DISSENTING OPINION OF JUDGE KOROMA

Article IX of the Genocide Convention applies not only to disputes as to the interpretation or application of the Convention but also to disputes as to the fulfilment of the Convention — Article IX envisions that disputes relating to the responsibility of a State for genocide be submitted to the Court — Reservations to a clause concerning dispute settlement are contrary to the object and purpose of the treaty if the provision is the raison d'être of the treaty — The object and purpose of the Genocide Convention is the prevention and punishment of the crime of genocide, and this encompasses holding a State responsible for violating its obligations under the Convention — The DRC's failure to object to Rwanda's reservation is not sufficient to prevent the Court from examining the issue of Rwanda's reservation — Human rights treaties like the Genocide Convention are based not on reciprocity between States but instead serve to protect individuals and the international community at large — Principle of good faith and Rwanda's prior statements in support of human rights — Principle of good faith and Rwanda's prior efforts to establish International Criminal Tribunal for Rwanda — Forum prorogatum *— Court should have seized opportunity to examine thoroughly whether reservation violated object and purpose of Convention.*

1. Among the bases of jurisdiction invoked by the Democratic Republic of the Congo (DRC) in instituting legal proceedings against Rwanda before the Court is Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, to which both States are parties, the DRC having acceded on 31 May 1962 and Rwanda on 16 April 1975. Article IX of the Convention stipulates that:

> "Disputes between the Contracting Parties relating to the interpretation, application or *fulfilment* of the present Convention, *including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute*." (Emphasis added.)

2. Article VIII provides that:

> "Any Contracting Party may call upon the *competent organs of the United Nations* to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide . . ." (emphasis added).

3. According to Article III:

> "The following acts shall be punishable:
>
> *(a)* Genocide;
>
> *(b)* Conspiracy to commit genocide;
>
> *(c)* Direct and public incitement to commit genocide;
>
> *(d)* Attempt to commit genocide;
>
> *(e)* Complicity in genocide."

4. Thus, Article IX envisions that disputes between Contracting Parties relating to a violation of the Convention and disputes relating to the interpretation, application or *fulfilment* of the Convention, including those *relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III*, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

5. As stated earlier, both the DRC and Rwanda are parties to the Genocide Convention. In its accession instrument Rwanda entered a reservation that: "The Rwandese Republic does not consider itself as bound by Article IX of the Convention." Thus, Rwanda argued, the jurisdiction of the Court under the Genocide Convention was excluded by the reservation entered by it to Article IX.

6. However, Rwanda's reservation, in my view, has to be considered in light of the object and purpose of the Convention. Under Article I of the Convention,

> "The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law *which they undertake to prevent and to punish*." (Emphasis added.)

Article I thus imposes an obligation on States to prevent and punish the crime of genocide.

7. In its Application, the DRC contends that Rwanda has violated Articles II and III of the Convention.

8. Article II defines genocide to be:

> "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> *(a)* Killing members of the group;
>
> *(b)* Causing serious bodily or mental harm to members of the group;
>
> *(c)* Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> *(d)* Imposing measures intended to prevent births within the group;
>
> *(e)* Forcibly transferring children of the group to another group."

Article III has been quoted earlier.

9. Specifically, the DRC claims that Rwandan forces, directly or through their Rassemblement congolais pour la démocratie (RCD/Goma) agents, committed acts of genocide against 3,500,000 Congolese, by carrying out large-scale massacres, assassinations and other murders targeting well-identified groups (Warega, Bemba, Bashi, Bahemba . . .) in Rwandan-occupied territories of the DRC.

10. It is in the light of these tragic events that the DRC decided to exercise its right under Article IX of the Convention, alleging that Rwanda had violated its obligations under the Convention and bears responsibility for those violations. Rwanda, for its part, denied the Court's jurisdiction on the grounds that: it was not bound by the Article as it had entered a reservation to it; and the Court therefore lacked competence to adjudicate on the matter.

11. While a reservation to a treaty clause concerning dispute settlement or the monitoring of the implementation of the treaty is not, in itself, incompatible with the object and purpose of the treaty, it is incompatible if the provision to which the reservation relates constitutes the raison d'être of the treaty ("Tenth Report on Reservations to Treaties", International Law Commission, Fifty-seventh Session, A/CN.4/558/Add.2, Ann., p. 31, para. 3.1.13 (14 June 2005)).

12. The object and purpose of the Genocide Convention is the prevention and punishment of the crime of genocide, and this encompasses holding a State responsible whenever it is found to be in breach of its obligations under the Convention. As explained below, Article IX is the *only* provision of the Convention addressing the question of State responsibility and it provides:

> "*Disputes between the Contracting Parties* relating to the interpretation, application or fulfilment of the present Convention, *including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.*" (Emphasis added.)

The Article thus contemplates that *disputes concerning acts of genocide, or the responsibility of a State or government* for such acts, will be referred to the Court for judicial scrutiny, and that a State accused of breaching its obligations under the Convention should account to the Court for its conduct.

13. An analysis of the structure of the Genocide Convention reinforces this conclusion. The title itself of the Convention — Convention on the Prevention and Punishment of the Crime of Genocide — clearly frames it in terms of both prevention and *punishment* of genocide (see, for example, *Certain Norwegian Loans (France* v. *Norway), Judgment, I.C.J. Reports 1957*, p. 24 (deducing the object and purpose of a Convention from its title)). Having conclusively established that the acts listed in Article III are punishable, the Genocide Convention then sets up two types of punishment mechanisms: the first is aimed at persons and the second at State actors. In keeping with this dichotomy, Articles IV, V, VI and VII treat the punishment of persons responsible for genocide or any of the other acts listed in Article III. Unlike Articles IV, V, VI and VII, however, Article IX focuses on disputes at the level of State actors. Indeed, given the nature of the crime, it is difficult to imagine how genocide could be committed without some form of State complicity or involvement. Article IX is thus crucial to fulfilling the object and purpose of the Convention since it is the *only* avenue for adjudicating the responsibilities of States. Denying the Court this function, as Rwanda purports to do by its reservation, not only prevents the Court from interpreting or applying the Convention but also — and this in my view is the critical point in the present case before the Court — from enquiring into disputes between Contracting Parties relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III, and is thus not conducive to the *fulfilment* of the object and purpose of the Convention, namely, the prevention and punishment of genocide. As the Court stated in the *Legality of Use of Force* cases:

> "*Article IX of the Convention accordingly appears to constitute a basis on which the jurisdiction of the Court might be founded to the extent that the subject-matter of the dispute relates* to 'the interpretation, application or fulfilment' of the Convention,

> including disputes '*relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III*' of the said Convention" (*Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (I)*, p. 137, para. 37; emphasis added).

14. In considering Rwanda's reservation to Article IX of the Genocide Convention, the Court observed that the Convention does not prohibit reservations and that the DRC had put forward no objection to Rwanda's reservation when it was made. This finding notwithstanding, the fact that a State does not object to such a reservation at the time it is made is not, in my view, of dispositive significance, given that States are often remiss in fulfilling their duties of objecting to reservations which they consider invalid. Moreover, the failure of a State to object should not be regarded as determinative in the context of *human rights treaties like the Genocide Convention that are not based on reciprocity between States but instead serve to protect individuals and the international community at large*.

15. As the Human Rights Committee stated in its General Comment 24, human rights treaties

> "are not a web of inter-State exchanges of mutual obligations. They concern the endowment of individuals with rights. The principle of inter-State reciprocity has no place, save perhaps in the limited context of reservations to declarations on the Committee's competence under article 41. And because the operation of the classic rules on reservations is so inadequate for the Covenant, States have often not seen any legal interest in or need to object to reservations. *The absence of* protest by States cannot imply that a reservation is either compatible or incompatible with the object and purpose of the Covenant." (Human Rights Committee, General Comment No. 24 (CCPR/C/21/Rev.I/Add.6), 4 November 1994, para. 17.)

The Committee concluded that the pattern of objections to reservations is so unclear that it is unsafe to assume that a non-objecting State "thinks that a particular reservation is acceptable" (*ibid.*, para. 17). Although the Human Rights Committee was speaking about the International Covenant on Civil and Political Rights, the same holds true for the Genocide Convention. Because, as the Court itself has stated, the Genocide Convention, like other human rights treaties, is not based on reciprocity between States, the fact that the DRC did not object to Rwanda's reservation at the time it was made has no bearing on the Court's ability to consider it. Hence, the DRC's failure to object should not have been deemed sufficient to prevent the Court from examining the issue of Rwanda's reservation on this occasion.

16. While the question of reservations to Article IX of the Genocide Convention came up in the cases concerning *Legality of Use of Force — (Yugoslavia* v. *Spain)* (*Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (II)*, p. 772, para. 32) and *(Yugoslavia* v. *United States of America)* (*Provisional Measures, Order of 2 June 1999 (II), I.C.J. Reports 1999*, p. 924, para. 24) — the Court in those cases did not examine the issue whether the reservations to Article IX by Spain and the United States prevented the fulfilment of the object and purpose of the Convention, because that precise issue was not raised by Yugoslavia. Since Yugoslavia neither explicitly raised the issue nor alluded to it in its arguments, the Court concisely concluded that it lacked jurisdiction under Article IX. Be that as it may, the Court did however confirm that disputes relating to "the interpretation, application or fulfilment" of the Convention included disputes "relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III", even though in those cases the acts complained of by Yugoslavia were incapable of

coming within the provisions of the Genocide Convention. In the present case, the fact that the issue of the reservation was addressed by both Parties entitled the Court to examine Rwanda's reservation in the light of the purpose and object of the Convention.

17. Moreover, in considering this issue the Court should have taken due account of the principle of good faith as it relates to the effect of the Statement made by Rwanda, in the person of its Minister of Justice, before the United Nations Commission on Human Rights:

> "Rwanda is one of the countries that has ratified the greatest number of international human rights instruments. In 2004 alone, our Government ratified ten of them, including those concerning the rights of women, the prevention and repression of corruption, the prohibition of weapons of mass destruction, and the environment. The few instruments not yet ratified will shortly be ratified and past reservations not yet withdrawn will shortly be withdrawn." (Sixty-first Session of the United Nations Commission on Human Rights.)

Among the few instruments to which Rwanda had entered reservations, reservations that were "shortly [to] be withdrawn", was the Genocide Convention.

18. The Court made clear in the *Nuclear Tests (Australia* v. *France)* case that:

> "Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected." (*Judgment, I.C.J. Reports 1974*, p. 268, para. 46; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 473, para. 49.)

It would not be appropriate to regard Rwanda's declaration concerning its reservation to the "most important" human rights and humanitarian treaty as nothing more than political posturing devoid of legal effect.

19. This is all the more so given the principles underlying the Convention, as well as the gravity of the present case, in which 3,500,000 Congolese citizens are alleged to have been massacred on grounds of ethnicity.

20. As the Court stated in the *Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain)* case:

> "By [its] very nature [the outlawing of *genocide*, aggression, slavery and racial discrimination is] 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*." (*Second Phase, Judgment, I.C.J. Reports 1970*, p. 32; emphasis added.)

21. Thirty years later, the Court confirmed its understanding of the object and purpose of the Convention and concluded:

> "It follows that the rights and obligations enshrined by the Convention are rights and obligations *erga omnes*. The Court notes that the obligation each State thus has to prevent and to punish the crime of *genocide is not territorially limited by the Convention*." (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 616, para. 31; emphasis added.)

Hence, in my judgment, a State which denies the Court's jurisdiction to enquire into allegations alleging violation of the Convention would not be lending the co-operation required to "liberate mankind from [the] . . . odious scourge" of genocide or to fulfil the object and purpose of the Convention. Denying recourse to the Court essentially precludes judicial scrutiny into the responsibility of a State in a dispute relating to the violation of the Convention.

22. *This point is of particular cogency in this case concerning Rwanda*, a State where genocide took place and which justifiably called on the United Nations Security Council to set up an international criminal tribunal to try those who committed the crime against a section of its population. It will thus not be in keeping with the spirit and objective of the Convention to refuse to allow judicial consideration of the allegation of genocide perpetrated in another country because Rwanda itself or its agents are alleged to be responsible. While this is not to claim that the seriousness of an obligation, the *jus cogens* status of a norm or the *erga omnes* nature of an obligation *per se* confers jurisdiction on the Court, as was recognized in the Judgment, it is nevertheless my opinion that it is incumbent on Rwanda in this case, as a State party to the Genocide Convention — and which itself was a victim of genocide and rightly referred the matter to the competent organ of the United Nations — to allow scrutiny of the allegation that it had breached its obligations under the Genocide Convention.

23. In its letter to the Secretary-General of 28 December 1994 regarding this issue, Rwanda rightly stressed the gravity of the genocide which had been committed on its territory and requested the "[s]etting up as soon as possible [of] an international tribunal to try the criminals". In the request, Rwanda stated as follows:

> "There is evident reluctance by the international community . . . to expose and punish the criminals . . . still at large. This is tantamount to diluting the question of genocide that was committed in Rwanda." (Letter dated 28 September 1994 from the Permanent Representative of Rwanda to the United Nations addressed to the President of the Security Council, United Nations doc. S/1994/1115 (29 September 1994).)

Parallel reasoning would suggest that Rwanda's unwillingness to allow the Court to scrutinize its alleged genocidal conduct in this case not only has the same effect of diluting the question of genocide, a result which Rwanda rightly criticized and sought to prevent, but in fact has an even more drastic effect: denial of the question of genocide. In this connection, it is worth stressing that all human lives — be they Rwandan, Congolese, or of any other nationality — are precious; offering redress to some while denying it to others is neither in conformity with the Convention, nor with justice; nor does it further the purposes and principles of the United Nations Charter in respect of the peaceful settlement of disputes. The spirit of the Convention as well as the letter of the Convention must be respected at all times.

24. The allegation involving the commission of genocide is far too serious a matter to be allowed to escape judicial scrutiny by means of a procedural device. The nature of the Convention and gravity of the allegation dictate that, wherever possible, it must be subject to judicial scrutiny. Inasmuch as Rwanda was able to call on the international community to hold to account those alleged to have committed genocide in Rwanda itself, it cannot justifiably shield itself from enquiry

in respect of the very kinds of acts for which it succeeded in obtaining scrutiny by a competent organ. In other words, it is neither morally right nor just for a State to shield itself from judicial scrutiny under Article IX of the Convention in respect of acts alleged to have taken place in the territory of a *neighbouring* State when those acts constitute the very same conduct as that in response to which the State successfully urged the establishment of an international tribunal for the prosecution of persons responsible for genocide and other serious violations of international humanitarian law.

25. It is indeed a principle of law that the jurisdictional basis of the Court is consensual. In paragraph 21 of the Judgment the Court recalls that such consent may take various forms. Among these is *forum prorogatum*, which was explained not long ago by Judge *ad hoc* Lauterpacht in his separate opinion in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro))* case as follows:

> "the possibility that if State A commences proceedings against State B on a non-existent or defective jurisdictional basis, State B can remedy the situation by conduct amounting to an acceptance of the jurisdiction of the Court." (*Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993,* p. 416, para. 24, *separate opinion of Judge Lauterpacht*.)

While I do not accept the substance of the DRC's argument on this issue, I do believe that the gravity of the matter and the nature of the allegation before the Court are such that the Court should have been allowed to adjudicate the case. There is no impediment in law preventing Rwanda from expressing its consent and thereby entitling the Court to examine the alleged breaches of Rwanda's obligations under the Genocide Convention.

26. As can be seen from the foregoing, this opinion has, to a great extent, drawn on the jurisprudence of the Court on the subject of the Genocide Convention to show why the Court should have been able to exercise its jurisdiction. The Court has over the years taken cognizance of the importance of the Genocide Convention, has acknowledged the denial of humanity that genocide — described as the "crime of all crimes" — represents, and has responded appropriately, declaring "the principles underlying the Convention" to be "principles which are recognized by civilized nations as binding on States, even without any conventional obligation" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 616, para. 31). In reaching such profound conclusions, the Court, in my view, was reflecting the gravity of the crime of genocide and the seriousness with which it, the international community and mankind as a whole take the Convention. While not denying the right of the States parties to the Convention to enter reservations to Article IX, the Court, through its jurisprudence, has stressed the unique nature of the Convention and the necessity for States to respect their obligations under it. The Court's pronouncements fostered high hopes and expectations that the object and purpose of the Convention would be fulfilled. This case presented an opportunity for the Court to apply the Convention and its principles.

27. It is thus this profound respect for the Court's earlier affirmations of the principle underlying the Convention, its object and purpose, together with the seriousness of the matter before it, which leads me to regret the Court's conclusion that it is not entitled to take on the present case. In my view, had the Court also, besides the Genocide Convention, taken a different, but no less valid, view of the other instruments relied upon including the Convention on the Elimination of All Forms of Discrimination Against Women and the Montreal Convention for the

Suppression of Unlawful Acts against the Safety of Civil Aviation, it could have reached a different conclusion with respect to its jurisdiction. My regret that the Court was not able to do so explains my vote.

28. I have read with considerable interest the joint separate opinion of Judges Higgins, Kooijmans, Elaraby, Owada and Simma. They have succinctly reflected the essence of the judicial concern underlying this opinion, namely, that it is a very grave matter for a State to shield itself from international judicial scrutiny for

> "any claim that might be made against it concerning genocide. A State so doing shows the world scant confidence that it would never, ever, commit genocide, one of the greatest crimes known" (p. 5, para. 25).

That concern could not have been more aptly stated. I also agree with the joint opinion to the effect that in matters relating to the compatibility of a reservation with the object and purpose of a treaty, the reserving State or States do not have the final word.

29. On the other hand, while not disagreeing with the view of the authors of the joint opinion that Article IX of the Genocide Convention creates no monitoring function involving the review of periodic reports by human rights treaty bodies on States behaviour, I wish to reiterate that Article IX does provide for the Court to adjudicate:

> "*Disputes* between the *Contracting Parties* relating to the interpretation, *application* or *fulfilment* of the present Convention, *including those relating to the responsibility of a State*" (emphasis added).

The Article, in my view, therefore provides a basis for the Court, *inter alia*, to enquire into State responsibility for genocide.

(Signed) Abdul G. KOROMA.