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The Georgia–Russia conflict: testing the International Court of Justice

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On 12 August 2008, the Republic of Georgia lodged an application with the International Court of Justice (the ICJ) against the Russian Federation in connection with the armed conflict which occurred in the South Caucasus in summer 2008. In its application Georgia complained of violations committed by the Russian Federation under the International Convention on the Elimination of All Forms of Racial Discrimination (the CERD) in the context of Russian interventions in South Ossetia and Abkhazia from 1990 onwards, up to and including the August 2008 armed conflict. The application was made only four days after the commencement of hostilities between the two countries and was followed on 14 August 2008 with a request by Georgia for the order of provisional measures *"to protect its citizens against violent discriminatory acts by Russian armed forces, acting in concert with separatist militia and foreign mercenaries"*, the continuation of which Georgia alleged constituted an *"extremely urgent threat of irreparable harm"* to the rights protected by the CERD.

The use of the CERD in this context has some limitations. Aside from the racial discrimination issue, the conflict also and primarily raised serious issues under general international law: Was the use of force by Georgia against its *de jure* regions of South Ossetia and Abkhazia but *de facto* quasi–independent states legal and

legitimate under international law? Can the use of force by the Georgian army be regarded as an '*armed attack*' within the meaning of Art. 51 of the UN Charter as was claimed by Russia? Does the right of self-defence extend to military action undertaken by one sovereign state in order to protect its 'nationals' staying on the territory of another sovereign state?[1] If it does, can the Russian military actions be accepted as proportionate and adequate? Was the Russian support of armed Ossetian groups legal in the light of the obligation under customary international law not to intervene in the affairs of another State?[2] And finally, how should two universal and at the same time mutually overlapping principles of international law – the principle of territorial integrity and the right of self-determination – be managed?

It would seem that the reliance upon the CERD before the ICJ limits the Court's consideration of the conflict to the human rights issues as outlined in Arts. 2 and 5 of the CERD: *inter alia*, the prohibition of any act of racial discrimination, the right of security of persons, the right of movement and residence and the protection of property. However, since neither Russia nor Georgia had accepted the Court's compulsory jurisdiction under the optional clause,[3] it seems that in the instant case Art. 22 of CERD was the only means by which Georgia could grant to the ICJ the competence (at least *prima facie)* to deal with the dispute, thereby bringing the political and military conflict into the legal arena.[4]

In its application, Georgia alleged that during the conflict, local Ossetian separatist militia, together with foreign mercenaries who remained under the direction and control of the Russian authorities, had committed ethnic cleansing against Georgians, including murder, forced displacement and widespread destruction of property. In response the Russian authorities argued a lack of jurisdiction of the Court and contended that, as the facts at issue related exclusively to the use of force, humanitarian law and territorial integrity, they therefore did not fall within the scope of CERD.[5]

Georgia's request to the ICJ for the Indication of Provisional Measures of Protection was granted by the Court on 15 October 2008, but not solely against the Russian Federation. The ICJ ordered both parties to refrain from any act of racial discrimination within South Ossetia and Abkhazia and the adjacent areas of Georgia. The Court also ordered that both parties ensure the security of persons, the right to freedom of movement and residence and the protection of the property of displaced persons and refugees.

The Court's Order on Provisional Measures was adopted by eight votes to seven. The seven judges who issued the joint dissenting opinion stated that the Russian military offensive in itself did not fall within the provisions of the CERD and thus, there was no 'dispute' with respect to the interpretation or application of the CERD. Arguably, this ambiguous situation considerably weakened the moral authority of the Court's Order despite its formally 'binding effect'. Moreover, the absence of a unanimous approach within the Court may jeopardise the subsequent judicial development of the case.

Regrettably, it is doubtful that the Court will see this case as an opportunity to look beyond the qualification of the parties' conduct under the legal provisions of the CERD in order to clarify the abovementioned wider issues of general international law raised by the South Ossetian conflict. However, if the ICJ were to reaffirm its position on the scope of the right to self–determination and the supremacy of the principle of territorial integrity issues (at least within its *obiter dictum* of the judgment) it could help to facilitate the settlement not only of the Georgia–Russia conflict, but also other similar confrontations.

This case also demonstrates the growing importance of human rights within international law and provides the ICJ with an opportunity to directly examine the substance of those rights. In its recent Order, the Court has already interpreted Arts. 2 and 5 of CERD as having an extra-territorial effect to a state party when it acts beyond its territory.

Proceedings at the ICJ move slowly: the time-limits set by the Court for initial pleadings in this case required that the full Georgian Memorial be served by September 2009, with the Russian Federation's Counter-Memorial due in July 2010. A decision from the Court itself therefore is by no means imminent – it will however be awaited with interest.

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1 Furthermore, it could be argued that the mass granting of Russian nationality to Ossetian residents is not valid in the light of international law due to the lack of its 'sincerité', or, genuineness (there has to be a complex bond of attachment between a national and a state - see in particular the ICJ's case *Nottebohm (Liechtenstein v Guatemala)*, judgment of 6 April 1955, p. 26).

2 The ICJ found a violation of the principle of non-intervention in internal affairs by a state which supports military and/or paramilitary activity in the territory of another state in its judgment in the case *The Military Activity in Nicaragua (Nicaragua v United States)*, judgment of 27 June 1986 (see in particular § 3 of the operative part of the judgment).

3 The optional clause provides that a state may recognise as compulsory the jurisdiction of the Court in all eventual legal disputes concerning any question of international law (see Art. 36-2 of the Statute of the ICJ).

4 This strategy was skilful as it also allowed Georgia to ask the Court to indicate provisional measures in order to, *inter alia*, stop the Russian military offensive.

5 See the Order of 15 October 2008: Request for the Indication of Provisional Measures in the case *Georgia v Russian Federation*, § 95. Available at: http://www.icj-cij.org/docket/files/140/14801.pdf.