INTERNATIONAL COURT OF JUSTICE

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

# COMMENTS OF THE RUSSIAN FEDERATION ON THE WRITTEN REPLIES OF GEORGIA TO THE QUESTIONS PUT TO THE PARTIES DURING THE ORAL HEARING BY JUDGES KOROMA AND CANÇADO TRINDADE

**1 October 2010**

## A. COMMENTS ON THE ANSWER OF GEORGIA TO THE QUESTION PUT BY JUDGE KOROMA

The Russian Federation has no difficulty with the first part of Georgia's answer to Judge Koroma's question, which consists in asserting that the object and purpose of the Convention on the Elimination of All Forms of Racial Discrimination is to eliminate racial discrimination. But this misses the point. Judge Koroma's question concerns the more specific issue of

> "... 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'".

Again, the question is not to determine what is "appropriate" according to Georgia (as it appears to contend in the concluding paragraph of its answer), but what is the object and purpose of the phrase in question when interpreted according to the general rule of interpretation, as embodied in Article 31 of the 1969 Vienna Convention on the Law of Treaties. In this respect, Georgia simply sticks to an interpretation which deprives the phrase identified by Judge Koroma of any object and purpose whatsoever.

In addition, the task of addressing that question is not assisted by the incorrect characterisation of the conciliation procedures of CERD, which Georgia seeks to downplay and distinguish by its reference to "the different inquiry function of the bodies established by Part II". Articles 11 – 13 of CERD in fact establish a compulsory mechanism for the conciliation of inter-State disputes (once crystallised in accordance with Articles 11(1) and 11(2) CERD).

It is also noted that Georgia, whether for reasons of shorthand or otherwise, refers only to the first words - "which is not settled" - of the phrase addressed in the question put by Judge Koroma.[1] This approach of Georgia is entirely reflective of its attempts to deprive the phrase of all meaning – and therefore of any possible object and purpose.

As a matter of fact, the phrase does not stop after these four words, but continues precisely to indicate what means of dispute settlement must be used as preconditions for the unilateral submission of the dispute to the Court by a State Party. It is the entirety of the phrase "which is not settled by negotiation or by the procedures expressly provided for in this Convention", that makes it meaningful and, by the same token, reveals its clear object and purpose.

As demonstrated again in the Russian response, the clear object and purpose of the provision in question, when interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context" was – and is – to oblige the Contracting Parties of CERD to attempt to settle a dispute concerning the interpretation or application of the Convention by negotiation or by the procedures expressly provided for in the Convention before being able to submit it to the Court should those attempts have failed.

This is the only possible interpretation if one wants to give effect to the phrase at issue.

This interpretation is further confirmed by the drafting history of that phrase. As demonstrated in Russia's Preliminary Objections[2] and during the oral hearings,[3] the part of the phrase referring to the "procedures expressly provided for..." was deliberately inserted into the draft Convention at a late stage, as a compromise solution in a situation where a number of delegations were unwilling to agree on the compulsory jurisdiction of the Court.

In this respect, the Russian Federation notes again that Georgia invokes the *travaux préparatoires* of the Convention in support of its views but, while quoting some extracts of the summary records of the discussions in order to establish the general object and purpose of the Convention, Georgia tellingly does not quote any passage when it comes to defining the object and purpose of the expression in question.

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1 See in particular the two last paragraphs of Georgia's answer.

2 Preliminary Objections of the Russian Federation, vol.I, pp.125-126.

3 CR 2010/8, pp. 56-57 (Pellet).

## B. COMMENTS ON THE ANSWER OF GEORGIA TO THE QUESTION PUT BY JUDGE CANÇADO TRINDADE

As set out in further detail in its own answer to the question asked by Judge Cançado Trindade, the Russian Federation fully accepts the *erga omnes* nature of the rights protected by human rights treaties, including CERD.

With respect to the interpretation of compromissory clauses contained in such treaties, the Russian Federation likewise accepts that these are special in nature in that any State Party thereto may bring a dispute concerning a breach of those obligations by another State Party before the Court. However, that does not mean that the specific pre-conditions to jurisdiction in the given compromissory clause may be bypassed, or that the compromissory clause should be interpreted entirely in isolation from the relevant context, which may (and, in this case, does) comprise inter-related dispute settlement mechanisms within the treaty itself.

As the Court has already had occasion to emphasize,

> "... 'the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things' (*East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995*, p. 102, para. 29), and ... the mere fact that rights and obligations *erga omnes* may be at issue in a dispute would not give the Court jurisdiction to entertain that dispute.
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> The same applies to the relationship between peremptory norms of general international law (*jus cogens*) and the establishment of the Court's jurisdiction: the fact that a dispute relates to compliance with a norm having such a character, which is assuredly the case with regard to the prohibition of genocide, cannot of itself provide a basis for the jurisdiction of the Court to entertain that dispute. Under the Court's Statute that jurisdiction is always based on the consent of the parties.
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> 65. As it recalled in its Order of 10 July 2002, the Court has jurisdiction in respect of States only to the extent that they have consented thereto (*Armed Activities on the Territory of the Congo (New Application : 2002) (Democratic Republic of the Congo v. Rwanda), Provisional Measures, Order of 10 July 2002, I.C.J. Reports 2002*, p. 241, para. 57). When a compromissory clause in a treaty provides for the Court's jurisdiction, that jurisdiction exists only in respect of the parties to the treaty who are

bound by that clause and within the limits set out therein (*ibid.*, p. 245, para. 71)".[4]

This is also true in respect of CERD. And neither the interest in the protection of the rights protected by CERD nor, more generally, the interests of international justice would be served by violation of this fundamental principle.

In the present case, Article 22 CERD strikes a deliberate and fair balance between the (compulsory) jurisdiction of the Court on the one hand and the (preliminary) mandatory inter-State conciliation by the CERD Committee deliberately instituted by the Convention on the other. This in turn reflects the balance to be achieved between the breadth of the category of potential claimant States under Article 22 (given the *erga omnes* nature of obligations under CERD) and the interests of respondent States in only appearing before the Court once disputes have been crystallised and the requisite attempts at settlement have failed.

The CERD Committee has the primary role as to the implementation and supervision of CERD including through the settlement of eventual disputes between States Parties. The fact that the Convention provides for a possibility of seizing the Court should not be interpreted to the detriment of the Committee's vital functions.

Lessening the role of the CERD Committee would certainly neither be in line with the intentions of the drafters of CERD, nor would it contribute to preserving the special nature of human rights treaties in general, nor that of CERD in particular.

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[4] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 32, paras. 64-65.