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CASE CONCERNING ARMED ACTIVITIES ON THE TERRITORY OF THE CONGO (NEW APPLICATION: 2002) (DEMOCRATIC REPUBLIC OF THE CONGO *v.* RWANDA) JURISDICTION OF THE COURT AND ADMISSIBILITY OF THE APPLICATION

Present proceedings confined to the questions of the jurisdiction of the Court and the admissibility of the DRC's Application.

JUDGMENT

Present: President SHI; *Vice-President* RANJEVA; *Judges* KOROMA, VERESHCHETIN, HIGGINS, PARRA-ARANGUREN, KOOIJMANS, REZEK, AL-KHASAWNEH, BUERGENTHAL, ELARABY, OWADA, SIMMA, TOMKA, ABRAHAM; *Judges* ad hoc DUGARD, MAVUNGU; *Registrar* COUVREUR.

THE COURT, composed as above, after deliberation, *delivers the following Judgment:*

1. On 28 May 2002 the Government of the Democratic Republic of the Congo (hereinafter "the DRC") filed in the Registry of the Court an Application instituting proceedings against the Republic of Rwanda (hereinafter "Rwanda") in respect of a dispute concerning "massive, serious and flagrant violations of human rights and of international humanitarian law" alleged to have been committed "in breach of the 'International Bill of Human Rights', other relevant international instruments and mandatory resolutions of the United Nations Security Council"; in that Application the DRC stated that "[the] flagrant and serious violations [of human rights and of international humanitarian law]" of which it complained "result from acts of armed aggression perpetrated by Rwanda on the territory of the Democratic Republic of the Congo in flagrant breach of the sovereignty and territorial integrity of [the latter], as guaranteed by the Charters of the United Nations and the Organization of African Unity".

In order to found the jurisdiction of the Court, the DRC, referring to Article 36, paragraph 1, of the Statute, invoked in its Application: Article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965 (hereinafter the "Convention on Racial Discrimination"); Article 29, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination Against Women of 18 December 1979 (hereinafter the "Convention on Discrimination Against Women"); Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 (hereinafter the "Genocide Convention"); Article 75 of the Constitution of the World Health Organization of 22 July 1946 (hereinafter the "WHO Constitution"); Article XIV, paragraph 2, of the Constitution of the United Nations Educational, Scientific and Cultural Organization of 16 November 1945 (hereinafter the "Unesco Constitution") and Article 9 of the Convention on the Privileges and Immunities of the Specialized Agencies of 21 November 1947 (hereinafter "the Convention on Privileges and Immunities"); Article 30, paragraph 1, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10

December 1984 (hereinafter the "Convention against Torture"); and Article 14, paragraph 1, of the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 23 September 1971 (hereinafter the "Montreal Convention").

The DRC further contended in its Application that Article 66 of the Vienna Convention on the Law of Treaties of 23 May 1969 established the jurisdiction of the Court to settle disputes arising from the violation of peremptory norms *(jus cogens)* in the area of human rights, as those norms were reflected in a number of international instruments.

2. On 28 May 2002, immediately after filing its Application, the DRC also submitted a request for the indication of provisional measures pursuant to Article 41 of the Statute of the Court and Articles 73 and 74 of its Rules.

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14. The Court notes first of all that at the present stage of the proceedings it cannot consider any matter relating to the merits of this dispute between the DRC and Rwanda. In accordance with the decision taken in its Order of 18 September 2002 (see paragraph 6 above), the Court is required to address only the questions of whether it is competent to hear the dispute and whether the DRC's Application is admissible.

15. In order to found the jurisdiction of the Court in this case, the DRC relies in its Application on a certain number of compromissory clauses in international conventions, namely: Article 22 of the Convention on Racial Discrimination; Article 29, paragraph 1, of the Convention on Discrimination Against Women; Article IX of the Genocide Convention; Article 75 of the WHO Constitution; Article XIV, paragraph 2, of the Unesco Constitution and Article 9 of the Convention on Privileges and Immunities; Article 30, paragraph 1, of the Convention against Torture; and Article 14, paragraph 1, of the Montreal Convention. It further contends that Article 66 of the Vienna Convention on the Law of Treaties establishes the jurisdiction of the Court to settle disputes arising from the violation of peremptory norms *(jus cogens)* in the area of human rights, as those norms are reflected in a number of international instruments (see paragraph 1 above).

For its part Rwanda contends that none of these instruments cited by the DRC "or rules of customary international law can found the jurisdiction of the Court in the present case". In the alternative, Rwanda argues that, even if one or more of the compromissory clauses invoked by the DRC were to be found by the Court to be titles giving it jurisdiction to entertain the Application, the latter would be "nevertheless inadmissible".

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[The Court concluded that the DRC could not rely on the Convention against Torture as a basis of jurisdiction in this case, and dismissed the two new bases of jurisdiction invoked by the DRC—*forum prorogatum* and the Court's July 10, 2002 order on provisional measures.]

27. The Court will examine in the following order the compromissory clauses invoked by the DRC: Article IX of the Genocide Convention; Article 22 of the Convention on Racial Discrimination; Article 29, paragraph 1, of the Convention on Discrimination Against Women; Article 75 of the WHO Constitution; Article XIV, paragraph 2, of the Unesco Constitution; Article 14, paragraph 1, of the Montreal Convention; Article 66 of the Vienna Convention on the Law of Treaties.

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

Article II of that Convention prohibits:

"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 provides:

"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."

In order to found the jurisdiction of the Court to entertain its claim, the DRC invokes Article IX of the Convention, which reads as follows:

"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."

29. Rwanda argued in its Memorial that the jurisdiction of the Court under the Genocide Convention was excluded by its reservation to the entirety of Article IX. In its Counter-Memorial the DRC disputed the validity of that reservation. At the hearings it further contended that Rwanda had withdrawn its reservation; to that end it cited a Rwandan *décret-loi* of 15 February 1995 and a statement of 17 March 2005 by Rwanda's Minister of Justice at the Sixty-first Session of the United Nations Commission on Human Rights. Rwanda has denied the DRC's contention that it has withdrawn its reservation to Article IX of the Genocide Convention. The Court will therefore begin by examining whether Rwanda has in fact withdrawn its reservation. Only if it finds that Rwanda has maintained its reservation will the Court need to address the DRC's arguments concerning the reservation's validity.

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30. As just stated, the DRC claimed at the hearings that Rwanda had withdrawn its reservation to Article IX of the Genocide Convention. Thus the DRC argued that, in Article 15 of the Protocol of Agreement on Miscellaneous Issues and Final Provisions signed between the Government of Rwanda and the Rwandan Patriotic Front at Arusha on 3 August 1993, Rwanda undertook to withdraw all reservations made by it when it became party to treaty instruments "on human rights". The DRC contends that Rwanda implemented that undertaking by adopting *décret-loi* No. 014/01 of 15 February 1995, whereby the Broad-Based Transitional Government allegedly withdrew all reservations made by Rwanda at the accession, approval and ratification of international instruments relating to human rights.

31. In this regard the DRC observed that the Arusha Peace Agreement concluded on 4 August 1993 between the Government of Rwanda and the Rwandan Patriotic Front, of which the above-mentioned Protocol forms an integral part, was not a mere internal political agreement, as Rwanda contended, but a text which under Rwandan law, namely Article 1 of the Fundamental Law of the Rwandese Republic adopted by the Transitional National Assembly on 26 May 1995, formed part of the "constitutional ensemble". The DRC argued, furthermore, that Rwanda's contention that *décret-loi* No. 014/01 had fallen into desuetude or lapsed because it was not confirmed by the new parliament was unfounded. According to the DRC, "[i]f the Rwandan parliament did not confirm the Order in Council, without, however leaving any trace of this *volte-face*, that is neither more nor less than . . . a 'wrongful act'; and it was a universal principle of law that 'no one may profit by his own wrongdoing'". The DRC maintained moreover that the *décret-loi* was not subject to the procedure of approval by parliament, since, under Congolese and Rwandan law, both of which had been influenced by Belgian law, a *décret-loi* was a measure enacted by the executive branch in cases of emergency when parliament is in recess; if these conditions were satisfied, parliamentary approval was not necessary, save in the case of a constitutional *décret-loi*, which was not the case for *décret-loi* No. 14/01.

32. The DRC further argued that the fact that withdrawal of the reservation was not notified to the United Nations Secretary-General could not be relied on against third States, since Rwanda expressed its intention to withdraw the reservation in a legislative text, namely the *décret-loi* of 15 February 1995. According to the DRC, the failure to notify that *décret-loi* to the United Nations Secretary-General has no relevance in this case, since it is not the act of notification to an international organization which gives validity "to a domestic administrative enactment, but rather its promulgation and/or publication by the competent national authority".

33. Finally, the DRC contended that Rwanda's withdrawal of its reservation to Article IX of the Genocide Convention was corroborated by a statement by the latter's Minister of Justice on 17 March 2005 at the Sixty-first Session of the United Nations Commission on Human Rights. The Minister there announced that "the few [human rights] instruments not yet ratified" at that date by Rwanda, as well as reservations "not yet withdrawn", would "shortly be ratified . . . [or] withdrawn". In the DRC's view, this statement meant that there were reservations, including that made by Rwanda in respect of Article IX of the Genocide Convention, which had already been withdrawn by that State in 1995. The DRC added that the statement by the Rwandan Minister of Justice "gave material form at international level to the . . . decision taken by the Rwandan Government [in February 1995] to withdraw all reservations to human rights treaties", and that this statement, "made within one of the most representative forums of the international community, the United Nations Commission on Human Rights, . . . [did] indeed bind the Rwandan State".

34. For its part, Rwanda contended at the hearings that it had never taken any measure to withdraw its reservation to Article IX of the Genocide Convention. As regards the Arusha Peace Agreement of 4 August 1993, Rwanda considered that this was not an international instrument but a series of agreements

concluded between the Government of Rwanda and the Rwandan Patriotic Front, that is to say an internal agreement which did not create any obligation on Rwanda's part to another State or to the international community as a whole. Rwanda further observed that Article 15 of the Protocol of Agreement on Miscellaneous Issues and Final Provisions of 3 August 1993 made no express reference to the Genocide Convention and did not specify whether the reservations referred to comprised both those concerning procedural provisions, including provisions relating to the jurisdiction of the Court, and those concerning substantive provisions.

35. In regard to *décret-loi* No. 014/01 of 15 February 1995, Rwanda pointed out that this text, like Article 15 of the Protocol of Agreement, was drawn in very general terms, since it "authorized the withdrawal of all reservations entered into by Rwanda to all international agreements". Rwanda further stated that, "under the constitutional instruments then in force in Rwanda, a decree of this kind had to be approved by Parliament—at that time called the Transitional National Assembly –at its session immediately following the adoption of the decree". Rwanda points out that, at the session immediately following the adoption of *décret-loi* No. 014/01, which took place between 12 April and 11 July 1995, the Order was not approved, and therefore lapsed.

36. Rwanda further observed that it had never notified withdrawal of its reservation to Article IX of the Genocide Convention to the United Nations Secretary-General, or taken any measure to withdraw it, and that only such formal action on the international plane could constitute the definitive position of a State in regard to its treaty obligations.

37. Regarding the statement made on 17 March 2005 at the Sixty-first Session of the United Nations Commission on Human Rights by its Minister of Justice, Rwanda contends that in her speech the Minister simply restated Rwanda's intention to lift "unspecified" reservations to "unspecified" human rights treaties "at some time in the future". Rwanda notes that the statement was inconsistent with the argument of the DRC that it had already withdrawn those same reservations in 1995. It further observes that the statement could not bind it or oblige it to withdraw "a particular reservation", since it was made by a Minister of Justice and not by a Foreign Minister or Head of Government, "with automatic authority to bind the State in matters of international relations". Finally, Rwanda asserts that a statement given in a forum such as the United Nations Commission on Human Rights, almost three years after the institution of the present proceedings before the Court, cannot have any effect on the issue of jurisdiction, which "has to be judged by reference to the situation as it existed at the date the Application was filed".

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38. The Court notes that both the DRC and Rwanda are parties to the Genocide Convention, the DRC having acceded on 31 May 1962 and Rwanda on 16 April 1975. The Court observes, however, that Rwanda's instrument of accession to the Convention, as deposited with the Secretary-General of the United Nations, contains a reservation worded as follows: "The Rwandese Republic does not consider itself as bound by Article IX of the Convention."

39. The Court also notes that the Parties take opposing views, first on whether, in adopting *décret-loi* No. 014/01 of 15 February 1995, Rwanda effectively withdrew its reservation to Article IX of the Genocide Convention and, secondly, on the question of the legal effect of the statement by Rwanda's Minister of Justice at the Sixty-first Session of the United Nations Commission on Human Rights. The Court will accordingly address in turn each of these two questions.

40. In regard to the first question, the Court notes that an instrument entitled "*Décret-loi* No. 014/01 of 15 February 1995 withdrawing all reservations entered by the Rwandese Republic at the accession, approval and ratification of international instruments" was adopted on 15 February 1995 by the President of the

Rwandese Republic following an Opinion of the Council of Ministers and was countersigned by the Prime Minister and Minister of Justice of the Rwandese Republic. Article 1 of this *décret-loi*, which contains three articles, provides that "[a]ll reservations entered by the Rwandese Republic in respect of the accession, approval and ratification of international instruments are withdrawn"; Article 2 states that "[a]ll prior provisions contrary to the present *décret-loi* are abrogated"; while Article 3 provides that "[t]his *décret-loi* shall enter into force on the day of its publication in the Official Journal of the Rwandese Republic". The *décret-loi* was published in the Official Journal of the Rwandese Republic, on a date of which the Court has not been apprised, and entered into force.

41. The validity of this *décret-loi* under Rwandan domestic law has been denied by Rwanda. However, in the Court's view the question of the validity and effect of the *décret-loi* within the domestic legal order of Rwanda is different from that of its effect within the international legal order. Thus a clear distinction has to be drawn between a decision to withdraw a reservation to a treaty taken within a State's domestic legal order and the implementation of that decision by the competent national authorities within the international legal order, which can be effected only by notification of withdrawal of the reservation to the other States parties to the treaty in question. It is a rule of international law, deriving from the principle of legal security and well established in practice, that, subject to agreement to the contrary, the withdrawal by a contracting State of a reservation to a multilateral treaty takes effect in relation to the other contracting States only when they have received notification thereof. This rule is expressed in Article 22, paragraph 3 *(a)*, of the Vienna Convention on the Law of Treaties, which provides as follows: "3. Unless the Treaty otherwise provides, or it is otherwise agreed: *(a)* the withdrawal of a reservation becomes operative in relation to another Contracting State only when notice of it has been received by that State." Article 23, paragraph 4, of that same Convention further provides that "[t]he withdrawal of a reservation or of an objection to a reservation must be formulated in writing".

42. The Court observes that in this case it has not been shown that Rwanda notified the withdrawal of its reservations to the other States parties to the "international instruments" referred to in Article 1 of *décret-loi* No. 014/01 of 15 February 1995, and in particular to the States parties to the Genocide Convention. Nor has it been shown that there was any agreement whereby such withdrawal could have become operative without notification. In the Court's view, the adoption of that *décret-loi* and its publication in the Official Journal of the Rwandese Republic cannot in themselves amount to such notification. In order to have effect in international law, the withdrawal would have had to be the subject of a notice received at the international level.

43. The Court notes that, as regards the Genocide Convention, the Government of Rwanda has taken no action at international level on the basis of the *décret-loi*. It observes that this Convention is a multilateral treaty whose depositary is the Secretary-General of the United Nations, and it considers that it was normally through the latter that Rwanda should have notified withdrawal of its reservation. Thus the Court notes that, although the Convention does not deal with the question of reservations, Article XVII thereof confers particular responsibilities on the United Nations Secretary-General in respect of notifications to States parties to the Convention or entitled to become parties; it is thus in principle through the medium of the Secretary-General that such States must be informed both of the making of a reservation to the Convention and of its withdrawal. Rwanda notified its reservation to Article IX of the Genocide Convention to the Secretary-General. However, the Court does not have any evidence that Rwanda notified the Secretary-General of the withdrawal of this reservation.

44. In light of the foregoing, the Court finds that the adoption and publication of *décret-loi* No. 014/01 of 15 February 1995 by Rwanda did not, as a matter of international law, effect a withdrawal by that State of its reservation to Article IX of the Genocide Convention.

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45. The Court will now turn to the second question, that of the legal effect of the statement made on 17 March 2005 by Ms Mukabagwiza, Minister of Justice of Rwanda, at the Sixty-first Session of the United Nations Commission on Human Rights. At the hearings the DRC cited this statement and contended that it could be interpreted as corroborating Rwanda's withdrawal of its reservation to Article IX of the Genocide Convention, or as constituting a unilateral commitment having legal effects in regard to the withdrawal of that reservation. In her statement Ms Mukabagwiza said *inter alia* the following:

> "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."

46. The Court will begin by examining Rwanda's argument that it cannot be legally bound by the statement in question inasmuch as a statement made not by a Foreign Minister or a Head ofGovernment "with automatic authority to bind the State in matters of international relations, but by a Minister of Justice, cannot bind the State to lift a particular reservation". In this connection, the Court observes that, in accordance with its consistent jurisprudence (*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, pp. 269-270, paras. 49-51; *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. 622, para. 44; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, pp. 21-22, para. 53; see also *Legal Status of Eastern Greenland (Denmark* v *Norway), Judgment, 1933, P.C.I.J., Series A/B, No. 53*, p. 71), it is a well-established rule of international law that the Head of State, the Head of Government and the Minister for Foreign Affairs are deemed to represent the State merely by virtue of exercising their functions, including for the performance, on behalf of the said State, of unilateral acts having the force of international commitments. The Court moreover recalls that, in the matter of the conclusion of treaties, this rule of customary law finds expression in Article 7, paragraph 2, of the Vienna Convention on the Law of Treaties, which provides that "[i]n virtue of their functions and without having to produce full powers, the following are considered as representing their State: *(a)* Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty".

47. The Court notes, however, that with increasing frequency in modern international relations other persons representing a State in specific fields may be authorized by that State to bind it by their statements in respect of matters falling within their purview. This may be true, for example, of holders of technical ministerial portfolios exercising powers in their field of competence in the area of foreign relations, and even of certain officials.

48. In this case, the Court notes first that Ms Mukabagwiza spoke before the United Nations Commission on Human Rights in her capacity as Minister of Justice of Rwanda and that she indicated *inter alia* that she was making her statement "on behalf of the Rwandan people". The Court further notes that the questions relating to the protection of human rights which were the subject of that statement fall within the purview of a Minister of Justice. It is the Court's view that the possibility cannot be ruled out in principle that a Minister of Justice may, under certain circumstances, bind the State he or she represents by his or her statements. The Court cannot therefore accept Rwanda's argument that Ms Mukabagwiza could not, by her statement, bind the Rwandan State internationally, merely because of the nature of the functions that she exercised.

49. In order to determine the legal effect of that statement, the Court must, however, examine its actual content as well as the circumstances in which it was made (*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 269, para. 51; *Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, pp. 573-574, paras. 39-40).

50. On the first point, the Court recalls that a statement of this kind can create legal obligations only if it is made in clear and specific terms (see *Nuclear Tests (Australia* v. *France) (New Zealand* v. *France), I.C.J. Reports 1974*, p. 267, para. 43; p. 269, para. 51; p. 472, para. 46; p. 474, para. 53). In this regard the Court observes that in her statement the Minister of Justice of Rwanda indicated that "past reservations not yet withdrawn [would] shortly be withdrawn", without referring explicitly to the reservation made by Rwanda to Article IX of the Genocide Convention. The statement merely raises in general terms the question of Rwandan reservations. As such, the expression "past reservations not yet withdrawn" refers without distinction to any reservation made by Rwanda to any international treaty to which it is a party. Viewed in its context, this expression may, it is true, be interpreted as referring solely to the reservations made by Rwanda to "international human rights instruments", to which reference is made in an earlier passage of the statement. In this connection the Court notes, however, that the international instruments in question must in the circumstances be understood in a broad sense, since, according to the statement itself, they appear to encompass not only instruments "concerning the rights of women" but also those concerning "the prevention and repression of corruption, the prohibition of weapons of mass destruction, and the environment". The Court is therefore bound to note the indeterminate character of the international treaties referred to by the Rwandan Minister of Justice in her statement.

51. The Court further observes that this statement merely indicates that "past reservations not yet withdrawn will shortly be withdrawn", without indicating any precise time-frame for such withdrawals.

52. It follows from the foregoing that the statement by the Rwandan Minister of Justice was not made in sufficiently specific terms in relation to the particular question of the withdrawal of reservations. Given the general nature of its wording, the statement cannot therefore be considered as confirmation by Rwanda of a previous decision to withdraw its reservation to Article IX of the Genocide Convention, or as any sort of unilateral commitment on its part having legal effects in regard to such withdrawal; at most, it can be interpreted as a declaration of intent, very general in scope.

53. This conclusion is corroborated by an examination of the circumstances in which the statement was made. Thus the Court notes that it was in the context of a presentation of general policy on the promotion and protection of human rights that the Minister of Justice of Rwanda made her statement before the United Nations Commission on Human Rights.

54. Finally, the Court will address Rwanda's argument that the statement by its Minister of Justice could not in any event have any implications for the question of the Court's jurisdiction in this case, since it was made nearly three years after the institution of the proceedings. In this connection, the Court recalls that it has consistently held that, while its jurisdiction must surely be assessed on the date of the filing of the act instituting proceedings (*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. 613, para. 26; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 12, para. 26), the Court should not, however, penalize a defect in procedure which the Applicant could easily remedy (*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. 613, para. 26). In the present case, if the Rwandan Minister's statement had somehow entailed the withdrawal of Rwanda's reservation to Article IX of the Genocide Convention in the course of the proceedings, the DRC could on its own initiative have

remedied the procedural defect in its original Application by filing a new Application. This argument by Rwanda must accordingly be rejected.

55. Having concluded that the DRC's contention that Rwanda has withdrawn its reservation to Article IX of the Genocide Convention is unfounded, the Court must now turn to the DRC's argument that this reservation is invalid.

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56. In order to show that Rwanda's reservation is invalid, the DRC maintains that the Genocide Convention has "the force of general law with respect to all States" including Rwanda, inasmuch as it contains norms of *jus cogens*. The DRC further stated at the hearings that, "in keeping with the spirit of Article 53 of the Vienna Convention", Rwanda's reservation to Article IX of the Genocide Convention is null and void, because it seeks to "prevent the . . . Court from fulfilling its noble mission of safeguarding peremptory norms". Hence the fact that the DRC had not objected to that reservation was of no consequence in the present proceedings.

57. The DRC also contends that Rwanda's reservation is incompatible with the object and purpose of the Convention, since "its effect is to exclude Rwanda from any mechanism for the monitoring and prosecution of genocide, whereas the object and purpose of the Convention are precisely the elimination of impunity for this serious violation of international law".

58. The DRC further argues that Rwanda's reservation is irrelevant in the light of the evolution of the international law relating to genocide since 1948, which testifies to a "will" in the international community "to see full effectiveness given to the . . . Convention" and which is reflected in Article 120 of the Statute of the International Criminal Court, which prohibits reservations, and in the recognition of the *jus cogens* nature of the prohibition of genocide established by recent doctrine and jurisprudence.

59. The DRC argues finally that, even if the Court were to reject its argument based on the peremptory character of the norms contained in the Genocide Convention, it cannot permit Rwanda to behave in a contradictory fashion, that is to say, to call on the United Nations Security Council to set up an international criminal tribunal to try the authors of the genocide committed against the Rwandan people, while at the same time refusing to allow those guilty of genocide to be tried when they are Rwandan nationals or the victims of the genocide are not Rwandans.

60. With respect to its reservation to Article IX of the Genocide Convention, Rwanda first observes that, although, as the DRC contends, the norms codified in the substantive provisions of the Genocide Convention have the status of *jus cogens* and create rights and obligations *erga omnes*, that does not in itself suffice to "confer jurisdiction on the Court with respect to a dispute concerning the application of those rights and obligations", as, according to Rwanda, the Court had held in the case concerning *East Timor* and in its Order of 10 July 2002 in the present case.

61. Secondly, Rwanda argues that its reservation to Article IX is not incompatible with the object and purpose of the Genocide Convention, inasmuch as the reservation relates not "to the substantive obligations of the parties to the Convention but to a procedural provision". It claims in this connection that 14 other States maintain similar reservations, and that the majority of the 133 States parties to the Convention have raised no objection to those reservations; the DRC itself did not object to Rwanda's reservation prior to the hearings of June 2002. Rwanda further observes that, at the provisional measures stage in the cases concerning *Legality of Use of Force*, the Court, in light of the reservations to Article IX of the Genocide Convention by Spain and the United States—which are in similar terms to Rwanda's reservation—decided to remove the cases concerning those two States from its List, on the ground of its manifest lack of jurisdiction; it necessarily followed that the Court considered that there was no room for

doubt as to the validity and effect of those reservations. The fact that the Court, in its Order of 10 July 2002, did not find that there was a manifest lack of jurisdiction did not in any way support the DRC's argument, inasmuch as this conclusion was addressed to the totality of the DRC's alleged bases of jurisdiction; it could be explained only by reference to the other treaties invoked by the DRC, and not to the Genocide Convention.

62. Rwanda observes thirdly that the fact that Article 120 of the Statute of the International Criminal Court—to which Rwanda is not a party and which it has not even signed—prohibits reservations has no bearing whatever on this issue. Thus, according to Rwanda, the fact that the States which drew up the Statute of the International Criminal Court "chose to prohibit all reservations to that treaty in no way affects the right of States to make reservations to other treaties which, like the Genocide Convention, do not contain such a prohibition".

63. Rwanda contends fourthly that its request to the United Nations Security Council to establish an international criminal tribunal to try individuals accused of participation in the genocide perpetrated on Rwandan territory in 1994 is "an entirely separate matter from the jurisdiction of [the] Court to hear disputes between States". There can be no question, according to Rwanda, of "an otherwise valid reservation to Article IX being rendered 'inoperative', because the reserving State supported the creation by the Security Council of a criminal tribunal with jurisdiction over individuals".

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64. The Court will begin by reaffirming that "the principles underlying the [Genocide] Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation" and that a consequence of that conception is "the universal character both of the condemnation of genocide and of the co-operation required 'in order to liberate mankind from such an odious scourge' (Preamble to the Convention)" (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23). It follows that "the rights and obligations enshrined by the Convention are rights and obligations *erga omnes*" (*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).

The Court observes, however, as it has already had occasion to emphasize, that "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 that 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.

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.

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).

66. The Court notes, however, that it has already found that reservations are not prohibited under the Genocide Convention (Advisory Opinion in the case concerning *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, I.C.J. Reports 1951*, pp. 22 *et seq.*). This legal situation is not altered by the fact that the Statute of the International Criminal Court, in its Article 120, does not permit reservations to that Statute, including provisions relating to the jurisdiction of the International Criminal Court on the crime of genocide. Thus, in the view of the Court, a reservation under the Genocide Convention would be permissible to the extent that such reservation is not incompatible with the object and purpose of the Convention.

67. Rwanda's reservation to Article IX of the Genocide Convention bears on the jurisdiction of the Court, and does not affect substantive obligations relating to acts of genocide themselves under that Convention. In the circumstances of the present case, the Court cannot conclude that the reservation of Rwanda in question, which is meant to exclude a particular method of settling a dispute relating to the interpretation, application or fulfilment of the Convention, is to be regarded as being incompatible with the object and purpose of the Convention.

68. In fact, the Court has already had occasion in the past to give effect to such reservations to Article IX of the Convention (see *Legality of Use of Force (Yugoslavia* v. *Spain), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999*, p. 772, paras. 32-33; *Legality of Use of Force (Yugoslavia* v. *United States of America), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999*, p. 924, paras. 24-25). The Court further notes that, as a matter of the law of treaties, when Rwanda acceded to the Genocide Convention and made the reservation in question, the DRC made no objection to it.

69. In so far as the DRC contended further that Rwanda's reservation is in conflict with a peremptory norm of general international law, it suffices for the Court to note that no such norm presently exists requiring a State to consent to the jurisdiction of the Court in order to settle a dispute relating to the Genocide Convention. Rwanda's reservation cannot therefore, on such grounds, be regarded as lacking legal effect.

70. The Court concludes from the foregoing that, having regard to Rwanda's reservation to Article IX of the Genocide Convention, this Article cannot constitute the basis for the jurisdiction of the Court in the present case.

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71. The DRC also seeks to found the jurisdiction of the Court on Article 22 of the Convention on Racial Discrimination, which states:

> "Any 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."

In its Application the DRC alleges that Rwanda has committed numerous acts of racial discrimination within the meaning of Article 1 of that Convention, which provides *inter alia*:

> "the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an

equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life".

72. Rwanda claims that the jurisdiction of the Court under the Convention on Racial Discrimination is precluded by its reservation to the entire Article 22. It contends that, as the Court observed in its Order of 10 July 2002, the said reservation did not attract objections from two-thirds of the States parties and should therefore be regarded as compatible with the object and purpose of the Convention pursuant to Article 20, paragraph 2, thereof. Rwanda also points out that the DRC itself did not raise any objection to that reservation or to any similar reservations made by other States.

73. For its part, the DRC argues that Rwanda's reservation to Article 22 of the Convention on Racial Discrimination is unacceptable on the ground of its incompatibility with the object and purpose of the treaty, "because it would amount to granting Rwanda the right to commit acts prohibited by the Convention with complete impunity". The DRC further contended at the hearings that the prohibition on racial discrimination was a peremptory norm and that, "in keeping with the spirit of Article 53 of the Vienna Convention" on the Law of Treaties, Rwanda's reservation to Article 22 of the Convention on Racial Discrimination should "be considered as contrary to *jus cogens* and without effect". Hence the fact that the DRC had not objected to that reservation was of no consequence in the present proceedings. In addition, the DRC maintained, as it did in respect of the reservation to Article IX of the Genocide Convention (see paragraph 30 above), that the reservation entered by Rwanda to Article 22 of the Convention on Racial Discrimination has "lapsed or fallen into desuetude as a result of the undertaking, enshrined in the Rwandan Fundamental Law, to 'withdraw all reservations entered by Rwanda when it adhered to . . . international instruments'" relating to human rights.

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74. The Court notes that both the DRC and Rwanda are parties to the Convention on Racial Discrimination, the DRC having acceded thereto on 21 April 1976 and Rwanda on 16 April 1975. Rwanda's instrument of accession to the Convention, as deposited with the United Nations Secretary-General, does however include a reservation reading as follows: "The Rwandese Republic does not consider itself as bound by article 22 of the Convention".

75. The Court will first address the DRC's argument that the reservation has "lapsed or fallen into desuetude as a result of the undertaking, enshrined in the Rwandan Fundamental Law, to 'withdraw all reservations entered by Rwanda when it adhered to . . . international instruments'" relating to human rights. Without prejudice to the applicability *mutatis mutandis* to the Convention on Racial Discrimination of the Court's reasoning and conclusions in respect of the DRC's claim that Rwanda withdrew its reservation to the Genocide Convention (see paragraphs 38-55 above), the Court observes that the procedures for withdrawing a reservation to the Convention on Racial Discrimination are expressly provided for in Article 20, paragraph 3, of that Convention, which states: "Reservations may be withdrawn at any time by notification to this effect addressed to the Secretary-General. Such notification shall take effect on the date on which it is received." However, there is no evidence before the Court of any notification by Rwanda to the United Nations Secretary-General of its intention to withdraw its reservation to Article 22 of the Convention on Racial Discrimination. The Court accordingly concludes that the respondent State has maintained that reservation.

76. The Court must therefore now consider the DRC's argument that the reservation is invalid.

77. The Court notes that the Convention on Racial Discrimination prohibits reservations incompatible with its object and purpose. The Court observes in this connection that, under Article 20, paragraph 2, of the Convention, "[a] reservation shall be considered incompatible . . . if at least two-thirds of the States

Parties to [the] Convention object to it". The Court notes, however, that such has not been the case as regards Rwanda's reservation in respect of the Court's jurisdiction. Without prejudice to the applicability *mutatis mutandis* to Rwanda's reservation to Article 22 of the Convention on Racial Discrimination of the Court's reasoning and conclusions in respect of Rwanda's reservation to Article IX of the Genocide Convention (see paragraphs 66-68 above), the Court is of the view that Rwanda's reservation to Article 22 cannot therefore be regarded as incompatible with that Convention's object and purpose. The Court observes, moreover, that the DRC itself raised no objection to the reservation when it acceded to the Convention.

78. In relation to the DRC's argument that the reservation in question is without legal effect because, on the one hand, the prohibition on racial discrimination is a peremptory norm of general international law and, on the other, such a reservation is in conflict with a peremptory norm, the Court refers to its reasoning when dismissing the DRC's similar argument in regard to Rwanda's reservation to Article IX of the Genocide Convention (see paragraphs 64-69 above): the fact that a dispute concerns non-compliance with a peremptory norm of general international law cannot suffice to found the Court's jurisdiction to entertain such a dispute, and there exists no peremptory norm requiring States to consent to such jurisdiction in order to settle disputes relating to the Convention on Racial Discrimination.

79. The Court concludes from the foregoing that, having regard to Rwanda's reservation to Article 22 of the Convention on Racial Discrimination, this Article cannot constitute the basis for the jurisdiction of the Court in the present case.

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[The Court then considered the others bases for jurisdiction and found that:]

93. It follows from the foregoing that Article 29, paragraph 1, of the Convention on Discrimination Against Women cannot serve to found the jurisdiction of the Court in the present case.

101. The Court concludes from the foregoing that Article 75 of the WHO Constitution cannot serve to found its jurisdiction in the present case.

109. The Court concludes from the foregoing that Article XIV, paragraph 2, of the Unesco Constitution cannot serve to found its jurisdiction in the present case.

119. The Court considers that Article 14, paragraph 1, of the Montreal Convention cannot therefore serve to found its jurisdiction in the present case.

[It also concluded that Vienna Convention on the Law of Treaties Article 66 also could not provide a basis for jurisdiction.]

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126. The Court concludes from all of the foregoing considerations that it cannot accept any of the bases of jurisdiction put forward by the DRC in the present case. Since it has no jurisdiction to entertain the Application, the Court is not required to rule on its admissibility.

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127. While the Court has come to the conclusion that it cannot accept any of the grounds put forward by the DRC to establish its jurisdiction in the present case, and cannot therefore entertain the latter's Application, it stresses that it has reached this conclusion solely in the context of the preliminary question of whether it has jurisdiction in this case the issue to be determined at this stage of the proceedings (see paragraph 14 above). The Court is precluded by its Statute from taking any position on the merits of the claims made by the DRC. However, as the Court has stated on numerous previous occasions, there is a fundamental distinction between the question of the acceptance by States of the Court's jurisdiction and the conformity of their acts with international law. Whether or not States have accepted the jurisdiction of the Court, they are required to fulfil their obligations under the United Nations Charter and the other rules of international law, including international humanitarian and human rights law, and they remain responsible for acts attributable to them which are contrary to international law.

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128. For these reasons,

THE COURT,

By fifteen votes to two,

Finds that it has no jurisdiction to entertain the Application filed by the Democratic Republic of the Congo on 28 May 2002.

IN FAVOUR: *President* Shi; *Vice-President* Ranjeva; *Judges* Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Simma, Tomka, Abraham; *Judge* ad hoc Dugard;

AGAINST: *Judge* Koroma; *Judge* ad hoc Mavungu.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this third day of February, two thousand and six, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Democratic Republic of the Congo and the Government of the Republic of Rwanda, respectively.

(Signed) SHI Jiuyong,
President.

(Signed) Philippe COUVREUR,
Registrar.

Judge KOROMA appends a dissenting opinion to the Judgment of the Court; Judges HIGGINS, KOOIJMANS, ELARABY, OWADA and SIMMA append a joint separate opinion to the Judgment of the Court; Judge KOOIJMANS appends a declaration to the Judgment of the Court;
Judge AL-KHASAWNEH appends a separate opinion to the Judgment of the Court; Judge ELARABY appends a declaration to the Judgment of the Court; Judge *ad hoc* DUGARD appends a separate opinion to the Judgment of the Court; Judge *ad hoc* MAVUNGU appends a dissenting opinion to the Judgment of the Court.