The ICJ decides it has no jurisdiction in Georgia v. Russia

internationallawobserver.eu/2011/04/01/no-jurisdiction-in-georgia-v-russia/

Professor Gentian
Zyberi

In its judgment delivered today the ICJ found that it had no jurisdiction to entertain the Application filed by Georgia on 12 August 2008. From the issuing by the Court on 15 October 2008 of its Order indicating provisional measures I had a feeling that the case would not go further than the preliminary objections phase. There are other posts on the case in our blog under the 'Caucasus Crises'.

After a brief procedural history, the Court recalled 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 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".

During the proceedings the Russian Federation had raised four preliminary objections to the jurisdiction of the Court.

First preliminary objection

The Court rejected the first preliminary objection that there was no dispute between the parties by twelve votes to six (paras. 23-114). The Court observed that, while the claims raised against the Russian Federation by Georgia between 9 and 12 August 2008, when Georgia submitted its Application, were primarily claims about the unlawful use of force, they also expressly referred to ethnic cleansing by Russian forces. Since these claims were made against the Russian Federation directly and were rejected by the latter, the Court found 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.

Second preliminary objection

The second objection of Russia was upheld by the Court by ten votes to six. This objection related to the procedural conditions present in Article 22 of CERD (paras. 115-184). The Russian Federation asserted that Georgia was precluded from having recourse to the Court as it had 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 maintained 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.

The Court determined the ordinary meaning of the terms used in Article 22 of CERD in order to ascertain whether this Article contained preconditions to be met before its seisin. At the beginning the Court noted 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, suggested an affirmative duty to resort to them prior to its seisin. In addition, the Court observed that the use of the future perfect tense in the French version of the text further reinforced the idea that an attempt to settle the dispute must have taken place before referral to the Court. The other three authentic texts of CERD, namely the Chinese, the Russian and the Spanish texts, did not contradict this interpretation.

Having reviewed its jurisprudence concerning compromissory clauses comparable to Article 22 of CERD, the Court observed that it has consistently interpreted the reference to negotiations in such clauses as constituting a precondition to seisin. Accordingly, the Court concluded 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 facts in the record showed 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.

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 constituted preconditions to its jurisdiction, and considering the factual finding that neither of these two modes of dispute settlement was attempted by Georgia, the Court found that it did not need to examine whether the two preconditions are cumulative or alternative.

Having upheld the second objection the Court did not need to deal with the other grounds. While stating that its Order of 15 October 2008 ceases to be operative, the Court reminded the parties that they are under a duty to comply with their obligations under CERD.

Some remarks

The dissenting, separate opinions and declarations appended by the Judges of the Court to the judgment show the seriousness and eventually the complexity of the legal issues raised by this case. To some extent this decision resembles that taken in the case *Armed Activities in the Territory of the Congo* (DRC v. Rwanda). What the present decision makes clear is that, regrettably, certain human rights treaties provide a weak basis to found the jurisdiction of the Court, even when they include such a compromissory clause. Using them as a vehicle to establish the jurisdiction of the Court is even more difficult when what are primarily claims about the unlawful use of force are presented as violations of obligations falling under a specific human rights treaty, such as CERD. At the very least that is going to make some of the Judges feel uncomfortable. It is unfortunate that negotiations and other procedures expressly provided for in the compromissory clause of a human rights treaty are interpreted as presenting a bar to the seisin of the Court, even in an armed conflict situation. Putting the emphasis in procedural conditions present in a compromissory clause under such serious circumstances seems to me similar to putting the cart before the horse. Hopefully, the International Law Commission will provide some more clarity on this issue in the coming years.

For more details you can consult the decision by the Court and the press release.