DECLARATION OF JUDGE ELARABY

Agreement with findings of the Court — Limitations of the international legal system — Court precluded from the appropriate administration of justice — Related cases based on different grounds of jurisdiction — Rwanda's non-recognition of the compulsory jurisdiction of the Court — Consensual nature of the jurisdiction of the Court — Gravity of the situation in question — Importance of States' acceptance of the compulsory jurisdiction of the Court.

1. I have voted with a degree of reluctance in favour of the Judgment that the Court has no jurisdiction to entertain the Application of the Democratic Republic of the Congo. While I accept the findings and conclusions therein as consistent with the Statute and hence sound in law, I do firmly believe that States, in general, should not be permitted to evade international judicial scrutiny regarding a crime as grave as genocide. The Court's inability to examine the merits due to jurisdictional limitations cogently demonstrates a major weakness in the contemporary international legal system. I have therefore joined other judges in a separate opinion which examines certain aspects of the Court's jurisprudence in the matter of reservations. In addition, I consider it appropriate to append a brief declaration to elaborate further on some other aspects relating to the jurisdiction of the Court.

2. In the instant case, the Court was precluded, by virtue of the nature and limitations of the international legal system as it exists today, from the appropriate administration of justice. As a result, the Court has not been able to examine the merits of the claims of the Democratic Republic of the Congo. This inability is compounded by the fact that the case forms part of a series of cases brought before the Court by the Democratic Republic of the Congo relating to armed activities of neighbouring States on its territory. Although these cases are related and, to a considerable extent, the facts, circumstances and situations at issue overlap, they are nonetheless distinct cases, each brought upon its own grounds for jurisdiction and giving rise to its own legal considerations. The Court referred to this fact in the Judgment by stating that:

> "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 deci-

> sion 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." (Judgment, para. 14.)

3. This is particularly clear in relation to the jurisdictional bases upon which the Court has been asked to examine the individual cases. In the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, both States had made declarations of acceptance of compulsory jurisdiction in accordance with Article 36, paragraph 2, of the Statute. The case was brought on the basis, *inter alia*, of the Charter of the United Nations, the Charter of the Organization of African Unity and other multilateral treaties to which both States were parties. The Court thus proceeded to a full examination of the case on its merits, delivering its Judgment on 19 December 2005. In the instant case, however, while the Democratic Republic of the Congo has accepted the compulsory jurisdiction, Rwanda has not. Thus the Democratic Republic of the Congo has instead invoked the dispute settlement clauses of a number of multilateral conventions as the basis for establishing jurisdiction in these proceedings.

4. In the Court's Judgment, it examines each individual basis of jurisdiction asserted by the Democratic Republic of the Congo. The Court has found that none of these suggested bases would establish jurisdiction. In each case, it has given reasons supporting its findings. Thus, the Court has been unable to proceed to the merits of the case at hand.

5. The Court has made such a finding even though it acknowledges that the allegations made by the Democratic Republic of the Congo are of a most serious nature. This seriousness has already been acknowledged in the Court's Order of 10 July 2002 on the request for the indication of provisional measures (*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*, pp. 240-241, paras. 54-56, and pp. 249-250, para. 93).

6. At the provisional measures stage, the Court stated:

> "there is a fundamental distinction between the question of the acceptance by a State of the Court's jurisdiction and the compatibility of particular acts with international law; the former requires consent; the latter question can only be reached when the Court deals with the merits after having established its jurisdiction and having heard full legal arguments by both parties" (*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. 249, para. 92).

This distinction must be reiterated today. This is all the more so in the

light of the Court's Judgment of 19 December 2005 in the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*. That case highlighted the complexity of the circumstances in the Great Lakes region and the role of all States in the region in the instability and turmoil which are at the heart of the claims advanced by the Democratic Republic of the Congo. Yet it is crucial to note that, whereas in the case concerning Uganda, the Court clearly had jurisdiction on the basis of the declarations of both States accepting compulsory jurisdiction under Article 36, paragraph 2, in the instant case — by way of contrast — no such jurisdiction exists. Thus, the Court is not competent to examine the merits and accordingly must not prejudge the substantive issues of international law asserted by the Democratic Republic of the Congo.

7. At present, the jurisdiction of the Court in particular, and international adjudication in general, is of a consensual nature. Consent is its cornerstone and can manifest itself through a declaration under Article 36, paragraph 2, of the Statute, an appropriate compromissory clause in a treaty, special agreement or even through tacit acceptance referred to as *forum prorogatum*. Without such consent, however, the Court has no jurisdiction to examine the merits of a particular case.

8. The promise and possibilities of the Court, as the principal judicial organ of the United Nations entrusted with the responsibility of settling disputes, requires that States submit their disputes to the Court and accept its jurisdiction. The duty of States to settle their disputes peacefully and in accordance with international law is emphasized in a number of important provisions enshrined in the Charter of the United Nations. Efforts to realize the objective of wider acceptance of the compulsory jurisdiction of the Court have been exerted on many occasions in recent years. The Manila Declaration on the Peaceful Settlement of International Disputes was adopted by the General Assembly on 15 November 1982 (A/RES/37/10) with a particular emphasis on the importance of States recognizing the compulsory jurisdiction of the Court. In 1992 the then Secretary-General, Boutros-Ghali, in his Agenda for Peace Report called on all Member States to accept the "general jurisdiction of the International Court under Article 36 of its Statute, without any reservation, before the end of the United Nations Decade of International Law in the year 2000" (*An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping*, Report of the Secretary-General adopted by a summit meeting of the Security Council on 31 January 1992, A/47/277-S/24111, para. 39).

9. More recently, Secretary-General Kofi Annan has called on States to submit to the compulsory jurisdiction of the Court. In his 2001 Report on the Prevention of Armed Conflict, he "reiterate[d] [his] appeal to

Member States who have not yet done so to consider accepting the compulsory jurisdiction of the Court" (*Prevention of Armed Conflict*, Report of the Secretary-General, 7 June 2001, A/55/985-S/2001/574, para. 48). He continued: "the more States that accept compulsory jurisdiction of the Court, the higher the chances that potential disputes can be expeditiously resolved through peaceful means" (*ibid.*, para. 48). Recommendation 6 of this Report "urge[d] Member States to accept the general jurisdiction of the Court" (*ibid.*, para. 50). Thus, while consent forms the cornerstone of the system of international adjudication, States have a duty under the Charter to settle their disputes peacefully. Recognition of the compulsory jurisdiction of the Court fulfils this duty.

10. Some built-in limitations of the Statute, resonant of limitations of the international legal system generally, are relics of a past era which need to be revisited. The case before the Court today represents a clear reflection of these limitations. It serves as a reminder to the international community in the twenty-first century of the imperative of actively seeking to overcome the hurdles in establishing jurisdiction. The Court may thereby play a stronger role in the peaceful settlement of international disputes and in enhancing respect for international law among States, thus contributing in fact

> "to bring[ing] about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace" (Art. 1, para. 1, of the Charter of the United Nations).

(Signed) Nabil ELARABY.