DECLARATION OF JUDGE *AD HOC* SIMMA

Jurisdictional implications of the UAE's reservation to Article IX of the Genocide Convention — Article IX as the only basis for adjudicating inter-State claims involving genocide — The evolution of international human rights law over the past two decades — Reservations to the Court's jurisdiction may contravene essential provisions of the Convention — The need to revisit a problematic legacy to ensure the Genocide Convention receives the judicial attention it rightfully deserves.

1. I voted against the Order and joined five other judges of the Court in authoring the partly dissenting opinion[1] to set out the reasons for our dissent and its underlying rationale. I also support the views expressed by Judge Yusuf in his opinion, who rightly states that denying the Parties the opportunity to present their arguments on the Court's jurisdiction runs counter to Article 36 (6) of the Statute, as well as Articles 79, 79*bis* and 79*ter* of the Rules of Court[2]. That said, I consider it necessary to give certain additional explanations for my dissent. This is the purpose of the present declaration.

2. I will focus exclusively on the jurisdictional implications of the UAE's reservation to Article IX of the Genocide Convention — the provision that designates the Court as the sole judicial forum for adjudicating inter-State claims involving genocide, among them the question of State responsibility for this international crime.

3. The UAE's reservation, in the words of the Court's 1951 Advisory Opinion, goes to the very "*raison d'être* of the [C]onvention"[3].

4. Article IX of the Genocide Convention has entrusted the Court with a task that ought to be supported to the greatest measure possible by all members of the international community of States. Reservations to Article IX of the Convention excluding the Court's jurisdiction pure and simple must thus be regarded as serious obstacles on this path and, I would add, a disgrace to the States parties concerned.

5. This finding is nothing new. It is almost twenty years ago that the joint separate opinion appended to the 2006 Judgment of the Court in *Democratic Republic of the Congo* v. *Rwanda* expressed the strong discontent that any human rights-minded observer must feel facing a reservation of the type before us. The joint separate opinion did so in words that deserve to be repeated here. I had the privilege to co-author this opinion at the time and I continue to uphold the position taken therein, even more firmly than I did at the time:

> "It is a matter for serious concern that at the beginning of the twenty-first century it is still for States to choose whether they consent to the Court adjudicating claims that they have committed genocide. It must be regarded as a very grave matter that a State

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[1] Joint partly dissenting opinion of Judges Bhandari, Charlesworth, Gómez Robledo, Cleveland, Tladi and Judge *ad hoc* Simma, appended to the present Order.

[2] Dissenting opinion of Judge Yusuf, appended to the present Order.

[3] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23.

> should be in a position to shield from international judicial scrutiny 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."[4]

6. I believe it is essential to give the question of reservations to Article IX the careful attention it deserves. This means that it is to be subjected to a full jurisdictional phase of the proceedings, in which all relevant arguments are properly heard. Over the past two decades, international law on reservations to treaties — particularly in the context of human rights treaties — has evolved significantly. At the same time, the Court's body of jurisprudence concerning obligations *erga omnes* (*partes*) and peremptory norms of general international law (*jus cogens*) has grown considerably[5], as an increasing number of States have brought cases in the public interest, including in response to horrific acts of genocide that the international community vowed to prevent back in 1948. There is thus much more law and legal policy to consider than at the time of *Rwanda*. Nowadays, to deal with all of this conclusively within a minimal time frame at the provisional measures stage is glaringly inadequate.

7. In this context, I consider it highly relevant that an increasing number of States have withdrawn their reservations to Article IX. Whether this trend signals a broader shift in international law, however, is not a question that can be conclusively determined in the course of a single-day hearing on provisional measures. What it signals in any case is that the States in question have read the signs of the time more readily than the Court in charge of rendering the Genocide Convention effective.

8. The International Law Commission's 2011 Guide to Practice on Reservations to Treaties recognizes that the object and purpose of a treaty is relevant to the interpretation of a reservation[6]. Its discussion of the validity, and its limits, of a reservation dealing with a treaty's jurisdictional

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[4] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, joint separate opinion of Judges Higgins, Kooijmans, Elaraby, Owada and Simma, p. 71, para. 25.

[5] See, for example, *Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium* v. *Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 32, paras. 33-34; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 56, para. 126; *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 102, para. 29; *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),* pp. 615-616, para. 31; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I),* pp. 199-200, paras. 155-159; *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II),* pp. 449-450, paras. 68-70; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019 (I),* p. 139, para. 180; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Preliminary Objections, Judgment, I.C.J. Reports 2022 (II),* pp. 515-518, paras. 107-114; *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion of 19 July 2024*, para. 232.

[6] International Law Commission, Guide to Practice on Reservations to Treaties (2011), 4.2.6 Interpretation of reservations ("A reservation is to be interpreted in good faith, taking into account the intention of its author as reflected primarily in the text of the reservation, as well as the object and purpose of the treaty and the circumstances in which the reservation was formulated").

clauses — particularly the Commission's commentary to Guideline 3.1.5.7[7]— relies heavily on the Court's jurisprudence. And it leaves a door open to the argument that a reservation to the Court's jurisdiction as to the Genocide Convention can be contrary to an essential provision of the Convention, pointing to the joint separate opinion in *Democratic Republic of the Congo* v. *Rwanda*[8].

9. The 2006 *Rwanda* Judgment rightly affirms that the Court should remove a case from the General List "only if it is apparent from the outset that there is no basis on which jurisdiction could lie, and that it therefore cannot entertain the case"[9]. However, this condition is not met, at least not clearly, in the present case: the mere fact that six Members of the Court already in 2006[10], and seven judges today[11], hold the view that the Court should have reached a different conclusion underscores that it is "not *self-evident* that a reservation to Article IX could not be regarded as incompatible with the object and purpose of the Convention"[12]. Accordingly, it cannot be said that it is "apparent" that there is a *manifest* lack of jurisdiction in this case.

10. Moreover, in my view, the Court's treatment of prima facie jurisdiction and the concept of manifest lack of jurisdiction in paragraph 35 of today's Order is problematic. Contrary to the implication made by the Court, the absence of prima facie jurisdiction does not necessarily equate to a manifest lack of jurisdiction. In fact, there have been cases in which the Court initially found the existence of prima facie jurisdiction — thereby justifying the indication of provisional measures — but later concluded, at the jurisdictional phase, that it lacked jurisdiction to consider the merits[13]. What is at our disposal here is a two-way street: it is equally consistent for the Court to determine at the provisional measures stage that no prima facie jurisdiction exists, and yet to ultimately find, at the jurisdictional phase, that jurisdiction is established. In such cases, the only way to reach a sound and fair conclusion is not to dismiss the case prematurely — as the Court, regrettably, has still done in the present instance — but by allowing the parties to be fully heard during the jurisdictional phase.

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[7] *Ibid.*, 3.1.5.7 Reservations to treaty provisions concerning dispute settlement or the monitoring of the implementation of the treaty ("A reservation to a treaty provision 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, unless: *(a)* the reservation purports to exclude or modify the legal effect of a provision of the treaty essential to its *raison d'être*; or *(b)* the reservation has the effect of excluding the reserving State or international organization from a dispute settlement or treaty implementation monitoring mechanism with respect to a treaty provision that it has previously accepted, if the very purpose of the treaty is to put such a mechanism into effect").

[8] See *Yearbook of the International Law Commission*, 2007, Vol. II, Part II, p. 54, footnote 286.

[9] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 20, para. 25 (emphasis added).

[10] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, joint separate opinion of Judges Higgins, Kooijmans, Elaraby, Owada and Simma, pp. 65-72; dissenting opinion of Judge Koroma, pp. 55-64.

[11] See the joint partly dissenting opinion of Judges Bhandari, Charlesworth, Gómez Robledo, Cleveland, Tladi and Judge *ad hoc* Simma, as well as the dissenting opinion of Judge Yusuf, both appended to the present Order.

[12] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, joint separate opinion of Judges Higgins, Kooijmans, Elaraby, Owada and Simma, p. 72, para. 29 (emphasis added).

[13] See, for example, *Anglo-Iranian Oil Co. (United Kingdom* v. *Iran), Preliminary Objection, Judgment, I.C.J. Reports 1952*, p. 93; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 70; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Preliminary Objections, Judgment, I.C.J. Reports 2021*, p. 71.

11. I must thus observe with great regret that the Court has missed a significant opportunity to give the Genocide Convention the judicial attention it so rightfully, and urgently, deserves. It would not have been "a bridge too far"[14] to do so.

12. However, since today's decision by the Court is not a judgment reached after sufficient hearing of the parties and deliberation in the fullest sense of the term, I have not given up hope that the Court will revisit the issue of limits to reservations excluding the application of Article IX of the Genocide Convention in order to enable the full realization of the Convention's "purely humanitarian and civilizing purpose"[15].

(Signed) Bruno SIMMA.

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[14] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, separate opinion of Judge *ad hoc* Dugard, p. 91, para. 13.

[15] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23.