INTERNATIONAL COURT OF JUSTICE

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

REPLIES OF THE RUSSIAN FEDERATION TO THE QUESTIONS PUT TO THE PARTIES DURING THE ORAL HEARING BY JUDGES KOROMA, ABRAHAM AND CANÇADO TRINDADE

A. QUESTION PUT BY JUDGE KOROMA

"What precisely, in the view of the Parties, is the object and purpose of the clause contained in Article 22 of the Convention on the Elimination of All Forms of Racial Discrimination which reads as follows: "which is not settled by negotiation or by the procedures expressly provided for in this Convention"?"

Reply of the Russian Federation:

The concept of object and purpose is widely used in the 1969 Vienna Convention on the Law of Treaties where it occurs in eight different provisions[1] and is usually related to the treaty as a whole. In particular, according to Article 31 (1) of the Vienna Convention, it is used for the purpose of enlightening the meaning of the words of a specific clause:

> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

[1] Cf. articles 18, 19 (c), 20, paragraph 2, 31, paragraph 1, 33, paragraph 4, 41, paragraph 1 (b) (ii), 58, paragraph 1 (b) (ii), and 60, paragraph 3 (b).

However, as the ILC has noted,

> "It is by no means easy to put together in a single formula all the elements to be taken into account, in each specific case, in determining the object and purpose of the treaty. Such a process undoubtedly requires more "*esprit de finesse*" than "*esprit de géométrie*"[2], like any act of interpretation, for that matter - and this process is certainly one of interpretation."[3]

This is certainly also true when one endeavours to determine not the object and purpose of a treaty as a whole, but that of particular terms in a specific provision of the treaty, as requested in Judge Koroma's question.

In both cases, the object and purpose must be assessed by reference to the intent of the Parties. To that end, the text of the clause will always constitute the main element in the assessment of object and purpose.

When the object and purpose of the treaty or of a provision thereof is not apparent from the text, it is natural and legitimate to draw it from the drafting history of the treaty or of the clause in question.

Moreover, especially when a single provision, sentence, phrase or word is concerned, the principle of the *effet utile*, to which the Russian Federation has already made reference in its pleadings[4], has a particular role to play since it

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[2] Blaise Pascal, *Pensées*, in *Œuvres complètes* (Paris: Bibliothèque de la Pléiade, N.R.F.-Gallimard, 1954), p. 1091.

[3] ILC, *Report of the fifty-ninth session (2007), General Assembly, Official Records, Supplement No. 10*, document A/62/10, p. 77.

[4] RPO, vol. I, pp. 85- 87 and in the course of its oral submissions at the preliminary objections stage (CR 2010/8, 13 Sep. 2010, pp. 44–45, paras. 10-13 (Pellet) and CR 2010/10, 15 Sep. 2010, pp. 23-24, paras 1-4 (Pellet)).

can scarcely be accepted that words deliberately inserted in the treaty would be superfluous – that is devoid of any object or purpose. This has been underlined by the Court in several cases. For instance, in the *Territorial Dispute* case, the Court underlined that no provision of a treaty could be considered as superfluous, for this would run contrary to the ordinary meaning of the text and of its object and purpose:

> "In the view of the Court, the terms of the Treaty signified that the parties thereby recognized complete frontiers between their respective territories as resulting from the combined effect of all the instruments listed in Annex 1; no relevant frontier was to be left undefined and no instrument listed in Annex 1 was superfluous. It would be incompatible with a recognition couched in such terms to contend that only some of the specified instruments contributed to the definition of the frontier, or that a particular frontier remained unsettled. So to contend would be to deprive Article 3 of the Treaty and Annex 1 of their ordinary meaning"[5].

Nonetheless, in the present case, Georgia's interpretation of Article 22 CERD does render the terms referred to by Judge Koroma superfluous.

However, the expression "which is not settled by negotiation or by the procedures expressly provided for in this Convention" inserted in Article 22 CERD must have some object and purpose. It follows from a plain reading of Article 22 that this phrase was inserted in order to indicate that these specified means of settlement of disputes *must* be used and must be used *prior* to the seisin of the Court, as the language used in Article 22 makes clear since

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[5] ICJ, Judgment of 3 February 1994, *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Rep.* 1994, p. 22, para. 43. For a specific mention of the object of the treaty and its relation with the Annex 1 instruments, see *id.*, p. 24, para. 48.

negotiations or using the procedures provided for in the Convention *after* the Court has given its Judgment would be meaningless – that is devoid of any *effet utile*.

The drafting history of this provision confirms this understanding of its object and purpose[6] and, at the same time, dispels any doubt which could remain as to the meaning of the conjunction "or": as shown during the hearings, in a phrase like that at issue, "or" will usually have a cumulative meaning[7]. And, indeed, the *travaux préparatoires* leave no doubt as to the negotiators' intention to have any reference of a dispute to the Court preceded by negotiations *and* by the conciliation procedures provided for in CERD. Although the precise method of negotiation they had in mind might be considered as uncertain (possibly within or outside the framework of Articles 11 to 13 of the Convention), the *travaux* demonstrate that the phrase at issue was inserted into the text to make clear the requirement that the parties have resort in the first instance to the institutional procedures provided for in these Articles. [8]

In this way, States were provided with the means, but also the obligation, to crystallize and then seek to settle the dispute before any unilateral application was brought before the Court[9]. The existence of such means/pre-condition to jurisdiction was intended to defeat the reluctance on the part of

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[6] It is undisputed that the *travaux préparatoires* can be a useful means to confirm the object and purpose of a convention. See ICJ, *Territorial Dispute case*, above footnote, p. 27, para 55. See also ICJ, Advisory opinion, 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Rep.* 2004, p. 179, para. 109.

[7] CR 2010/8, 13 Sep. 2010, pp. 54–55, para. 36 (Pellet) and CR 2010/10, 15 Sep. 2010, p. 25, paras. 7-8 (Pellet).

[8] RPO, vol. I, pp. 122- 127, paras. 4.67 - 4.72 and in the course of its oral submissions at the preliminary objections stage (CR 2010/8, 13 Sep. 2010, p. 48, para. 23 and id, pp. 57 -58, para. 45 (Pellet) and CR 2010/10, 15 Sep. 2010, pp. 28- 29, paras 17-18 (Pellet).

[9] See statement by M. Cochaux (Belgium), Russia, *Judges' Folder for the oral submissions on the Preliminary Objections*, Tab 3. As to crystallization of the dispute see CR 2010/8, 13 Sep. 2010, pp. 29-31, paras. 5-14, (Wordsworth) and CR 2010/10, 15 Sep. 2010, pp. 11-12, paras 5-10 (Wordsworth). Compare also Rules 69 and 72 of the CERD Rules of Procedure, CERD/C/35/Rev.3; cf. CR 2010/11, 17 Sep. 2010, p. 23, paras. 5-6, (Crawford).

various States to the possibility that the Court be seized by unilateral application. At the same time, the introduction of the second part of the phrase by the three-Powers amendment was meant to harmonize the different mechanisms of implementation provided for in the Convention, in particular, to harmonize the Court's jurisdiction with the competence of the CERD committee[10]. Without such a compromise the whole Convention, and, certainly, its compromissory clause would probably not have been adopted.

In the light of the text of the phrase, of the *effet utile* principle, and of the intention of its drafters as appears from the *travaux*, the object and purpose of the phrase at issue in Article 22 is to make explicit the existence of preconditions to the Court's seisin under CERD. This phrase is part and parcel of the compromissory clause, and, therefore, negotiations and the recourse to the procedures provided for in the Convention constitute pre-conditions to States' acceptance of the Court's jurisdiction.

B. QUESTION POSÉE PAR M. LE JUGE ABRAHAM

"Au stade actuel de la procédure, la Cour est appelée seulement à se prononcer sur les exceptions préliminaires soulevées par la Partie défenderesse.

Compte tenu des débats qui ont eu lieu au cours des audiences, faut-il comprendre que la Russie a retiré sa troisième exception en tant qu'exception préliminaire?"

Réponse de la Fédération de Russie :

Dans ses écritures, la Fédération de Russie a soulevé quatre objections préliminaires, la troisième ayant trait à la compétence *ratione loci* de la Cour.

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[10] See statements by M. Lamptey (Ghana) and M. Boullet (France), Russia, *Judges' Folder for the oral submissions on the Preliminary Objections*, Tab 3.

Durant la procédure orale, la Russie a constaté que cette objection ne présente pas un caractère exclusivement préliminaire[11]. Par conséquent et dans l'hypothèse où la Cour déciderait qu'elle a compétence, la Russie l'invite à aborder les questions relatives à l'application extraterritoriale de la CERD uniquement au stade de la procédure au fond.

Il ne doit pas en être conclu que la Russie ait retiré la troisième objection relative à la compétence *ratione loci* de la Cour. Il s'agit plutôt d'une suggestion de la part de la Russie – en ce qui concerne cette objection et cette objection seulement – tendant à ce qu'il soit sursis à l'examen de cette objection jusqu'à la phase de l'examen au fond[12].

En conséquence, dans cette dernière hypothèse, la Russie se réserve le droit de revenir sur cette objection dans le cadre de la procédure sur le fond dans l'hypothèse où la Cour estimerait pouvoir exercer sa compétence au fond dans la présente affaire (*quod non*), c'est-à-dire où elle rejetterait les autres exceptions soulevées par la Russie.

Reply of the Russian Federation:

In its written Preliminary Objections the Russian Federation submitted four preliminary objections. The third preliminary objection related to the Court's jurisdiction *ratione loci.*

During the oral hearing, Russia noted that this objection is not necessarily of an exclusively preliminary nature[13] and, therefore, respectfully

[11] CR 2010/8, p. 26, para. 31 (Kolodkin)

[12] CR 2010/10, p. 47, para. 49 (Zimmermann); CR 2010/10, p. 53, para. 23 (Gevorgian)

[13] CR 2010/8, p. 26, para. 31 (Kolodkin)

invited the Court, should it ever decide to uphold jurisdiction, to address issues related to the extraterritorial application of CERD as part of the merits only[14].

It was not meant to be understood that the third objection relating to the Court's jurisdiction *ratione loci* should be considered as withdrawn. Rather, Russia has merely – with regard to that objection and with regard to that objection only – suggested that this objection should be decided at any merits stage.

Accordingly, Russia reserves its right to come back to this objection as part of the proceedings on the merits in the event that the Court finds that it is in a position to exercise its jurisdiction in the case at hand (*quod non*), *i.e.* rejects Russia's other objections.

C. QUESTION PUT BY JUDGE CANÇADO TRINDADE

"In your understanding, does the nature of human rights treaties such as the CERD Convention (regulating relations at intra-State level) have a bearing or incidence on the interpretation and application of a compromissory clause contained therein?"

Reply of the Russian Federation:

As a multi-ethnic State, the Russian Federation acknowledges and values the specific character of the CERD Convention as a treaty imposing upon member States obligations primarily to be performed at the intra-State level.

This specific character is, in many respects, reflected in the CERD's

[14] CR 2010/10, p. 47, para. 49 (Zimmermann); CR 2010/10, p. 53, para. 23 (Gevorgian)

unique implementation and enforcement mechanism to which Article 22 specifically makes reference. This mechanism provides for reporting obligations on the part of the States parties, which allows the Committee to supervise the domestic practices of the contracting parties[15].

It equally establishes, through the Articles 11 to 13 procedure, a form of collective guarantee of respect for the Convention by the States Parties, to be ensured by an inter-State complaint and conciliation procedure under the auspices of the Committee. No special acceptance of this procedure is needed; the ratification by a State of the Convention makes this procedure automatically applicable, and the procedure is mandatory so far as concerns any respondent State. Thus the contracting parties, alongside the Committee, become guarantors of the enforcement of the Convention.

Most notably, the Individual Complaint Procedure of Article 14 CERD (which the Russian Federation has accepted since 1st October 1991) underlines the intra-State character of the CERD Convention in that it enables individuals themselves to take action vis-à-vis Contracting Parties when the individual believes that there has been a violation of rights protected by CERD.

The specific importance of individual intra-State rights guaranteed by CERD is also reflected in the practice of the CERD Committee, *i.e.* in its

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[15] The unique role of the human rights treaties' monitoring bodies, which reflects the specific character of human rights treaties, has recently been recognized by the International Law Commission in its work on reservations. See for instance guideline 4.2.5 of the ILC Guide to Practice on reservations to treaties on the effect of reservations to non reciprocal obligations and its commentaries (not yet publicly available). For the commentaries of the Special Rapporteur, see Alain Pellet, *Fourteenth Report on Reservations to Treaties, Addendum 2*, document A/CN.4/614/Add.2, para. 285.

The ILC, most notably, has acknowledged the role of the monitoring bodies as guardians of the treaties, through an express recognition of their competence to assess the permissibility of reservations. See guideline 3.2.2 and its commentary, *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/64/10), pp. 297- 299.

development of an urgent procedure to provide for the protection of individual rights guaranteed by CERD when these are most endangered.

The Convention also contains implementation procedures of a more traditional character (when compared with general international law) in the form of inter-State dispute settlement before the International Court of Justice under Article 22 CERD, which necessarily falls to be interpreted and applied in the context of CERD's other implementation procedures. Hence, and as also follows from the express language used in the provision, the rights under Article 22 only come into play once a matter arising under CERD has crystallised into an inter-State dispute and when, moreover, the disputant parties have not been able to settle the dispute by inter-state negotiations and by the procedures provided for in Articles 11 – 13 CERD.

Further, as follows from the combination of the subject-matter, as well as the intra- and inter-State features of CERD, the obligations under the Convention are of an *erga omnes* nature. This also has a bearing on the interpretation and application of Article 22 of the Convention and of the procedures expressly provided for in this Convention to which Article 22 refers. As the Russian Federation stated in its Preliminary Objections, "[t]he *erga omnes* character of the obligations instituted therein [in CERD] is reflected in the procedures established by the Convention to deal with the inter-State complaints, which involve the other Parties to the Convention"[16].

This interpretation of Article 22 CERD takes full account of the specific intra-State character of the CERD Convention aimed at protecting human rights of individuals.

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[16] RPO, vol. I, para 4.33.