SEPARATE OPINION OF JUDGE AL-KHASAWNEH

Court lacks jurisdiction — Doubts regarding element of reasoning regarding prior negotiations — Court acknowledges protests —- At bilateral and multilateral levels — Not in respect of interpretation or application of Convention on Discrimination against Women — Multifaceted dispute — Not realistic to expect reference to specific treaty in diplomatic negotiations — Much depends on context — Contents of treaty also relevant — Crucial test is substantive relevance — Test met by reference to allegations of rape and sexual assault — Violence is form of discrimination — Comment by monitoring committee carries considerable weight — Court's jurisprudence favours broad interpretation — Plausibility test — Test of "reasonable" or tangible connection — Prior negotiation is a condition precedent — Need for flexibility on form — Complaints by DRC meet criteria of prior negotiations — Failure to arbitration — Leads to failure to meet prior conditions for seisin of Court.

1. Whilst I have concurred with the Court's finding that "it has no jurisdiction to entertain the Application filed by the Democratic Republic of the Congo on 28 May 2002" (Judgment, para. 128), I continue to have serious doubts regarding some elements in the Court's reasoning leading to the conclusion that it has no jurisdiction under Article 29 of the Convention on the Elimination of All Forms of Discrimination against Women.

2. It is readily apparent that the consequences of that conclusion go beyond the present case and affect not only the many compromissory clauses which are

> "rapidly replacing declarations accepting the compulsory jurisdiction of the Court under Article 36 (2) as the primary method by which the Court gains jurisdiction in contentious cases" (Jonathan I. Charney, "Compromissory Clauses and the Jurisdiction of the International Court of Justice", *American Journal of International Law, Vol. 81, p. 855 (1987))*

but also the very definition of what constitutes a dispute.

3. In view of this and of the fact that I find that conclusion disconcerting, I feel that I should set out in this brief separate opinion my views on this issue.

4. In paragraph 91 of the Judgment, the Court took note of the fact that:

> "the DRC made numerous protests against Rwanda's actions in

alleged violation of international human rights law, both at the bilateral level through direct contact with Rwanda and at the multilateral level within the framework of international institutions".

However the Court went on to conclude that:

"Whatever may be the legal characterization of such protests as regards the requirement of the existence of a dispute between the DRC and Rwanda for purposes of Article 29 of the Convention, that Article requires also that any such dispute be the subject of negotiations. The 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. In paragraph 79 of its Order of 10 July 2002 indicating provisional measures the Court had already had a chance to reason that:

"Whereas at this stage in the proceedings the Congo has not shown that its attempts to enter into negotiations or undertake arbitration proceedings with Rwanda . . . concerned the application of Article 29 of the Convention on Discrimination against Women; whereas nor has the Congo specified which rights protected by the Convention have allegedly been violated by Rwanda and should be the object of provisional measures; whereas the preconditions on the seisin of the Court set by Article 29 of the Convention therefore do not appear prima facie to have been satisfied" (*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, p. 247, para. 79).

6. In other words, the Court acknowledged the DRC's attempts to enter into negotiations or to undertake arbitration proceedings but was not satisfied that those negotiations were "in respect of the interpretation or application of the Convention" (Judgment, para. 91).

7. As the whole world knows, the dispute between the two neighbouring States was not confined to the application or interpretation of the Convention on Discrimination against Women but encompassed wide-ranging and multifaceted aspects, where, nevertheless, allegations of serious human rights abuses permeated the entire dispute. In such a situation, should diplomatic negotiations including "diplomacy by congress" (*South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa)*, *Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 346) be compelled to itemize complaints on a treaty-by-treaty basis? I am of the view that such a requirement would be unrealistic as anyone reasonably acquainted with diplomatic negotiations would agree. Much depends on

context. Complaints before the Security Council are not usually compartmentalized on a treaty-by-treaty or provision-by-provision basis. In addition, much would depend on the content of the conventions in question. In a treaty on maritime delimitation, for example, the very subject-matter would suggest, even compel, by its technicality, very specific references to individual provisions. The same might not be true in cases of allegations of human rights violations where a general reference to human rights abuses might be sufficient.

The crucial consideration is that the substantive relevance of the Convention on Discrimination against Women seems obvious as the DRC has included numerous allegations of rape and sexual assault of the most horrible forms imaginable committed against thousands of Congolese women and girls. The Committee on the Elimination of All Forms of Discrimination against Women had the following to say:

> "General comments
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> 6. The Convention in article 1 defines discrimination against women. The definition of discrimination includes *gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately*. It includes acts that inflict physical, mental, or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender-based violence may breach specific provisions of the Convention regardless of whether those provisions expressly mention violence." (General Recommendations, No. 19 (11th session, 1992).)

The Committee went on to describe gender-based violence which impairs the enjoyment by women of human rights and fundamental freedoms as discrimination within the meaning of Article 1 of the Convention and referred specifically in that context to "the right to enjoy protection according to humanitarian norms in time of international or internal armed conflict" *(ibid.)*.

8. To be sure this clear language emanating from the human rights body charged with monitoring compliance with the Convention is not in itself determinative of the matter nor does it relieve judges of the duty of interpreting the provisions of the Convention with the aim of ascertaining their substantive relevance to complaints alleging human rights violations against women. Nevertheless it carries considerable weight.

9. What is more important is that the Court's own jurisprudence regarding the interpretation of compromissory clauses is well developed and favours a broad interpretation of such provisions. It can be safely asserted that when the applicant provides a "plausible" or "reasonable" argument that substantive provisions of the treaty containing a compromissory clause have been violated, the Court will not impose an

additional burden on the applicant to establish that the dispute concerns the application of interpretation of the treaty. This plausibility test was described in the *Ambatielos* case of 1953 in the following terms:

> "[I]f it is made to appear that the [party] is relying upon an arguable construction of the Treaty, that is to say, a construction which can be defended, whether or not it ultimately prevails, then there are reasonable grounds for concluding that its claim is based on the Treaty." (*Ambatielos (Greece* v. *United Kingdom), Merits, Judgment, I.C.J. Reports 1953*, p. 18.)

10. Indeed the suggestion is often made that the Court's jurisprudence reveals a consistent willingness on the part of the Court to adjudicate on subject-matter that is merely *reasonably* or *tangibly* connected to the treaty containing the compromissory clause. For the purposes of this brief opinion it would suffice to refer to one recent case, the *Oil Platforms* case where the Court adjudicated on the whole of the law of force contained in the United Nations Charter and customary international law in the context of the interpretation or application of the compromissory clause (*Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment, I.C.J. Reports 2003*; Art. X, para. 1, of the 1955 Treaty and the exception thereto, Art. XX, para. 1 *(d)* 1).

11. In the present case the subject-matter of the dispute is directly related to the substantive provisions of the treaty, i.e., the allegation of widespread violence directed against women.

12. I have indicated earlier (para. 7) that as a matter of diplomatic negotiations the requirement that reference be made to a particular treaty or provisions thereof is unrealistic and I would also, with reference to the Court's jurisprudence, venture the opinion that it is not required, provided of course, a link exists between substantive provisions of the treaty in question and the dispute. It would be recalled that in the *Nicaragua* case a similar claim regarding the requirement of prior negotiations was made by the United States in the following terms:

> "Since . . . Nicaragua has never even raised in negotiations with the United States the application or interpretation of the Treaty to any of the factual or legal allegations in its Application, Nicaragua has failed to satisfy the Treaty's own terms for invoking the compromissory clause." (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984,* pp. 427-428.)

The Court dismissed this objection and stated:

> "In the view of the Court, 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 compro-

> missory clause in that treaty. The United States was well aware that Nicaragua alleged that its conduct was a breach of international obligations 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*, pp. 427-428.)

13. In conclusion, whilst the requirement of prior negotiations is a prior condition that has to be met in determining the limits of consent to submit to the jurisdiction of the Court, the manner in which these negotiations take place is ultimately a matter of form and there are no general requirements that negotiations should be itemized. Nor that they should refer expressly to a particular treaty. The decisive factor will seem to be the relevance of the substantive provisions of the treaty in question to the subject-matter of the dispute. An attempt by the DRC to enter into negotiations bilaterally or multilaterally with Rwanda with regard to the alleged human rights violations against women should suffice to meet the requirement of prior diplomatic negotiations under Article 29 of the Convention on the Elimination of All Forms of Discrimination against Women. The complaint referred by the DRC on 24 February 1999 to the African Commission on Human and Peoples' Rights as well as its complaints to the Security Council in which it referred to human rights abuses would meet the requirement of attempting to enter into prior negotiations for the purposes of Article 29.

14. Having reached this conclusion, I should nevertheless recall that, in addition to the requirements of prior negotiations, Article 29 of the Convention on Discrimination against Women contains other conditions precedent, namely the undertaking of arbitral proceedings and the lapse of six months before referral to the Court. With respect to arbitration and notwithstanding the confusing language of paragraph 79 of the 2002 Order, which spoke of the DRC's "attempts to enter into negotiations or undertake arbitration proceedings with Rwanda", there is nothing that would enable me to conclude "that the DRC made a proposal to Rwanda that arbitration proceedings should be organized, and that the latter failed to respond thereto" (Judgment, para. 92). It is on this basis that I concurred with the judgment that the Court lacks jurisdiction.

(*Signed*) Awn AL-KHASAWNEH.
