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NOTE

Georgia v. Russian Federation: A Question of the Jurisdiction of the International Court of Justice

NATALIA LUCAK[†]

INTRODUCTION

The limitations on both international and domestic courts' jurisdiction has created a gap in who will enforce human rights. First, the International Court of Justice (ICJ)¹ has a limited role in international human rights disputes because only a state party may initiate proceedings at the ICJ.² However, the victims of human rights violations are individuals and as such do not have access to the ICJ.

The ICJ further restricted its already limited role in international human rights law in *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*.³ In this case, Georgia sought to stop the Russian Federation's military advances into its territory and the ethnic cleansing of native Georgians by claiming that Russia had violated the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).⁴ Georgia claimed that Russia had engaged in widespread discrimination against ethnic Georgians in

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1. The ICJ is the "principal judicial organ of the United Nations." U.N. Charter art. 92.

2. Statute of the International Court of Justice art. 34(1), June 26, 1946, 33 U.N.T.S. 993.

3. See *infra* Part V.B.1.

4. Cindy Galway Buys, *International Decisions: Application of the International Convention on the Elimination of All Forms of Racial Discrimination: International Court of Justice Order on Provisional Measures and Application of CERD as Basis of Jurisdiction*, 103 AM. J. INT'L L. 294, 294 (2009). Signed in 1965, this convention has the goal of eliminating racial discrimination around the world. International Convention on the Elimination of All Forms of Racial Discrimination preamble, Dec. 21, 1965, 660 U.N.T.S. 195 [hereinafter CERD].

South Ossetia.⁵ It further asserted that Russia's discrimination included murder, torture, rape, deportation and forcible transfer, imprisonment, and hostage taking of ethnic Georgians.⁶ In addition, Georgia accused Russia of preventing forcibly displaced ethnic Georgians from returning to South Ossetia.⁷

The ICJ initially found it had jurisdiction to issue provisional measures to stop the violence.⁸ Notably, this was the first time the Court determined that it had jurisdiction under CERD in the fifty years since the treaty had been ratified.⁹ However, when the ICJ ultimately decided whether it had jurisdiction based on the merits of the case, the ICJ found it did not have jurisdiction to adjudicate the claim.¹⁰ The case highlights certain problems with the ICJ including how the court handles human rights issues. The ICJ could have expanded its jurisdiction to deal with cases of this nature. Instead, it further limited the scope of human rights cases that it may adjudicate.¹¹

As an alternative to the ICJ, states and individuals may initiate proceedings in regional human rights courts such as the European Court of Human Rights (EHCR), the Inter-American Court of Human Rights (IACHR), and the African Court of Justice and Human Rights (ACJHR); however, these regional human rights courts only have jurisdiction over states that are parties to the relevant convention establishing the court.¹² Furthermore, the ICJ recently held that

5. Application of International Convention on Elimination of All Forms of Racial Discrimination (Geor. v. Russ.), Provisional Measures, 2008 I.C.J. 353, ¶ 21 (Oct. 15). South Ossetia is in the northern region of Georgia and it borders Russia. *Regions and Territories: South Ossetia*, BBC NEWS, http://news.bbc.co.uk/2/hi/europe/country_profiles/3797729.stm (last updated Nov. 30, 2011).

6. *Geor. v. Russ.*, 2008 I.C.J. ¶ 21.

7. *Id.* ¶ 3.

8. *Id.* ¶ 117. The ICJ has the jurisdiction to issue provisional measures before the Court renders its final decision on the merits of the case, when such measures are required to preserve the respective rights of the parties. Statute of the International Court of Justice, *supra* note 2, art. 41; Shigeru Oda, *Provisional Measures, in FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE* 541, 541 (Vaughan Lowe & Malgosia Fitzmaurice eds., 1996).

9. Buys, *supra* note 4, at 294.

10. Application of International Convention on the Elimination of all Forms of Racial Discrimination (Geor. v. Russ.), Preliminary Objections, ¶ 184 (Apr. 1, 2011), available at <http://www.icj-cij.org/docket/files/140/16398.pdf>.

11. *See infra* Part V.B.1.

12. *See* Convention for the Protection of Human Rights and Fundamental Freedoms as Amended by Protocols 11 and 14, arts. 33–34, Nov. 4, 1950, 5 E.T.S. 10 [hereinafter EHCR Convention] (stating that any State party “may refer to the [EHCR] any alleged breach of

domestic courts do not have the jurisdiction to adjudicate claims made against states that violate human rights.¹³ Neither international nor domestic courts have the right to enforce human rights in certain cases. Thus, there is a gap in who will enforce human rights.

This article begins by explaining the historical background of the conflict between Russia and Georgia. Part II will discuss the purpose, goals, and jurisdiction of the ICJ. Then, this note will look at the purpose of CERD and the structure and procedure it creates for dealing with problems involving racial discrimination. Specifically, this note will explore the provisions that deal with dispute resolution and the jurisdiction of the ICJ as related to CERD. Part III examines *Georgia v. Russian Federation* case and the reasoning of the ICJ both with respect to its jurisdiction. The final section discusses the implications of its decision.

I. HISTORICAL BACKGROUND OF THE CONFLICT BETWEEN GEORGIA AND RUSSIA

The 2008 conflict between Russia and Georgia involved a region of Georgia called South Ossetia, which is located in the northern region of Georgia.¹⁴ South Ossetia shares a border and maintains “very close ties with Russia.”¹⁵ Many South Ossetians are neither

provisions of the Convention . . . by another High Contracting party” and that the EHCR “may receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols”); American Convention on Human Rights, Pact of San José, Costa Rica, arts. 44, 61(1), Nov. 21, 1969, S. Treaty Doc. No. 95-21, 1144 U.N.T.S. 144 [hereinafter IACHR Convention] (stating that State parties and any person or group of people, “may lodge petitions . . . containing denunciations or complaints of violation of the Convention by a State [p]arty” with the Inter-American Commission on Human Rights which in turn may submit the case to the IACHR); Protocol on the Statute of the African Court of Justice and Human Rights, arts. 29–30, July 1, 2008, 48 I.L.M. 317 [hereinafter ACJHR Protocol] (stating that State parties and individuals are “entitled to submit cases” to the ACJHR but that the Court is “not . . . open to States which are not members of the [African] Union,” and that the Court has no “jurisdiction to resolve a dispute involving a Member State that has not ratified the Protocol”).

13. See *Jurisdictional Immunities of State (Ger. v. It.)*, Judgment, 2012 I.C.J. 1, ¶ 139 (Feb. 3) (holding that Italy “violated its obligation to respect [Germany’s sovereign] immunity . . . by allowing civil claims to be brought against [Germany] based on violations of international humanitarian law committed by the German Reich . . .”).

14. BBC NEWS, *supra* note 5.

15. *Russia/Georgia: All Parties in August/South Ossetia Conflict Violated Laws of War*, HUM. RTS. WATCH (Jan. 23, 2009), <http://www.hrw.org/en/news/2009/01/22/russiageorgia-all-parties-augustsouth-ossetia-conflict-violated-laws-war>; INT’L CRISIS GROUP, *GEORGIA: AVOIDING WAR IN SOUTH OSSETIA 2* (2004).

ethnically Georgian nor Russian, and speak a distinct language.¹⁶ There is a long history of tension between South Ossetia and Georgia.¹⁷ In 1918 and again in 1920, South Ossetia attempted to declare its independence from Georgia during the Ossetian rebellions.¹⁸ In 1923, after the Soviet Union conquered Georgia in 1921, South Ossetia became an autonomous region in Georgia.¹⁹ During the Soviet era, rivalries between the Georgians and South Ossetians continued to fester below the surface.²⁰ The South Ossetians did not attempt to create an independent republic again until the 1990s.²¹

In 1990, the South Ossetian Autonomous Oblast²² declared independence from Georgia once again.²³ This declaration of independence sparked conflict between South Ossetia and Georgia from 1991 to 1992.²⁴ Russian military command aided South Ossetia in this conflict.²⁵ Local Russian military commanders ordered Russian troops to leave their barracks in Georgia and support the secessionists.²⁶ In June 1992, Russia and Georgia agreed to a cease-fire.²⁷ As a result of this conflict, South Ossetia has been functionally independent from Georgia since the early 1990s.²⁸ South Ossetia has its own parliament, economic policy, educational system, and army.²⁹

16. Helen Womack & Mark Tran, *Q&A: South Ossetia Dispute*, GUARDIAN, Aug. 12, 2008, <http://www.guardian.co.uk/world/2008/aug/08/georgia.russia4>; BBC NEWS, *supra* note 5.

17. JIM NICHOL, CONG. RESEARCH SERV., RL 34618, RUSSIA-GEORGIA CONFLICT IN SOUTH OSSETIA: CONTEXT AND IMPLICATIONS FOR U.S. INTERESTS 1 (2008).

18. INT'L CRISIS GROUP, *supra* note 15, at 3.

19. NICHOL, *supra* note 17, at 1; PETER ROUDIK, L. LIBR. CONGRESS, RUSSIAN FEDERATION: LEGAL ASPECTS OF WAR IN GEORGIA 1 (2008); INT'L CRISIS GROUP, *supra* note 15, at 3.

20. INT'L CRISIS GROUP, *supra* note 15, at 3.

21. *Id.*

22. The South Ossetian Autonomous Oblast is an administrative division of Georgia. *Id.* at 2.

23. Roy Allison, *Russia Resurgent? Moscow's Campaign to 'Coerce Georgia to Peace'*, 84 INT'L AFF. 1145, 1146 (2008).

24. *Id.*

25. Charles King, *The Five-Day War: Managing Moscow After the Georgia Crisis*, FOREIGN AFF., Nov.–Dec. 2008, at 2, 5.

26. *Id.*

27. NICHOL, *supra* note 17, at 1.

28. King, *supra* note 25, at 4.

29. *Id.*

After this period, Russia maintained a friendly relationship with South Ossetia and gave Russian passports to many South Ossetians.³⁰

Hostilities in the region arose again in 2004 when the President of Georgia decided to tighten border controls and break up large-scale smuggling operations in the region.³¹ The President also “sent several hundred police, military, and intelligence personnel into South Ossetia.”³² Additionally, “Georgian guerrilla forces . . . reportedly entered the region.”³³

Tensions reached a climax in the summer of 2008.³⁴ Both South Ossetia and Georgia launched military attacks against each other after a bomb went off in a South Ossetian village.³⁵ The explosion killed an Ossetian police chief and injured the head of the pro-Georgian government in South Ossetia, Dmitriy Sanakoyev.³⁶ On July 8, 2008, the Russian air force flew patrols over South Ossetian airspace.³⁷ Russia claimed that it was merely trying to discourage Georgia from launching an attack on South Ossetia.³⁸

On August 7, 2008, both South Ossetia and Georgia accused each other of attacks.³⁹ The Georgian President called for a ceasefire and requested the continuation of peace talks.⁴⁰ However, Georgia alleged that South Ossetian forces did not stop attacking Georgian villages and as a result, Georgia began sending ground forces into South Ossetia.⁴¹ On August 8th, Russian tanks moved across the border into Georgia.⁴² The conflict lasted five days at which point, under the encouragement of French President Nicholas Sarkozy, acting on behalf of the European Union, Russia and Georgia signed a ceasefire agreement.⁴³ This five-day war left hundreds dead and

30. Allison, *supra* note 23, at 1147.

31. NICHOL, *supra* note 17, at 2.

32. *Id.*

33. *Id.*

34. *Id.* at 4.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 5.

40. *Id.*

41. *Id.*

42. *Id.*

43. INDEPENDENT INTERNATIONAL FACT-FINDING MISSION ON THE CONFLICT IN GEORGIA, REPORT 11 (2009), available at <http://www.ceiig.ch/Report.html>.

thousands as refugees.⁴⁴ In response to Russia's military aid to South Ossetians, Georgia filed its Application against Russia under the CERD at the ICJ.⁴⁵

II. THE INTERNATIONAL COURT OF JUSTICE: HISTORICAL BACKGROUND, PURPOSE, AND PROCEDURE

The ICJ is the principal court of the United Nations and, as such, plays an important role in international law. This section will discuss the background of how the Court and its purpose. Next, it will discuss when the ICJ has jurisdiction to adjudicate a case before it.

A. *Background of the International Court of Justice*

On June 26, 1945, fifty-one countries established the United Nations to maintain international peace and security, to develop friendly relations among nations, and to support international collaboration in solving "international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."⁴⁶ The UN Charter detailed the rights and obligations of members of the United Nations.⁴⁷ Moreover, the Charter established the various organs and procedures of the organization.⁴⁸ The UN Charter established the ICJ as the "principal judicial organ of the United Nations."⁴⁹

The drafters of the UN Charter designed the ICJ to contribute to world peace through the judicial settlement of international disputes and to develop international law through its opinions.⁵⁰ The rationale of the ICJ is set out in Article 2 of the UN Charter, which states that, "[a]ll Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and

44. King, *supra* note 25, at 2.

45. Buys, *supra* note 4, at 294.

46. *Id.* art. 1.

47. *See generally id.* (setting out the purposes, principles, structure, and procedure of the United Nations).

48. *Id.*

49. *Id.* art. 92.

50. MOHAMED SAMEH M. AMR, THE ROLE OF THE INTERNATIONAL COURT OF JUSTICE AS THE PRINCIPAL JUDICIAL ORGAN OF THE UNITED NATIONS 20 (2003).

justice, are not endangered.”⁵¹ All member of the United Nations are parties to the Statute of the ICJ (Statute), which is annexed to the UN Charter.⁵² The Statute set up the structure, organization, and procedure of the Court.⁵³

B. *Jurisdiction of the International Court of Justice*

The Court reviews two types of cases.⁵⁴ The first type are contentious cases submitted to the Court by states.⁵⁵ The Court’s decisions in these cases are binding only on the parties to the dispute.⁵⁶ The second type are advisory proceedings where the Court gives non-binding advisory opinions on legal questions referred to it by UN organs and specialized agencies.⁵⁷ Advisory proceedings before the ICJ are open only to five organs of the UN and several specialized organizations.⁵⁸ “The UN General Assembly and Security Council may request advisory opinions on any legal issue.”⁵⁹ The other UN organs and specialized agencies, which have been authorized to seek advisory opinions, can only request an opinion regarding a “legal question arising within the scope of their

51. U.N. Charter art. 2(3).

52. *Id.* art. 92; art. 93(1).

53. *See* Statute of the International Court of Justice, *supra* note 2, art. 2.

54. *How the Court Works*, THE INTERNATIONAL COURT OF JUSTICE, <http://www.icj-cij.org/court/index.php?p1=1&p2=6> (last visited Mar. 5, 2012).

55. *Id.* Some disputes the Court has resolved relate to land frontiers, territorial sovereignty, the use of force, hostage taking, rights of passage, and economic rights. *ICJ: Mission & History Guide to Archives of International Organizations*, UNITED NATIONS EDUC., SCI. AND CULTURAL ORG., http://www.unesco.org/archives/sio/Eng/presentation_print.php?idOrg=1016 (last visited Jan. 3, 2012).

56. Rules of Court, 6 I.C.J. Acts & Docs. 151.

57. *How the Court Works*, *supra* note 54.

58. *Organs and Agencies of the United Nations Authorized to Request Advisory Opinions*, INT’L COURT OF JUSTICE, <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=2&p3=1> (last visited Jan. 3, 2012). The five organs include the General Assembly, the Security Council, the Economic and Social Council, the Trusteeship Council, and the Interim Committee of the General Assembly. *Id.* The specialized organizations that can request advisory opinions are the International Labour Organization (ILO), Food and Agriculture Organization of the United Nations (FAO), United Nations Educational, Scientific and Cultural Organization (UNESCO), World Health Organization (WHO), International Bank for Reconstruction and Development (IBRD), International Finance Corporation (IFC), International Development Association (IDA), International Monetary Fund (IMF), International Civil Aviation Organization (ICAO), International Telecommunication Union (ITU), International Fund for Agricultural Development (IFAD), World Meteorological Organization (WMO), International Maritime Organization (IMO), World Intellectual Property Organization (WIPO), and United Nations Industrial Development Organization (UNIDO). *Id.*

59. *How the Court Works*, *supra* note 54.

activities.”⁶⁰ The requesting organ or agency may adhere to the opinion through any available means.⁶¹ However, when the concerned organ or agency implements an opinion, then it is as though the opinion becomes international law.⁶² Since 1946, the ICJ has delivered 125 opinions in contentious cases and twenty-six advisory opinions.⁶³

For the ICJ to review contentious cases, it must have jurisdiction to do so.⁶⁴ The ICJ has jurisdiction over legal disputes between member states concerning “the interpretation of a treaty; any question of international law; the existence of any fact which, if established, would constitute a breach of an international obligation; and the nature or extent of the reparation to be made for the breach of an international obligation.”⁶⁵ In addition, only states may be parties in cases before the Court.⁶⁶ Consequently, neither individuals, organizations, nor companies may have cases adjudicated in the ICJ. This is particularly important when considering human rights law because individuals are generally the victims of human rights violations. However, individuals cannot seek redress in the ICJ.

The ICJ may adjudicate claims between states that are parties to a treaty conferring ICJ jurisdiction over certain disputes.⁶⁷ Where jurisdiction exists through a treaty, the Court can only adjudicate cases relating to disputes about the interpretation or application of the treaty.⁶⁸ While treaties can confer jurisdiction, parties to the treaty may make reservations regarding the jurisdiction of the ICJ.⁶⁹ A reservation is a statement made by a state when it is “signing, ratifying, accepting, approving or acceding to a treaty” that excludes or modifies the “legal effect of certain provisions of the treaty in their

60. *Id.*

61. *Id.*

62. *Id.*

63. *List of Contentious Cases by Date of Introduction*, INT’L COURT OF JUSTICE, <http://www.icj-cij.org/docket/index.php?p1=3&p2=3> (last visited Jan. 3, 2012); *List of Advisory Proceedings Referred to the Court Since 1946 by Date of Introduction*, INT’L COURT OF JUSTICE, <http://www.icj-cij.org/docket/index.php?p1=3&p2=4> (last visited Jan. 3, 2012).

64. Statute of the International Court of Justice, *supra* note 2, art. 36(1).

65. *Id.* art. 36(2).

66. *Id.* art. 34(1).

67. *Id.* art. 36(1).

68. See AMR, *supra* note 50, at 180.

69. *Id.* at 194.

application to that State.”⁷⁰ Therefore, if a state does not want to be subject to the jurisdiction of the ICJ when it signs or ratifies a treaty, it may make a reservation to the provision that confers jurisdiction on the ICJ. If there is ever a dispute about whether the Court has jurisdiction, a decision by the Court will settle the matter.⁷¹

In addition, the ICJ has the jurisdiction to issue provisional measures before the Court renders its final decision on the merits of the case, when such measures are required to preserve the respective rights of the parties.⁷² A state party may make a written request for the indication of provisional measures at any time during the course of proceedings.⁷³ In such cases, the ICJ must at least find that it has *prima facie* jurisdiction to adjudicate the claim.⁷⁴ When determining whether to issue provisional measures, the Court evaluates the urgency of the situation and the potential for irreparable harm to the parties.⁷⁵ These provisions are binding on the parties.⁷⁶ The measures protect the rights that the Court will review at the merits stage of the case and which relate to the subject of the application.⁷⁷ If the Court later finds it did not have jurisdiction, the provisional measures no longer have legal effect.⁷⁸

In making any of its decisions, the ICJ shall apply international conventions, international custom, the general principles of law recognized by civilized nations, and also “judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”⁷⁹

70. Vienna Convention on the Law of Treaties art. 2, ¶ 1(d), May 23, 1969, 1155 U.N.T.S. 331.

71. Statute of the International Court of Justice, *supra* note 2, art. 36(6).

72. *Id.* art. 41. *See also* Shigeru Oda, *supra* note 8, at 541 (“The indication of provisional measures—which is deemed to be an almost essential instrument in the panoply of any judicial process—is intended to preserve, pending the final decision, the respective rights of the parties before the Court.”).

73. Rules of the Court, *supra* note 56, at 137.

74. Shigeru Oda, *supra* note 8, at 549.

75. *Id.* at 551.

76. La Grand Case (Ger. v. U.S.), Provisional Measures, 1999 I.C.J. 9, ¶¶ 28–29 (Mar. 3).

77. Shigeru Oda, *supra* note 8, at 551.

78. *Id.* at 545; Nuclear Tests (Austl. v. Fr.), Judgment, 1974 I.C.J. 253, ¶ 61 (Dec. 20).

79. Statute of the International Court of Justice, *supra* note 2, art. 38.

III. INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

CERD is the international community's tool for combating racial discrimination.⁸⁰ The primary purpose of CERD was to adopt all necessary measures to eliminate racial discrimination.⁸¹ CERD "opposes racist doctrines" and promotes "understanding between races."⁸² Lastly, CERD attempts "to build an international community free from all forms of racial segregation and racial discrimination."⁸³ Both Georgia and Russia are parties to CERD.⁸⁴

CERD defines racial discrimination as:

[A]ny distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.⁸⁵

CERD lists specific ways in which state parties should eliminate and prevent discrimination.⁸⁶ It declares that each state shall agree to not "sponsor, defend, or support racial discrimination by any person or organization."⁸⁷ Furthermore, members shall condemn all propaganda and organizations that are based on a theory of superiority of one race or group of persons over another.⁸⁸ Additionally, each state party shall declare as a punishable offense all dissemination of ideas based on "racial superiority or hatred,

80. Theodor Meron, *The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination*, 79 AM. J. INT'L L. 283, 283 (1985) (quoting 33 UN FAOR Supp. (No. 18) at 108, 109, UN Doc. A/33/18 (1978)) ("It [CERD] has been eloquently described as 'the international community's only tool for combating racial discrimination which is at one and the same time universal in reach, comprehensive in scope, legally binding in character, and equipped with built-in measures of implementation.'").

81. CERD, *supra* note 4, pmb1.

82. *Id.*

83. *Id.*

84. See *International Convention on the Elimination of All Forms of Racial Discrimination*, UNITED NATIONS, (Mar. 9, 2012, 6:01 AM), <http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-2.en.pdf> (listing all state participants and dates of signature, ratification, accession, and succession).

85. CERD, *supra* note 4, art. 1(1).

86. See generally *id.*

87. *Id.* art. 2(1)(b).

88. *Id.* art. 4.

incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons.”⁸⁹

For present purposes, the important rights that require equality are the right to security against violence, political rights (particularly the right to vote and stand for election), the right to freedom of movement and residence within the territory of a state, and the right to leave any country and to return to one’s own country.⁹⁰ CERD commands that the parties to the convention assure these rights to all people within their jurisdiction.⁹¹

CERD also establishes a procedure to address violations of the treaty. Specifically, CERD creates the Committee on the Elimination of Racial Discrimination (Committee), which helps to ensure that state parties are fulfilling their obligations under CERD.⁹² If a state believes that another state party is violating provisions of CERD, that state can bring the issue to the attention of the Committee.⁹³ The Committee then transmits the message to the state party accused of violating the treaty.⁹⁴ The accused state has three months to submit a written explanation to the Committee clarifying the matter and the remedy, if any, that the state has instituted.⁹⁵ If the matter is not resolved to the satisfaction of both parties within six months of the initial communication, either state can refer the matter to the Committee again.⁹⁶ The Committee will then handle the matter after it has determined that the parties have exhausted all available domestic remedies.⁹⁷ Most importantly for the purposes of this note, Article 22 of CERD provides that any dispute between two or more state parties related to the interpretation or application of CERD that is not settled through negotiation or by the Committee may, at the request of any of the parties to the dispute, be referred to the ICJ for decision, unless the parties to the dispute agree to another mode of settlement.⁹⁸

89. *Id.* art. 4(a).

90. *Id.* art. 5.

91. *See id.* art. 6.

92. *See id.* art. 8(1).

93. *Id.* art. 11(1).

94. *Id.*

95. *Id.*

96. *Id.* art. 11(2).

97. *Id.* art. 11(3).

98. *Id.* art. 22.

IV. THE COURT'S DECISION

As previously discussed, tensions between Georgia and the South Ossetian have existed for many decades.⁹⁹ In August 2008, hostilities between the two parties intensified, leading to violence in South Ossetia.¹⁰⁰ At that time, Russia, which had been supporting the South Ossetian separatist movement, sent its military into Georgian territory.¹⁰¹ On August 12, 2008, Georgia initiated proceedings before the ICJ against Russia for “its actions on and around the territory of Georgia” in breach of CERD.¹⁰² Georgia sought to ensure that, under CERD, the individual rights of all people in Georgia’s territory were “respected and protected.”¹⁰³ It charged Russia with violating CERD through its interventions in South Ossetia and Abkhazia since 1990.¹⁰⁴ More specifically, Georgia claimed that Russia violated the provisions of CERD when it engaged in practices of racial discrimination reflected in acts including murder, torture, rape, deportation and forcible transfer, imprisonment and hostage taking.¹⁰⁵ Furthermore, Georgia accused Russia of the systematic denial, on discriminatory grounds, of the right of South Ossetia’s ethnic Georgians to return to South Ossetia.¹⁰⁶ Lastly, Russia failed to condemn racial discrimination and all propaganda which promoted racial discrimination.¹⁰⁷ In Georgia’s application to the Court, it requested that the ICJ require that Russia cease military activities in Georgia, ensure the “prompt and effective return of internally displaced persons to South Ossetia,” pay compensation for its role in supporting the ethnic cleansing that occurred in the 1991 – 1994 conflicts, and also pay for all injuries “resulting from its internationally wrongful acts.”¹⁰⁸

99. See *supra* Part I. See also Allison, *supra* note 23, at 1146.

100. Tyler B. Musselman, *Skirmishing for Information: The Flaws of the International Legal System as Evidenced by the Russian-Georgian Conflict of 2008*, 19 *TRANSNAT’L. L. & CONTEMP. PROBS.* 317, 318 (2010).

101. See Allison, *supra* note 23, at 1147; Musselman, *supra* note 100, at 318–19.

102. Application of International Convention on the Elimination of All Forms of Racial Discrimination (Geor. v. Russ.), Application Instituting Proceedings, ¶ 4 (Aug. 12, 2008), available at <http://www.icj-cij.org/docket/files/140/14657.pdf>.

103. *Id.* ¶ 1.

104. See *id.* ¶¶ 4, 6.

105. See *id.* ¶ 81(a).

106. See *id.*

107. See *id.* ¶ 82(c)–(e).

108. See *id.* ¶¶ 83(b), (e), (i).

On August 14, 2008, Georgia filed a request for the indication of provisional measures by the ICJ 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.”¹⁰⁹ On August 25, 2008, Georgia filed an Amended Request for the Indication of Provisional Measures of Protection.¹¹⁰ Given that Russia had invaded South Ossetia and Abkhazia on August 8, 2008, and had taken control of the region, Georgia requested that the Court order the provisional measures to prevent irreparable harm to the rights of ethnic Georgians to be secure in their persons and to be protected against violence in the Georgian territory that was under the effective control of Russia.¹¹¹ Georgia requested that the ICJ “protect its citizens against violent discriminatory acts by Russian armed forces.”¹¹²

A. *The Court’s Decision to Issue Provisional Measures*

The ICJ declared that when a state party makes a request for the indication of provisional measures, the Court does not need to definitively determine if it has jurisdiction over a matter before deciding whether to issue the measures.¹¹³ However, the Court must, at least, have *prima facie* jurisdiction over the case.¹¹⁴ For this reason, the Court examined whether the claims made by Georgia afforded it *prima facie* jurisdiction to issue the provisional measures.¹¹⁵ As mentioned earlier, Article 22 of CERD, which allows the ICJ to adjudicate a claim, requires (1) that there be a dispute between the

109. Application of International Convention on the Elimination of All Forms of Racial Discrimination (Geor. v. Russ.), Preliminary Objections, 2011 I.C.J. 1, ¶ 3 (Apr. 1) (internal quotation marks omitted) (addition in original).

110. *Id.* ¶ 5.

111. Application of International Convention on the Elimination of All Forms of Racial Discrimination, Amended Request for the Indication of Provisional Measures of Protection Submitted by the Government of Georgia (Geor. v. Russ.), ¶ 23 (Aug. 25, 2008), available at <http://www.icj-cij.org/docket/files/140/14689.pdf>.

112. Application of International Convention on the Elimination of All Forms of Racial Discrimination (Geor. v. Russ.), Request for the Indication of Provisional Measures of Protection Submitted by the Government of the Republic Georgia, ¶ 1 (Aug. 14, 2008), available at <http://www.icj-cij.org/docket/files/140/14663.pdf>.

113. Application of International Convention on the Elimination of All Forms of Racial Discrimination (Geor. v. Russ.), Provisional Measures, 2008 I.C.J. 353, ¶ 85 (Oct. 15).

114. Shigeru Oda, *supra* note 8, at 549.

115. Application of International Convention on the Elimination of All Forms of Racial Discrimination (Geor. v. Russ.), Request for the Indication of Provisional Measures, 2008 I.C.J. 353, ¶ 85 (Oct. 15).

parties and (2) that the parties have not been able to settle the dispute through negotiation or through a complaint to the Committee.¹¹⁶

The Court found that there was in fact a dispute about the interpretation of CERD since the parties disagreed about whether Russia had violated Articles 2 and 5 of CERD.¹¹⁷ In addition, Georgia's claims dealt with various rights under CERD, thus jurisdiction could be found under CERD.¹¹⁸ The Court also claimed that CERD did not include a territorial restriction, thus it was inconsequential that the racial discrimination occurred outside of Russia's territory.¹¹⁹ The ICJ found this was sufficient to establish the existence of a dispute between the parties relating to the interpretation and application of CERD.¹²⁰

The Court further determined it had *prima facie* jurisdiction in this case because preconditions set out by Article 22 of CERD had been met.¹²¹ The preconditions require that the parties settle the dispute through negotiation or through a complaint to the Committee.¹²² The Court determined that there did not have to be formal negotiations between state parties to invoke Article 22 of CERD, but there must be at least some attempt to initiate discussion with the opposing state party.¹²³ The Court found that the issues raised by Georgia had been discussed in bilateral contacts between the parties, and that these problems had not yet been resolved prior to Georgia filing the application.¹²⁴ This demonstrated that the state parties had tried to negotiate before initiating the ICJ proceedings.¹²⁵ For these reasons, the Court found that it had *prima facie* jurisdiction over this matter.¹²⁶

The Court held that it could properly issue provisional measures since there was imminent risk of irreparable harm in the form of loss of life, bodily injury, hardship, and anguish.¹²⁷ The Court ordered

116. CERD, *supra* note 4, art. 22.

117. *Geor. v. Russ.*, Provisional Measures, 2008 I.C.J. ¶ 112.

118. *Id.*

119. *Id.* at ¶ 109.

120. *See id.* ¶ 112.

121. *Id.* ¶ 117.

122. *See id.* ¶ 113.

123. *Id.* ¶ 114.

124. *Id.* ¶ 115.

125. *See id.*

126. *Id.* ¶ 117.

127. *Id.* ¶¶ 142, 146.

both Georgia and Russia to “refrain from any act of racial discrimination against persons, groups of persons or institutions.”¹²⁸ Second, the ICJ required that both parties cease supporting racial discrimination.¹²⁹ Third, the Court ordered both parties to guarantee the security of persons and protection of property without regard to national or ethnic origin.¹³⁰ Lastly, the Court directed the parties to do all in their power to “ensure that public authorities and public institutions under their control or influence do not engage in acts of racial discrimination against persons, groups of persons or institutions.”¹³¹

B. *The Final Decision of the International Court of Justice*

On December 1, 2009, Russia presented four objections to the ICJ’s initial decision to issue provisional measures.¹³² Russia’s first objection was that the requirements for the Court’s jurisdiction had not been met since there was not a dispute between the parties with respect to the interpretation or application of CERD.¹³³ Second, procedural requirements of Article 22 of CERD had not been met since there had not been any negotiations between the parties prior to initiating proceedings with the ICJ.¹³⁴ Third, Russia contended that the alleged wrongful conduct took place outside of its territory and, therefore, the Court lacked jurisdiction to entertain the case.¹³⁵ Fourth, if there was jurisdiction, it was limited to events that occurred after the entry into force of CERD as between the parties, on July 2, 1999.¹³⁶

1. First Objection: Existence of a Dispute

The Court echoed Article 22 of CERD and explained that the dispute must be “with respect to the interpretation or application of [the] Convention.”¹³⁷ It held that states do not have to expressly refer to the treaty in its exchanges to invoke the instrument before the

128. *Id.* ¶ 149.

129. *Id.*

130. *Id.*

131. *Id.*

132. Application of International Convention on the Elimination of all Forms of Racial Discrimination (Geor. v. Russ.), Preliminary Objections, 2011 I.C.J. 1, ¶ 22 (Apr. 1, 2011).

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* ¶ 20 (quoting CERD, *supra* note 4, art. 22).

Court.¹³⁸ However, the exchanges must refer to the “subject-matter of the treaty with sufficient clarity” so that the state against which the claim is made understands that there is a dispute with regard to that subject matter.¹³⁹ Furthermore, the Court declared that when deciding whether there is a dispute, the Court must

[D]etermine (1) whether the record shows a disagreement on a point of law or fact between the two States; (2) whether that disagreement is with respect to the interpretation or application of CERD, as required by [A]rticle 22 of CERD; and (3) whether that disagreement existed as of the date of the Application.¹⁴⁰

When examining the exchanges between the state parties to determine whether there was a dispute, the Court focused on statements made by the executive branch of each state since the executive represents the state in its international relations.¹⁴¹ Thus, the Court gave any statements made by the legislature of either state less weight than a statement by the executive. The Court also examined documents from 1990 until the date of Application.¹⁴² When reviewing these documents, the Court looked for statements that might indicate there was a dispute between Georgia and Russia prior to the initiation of proceedings.¹⁴³

The Court distinguished between documents that were produced before July 2, 1999, and documents that were produced after because Georgia did not become a party to CERD until that date and therefore the treaty relationship between Georgia and Russia under CERD did not exist.¹⁴⁴ The ICJ reviewed these earlier documents to place into context the documents issued after CERD entered into force between the two parties.¹⁴⁵

In reviewing the documents produced before 1999, the Court concluded that none of the documents provided any basis for finding there was a dispute based on racial discrimination before July

138. *Id.* ¶ 30.

139. *Id.*

140. *Id.* ¶ 31.

141. *Id.* ¶¶ 36–37.

142. *Id.* ¶¶ 31, 33.

143. *Id.* ¶¶ 31–32.

144. *Id.* ¶ 34.

145. *Id.* ¶ 50.

1999.¹⁴⁶ The reasons for this finding relate to the authors of the statements, the intended addressee, and the content.¹⁴⁷ The author of several of the documents was the Georgian Parliament and the President did not endorse these documents.¹⁴⁸ Thus, according to the Court, the Georgian government did not intend those statements for the international community.¹⁴⁹ Another problem was the subject matter of the documents since they referenced concerns about the use of force and not racial discrimination.¹⁵⁰

The Court next reviewed documents issued between July 1999 and the beginning of the conflict in August 2008.¹⁵¹ Upon looking at these records, the Court concluded there was no legal dispute between Georgia and Russia during that period with respect to Russia's compliance with CERD.¹⁵² The Court reviewed reports to monitoring committees of various treaties, including the reports related to CERD, the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR), and the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).¹⁵³ In these reports and other documents, the Court commented that Georgia did not direct criticism against Russia based on CERD.¹⁵⁴ Even if there was some criticism, it did not amount to an allegation against Russia regarding its compliance with CERD.¹⁵⁵

Finally, the Court reviewed documents from August 7, 2008, to August 12, 2008, the period during which the violence between Georgia and Russia occurred.¹⁵⁶ The ICJ concluded that, during this period, a legal dispute concerning CERD did arise.¹⁵⁷ The Court based this finding on the fact that there had been exchanges about Russia's compliance with CERD between a Georgian and Russian

146. *Id.* ¶ 63.

147. *Id.*

148. *Id.*

149. *See id.* ¶¶ 37, 63–64.

150. *Id.* ¶ 63.

151. *Id.* ¶ 65.

152. *Id.* ¶ 105.

153. *Id.* ¶ 65.

154. *Id.*

155. *Id.* ¶ 67.

156. *Id.* ¶¶ 106–13.

157. *Id.* ¶ 113.

representative in the UN Security Council on August 10, 2008.¹⁵⁸ Furthermore, the Georgian President had made claims on August 9th and 11th about the Russian military's violence in South Ossetia and Abkhazia to which the Russian Foreign Minister had responded on August 12th.¹⁵⁹ For this reason, the Court found there was a legal dispute between the parties and dismissed Russia's first objection.¹⁶⁰

2. Second Objection: Procedural Conditions of Article 22 of CERD

a. *How to Interpret Article 22 of CERD*

The Court next considered Russia's second objection, whether the requirements for ICJ jurisdiction had been satisfied.¹⁶¹ As mentioned earlier, Article 22 of CERD states that the ICJ has jurisdiction over any dispute between two or more state parties, which is "not settled by negotiation or by procedures expressly provided for in [the] Convention."¹⁶² In interpreting this statement, the Court considered "the ordinary meaning of the terms in their context and in light" of the purpose of CERD and the "*travaux préparatoires* of CERD."¹⁶³

When considering the ordinary meaning of CERD, the Court explained that it must give effect to Article 22.¹⁶⁴ Since there are two modes of dispute settlement described in Article 22, the Court found this suggested that there is an affirmative duty to resort to these two methods of dispute settlement before the Court could have jurisdiction.¹⁶⁵ In addition, the Court noted that when interpreting other treaties with a similar jurisdiction clause, the Court had interpreted any reference to other methods of dispute resolution as a precondition to the Court having jurisdiction.¹⁶⁶ For these reasons, the Court concluded that negotiations or other procedures "expressly

158. *Id.*

159. *Id.* ¶¶ 109–13.

160. *Id.* ¶ 114.

161. *Id.* ¶ 115.

162. CERD, *supra* note 4, art 22.

163. Application of International Convention on the Elimination of all Forms of Racial Discrimination (Geor. v. Russ.), Preliminary Objections, 2008 I.C.J. 353, ¶ 122 (Oct. 15). *Travaux préparatoires* is the drafting history and discussions held when writing a treaty. See *id.* ¶¶ 142–47.

164. *Id.* ¶ 133.

165. *Id.* ¶ 134.

166. *Id.* ¶¶ 133, 136.

provided” for in CERD were “preconditions” to it finding that it had jurisdiction.¹⁶⁷

When reviewing the *travaux préparatoires* related to CERD, the ICJ noted that it could not draw firm inferences as to whether the drafters intended the negotiations or the procedures expressly provided for in the treaty to act as preconditions for finding jurisdiction.¹⁶⁸ However, the Court determined that the *travaux préparatoires* did not suggest that the ICJ’s reading of the ordinary meaning of Article 22 was incorrect.¹⁶⁹ Thus, the Court found that negotiations and the procedures provided for in the Convention were preconditions to finding jurisdiction.¹⁷⁰

b. Question of Whether the Precondition Was Satisfied

The Court determined that the precondition is only met when there had been a failure of negotiations or when the negotiations have become deadlocked or futile.¹⁷¹ Whether a negotiation has “failed or . . . futile” is a question of “fact for consideration in each case.”¹⁷² The Court looked at precedent and found that negotiations do not necessarily have to be formal.¹⁷³ The Court would recognize when there was “diplomacy by conference or parliamentary diplomacy.”¹⁷⁴ The negotiations must relate to the dispute, which must “concern the substantive obligations contained in the treaty in question.”¹⁷⁵

In this case, it was only possible for Georgia and Russia to negotiate matters in dispute from August 9–12, 2008, because that is when the dispute existed.¹⁷⁶ Based on this information, the Court needed to answer two questions. First, whether there were negotiations between Georgia and Russia “concerning the interpretation or application of CERD.”¹⁷⁷ Second, if the parties did engage in negotiations, whether those negotiations failed.¹⁷⁸ The

167. *Id.* ¶ 141.

168. *Id.* ¶ 147.

169. *Id.*

170. *Id.* ¶ 148.

171. *Id.* ¶ 159 (collecting citations).

172. *Id.* ¶ 160 (internal quotation marks omitted).

173. *Id.*

174. *Id.* (internal quotation marks omitted).

175. *Id.* ¶ 161.

176. *Id.* ¶ 168.

177. *Id.* ¶ 169.

178. *Id.*

Court looked at exchanges between Georgian and Russian representatives and found that Russia had not “dismiss[ed] the possibility of future discussions” and, thus, negotiations had not failed.¹⁷⁹ In addition, the subject matter of discussions between Georgia and Russia was not about Russia’s compliance with CERD.¹⁸⁰ For these reasons, the Court found there had not been negotiations prior to the initiation of proceedings.¹⁸¹ Therefore, the preconditions of Article 22 had not been met and the ICJ did not have jurisdiction.¹⁸²

c. Dissent

The five-judge dissent argued that the ICJ did, in fact, have jurisdiction.¹⁸³ The dissent disagreed with the majority’s decision on the second preliminary objection.¹⁸⁴ It argued that any “reasonable possibility of settling the dispute by negotiation had been exhausted by the date on which the proceedings were instituted.”¹⁸⁵ When interpreting Article 22 of CERD, the Court sought to ensure that this provision had practical effect and did not consider other elements important in interpreting the provision.¹⁸⁶ For example, the Court did not look at the literal meaning of the provision when the terms are “given their most common meaning.”¹⁸⁷ If the Court had, it would have found that an attempt at settlement did not have to be made before reference to the ICJ.¹⁸⁸ Furthermore, “the exhaustion of diplomatic negotiations,” as a general rule, is not a mandatory precondition for the ICJ to have jurisdiction.¹⁸⁹

The dissent argued that neither the literal meaning of Article 22 of CERD nor the *travaux préparatoires* supported the majority’s

179. *Id.* ¶ 180.

180. *Id.*

181. *Id.* ¶¶ 181–82.

182. *Id.* ¶ 184.

183. Application of International Convention on the Elimination of all Forms of Racial Discrimination (Geor. v. Russ.), Preliminary Objections (Joint Dissenting Opinion of President Owada, Judges Simma, Abraham and Donoghue and Judge *Ad Hoc* Gaja), ¶ 2 (Apr. 1, 2011), <http://www.icj-cij.org/docket/files/140/16422.pdf>.

184. *Id.*

185. *Id.* ¶ 12.

186. *Id.* ¶ 22.

187. *Id.* ¶ 23.

188. *Id.*

189. *Id.* ¶ 24.

interpretation.¹⁹⁰ Furthermore, the dissent maintained that requiring the preconditions in question to be fulfilled “before the seisin of the Court” did not follow from recent cases.¹⁹¹ What is important is that the preconditions are met by the date when the Court decides on its jurisdiction.¹⁹² The dissent noted that in this case, the majority only looked at whether the preconditions had been met before the date that Georgia filed proceedings.¹⁹³ It concluded that this reasoning was at odds with the general thrust of the ICJ’s most recent jurisprudence.¹⁹⁴

The dissent asserted that assuming Article 22 of CERD sets out preconditions for the ICJ jurisdiction, those preconditions were satisfied in this case since there had been an unsuccessful attempt to negotiate between Georgia and Russia.¹⁹⁵ Additionally, the dissent argued that the majority should have determined whether on the date the proceedings were instituted there was still a “reasonable possibility of negotiating a settlement of the dispute.”¹⁹⁶ The dissent believed there was no reasonable possibility.¹⁹⁷ In the dissent’s view, it was sufficient for Georgia to show it had made known the existence of its claims against Russia, thus enabling Russia to respond.¹⁹⁸ The dissent found that Georgia had met this standard and, thus, the ICJ should have jurisdiction.¹⁹⁹

V. ANALYSIS AND IMPLICATIONS

The ICJ’s decision restricted established precedent. When determining that there was a dispute, the Court only considered statements made by the executive branch instead of also looking at other parts of government also involved in foreign policy.²⁰⁰ In deciding that the preconditions of Article 22 had not been met, the Court not only required that negotiations were initiated as required by precedent, but that negotiations had failed or become futile.²⁰¹ These

190. *Id.* ¶¶ 23, 34.

191. *Id.* ¶ 35.

192. *Id.*

193. *Id.* ¶ 36.

194. *Id.* ¶ 35.

195. *Id.* ¶ 38.

196. *Id.* ¶ 67.

197. *Id.*

198. *Id.* ¶ 72.

199. *Id.* ¶ 84.

200. *See supra* Part IV.A.1.

201. *See supra* Part IV.B.2.b.

strict standards further limit the ICJ's already restricted role as an enforcer of human rights.

States and individuals may initiate proceedings in regional human rights courts as an alternative to the ICJ. However, these regional human rights courts only have jurisdiction over states that are parties to the relevant convention establishing the court.²⁰² Furthermore, the ICJ recently held that domestic courts do not have the jurisdiction to adjudicate claims made against states who violated human rights.²⁰³ Neither international nor domestic courts have the right to enforce human rights in certain cases. Thus, there is a gap in who will enforce human rights.

This section will first analyze the ICJ's decision and discuss how the Court further restricted its role in international human rights law by reading precedent narrowly. Then it will examine the implications of this case on international human rights law.

A. Analysis of the Court's Decision in *Georgia v. Russian Federation*

1. Whether there is a Dispute

When determining whether the ICJ has jurisdiction over a matter, the Court must first decide whether there is a dispute related to the interpretation or application of CERD.²⁰⁴ A dispute is "a disagreement on a point of law or fact, a conflict of legal views or interests between parties."²⁰⁵ A mere assertion by one party is not sufficient to prove there is a dispute.²⁰⁶ Furthermore, it is not "adequate to show that the interests of the two parties . . . are in conflict."²⁰⁷ In order to establish the existence of a dispute, "[i]t must be shown that the claim of one party is positively opposed by the other."²⁰⁸ The determination of whether there is an international dispute is based on an objective view of the parties' arguments rather

202. See *supra* note 12 and accompanying text.

203. See Jurisdictional Immunities of State (Ger. v. It.), Judgment, 2012 I.C.J. 1, ¶ 139 (Feb. 3).

204. CERD, *supra* note 4, art. 22.

205. Mavrommatis Palestine Concessions, 1924 P.C.I.J. (ser. A) No. 2, at 11 (Aug. 30).

206. South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.), Preliminary Objections, 1962 I.C.J. 319, 328 (Dec. 21).

207. *Id.*

208. *Id.*

than the subjective view of the parties themselves.²⁰⁹ In addition, the applicant must establish a reasonable connection between the treaty that gives jurisdiction and the claims submitted to the Court.²¹⁰

In this case, the Court found that there was a dispute. When looking at the ICJ's findings in previous cases, however, the Court's finding in this case narrowed the scope of the meaning of "dispute." First, the Court only focused on the executive branches' statements when determining that there was a dispute, citing *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda)* as precedent.²¹¹ However, the Court's decision to only use statements made by the executive branch does not necessarily follow from that case. There, the Court stated that the Head of State, Heads of Government, and the Minister of Foreign Affairs have the power to represent a state and bind it to treaties or other international commitments.²¹² In this case, the ICJ is not determining whether Georgia or Russia is bound to a treaty or other commitment, but merely determining whether there is a dispute. Thus, only reviewing documents produced by the executive branch unnecessarily limits the evidence that the Court considers.

Second, in *Anglo-Iranian Oil Co. (United Kingdom v. Iran)*, the Court found that Iranian legislation was admissible.²¹³ In this case, a number of Georgia's parliamentary resolutions were submitted to the United Nations as statement of the government's position.²¹⁴ Furthermore, there was no evidence to show that the Georgian Parliament's statements were made contrary to the authority of the

209. Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion, 1950 I.C.J. 65, 74 (Mar. 30).

210. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 392, ¶ 81 (Nov. 26).

211. Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Geor. v. Russ.), Preliminary Objections, 2011 I.C.J. 1, ¶ 37 (Apr. 1) (citing *Armed Activities on Territory of Congo (New Application: 2002)* (Dem. Rep. Congo v. Rwanda), Jurisdiction and Admissibility, 2006 I.C.J. 6, ¶¶ 46–47 (Feb. 3)).

212. *Armed Activities on Territory of Congo (New Application: 2002)* (Dem. Rep. Congo v. Rwanda), Jurisdiction and Admissibility, 2006 I.C.J. 6, ¶ 46 (Feb. 3).

213. *Anglo-Iranian Oil Co. (U.K. v. Iran)*, Preliminary Objections, 1952 I.C.J. 93, 107 (July 22).

214. Application of International Convention on the Elimination of All Forms of Racial Discrimination (Geor. v. Russ.), Preliminary Objections, 2011 I.C.J. 1, ¶ 36 (Apr. 1).

Georgian executive.²¹⁵ Thus, the ICJ should have considered the parliamentary statements.

Additionally the ICJ failed to note that the Court in *Democratic Republic of the Congo v. Rwanda* asserted that “with increasing frequency in modern international relations other persons representing a state in specific fields may be authorized by that state to bind it by their statements in respect of matters falling within their purview.”²¹⁶ The Court should have considered statements of the legislature because the Georgian Parliament determines the “principle directions” of domestic and foreign policy and its actions play a role in international relations.²¹⁷ Thus, pursuant to *Democratic Republic of the Congo v. Rwanda*, the Georgian Parliament may be considered a body representing Georgia in a specific field and is, therefore, authorized to bind Georgia.

Had the ICJ considered statements by the Georgian Parliament the Court would have found there was a dispute before the conflict in 2008. The ICJ had evidence indicating that the Georgian Parliament accused Russian troops of ethnic cleansing in the Georgian territory of Abkhazia in 1993.²¹⁸ It also had evidence demonstrating that the Georgian Parliament adopted a resolution in 2001 alleging that since the deployment of Russian peacekeepers under the auspices of the Commonwealth of Independent States, ethnic cleansing continued.²¹⁹ Georgia’s claim that Russia was a party to a conflict involving ethnic cleansing is reasonably connected to CERD. Therefore, this dispute began prior to the August 2008 conflict.

2. Question of Prior Negotiations

Article 22 of CERD also requires that the two parties hold negotiations before initiating proceedings at the ICJ.²²⁰ In *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, the ICJ declared that just “because a State has not expressly referred in negotiations with another State” to that state’s violations of a particular treaty, does not mean that a state

215. *See id.* at 24–47 (showing that the Georgian executive branch did not counter the Georgian Parliament’s position).

216. *Dem. Rep. Congo v. Rwanda*, 2006 I.C.J. ¶ 47.

217. Sakartvelos K’onstitutsia [CONSTITUTION] Aug. 24, 1995, art. 48. (Geor.).

218. *Geor. v. Russ.*, 2011 I.C.J. ¶ 52 (Apr. 1).

219. *Id.* ¶ 71.

220. *Id.* ¶ 112.

cannot initiate proceedings against the state who is violating the treaty.²²¹ Furthermore, in that case, the Court found that the United States was “well aware” it was in breach of international obligations before Nicaragua brought the case.²²² In *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, the ICJ claimed that negotiations do not necessarily have to be lengthy; rather, the fact that a discussion has commenced is sufficient.²²³ The requirement to negotiate does not imply a requirement to make an agreement.²²⁴ Lastly, preconditions for jurisdiction do not have to be met on the day that the state party submits its application to the Court, but rather must be satisfied by the date that the Court makes its decision regarding jurisdiction.²²⁵

In this case, the Court once again narrowed the standard established in previous ICJ decisions by requiring that the negotiations fail or are deadlocked before initiating proceedings in the ICJ.²²⁶ Precedent does not necessitate such a strict requirement. Georgia could still initiate proceedings in the ICJ even if it had not expressly referred to CERD in negotiations. Furthermore, similar to the *Nicaragua v. United States of America* case, Russia likely knew its conduct was in violation of its international obligations.²²⁷ Georgia submitted evidence to demonstrate it had initiated negotiations with Russia concerning racial discrimination in various fora.²²⁸ Lastly, the Court did not need to determine whether preconditions had been met by the day that Georgia initiated proceedings but rather by the date that the ICJ made its determination regarding jurisdiction.²²⁹ The Court could have considered any negotiations that related to the conflict after Georgia submitted its application to the Court on

221. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1984 I.C.J. 392, ¶ 83 (Nov. 26).

222. *Id.*

223. *South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.)*, Preliminary Objections, 1962 I.C.J. 319, 345 (Dec. 21) (quoting *Mavrommatis Palestine Concessions*, 1924 P.C.I.J. (ser. A) No. 2, at 13 (Aug. 30)).

224. *Railway Traffic Between Lithuania and Poland*, Advisory Opinion, 1931 P.C.I.J. (ser. A/B) No. 42, at 116 (Oct. 15).

225. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.)*, Preliminary Objections, 2008 I.C.J. 412 ¶ 85 (Nov. 18).

226. *Application of International Convention on the Elimination of all Forms of Racial Discrimination (Geor. v. Russ.)*, Preliminary Objections, 2011 I.C.J. 1, ¶ 159 (Apr. 1).

227. *Nicar. v. U.S.*, 1984 I.C.J. ¶ 83.

228. *Geor. v. Russ.*, 2011 I.C.J. ¶ 164.

229. *See Croat. v. Serb.*, 2008 I.C.J. ¶ 85.

August 12, 2008. Therefore, Georgia did meet the preconditions required to initiate proceedings in the ICJ under CERD.

B. Implications for International Human Rights

Human rights treaties challenge how we think about the jurisdiction of the ICJ. It makes us question whether the ICJ can resolve legal disputes related to human rights treaties. This case illustrates the limitations of the ICJ as it relates to CERD and other human rights treaties. However, if the ICJ is not adjudicating claims brought under human rights treaties, who will enforce human rights law? In this case, Georgia turned to the European Court of Human Rights (ECHR) to resolve the dispute.²³⁰ The ECHR, in contrast to the ICJ, found that it did indeed have jurisdiction to adjudicate Georgia's claim.²³¹ Thus, the ECHR will adjudicate the case between Georgia and Russia.²³²

While regional courts such as the ECHR, IACHR, and the ACJHR are available to both individuals and states, they are not accessible to them when the state party violating human rights is not a member to the regional human rights convention.²³³ Thus, many human rights claims cannot be adjudicated in the regional human rights courts. Furthermore, the ICJ recently held that domestic courts do not have the jurisdiction to adjudicate claims made against states who violated human rights.²³⁴ Thus, there is a gap in who will enforce human rights.

1. ICJ Limitation as Related to Human Rights Treaties

This case illustrates the limitations of the ICJ as it relates to CERD and other human rights treaties. In issuing the provisional measures, this was the first time that the ICJ found jurisdiction under

230. See *Georgia v. Russia (II)*, App. No. 38263/08, Eur. Ct. H.R., Preliminary Objections, ¶ 1–2 (Dec. 13, 2011), <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=897303&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

231. *Id.* at ¶ 102.

232. As of the time of printing, the ECHR has not scheduled public hearings for *Georgia v. Russia (II)*. See *Provisional List of Scheduled Public Hearings*, EUROPEAN COURT OF HUMAN RIGHTS, <http://www.echr.coe.int/ECHR/EN/Header/Pending+Cases/Pending+cases/Calendar+of+scheduled+hearings/> (last updated Apr. 13, 2012).

233. See *supra* note 12 and accompanying text.

234. See *Jurisdictional Immunities of State (Ger. v. It.)*, Judgment, 2012 I.C.J. 1, ¶ 139 (Feb. 3).

CERD in the fifty years the treaty has existed.²³⁵ While it seems that Georgia's complaints under CERD were tangential to the actual issue of Russia's invasion into Georgia, the Court took a formalistic approach to determining that it did not have jurisdiction.²³⁶ It did not address the substantive issues of the Russian invasion and the fact that CERD did not deal with use of force issues.²³⁷ Although this case may not be a classic human rights case in which CERD would apply, the ICJ focused purely on whether the preconditions of Article 22 of CERD had been met. Therefore, this case has implications for future cases relating to human rights treaties that give the ICJ jurisdiction.

One problem with the human rights treaties that confer jurisdiction to the ICJ, in particular, is that only state parties can initiate proceedings in the ICJ.²³⁸ However, in many situations, the victims of discrimination and other human rights violations are individuals. These individuals do not have the power to bring claims to the ICJ. Given the ICJ's limitations in terms of jurisdiction, the effectiveness and strength of the human rights treaties that give jurisdiction to the Court come into question. If disputes relating to the interpretation and application of human rights treaties cannot be brought to the ICJ by the individual victims of human rights violations, then those who should be protected by the human rights treaties have no way to seek redress. Furthermore, in many cases, the state parties are the perpetrators of human rights violations and, thus, have no interest in initiating proceedings in the ICJ. Since states that are perpetrators of human rights violations and victims are not bringing claims to the ICJ, the Court is not hearing the disputes related to the human rights treaties that give the ICJ jurisdiction. Several human rights treaties give jurisdiction to the ICJ, all of which become less effective because the ICJ is not adjudicating disputes related to such treaties.²³⁹ For these reasons, the ICJ plays a limited role in international human rights law.

235. Buys, *supra* note 4, at 294.

236. Phoebe Okowa, *The International Court of Justice and the Georgia/Russia Dispute*, 11 HUM. RTS. L. REV. 739, 740, 749–50 (2011).

237. *Id.*

238. Statute of the International Court of Justice, *supra* note 2, art. 34(1).

239. The relevant treaties include the Convention on the Prevention and Punishment of the Crime of Genocide, art. 9, Dec. 9, 1948, 78 U.N.T.S. 277; the Convention on the Elimination of All Forms of Discrimination against Women, art. 29, Dec. 18, 1979, 1249 U.N.T.S. 13; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 30, Dec. 10, 1984, 1465 U.N.T.S. 85; the International Convention on the Protection of the Rights of All Migrant Workers and Members of their

Through its decision in this case, the ICJ has further restricted the role it will play as an enforcer of human rights law. As discussed above, the Court restricted established precedent.²⁴⁰ First, the ICJ claimed that when determining there was a dispute, it would only consider statements made by the executive branch instead of looking at other parts of government also involved in foreign policy.²⁴¹ As a result, the Court improperly discarded evidence merely because the Georgian President had not officially endorsed the Georgian Parliament's statements related to ethnic cleansing and discrimination.²⁴² Second, when deciding that the preconditions of Article 22 had not been met, the Court not only required that negotiations had been initiated, as required by precedent, but that negotiations had failed or become futile.²⁴³ Consequently, the Court did not consider evidence demonstrating that Georgia had initiated negotiations with Russia concerning racial discrimination.²⁴⁴ The Court further limited the scope of human rights cases that it may adjudicate. Thus, the human rights treaties that give jurisdiction to the ICJ only become less effective because the Court is less likely to enforce them. If the ICJ is not enforcing human rights treaties, then who will? In this case, Georgia turned to the ECHR.

2. Regional Human Rights Courts as a Solution to the International Court of Justice's Limitation as Related to Human Rights Treaties

Regional human rights courts provide an alternative to the ICJ when dealing with human rights violations. These regional courts, such as the ECHR, IACHR, and the ACJHR, allow state parties and individuals to initiate proceedings against states that are parties to the conventions establishing the courts.²⁴⁵

In this case, in August 2008, Georgia submitted an application to initiate proceedings in the ECHR to resolve the dispute with

Families, art. 92(1), Dec. 18, 1990, 2220 U.N.T.S. 3; and the Convention Relating to the Status of Refugees, art. 38, July 28, 1951, 198 U.N.T.S. 137.

240. *See supra* Part V.A.

241. *See supra* Part IV.B.1.

242. *See supra* Part V.A.

243. *See supra* Part IV.B.2.b.

244. *See supra* Part IV.A.2.

245. *See supra* note 12 and accompanying text.

Russia.²⁴⁶ It alleged that Russia had violated several provisions of the European Convention on Human Rights (the Convention) including the civilians' right to life under Article 2, right to liberty and security under Article 5, right to respect for private and family life under Article 8, right to education under Article 2 of the first Protocol, freedom of movement under Article 2 of Protocol number 4, the right to an effective remedy under Article 13.²⁴⁷ Finally it also claimed that Russia had violated the prohibition against torture under Article 3.²⁴⁸ These claims were similar to the contentions that Georgia had made in the case in front of the ICJ. In its application to the ICJ, Georgia had claimed that Russia had been responsible for murdering, torturing, raping, deporting, and forcibly transferring ethnic Georgians.²⁴⁹ Georgia has also asserted that Russia had denied ethnic Georgians the right to return to their homes in South Ossetia.²⁵⁰ On December 13, 2012, the ECHR found that it had jurisdiction to adjudicate the case between Georgia and Russia on its merits.²⁵¹

The fact that Georgia was able to initiate proceedings in two international courts illustrates one of the positive effects of the fragmentation of international law as related to human rights law. One of the causes of the fragmentation of international law is the proliferation of specialized and regional tribunals.²⁵² The multiplication of jurisdiction has enlarged the scope of justiciability of international disputes, which many scholars have viewed

246. See *Georgia v. Russia (II)*, App. No. 38263/08, Eur. Ct. H.R., Preliminary Objections, ¶ 1–2 (Dec. 13, 2011), <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=897303&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

247. *Id.*

248. *Id.*

249. Application of International Convention on the Elimination of all Forms of Racial Discrimination (*Geor. v. Russ.*), Application Instituting Proceedings, ¶ 81(a) (Aug. 8, 2008), available at <http://www.icj-cij.org/docket/files/140/14657.pdf>.

250. See *id.* ¶ 81(c).

251. See *Georgia v. Russia (II)*, ¶ 1–2. The ECHR dismissed Russia's claim that Georgia had violated Article 35 of the Convention by filing its application to Court more than six months after the date of the act which is said not to comply with the Convention. *Id.* The ECHR decided that it would make a final determination as to Russia's other preliminary objections in the merits portion of the case. *Id.* Russia's other objections include that the Convention does not apply in times of armed conflict, the Convention does not apply extraterritorially, and that Georgia has not satisfied the precondition to the ECHR's jurisdiction, the exhaustion of domestic remedies. *Id.*

252. See Gerhard Hafner, *Pros and Cons Ensuing from the Fragmentation of International Law*, 25 MICH. J. INT'L L. 849, 849–50 (2004).

positively.²⁵³ However, there are also problems that accompany the proliferation of tribunals. One problem is that the fragmentation of international law may cause “conflicting and incompatible rules, principles, rule systems and institutional practices.”²⁵⁴ Because there is no hierarchy between the various international courts, different rules develop, thus prejudicing the “basic unity of the international legal order.”²⁵⁵ This note does not seek to discuss in depth the issue of fragmentation of international law. However, it must be noted that the fact that the ECHR found that it could adjudicate this case demonstrates that the ECHR has set a different standard for finding jurisdiction than the ICJ. When the ECHR issues its decision on the merits of the case, we will have a better understanding of how much the ECHR and ICJ diverge when determining how human rights treaties apply during armed conflict.

While the ECHR may have provided an alternate venue to resolve this case, there may not be such an option in other human rights cases. The regional human rights courts only have jurisdiction over the state parties to the convention establishing the court.²⁵⁶ Thus, if one state alleges that another state, which is not a party to any of the regional human rights conventions, has violated certain human rights, that state may not use the regional courts to resolve the dispute. Furthermore, as discussed earlier, the ICJ has further restricted the scope of human rights cases that it may adjudicate by narrowing the interpretation of the Court’s precedent when making a determination about jurisdiction.²⁵⁷ Therefore, the state parties to human rights treaties giving jurisdiction to the ICJ must wait until negotiations become futile before initiating proceedings. Waiting until that point may increase the number of human rights violations committed. Thus, there are situations in which states alleging human rights violations may not be able to initiate proceedings in any international court.

253. Pierre-Marie Dupuy, *The Danger Of Fragmentation Or Unification Of The International Legal System And The International Court Of Justice*, 31 INT’L L. & POL. 791, 796 (1999).

254. Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law, Rep. of the Int’l Law Comm’n, 58th Sess., May 1–June 9, July 3–Aug. 11, 2006, 14, U.N. Doc. A/CN.4/L.682 (Apr. 16, 2006).

255. Dupuy, *supra* note 253, at 792.

256. *See supra* note 12 and accompanying text.

257. *See supra* Part V.A.2.

3. Domestic Courts as a Solution to the International Court of Justice's Limitation in Human Rights Treaties

In the cases where regional courts do not have jurisdiction to adjudicate cases, individuals could initiate proceedings in domestic courts. However, the ICJ recently held that Italy had violated its obligation to respect Germany's sovereign immunity by allowing individuals to bring civil claims against Germany in Italian domestic courts based on violations of international humanitarian law committed by the German Reich between 1943 and 1945.²⁵⁸ The ICJ also found that Italy failed to respect Germany's sovereign immunity when Italian domestic courts enforced decisions of Greek courts finding that the German Reich had committed violations of international humanitarian law committed in Greece.²⁵⁹ Therefore, victims of human rights violations by a state may not seek redress in domestic courts since domestic courts do not have the jurisdiction to adjudicate such claims due to the state's sovereign immunity.

The limitations on both international and domestic courts' jurisdiction has created a gap in who will enforce human rights. The ICJ further limited its ability to adjudicate claims arising from human rights treaties in its decision in *Georgia v. Russian Federation* by reading precedent narrowly and requiring high standards for finding jurisdiction.²⁶⁰ The regional human rights courts are also limited in the cases they can adjudicate because they do not have universal jurisdiction.²⁶¹ Lastly, domestic courts cannot adjudicate human rights claims against states because the ICJ has found that such cases violate sovereign immunity.²⁶² If the courts are not adjudicating human rights claims, where can they be resolved? This gap in the court system is problematic because resolving human rights disputes is better accomplished through the courts than negotiations or diplomacy because courts are, theoretically, impartial bodies.²⁶³ An

258. Jurisdictional Immunities of State (Ger. v. It.), Judgment, 2012 I.C.J. 1, ¶ 139 (Feb. 3).

259. *Id.*

260. *See supra* Part V.B.1.

261. *See supra* Part V.B.2.

262. *See Ger. V. It.*, 2012 I.C.J. ¶ 139.

263. *See* Erik Voeten, *The Impartiality of International Judges: Evidence from the European Court of Human Rights*, 102 AM. POL. SCI. REV. 417, 417 (2008) ("Scholars of various theoretical persuasions agree that impartiality should be a defining quality of such bodies.").

impartial third party is important to resolve human rights disputes because one state party may be politically, economically, or militarily stronger than the other thus, increasing the possibility of unfairness in negotiations.

CONCLUSION

The ICJ already has a limited role in international human rights law since only states are able to bring claims to the Court. In this case, the ICJ further limited its role in human rights law by only considering executive branch statements when determining that a dispute exists. Furthermore, it restricted provisions similar to Article 22 of CERD when it determined that negotiations must have failed or become futile before the Court will have jurisdiction. These requirements further limit the number of human rights cases that the ICJ may hear as well as decrease the limited role the ICJ plays in international human rights law. Thus, the human rights treaties themselves become less effective because the ICJ is not adjudicating cases and, thus, not enforcing the treaties. Furthermore, while state parties and individuals may initiate proceedings in regional human rights courts, these courts only have jurisdiction over state parties to the courts' conventions. Furthermore, the ICJ recently held that domestic courts do not have the jurisdiction to adjudicate claims made against states who violated human rights. Thus, there is a gap in who will enforce human rights, which is problematic since courts provide a relatively fairer forum to resolve human rights disputes than negotiations between parties. The ICJ's decision in this case has only further widened this gap. Thus, the question remains, who will enforce human rights?