DECLARATION OF JUDGE KOOIJMANS

Compromissory clause of Article 29, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women — Condition of prior diplomatic negotiations — Complaints by DRC in multilateral context as attempts to negotiate — Explicit reference to Convention necessary? — Position of the Court unduly restrictive.

1. I subscribe to the finding of the Court that it has no jurisdiction to entertain the DRC's Application. I have serious doubts, however, as to the appropriateness of one of the elements of the Court's conclusion that it lacks jurisdiction under Article 29, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women. Since in my view this issue transcends the scope of the present case, I wish to give expression to my concerns in this respect.

2. Article 29, paragraph 1, of the Convention reads as follows:

> "Any dispute between two or more States concerning the interpretation or application of the present Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court."

3. In the Judgment the Court observes that the Convention subjects its jurisdiction to the following conditions: firstly, an unsuccessful attempt must have been made to settle the dispute through negotiation; secondly, a request for arbitration must have been submitted; and finally, a period of six months must have elapsed from the date of that request (Judgment, para. 87).

4. As for the first condition, the Court finds that

> "[t]he evidence has not satisfied the Court that the DRC in fact sought to commence negotiations in respect of the interpretation or application of the Convention" (Judgment, para. 91).

5. The Court evidently accepts the DRC's argument that such negotiations do not necessarily have to take the form of bilateral negotiations but can also take place in a multilateral context and be initiated on the basis of protests or complaints brought to the attention of international

institutions. In this respect the DRC has cited the complaint it referred on 24 February 1999 to the African Commission on Human and Peoples' Rights and its many complaints, *inter alia*, about human rights violations, to the Security Council. The Court's position in this respect is in line with its previous pronouncement:

> "[D]iplomacy by conference or parliamentary diplomacy has come to be recognized in the past four or five decades as one of the established modes of international negotiation." (*South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa)*, *Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 346.)

6. In the view of the Court, these complaints are, however, unfit to be considered as attempts to settle the dispute by negotiation in the sense of Article 29, paragraph 1, of the Convention merely by virtue of the fact that the DRC failed to refer explicitly to the Convention on Discrimination against Women in them.

7. I am of the view that this position of the Court is unrealistic, in particular in the case of a multifaceted conflict like the present one. In its complaints to the Security Council the DRC alleged violations by Rwanda of a wide variety of legal norms dealing with the use of force, humanitarian law and human rights law. In view of the character and mandate of the international institutions to which these grievances were addressed, the complaints could not be expected to itemize on a treaty-by-treaty basis the provisions allegedly breached. By requiring the complainant nevertheless to do so, the Court in actual fact makes it virtually impossible to characterize such protests in a multilateral context as attempts to negotiate as required by, *inter alia*, the compromissory clause in the Convention on Discrimination against Women.

8. In this respect it deserves mentioning that specific concern about the rights of women *was* expressed by the international community. Resolution 2002/14 of 19 April 2002 of the United Nations Commission on Human Rights, for instance, urged all parties to the conflict in the Democratic Republic of Congo to respect, in particular, the rights of women and children.

9. Moreover, in the White Books it published during the years of the armed conflict (1998-2002) the DRC had regularly complained of the violation of a wide range of norms of international humanitarian and human rights law. A number of specific examples of atrocities committed by Rwandese troops against women were cited there. Rwanda, therefore, cannot have been unaware that it was accused of the breach of multiple treaty-based human rights norms, including norms providing for the protection of women.

10. In this respect the present case resembles that concerning *Military and Paramilitary Activities in and against Nicaragua*, in which the Court in its Judgment on issues of jurisdiction and admissibility stated its view that

> "it does not necessarily follow that, because a State has not expressly referred in negotiations with another State to a particular treaty as having been violated by conduct of that other State, it is debarred from invoking a compromissory clause in that treaty. The United States was well aware that Nicaragua alleged that its conduct was a breach of international law before the present case was instituted; and it is now aware that specific articles of the 1956 Treaty are alleged to have been violated." (*I.C.J. Reports 1984*, p. 428, para. 83.)

11. I therefore disagree with the Court when it finds that the DRC cannot be deemed to have sought to commence negotiations in respect of the interpretation or application of the Convention, particularly in view of the fact that the attempts to negotiate in this more general, multilateral context did not lead to any positive response by the other party. I find the Court's position unduly restrictive and not in line with its previous case law, which reflects a certain flexibility with regard to the requirement of prior negotiations.

12. It is quite another matter whether the alleged breaches of the Convention on Discrimination against Women are capable of falling within the provisions of that instrument and whether, therefore, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain pursuant to Article 29, paragraph 1, of the Convention. In the present case Rwanda has submitted no arguments in this respect and the Court has made no finding on this matter.

13. The foregoing observations hold good even more in light of the fact that the second condition laid down in Article 29, paragraph 1 — the request for arbitration — would have compelled the complainant to identify the specific character of the dispute. A request for arbitration under Article 29 necessarily implies the specification of the treaty provision allegedly breached.

14. It is this requirement — that an attempt has been made to settle by arbitration — which is the key element of Article 29, paragraph 1. The Court has no jurisdiction unless this condition has been met (see *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 17, para. 21). Since the Court found no evidence that the DRC attempted to initiate arbitration proceedings (Judgment, para. 92), it could not but conclude that it has no jurisdiction under Article 29, paragraph 1, of the Convention.

15. It may be regrettable that the threshold for bringing complaints to the Court's attention by States parties about alleged breaches of human

rights conventions by other States parties is set rather high by the requirement that a number of preconditions must be met. This is true in particular when a convention with a compromissory clause (like the present one) does not contain a (parallel) procedure for State complaints to a body established under that treaty. Yet the Court has no choice but to ascertain whether a precondition, explicitly laid down by the Contracting States, is met and to decline jurisdiction if it is not. The Convention does not, however, set out any specific criteria for the element of "not settled by negotiation". It leaves sufficient room to allow full consideration to be given to the context of such (attempted) negotiations. The words "any dispute concerning the interpretation or application of the present Convention" in Article 29, paragraph 1, refer in a direct sense only to the precondition of arbitration and thus only become relevant when negotiations, in whatever form they have been conducted, have proved fruitless.

(Signed) P. H. KOOIJMANS.