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## **APPLICATION OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (GEORGIA V. RUSSIAN FEDERATION DISPUTE)**

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### **Sabovchyk A., Popovych A. Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation Dispute).**

Four days later aftermath of the armed conflict that broke out between the Parties in the Georgian territories of South Ossetia and Abkhazia (on August 8, 2008), on August 12, 2008 the Republic of Georgia instituted proceedings before the International Court of Justice (hereinafter – the Court) against the Russian Federation relating to “its actions on and around the territory of Georgia in breach of CERD (the 1965 International Convention on the Elimination of All Forms of Racial Discrimination)” [1].

Georgia alleged that Russia “practised, sponsored and supported racial discrimination through attacks against, and mass-expulsion of, ethnic Georgians” in the two territories in violation of Russia’s obligations under the CERD. Georgia’s Application was accompanied by a Request for the indication of provisional measures 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”.

On 15 August 2008, having considered the gravity of the situation, the President of the Court, acting under Article 74, paragraph 4, of the Rules of Court, urgently called upon the Parties “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”. Following public hearings that were held from 8 to 10 October 2008, the Court issued an Order on the Request for the indication of provisional measures submitted by Georgia. The Court also indicated that “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”. Finally, the Court ordered each Party to “inform it as to its compliance with the ... provisional measures” [2].

Although the Court has concluded, by ten votes to six, that it has no jurisdiction under CERD to give a judgment on the merits, the dispute nevertheless retains historical significance as the first dispute involving Russian Federation that has come before the International Court of Justice. It was also the first time that the International Court of Justice was directly called upon to interpret the provisions of CERD.

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. 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.

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. 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.

**Key words:** racial discrimination, elimination of all forms of racial discrimination, International Court of Justice, Convention on the Elimination of All Forms of Racial Discrimination.

**Сабовчик А., Попович А. Застосування Міжнародної конвенції про ліквідацію всіх форм расової дискримінації (Спір Грузія проти Російської Федерації).**

Через чотири дні після збройного конфлікту, який спалахнув між сторонами на грузинських територіях Південної Осетії та Абхазії (8 серпня 2008 року), 12 серпня 2008 року Республіка Грузія порушила справу в Міжнародному суді ООН (надалі – Суд) проти Російської Федерації щодо «її дій на території Грузії та навколо неї, що порушують Міжнародну конвенцію 1965 року про ліквідацію всіх форм расової дискримінації (надалі - Конвенція)».

Грузія стверджувала, що Росія «практикувала, спонсорувала та підтримувала расову дискримінацію шляхом нападів на етнічних грузин та їх масового вигнання» на двох територіях, порушуючи зобов'язання Росії згідно з Конвенцією. Заявка Грузії супроводжувалася запитом про зазначення тимчасових заходів, щоб «зберегти її права згідно з Конвенцією щодо захисту своїх громадян від насильницьких дискримінаційних дій з боку російських збройних сил, які діють спільно з сепаратистським ополченням та іноземними найманцями».

15 серпня 2008 року, враховуючи серйозність ситуації, Голова Суду, діючи відповідно до пункту 4 статті 74 Регламенту Суду, терміново закликав сторони «діяти таким чином, щоб забезпечити незалежно від того який наказ стосовно запиту про тимчасові заходи Судом може бути прийнято, щоб такі заходи мали належний ефект». Після відкритих слухань, які відбулися з 8 по 10 жовтня 2008 року, Суд видав наказ щодо тимчасових заходів, поданих Грузією. Суд також зазначив, що «кожна Сторона повинна утримуватися від будь-яких дій, які можуть завдати шкоди правам іншої Сторони щодо будь-якого рішення, яке Суд може винести у справі, або які можуть погіршити чи подовжити спір у Суді чи ускладнити вирішення». Нарешті, Суд зобов'язав кожную сторону «інформувати його про дотримання нею ... тимчасових заходів».

Відтак, Суд дійшов висновку десятима голосами проти шести, що він згідно з Конвенцією не має юрисдикції виносити рішення по суті. Тим не менш, дана справа зберігає історичне значення як перша справа за участю Російської Федерації, яка потрапила до Міжнародного суду ООН. Це також був перший випадок, коли Міжнародний суд ООН був безпосередньо покликаний тлумачити положення Міжнародної конвенції 1965 року про ліквідацію всіх форм расової дискримінації.

Разом з цим, Суд не був готовим розглянути ключове питання, адже центральне місце в даному спорі було пов'язане зовсім не з расовою дискримінацією. Це було випадкове запитання в контексті справи, яка стосувалася саме застосування сили. Міжнародний суд в свою чергу не має юрисдикції щодо питань застосування сили, і такий висновок мав би вирішити спір раз і назавжди. У цій справі було зрозуміло, що можливість винесення рішення по суті малоімовірна і що Міжнародний суд, у кращому випадку, використовувався як зручний майданчик для публічного висловлювання політичних образ або для привернення уваги міжнародної спільноти до важкого становища Грузії, без жодного наміру залучати судову функцію до фактичного врегулювання спору.

Вважається, що справа «Грузія проти Російської Федерації» – належала саме до категорії спорів, які Суд мав без зволікання вилучити як зловживання процесом. Цей аргумент посилюється тим фактом, що Грузія порушила справу загалом щодо того самого предмета в Європейському суді з прав людини, можливо, більш підходящому форумі для розгляду справ про права людини, ніж Міжнародний суд.

**Ключові слова:** расова дискримінація, ліквідація всіх форм расової дискримінації, Міжнародний суд ООН, Конвенція про ліквідацію всіх форм расової дискримінації.

**Formulation of the problem.** The legal importance of the Georgia v. Russia case is that it 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.

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.

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.

**Analysis of scientific sources.** Ukrainian scientists have not been studied separately the issue of proceeding instituted by the Republic of Georgia before the International Court of Justice against the Russian Federation relating to "its actions on and around the territory of Georgia in breach of the International Convention on the Elimination of All Forms of Racial Discrimination. However, it is important to note the works of foreign scientists on this issue, namely: Szewczyk, Bart M.J., Phoebe Okowa and others.

**The purpose of the article** is to establish real goals and expectations from the submission of the specified dispute by the Republic of Georgia to the International Court of Justice against the Russian Federation relating to its actions on and around the territory of Georgia in breach of the International Convention on the Elimination of All Forms of Racial Discrimination. And also to investigate the legal nature of the consequences of such an appeal and the position of the Court regarding this case and the parties.

**Presenting of the main material.** On April 1, 2011, the International Court of Justice (ICJ, International Court) delivered its judgment on preliminary objections to jurisdiction in the Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination, a contentious case initiated by Georgia against the Russian Federation in the aftermath of the armed conflict that broke out between the parties in the Georgian territories of South Ossetia and Abkhazia on August 8, 2008. In its application, Georgia alleged that Russia was responsible for racial discrimination and ethnic cleansing in the two territories in violation of its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). On October 15, 2008, by eight votes to seven, the Court ordered provisional measures against both Parties based on prima facie jurisdiction under Article 22 of CERD. Having held that its Order on provisional measures nonetheless did not prejudice its jurisdiction on the merits, the Court had to examine de novo four preliminary objections raised by the Russian Federation. In the Judgment, however, the Court declined jurisdiction over the matter.

Although the Court has concluded, by ten votes to six, that it has no jurisdiction under 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.

But it would be better to explain everything in more detail.

#### 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. 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.

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.

The tensions culminated in a ceasefire mediated by the Commonwealth of Independent States (CIS) and the deployment of Russian-led CIS peacekeepers, although their neutrality in the conflict was consistently questioned. 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. 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.

In the aftermath of the armed conflict that broke out between the Parties in the Georgian territories of South Ossetia and Abkhazia on August 8, 2008, Georgia instituted proceedings against Russia four days later. Georgia alleged that Russia "practised, sponsored and supported racial discrimination through attacks against, and mass-expulsion of, ethnic Georgians" in the two territories in violation of Russia's obligations under the CERD" [3].

The next day, Georgia submitted a request for provisional measures (subsequently amended) ordering Russia to cease and desist from conduct inconsistent with CERD [4]. In its Order on provisional measures, by eight votes to seven, the Court found prima facie jurisdiction based on Article 22 of CERD, which provided 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 be referred to the ICJ at the request of any party to the dispute [5]. The Court concluded that Article 22 does not, in its plain meaning, suggest that formal negotiations in the framework of the Convention constitute preconditions to be fulfilled before the seisin of the Court. On the other hand, it noted 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. Most importantly, it held that this decision in no way prejudices the question of the jurisdiction of the Court to deal with the merits of the case.

As Judge Greenwood wrote subsequently in his concurring opinion to the Judgment, the "jurisdictional threshold which the applicant has to cross (at the provisional measures stage) is set quite low and any ruling – whether as to law or fact – which the Court makes is necessarily provisional" [6].

Thus, the Court had to examine de novo four preliminary objections to its jurisdiction on the merits raised by the Russian Federation.

#### *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.

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*.

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 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. There were concerns too about conformity with domestic Russian law on citizenship, especially the formal requirements on residency. 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. 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.

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. This has been met with protest and condemnation from the rest of the international community, who have consistently treated the conflict as a matter internal to Georgia and in respect of which its territorial integrity was paramount.

#### Parties Arguments.

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.

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.

Russia further argued that its obligations under CERD did not apply outside of its territory and specifically that the provisions relied on in Articles 2 to 4 did not have extra-territorial application.

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. 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) That 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 ICJ.

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.

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 preconditions for the Court's seisin and until they had been exhausted the Court plainly had no jurisdiction.

Decision on Preliminary Objections.

Russia submitted four preliminary objections, two of which turned out to be determinative [7]:

1. First, Russia argued that there was no dispute between the parties regarding the interpretation or application of CERD at the date Georgia filed its application.

2. Second, Russia argued that Georgia had not met the CERD preconditions for the seisin of the Court by failing to negotiate or resort to CERD procedures before instituting proceedings.

With respect to Russia's first preliminary objection, the Court noted that a "dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons." It also observed that while a State does not have to expressly refer to a specific treaty in its communications with another State to be able to invoke the treaty as a jurisdictional basis before the Court, the exchanges have to refer to the subject matter of the treaty "with sufficient clarity to enable the State against which a claim is made to identify that there is, or may be, a dispute with regard to that subject-matter." The Court then proceeded to assess numerous official documents and statements presented by Georgia to determine whether a dispute existed and whether the parties had attempted to negotiate its resolution.

The Court found that between July 1999 and July 2008, there was no evidence of a dispute between the Parties regarding the subject matter of CERD. It held that the submitted documents either:

- (1) did not refer to the CERD, racial discrimination, or ethnic cleansing;
- (2) did not attribute such conduct to Russia, but instead to separatist forces in South Ossetia and Abkhazia;
- (3) were not authored, endorsed, nor acted upon by the Georgian Executive (as the primary representative and spokesperson for the State in its international relations); or
- (4) were not communicated to Russia.

Indeed, instead of perceiving Russia as a party in conflict with Georgia during this time period, the Court construed Russia as a peacekeeper. It cited many documents, including United Nations Security Council resolutions, which made "standard references to the Commonwealth of Independent States (CIS) peacekeeping forces and the Russian Federation's role as a facilitator" of communications between Georgia and the separatist forces. Even as late as June 2008, the Court found, Georgia approached "the Russian Federation as a facilitator, as a potential guarantor and in terms of its role in the CIS peacekeeping forces," rather than alleging Russia's direct or indirect responsibility for racial discrimination or ethnic cleansing in South Ossetia and Abkhazia.

However, after war erupted between Georgia and Russia, the Court found that Georgia made direct allegations of Russia's ethnic cleansing against Georgians in South Ossetia and Abkhazia. On August 9, 2008, Georgian President Saakashvili stated in a press conference that "Russian troops expelled the whole ethnically Georgian population of South Ossetia" and were trying to do the same in Abkhazia. Georgia repeated these claims the following day at the UN Security Council and in subsequent statements, all of which Russia contested.

Consequently, the Court found that there was a dispute between the parties relating to the subject matter of CERD that emerged between August 8 and 12, 2008, the date of Georgia's Application. Thus, Russia's first preliminary objection was dismissed.

Turning to Russia's second preliminary objection, the Court held that Article 22 of CERD established procedural preconditions for the seisin of the Court. The Court concluded that Georgia did not meet these conditions by failing to negotiate with Russia regarding their dispute under CERD or to utilize CERD procedures prior to initiating proceedings at the ICJ.

Based on the ordinary meaning of Article 22, the Court held that the phrase "which is not settled by negotiation or by the procedures expressly provided for in this Convention" would be rendered

meaningless, contrary to the principle of *effet utile*, if it did not require some effort at negotiation or CERD procedures before the seisin of the Court.

The Court rejected Georgia's argument that the phrase was "merely a statement of fact" that a dispute existed since it was not settled. With respect to the substantive requirement of the preconditions set forth by Article 22, the Court held that "negotiations are distinct from mere protests or disputes" and require, 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."

It rejected Georgia's claim that "the threshold for negotiations is low; that substance is more important than form; that it is for the parties to determine whether further negotiations are likely to be fruitful; and that no purpose is to be served in the pursuit of hopeless or futile negotiations." However, it acknowledged that beyond the general guidelines for negotiations that it articulated, "ascertainment of whether negotiations, as distinct from mere protests or disputations, have taken place, and whether they have failed or become futile or deadlocked, are essentially questions of fact for consideration in each case."

Moreover, it recognized that negotiations can be through "diplomacy by conference or parliamentary diplomacy," but emphasized that they must relate to the subject matter of the treaty asserted as the basis for the Court's jurisdiction. Here, however, the Court found that a genuine attempt at CERD-related negotiations was lacking.

The Court noted that both parties accused each other of ethnic cleansing during an emergency session of the UN Security Council on August 10, 2008, and in subsequent statements, but did not attempt negotiations on the subject matter of the CERD. Notably, the Court acknowledged the "complex" nature of this issue, since Russia's Foreign Minister stated that he did "not think that Russia will have the mindset not only to negotiate, but even to speak with Mr. Saakashvili" and that "Mr. Saakashvili can no longer be our partner and it would be best if he left." However, it also observed that Russia "did not dismiss the possibility of future negotiations on the armed activities," presumably with Georgia's Foreign Minister or any Georgian representative other than the President.

Thus, the Court concluded that CERD-related negotiations "were never genuinely or specifically attempted." By ten votes to six, it held that it did not have jurisdiction over the merits.

In a joint dissenting opinion, five judges disagreed with the Court's ruling on Russia's second objection based on two main grounds [8].

First, the dissent argued that a recent ICJ decision interpreted the phrase "which is not settled" as a statement of fact that a dispute has not been settled rather than a condition for negotiations. Quoting the ICJ's decision in the *Oil Platforms Case (Islamic Republic of Iran v. United States of America)* (2003), the dissent noted that a similar phrase – "not satisfactorily adjusted by diplomacy" – did not pose a jurisdictional bar as it was "sufficient for the Court to satisfy itself that the dispute was not satisfactorily adjusted by diplomacy before being submitted to the Court." The dissent noted that "surprisingly, this clear and fairly recent precedent is not even mentioned in the Judgment." However, it then acknowledged that "admittedly, that decision looks to two precedents which, on careful inspection, are not entirely consistent with the position the Court took in 2003." Thus, it concluded that the Court's jurisprudence interpreting phrases similar to those in Article 22 "was not consistent, but was fluid and uncertain," such that there was no clear ordinary meaning of Article 22.

Second, the dissent argued that, assuming Article 22 required negotiations, the Court adopted a "formalistic" rather than a "realistic" approach to the facts of this case in concluding that there was no attempt to negotiate regarding CERD-related issues. Having reviewed the same documents cited in the Judgment, the dissent argued that Russia "maintained an immutable position" and "denied any responsibility for acts of ethnic cleansing." Given Russia's "unwavering stance" – refusing to even communicate, let alone negotiate, with Georgia's President – the dissent concluded that "there was no reasonable possibility of a negotiated settlement of the dispute as it was presented to the Court."

### **Conclusions**

To paraphrase Carl von Clausewitz, this case illustrated litigation as continuation of war by other means. The dispatch with which the proceedings were instituted – merely four days after the outbreak of hostilities – distinguished it from most cases before the ICJ which typically follow years after a dispute emerges, the issues of contention have crystallized, the factual record has developed, and the respective interests of the parties have been identified [9].

The ICJ is a court of first and final instance, but here it became an immediate instrument of military strategy resting on the element of surprise and skillful use of the public media.

Consider, as comparison, the Court's case concerning Maritime Delimitation in the Black Sea (Romania v. Ukraine), which was initiated six years after the start of negotiations between the parties and following twenty-four rounds of negotiations [10].

On the other hand, there may be an emerging trend where litigation becomes legitimately integrated with other tools of international politics in real time as events unfold. For instance, shortly after Col. Muammar el-Gaddafi began to violently suppress the popular resistance to his rule in Libya, the UN Security Council referred him to the ICC for crimes against humanity. In the midst of the ongoing NATO mission to protect Libyan civilians, the ICC has issued arrest warrants against Gaddafi, one of his sons, and his chief of military intelligence. Concurrently, the African Court on Human and Peoples' Rights has issued an order for provisional measures requiring Libya to "immediately refrain from any action that would result in loss of life or violation of physical integrity of person" in breach of its obligations under the African Charter on Human and Peoples' Rights and other international human rights instruments. In these cases, the consent of parties to the dispute turned out to be less relevant to jurisdiction than the power and will of other actors to enforce the courts' judgments, though the practical effectiveness of these decisions is still to be determined.

The debate over the Court's function is likely to continue without any definitive resolution. Each international actor, including the Court, should do what it can to promote human dignity – a philosophy that could be termed "principled pragmatism" [11]. At times, this approach may imply that the Court should decline jurisdiction lest parties in the long-term would be less likely to utilize the Court's procedures without any short-term benefit in resolving the immediate dispute before it. Over time, it appears that the Court has proven to be a wise judge of the scope of its power and has secured compliance with most of its decisions. This record should be expanded, but that will occur only if states file cases that the Court can realistically adjudicate.

The legal importance of the Georgia v. Russia case is that latter 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 [12].

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. 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 [13], 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, the Court had no difficulty in accepting jurisdiction in a dispute concerning the use of force where the jurisdiction was based on a Treaty of Friendship. 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 ICJ 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.

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 (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). 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 of 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 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 state parties on a private rights model reached different conclusions from the facts, both positions shared the same limitations.

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