



INTERNATIONAL COURT OF JUSTICE

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Press Release

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Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)

Preliminary Objections

The Court finds that it has no jurisdiction to decide the dispute

THE HAGUE, 1 April 2011. The International Court of Justice (ICJ), principal judicial organ of the United Nations, today rendered its Judgment on the preliminary objections raised by the Russian Federation in the case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation).

In its Judgment, the Court

“(1) (a) by twelve votes to four,

Rejects the first preliminary objection raised by the Russian Federation;

IN FAVOUR: President Owada; Judges Al-Khasawneh, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Cançado Trindade, Yusuf, Greenwood, Donoghue; Judge ad hoc Gaja;

AGAINST: Vice-President Tomka; Judges Koroma, Skotnikov, Xue;

(b) by ten votes to six,

Upholds the second preliminary objection raised by the Russian Federation;

IN FAVOUR: Vice-President Tomka; Judges Koroma, Al-Khasawneh, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Yusuf, Greenwood, Xue;

AGAINST: President Owada; Judges Simma, Abraham, Cançado Trindade, Donoghue; Judge ad hoc Gaja;

(2) by ten votes to six,

Finds that it has no jurisdiction to entertain the Application filed by Georgia on 12 August 2008.

IN FAVOUR: Vice-President Tomka; Judges Koroma, Al-Khasawneh, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Yusuf, Greenwood, Xue;

AGAINST: President Owada; Judges Simma, Abraham, Cançado Trindade, Donoghue; Judge ad hoc Gaja.”

History of the proceedings

The history of the proceedings can be found in Press Release No. 2011/7 of 15 March 2011.

Reasoning of the Court

Introduction (paras. 20-22)

After a brief procedural history, the Court recalls that to found the jurisdiction of the Court Georgia relied on Article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter “CERD”), which entered into force as between the Parties on 2 July 1999, and that the Russian Federation raised four preliminary objections to the jurisdiction of the Court. Article 22 of CERD reads as follows:

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

First preliminary objection — Existence of a dispute (paras. 23-114)

The Court considers the first preliminary objection, according to which there is no dispute between Georgia and the Russian Federation. After reviewing the Parties’ arguments, the Court begins by examining the meaning of the word “dispute” in Article 22 of CERD. The Court does not accept the Russian Federation’s contention that this term should be given in that provision a narrower interpretation than that to be found in general international law. The Court recalls that in its jurisprudence, “[a] dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons” and stresses that its determination must turn on an examination of the facts. The Court observes that the existence of a dispute may be inferred from the failure of a State to respond to a claim in circumstances where a response is called for.

The Court then sets out the steps it will follow in order to establish the existence or otherwise of a dispute under Article 22 of CERD. The Court needs to determine (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 Article 22 of CERD; and (3) whether that disagreement existed as of the date of the Application. In terms of the legal significance to be accorded to the various documents and statements adduced by the Parties, the Court states its intention to limit itself to official documents and statements, and to make a distinction between documents issued and statements made before and after Georgia became party to CERD.

In order better to understand the context in which these documents and statements were issued or made, the Court begins by addressing the relevant agreements reached in the 1990s concerning the situation in South Ossetia and Abkhazia, and the pertinent Security Council resolutions adopted from the 1990s until early 2008.

A number of documents and statements from the period before CERD entered into force between the Parties are also assessed as to their relevance in offering context to later documents and statements referred to by the Parties. The Court concludes that none of these documents or statements provides any basis for a finding that there was a dispute between the Parties concerning racial discrimination before 2 July 1999. The Court adds that even if a dispute about racial discrimination had been found to have existed, it could not have been a dispute with respect to the interpretation or application of CERD, the only kind of dispute in respect of which the Court is given jurisdiction by Article 22 of that Convention.

The Court then focuses its attention on documents and statements from the period after CERD entered into force between the Parties and before the beginning of armed conflict between the Parties in early August 2008. On the basis of its review the Court concludes that no legal dispute arose between Georgia and the Russian Federation during that period with respect to the interpretation and application of CERD.

Turning to the events that unfolded in early August 2008, in particular the armed hostilities in South Ossetia that began during the night of 7 to 8 August 2008, the Court observes that, while the claims levelled against the Russian Federation by Georgia between 9 and 12 August 2008 (the day on which Georgia submitted its Application) were primarily claims about the unlawful use of force, they also expressly referred to ethnic cleansing by Russian forces. These claims were made against the Russian Federation directly and were rejected by the latter. The Court therefore finds that by 12 August 2008, there was a dispute between Georgia and the Russian Federation about the latter's compliance with its obligations under CERD. The first preliminary objection of the Russian Federation is accordingly dismissed.

Second preliminary objection — Procedural conditions in Article 22 of CERD (paras. 115-184)

The Court next examines the second preliminary objection according to which the Russian Federation asserts that Georgia is precluded from having recourse to the Court as it has failed to satisfy two procedural preconditions contained in Article 22 of CERD, namely, negotiations and referral to procedures expressly provided for in the Convention. For its part, Georgia maintains that Article 22 does not establish any express obligation to negotiate nor does it establish any obligation to have recourse to the procedures provided for in CERD before the seisin of the Court.

Before providing its interpretation of Article 22 of CERD, the Court recalls that in its Order on the indication of provisional measures of 15 October 2008 it made a provisional finding as to the meaning of the expression “which is not settled by negotiation”. The Court further recalls that in that Order it also indicated that its provisional conclusion was without prejudice to its definitive decision on the question of whether it has jurisdiction to deal with the merits of the case. The Court in addition observes that it is not unusual in compromissory clauses conferring jurisdiction on the Court and other international jurisdictions to refer to resort to negotiations.

The Court then proceeds to the determination of the ordinary meaning of the terms used in Article 22 of CERD with a view to ascertaining whether this Article contains preconditions to be met before the seisin of the Court. The Court notes that the expression “dispute . . . which is not settled” must be given effect. According to the Court, the express choice of two modes of dispute settlement, namely, negotiations or resort to the special procedures under CERD, suggests an affirmative duty to resort to them prior to seisin. In addition, the Court observes that the use of the future perfect tense in the French version of the text further reinforces the idea that an attempt to settle the dispute must have taken place before referral to the Court. In this regard, it points out that the other three authentic texts of CERD, namely the Chinese, the Russian and the Spanish texts, do not contradict this interpretation. The Court, having reviewed its jurisprudence concerning compromissory clauses comparable to Article 22 of CERD, further observes that it has

consistently interpreted the reference to negotiations in such clauses as constituting a precondition to seisin. Accordingly, the Court concludes that in their ordinary meaning, the terms of Article 22 of CERD, namely “[a]ny dispute . . . which is not settled by negotiation or by the procedures expressly provided for in this Convention”, establish preconditions to be fulfilled before the seisin of the Court.

The Court states that, in light of this conclusion on the meaning of Article 22, it need not resort to supplementary means of interpretation. However as both Parties have made extensive arguments relating to the travaux préparatoires of CERD, and given the further fact that in other cases, the Court has resorted to the travaux in order to confirm its reading of the relevant texts, the Court considers that in this case an examination of the travaux préparatoires is warranted. After reviewing the Parties’ arguments on the question, the Court notes that, whilst no firm inferences can be drawn from the drafting history of CERD as to whether negotiations or the procedures expressly provided for in the Convention were meant as preconditions for recourse to the Court, it is possible nevertheless to conclude that the travaux préparatoires do not suggest a different conclusion from that at which the Court has already arrived through the main method of ordinary meaning interpretation.

Having thus interpreted Article 22 of CERD to the effect that it imposes preconditions which must be satisfied before resorting to the Court, the next question addressed by the Court is whether these preconditions were complied with in the current instance. First of all, the Court notes that Georgia did not claim that, prior to seising the Court, it used or attempted to use the procedures expressly provided for in CERD. The Court therefore limits its examination to the question of whether the precondition of negotiations was fulfilled.

In seeking to determine what constitutes negotiations, the Court first observes that negotiations are distinct from mere protests or disputations. In its view, the concept of “negotiations” requires — at the very least — a genuine attempt by one of the disputing parties to engage in discussions with the other disputing party, with a view to resolving the dispute. According to the Court, in the absence of evidence of a genuine attempt to negotiate, the precondition of negotiation is manifestly not met. Where negotiations are attempted or have commenced, the precondition of negotiation is met only when there has been a failure of negotiations, or when negotiations have become futile or deadlocked. Concerning the substance of negotiations, the Court observes that the absence of an express reference to the treaty in question during negotiations does not bar the invocation of the compromissory clause to establish jurisdiction. However, to meet the precondition of negotiation in the compromissory clause of a treaty, these negotiations must relate to the subject-matter of that treaty.

Against the background of these criteria, the Court turns to the evidence submitted to it by the Parties to determine whether, at the time Georgia filed its Application on 12 August 2008, there had been negotiations between Georgia and the Russian Federation concerning the subject-matter of their legal dispute under CERD, and if so, whether these negotiations had been unsuccessful. In view of the Court’s earlier finding that a dispute between Georgia and the Russian Federation falling within the ambit of CERD arose only in the period immediately before the filing of the Application, the Court notes that it was only possible for the Parties to be negotiating the matters in dispute during that relevant period, i.e., between 9 August 2008 and 12 August 2008. The Court also observes that it follows that it cannot accord any legal significance to earlier negotiations between the Parties which took place between Georgia and the Russian Federation before 9 August 2008. After reviewing the facts in the record during the period of dispute, the Court is of the view that, although certain claims and counter-claims made by the Parties concerning ethnic cleansing may evidence the existence of a dispute as to the interpretation and application of CERD, these exchanges did not constitute attempts at negotiations by either Party. The Court thus concludes that the facts in the record show that, between 9 August and 12 August 2008, Georgia did not attempt to negotiate CERD-related matters with the Russian Federation, and that,

consequently, Georgia and the Russian Federation did not engage in negotiations with respect to the latter's compliance with its substantive obligations under CERD.

The Court refers back to its earlier comment that Georgia did not claim to have used, prior to the seisin of the Court, the other mode of dispute resolution contained at Article 22, namely the procedures expressly provided for in CERD. Considering the Court's conclusion that, under Article 22 of CERD, negotiations and the procedures expressly provided for in CERD constitute preconditions to its jurisdiction, and considering the factual finding that neither of these two modes of dispute settlement was attempted by Georgia, the Court finds that it does not need to examine whether the two preconditions are cumulative or alternative.

The Court accordingly concludes that neither requirement contained in Article 22 has been satisfied. Article 22 of CERD thus cannot serve to found the Court's jurisdiction in the present case. The Court therefore upholds the second preliminary objection of the Russian Federation.

Third and fourth preliminary objections (para. 185)

Having upheld the second preliminary objection of the Russian Federation, the Court finds that it is required neither to consider nor to rule on the other objections to its jurisdiction raised by the Russian Federation and that the case cannot proceed to the merits phase.

Lapse of the Court's Order of 15 October 2008 (para. 186)

The Court recalls that, in its Order of 15 October 2008, it indicated certain provisional measures. The Court informs the Parties that this Order ceases to be operative upon the delivery of the Judgment on preliminary objections. It adds however that the Parties are under a duty to comply with their obligations under CERD, of which they were reminded in that Order.

Composition of the Court

The Court was composed as follows: President Owada; Vice-President Tomka; Judges Koroma, Al-Khasawneh, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue, Donoghue; Judge ad hoc Gaja; Registrar Couvreur.

President OWADA and Judges SIMMA, ABRAHAM, DONOGHUE and Judge ad hoc GAJA append a joint dissenting opinion to the Judgment of the Court; President OWADA appends a separate opinion to the Judgment of the Court; Vice-President TOMKA appends a declaration to the Judgment of the Court; Judges KOROMA, SIMMA and ABRAHAM append separate opinions to the Judgment of the Court; Judge SKOTNIKOV appends a declaration to the Judgment of the Court; Judge CANÇADO TRINDADE appends a dissenting opinion to the Judgment of the Court; Judges GREENWOOD and DONOGHUE append separate opinions to the Judgment of the Court.

A summary of the Judgment is published in the document entitled "Summary No. 2011/1", to which summaries of the declaration and opinions attached to the Judgment are annexed. The present Press Release, the summary and the full text of the Judgment also appear on the Court's website under the "Docket" and "Decisions" headings (www.icj-cij.org).

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