

Provisional Measures in the ‘*Case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination*’ (Georgia v. Russian Federation)

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Table of Contents

A. Introduction.....	144
B. The Jurisdiction of the Court	144
I. A “dispute [...] with respect to the interpretation or application of the Convention” and Jurisdiction Under Article 41 of the ICJ Statute	145
1. The Test Under Article 41 of the ICJ Statute	145
2. The Applicability of CERD.....	148
II. A Dispute “not settled by negotiation or by the procedures [of CERD]”	152
C. The Risk of Irreparable Prejudice and the Urgency of Provisional Measures	153
D. The Measures Indicated	155
E. Conclusion	157

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A. Introduction

On 15 October 2008, the International Court of Justice indicated provisional measures under Article 41 of its Statute in the Case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russia)*.¹ By these measures, it instructed both Russia and Georgia to refrain from specified violations of the Convention,² to do all in their power to prevent their public authorities from committing such violations, to facilitate humanitarian assistance, and to generally refrain from any action which might prejudice the rights under adjudication in the case. The Order of the Court was made by a vote of eight to seven, and gave rise to a Joint Dissenting Opinion by seven judges. Those judges expressed not only their dissent from the making of the Order, but also their disagreement with the majority's finding of even *prima facie* jurisdiction.³

The case has already raised a few interesting issues relating to the Court's jurisdiction to indicate provisional measures, and to the interpretation of CERD. These issues were all hotly contested not only between the parties, but also between the judges of the ICJ. This note will give a brief overview of the decision of the Court, and will comment on some outstanding features of the different opinions expressed.

B. The Jurisdiction of the Court

The main issue which divided the parties and the judges was whether the Court had jurisdiction to indicate provisional measures. Such

¹ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Order of 15 October 2008 (*Georgia v. Russia*), available at <http://www.icj-cij.org/docket/files/140/14801.pdf> (last visited 10 December 2008).

² International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, 660 U.N.T.S. 195 (hereinafter CERD). On the measures indicated by the Court, see further Section D below.

³ *Georgia v. Russia* (see, *supra*, note 1), Joint Dissenting Opinion of Vice-President Al-Khasawneh and Judges Ranjeva, Shi, Koroma, Tomka, Bennouna and Skotnikov, esp. para. 23 (Joint Dissenting Opinion) available at <http://www.icj-cij.org/docket/files/140/14805.pdf> (last visited 10 December 2008).

jurisdiction could only be based on Article 22 of CERD,⁴ which provides that:

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

Article 22 raises two questions: first, whether there was a dispute between the parties “with respect to the interpretation or application of the Convention,” and secondly, whether the requirement that the dispute should be “not settled by negotiation or by the procedures expressly provided for in [CERD]” had been met in the case before the Court.⁵

I. A “dispute [...] with respect to the interpretation or application of the Convention” and jurisdiction under Article 41 of the ICJ Statute

1. The Test Under Article 41 of the ICJ Statute

In order to have a power to indicate provisional measures, the Court must have *prima facie* jurisdiction.⁶ The Court does not, however, have to be entirely certain that it has (complete) jurisdiction to decide the case on its merits later; any such requirement would ask too much of the provisional measures procedure, which is designed, above all, to provide fast interim relief.⁷ In the case of *Georgia v. Russia*, the title of jurisdiction invoked by the applicant was a compromissory clause in a treaty, which establishes the

⁴ Georgia has not brought forward any other basis of jurisdiction, and it is not for the Court to search for titles of jurisdiction that have not been invoked before it: *Christian Tomuschat*, Art. 36 in: *Andreas Zimmermann et al.* (eds), *The Statute of the International Court of Justice. A Commentary* (2006), 609, mn 30.

⁵ Joint Dissenting Opinion (see, *supra*, note 3), para. 6.

⁶ *Fisheries Jurisdiction (United Kingdom v. Iceland)*, Provisional Measures, Order of 17 August 1972, I.C.J. Reports 1972, 12-19, 16 (para. 17); see, *supra*, note 1 *Georgia v. Russia*, para. 85.

⁷ Cf. *Karin Oellers-Frahm*, Art. 41 in: *Zimmermann et al.* (note 4), 934, mn 27.

jurisdiction of the ICJ over disputes relating to the subject-matter of the treaty. The question therefore arises to what extent the Court needs to ascertain whether the respondent has indeed violated the treaty, or that the facts complained of would, if found to exist, come within the scope of the Convention.⁸

Georgia v. Russia was not the first time that the Court has had to deal with this question. In the *Kosovo* (officially: *Legality of Use of Force*) cases relating to the 1999 NATO campaign, Yugoslavia based the jurisdiction of the Court on the compromissory clause in the Genocide Convention. The Court held at the time that it should examine whether “the breaches alleged by Yugoslavia are capable of falling within the provisions of [the Genocide Convention].”⁹ That test was expressly taken from the judgment on jurisdiction in the *Oil Platforms* case.¹⁰ In that case, the Court had enquired whether the facts, as alleged by the applicant, would “fall within” the treaty in such a way as to amount to a violation, if not disproved or justified.¹¹ The NATO bombings did not, on that test, fall within the Genocide Convention, as they – fairly clearly – did not disclose the requisite intent to destroy any protected group.¹²

Against that background, the Court said in *Georgia v. Russia*:

“in the view of the Court, the Parties disagree with regard to the applicability of Articles 2 and 5 of CERD in the context of the events in South Ossetia and Abkhazia; whereas, consequently, there appears to exist a dispute between the Parties as to the interpretation and application of CERD; whereas, moreover, the acts alleged by Georgia appear to be capable of contravening rights provided for by CERD, even if certain of these alleged acts might also be covered by other rules of international law,

⁸ See *id.* p. 935, mn 28-30, and, with respect also to the question of complete subject-matter jurisdiction in such a context, *Christian Tomuschat*, Art. 36 *id.* p. 624-625, mn. 57-60.

⁹ *Legality of Use of Force (Yugoslavia v. Belgium)*, Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999, 124-141, 137 (para. 38) (Kosovo). The parallel cases against the other member States of NATO (except Spain and the US) were to like effect.

¹⁰ *Oil Platforms (Islamic Republic of Iran v. United States Of America)*, Preliminary Objection, Judgment, I.C.J. Reports 1996, 803-821, 810 (para. 16).

¹¹ See *id.*, at 811 (para. 20); Separate Opinion of Judge Higgins, at 847, 856-857 (para. 34). See also *id.*, Separate Opinion of Judge Shahabuddeen, at 822.

¹² *Kosovo* (see, *supra*, note 9), at 138 (paras 40-41).

including humanitarian law; whereas this is sufficient at this stage to establish the existence of a dispute between the Parties capable of falling within the provisions of CERD, which is a necessary condition for the Court to have *prima facie* jurisdiction under Article 22 of CERD.”¹³

The first of these considerations is not easily understood. The dissent charges that the majority simply treats the existence of divergent views, relating to CERD, as disclosing a dispute within the meaning of Article 22.¹⁴ If so, then that is certainly a departure from the *Kosovo* precedent¹⁵, despite the invocation of the same language towards the end of the quotation, and a very permissive application of Article 22 of CERD: if the Convention does not apply even to the alleged facts of a case, it is difficult to see why a mere opinion that it does should make the case amenable to a merits review under the Convention, with the obvious result that there has been no violation. The Court, however, may not have said that it does; after all, its provisional conclusion to the first sentence is only that “there appears to exist” a dispute of the kind required. The argument might therefore be that the fact that the parties express divergent views on CERD merely *points to* the relevance of the Convention to the facts at issue. Yet that is also unpersuasive, since it is quite natural that a respondent State would defend itself against any serious charge made by the applicant, however irrelevant or outlandish it may be. The only reasonable construction appears to be that, in order to be a dispute on CERD, a state of affairs has to be a ‘dispute’ first, in the general sense of any “disagreement on a point of law or fact,”¹⁶ and then a dispute relating to CERD (on the *Kosovo* test). Whether the Court has actually said that, however, may be open to question.

The second part of the quotation, according to which “the acts alleged by Georgia appear to be capable of contravening rights provided for by CERD”, departs from the language used in *Kosovo*, in that the test expounded there went further than to ask only whether the alleged facts

¹³ *Georgia v. Russia* (see, *supra*, note 1), para. 112.

¹⁴ *Georgia v. Russia* (see, *supra*, note 3), Joint Dissenting Opinion, para. 10.

¹⁵ The Court had also said there: “the Court cannot limit itself to noting that one of the Parties maintains that the Convention applies, while the other denies it” (*Kosovo* [note 9], 137 [para. 38]).

¹⁶ See on this general requirement, separating the Court’s *contentious* jurisdiction from an advisory function for States that it does not have, *Mavrommatis Palestine Concessions* (*Greece v. United Kingdom*), P.C.I.J., Series A, No. 2, 11; *East Timor* (*Portugal v. Australia*), I.C.J. Reports 1995, 90-106, 99-100 (para. 22).

appeared to be capable of violating the Convention. However, that merely restores to the Article 41 enquiry an element that *Kosovo* did not really express, namely the rule that jurisdiction need only appear *prima facie*. The earlier case involved a relatively simple legal assessment, which only had to point out that a use of force did not, without more, entail genocide. On those grounds, jurisdiction could be denied even on the relatively demanding test from *Oil Platforms*.¹⁷ But that enquiry, which would have demanded a full analysis of all legal issues in the case (other than justifications under the treaty), cannot generally be appropriate at the provisional measures stage.¹⁸ It is anything but a *prima facie* examination, and as such, may take up more of the Court's time than Article 41 applications are designed to do.¹⁹ *Kosovo* should therefore be taken to have described *what* the Court needed to examine, *i.e.* when a compromissory clause applied, but not how certain (*prima facie*) it would have to be.

Even so, the Court's treatment of this point on the facts was rather brief, amounting to little more than a mere assertion that the allegations appeared to engage CERD.²⁰ It might be noted, though, that the Court has been known to be as obscure even in a merits judgment, for example, in the *Armed Activities* case, where it found the established facts to have violated a whole list of rules.²¹

2. The Applicability of CERD

As in *Armed Activities*, the Court had, at least, some brief comments on the applicability of the provisions at issue, if not on the application of the provisions as such. The Court stated, quite briefly, that the fact that there might be issues also under international humanitarian law or the *jus ad bellum* did not mean that there were no issues under CERD.²² Moreover, it

¹⁷ The Court naturally allowed for amended pleadings at a later stage, reviewing only the facts already before it.

¹⁸ *Cf.* also *Oil Platforms* (see, *supra*, note 10), Separate Opinion of Judge Higgins, at 857 (para. 35).

¹⁹ See, *supra*, text at note 7.

²⁰ As criticised by the Joint Dissenting Opinion (*supra* note 3), para. 10. For the allegations see para. 111 of the Order.

²¹ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, I.C.J. Reports 2005, 168, 244 (para. 219) (*Armed Activities*).

²² See the quotation from *Georgia v. Russia* above, and generally on the application *pari passu* of human rights and humanitarian law *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, Advisory Opinion, I.C.J. Reports

concerned itself with a Russian argument to the effect that CERD could not apply to actions by Russia outside its own territory. This would have made the dispute one not about CERD and ruled out provisional measures for the protection of CERD rights.²³ That submission was based on a general presumption against the extraterritorial effect of treaties derived from Article 29 of the Vienna Convention on the Law of Treaties,²⁴ and on the wording of Articles 2 and 5 of CERD.²⁵

The argument drawn from Article 29 VCLT holds some attraction, particularly because the official title of the article (“Territorial scope of treaties”) suggests that the article also covers the extraterritorial application of treaties, as opposed to just their application *throughout the territory* of every State party.²⁶ Yet the drafters of the VCLT in the International Law Commission expressly excepted the former question from the scope of the article, and its wording contains no reference to the problem.²⁷ There also does not seem to be any good reason why there *should* be a general presumption against the extraterritorial application of treaties. States are perfectly entitled to enter into obligations binding themselves, no matter *where* they will be bound by such law.²⁸ Real problems arise only if States create obligations, by treaty, that not only apply abroad, but also *to third States*;²⁹ or if a treaty makes directly effective law that its parties do not have jurisdiction to make, due to the absence of any territorial, *or personal or other proper* link. Such treaty rules would be beyond the powers of their makers, but in neither case would the problem really lie with the *extraterritorial* application, as opposed to their application *ratione personae* (to third States) or the absence of *any* title of jurisdiction. The only basis,

2004, 136-203, 177-178 (paras 105-106) (Wall Opinion); see, *supra*, note 21, *Armed Activities*, at 243 (para. 216).

²³ CR 2008/23, available at <http://www.icj-cij.org/docket/files/140/14713.pdf> (last visited 10 December 2008), at 39 (*Zimmermann*).

²⁴ Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331 (hereinafter VCLT). Article 29 provides: “Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.”

²⁵ CR 2008/23 (see, *supra*, note 23), at 40-42 (*Zimmermann*).

²⁶ *Contra Adolfo Maresca*, *Il diritto dei trattati* (1971), 382.

²⁷ ILC Draft Articles on the Law of Treaties, Yearbook of the International Law Commission 1966, vol. II, 213-214; *Syméon Karagiannis*, Art. 29 in: *Olivier Corten & Pierre Klein* (eds), *Les Conventions de Vienne sur le droit des traités* (2006), vol. II 1230-1231, mn. 60, 61; *Maresca* (see, *supra*, note 26), 382.

²⁸ *Cf. Tobias Thienel*, *The ECHR in Iraq*, *Journal of International Criminal Justice* 6 (2008), 115-128, 116, 125-126.

²⁹ *Cf. Karagiannis* (see, *supra*, note 27), 1232, mn. 63.

therefore, on which a presumption against extraterritorial effect could rest would not be that such effect is legally problematic, but that States are simply more likely to only want to make law for their home jurisdiction. That, however, would seem to be a matter of every treaty's own object and purpose, and not the province of any general presumption.

The Court did not pronounce explicitly on the existence of the presumption invoked by Russia, but it certainly approached the matter from another direction, holding that:

“there is *no restriction* of a general nature in CERD relating to its territorial application; whereas it further notes that, in particular, neither Article 2 nor Article 5 of CERD, alleged violations of which are invoked by Georgia, contain a specific *territorial limitation*; and whereas the Court consequently finds that these provisions of CERD generally appear to apply, like other provisions of instruments of that nature, to the actions of a State party when it acts beyond its territory.”³⁰

It might even be thought that the Court has applied a presumption in *favour* of extraterritorial effect, looking only for textual evidence *against* such effect. However, the Court's brief reference to “other [...] instruments of that nature” may well point to its real, more convincing thoughts. The Court and others have previously held that other human rights treaties apply extraterritorially, on the grounds of their object and purpose.³¹ a State should not be allowed to do abroad what it cannot do at home.³² The inference from that object and purpose is that human rights treaties will bind their parties wherever they may be acting, unless some territorial limitation otherwise appears from the treaty. As CERD is an “instrument of that nature,” the same interpretive approach – a *quasi*-presumption, arising from the treaty itself, not the general law – fell to be applied to it.

On that approach, there certainly is nothing in CERD to suggest any territorial limitation. Its central provision, Article 2(1), provides, so far as is

³⁰ *Georgia v. Russia* (see, *supra*, note 1), para. 109 (emphasis added).

³¹ See, *supra*, note 22, *Wall opinion*, at 179 (para. 109).

³² *Issa and Others v. Turkey*, 41 Eur. Ct. H.R. 27 (2004) Judgment of 16 December 2004, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=707749&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649> (last visited 10 December 2008), para. 71.

relevant (highlighting the passages that, according to Russia, pointed to its exclusively territorial effect³³):

“States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:

(a) Each State Party undertakes to [...] ensure that all public authorities and public institutions, *national and local*, shall act in conformity with this obligation; [...]

(c) Each State Party shall take effective measures to review governmental, *national and local* policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;

(d) Each State Party shall prohibit and bring to an end, by all appropriate means, *including legislation* as required by circumstances, racial discrimination by any persons, group or organization;

(e) Each State Party undertakes to encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.”

The article contains a general condemnation of all racial discrimination and an undertaking to eliminate it, along with a list of means to be used “to this end.” Some of those means refer to the control and review of *national and local* authorities and policies, but those expressions would seem to relate more to the entities that will have to act than to the places where they are to do so; the article is concerned that all State entities, at all levels, should be made to comply with the Convention,³⁴ but does not say that they should only do so domestically. In any event, it is difficult to see why a description of the particular *means* to be employed, even if it is

³³ CR 2008/23 (see, *supra*, note 23), at 41 (Zimmermann).

³⁴ It thus complements the principle by which *all* State organs can engage the responsibility of the State: *LaGrand (Germany v. United States of America)*, Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999, 9-17, 16 (para. 28); *Difference relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion, I.C.J. Reports 1999, 62-91, 87 (para. 62).

somewhat limited, should be read as restricting the general obligation to “pursue *by all appropriate means*” the *end* expressed in Article 2.³⁵ Therefore, the obligations to offer protection and to promote integrationist organisations in subsections (d) and (e) – which, in any case, may apply wherever a State *is in control* – likewise do not show that CERD generally applies only territorially. Indeed, looked at in the round, CERD is not so limited.

II. A Dispute “not settled by negotiation or by the procedures [of CERD]”

The Court further held that Article 22 of CERD did not import any requirement that negotiations or the procedures of CERD should have been exhausted before the dispute is taken to the ICJ; the structure of the article, the Court held, was different from that of other instruments that do provide for the prior exhaustion of such means of dispute settlement.³⁶ This is a surprising conclusion. It is true that an obligation to first exhaust negotiations or other specified mechanisms could have – and has elsewhere – been expressed more clearly, but the Court’s interpretation, in effect, turns the clause into a simple condition that the dispute should not already have been settled. That condition goes without saying,³⁷ and the clause is therefore left without any real meaning.³⁸ Yet, it should not be overlooked that the rule by which every clause in a treaty should be taken to have some legal effect of its own does not apply with any particular strength to every international treaty; repetitions of trite law occur all the time. Indeed, a clause very similar to the negotiations clause in Article 22 of CERD has previously been interpreted much like Article 22 has been in *Georgia v. Russia*: it did not matter, the Court said of such a clause in the *Oil Platforms* case, which of the parties had failed to pursue negotiations, as the only

³⁵ Beyond Article 2, Articles 3, 6 and 14 of CERD refer to a State’s “jurisdiction.” That is not a *strict* territorial limitation on any view, and on the correct view refers only to the exercise of power in *fact*: see Marko Milanović, From Compromise to Principle: Clarifying the Notion of State Jurisdiction in International Human Rights Treaties, *Human Rights Law Review* 8 (2008), 411-448. Moreover, Articles 6 and (especially) 14 of CERD would seem to apply the “jurisdiction” formula to *all* rights under CERD.

³⁶ *Georgia v. Russia* (see, *supra*, note 1), para. 114.

³⁷ *Cf. supra*, note 16.

³⁸ Joint Dissenting Opinion (see, *supra*, note 3), para. 12.

condition was that the dispute “was not satisfactorily adjusted before being submitted to the Court.”³⁹

But even if Article 22 of CERD established a condition of the prior exhaustion of negotiations or CERD procedures, this would not necessarily have availed Russia. Regarding the alternative of negotiations, such a clause would require, not only that the party bringing the case to the ICJ has sought to negotiate at all, but also that it has done so concerning the application of the convention on which its case in the ICJ is based.⁴⁰ However, it would make little sense to require that the convention in question should be explicitly cited. Given that the purpose of the negotiations is to put the other State on notice that there are some grievances under the convention,⁴¹ and to allow it to perhaps change its ways, it should be sufficient if facts are complained of that quite clearly engage the convention. Such complaints need not be made by the State that later brings the case to the ICJ, but may come from third parties trying to settle the dispute.⁴² In *Georgia v. Russia* it should, therefore, be enough that Russia has been referred to acts of “ethnic cleansing” and similar actions by Georgian and international officials,⁴³ actions that on any view violate CERD.

C. The Risk of Irreparable Prejudice and the Urgency of Provisional Measures

The Court then had to decide whether to indicate provisional measures in the circumstances of the case. Article 41 of the ICJ Statute has very little to say on this, prescribing only that circumstances should require the indication of provisional measures. This presupposes, according to the

³⁹ *Oil Platforms* (see, *supra*, note 10), Merits, I.C.J. Reports 2003, 161-219, 210-211 (para. 107); see in the same sense *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Separate Opinion of Judge Sir Robert Jennings, I.C.J. Reports 1984, 533-557, 556.

⁴⁰ *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Provisional Measures, Order of 10 July 2002, I.C.J. Reports 2002, 219-251, 247 (para. 79); *id.*, Judgment, I.C.J. Reports 2006, 6-54, 40-41 (para. 91); see, *supra*, note 3, Joint Dissenting Opinion, para. 15.

⁴¹ See *supra*, note 39, *Nicaragua*, Judgment, at 392, 428 (para. 83).

⁴² *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, I.C.J. Reports 1962, 319-348, 346; see also, *supra*, note 39 *Nicaragua*, Separate Opinion of Judge Sir Robert Jennings, at 556.

⁴³ See CR 2008/25, available at <http://www.icj-cij.org/docket/files/140/14719.pdf> (last visited 10 December 2008), at 16, 19-20 (*Crawford*).

Court's settled case-law, that "irreparable prejudice shall not be caused to rights which are the subject of a dispute in judicial proceedings."⁴⁴ Consequently, there must be a real risk of such prejudice, "such as to require, as a matter of urgency, the indication of provisional measures."⁴⁵

The Court has approached this dual requirement, of a risk of irreparable damage raising an urgent need for judicial action, by noting in a first step that the rights at issue were "of such a nature that prejudice to them could be irreparable." Violations of the right to security of person and to protection against violence (Article 5 (b) of CERD) could involve loss of life, and people displaced from their homes could be "exposed to privation, hardship, anguish and even danger to life and health."⁴⁶ That is all convincing, if obviously for different reasons: deprivations of life are by their very nature irreparable,⁴⁷ while severe violations not resulting in death may be deemed to have caused suffering that reparations will never be able to fully compensate, or to be beyond recompense on a more normative approach.

In a second step, the Court has dealt with the requirement of urgency by noting that there remain uncertainties as to the lines of authority in Georgia and that the situation is volatile and could rapidly change. The Court, therefore, concluded that the ethnic Georgians in the areas affected by the recent conflict remained vulnerable, as were the ethnic Ossetian and Abkhazian populations, and consequently that there was an imminent risk of irreparable prejudice to the rights at issue.⁴⁸ The Court apparently did not look for a very proximate or concrete risk, which might at first sight seem to conflict with its approach in *Certain Criminal Proceedings in France*, where it examined the likelihood of any violation on the facts.⁴⁹ The approach might seem to conflict even more with the approach in *Avena and Other Mexican Nationals*, where the Court indicated measures only in

⁴⁴ *Vienna Convention on Consular Relations (Paraguay v. United States of America)*, Provisional Measures, Order of 9 April 1998 I.C.J. Reports 1998, 248-258, 257 (para. 35); *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, Provisional Measures, Order of 17 June 2003 I.C.J. Reports 2003, 102-112, 107 (para. 22); see, *supra*, note 1, *Georgia v. Russia*, para. 129.

⁴⁵ *Certain Criminal Proceedings in France* (See, *supra*, note 44), at 109 (para. 30).

⁴⁶ *Georgia v. Russia* (see, *supra*, note 1), para. 142.

⁴⁷ *Vienna Convention on Consular Relations* (see, *supra*, note 44), at 257 (para. 37); *LaGrand* (see, *supra*, note 34), at 15 (para. 24).

⁴⁸ *Georgia v. Russia* (see, *supra*, note 1), para. 143.

⁴⁹ *Certain Criminal Proceedings in France* (see, *supra*, note 44), at 109-111 (paras. 30-38).

respect of those death row inmates for whose execution dates had already been set, but expressly not (yet) for many others.⁵⁰ However, the Court's approach is no more than a consequence of the volatile nature of the situation; where the situation is foreseeable, as in *Avena*, it may easily be said that there is not yet a sufficiently proximate risk; but where the situation is unclear and in flux, there is a risk, though no-one knows quite how serious it is. In such circumstances, it will be better to act than to wait until a more proximate risk appears, for if violations materialise (again), a lot could happen before the Court would be able, even *proprio motu*,⁵¹ to indicate the necessary measures. Considering further that *Georgia v. Russia* is about the human rights of individual people (even if the claim is brought by a State), there can be no suggestion that there is a threshold of temporarily tolerable suffering, that some damage may have to be suffered. A suggestion along those lines might possibly hold water in a pure inter-State case, where, at the risk of having a State tolerate some slight damage before measures are taken at a later stage, the Court may not be prepared to make a protective order in the absence of any true urgency. However, human rights law is more sensitive, looking as it does at every bearer of rights *individually*: once one person has sustained irreparable damage, the proceedings will have been (partly) set at naught.

D. The Measures Indicated

The obligations imposed by the Order of the Court, for the most part, repeat the obligations already incumbent on the parties by virtue of CERD itself. This is unsurprising; where violations of the substantive law at issue would happen to cause irreparable prejudice, provisional measures under Article 41 of the ICJ Statute must forbid such violations. But the Court did not simply remind the parties of the existence of Articles 2 and 5 of CERD by brief reference to those provisions.⁵² Doing so would be no more than putting the existing rules on an additional legal basis;⁵³ this would have

⁵⁰ *Avena and Other Mexican Nationals (Mexico v. U.S.)*, Provisional Measures, Order of 5 February 2005, I.C.J. Reports 2003, 77-92, 91 (paras 55-56).

⁵¹ The Court apparently reserved the power to so act in *Avena*, in case further dates of execution might have been set: *Shabtai Rosenne*, Provisional Measures in International Law (2006), 204.

⁵² That, by contrast, is what the President of the ECtHR has done, with respect to Articles 2 and 3 ECHR: see that Court's Press Release of 12 August 2008.

⁵³ It has been suggested that the obligation under Article 41 of the ICJ Statute to comply with the Court's Order can even take priority over any conflicting treaty obligations

been rather unhelpful, as all disputes about the application of those articles would then have been transferred to the application of the Order. Instead, the Court at least clarified the territorial application of its measures in South Ossetia, Abkhazia and adjacent areas of Georgia, and also that the obligation imposed “to ensure [...] security of persons” and other rights would not require Russia to exercise more power in Georgia than it currently does,⁵⁴ but would only apply “whenever and wherever possible.”⁵⁵

It seems, however, that the Court has gone beyond the rights at issue in requiring the parties to ensure *the rights to security of person (etc.)*; the obligation in Article 5 of CERD is to guarantee the right to *equality* before the law, “notably *in the enjoyment of*” the specified rights, but CERD does not itself guarantee those rights. It is, after all, concerned with racial discrimination, not with the measure of protection afforded to all. It presupposes the existence of the specified rights, but leaves the legal enforcement of that expectation to other treaties. The Court, on the other hand, has ordered not only that there should be equality *of* protection, but protection *and* full equality in this regard (“to ensure, without distinction as to national or ethnic origin, security of persons”).

Beyond the measures taken from CERD, the Court has ordered that the parties should facilitate all relevant humanitarian assistance, and that they should “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.”⁵⁶ The latter is a common formula,⁵⁷ and gives expression to a general obligation incumbent on the parties to international proceedings.⁵⁸

under Articles 103 and 92 of the UN Charter: *Rosenne* (see, *supra*, note 51), 108, note 60.

⁵⁴ This concern was raised in oral argument: CR 2008/23 (see, *supra*, note 23), at 50 (*Zimmermann*).

⁵⁵ *Georgia v. Russia* (see, *supra*, note 1), para. 149 (A).

⁵⁶ *Id.*, para. 149 (B) and (C).

⁵⁷ See e.g. *Nicaragua* (*supra*, note 39), Provisional Measures, Order of 10 May 1984, I.C.J. Reports 1984, 169-188, 187 (para. 41(B)(3), (4)); *Armed Activities* (note 21), Provisional Measures, ICJ Reports 2000, 111, 129 (para. 47(1)). The power to indicate such measures is additional to that to preserve the rights in dispute: see the last-cited Order, at 128 (para. 44).

⁵⁸ See *LaGrand* (*supra*, note 34), Judgment, I.C.J. Reports 2001, 466-517, 503 (para. 103).

E. Conclusion

It may be concluded that the Court had jurisdiction to indicate provisional measures. However, the decision has left some questions rather less than fully answered. Indeed, what the Court has said seems at least plausible, but for the most part the Court has not made the argument. Even so, the Order (and the case) is interesting, not just for the Court's renewed sojourn into human rights law, and into a specialised and almost universally ratified treaty at that. In particular, the Court has clarified that human rights treaties may readily be taken to govern the actions of States even beyond their territory, and that they apply also in armed conflicts. It seems unlikely that either proposition could be successfully attacked again later. The Court has not, however, decided at this stage that it has complete jurisdiction to decide the case; instead, it has been content to only say now that the acts complained of *appear to be* capable of falling within CERD. Whether those acts actually do violate the Convention, and whether they can be proved, is a matter for another day.

In practical terms, it is open to doubt whether the Order of the Court will (have to) achieve much on the ground, given that the situation may well not get worse again. It is nonetheless understandable that the Court has made provision for such a possibility.

