



Corvinus University of Budapest

**Georgia and Russia Dispute over South Ossetia and Abkhazia: Concerning the
Application of 1965 International Convention on the Elimination of All Forms of
Discrimination**

International Law in Practice I

Maudy Noor Fadhlia

AAK19V

2019/2020

A. Introduction

Armed conflict broke out between Russia and Georgia in the Abkhazia and South Ossetia in early 2008. The dispute was preceded by public military confrontation between two states, with both sides making claims and counterclaims about the alleged violations of the international law norms on the use of force. In response, Georgia took this case to International Court of Justice (ICJ) on 12 August 2008, alleging that Russia violated its obligations under CERD by engaging in widespread and systematic discrimination against ethnic Georgians in that region (ICJ Reports, 2008). Two days later, Georgia went back to the ICJ to request the indication of provisional measures where they indicated that Russia alleged an extremely urgent threat of irreparable harm. But according to Georgia's application to ICJ, Russia armed hostilities continue a dispute that predates a break up of former Soviet Union, where Georgia has formally declared its independence from Soviet Union in 1991. However, South Ossetia and Abkhazia had been openly advocating for autonomous status, which was refused by Georgia.

From the onset of five days war between Georgia and Russia in South Ossetia, the conflicting parties failed to take necessary measures to protect civilians from the hostilities. Villages and residential areas in towns were bombed and shelled. So the overall number of civilian deaths outnumbered the number of combatants. All of the facilities such as homes, hospitals, and schools were damaged or destroyed. The conflict displaced nearly 200,000 people and made tens of thousands unable to return to home (Itami, 2011). It rose concerns that serious violations of human rights was committed by both parties during the conflict. Russia sympathized with the separatist movements and provided support to them by sending Russian troops to the regions and also providing weapons and supplies. But in 1994, Georgia reached settlements with the separatist forces and Russia, in which Russia agreed to a joint peacekeeping force in the region. However, Georgia stated that Russia has improperly interfered in these regions by engaging in widespread and systematic discrimination, including attacks and mass expulsion against ethnic Georgian populations in these regions. Georgia authorities brought up the statement that Russia violates the articles 2, 3, 4, 5, and 6 of CERD (ICJ Reports, 2008).

It was surprising that the alleged violations was based on provisions of International Convention on the Elimination of All Forms of Racial Discrimination (CERD), where the Court does not have jurisdiction or even give judgment on the merits. Because the dispute retained historical significance, so the Court had to interpret the provisions of the convention. International Court's jurisdiction is based on state consent, and none of the relevant instruments that were binding on the two states provided a jurisdictional basis for disputes on the use of force. The substance of the dispute was concerned with racial discrimination which is mentioned in CERD and becomes a convenient peg for Georgia's public articulation. The Court itself ruled on the preliminary phase of the dispute, and decided that the issues about racial discrimination were largely peripheral in the context about the use of force. So instead, the Court took the provision of Article 22 in the Convention that requires the parties to attempt a negotiated settlement before proceeding to adjudication which had not occurred.

The International Court of Justice has been attentive to the basis of its jurisdiction and having reached the conclusion that it had no jurisdiction to proceed to the merits. Because it did not express the opinion on the substantive issues that were central of the dispute, even though both parties had put forward the issues in their oral and written pleadings. Despite that, the dispute had raised some of the

important issues in international law, which makes its merits extended consideration.

B. Georgia-Russia Dispute

The status of South Ossetia is one of issues over sovereignty that accompanied Georgia's exit from Soviet Union, along with Abkhazia which located in the Black Sea coast. The former autonomous region of South Ossetia is known as Tskhinvali district in Georgia. The conflict happened for two years between 1990 and 1992, then ended with *de facto* secession of South Ossetia. The same thing also happened in Abkhazia in 1992 when Georgian military defeat the other parties in 1993. South Ossetia and Abkhazia has proclaimed their independence from Georgia, yet no state recognized their independence until the conflict arose. That was the beginning of serious resumption of violence in South Ossetia since August 2004. *De facto* authority in the capital of the region refers itself as the Republic of South Ossetia, which was not even recognized by one state until Russia recognized it on 26 August 2008 (Drachev, 2008). Nicaragua is the other state to have recognized the independence of South Ossetia and Abkhazia. South Ossetia did not controlled entirely by their own authorities, because parts of the territory within the former South Ossetian autonomous region which was mainly populated by Georgians, remained under Georgian control. Therefore, the conflict in South Ossetia represented a patchwork of territories under *de facto* Georgian and South Ossetian control.

Moreover, Russia has given various forms of support to the *de facto* regions in South Ossetia and Abkhazia since 1990. They even issued passport for certain amount of population in each territory. Without these passports, the inhabitants of South Ossetia and Abkhazia would not be allowed to travel internationally since they had no other document, other than the politically charged of Georgian passport. Regarding to this matter, Russia even claimed that military action against Georgia was necessary in order to protect Russia citizens who are living there. The *de facto* administration of South Ossetia in the capital Tskhinvali has been led by President Kokoity since 2001 (Allison, 2008). All of sudden, *de facto* administration backed by Tbilisi and led by Dmitri Sanakoev, emerged in the region. Sanakoev consistently became an advocate of resolving the conflict within the framework of Georgian territorial integrity.

Since April 2008, the tensions around the region increased, which deteriorated Georgia-Russia relations (Okowa, 2011). In July of the same year, there were even reports of armed clashes, Georgian military personnel kidnapped, firing on Georgian and Tskhinvali villages, alleged violation of Georgian airspace by Russian military aircraft, and shooting incidents in the region. These incidents had been a sign of the collapse of the formal negotiations for resolving conflict between both parties. On 31 July, there was a report indicate that South Ossetian and Abkhazian forces blew up and attacked a Georgian military vehicle which carried Georgian peacekeepers. Both sides accused each other of using mortar fire.

On 8 August 2008, Russia launched a full-scale military operation in Georgia to protect its peacekeepers and nationals who were facing attacks in South Ossetia and Abkhazia (Drachev, 2008). Many attempts had been done, such as suggested talks by both parties which later collapsed and convene a United Nations Security Council emergency meeting which also failed. Georgia declared a ceasefire on television then launched an offensive in the capital of South Ossetia, Tskhinvali. Georgia claimed its bold action was a response, as Georgia had decided to restore constitutional order in the entire region. Meanwhile, Russia also started to move their tanks into Georgia. They commented how its action was the way of response to what Georgia do in

Tskhinvali. Even if Georgian forces initially took control of parts of South Ossetia and several surrounding villages, Russian forces rapidly repelled them. As Russian forces were taking control of South Ossetia, hostilities further extended to some locations outside South Ossetia and the part of Abkhazia under Georgian control. Russian forces quickly took control over these location, backed by air forces.

Later on 12 August, Russia announced the end of Russian operations in Georgia and continued to be deployed in areas outside of Abkhazia and South Ossetia (Drachev, 2008). Cessation of hostilities was finally achieved on 16 August when both parties agreed to comply with the terms of European Union brokered ceasefire under the leadership of Nicolas Sarkozy. This conflict itself has a long history and events followed by the emergence of Georgia as an independent state.

It appears that there was deliberate misinformation and exaggerated reports during the course of conflict, especially in the early stages, while a certain degree of confusion and conflicting information is practically inevitable during this intense fighting period. The problem of obtaining reliable information was undeniable by the blocking of access by both parties for independent monitors to verify claims of civilian casualties by the parties and reproduced in international media. The withdrawal of Russian forces from the buffer zones began with the dismantling of some checkpoints established in Georgian territory near South Ossetia in early October. There was a car bomb happened during that time, which killed some Russian soldiers and injured several others but no one claimed responsibility for this attack. Russia completely withdrew on 10 October, although Russia continues to maintain a significant military presence in both South Ossetia and Abkhazia.

C. Jurisdiction Issue

The dispute brought up the question of state complicity in the acts of armed rebel groups and circumstances where the activities of that groups can be attributed to a state or institutions, as well as its consequences. The arguments of both parties had been controversial especially from the request of provisional measures and preliminary objections submitted by both Georgia and Russia. Georgian authorities had indirectly raised the question of Russia conferment legality on the inhabitants of South Ossetia and Abkhazia. Given a judgment to the merits, the Court had to address the question of succession in matters of nationality and whether the international law imposes any constraints under the state municipal law. Apparently, Russia had extended its citizenship to South Ossetia and Abkhazia. Russia action was based on the claim that citizenship was when the inhabitants had the ability to speak the Russian language and in the absence of any formal ties of kinship or allegiance (ICJ Reports, 2008). Extra territorial collective naturalisation was contrary to international law. There were also some concern about conformity with Russian domestic law on citizenship about the formal requirements on residency. In some cases, several citizens had been granted Russian citizenship one month before the invasion.

The conflict also raised questions about the application of law on self determination in the context of secession, whether the enforceable content of international law contains criteria applicable to breakaway the republics. It also involved an examination of legal consequences of providing armed support to separatist groups who protested their parent state, in this case Georgia. The issue of self-determination in general has only been considered in the context of people under colonial or foreign military occupation, the application outside those contexts remains problematic and not examined comprehensively in international dispute settlement. The dispute presented the International Court with 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 placed on the exercises of the mentioned right.

This case also involved the recognition of states, in which the period between the application and delivery of judgment on preliminary statement by the respondent party, Russia proceeded to extend recognition to the two regions. This met with protest from the international community who treated the conflict as an internal matter to Georgia. The central of this dispute were the legal implications of secession and the related problems of recognition. Although South Ossetia and Abkhazia have been autonomous from Georgia, their formal independence has been largely unsuccessful. Assuming that all the other conditions are met, the recognition of these regions brought up the question whether the circumstances when international law must accept that statehood is not a viable option in small entities that are unlikely to function as members of international community because of their limited size existed.

The dispute between Russia and Georgia has raised a hesitation about Russia's obligations under CERD and the extent to which the obligations could be regarded as having extra territorial application (Okowa, 2011). There had been an essential problem, whether the convention obligations under CERD were territorial in application or whether they operated as effective constraints on the conduct of involved parties. Georgia argued that the obligations under CERD did not have a limitation and were equally applicable to Russia's conduct on Georgia's territory. The violation of several articles of CERD had been mentioned. Russia alleged actions of discrimination include murder, torture, rape, deportation and forcible transfer, imprisonment, hostage taking, enforced disappearance, and any unlawful appropriation of property not justified by military necessity. Georgia further alleged that Russia seeks to consolidate changes in the ethnic composition of South Ossetia and Abkhazia, resulting from its actions to prevent the forcibly displaced ethnic Georgian citizens to return to South Ossetia and Abkhazia. They also undermined Georgia's capacity to exercise jurisdiction in this part of its territory. Georgia contended that the changed demographic situation in South Ossetia and Abkhazia was intended to provide the foundation for the unlawful assertion of independence from Georgia by *de facto* separatists authorities. Georgia asked the International Court to order Russia to comply with its obligations under CERD and to pay compensation for its actions. Georgia also submitted an urgent request pursuant to Article 41 of ICJ Statute for the indication of provisional measures against Russia (ICJ Reports, 2008).

D. Statements from both sides

The parties arguments offered valuable insights about the issues to go deep into the dispute. Georgia based its application on the jurisdictional matters in Article 22 of CERD. It mentioned that any dispute between two or more state 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 Court for decision, unless the parties involved in the dispute agree to another mode of settlement. Therefore, the Court was not called upon to re-examine the question on whether there was a rule of automatic succession to human rights treaties under general international law.

Russia put forward a number of substantive and procedural objections to the International Court jurisdiction at the provisional measures phase. Russia argued that the intervention had been in the nature of a peacekeeping operation with the express

consent of Georgia. In this argument, there was the suggestion that the circumstances and the justification for its intervention were in fact inconsistent with deliberate violation of human rights. Russia also argued that its obligations under CERD did not apply outside of their territory. They mentioned that the specific provisions in Article 2, 3, and 4 did not have extra territorial application. Russia claimed that the responsibility for violations of obligations under CERD rested primarily with the separatist authorities in South Ossetia and Abkhazia (ICJ Reports, 2008). Referring to the request for provisional measures, Russia maintained that the dispute fell outside the scope of CERD. In the end, Russia argued that if there were a dispute, it would relate to the use of force, territorial integrity and international humanitarian law, but not racial discrimination. They denied that the exercise of requisite degree of control attributable to Russia, so Russia was not legally responsible for violations of human rights in the two regions. In Russia's view, the fact that Georgia has never complained to the Committee on the Elimination of Racial Discrimination demonstrates that Georgia never viewed this matter as a violation of CERD. Russia also mentioned that even if CERD were applicable, the procedural requirements of Article 22 had not been met (ICJ Reports, 2008). Because Georgia had failed to provide evidence that it had attempted to negotiate, as required by the provision, nor it had indicated that it had attempted some form of mechanism provided by the convention before taking this dispute to the International Court of Justice.

Based on these arguments, Russia asked the Court to declare that it lacked jurisdictional competence to hear the dispute and that decided the request for provisional measures supposed to be rejected and the case removed from the list. In opposite, Georgia maintained that Article 22 was merely a descriptive process that the parties could avail themselves without making it an indispensable requirement. Georgia realized of the disconnect between the declared basis of jurisdiction and the substance of dispute, so it was keen on the *jus ad bellum* aspect of the dispute, which it emphasized that it was not making claims under the applicable law of use of force or international humanitarian law (Okowa, 2011). Instead, it confined to breaches of rights owed to ethnic Georgian under Article 2 and 5 of CERD.

On 15 October 2008, in a closely divided 8-7 vote, the International Court rejected Russia's position and determined the the Court does not have jurisdiction pursuant to CERD (ICJ Judgment, 2011). In its order, the International Court first determined that it has jurisdiction pursuant to the dispute resolution clause of CERD because both Russia and Georgia are parties to CERD and there is a disagreement between state parties to CERD as to the interpretation and application of the convention. So it noted that the provisions were of a general nature and applied equally to a state party when it acted beyond its borders. The Court noted that Article 22 of CERD was unlike other jurisdictional instruments of a similar nature, which contained binding pre-conditions for their application. The relevant convention specified that a prescribed period must lapsed before the dispute could be brought for judicial adjustment. Russia had argued that the preconditions for bringing the matter to the Court had not been met because Georgia did not first bring the matter to the attention of the Committee according to Article 11 of CERD (ICJ Reports, 2008). The Court disagreed and stated that the record showed that the matter had in fact been raised in bilateral contacts between the parties and had not been resolved. The International Court then held that CERD does not require that a matter be brought to the Committee before the International Court may be seized of jurisdiction. The Court determined that there is no restriction of a general nature in CERD concerning its territorial application.

E. Court decisions

The Court indicated the provisional measures against the respondent party and the applicant. Thus, it stated that it has power to indicate this but the preservation of respective rights of parties pending the decision of the Court, in order to ensure that irreparable prejudice shall not cause misunderstanding of the subject of dispute. The Court stated further that it is not called upon to establish the existence breach of CERD but to determine whether the circumstances require the indication of provisional measures for the protection of rights under CERD. Moreover, the Court also stated that the rights in question, particularly Article 5 paragraph (b) regarding the security of the person against violence or bodily harm and paragraph (d) (i) regarding the freedom of movement, are coming from nature that prejudice could be irreparable. The Court determined that the indication of provisional measures is required for the protection of right under CERD. The International Court called on both parties to refrain from any acts of racial discrimination and to ensure the security of all persons , the freedom of movement, and property of displaced persons and refugees.

All of other similar attempts to base jurisdiction on CERD have failed, making Georgia's application the first one to successfully establish jurisdiction on the basis of CERD. Despite the obvious issues raised by this dispute with respect to international humanitarian law, the Court will be limited to interpreting and applying the provisions of CERD since jurisdiction is founded exclusively on that convention. Referring to the merits of dispute, Article 1 of CERD defines racial discrimination broadly as any distinction, exclusion, restriction or preference based on race, color, national or ethnic origin which has the purpose of recognizing the human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life (CERD, 1965). Georgia alleges that the most relevant treaty provision to this dispute are Article 2 to 6 of CERD.

The Article 2 mentioned that each state party undertakes to engage in no act or any practice of racial discrimination against persons, groups of persons or institutions. (CERD, 1965). They also can not sponsor, defend, or support racial discrimination by any persons or organizations. The second statement may support the Georgia's argument that Russia does have an affirmative obligation to refrain from supporting racially discriminatory acts by persons in Abkhazia and South Ossetia. Oppositely, Article 3 and 6 support Russia's position that CERD is not intended to apply extra-territorially. Article 3 mentioned that states parties condemn racial segregation and apartheid to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction (CERD, 1965). Article 6 also mentioned something similar that state parties shall assure to everyone within their jurisdiction an effective protection and remedies, against any acts of racial discrimination which violate human rights and fundamental freedoms contrary to this convention (CERD, 1965).

In the end, the Court took a formalistic view of its role and mandate under Article 22 and not considering the wider questions that were implicit in Georgia's application. It did not consider or make reference to any of substantive issues that underpinned the dispute. After reviewing the evidence and the exchanges between both parties, the Court concluded that a number of unilateral statements made by Georgia definitely demonstrate that a dispute concerning Russia obligations under CERD came into existence (ICJ Judgment, 2011). The documentary evidence provided by Georgia was vague. The evidence could be regarded as legally determinative of presence of dispute. With the result of votes 12-4, the Court decisively rejected Russia's first preliminary objection on the alleged non existence

on the date of application was filed between two parties concerning the application of CERD (ICJ Judgment, 2011).

The Court also took the view that even if the conditions of attempt at negotiation between the parties had been fulfilled because it was a matter for objective determination and any different kind of interpretation would deprive the effectiveness of those provisions. The Court could not have assumed jurisdiction if negotiations were a condition pre-requisite to the exercise of that jurisdiction. The decision to uphold the second preliminary objection was arguably inconsistent with decision on provisional measures, by ten votes to six. International Court concluded that Georgia made no attempt at negotiations in the narrow period when the dispute came into existence and before the filing of the application. As a result, there was no point in examining whether the negotiations with respect to substantive obligations under CERD had become futile or deadlocked (ICJ Judgment, 2011).

F. Conclusion

In this case, it was clear that the possibility of a judgment on the merits was unlikely and the International Court was being used as a convenient platform for the public articulation and to draw international attention to Georgia's pledge, without any intention of engaging the judicial function in the actual settlement of the dispute. The dispute brought up the question whether the Court should assume jurisdiction under a treaty such as CERD, when the racial discrimination issue was only a marginal aspect of much larger dispute in another area of international law, which are the legality of use of force. The Court has taken a view that it will not refuse to hear a claim because dispute has reasons that did not litigate, however it has not been entirely consistent in the application when the subject matter of dispute is only governed by the treaty instrument. The Court does not have jurisdiction over the use of force questions, because international dispute settlement system is firmly rooted in state consent and the Court's role is limited to settling actual disputes between states parties on a private rights model.

References

- Allison. (2008). Russia Resurgent? Moscow's Campaign to Coerce Georgia to Peace. *International Affairs* 6-1145
- Amnesty International. (2008). *Civilians in the Line of Fire: The Georgia-Russia Conflict*. Amnesty International Publications. Accessed on 30 December 2019 at <https://www.amnesty.org/download/Documents/52000/eur040052008eng.pdf>
- Buys, Cindy Galway. (2009). Case Concerning Application of International Convention on the Elimination of All Forms of Racial Discrimination. *American Journal of International Law*, Vol. 103, No. 294. Accessed on 31 December 2019 at file:///C:/Users/HP/Downloads/SSRN-id1672862.pdf
- Chivers, C.J.; Barry, Ellen. (2008). Georgia claims on Russia War called into question. *New York Times*. 6 November 2008. Accessed on 1 January 2020 at , <http://jurist.law.pitt.edu/forumy/2008/08/russia-georgia-and-useof-force.php>
- Drachev. (2008). Russia recognizes Abkhazian & South Ossetian independence. *Russia Today*. Accessed at 01 January 2020 at <http://rt.com/politics/russia-recognises-abkhazian-and-southossetian-independence>
- Higgins and O'Reilly. (2009). The Use of Force, Wars of National Liberation and the Right of Self Determination in the South Ossetian Conflict. *International Criminal Law Review* 9-567
- ICJ. (2008). Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation). Provisional Measures. Accessed on 29 December 2019 at www.icj-cij.org/docket/files/140/14663.pdf
- ICJ. (2008). Georgia Report in Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation). Application Instituting Proceedings. Accessed on 29 December 2019 at <http://www.icj-cij.org/docket/files/140/14657.pdf>
- ICJ. (2011). Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation). Preliminary Objections, Judgment. Accessed on 29 December 2019 at : : <http://www.icj-cij.org/docket/files/140/16398.pdf>
- International Convention on the Elimination of All Forms of Racial Discrimination (CERD). 21 December 1965. Accessed on 30 December 2019 at <https://www.ohchr.org/en/professionalinterest/pages/cerd.aspx>
- Itami. (2011). ICJ upholds Russian Preliminary Objection in Georgia. *Harvard National Security Journal* 1. Accessed on 31 December 2019 at <http://harvardnsj.com/2011/04/icj-upholds-russian-preliminary-objections-in-dispute-with-georgia>
- Okowa, Phoebe. (2011). The International Court of Justice and the Georgia/Russia Dispute. *Human Rights Law Review* 11:4. Accessed on 31 December 2019 at <http://www.corteidh.or.cr/tablas/r27638.pdf>