CR 2005/18 (traduction)

CR 2005/18 (translation)

Mardi 5 juillet 2005 à 10 heures

Tuesday 5 July 2005 at 10 a.m.

8 Le PRESIDENT : Veuillez vous asseoir. La Cour se réunit aujourd'hui pour entendre le premier tour de plaidoiries du Congo. Le Congo s'exprimera ce matin, jusqu'à 13 heures. Aussi je donne maintenant la parole à S. Exc. M. Masangu-a-Mwanza, agent du Congo. Monsieur Masangu-a-Mwanza, vous avez la parole.

Mr. MASANGU-A-MWANZA: Thank you, Mr. President.

Mr. President, Members of the Court, just two months after the hearings in the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, I am appearing again before this distinguished Court for today's hearings on the issues of its jurisdiction and the admissibility of the Application in the case concerning *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda)*.

In this introductory speech, Mr. President, Members of the Court, I should like to present to you our delegation, led by His Excellency *Bâtonnier* Honorius Kisimba Ngoy, Minister of Justice and Keeper of the Seals.

In addition to His Excellency Minister Honorius Kisimba Ngoy, Head of the Delegation, the latter is composed as follows:

1. Mr. Jacques Masangu-a-Mwanza, Ambassador Extraordinary and Plenipotentiary to the Kingdom of the Netherlands, as Agent,

2. Mr. Ntumba Luaba Lumu, Professor of Law at the University of Kinshasa, former Minister, currently Secretary-General to the Government, as Co-Agent and Counsel,

3. Mr. Lwamba Katansi, Professor at the Law Faculty of the University of Kinshasa, *avocat* of the Kinshasa/Gombe Court of Appeal, Director of the Interdisciplinary Research Centre for the Promotion and Protection of Human Rights in Central Africa and former Minister,

4. Mr. Pierre Akele Adau, Professor and Honorary Dean of the Law Faculty of the University of Kinshasa, President of the Military High Court,

5. Mr. Mukadi Bonyi, Professor at the Law Faculty of the University of Kinshasa, *avocat* of the Supreme Court of Justice, as counsel and advocates,

9 6. *Maître* Crispin Mutumbe Mbuya, Legal Adviser to the Minister of Justice,

7. Mr. Victor Musompo Kasongo, Private Secretary to the Minister of Justice,

8. Mr. Richard Lukunda Vakala Mfumu, assistant to Counsel and Advocates,

9. Mr. Nsingi-zi-Mayemba, First Counsellor, Embassy of the Democratic Republic of the Congo in the Kingdom of the Netherlands,

10. Ms Marceline Masele, Second Counsellor, Embassy of the Democratic Republic of the Congo in the Kingdom of the Netherlands, as Advisers.

Mr. President, Members of the Court, allow me now to indicate to you the order in which the Counsel and Advocates of the Democratic Republic of the Congo will speak.

First, His Excellency the Minister of Justice and Keeper of the Seals, *Bâtonnier* Honorius Kisimba Ngoy, will give a general introduction.

Then Professor Akele Adau will address two linked aspects of the Court's jurisdiction, namely whether the Court is judge of its own jurisdiction and the fact that there is, indeed, no manifest absence of jurisdiction.

He will be followed by Professor Lwamba Katansi, who will address the issues concerning reservations to treaties, the exhaustion of the compromissory clauses contained in the various treaties invoked by the Democratic Republic of the Congo and the nature of a State's complaints.

For his part, His Excellency Professor Ntumba Luaba Lumu will enlighten your distinguished Court on two fundamental aspects: first, the Democratic Republic of the Congo's reliance on the Vienna Convention of 23 May 1969 on the Law of Treaties as basis for the Court's jurisdiction and, secondly, the reality of the negotiations.

Finally, Professor Mukadi Bonyi will deal with the admissibility of the Congo's Application. He will demonstrate Rwanda's confusion of objections to jurisdiction with objections to admissibility. He will also explain that the removal of a case from the List does not deprive the applicant State of the right to file a new application.

He will conclude by discussing the question of arbitration and the signature by the Democratic Republic of the Congo and Rwanda of the Pretoria Agreement of 31 July 2002.

10 I thank the Court for its attention, and kindly ask you, Mr. President, to give the floor to His Excellency the Minister of Justice.

Excuse us for this slight delay. The Minister isn't here yet, so I should like to give the floor first to Professor Akele.

Le PRESIDENT : Je vous remercie, Excellence. Je donne maintenant la parole à M. Akele.

Mr. AKELE:

1. Mr. President, Members of the Court, allow me first of all to thank you for giving me the floor and to tell you of the great honour, emotion and respect inspired in me by your Court.

2. As a professor of criminal and civil law, concerned — it is true — by the punishment of serious breaches of international law, it is thus a great honour and a rare opportunity to appear before this eminent international Court in order to seek, not punishment — at least not in the specific context of the present case — but that other prime constituent of criminal law and of the law in general, including therefore international law, namely the restoration, through legal process, of the dignity of hundreds of thousands of children, women and men of all ages and all conditions, victims of serious violations of international law perpetrated by Rwanda on the territory of the Democratic Republic of the Congo.

3. I am conscious of the fact that taking the floor before your distinguished Court in circumstances as dramatic as those that have brought us here is to testify for the conscience of mankind as well as for the memory of all those persons in whom we can all recognize ourselves, victims of blind, barbaric violence, contrary to any notion of civilization. To take the floor before this august Court is to challenge the conscience of civilized mankind, on behalf of the countless anonymous martyrs of the past and the present, in order to save millions of other innocent victims from present and future horrors.

4. This expectation gives a measure of the difficulty of your task, which inspires admiration and respect.

5. Mr. President, Members of the Court, in a sense both the Democratic Republic of the
11 Congo and Rwanda saw their claims dismissed by the Court's Order of 10 July 2002. On the one hand, considering that it had no prima facie jurisdiction in the case, the Court rejected the request for the indication of provisional measures submitted by the DRC. On the other hand, in the

absence of manifest lack of jurisdiction, the Court refused to grant Rwanda's request to remove the case from its List.

6. However, the Court immediately pointed out that the findings reached by the Court at that stage of the proceedings in no way prejudged the question of its jurisdiction to deal with the merits of the case or any questions relating to the admissibility of the Application, or relating to the merits themselves, and that they left unaffected the right of the Governments of the Congo and of Rwanda to submit their arguments in respect of those questions.

7. The present phase of the proceedings gives us precisely that opportunity. And I do not think it necessary, in the light of the Court's position, to make the assertion that was made yesterday by Rwanda through its counsel, my distinguished colleague Professor Christopher Greenwood, that a State which has lost at the provisional measures phase of a case cannot plead a definitive and valid basis for jurisdiction with regard to the merits.

8. In reality, Mr. President, the case is a complex and difficult one. For this reason, the Court, which gauged the full extent of this complexity and difficulty, deemed it necessary, in paragraphs 92 and 93 of its Order of 10 July 2002, to recall:

(i) That "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, the Court points out, 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.

(ii) That, whether or not States accept the jurisdiction of the Court, they remain in any event responsible for acts attributable to them that violate international law; in particular, they are required to fulfil their obligations under the United Nations Charter.

(iii) Following in the footsteps of the Security Council, the Court also reminded all the parties to the conflict [on Congolese territory] of their obligation to "put an . . . end to violations of human rights and international humanitarian law" and to fulfil their obligations with respect to the security of civilian populations under the Fourth Geneva Convention of 12 August 1949 relative to the Protection of Civilian Persons in Time of War.

(iv) The Court added that "all forces present on the territory of the Democratic Republic of the Congo are responsible for preventing violations of international humanitarian law in the territory under their control". Lastly, it stressed the necessity for the Parties to these proceedings, i.e., Rwanda and the Democratic Republic of the Congo, to use their influence to prevent the repeated grave violations of human rights and international humanitarian law which have still been observed even recently.

9. This is no doubt the right moment, Mr. President, Members of the Court, to thank the Court on behalf of the Democratic Republic of the Congo, since by stressing these principles and endorsing the warnings contained in certain Security Council resolutions, the Court, as is noted in timely fashion by Professor Mampuya in a recent work entitled "*Le droit international à l'épreuve du conflit des Grands-Lacs au Congo-Zaïre. Guerre-droit, responsabilité et réparations" [International law in the Crucible of the Great Lakes Conflict in Congo-Zaire. War and Law, Responsibility and Reparations]* (Ama. Ed-Nancy-Kinshasa 2004, p. 83), "seems to accept the Congolese claims on the merits in many respects", particularly since it expresses concern for "the deplorable human tragedy, loss of life, and enormous suffering in the east of the Democratic Republic of the Congo".

10. In fact, by placing emphasis on these principles, the Court wished to express its predicament vis-à-vis the complexity and difficulty to which I referred a moment ago and which, over and above the case which concerns us here, reflect a situation of long standing, a situation that constitutes something of a thorn in the Court's side, imperatively requiring removal by means consistent with current trends in international law.

11. No so long ago, in 1999, in the case concerning *Legality of Use of Force (Yugoslavia* v. *Spain)*, the Court encountered the same problem. Paragraphs 36 and 37 of the Order made in that case on 2 June 1999 are moreover strikingly similar to paragraphs 92 and 93 of the Order of 10 July 2002.

13 12. The question now faced by the Court is how best to reconcile the requirement of consensuality in relation to the Court's determination of its jurisdiction and the need to enforce compliance by all States, under the guarantee of the Court's jurisdictional authority — whether or not those States have recognized the Court's jurisdiction — with the rule requiring that particular

acts exhibit a minimum degree of compatibility, as befitting civilized nations, with international law and, more particularly, with human rights.

13. In other words, how are States to be prevented from using institutions, rules or legal concepts, through what may be regarded as an abuse of process or of rights, to hamper the effective implementation of international law, despite the risk of serious disruptions of international peace and security that such an attitude may engender.

14. This issue shows that international law is at a crossroads, with the prospect of globalization-driven developments leading "in the direction of ever greater interference in the internal affairs of States"[1]. All international legal fora are showing awareness of this issue.

15. This is true, for example, of the International Criminal Tribunal for Rwanda, which has pronounced itself in favour of "the inclusion in its jurisdiction . . . of violations of common Article 3 and Additional Protocol II to the Geneva Conventions, i.e., crimes committed in the context of a non-international conflict"; this despite the opposition of the Rwandan authorities who, "fearing in particular that the actions of the RPF itself might be called in question, suggested that crimes other than genocide should come under the jurisdiction of the domestic courts"[2].

16. Thus, in reality, the issue which concerns the Court in the present case exceeds the bounds of our dispute with Rwanda and involves interests that are much more than merely casuistic.

17. This issue, as I said earlier, is a phenomenon of long standing, which has gradually taken shape as a result of the increasingly large number of strenuous objections to the jurisdiction of the International Court of Justice in recent contentious cases, which have manifested themselves where

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necessary, almost as an act of desperation, in a party absenting itself from the proceedings. So much so that the Court has been portrayed as an institution whose authority is increasingly under challenge. In reality, while the reasons for this challenge are varied, they are all motivated by developments in international society, developments which have undermined the legal and political consensus on which the system of international justice was based. Moreover, as is demonstrated by

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[1]Frédéric Mégret, *Le Tribunal pénal international pour le Rwanda*, Cedin Paris 1, 2002, *Perspectives internationales* No. 23, p. 35.

[2]*Ibid*., p. 35, note No. 57.

Jean-Pierre Cot, for example, these objections are being raised in connection with sensitive contentious issues. There was first the question of continental shelves, followed by that of nuclear tests and then by more general military defence issues, such as the "legality of use of force" or, as in the present case, armed activities on the territory of another State, etc.

18. In short, the phenomenon of challenges to the jurisdiction of the Court and that of trends in international society reflects a new element of international law, namely "abuse of process" or "abuse of law". This is, indeed, one of the main arguments used by Rwanda against the Democratic Republic of the Congo, on the ground firstly that the DRC, after withdrawing its first Application, filed a second one allegedly of the same nature and having the same subject-matter, and secondly that the accusations in the DRC's Application are directed at Rwanda, Uganda and Burundi indiscriminately.

19. One of my colleagues in these proceedings will dispose of this argument. In actual fact, to quote an African proverb, he who cries "Stop thief!" is not always the victim, but often the perpetrator! If there is in fact an abuse of process in this case, it is rather attributable to Rwanda than to the Democratic Republic of the Congo, according to a strict interpretation of the theory and concept of "abuse of process", concerning which Jean-Marc Sorel and Florence Poirat of the Rennes legal faculty in France posed the following question as the title of a work: *Les procédures incidentes devant la Cour internationale de Justice: exercice ou abus de droit ? [Incidental Proceedings before the International Court of Justice: Exercise of Rights or Abuse?]*[3].

20. Indeed, objections to jurisdiction and reservations to certain clauses of international treaties frequently smack of the abuse of incidental proceedings. This is the enterprise on which
15 Rwanda has embarked in this case, thus playing cat and mouse with the Court, to quote the expression used by its counsel, Professor Greenwood. Although one could ask the author of that expression who, in this case, is the cat, and who the mouse.

21. Rwanda's attitude is truly symptomatic of such abuses of process, which in the long term will backfire against their authors.

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[3]This work is the outcome of workshops organized, under the direction of J. M Sorel and F. Poirat, by the Faculty of Law and Political Sciences of the University of Rennes, 18 May 2000.

22. Mr. President, honourable Members of the Court, what is the point of a rule that lacks a sanction, particularly if it lacks the most important of all sanctions, that of being required to submit to the decision of an independent and impartial court when the rule is broken?

23. It is in this connection that the Democratic Republic of the Congo continues to believe that, if 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 of that State with international law, this fundamental distinction does not rule out the necessity, in certain situations and under certain circumstances, of constructing an appropriate linkage between the issues of the Court's jurisdiction and that of the compatibility of States' acts with international law.

24. The present proceedings bring the Court face to face with the ongoing process of elaboration or adjustment of the basic rules of international law. Indeed, this case offers it the needed opportunity to find a solution to this question. The Court has no lack of resources at its disposal in this field. It is certainly not, as Rwanda would have us believe — in the words of the Japanese writer, Yashio Otani — "an emperor with no clothes"[4].

A. The principle of the Court's optional jurisdiction

25. Mr. President, Members of the Court, it is a principle of international law that no State may bring another before an international court without its consent[5]. This principle has been
16 constantly upheld by your Court in numerous decisions, as well as by your predecessor, the Permanent Court of International Justice[6].

26. However, if the determination of such consent poses no difficulty where it is expressed clearly, the Court is duty bound to undertake a more careful examination of the question where the

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[4]See Yashio Otani *"Quelques réflexions sur la jurisdiction et la recevabilité vis-à-vis de l'affaire du* Thon à nageoire bleue", *Liber Amicorum*, Judge Shigeru Oda, Vol. I, K. LI., 2002, p. 191.

[5]Michel Dubuisson, *La Cour internationale de Justice*, Paris, *LGDJ*, 1964, p. 152; Patrick Daillier and Alain Pellet, *Droit international public*, 7th Ed., *LGDJ*, Paris, 2002, No. 542, 543, p. 894 *et seq.;* Shabtai Rosenne, *The Law and Practice of International Courts*, Vol. 1, Leiden, Sijthoff, 1965, p. 313, quoted by Judge *ad hoc* Mavungu, separate opinion, in the case concerning *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*.

[6]"The Court's jurisdiction depends on the will of the Parties" (case concerning *Rights of Minorities in Upper Silesia, P.C.I.J., Series A, No. 15*, p. 22; *Factory at Chorzów, Merits, Judgment No. 13, P.C.I.J., Series A, No. 17*, pp. 37-38); "the Court can only exercise jurisdiction over a State with its consent" (case concerning *Monetary Gold Removed from Rome in 1943, I.C.J. Reports 1954*, p. 32.); an ex officio examination of such consent is all the more essential where one of the parties fails to appear before the Court or to defend its case (*Aegean Sea Continental Shelf, Jurisdiction, I.C.J. Reports 1978*, p. 9; *East Timor (Portugal* v. *Australia), Judgment* of 30 June 1995, para. 26).

basis of the seisin consists of a series of actions and patterns of behaviour[7] serving to attest to the consent of a State — albeit timid and tacit — to the Court's jurisdiction.

27. According to established jurisprudence, the consent of a State to the submission of a dispute to the Court may not only result from an express declaration contained in a prior formal agreement, but may also be inferred from "acts conclusively establishing it", in particular from the behaviour of the respondent State subsequent to the seisin of the Court (case concerning *Rights of Minorities* between Germany and Poland, 26 April 1928, *P.C.I.J. Series A, No. 15*, p. 24; *Corfu Channel*, 25 March 1948, *I.C.J. Reports 1947-48*, p. 28; *Anglo-Iranian Oil Co.*, 22 July 1952, *I.C.J. Reports 1952*, p. 114). An extension of the Court's jurisdiction may thus legitimately be envisaged. Notwithstanding the absence of a special agreement, such jurisdiction would no longer be open to objection in the light of events subsequent to the opening of the proceedings *(forum prorogatum)*. Thus, where a State brings a case directly before the Court, the latter would consider that it had been legitimately seised if the other State agreed to appear in the proceedings (*Corfu Channel*, cited above), or if it effectively participated in the deliberations by filing its own submissions or expressing no objection to a future decision on the merits (*Mavrommatis Jerusalem Concessions, 1925, P.C.I.J. Series A, No. 5*, pp. 27-28; *Haya de la Torre, I.C.J. Reports 1951*, p. 78). Such conduct is considered by the Court to manifest a tacit acceptance of its jurisdiction which, on the principle of good faith, the Respondent is no longer entitled to withdraw or reconsider[8].

17 28. This is true, in the present case, of the implementation of procedural steps before this Court by the Democratic Republic of the Congo and Rwanda. *Thus, the fact of agreeing to argue its case amounts to the acceptance by the Respondent of the Court's jurisdiction* (*Corfu Channel, Judgment* of 25 March 1948).

29. It may be noted that, in the present case, Rwanda has complied with all the procedural steps prescribed or demanded by the Court. While it is true that Rwanda disputes the Court's jurisdiction, inasmuch as it has not formally recognized that jurisdiction, in reality, as is observed by Professor Louis Favoreu, it does not challenge the Court's authority to determine the question of

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[7]Patrick Dailler and Alain Pellet, *op. cit.*, No. 543, p. 895.

[8]Patrick Daillier and Alain Pellet, *op. cit.*, No. 543-3, p. 896.

jurisdiction. In other words, it nonetheless accepts the Court's jurisdiction to form a judgment as to its own jurisdiction. Professor Louis Favoreu notes that the party contesting the Court's jurisdiction "accepts that jurisdiction inasmuch as it submits to the unfettered judgment of the Court those arguments which, in its view, should lead the Court to refuse to entertain the dispute". The author refers, for example, to the *South-West Africa* case[9] where South Africa considered the compromissory clause relied upon to be null and void, but nevertheless appeared before the Court in order to raise preliminary objections. It submitted a Counter-Memorial in which it developed its objections to the Court's jurisdiction, and then had itself represented at the proceedings[10].

30. It is true that Rwanda has shown no discourtesy to the Court; it has fully and properly participated in the different procedures in this case, without having someone else stand in for it or failing to appear, unlike the parties in certain cases which strongly disputed the Court's jurisdiction. It has not refused to appear before the Court or to make submissions[11].

18 31. The fact nevertheless remains that its attitude partakes of an *abuse of process*, which consists in using objections as a delaying tactic, when "certain of losing on the merits, [one is] on the contrary convinced of the ability to win on the question of jurisdiction"[12].

32. By acting in this manner, however, Rwanda has implicitly — or indeed, manifestly — recognized the Court's authority to determine the question of jurisdiction.

B. The Court's lack of jurisdiction is not manifest

33. Mr. President, Members of the Court, your distinguished Court has thus properly held that it does not manifestly lack jurisdiction in this case. That there is no manifest lack of jurisdiction is clear *inter alia* from an analysis of Rwanda's attitude regarding, for example, the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, which the DRC relies on as one of the grounds of your jurisdiction in this case.

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[9]Louis Favoreu, "Les arrêts du 2 février 1973", *AFDI*, XX, 1974, cited by Philippe Sabourin, *La contestation de la compétence de la Cour internationale de Justice dans les affaires contentieuses récentes*, paper presented, under the direction of Professor Bretton, with a view to the award of the advanced diploma in general public law, Orléans Faculty of Law and Economics, 1984-1985, p. 4.

[10]Philippe Sabourin, *op. cit.*, p. 5.

[11]*Ibid.*, p. 6, footnote 1.

[12]*Ibid.*, footnote 5; *Le Monde* of 20-21 January 1985.

34. This is doubtless neither the right place nor the right moment to review the DRC's complaints against Rwanda concerning a variety of proven acts of genocide, involving in particular numerous, systematic and serious violations of the physical or mental integrity of specific ethnic or national groups; the deliberate subjection of those groups to living conditions that could only lead to their total or partial destruction; deportations of members of such groups; the systematic and widespread use of rape and other serious sexual abuses against women; the spread of the AIDS virus through rape used as a means of warfare, etc. The three instances of armed clashes in Kisangani, given the scale of the human casualties and the readiness of the Ugandan and Rwandan troops to use heavy weapons in the middle of a city of 1 million inhabitants, were rightly characterized as genocide by the MONUC Commander. Similar criminal actions were perpetrated by Rwanda in the same city of Kisangani, on 14 May 2002, leaving more than 200 dead. International governmental and non-governmental organizations today estimate that several million people were massacred in the territories occupied by the Rwandan and Ugandan armed forces, not
19 to mention the millions of local people displaced, deported and replaced by persons brought in directly from Rwanda.

35. We shall return to these atrocities in due course, with supporting arguments and evidence.

36. What should be emphasized for the moment is that the Democratic Republic of the Congo, which, like Rwanda, is a party to the Convention on the Prevention and Punishment of the Crime of Genocide, relies on Article IX of that instrument to found the jurisdiction of the Court.

37. It is true that Rwanda has formulated reservations to the Court's jurisdiction and does not consider itself bound by Article IX. That reservation cannot, however, be taken into account, for the reasons we have developed in our Counter-Memorial.

38. We continue to believe that Rwanda's reservation is incompatible with the object and purpose of the Convention. It has the effect of excluding Rwanda from any process of control and prosecution for acts of genocide, whereas the object and purpose of the Convention consists precisely in eliminating impunity for this grave violation of international law.

39. However, as was emphasized by the Commission responsible for establishing the International Criminal Tribunal for Rwanda,

> "even if Rwanda had not ratified the Genocide Convention on 16 April 1975, it would be bound by the prohibition of genocide which has, since 1948, developed into a norm of customary international law, since it is universally recognized by the international community that the prohibition of genocide has attained the status of *jus cogens*"[13].

40. While it is true that this statement does not imply recognition of the Court's jurisdiction, it nevertheless places Rwanda in difficulty as a country which, having itself been the victim of genocide in 1994, has practically come to symbolize the need not to leave unpunished the authors of such acts, whoever they may be.

41. Mr. President, it is curious that the question of the admissibility of reservations should be raised before an international court in connection with a convention whose effectiveness might at the time have appeared doubtful at best, a convention the text of which was long considered

20 "purely ornamental"[14], "comparable to the preambles of African constitutions, i.e., no more than a litany of pious intentions", "a set of promises"[15] never fulfilled. It should, however, be mentioned that, even at that time, the International Court of Justice had taken the opportunity, in its 1951 Advisory Opinion, to emphasize that the principles underlying the Convention are recognized by civilized nations as binding on States, even without any conventional obligation. Similarly, it pointed out that the Convention was one of deliberately universal scope, adopted for a purely humanitarian and civilizing purpose; the Contracting States do not have individual advantages or disadvantages, or any interests of their own; they merely have a common interest[16].

42. Fortunately, these principles have gradually prevailed, to the point of underpinning the international community's willingness to ensure the effectiveness of the 1948 Convention. Moreover, whilst the events which took place in the former Yugoslavia had a positive influence on this development, its consecration was attained as a result of the terrible acts committed in Rwanda in 1994. Thus, the Commission of Experts established by the United Nations Secretary-General in order to find the best response to the 1994 atrocities, after noting that Rwanda acceded to the Genocide Convention on 16 April 1975 and that it entered its well-known reservation, found that:

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[13]Frédéric Mégret, *op. cit.*, p. 35, footnote 58.

[14]Joe Verhoeven, "Le crime de génocide. Originalité et ambiguïté", in *Revue belge de droit international*, ed. Bruylant, Brussels, 1991/1, p. 5.

[15]*Ibid.*

[16]United Nations, *Summaries of Judgments, Advisory Opinions and Orders of the International Court of Justice, 1948-1991*, doc. ST/LEG/SER.F/1, p. 23.

"[e]ven if Rwanda had not ratified the . . . Convention, it would be bound by the prohibition of [that crime]"[17].

43. That interpretation is in line with the position of doctrine and the recent jurisprudence of the ICJ. Moncef Kdhir, for example, notes that whilst the Vienna Convention of 1969 does not exhaustively enumerate instances of *jus cogens*, the International Law Commission cites a number of them, *inter alia* the perpetration of acts such as the slave trade, piracy or genocide, against which all States are under an obligation to co-operate[18]. The author describes this as a peremptory norm of international law, that is to say a norm accepted and recognized by the international community

21 of States as a whole and a norm from which there can be no derogation. He concludes that, in consequence, the obligations which arise in particular from the Genocide Convention are obligations *erga omnes*, as described by the ICJ in its Judgment of 5 February 1970 (*Barcelona Traction, I.C.J. Reports 1970*, p. 32). Georges Perrin[19] adds, for his part, that such obligations and norms cannot be subject to any reservation. This is moreover consistent with the Judgment of the ICJ in the *North Sea Continental Shelf* cases. The Court states therein as follows:

> "It is a characteristic of purely conventional rules and obligations that . . . some faculty of making unilateral reservations may, within certain limits, be admitted; — whereas this cannot be so in the case of general or customary rules and obligations which, by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour."[20]

44. Perrin distinguishes between fundamental customary rules and non-fundamental customary rules. He states that there is nothing to prevent States from entering reservations to treaty provisions which reflect non-fundamental customary rules. By contrast, fundamental rules are accepted by all States and none of them would consider entering a reservation to exclude or modify a treaty provision which precisely reflects such a fundamental rule[21].

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[17]Letter dated 1 October 1994 from the Secretary-General to the President of the Security Council, S/1994/1125 of 4 October 1994, p. 27, para. 119.

[18]Moncef Kdhir, *Dictionnaire juridique de la Cour internationale de justice*, Bruylant, Bruxelles, 2000, p. 221.

[19]Georges J. Perrin, *Droit international public. Sources, sujets, caractéristiques*, Schulthess Polygraphischer Verlag, p. 172.

[20]*I.C.J. Reports 1969*, pp. 38-39, para. 63.

[21]Georges J. Perrin, *op. cit.*, pp. 172-173.

45. There is no doubt, to paraphrase President Bedjaoui, "that most principles and rules of humanitarian law [such as those prescribed by the Genocide Convention] . . . form part of the *jus cogens*"[22]. The Genocide Convention belongs to that category and reflects fundamental customary norms. Accordingly, Rwanda cannot exclude itself from that Convention, neither as a victim nor, still less, as a perpetrator.

46. In the present case, Rwanda is particularly not entitled to reject the jurisdiction of the International Court of Justice in view of the fact that it requested [S/1994/1115][23] and obtained the
22 institution by the international community of an *ad hoc* international criminal tribunal for the prosecution of perpetrators of the Rwandan genocide of l994. To believe otherwise would be to exclude from the judicial terrain the serious charges of genocide laid against Rwanda and perpetrated to the detriment of the Congolese people and of the international community, and would allow Rwanda to enjoy total immunity from prosecution and jurisdiction in respect of acts of genocide with absolute impunity — doubtless in consideration of the atrocities suffered by that country in 1994, which will be on the conscience of mankind for ever.

47. Thus, the specific nature of the 1948 Convention implies that the Parties thereto should be willing, each and every one of them, to collaborate in particular in any international judicial activity; that accordingly, this renders moot a reservation of the kind formulated by Rwanda. Moreover, in the name of the fight against genocide that the Rwandan Government has undertaken since 1994, that country should be the first to renounce such a reservation. The Democratic Republic of the Congo certainly has no intention of encouraging the misconceived notion that one massacre or genocide precludes the prosecution of another. For such a position would be liable to lead to new massacres or genocides and to perpetuate the impunity and paradoxical silence surrounding the practice of the 1948 Convention. Let there be no mistake: whether it is genocide by retaliation or counter-genocide, it remains genocide!

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[22] *Ibid.*, p. 222; *I.C.J. Reports 1986*, p. 273.

[23] Security Council resolution deciding to establish an international tribunal to try individuals presumed responsible for acts of genocide or other serious violations of international humanitarian law committed in Rwanda or on the territory of neighboring States, S/RES/955, 8 November 1994; see also Frédéric Mégret, *Le tribunal pénal international pour le Rwanda*, A. Pedone, Cedin, pp. 40 *et seq.*

48. The Court will thus rightly dismiss Rwanda's reservation and uphold the Congo's objection to that reservation, concluding that it does have jurisdiction in the case before it, on the basis of Rwanda's violation of the 1948 Convention on the Prevention and Repression of Genocide.

49. The Court will reach this conclusion with all the more serenity and security in view of the most recent Rwandan doctrine in the same vein. In their work entitled *Introduction au droit rwandais [Introduction to Rwandan Law]*, Martin Imbleau and William A. Schabas[24] write the following:

> "Reservations are in principle accepted by the international community, but they must not be contrary to the object and purpose of the treaty. Any reservations entered which do not fulfil that condition are subject to the objections of other States and may be disputed before international organs charged with the application of the treaty. At the time of ratification in 1975, Rwanda entered a reservation to Article IX of the Convention for the Prevention and Repression of the Crime of Genocide, whereby the International Court of Justice is granted compulsory jurisdiction in respect of conflicts falling within the scope of the Convention. Rwanda however
> 23 undertook to remove all such reservations in matters of human rights (Art. 15, Arusha VII) and enacted a law to that effect in 1996 (Decree-Law 014/01 of 15 February 1995)." *[Translation by the Registry.]*

It should be added that Rwanda is probably among the few countries in Africa, or even in the world, to have such an exemplary range of legislative, criminal and judicial provisions for the prevention and repression of genocide. In this respect, it is sufficient to cite the Rwandan Organic Law of 30 August 1996 on Genocide.

50. It is thus noteworthy that there has clearly been a radical change in Rwanda's general attitude towards the mechanisms of repression against certain serious violations of international law, in this case the crime of genocide, and by extension towards the jurisdiction of the International Court of Justice in such matters.

C. The Court is judge of its jurisdiction

51. Mr. President, the Court is without doubt entitled to rule on any dispute relating to the existence or scope of its powers. "The rule, as confirmed in Article 36, paragraph 6, of the Court's Statute, is not in dispute; it is moreover applicable to any judicial organ, within the limit of what

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[24] *Éditions Yvon Blais inc*., Quebec, Canada, 1999, p. 231.

the States concerned have agreed to submit to it."[25] The Court has the power to determine its own jurisdiction; it is judge of its jurisdiction [International Court of Justice, *Nottebohm* case, Judgment of 18 November 1953]. In this sense, the *compétence de la compétence* "has from experience shown itself to be particularly useful when the Court has been seised by unilateral application"[26].

52. This has the following consequences:

— First, that "[for the Court], the establishment or otherwise of jurisdiction is not a matter for the parties but for the Court itself". Although a party seeking to assert a fact must bear the burden of proving it (see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984,* p. 437, para. 101), this has no relevance for the establishment of the Court's jurisdiction, which is a "question of law to be resolved in the light of the relevant facts" (*Border and Transborder*

24 *Armed Actions (Nicaragua* v. *Honduras*), *Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988,* p. 76, para. 16). (Case concerning *Fisheries Jurisdiction (Spain* v. *Canada), Judgment, I.C.J. Reports 1998*, p. 450, para. 37).

— Secondly, that the Court has the power, in a case such as the present one — and a case that is evidently underpinned by the humanitarian concerns which prevail in our societies at the dawn of this new millennium — to give new dimensions to the principles governing its jurisdiction *ratione personae, ratione materiae, ratione temporis.*

53. This also seems to have been the case at the start of the second half of the twentieth century. The Democratic Republic of the Congo shares in the belief of the Australian Attorney-General, the Honourable Lionel Murphy, expressed before this very Court in May 1973 (case concerning *Nuclear Tests (Australia* v. *France); (New Zealand* v. *France), Order of 22 June 1973*). This belief, to paraphrase it, is that "if this Court, the highest court ever created by mankind, does not put a halt to" the massacres by Rwanda, "it will come as no surprise if others end up assuming that they may do they same" as Rwanda "with all impunity".

54. Finally, the extensive nature — or rather tendency towards extension — of the Court's jurisdiction is also apparent from the Judgments of 2 February 1973 and from the two Judgments of

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[25] Joe Verhoeven, *Droit international public*, Larcier, Bruxelles, 2000, p. 766. *[Translation by the Registry.]*

[26] *Idem.*

25 July 1974 (case concerning *Fisheries Jurisdiction (United Kingdom* v. *Iceland); (Federal Republic of Germany* v. *Iceland)*).

D. The Court has other relevant bases of jurisdiction

55. The Democratic Republic of the Congo would, moreover, recall that, in view of developments both in the complexity of relations between States and, hence, of the law underlying those relations, the jurisdiction of the Court, as confirmed by its jurisprudence, has bases other than those which will be cited throughout these oral proceedings.

Mr. President, Members of the Court, I wish to stop at this point and kindly request that you give the floor to His Excellency the Minister of Justice of the DRC. Thank you.

Le PRESIDENT : Je vous remercie, M. Akele.

25 Mr. AKELE: Excuse me, it is actually Professor Katansi. Thank you.

Le PRESIDENT : Je vous remercie. Je donne maintenant la parole à M. Katansi.

Mr. KATANSI: Mr. President, Members of the Court,

SUBMISSIONS AND OBSERVATIONS

1. It is once again an honour for me to appear before the Court. This honour is mine thanks to the decision set out in your Order of 10 July 2002, rejecting Rwanda's request that this case be removed from the List.

2. By way of introduction to my statement, I would like, Mr. President, with your leave, to raise very briefly several general considerations, just as the two Parties, Rwanda and the Congo, were brief in the written phase, that is to say in the Memorial and Counter-Memorial.

I. Various general considerations

3. The general considerations consist of a paradox and two observations.

***(a)* Paradox in the Respondent's conduct**

4. The first fact, Mr. President, is the trip to Kinshasa, capital of the Democratic Republic of the Congo, made last week by the Minister for Foreign Affairs of Rwanda, who met with the

Congolese authorities. According to the local press, the object of this visit was to seek support from the Congolese authorities for Rwanda's candidacy for the presidency of the African Development Bank.

5. At first sight, this visit would suggest that relations between Rwanda and the Democratic Republic of the Congo have appreciably improved.

6. Mr. President, it is not so.

7. Because, as the international media report over and over again, the war continues, albeit in more subtle form, in the eastern part of the DRC and because the Government of Rwanda persists in refusing to negotiate with the "Interahamwe", who furnished and continue to furnish the pretext

26 under which the Rwandan authorities make incursions into Congolese territory, causing human rights violations to be committed there.

8. By doing both one thing and its opposite and by claiming that the Court is without jurisdiction and that this case is inadmissible, Rwanda could surely only find encouragement for its policy of violating human rights in Congolese territory if the Court were to uphold its preliminary objections, submitted with the obvious aim of preventing an examination of the case on the merits.

***(b)* Ever stricter human rights law**

9. The second fact, Mr. President, is more in the nature of an observation. The observation that, by inaugurating a new era to succeed those of disputes over the continental shelf and nuclear tests, your decision of 10 July 2002 in the present case concerning *Armed Activities on the Territory of the Congo* highlighted the sanctity of human rights at the dawn of the third millennium: "Whereas the Court is deeply concerned by the deplorable human tragedy, loss of life, and enormous suffering in the east of the Democratic Republic of the Congo resulting from the continued fighting there."

10. Having proclaimed the sanctity of human rights on the frontispiece, as it were, of its decision of 10 July 2002, the Court immediately stressed, in the fourth paragraph of the reasoning in its Order, the principle of consent by States to its jurisdiction, the pre-eminent principle in respect of its jurisdiction. Specifically, "the Court therefore has jurisdiction only between States

parties to a dispute who not only have access to the Court but also have accepted the jurisdiction of the Court, either in general form or for the individual dispute concerned" (para. 57).

11. Mr. President, Members of the Court, this declaration has led the Government of the Congo to raise a nagging question which, in both its formulation and its response, characterizes not only the debate in the present case but also, and particularly, the attitude of the Respondent, Rwanda. The question: what happens to conventions to which a State has freely subscribed but in respect of which the State has entered reservations to the provisions for the enforcement of
27 obligations or commitments undertaken? Because, in reality, as we all know, it is the Court which is the arbiter of relations between States.

12. Mr. President, the response to this question will assuredly be found in the philosophy and structure of the legal argument which I shall attempt to elaborate in attacking the preliminary objections to jurisdiction raised by the Respondent in the main action and the moving Party on the objections.

13. The second observation, Mr. President, is that Rwanda did not put forward any new arguments in its presentation yesterday. Thus, as of yesterday at 1 p.m., the two Parties, Applicant and Respondent, were, if I dare say so, on equal terms.

14. To bring this, as it were, introduction to a close, I would like, Mr. President, to state that it is not out of respect for the biblical adage "what is written is written" that I shall refrain from repeating the entire line of argument set out in the Counter-Memorial, but rather in compliance with the limit on the speaking time which you have been kind enough to accord to us.

II. Rwanda's objections to the Court's jurisdiction and the admissibility of the Application are unfounded

A. The lack of foundation of the objections to the Court's jurisdiction

15. Mr. President, Members of the Court, Rwanda has raised several preliminary objections denying the Court's jurisdiction to entertain the present case.

16. It is therefore necessary first to set out those objections before subjecting them to critical review.

***(a)* List of preliminary objections raised by Rwanda**

17. Rwanda's Memorial of January 2003 is made up of various parts. The third part is entitled "The Court lacks jurisdiction to entertain the Application" and goes on to reel off allegations which can be grouped into four categories:

1. the lack of consent by Rwanda to the Court's compulsory jurisdiction, based on the lack of any declaration, either general or specific, accepting such jurisdiction;

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2. Rwanda's reservation to the jurisdiction of the Court under the Convention on the Prevention and Punishment of the Crime of Genocide;
3. the alleged inappropriateness of the Democratic Republic of the Congo's reliance on the Vienna Convention on the Law of Treaties;
4. the alleged failure by the Democratic Republic of the Congo to satisfy "essential conditions" laid down in the following Conventions: the Convention on the Elimination of Discrimination Against Women; the Montreal Convention; the WHO Constitution and, finally, the Unesco Constitution.

18. As presented, some of Rwanda's preliminary objections are invalid in law, Mr. President, while the others are inoperative, that is to say inadmissible.

***(b)* Lack of foundation of the objections to the Court's jurisdiction**

19. I would like, Mr. President, to say at the outset that, of the four objections raised by Rwanda, two have fallen away on their own. Those are the objections concerning the Respondent's lack of recognition of compulsory jurisdiction and the objection based on the reservation to the 1948 Genocide Convention.

1. The objection based on the lack of recognition by Rwanda of the Court's compulsory jurisdiction

20. First, the Government of the DRC seised the Court by means of its Application of 28 May 2002 knowing that Rwanda, which is nevertheless a party to the Court's Statute, has not recognized the Court's jurisdiction.

21. Further, Rwanda refused to enter into a special agreement which would have made it possible to seise the Court by joint agreement, that is, with the consent of the litigating Parties.

22. Accordingly, it is pointless to debate a preliminary objection which is not one inasmuch as the Applicant, namely, the DRC, knew that it was inevitable before submitting the Application to the Court.

29 **2. The objection based on the reservation to Article IX of the 1948 Convention on the Prevention and Punishment of Genocide**

23. Mr. President, Members of the Court, my colleague Akele discussed this objection a short while ago, but I wish to point out that the Government of the DRC would have refrained from returning time and again to the suspicion with which Rwanda constantly regards the Congolese people.

24. Thus Rwanda has insisted that the Court lacks jurisdiction, basing that argument on its reservation to Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, which article confers jurisdiction on the Court, even though Rwanda knows that this reservation has been withdrawn.

25. The Congo has now become aware of Decree Law 014/01 of 15 February 1995, whereby the Government of Rwanda withdrew the reservation. Incidentally, the existence of that legislative decree is noted in, *inter alia*, the Canadian work — which has already been cited — by Messrs. Martin Imbleau and William A. Schabas entitled *"Introduction au droit rwandais"*, published by Yvon Blais Inc., Quebec, Canada, 1999, page 231.

26. Mr. President, since the disputed reservation no longer exists, the Court can, I submit, dismiss the preliminary objection based upon it.

27. Mr. President, Members of the Court, two of the Respondent's objections having "gone with the wind", it remains to be shown that Rwanda's last two objections, if they can be maintained, are nevertheless inoperative, in other words inadmissible. I shall now attempt to show that.

28. But it is at this juncture, Mr. President, that it must be understood that the jurisprudential and doctrinal arguments set out in the Counter-Memorial fall to be reviewed.

3. The alleged failure by the Democratic Republic of the Congo to satisfy the compromissory clauses contained in the conventions relied upon

29. Mr. President, Members of the Court, the last preliminary objection raised by Rwanda is one that can be, or is, called a political objection, the aim of which is, if not to obstruct the proceedings, at least to delay examination of the case on the merits. Let me explain.

30 30. First, the clauses invoked by the DRC fall into the first of the categories of compromissory clauses, which in a sense preclude any challenge to the jurisdiction of the Court. I refer to the separate opinion of Judge *ad hoc* Mavungu appended to the Order of 10 July 2002, on which there is no need for me to elaborate. It is necessary only to observe that this objection cannot be supported by any text.

31. Secondly, Mr. President, three of the Conventions invoked by the DRC to support the jurisdiction of the Court fall into the category of compromissory clauses precluding from the outset any challenge to the jurisdiction of the Court: these are the Montreal Convention for the Suppression of Unlawful Acts against Civil Aviation of 23 September 1971; the Convention on the Elimination of all Forms of Discrimination against Women of 18 December 1974 and the Constitution of the World Health Organization (WHO) of 22 July 1946.

32. The Government of Rwanda has not entered any reservations to the compromissory clauses in these Conventions, which provide for the jurisdiction of the Court. Its challenge is based instead on the assertion that the DRC has not satisfied the preconditions in these clauses for seisin of the Court. In other words, Rwanda's challenge is based on the contention that the Democratic Republic of the Congo has failed to specify which provisions of the WHO Constitution are in issue and to satisfy the conditions requiring preliminary attempts at settlement stipulated in the Montreal Convention and the Unesco Constitution.

33. The Court will note that, as thus understood, Rwanda's last objection is at the very least misconceived.

34. Thus, as regards the compromissory clause in the WHO Constitution, the Democratic Republic of the Congo has amply shown that competent public and intergovernmental organizations, such as the United Nations Secretariat and the European Parliament, and trustworthy non-government international organizations, such as OXFAM, the International Rescue

Committee, Human Rights Watch, etc., have published detailed reports on the serious deterioration of the health situation in the DRC as a consequence of the war of aggression.

31 35. Rwanda cannot claim ignorance of either these organizations or their reports.

36. Finally, Mr. President, Members of the Court, it would appear that as a result of the most recent amendment of the Court's Rules, litigants will no longer be allowed to seek, in a case like the present one, joinder of objections to the merits. However, the Rules of Court as amended give the Court broad discretion, which, in the final analysis, will be the basis for its decision to reject Rwanda's objections.

B. Jurisdiction of the Court deriving from the fact that its jurisdiction is not manifestly absent

37. In other circumstances, I would say that it is here that battle was really joined. Mr. President, Members of the Court, in the cool morning hours yesterday Rwanda, through its counsel and advocates, engaged in a session of "mental aerobatics" in an attempt to destroy the basis of the Democratic Republic of the Congo's legal argument concerning your jurisdiction.

38. Not, or no longer, accustomed to hazardous exercises of this kind, because we cannot help but advance in years and in good sense, I prefer to keep my two feet on the ground and, therefore, to be brief here, as in the Counter-Memorial.

39. All the briefer because I am not entitled to exceed the speaking time allotted to me.

40. My statement will accordingly be confined to a single key argument, that of "jurisdiction which is not manifestly absent", an argument evoked by the Court in its Order of 10 July 2002 and which — to the satisfaction of the Congolese people — enabled these proceedings, this quest for justice, to proceed.

41. And if, notwithstanding the limits I have just set on it, my statement can contribute to the emergence of a "theory" of "non-manifest absence of jurisdiction", to which counsel for Rwanda referred in ironic terms, the people of the Congo and of Africa cannot but rejoice.

42. Mr. President, Members of the Court, the notion of "non-manifest absence of jurisdiction" is found, if we prefer not to go far back into the past, in the decision handed down in the *Fisheries* case between, on the one hand, the United Kingdom of Great Britain and Northern Ireland and the Federal Republic of Germany and, on the other, Iceland.

32 43. Not content to give notice of its refusal to appear by letter and telegram to the Court, Iceland maintained that the Court lacked jurisdiction on the primary ground that "the vital interests of the people of Iceland" were involved.

44. The Court nevertheless decided that there was no manifest absence of jurisdiction.

45. Some years later, Mr. President, the case concerning *Nuclear Tests* between Australia and France arose. It is here, Mr. President, that I would like to make one or two preliminary comments.

46. The first comment concerns the fact that these two cases, *Fisheries* and *Nuclear Tests*, arose at different times and each appeared to constitute a turning point in the Court's jurisprudence in respect of its jurisdiction.

47. The second comment is that some authors, like Philippe Sabourin working under the direction of Professor Bretton, have maintained that the Court did not, in its decision in the second case, need to have recourse to the notion of "non-manifest absence of jurisdiction", while others assert that the Court did again employ the notion of "non-manifest absence of jurisdiction" in the *Nuclear Tests* case.

48. Whatever might be the case in respect of this disagreement amongst commentators, the Democratic Republic of the Congo notes with satisfaction that the notion of "non-manifest absence of jurisdiction", while it might still appear uncertain, reappeared in the decision of 10 July 2002 in the present proceedings.

49. The DRC considers that, if the Court, made up of wise judges representing, or representative of, the various legal systems in the world, has returned to this notion, it is because it is conducive to the pacific settlement of disputes.

50. Admittedly, authoritative voices have denounced this concept as prejudging jurisdiction over the merits in those cases in which it is invoked.

51. It is nevertheless true, Mr. President, Members of the Court, that, in our humble opinion, this notion of "non-manifest absence of jurisdiction" is like a "toothing stone", that is to say, brimming with promise.

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C. The objection that the DRC has not satisfied the conditions set out in the compromissory clauses of the conventions is misconceived

52. I wish to point out that the Democratic Republic of the Congo has called upon a large number of counsel and advocates. I also observe that Rwanda has strengthened its team of legal representatives in this oral phase of the written proceedings.

53. On this specific point, I am in agreement, not with Rwanda, but with Ricardo, an economist by profession, who said that it was not by increasing the number of cooking utensils that you succeed in making a good meal.

54. It is true, Mr. President, that Rwanda, having attempted to refute the DRC's arguments concerning the jurisdiction of the Court, has now resorted to that tactic, alleging this time that the DRC has not fulfilled the conditions laid down in the compromissory clauses on which it relies, employing more rhetoric than the DRC in repeating its earlier arguments.

55. I would like, Mr. President, once again to go straight to the point so as to comply with the recommendation that the time-limit be respected.

56. In respect of fulfilment by the DRC of the conditions contained in the compromissory clauses of the eight conventions which it has invoked, Rwanda began by stating: the "only serious issues . . . concern . . . disputes clauses".

57. From that premise, Rwanda then attempted to refute the DRC's argument on the Court's jurisdiction.

58. Mr. President, it is not out of either caution or blindness that I would like to accompany Rwanda in its argument for a while, but out of the need for clarity.

59. And this clarity, which is so indispensable, leads me to assert, in line with a number of authors, that there are three basic categories of preliminary objection: the first legal in nature, others political and, between those two, preliminary exceptions which are both legal and political in nature.

60. I contend, Mr. President, that Rwanda's argument on the issue of the compromissory clauses is more political than legal and is made with the barely concealed intention, as I have said, of avoiding the merits of the case.

61. First, Mr. President, Rwanda has put forward a twofold argument.

34 62. The first limb asserts that the Democratic Republic of the Congo failed to specify, in either 2002 or in its Counter-Memorial in 2003, which provisions of the compromissory clauses which it was invoking were involved.

63. This in reality is the problem of the object of the dispute.

64. The second limb asserts that the Democratic Republic of the Congo has failed to satisfy the conditions laid down in the compromissory clauses in the conventions relied on. That, Mr. President, is a question of arbitration proceedings.

65. First, object of the dispute and, second, an arbitration procedure with which the Democratic Republic of the Congo allegedly failed to comply. Those, Mr. President, are the two limbs of Rwanda's argument and they can be refuted by a single argument.

66. I maintain that Rwanda's objections, as they have just been explained, are political.

67. First, Rwanda asserted in respect of the WHO Constitution that the WHO was invited by the Court to state its views on the attitude of the Democratic Republic of the Congo vis-à-vis the Constitution.

68. Continuing in that vein, Rwanda asserted that, after examining the Application or on invitation of the Court, the WHO Executive Committee seised or should have seised the International Court of Justice.

69. Mr. President, the first two assertions or objections by Rwanda form a first contention by the Respondent; it calls for criticism and I am going to criticize it.

70. Rwanda then asserted, in respect of the Montreal Convention and the Unesco Constitution, that after a rather summary examination Unesco alone responded to the Court's invitation, while all the other organizations remained silent. And that, moreover, the response from Unesco was a letter in which that institution, charged with educational responsibilities, said — and I quote Rwanda — that "it concurred entirely with the view of the Court".

71. That, Mr. President, is Rwanda's second contention, which cannot escape scrutiny either.

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EXAMINATION OF RWANDA'S CONTENTIONS

72. Rwanda's first contention, that the Democratic Republic of the Congo has failed to specify the object of the dispute between the Parties, does not stand up.

73. Mr. President, in attempting to deny the Court's jurisdiction to entertain this case, Rwanda, I shall again note, made two arguments: first, the Democratic Republic of the Congo did not indicate which provisions of the WHO Constitution were in dispute; secondly, the WHO Executive Committee seised, allegedly seised or even should have seised — the mode and tense do not matter — the Court.

74. Mr. President, if it is true that the WHO Executive Committee seised or should have seised the Court, then the WHO Committee must have known the object of the dispute; otherwise, it is hard to see what the Executive Committee's submission to the Court could have concerned.

75. It follows that, contrary to what Rwanda claims, the Democratic Republic of the Congo did indeed specify the object of the dispute between it and Rwanda and that, accordingly, the Respondent's objection will be dismissed.

76. Rwanda's second contention, that Unesco concurred with the view of the Court, does not stand up either.

77. Rwanda's last preliminary objection is more political, in that it cites Unesco's opinion in respect of the Court's Order of 10 July 2002.

78. Rwanda asserted in its statement yesterday that, after declining the invitation to submit its observations on the reliance by the DRC on provisions in its Constitution, Unesco confined itself to concurring with the view of the Court.

79. If this allegation by Rwanda were true, it would call for two criticisms.

80. First, there is a contradiction between the act of declining an invitation from the Court and that of giving one's opinion, regardless of what it might be, because, logically, declining means not responding.

81. As we can see, the Party resorting to rhetoric is Rwanda.

82. Next, Mr. President, Rwanda's assertion that Unesco concurred with the opinion of the Court raises a problem.

36 83. Which opinion is meant? The Statute of the Court confers two types of jurisdiction on the Court: contentious and advisory.

84. Was the Court consulted by Unesco, so as to give rise to an advisory opinion, i.e., an "opinion"?

85. On the other hand, does it mean the decision of the Court that it did not, in this case, have prima facie jurisdiction or that the absence of its jurisdiction was not manifest?

86. Ultimately, if it is the decision that the Court's lack of jurisdiction was not manifest, then Rwanda is unfounded in maintaining that the compromissory clause in the Unesco Constitution cannot serve as a basis for the Court's jurisdiction.

87. May it please the Court:

— to declare that the objections to jurisdiction raised by Rwanda, the Respondent in the main action and the moving Party on the objections, are unfounded;

— to declare accordingly that the case shall continue on the merits.

Mr. President, thank you. Before leaving the rostrum, I would like to ask the Court to call upon my colleague Ntumba.

Le PRESIDENT : Je vous remercie, Monsieur Katansi.

L'audience est suspendue pour une durée de dix minutes. Je donnerai ensuite la parole à M. Ntumba.

L'audience est suspendue de 11 h 25 à 11 h 40

Le PRESIDENT : Veuillez vous asseoir. Je donne maintenant la parole à M. Ntumba.

Mr. NTUMBA LUABA LUMU: Mr. President, honourable Members of the Court.

1. It is always an honour for me to have the opportunity to address the highest international court on behalf of the Democratic Republic of the Congo.

2. Contrary to what Rwanda implied in its presentation yesterday, 4 July 2005, we have absolutely no intention of seeking to abuse the possibilities offered by this Court, which, as one of the principal organs of the United Nations, contributes to the maintenance of international peace and security, to the development of friendly relations among nations based on well-established

37 principles, to the strengthening of universal peace and to the encouragement of respect for human rights and fundamental freedoms (Article 1 of the San Francisco Charter of 26 June 1945).

3. If such had been the case, the Congolese delegation would not have come with the Minister of Justice, Keeper of the Seals, when you consider the responsibilities weighing upon him.

And I myself, having become Secretary-General to the Government and Honorary Minister for Human Rights, would not have temporarily abandoned my national duties with the Council of Ministers and the Presidency of the Republic in order to come to The Hague.

4. That is to tell you how highly the Democratic Republic of the Congo values the sound administration of international justice, of which you, Members of the Court, are the temple guardians. The Democratic Republic of the Congo recognizes the eminent and irreplaceable role played by the International Court of Justice. That is why it has returned, is returning and will return again and again to the Court in order to obtain justice. Unlike Rwanda, believer in "variable geometry" international justice, the Democratic Republic of the Congo has clearly recognized and accepted the Court's compulsory jurisdiction.

5. The Congolese people, with its more than 3 million dead, victims of a conflict provoked and conducted by certain of its neighbour States, has as much right to justice as the Rwandan people, victim of a genocide in 1994 which we all deplore.

6. For the Democratic Republic of the Congo, there can be no shadow of doubt — and the evidence is there — that Rwanda, directly and indirectly through its troops and agents, has committed serious massive violations of human rights on Congolese territory. This Court has thus rightly declared itself to be "deeply concerned by the deplorable human tragedy, loss of life, and enormous suffering in the east of the Democratic Republic of the Congo resulting from the continued fighting there" (*Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda)*, Order of 10 July 2002, para. 54).

7. However, for the moment what concerns us is rather to establish the bases for the Court's jurisdiction. Let us leave these tragic and deplorable facts to return to the principal issue of the present hearings.

38 8. Does the Court, or does it not, have jurisdiction to rule on the dispute between the Democratic Republic of the Congo and Rwanda?

To this question, the Democratic Republic of the Congo responds unhesitatingly, and with conviction, in the affirmative. My colleagues who have preceded me have presented you with numerous reasons and arguments. For my part, I shall address the issues concerning the reality of

negotiations, or the beginnings of negotiations, and our reliance on the Vienna Convention of 23 May 1969 on the Law of Treaties.

9. Mr. President, as Mohammed Bedjaoui, then President of the International Court of Justice, so aptly put it in his address of 13 October 1994 to the United Nations General Assembly:

> "I am profoundly convinced that it is only when members of the international community have rid themselves of ancient prejudices and are psychologically prepared to have recourse to the Court as naturally as to political organs, without regarding this as an act necessarily more serious, conflictual or hostile, that the Court will be in a position fully to accomplish its mission." (Mohammed Bedjaoui, *"La place de la CIJ dans le système général du maintien de la paix institué par la Charte des Nations Unies."* [The Place of the I.C.J. in the General System of Peacekeeping established by the United Nations Charter], in *RADIC*, Vol. 8, London, 1996, p. 544.)

And that is why the Democratic Republic of the Congo invites Rwanda, which will always remain its neighbour, to rejoin those members of the international community who believe in the need for international justice.

I. THE REALITY OF NEGOTIATIONS

10. In order to counter the Congo's reliance on Article 29 of the Convention on the Elimination of all Forms of Discrimination against Women, and on Article 14 of the Montreal Convention, so as to found the Court's jurisdiction, Rwanda argues *inter alia* that the precondition of negotiations has not been satisfied. Thus Rwanda states that "there has been no attempt whatever to settle that dispute by negotiation" (MR, para. 3.31), and that "Rwanda has at no time rejected negotiations" (*ibid.* para. 3.67 *in fine*). I trust that it will soon be able to tell us also: "Rwanda does not reject, has never rejected and will not reject, judicial settlement, and in particular settlement by the International Court of Justice."

39 Rwanda further states that, in fact, "[the Congo] has made no attempt to settle its alleged dispute by negotiation" (*ibid.*, para. 3.66). Is this blindness, or manifest bad faith? Rwanda alone knows. But the facts will demonstrate the contrary.

11. Mr. President, as this distinguished Court will surely in its wisdom recognize, Rwanda is simply conducting an exercise in self-contradiction in relation to the reality of the negotiations initiated by the Congo — and with the Congo.

12. On the one hand, it acknowledges that the Congo raised this matter with the ICAO, while on the other it contends that ICAO was not in this instance a forum for negotiations, which it claims should have been bilateral! Moreover, Rwanda does not deny that the Congo raised the matter of the conflict and went to the United Nations Security Council — it acknowledges this —, to the General Assembly and to the Human Rights Commission; in its Memorial Rwanda further acknowledges various bilateral contacts initiated by the Congo, as well as other contacts in multilateral fora (*ibid.*, para. 3.65).

13. For its part, Mr. President, the Congo has shown how impossible it was, because of Rwanda's attitude, to negotiate directly to achieve a settlement. Yet, according to the Manila Declaration on the Peaceful Settlement of International Disputes (A/RES/37/10 of 15 November 1982):

> "States should . . . bear in mind that direct negotiations are a flexible and effective means of peaceful settlement of their disputes. When they choose to resort to direct negotiations, States should negotiate meaningfully, in order to arrive at an early settlement acceptable to the parties."

14. However, Rwanda has constantly striven to render "fruitless" — to cite the language of the Court — all exchanges of view and negotiations which the Congo has sought to organize in order to resolve various substantive disputes, including the question of the application of the Montreal Convention with a view to settling the issue of the aircraft shot down by Rwandan armed forces in 1998, and the Court has already given rulings in similar cases: (*Right of Passage over Indian Territory*, Judgment of 28 April 1960; *South-West Africa*, Judgment of 21 December 1962). On several occasions, Rwanda even refused an offer to participate in negotiations, most shockingly so at the Blantyre Summit in Malawi, on 14 January 2002, where, in the words of the United Nations Secretary-General, "no issue of substance could be addressed" because of Rwanda's

40 failure to attend, although invited (see Tenth Report of the Secretary-General on MONUC, S/2002/169 of 15 February 2002, para. 7). Malawi is in Africa; it is in East Africa, not far from Rwanda. But if Rwanda can travel as far as The Hague, how is it that it could not manage to make it to Malawi? Except because of bad faith. Mr. President, would you mind if I have some water? For various reasons, in certain circumstances, I cannot do without water. Thank you, Mr. President, prevention is better than cure.

15. If Rwanda already takes such a contemptuous view of mediation by the international community, whether at world, regional or sub-regional level, how can it agree to deal directly on the issue with the Democratic Republic of the Congo? Mr. President, this has consistently been Rwanda's attitude.

16. The report of 25 January 2005 of the United Nations Security Council Group of Experts, presented by the Chairman of the Security Council Committee established pursuant to resolution 1533 (2004) concerning the Democratic Republic of the Congo has once again confirmed the consistent bad faith and hypocrisy displayed by Rwanda: "The Group continues to be gravely concerned about the lack of co-operation received from Rwanda on civil aviation matters." (Security Council, Report S/2005/30 of 25 January, para. 93.) This is just one example, but in reality it applies to all the other issues.

17. According to the Court, if in the past collective negotiations have become deadlocked and the Parties' written and oral pleadings have clearly confirmed that this remains the case, then there is no reason to hope that further negotiations might lead to a settlement (*South-West Africa* cases, *Preliminary Objections, I.C.J. Reports 1962*).

18. Mr. President, if Rwanda argues that there has not even been the beginnings of an attempt to negotiate, that is *because it wrongly believes, or would have us believe, that there exists just one solemn, established form of negotiation*, namely direct bilateral negotiation. That is not so.

19. There is no single, enshrined form of negotiation. In the *South-West Africa* cases, when South Africa argued that there had never been any direct negotiations between the Applicants and

41 itself, the Court stated that *what counted was not so much the form of the negotiations* as the attitude and views of the parties on the substantive issues of the question involved *(ibid.)*.

20. It may be said that negotiation between the parties has been initiated either once the dispute has been the subject of an exchange of views, or indeed where it has been raised in a specific forum to which both States are party (this was the case for the ICAO, the United Nations Security Council, and various multilateral or sub-regional conferences), where the Congo consistently evoked Rwanda's violations of certain international instruments.

21. Mr. President, Professor Augustin Macheret tells us that "the Court has moreover interpreted broadly the notion of diplomatic negotiations (*exchanges of views, diplomatic notes,*

protests, debate within an international organization, initial discussions, etc.,)" (Augustin Macheret, *Droit international public, Le règlement pacifique des différends internationaux*, Université de Fribourg, faculté de Droit, Fribourg 1991, pp. 18 and 24).

22. And, as Jean Salmon and others have stated:

> "International law imposes no precise form on negotiations, which may be written or oral or both at once. While in principle bilateral, negotiation may equally be conducted within the framework or under the auspices of an international organization; in that case it is sometimes called 'parliamentary diplomacy'." (Jean Salmon, ed. *Dictionnaire de droit international public*, Bruylant/AUF, Brussels, 2001, p. 734.)

23. In the *South-West Africa* cases (*Ethiopia* v. *South Africa*; *Liberia* v. *South Africa*), the South African Government argued that the Applications were inadmissible on the ground that Ethiopia and Liberia had failed to undertake diplomatic negotiations with it before bringing the matter before the Court under Article 7 of the Mandate for South-West Africa. The Court rejected this objection, regarding as equivalent to negotiations the debates on the Mandate by United Nations Member States within the General Assembly and the various United Nations bodies.

The Court moreover took the opportunity to state that "diplomacy by conference or parliamentary diplomacy has come to be recognized . . . as one of the established modes of
42 international negotiation". And I shall now illustrate this with some examples. (*South-West Africa* cases, *Ethiopia* v. *South Africa*; *Liberia* v. *South Africa*) *Preliminary Objections*, Judgment of 21 December 1962, *I.C.J. Reports 1962*, p. 346.)

24. This is what happened, for example, in the case of the DRC and Rwanda when the Congo put the matter before the African Human Rights Commission. Confronted with the heinous violations of human rights protected by the African Charter on Human and Peoples' Rights — violations perpetrated or orchestrated by Rwanda — the Congo did indeed place the matter before the Commission by Communication-Complaint 227/99 of 24 February 1999. The Charter — if I may remind you, Members of the Court — entered into force on 21 October 1986 and both the Democratic Republic of the Congo and Rwanda have acceded to it.

At the close of its 27th Ordinary Session, held from 27 April to 11 May 2000 in Algiers, the Commission declared the Congo's complaint admissible and even appointed a Rapporteur. It

decided to hold an extraordinary session on that Communication-Complaint (see paragraph 20 of the Decision taken at the 30th Ordinary Session held in Banjul from 13 to 27 October 2001).

Unfortunately, these proceedings have so far proved fruitless, as a result of numerous postponements *sine die* of the examination of the Communication from one session to another, and various delaying tactics or pressure exerted by Rwanda or on its behalf. Five or six years after the matter was brought before the Commission and declared admissible, States have never really got round to debating or discussing it, and much of the time Rwanda has reported absent, or come to meetings to raise objections, or arranged for the matter not to be listed on the agenda.

25. Members of the Court, the African Commission on Human and Peoples' Rights plays a veritable role of arbitrator on human rights violations between African States, which can submit communication-complaints to it in respect not only of violations of the African Charter on Human and Peoples' Rights, but also of other relevant international instruments.

26. Thus Article 60 of the African Charter provides that in its proceedings:

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> "The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the present Charter are members."

27. Hence, if Rwanda had agreed to play the game and followed the procedure for written and oral communications to its conclusion, without seeking to obstruct it, it is clear that the Commission could also have ruled on conventions such as the Convention on the Elimination of Discrimination against Women, the Convention on the Elimination of all Forms of Racial Discrimination and the United Nations Convention on the Prevention and Punishment of the Crime of Genocide.

Thus, as you will note, Mr. President, Rwanda cannot claim that the Congo has never complained (or protested), or sought an exchange of views or discussions with it, in respect of its various violations of the instruments which safeguard human rights and of international humanitarian law.

28. The same applies, Members of the Court, to such exchanges and discussions as were able to take place within or through the Security Council.

As the Court knows perfectly well, the Democratic Republic of the Congo in fact complained to the United Nations Security Council of numerous specific human rights violations committed by Rwanda. And, given the gravity of the allegations and faced with Rwanda's persistent manifest bad faith in terms of bringing them to an end, the Organization's principal peacekeeping body progressed from mere requests to actual demands.

29. The following resolutions are particular instances of this:

— resolution 1304 (2000) of 16 June 2000, which deplored the fighting on Congolese territory between the armies of Rwanda and Uganda, which had caused massive and flagrant violations of human rights and international humanitarian law. In particular, in paragraph 4 *(a)* the Council "*demands* that Uganda and Rwanda which have violated the sovereignty and territorial integrity of the Democratic Republic of the Congo, withdraw all their forces from the territory of the Democratic Republic of the Congo without further delay . . . ";

44 — resolution 1417 (2002) of 14 June 2002, which makes a similar demand, urging Rwanda to exert its influence to put an end to the atrocities committed in Kisangani (see paragraph 6 of the resolution).

As I said, Rwanda has committed massive serious violations either directly or indirectly, and this is why the Council speaks here of its "exerting its influence".

30. Furthermore, Mr. President, whether there is a refusal to negotiate, absence of negotiation, embryonic negotiation, reasonably or sufficiently advanced negotiation, that cannot prevent the Court from entertaining an application and validly ruling thereon. In the present case we have, however, shown that on numerous occasions there were attempts to negotiate, negotiations were initiated, but, because of Rwanda's bad faith and clear refusal, those negotiations were never able to make any headway. In the case concerning *Right of Passage over Indian Territory*, the Court noted that none of its decisions states or even implies that, under customary international law, procedures for diplomatic negotiations must have been exhausted before the case may be brought before the Court by unilateral application (case concerning the *Right of Passage*

over Indian Territory (Portugal v. *India), I.C.J. Reports 1957*, see observations of Portugal, paragraph 44).

31. Mr. President, as I have just shown, no reliance may be placed on an objection based on lack of negotiation in order to render the Congo's Application inadmissible or to challenge the jurisdiction of the Court.

II. The Vienna Convention of 23 May 1969 on the Law of Treaties and the question of reservations

32. Mr. President, I shall now turn to my second point — the Vienna Convention of 23 May 1969 on the Law of Treaties — whilst taking due account of the instructions and recommendations you have given us as regards the management of our time. As you know, Mr. President, we are currently one hour behind. Europe is one hour ahead of the current time in Africa. However, we shall do our best to gain a little time for the Court.

Congo relies on the Vienna Convention of 23 May 1969 on the Law of Treaties. That Treaty was duly ratified by Rwanda on 3 January 1980 by Presidential Decree No. 473/16 of
45 19 October 1979 (*Journal officiel*, 1979, p. 675) and is therefore opposable to that State. It must be emphasized that this Convention revolutionized international law by enshrining the notion of "peremptory norm" in its Article 53.

33. Peremptory norms *(jus cogens)* are binding on all States, irrespective of whether they have been accepted. In one of its recent opinions the Court characterized as "intransgressible principles of international customary law" "a great many [of the] rules of humanitarian law applicable in armed conflict" (*Threat or Use of Nuclear Weapons, Advisory Opinion* of 8 July 1996, *I.C.J. Reports 1996 (I)*, pp. 257 and 273).

34. It goes without saying that peremptory norms *(jus cogens)* can never be the subject of reservations. The Court has moreover emphasized their "fundamental nature" and the "imperative character of the legal obligations incumbent upon States" (*United States Diplomatic and Consular Staff in Tehran, Order of 15 December 1979, I.C.J. Reports 1979*, p. 20).

35. The Democratic Republic of the Congo accordingly confirms that the first subparagraph of Article 66 of the Vienna Convention on the Law of Treaties is so worded. It establishes the Court's jurisdiction and enables it to rule on Rwanda's *non-compliance with* jus cogens. That

Article provides that, in the event of a dispute concerning the application or interpretation of Article 53 or 64 *(which concern peremptory norms)*, and where no solution has been reached within a period of 12 months following the date when it was found to exist, "any one of the parties . . . may, by a written application, submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration".

36. However, Mr. President, in its Memorial of January 2003 Rwanda states the following:

> "Article 66 is part and parcel of the machinery for the settlement of disputes regarding the interpretation and application of the Vienna Convention. *It provides for the jurisdiction of the Court only in respect of disputes regarding the validity of a treaty which is said to contravene a rule of* jus cogens." (MR, para. 3.76)

One point emerges clearly from this statement.

37. Rwanda *thus confirms that the Court has jurisdiction* once it is apparent that there is an issue concerning the validity of a treaty which is contrary to a rule of *jus cogens*. And when
46 reference is made to the invalidity of a treaty, it is clear that it is the treaty as a whole that is envisaged — that "one" or more provisions of that treaty engender such invalidity.

Article 53 of the Vienna Convention on the Law of Treaties states in terms that "a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law".

38. Mr. President, reservations form an integral part of a treaty, and are dealt with in Part II of the Vienna Convention, under the head of the *conclusion* and entry into force of treaties. It follows that reservations must *avoid either being in direct contradiction with a norm of* jus cogens, *or preventing the implementation of that norm*. But Rwanda's reservation to Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, as well as to other similar provisions and compromissory clauses, *seeks to prevent the International Court of Justice from fulfilling its noble mission of safeguarding peremptory norms, including the prohibition of genocide*.

39. Accordingly, Rwanda's reservation to the Court's jurisdiction in the Genocide Treaty and in other international human rights and international humanitarian law instruments must be considered null and void. Whether or not the Congo has ever objected to these reservations is irrelevant, since they are void *ab initio*.

40. Mr. President, any person of good faith or lawyer concerned to safeguard the fundamental values conveyed and protected by international law can only wonder at Rwanda's policy of systematically signing and ratifying international human rights and humanitarian law instruments, whilst systematically and stubbornly, in a deliberated and calculated manner, formulating reservations to the Court's jurisdiction.

Cynically, seeking to have its cake and eat it, giving the appearance of valuing the protection of fundamental rights whilst resisting any form of control by the courts.

41. Mr. President, to uphold Rwanda's position, which has not only failed to recognize the Court's compulsory jurisdiction, but also systematically makes reservations to all provisions
47 recognizing the jurisdiction of the International Court of Justice in specific legal instruments, would be to give Rwanda a certificate or guarantee of universal impunity. The right to do whatever it likes on the territory of another State with impunity, without incurring any responsibility or exposing itself to any form of sanction. That would effectively amount to granting Rwanda full and total irresponsibility in international law — to accord it absolute immunity. Mr. President, this would be to open up cracks — dangerous, gaping breaches — in a matter as sensitive as it is delicate, a matter in which humanity and humanitarianism are at stake.

The Democratic Republic of the Congo, accordingly believes that the Court will grasp the opportunity — the possibility — to establish its jurisdiction and, in so doing, help to ensure that barbarism gives way to humanity, at all times and in all places.

42. Mr. President, Members of the Court, I thank you for your kind attention and ask you, Mr. President, kindly to give the floor to Professor Mukadi Bonyi, who will complete my argument on other points. Thank you.

Le PRESIDENT : Je vous remercie, Monsieur Ntumba. Je donne maintenant la parole à M. Bonyi.

Mr. MUKADI BONYI: Thank you, Mr. President, for giving me the floor. Mr. President, Members of the Court,

SUBMISSIONS AND OBSERVATIONS ON THE ADMISSIBILITY OF THE APPLICATION OF THE DRC

1. If you will allow me, at the outset, I would like to express my gratitude and to convey to you my sincere thanks for this first opportunity that you have given me to speak before this Court.

2. Mr. President, Members of the Court, Rwanda devoted Part IV (paras. 4.1-4.4) of its Memorial to the question of the inadmissibility of the Application. It states in support of its claim that "[t]he new Application filed by the Congo is in substance largely a repetition of its 1999 Application" (para. 4.2). It further states that by discontinuing the earlier proceedings it implicitly acknowledged the lack of jurisdiction under the instruments invoked (para. 4.3). Lastly, it states
48 that to file an application, then to withdraw it and to bring a fresh application "is an abuse of the process of the Court and renders the application inadmissible" (para. 4.3).

3. Mr. President, Members of the Court, the grounds invoked by Rwanda in support of the inadmissibility of the Application of the DRC are not founded. I will simply make three observations now and I would refer you to the Counter-Memorial for further argument to this effect.

I. The new Application of the Democratic Republic of the Congo is not identical to the old one

4. Mr. President, Members of the Court, Rwanda itself recognizes this truth in its Memorial, since it claims that a comparison of the two Applications demonstrates that the Congo has added a few further allegations and references and that it has added a certain number of new grounds on which it seeks to establish the jurisdiction of the Court (paras. 4.2, 4.3).

5. Mr. President, Members of the Court, it is contradictory to assert, on the one hand, that the new Application is a repetition of the former one and, on the other, that it contains a certain number of new grounds.

6. The Court should find that the new Application is not a repetition of the old one because it does contain new elements. I would cite, in particular, the invocation of the Vienna Convention of 23 May 1969.

7. I would further cite the fact that the new Application denounces a number of facts and mass violations of human rights perpetrated after the filing of the 1999 Application (see in particular pp. 7-16 of the Application).

8. Rwanda itself recognizes the enumeration of those facts that it moreover seeks to minimize by speaking of "selected events which occurred, or are said to have occurred, in the two and a half years since the 1999 Application was filed" (para. 4.2).

9. All these very serious events cannot be denied to the point of speaking of a new application identical to the old one as if, Mr. President, Members of the Court, the millions of deaths recorded in this context constituted a minor news item which could not justify the new Application of 2002.

49 However, the numerous and barbaric crimes described in the new Application have been confirmed and condemned by the United Nations, in particular through Security Council resolution 1399 (2002) of 19 March 2002. It is not an abuse of process to file a new application on the basis of such widespread and flagrant violations of human rights.

II. The Democratic Republic of the Congo has not implicitly recognized the Court's lack of jurisdiction. On the contrary, it contends that the Court remains competent to entertain the present Application

10. Mr. President, Members of the Court, it is thus wrong for Rwanda to allege in its Memorial that the discontinuance of the earlier proceedings was decided "in circumstances which implicitly acknowledge the lack of jurisdiction under those instruments" (para. 4.3).

11. The Democratic Republic of the Congo protests at this assertion. It has never acknowledged, and never sought implicitly to acknowledge, the Court's lack of jurisdiction. It is indeed for that reason that it filed its new Application, since it was convinced that your Court does in fact have jurisdiction.

12. This belief on the part of the DRC is not simply a piece of fantasy. It is shared by a number of commentators, including two whom I have already cited, Professors Imbleau and Schabas, authors of the Rwandan classic, *Introduction to Rwandan Law* (Ed. Yvon Blais Inc., Quebec, 1999).

13. In that work the authors state quite clearly that "Rwanda . . . has now withdrawn [its reservation]" to Article IX of the Convention for the Prevention and Punishment of the Crime of Genocide.

14. They further indicate that this withdrawal of its reservations complies with the obligations undertaken by Rwanda to withdraw all of its reservations regarding the protection of human rights pursuant to Article 15 of the Protocol on Various Matters and Final Provisions signed in Arusha on 3 August 1993 between the Government of the Rwandese Republic and the Rwandan Patriotic Front.

50 15. As we have already stated, Rwanda has in fact adopted a new law to this effect, namely the Decree-Law of 15 February 1995 (No. 014/01).

16. Mr. President, Members of the Court, the opinion of the above authors is corroborated by the statement made on 17 May 2005 in Geneva by Her Excellency Madame Mukabagwiza, Minister of Justice representing the Republic of Rwanda at the 61st session of the United Nations Commission on Human Rights:

> "Rwanda has been among the first countries to have ratified a number of international instruments concerning human rights . . . the few human rights instruments not yet ratified and *reservations not yet withdrawn will be ratified or withdrawn shortly*."

This statement means that there are reservations which have already been withdrawn by Rwanda.

17. And these reservations include those to Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, as the above authors have stated.

18. Mr. President, Members of the Court, the DRC is delighted that Rwanda itself, which suffered the 1994 genocide, has been able to fulfil its commitments by withdrawing the reservation to Article IX made by it in 1975.

19. For its part, the Court will doubtless draw the legal consequences attaching to this withdrawal of reservations in terms of its jurisdiction.

III. The objection to admissibility based on an abuse of process is unfounded

20. The principal ground relied on by Rwanda in support of its objection to admissibility is founded on a purported *abuse of process*.

21. However, this claim is unfounded, since the Court's jurisprudence accepts that the conduct of a State which has properly submitted an application in the framework of the remedies open to it *does not amount to an abuse of process (Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 255, para. 38).

22. In the present case, the Democratic Republic of the Congo has, in conformity with the Court's jurisprudence, utilized its right to submit a new application, and my colleague, Mr. Akele, has abundantly demonstrated that in the present case there has been no abuse of process. And the
51 Court will appreciate that, if there is any abuse of process, that can only be on the part of our opponents, who are seeking to evade a debate on the merits by pleading that the Application is inadmissible on the ground of abuse of process.

23. Mr. President, Members of the Court, the Democratic Republic of the Congo urgently requests the Court to dispose of this time-wasting tactic on the part of Rwanda by giving it an appropriate response, in accordance with the position already adopted by the Court in these proceedings when, as we have already pointed out, it stated itself to be "deeply concerned by the deplorable human tragedy, loss of life, and enormous suffering in the east of the Democratic Republic of the Congo . . ."

24. Mr. President, Members of the Court, for all of these reasons may it please the Court to find that the objection raised by Rwanda to admissibility of the DRC's Application is unfounded.

I thank you Mr. President, and would kindly request you to allow me to ask that the Agent of the DRC take the floor. Thank you.

Le PRESIDENT : Je vous remercie, Monsieur Bonyi. Je donne maintenant la parole à S. Exc. M. Masangu-a-Mwanza.

Mr. MASANGU-A-MWANZA: Mr. President, thank you for the floor. I would just like to thank the Court for having kindly listened to our oral argument and also, as I have always said in other cases, may the Court pass judgment and do justice. We are convinced that, as Congolese, we are in the right because of the enormous losses that we have suffered. Women and children have been raped, massacred by Rwandan soldiers. This is not a matter which can be swept under the carpet because of the genocide in Rwanda, but there has also been genocide in our country. We have lost almost five million inhabitants and today there are people wandering the bush with nowhere to live, no medical care and dying daily.

We should like to live in peace with our Great Lakes neighbours. Let Rwanda look after its own country and leave the Democratic Republic of the Congo in peace. We want to live in perfect

52 harmony with all the countries of the Great Lakes, with all the countries of Central Africa and with all countries throughout the world.

I ask you, Mr. President, Members of the Court, to consider this case with care. We trust that you are going to do justice and that you will bring your jurisdiction to bear in this case, which is one which concerns us greatly. It is a very difficult problem for us. The entire population of our country awaits a fair judgment from the distinguished Court which you represent here. Thank you.

Le PRESIDENT : Je vous remercie, Excellence. Votre exposé clôt le premier tour de plaidoiries. Je souhaite remercier chacune des Parties pour les exposés qu'elles ont prononcés au cours de ce premier tour.

La Cour se réunira demain, 6 juillet, à 15 heures pour entendre le second tour de plaidoiries de la République du Rwanda sur les questions de compétence et de recevabilité. Le Rwanda présentera ses conclusions finales sur ces questions à la fin de l'audience qui aura lieu pendant l'après-midi de mercredi.

Le Congo présentera à son tour, le mercredi 8 juillet, à 10heures, son second tour de plaidoiries sur les questions de compétence et de recevabilité et fera connaître alors ses conclusions finales. Je souhaite rappeler une nouvelle fois, à votre intention, que le second tour de plaidoiries ne doit pas être la répétition des exposés antérieurs et que les Parties ne sont pas tenues d'utiliser tout le temps de parole qui leur est attribué.

Je vous remercie.

La séance est levée.

L'audience est levée à 12 h 40.