DISSENTING OPINION OF JUDGE GÓMEZ ROBLEDO

Disagreement with the second paragraph of the operative part of the Order, concerning the removal of the case from the Court's List — Inadequacy of the provisional measures phase to definitively rule on the lack of jurisdiction over the merits of the case — The unique character of the Genocide Convention in light of its object and purpose.

1. As a preliminary remark, I wish to express my full agreement with the arguments and reasoning set out in the joint partly dissenting opinion, which I have had the honour of signing alongside my esteemed colleagues, Judges Bhandari, Charlesworth, Cleveland, Tladi and Judge *ad hoc* Simma. Through the present dissenting opinion, I seek to offer a few additional reflections that have led me to vote against the second operative paragraph of the Order, which concerns the removal of the case from the Court's List.

2. I agree with the majority that, in the present case, in light of the reservation made by the United Arab Emirates to Article IX of the Genocide Convention, that provision does not, prima facie, constitute a basis for the Court's jurisdiction, which explains my vote in favour of rejecting Sudan's request for the indication of provisional measures.

3. Nonetheless, I am firmly of the view that the Court should have stopped there and refrained from pronouncing on its "manifest" lack of jurisdiction in order to strike the case from its List. I consider that an important opportunity was missed: that of allowing the Court to assess whether, 20 years after the case concerning *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda)*, international law relating both to reservations and to the Genocide Convention has evolved.

4. For the reasons already set out in the joint partly dissenting opinion, I am of the view that an order of the Court on whether or not to indicate provisional measures does not constitute the adequate procedural stage for the Court to make a definitive pronouncement on its jurisdiction — or lack thereof — to entertain the merits of the case. The Court already possesses, under Article 79, paragraph 1, of its Rules, a procedural mechanism that enables it to rule separately on any question relating to its jurisdiction or the admissibility of the application. To take a decision of such gravity at this preliminary stage of the proceedings is to penalize the applicant for having filed a request for provisional measures, without having had the opportunity — within the necessarily short time-limits dictated by the inherent urgency to such proceedings — to assert its arguments regarding the Court's jurisdiction.

5. This prevents the Court from examining the validity of reservations to the compromissory clause of a convention as important as the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and, where appropriate, from acknowledging any developments in international law in this regard.

6. The Genocide Convention is a unique treaty due to the extreme nature of the crime of genocide. The Convention must be interpreted in light of its object and purpose, namely, the prevention and punishment of the crime of genocide.

7. In its Advisory Opinion of 1951 on *Reservations to the Genocide Convention*, the Court said:

> "The objects of such a convention must also be considered. The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality. In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions." (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23.)

Over time, the Court has recognized the denial of humanity that genocide represents and has restated that "the principles underlying the Convention" are "principles which are recognized by civilized nations as binding on States, even without any conventional obligation" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 616, para. 31).

8. The Convention also differs from other human rights conventions in that it is not equipped with a monitoring mechanism. Article IX expressly confers upon the Court the role of adjudicating disputes between the Contracting Parties relating to the interpretation, application, or fulfilment of the Convention. Under this article, the Court is empowered to rule on State responsibility for genocide and to provide authoritative and binding interpretations of the Convention.

9. Significantly, the Court's jurisprudence regarding the Convention has only emerged following the case of *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda)*. The Court issued its first merits judgments under the Convention in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)* (*Judgment, I.C.J. Reports 2007 (I),* p. 43) and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia)* (*Judgment, I.C.J. Reports 2015 (I)*, p. 3). In this regard, there has been an increasing acknowledgment of the critical role of State responsibility in cases of genocide, beyond individual responsibility, as evidenced by the current General List of the Court.

10. Indeed, the fact that several cases currently pending before the Court concern the Genocide Convention illustrates the extent to which the Court is now seen as a guardian of this instrument, to which the States parties provide the collective guarantee of its implementation.

11. Moreover, the Guide to Practice on Reservations to Treaties, adopted by the International Law Commission in 2011, constitutes both the codification and progressive development of international law regarding reservations. In particular, Guideline 3.1.5.7 of this guide specifies that a reservation to a compromissory clause is not "in itself, incompatible with the object and purpose

of the treaty" unless "the reservation purports to exclude or modify the legal effect of a provision of the treaty *essential to its raison d'être*" (emphasis added).

12. International law is a *living* body of rules that evolves and adapts to meet the demands of an international society that is, by definition, dynamic. Although the Court recognized the validity of Rwanda's reservation to Article IX of the Genocide Convention in 2006 in the case of *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda)*, six judges expressed doubts, to varying degrees of vehemence, regarding the Court's conclusion on the compatibility of the reservation to Article IX (see *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, dissenting opinion of Judge Koroma; *ibid.*, joint separate opinion of Judges Higgins, Kooijmans, Elaraby, Owada and Simma). Among them, Judges Higgins, Kooijmans, Elaraby, Owada and Simma had already noted a certain evolution in international law regarding reservations compared to the 1951 Advisory Opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, and they concluded their joint separate opinion by urging the Court to revisit the issue of the validity of reservations to Article IX "for further consideration" (*ibid.*, p. 72, para. 29).

13. This opinion refers to the case law of the European Court of Human Rights and the Inter-American Court of Human Rights, which adopted an approach different from that taken by our Court in 1951. They did not follow the so-called "laissez faire" approach attributed to the International Court of Justice in light of its 1951 Advisory Opinion; instead, each Court ruled on the compatibility of specific reservations with the European Convention on Human Rights and the American Convention on Human Rights, respectively (*Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, joint separate opinion of Judges Higgins, Kooijmans, Elaraby, Owada and Simma, p. 69, para. 15).

14. Thus, while the Court may not legislate, it may note a general trend ("constater l'évolution [du droit]") (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 237, para. 18).

15. Nearly 20 years later, in light of the developments both in the interpretation of the Genocide Convention and in the law of reservations, and in view of the significant increase in cases brought before the Court alleging violations of this Convention, the Court's role as guardian of this legal instrument is more crucial than ever. It is equally imperative to ascertain whether international law has evolved with respect to the validity of a reservation to Article IX of the said Convention. By removing the present case from its List at the stage of provisional measures, the Court has failed in both of these fundamental responsibilities.

(Signed) Juan Manuel GÓMEZ ROBLEDO.