SEPARATE OPINION OF JUDGE *AD HOC* DUGARD

Agreement with Judgment of the Court — Jus cogens *has an important role to play in litigation before the Court* — Jus cogens *is to be invoked as a guide to the Court in the exercise of its judicial choice and not to overthrow a norm of general international law accepted and recognized by the international community of States as a whole* — *The argument that* jus cogens *confers jurisdiction on the Court in the present proceedings therefore unfounded* — *In order to satisfy requirement of negotiation in a compromissory clause by means of conference diplomacy, Applicant must identify convention and nature of alleged violation with some degree of precision.*

1. The Democratic Republic of the Congo (hereinafter the DRC) has failed to show that the Court has jurisdiction to hear the present Application, either in terms of the compromissory clauses of several treaties that it claims have been violated by Rwanda or in terms of a number of other bases for jurisdiction that it has advanced. In these circumstances I agree fully with the decision of the Court that it has no jurisdiction to entertain the Application filed by the DRC on 28 May 2002.

2. There are, however, two issues on which I wish to add some comments of my own. First, as this is the first occasion on which the Court has expressly acknowledged the existence of peremptory norms *(jus cogens)*, I wish to examine, albeit in a tentative manner, the role that *jus cogens* may play in international litigation and the limits that must be placed on its use, with special reference to the present Application. Secondly, I wish to comment on the subject of negotiations within the political organs of the United Nations for the purpose of satisfying the requirement in a compromissory clause for the exercise of jurisdiction that a dispute must be shown to be not capable of settlement by negotiation.

Jus cogens in international litigation

3. The DRC has sought to invoke the jurisdiction of the Court on the basis of a number of arguments premised on the violation of peremptory norms *(jus cogens)* by Rwanda. These arguments, in essence, may be reduced to two. First, the allegation of the violation of a norm of *jus cogens per se* confers jurisdiction on the Court. Secondly, where a violation of a norm of *jus cogens* is alleged, the respondent State cannot raise a reservation to the Court's jurisdiction to defeat that jurisdiction. In such a case, *jus cogens* in effect trumps the reservation. Aware, no doubt, of the novelty and far-reaching implications of its argument, the DRC has urged the Court to act "boldly and creatively". The Court has responded boldly by acknowledging the existence of norms of *jus cogens* but it has, rightly, declined the DRC's invitation to go beyond this. Instead it has, correctly in my judgment, rejected the DRC's submissions in holding that the fact that a dispute relates to compliance with a peremptory norm, such as genocide, cannot of itself provide a basis for the Court's jurisdiction; and that a reservation to the Court's jurisdiction cannot be held to be invalid on the ground that it violates a norm of *jus cogens*. In so finding the Court has emphasized that its jurisdiction is based on consent and that no peremptory norm requires States to consent to jurisdiction where the compliance with a peremptory norm is the issue before the Court.

4. This is the first occasion on which the International Court of Justice has given its support to the notion of *jus cogens*. It is strange that the Court has taken so long to reach this point because it has shown no hesitation in recognizing the notion of obligation *erga omnes*, which together with *jus cogens* affirms the normative hierarchy of international law. Indeed, the Court itself initiated the notion of obligation *erga omnes* in 1970 in the *Barcelona Traction* case (*Barcelona Traction, Light and Power Company, Limited, (Belgium* v. *Spain), Second Phase, Judgment, I.C.J. Reports*

1970, p. 32) and has recently confirmed its adherence to the notion in its Advisory Opinion in the case concerning *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (*I.C.J. Reports 2004*, p. 136, para. 155). Until the present Judgment the Court carefully and deliberately avoided endorsing the notion of *jus cogens* despite the many opportunities it had to do so. In 1969 it refrained from pronouncing "on any question of *jus cogens*" (*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 42, para. 72); in 1986 it acknowledged that the International Law Commission had found the prohibition on the use of force to have the character of *jus cogens*, but declined to align itself with this position *(Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 258, para. 83); and in 2002 it failed to respond to an argument that the granting of immunity to a Foreign Minister for crimes against humanity violated a norm of *jus cogens (Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, pp. 23-26). Despite this, *jus cogens* has been invoked by individual judges in cases before the Court in separate and dissenting opinions going back to the 1960s. In 1960, in a dissenting opinion in the *Right of Passage* case, Judge *ad hoc* Fernandes referred to the "rules of *ius cogens*, over which no special practice can prevail" (*Right of Passage over Indian Territory (Portugal* v. *India), Merits, Judgment, I.C.J. Reports 1960*, p. 135). Then in 1966, in his dissenting opinion in the *South West Africa* cases, Judge Tanaka declared:

> "If we can introduce in the international field a category of law, namely *jus cogens* examined the International Law Commission, a kind of imperative law which constitutes the contrast to the *jus dispositivum*, capable of being changed by way of agreement between States, surely the law concerning the protection of human rights may be considered to belong to the *jus cogens*." (*South West Africa, (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Second Phase, Judgment, I.C.J. Reports 1966*, p. 298.)

5. The failure of the International Court to endorse or pronounce on the subject of *jus cogens* has not gone unnoticed. Its silence has been aggravated by the fact that both other international tribunals (*Al-Adsani* v. *United Kingdom*, 123 *International Law Reports* 24 (European Court of Human Rights); *Prosecutor* v. *Furundzija*, IT-95-17/1-T, paras. 153-156, 121 *International Law Reports* 214, 260 (International Criminal Tribunal for the former Yugoslavia)) and national courts (see, for example, *R.* v. *Bow Street Metropolitan Stipendiary Magistrate: Ex Parte Pinochet Ugarte* (No. 3) [1999] 2 All ER 97 (HL); *Ferrini* v. *Federal Republic of Germany* (Italian Court of Cassation), 11 March 2004; (2005) 99 *American Journal of International Law* 242) have invoked the term *jus cogens* to portray higher norms of international law.

6. The approval given to *jus cogens* by the Court in the present Judgment is to be welcomed. However, the Judgment stresses that the scope of *jus cogens* is not unlimited and that the concept is not to be used as an instrument to overthrow accepted doctrines of international law.

7. The Court's endorsement of *jus cogens* raises the question of the future role of *jus cogens* and the legal consequences to be attached to a violation of *jus cogens* for, as Ian Brownlie states, "many problems of application remain" in respect of *jus cogens* (*Principles of Public International Law*, 6th ed. (2003), p. 490).

8. It is today accepted that a treaty will be void if at the time of its conclusion, it conflicts with "a peremptory norm of general international law" (Art. 53 of the Vienna Convention on the Law of Treaties of 1969); and that States must deny recognition to a situation created by the serious breach of a peremptory norm (Arts. 40 and 41 of the Draft Articles on the Responsibility of

States for Internationally Wrongful Acts, Report of the International Law Commission, United Nations, *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10) 29 (2001)). Moreover, it has been suggested that a Security Council resolution will be void if it conflicts with a norm of *jus cogens* (see the separate opinion of Judge *ad hoc* Sir Elihu Lauterpacht in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro), Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993*, p. 440, para. 100). *Jus cogens* does, however, have a less spectacular role to play in the judicial process and it is this role that becomes important now that the Court has finally recognized the existence of peremptory norms.

9. In national law there is a wealth of literature on judicial lawmaking and the nature of the judicial process. International law, on the other hand, is characterized by a dearth of literature on this subject. (Cf. Hersch Lauterpacht, *The Development of International Law by the International Court* (1958).) This explains why little attention has been paid to the place of *jus cogens* in the judicial process despite the pivotal role that it could — and should — play.

10. The judicial decision is essentially an exercise in choice. Where authorities are divided, or different general principles compete for priority, or different rules of interpretation lead to different conclusions, or State practices conflict, the judge is required to make a choice. In exercising this choice, the judge will be guided by principles (propositions that describe rights) and policies (propositions that describe goals) in order to arrive at a coherent conclusion that most effectively furthers the integrity of the international legal order.

Norms of *jus cogens* are a blend of principle and policy. On the one hand, they affirm the high principles of international law, which recognize the most important rights of the international order — such as the right to be free from aggression, genocide, torture and slavery and the right to self-determination; while, on the other hand, they give legal form to the most fundamental policies or goals of the international community — the prohibitions on aggression, genocide, torture and slavery and the advancement of self-determination. This explains why they enjoy a hierarchical superiority to other norms in the international legal order. The fact that norms of *jus cogens* advance both principle and policy means that they must inevitably play a dominant role in the process of judicial choice.

11. Several decisions of the International Court in which the Court might have invoked norms of *jus* cogens, but did not, illustrate the type of case in which norms of *jus cogens* might be employed. The Judgment of the Court in the *South West Africa* cases *(South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Second Phase, Judgment, I.C.J. Reports 1966*, p. 6) is an obvious example of such a case. There the Court was faced with a choice between the principle that a State must demonstrate a special, national, interest in the proceedings before the Court to enjoy legal standing and the "sacred trust of civilization" contained in the Mandate for South West Africa to promote to the utmost the well-being of the inhabitants of the territory. In preferring the former principle it chose not to accede to the higher norm; with serious consequences for the Court. In fairness, it must be added that this decision largely predated the recognition of norms of *jus cogens* although Judge Tanaka in his powerful dissenting opinion did refer to such norms (see above, para. 4).

Other cases in which norms of *jus cogens* might possibly have been invoked were *East Timor* (*(Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 90) and the *Arrest Warrant* case (*Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 3).

In the former, the Court declined to apply its decision in the *Certain Phosphate Lands* case (*Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992,* pp. 261-262) and instead preferred the controversial precedent of the *Monetary Gold* case *(Monetary Gold Removed from Rome in 1943, (Italy* v. *France, United Kingdom of Great Britain and Northern Ireland and United States of America), Judgment, I.C.J. Reports 1954)* above the peremptory norm of self-determination, which was described as a norm of *erga omnes* rather than *jus cogens* by the Court in its decision at page 102. The Court has recently retreated from the *Monetary Gold* case and instead relied on the *Certain Phosphate Lands in Nauru* case in the case concerning *Armed Activities on the Territory of the Congo* (*(Democratic Republic of the Congo* v. *Uganda),* Judgment of 19 December 2005, para. 203). Although the Court did not indicate that its choice was influenced by the fact that norms of *jus cogens* were involved in this case, it may safely be assumed that the gravity of the issues raised influenced the Court's choice.

In the *Arrest Warrant* case the Court found that a Foreign Minister enjoyed immunity before a national court in respect of crimes against humanity on the basis of weak evidence of State practice rather than allowing the *jus cogens* character of the crime to prevail over the plea of immunity (see the dissenting opinions of Judge Al-Khasawneh and Judge *ad hoc* van den Wyngaert in the *Arrest Warrant* case (*I.C.J. Reports 2002*, p. 98, para. 7, and p. 155, para. 28, respectively), which advocate the choice of the *jus cogens* norm of the prohibition of crimes against humanity over the unsettled rule of immunity).

12. In the above cases the Court was faced with competing principles, State practice and precedents and preferred not to choose that solution which gave effect to a norm of *jus cogens*. The Court was not asked to invoke *jus cogens* to trump an established, accepted rule but instead to choose a principle of *jus cogens* or a precedent coinciding with a norm of *jus cogens* in preference to a principle, State practice or precedent that did not enjoy the status of *jus cogens*. It was simply asked to exercise its choice within the interstices of the law in a molecular rather than a molar fashion[1].

13. In the present case the Court is confronted with a very different situation. The Court is not asked, in the exercise of its legitimate judicial function, to exercise its choice between competing sources in a manner which gives effect to a norm of *jus cogens*. On the contrary, it is asked to overthrow an established principle — that the basis of the Court's jurisdiction is consent — which is founded in its Statute (Art. 36), endorsed by unqualified State practice and backed by *opinio juris*. It is, in effect, asked to invoke a peremptory norm to trump a norm of general international law accepted and recognized by the international community of States as a whole, and which has guided the Court for over 80 years. This is a bridge too far. The Court cannot be expected to accept the arguments raised by the DRC for by so doing it would not engage in molecular law-making, but molar law-making that goes beyond the legitimate judicial function. Only States can amend Article 36 of the Court's Statute.

14. For this reason the Court, in the present instance, has rightly held that although norms of *jus cogens* are to be recognized by the Court, and presumably to be invoked by the Court in future in the exercise of its judicial function, there are limits to be placed on the role of *jus cogens*. The request to overthrow the principle of consent as the basis for its jurisdiction goes beyond these limits. This, in effect, is what the Court has held.

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[1]See the statement of Justice Oliver Wendell Holmes:

> "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially, they are confined from molar to molecular motions." *(Southern Pacific Co.* v. *Jensen,* 244 US 205 at 221 (1916).)

Negotiations within the United Nations and other international bodies

15. The DRC claims that the Court has jurisdiction in terms of Article 29 of the Convention on the Elimination of All Forms of Discrimination Against Women in that there is a dispute between it and Rwanda concerning the interpretation and application of the Convention, which cannot be settled by negotiation. It argues that it has made frequent protests about Rwanda's use of force in the region and its violation of human rights before the political organs of the United Nations and other international bodies. In support of its contention that these protests and complaints about Rwanda's actions within the political organs of the United Nations and other international bodies satisfy the requirement of negotiation, the DRC invokes the ruling of the Court in 1962 in the *South West Africa* cases when it stated:

> "Moreover, diplomacy by conference or parliamentary diplomacy has come to be recognized in the past four or five decades as one of the established modes of international negotiation. In cases where the disputed questions are of common interest to a group of States on one side or the other in an organized body, parliamentary or conference diplomacy has often been found to be the most practical form of negotiation." *(South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 346.)

16. There is an important difference between the *South West Africa* cases and the present case. In the former case it was quite clear to all States participating in the "conference or parliamentary diplomacy" within the United Nations that the dispute related to the Mandate for South West Africa, more particularly to the questions whether South Africa was obliged to account to the United Nations for its administration of the territory in terms of the Mandate, and whether it had violated Article 2 of the Mandate requiring it to "promote to the utmost the material and moral well-being and the social progress of the inhabitants of the Territory" by applying the policy of apartheid within the Territory. For ten years or more these issues had constituted the focus of debates within the United Nations.

17. In the present case, on the other hand, the DRC has failed to indicate with precision the nature of its complaint within the context of the Convention on the Elimination of All Forms of Discrimination Against Women. It has made sweeping allegations of Rwanda's use of force and violations of human rights in general without, in most instances, indicating which particular human rights convention it alleges has been violated. Nor has it indicated which of the 15 substantive provisions in the Convention on the Elimination of All Forms of on Discrimination Against Women Rwanda is alleged to have violated. The substantive provisions in this Convention oblige States parties to abolish discriminatory measures against women *within their own legal systems* by adopting legislation to ensure gender equality (Arts. 2, 2-3, 15); by pursuing affirmative action programmes for women (Art. 4); by eliminating social and cultural discrimination against women (Art. 5); by suppressing traffic in women (Art. 6); by eliminating discrimination against women in political life and in participation in government (Arts. 7 and 8); by protecting the right to nationality of women (Art. 9); by ensuring equal rights for women in education, employment, health care and economic life (Arts. 10-13); by promoting the position of women in rural areas (Art. 14); and by eliminating discrimination against women in marriage and family relations (Art. 16). None of these provisions, it seems, is relevant to the present dispute. Instead the nature of the DRC's allegation against Rwanda relate to acts of violence, including sexual violence, against women, not within the territory of Rwanda but within the territory of the DRC. Without in any way minimizing the gravity or seriousness of these allegations, it should be stressed that they raise issues pertaining to other human rights conventions — such as the Convention against Torture (to which Rwanda is not a party) and the International Covenant on Civil and Political Rights (which is not claimed as a basis for jurisdiction in the present proceedings) — and to international humanitarian law.

18. The fact that the DRC's allegations relating to the violation of the rights and personal integrity of women relate to human rights conventions other than the Convention on the Elimination of All Forms of Discrimination Against Women, probably explains why this Convention was not the subject of protest and complaint — that is "conference or parliamentary diplomacy" — in the United Nations or other international bodies. As these Conventions do not provide a basis for the Court's jurisdiction, the DRC has felt itself compelled to invoke the compromissory clause in the Convention on the Elimination of All Forms of Discrimination Against Women as a basis for jurisdiction in this matter. However, this invocation of jurisdiction is misplaced. First, it is doubtful whether the allegations in question relating to the mistreatment of women fall within the ambit of the Convention; secondly, even if they do in some way violate its provisions, it is clear that the DRC's protests and allegations of violence against women before the United Nations and other international bodies have not been premised on the violation of this Convention in particular, but on the violation of general human rights law and other human rights Conventions. This means that there have been no negotiations in the form of "conference or parliamentary diplomacy" within the United Nations or other international bodies on the subject of the Convention on the Elimination of All Forms of Discrimination Against Women. Accordingly, the DRC has failed to show that any dispute between the Parties relating to this particular Convention has been the subject of negotiation and that the dispute is one that cannot be settled by negotiation within the meaning of Article 29 of the Convention.

19. A party that wishes to rely on "conference or parliamentary diplomacy" in the political organs of the United Nations as evidence that it has engaged in negotiations for the purpose of satisfying the requirements of a compromissory clause must at least show that it has clearly identified the Convention in question, and should be able to show that it has indicated, albeit in broad terms, the nature of the violation it alleges has occurred.

(Signed) John DUGARD.