INTERNATIONAL COURT OF JUSTICE

APPLICATION OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

(GEORGIA v. RUSSIAN FEDERATION)

ANSWERS OF GEORGIA TO JUDGES' QUESTIONS

24 SEPTEMBER 2010

ANSWERS TO JUDGES' QUESTIONS

ANSWER TO QUESTION FROM JUDGE KOROMA

The question:

> 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"?

Georgia addressed the meaning and effect of Article 22 of CERD at paragraphs 3.12 through 3.53 of its *Written Statement on Preliminary Objections*. In response to the oral arguments of the Russian Federation, Georgia returned to the issue in the first and second rounds of its oral arguments.[1]

Georgia notes that the reference to "object and purpose" in the Vienna Convention on the Law of Treaties relates to the treaty as a whole, rather than to phrases within individual articles.[2] Georgia recognizes, however, that individual articles may contribute to an assessment of the overall object and purpose of a treaty, and that the treaty's object and purpose can inform the interpretation of individual words and phrases.

In Georgia's view, the overall object and purpose of CERD is to establish an effective regime at the international level to address racial (including ethnic) discrimination. The Convention's preamble refers to the resolution of the parties "to adopt all necessary measures for speedily eliminating racial discrimination in all its forms and manifestations." The *travaux préparatoires* are replete with references to the need to establish an effective regime, and examples include the following:

> **Mr. Ivanov (Union of Soviet Socialist Republics)**
> "[The Convention] should be an effective and practical instrument for eradicating racism and fascism, the most shameful phenomena of the contemporary world."
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> "The Convention which the Sub-Commission was to draft should not merely state principles; it should bind governments to take practical measures to liquidate racism and racial discrimination."

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[1] CR 2010/9, pp. 37-52, paras. 12-62 (Crawford); CR 2010/11, pp. 26-28, paras. 17-24 (Reichler).

[2] Article 31(1) of the 1969 Vienna Convention on the Law of Treaties provides that "*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.*" (emphasis added).

"...it should specify measures for effectively outlawing [racial discrimination]."[3]

Mr. Moskowitz (Consultative Council of Jewish Organizations) [Rep. from NGO]
"Unfortunately, the failure of the drafts before the Sub-Commission to provide for recourse to the International Court of Justice or for appropriate enforcement machinery raised serious questions concerning their effectiveness."[4]

Mr. Ostrovsky (Union of Soviet Socialist Republics)
"Mr. Ostrovsky cautioned against precipitating a vote on the remaining articles of Mr. Ingles's text. They had not been given adequate consideration and they contained a number of legal and textual inconsistencies; they could in no case be said to be an expression of the general views of the Sub-Commission. The only point on which general agreement had been reached was the need to include measures of implementation in the draft convention in order to make it more effective."[5]

Mr. Garcia (Philippines)
"During the debates in the Committee on the substantive articles of the Convention, [the Filipino] delegation had been deeply impressed by the universal desire of members to complete the consideration of the Convention quickly in order to secure an effective means of eliminating racial discrimination, which was clearly an important and urgent problem."[6]

The CERD regime includes the reporting and scrutiny system of the CERD Committee under Part II, but this is not the exclusive means by which States may address issues of racial or ethnic discrimination. The ICJ's jurisdiction is a separate part of the CERD regime, qualified only by reference to the requirements set out in Article 22 itself. The reporting and scrutiny system established by Part II is separate and distinct from Article 22 in its scope of application. Article 11, for example, may have a different purpose, in the sense of enabling any State party to query information given under Article 9 irrespective of whether it concerns the interpretation and application of the Convention; Article 22, by contrast, deals with disputes between States concerning the interpretation and application of the Convention.

If by negotiation or pursuant to the procedure envisaged in Part II, a dispute is settled as a matter of fact, then it is plain that the dispute cannot be brought to the Court under Article 22. This is the point of the "which is not settled" phrase, as Georgia has explained in its written and oral

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[3] U.N. Economic and Social Council, *Summary Record of the 407th Meeting*, U.N. Doc. E/CN.4/Sub.2/SR.407, p. 9, Written Statement of Georgia on Preliminary Objections (GWS), Vol. II, Annex 2.

[4] U.N. Economic and Social Council, *Summary Record of the 410th Meeting*, U.N. Doc. E/CN.4/Sub.2/SR.410, p. 5, GWS, Vol. II, Annex 2.

[5] U.N. Economic and Social Council, *Summary Record of the 429th Meeting*, U.N. Doc. E/CN.4/Sub.2/SR.429, p. 3, GWS, Vol. II, Annex 9

[6] U.N. General Assembly, *Official Record of the Third Committee, 1344th Meeting*, U.N. Doc. A/C.3/SR.1344, para. 27, GWS, Vol. II, Annex 24.

pleadings. This means, by way of example, if a complaint by an individual of discrimination that is raised by the government of another State is settled, then that State cannot take the matter further under Article 22.

For the reasons given by Georgia in oral argument,[7] it would not be consistent with the overall object of an effective fight against racial discrimination to subordinate the Court's judicial function under Article 22 to the different inquiry function of the bodies established by Part II. The phrase "which is not settled" does not in terms purport to so subordinate the Court's judicial function: much clearer language could have been used if that had been the intention, as is reflected for example in the language of the original proposal 8D.[8] For the reasons provided by Georgia (including in relation to Article 16), it is not appropriate to interpret the phrase "which is not settled" so as to subordinate the Article 22 jurisdiction of the Court in a manner that the negotiators plainly did not intend, and which is inconsistent with the object and purpose of the Convention to provide effective means to eliminate discrimination.

ANSWER TO QUESTION FROM JUDGE CANÇADO TRINDADE

The question:

> 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?

Georgia recognizes that – like many international human rights instruments – the CERD Convention regulates relations between the State and the citizen at the intra-State level, *i.e.*, the relations between a State and its own citizens, as with *apartheid*. (It also regulates actions taken by a State with respect to those located in other States.) In this respect, the international human rights movement from the Universal Declaration on Human Rights onwards reflected a genuinely new development in international law, and one that has since taken root. The purpose of multilateral treaties of this kind, of which the CERD was the first, was to build upon earlier declarations and make human rights scrutiny and enforcement effective at the international level, including by means of dispute settlement.[9]

As the Court has recognised, this new development was capable of affecting the interpretation of a compromissory clause. In its 1996 judgment on Preliminary Objections in the *Bosnia Genocide* case the Court referred no less than three times to the special nature of the Genocide

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[7] CR 2010/9, pp. 34-35, paras. 3-5 (Crawford); pp. 45-51, paras. 37-60 (Crawford).

[8] U.N. Economic and Social Council, *Draft International Convention on the Elimination of All Forms of Racial Discrimination, Final Clauses, Working paper prepared by the Secretary-General*, U.N. Doc. E/CN4/L.679 (17 February 1964), GWS, Vol. II, Annex 13, p. 62.

[9] *See* C. Tomuschat, *Human Rights: Between Idealism and Realism*, (Oxford University Press, 2003); D. Shelton, *Remedies in International Human Rights Law*, (2nd Ed., Oxford University Press, 2005).

Convention as a universal human rights instrument in order to found its jurisdiction *ratione personae, ratione materiae, ratione temporis* under Article IX of that Convention.[10] More recently, in relation to other cases, it has been noted that the Court has "looked beyond the strictly inter-State dimension,"[11] indicating – correctly in Georgia's view – an expansive approach to jurisdictional matters in order to safeguard the underlying values of the treaty at issue. Thus, because human rights treaties regulate the relations between the State and its own citizens, a compromissory clause should not be limited to matters covered by traditional international law, *e.g.*, in the field of diplomatic protection. It would likewise be incorrect to treat the interpretation and application of a human rights treaty as a matter confined exclusively to the advisory function of the supervisory body in question – as the Court in *South West Africa, Second Phase*, made clear in relation to the Mandate and the role of the Permanent Mandates Commission.[12] Relatedly, human rights-type protections may survive change of sovereignty[13] or change of supervisory regime[14] which merely bilateral interstate provisions may not survive.

Georgia's approach to the interpretation of Article 22 is further reinforced by the Court's established jurisprudence on *erga omnes* rights and obligations, in the *Barcelona Traction* case.[15] It is noteworthy that the Court gave as an example of *erga omnes* norms the basic rights of the human person, including explicitly the protection against racial discrimination, along with the prohibition of slavery and genocide.[16] The legal consequences of breaches of *erga omnes* norms has since been further clarified by the Court[17] and incorporated by the International Law Commission in its Articles on the Responsibility of States for Internationally Wrongful Acts.

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[10] *See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* Preliminary Objection, Judgment, I.C.J Rep. 1996, p. 595, paras. 22, 31 and 34.

[11] *See Pulp Mills on the River Uruguay (Argentina v. Uruguay)* Judgment, I.C.J. Rep. 2010, Separate Opinion of Judge Cançado Trindade, para. 158.

[12] The Court held that in relation to receiving and examining annual reports and advising the Council of the League of Nations on all matters relating to the observance of mandates, the Permanent Mandates Commission "alone had this advisory role". *South West Africa (Liberia v. South Africa)* Second Phase, Judgment, I.C.J. Rep. 1966, p. 6, para. 22.

[13] In the words of Judge Weeramantry: "[t]he Genocide Convention does not come to an end with the dismemberment of the original State, as it transcends the concept of State sovereignty." *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* Preliminary Objection, Judgment, I.C.J Rep. 1996, p. 595, Separate Opinion of Judge Weeramantry, p. 646.

[14] *International Status of South-West Africa*, Advisory Opinion, I.C.J Rep. 1950, p. 128, at pp. 132 *et seq.*

[15] *Barcelona Traction, Light and Power Company, Limited, (Belgium v. Spain)* Second Phase, Judgment, I.C.J. Rep. 1970, p. 32, para. 33 ("[…] an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.").

[16] *Ibid.*, para. 34.

[17] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Rep. 2004, 136, pp. 199-200, paras. 155-160.

particularly in Articles 48 and 54,[18] acknowledging the standing of all members of the international community to invoke the responsibility of the State for breach of *erga omnes* norms.[19]

The character of human rights treaties – in particular their non-synallagmatic character – provides a reason for the broad interpretation of compromissory clauses, and not for their narrow or restrictive interpretation. In the present case this provides a further reason for rejecting the Russian Federation's view that Article 22 is subordinated to Article 11.

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[18] International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, adopted in the Annual Report of the International Law Commission on its Fifty-third Session (23 April-1 June and 2 July-10 August 2001), U.N. Doc. A/56/10, Chapter IV (endorsed by UNGA Res. 56/83 (12 December 2001)).

[19] See also the Separate Opinion of Judge Simma in *Congo v. Uganda*, noting that, "If the international community allowed such interest to erode in the face not only of violations of obligations *erga omnes* but of outright attempts to do away with these fundamental duties, and in their proper place open black holes in the law in which human beings may be disappeared and deprived of any legal protection whatsoever for indefinite periods of time, then international law, for me, would become much less worthwhile." *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Rep. 2005, 168, Separate Opinion of Judge Simma, p. 350, para. 41.