council on 10 August 2008, the claims made by the President of Georgia on 9 and 11 August and the response by the Russian Foreign Minister on 12 August 2008, the day on which Georgia submitted its Application, made clear that by that date a dispute regarding the interpretation or application of CERD had come into existence between the Parties (Judgment, paras. 106-13).

(2) (by ten votes to six, President Owada, Judges Simma, Abraham, Cançado Trindade and Donoghue and Judge ad hoc Gaja dissenting) The second preliminary objection was upheld.

(a) It was not unusual for compromissory clauses conferring jurisdiction on the Court or another international tribunal to refer to resort to negotiations. Such resort gave notice to the respondent State and delimited the scope of the dispute and its subject-matter; it encouraged the parties to attempt to settle their dispute by mutual agreement and performed an important function in indicating the limit of consent of States, which was the basis for the jurisdiction of the Court (Judgment, paras. 129-31).

(b) The principles of treaty interpretation required that the words in Article 22 CERD, "which is not settled by negotiation or by the procedures expressly provided for in this Convention", be given effect. To read them as meaning no more than that the Court had jurisdiction with regard to a dispute provided that that dispute had not, as a matter of fact, been settled by one of those means would be to deprive them of any effect, since a dispute which had been settled would no longer be a dispute. Accordingly, and taking account of the jurisprudence of the Court regarding Article 22 and similar clauses, those words had to be interpreted as laying down preconditions which had to be fulfilled before the seisin of the Court. The *travaux préparatoires* shed only limited light on the subject as there was very little discussion of the relevant phrase in Article 22. However, given the extent of opposition to mandatory third-party settlement at the time, it was reasonable to assume that additional limitations to resort to judicial settlement in the form of prior negotiations and other settlement procedures were provided for with a view to facilitating wider acceptance of CERD (Judgment, paras. 132-47).

(c) The conditions for the seisin of the Court had not been met before Georgia filed its Application. Negotiations were distinct from mere protests

and required, at the very least, a genuine attempt by one of the disputing parties to engage in discussions with the other party with a view to resolving the dispute. While a duty to negotiate did not entail an obligation to reach agreement, it did require a genuine attempt to arrive at a settlement, although that need not invariably take the form of direct contact between the parties to a dispute. Moreover, the precondition of negotiation was met only when there had been a failure of negotiation or negotiations had become futile. The record before the Court did not demonstrate a genuine attempt by Georgia during the period in which there existed a dispute regarding the interpretation or application of CERD to resolve that dispute by negotiation. It was not suggested that there had been any attempt to settle the dispute by recourse to the other procedures provided for in the Convention. It was therefore unnecessary for the Court to decide whether the two conditions laid down by Article 22 were cumulative or alternative (Judgment, paras. 156-84).

(3) In view of the decision to uphold the Russian Federation's second preliminary objection, it was not necessary for the Court to rule on the third and fourth objections (Judgment, para. 185).

*Joint Dissenting Opinion of President Owada, Judges Simma, Abraham, Donoghue and Judge ad hoc Gaja*: (1) The Court's interpretation of Article 22 CERD was questionable. The language chosen by those who had drafted Article 22 did not suggest that recourse to negotiation was a precondition to jurisdiction. The principle that words should always be given effect was not absolute but merely one of several guides to ascertaining the meaning of a text. It was noticeable that, at the time Article 22 was adopted, other forms of compromissory clause in which recourse to negotiations was clearly a precondition to seisin of the Court were well known and yet were not employed in CERD. There was no general obligation of negotiation as a precondition of jurisdiction in international law and the decision that Article 22 contained such a requirement, though not manifestly absurd and unreasonable, was not required by the language of the clause, the *travaux préparatoires* or the jurisprudence of the Court (Joint dissent, paras. 14-38).

(2) The two methods of settlement referred to in Article 22 CERD were alternative, not cumulative. This result followed less from a strict textual reading than from the logic and object and purpose of the clause. The point of the text could not be to require a State to go through futile procedures solely for the purpose of delaying or impeding its access to the Court. That the two modes of settlement were intended to be alternative, not cumulative, was confirmed by the *travaux préparatoires* (Joint dissent, paras. 39-47).

(3) Even if Article 22 did impose a requirement of negotiation, the question of what was required had to be approached in a practical and realistic fashion and not in the formalistic way chosen by the Court. If the Court found that, on the date when proceedings were instituted, there was no prospect of a negotiated

settlement, it should not require an applicant State to go through a useless formality of attempting negotiation (Joint dissent, paras. 48-63).

(4) Even on the Court's interpretation of Article 22, the requirement of negotiation had been satisfied. Contrary to the finding of the Court in relation to the first preliminary objection, the dispute regarding CERD had come into existence long before 9 August 2008 and the record showed that Georgia had attempted to settle it by negotiation. By the time the Application was filed it was clear that there was no prospect of such a settlement (Joint dissent, paras. 64-86).

*Separate Opinion of President Owada*: It was easy to discern in the bilateral relations between Georgia and the Russian Federation a growing crystallization of a dispute regarding the interpretation or application of CERD with regard to ethnic cleansing and the treatment of refugees and displaced persons long before 9 August 2008. The analytical approach taken by the Court had led to a significant and unwarranted transformation in the scope, *ratione temporis*, of the dispute (pp. 164-75).

*Declaration of Vice-President Tomka*: The Court should have found that there was no dispute under Article 22 of CERD. By finding the existence of a dispute on the basis of references to ethnic cleansing in statements made at the time of the fighting in August 2008, the Court had adopted an artificial concept of a dispute (pp. 175-6).

*Separate Opinion of Judge Koroma*: The jurisdiction conferred on the Court by the parties to CERD with regard to disputes was limited both as to the subject-matter of the dispute and by the requirement, which was clearly a precondition, that a party first attempt to settle the dispute by the means specified in Article 22 (pp. 176-80).

*Separate Opinion of Judge Simma*: The relevant dispute had existed long before 9 August 2008. In holding otherwise, the Court had given undue importance to matters of form, such as the precise authorship of a document, which was contrary to its prior jurisprudence. Once it was appreciated that the dispute had existed for some time, the question whether Georgia had attempted to settle that dispute by negotiation appeared in a different light. It was apparent both that Georgia had attempted to resolve the dispute by negotiation and that this attempt had been rebuffed (pp. 180-214).

*Separate Opinion of Judge Abraham*: The first preliminary objection should have been rejected in more succinct fashion. The existence of a dispute between Georgia and the Russian Federation regarding the interpretation or application of CERD was clear well before 9 August 2008. The Court's approach adopted too strict a test of what constituted a dispute (pp. 214-25).