

JOINT SEPARATE OPINION OF JUDGES HIGGINS,  
KOOIJMANS, ELARABY, OWADA AND SIMMA

*A proper reading of the Court's Advisory Opinion of 1951 — Questions that were not and could not have been before the Court in 1951 — Problems that have arisen — Trends in practice of human rights courts and monitoring bodies under human rights treaties — Concordant practice of the International Court in 2002 and 2006 — Article IX of the Genocide Convention and the object and purpose of that Convention — Court should revisit its existing view that a reservation to Article IX is not incompatible with the object and purpose of the Convention.*

1. The Court has in paragraph 67 of its Judgment stated as follows:

“Rwanda’s reservation to Article IX of the Genocide Convention bears on the jurisdiction of the Court, and does not affect substantive obligations relating to acts of genocide themselves under that Convention. In the circumstances of the present case, the Court cannot conclude that the reservation of Rwanda in question, which is meant to exclude a particular method of settling a dispute relating to the interpretation, application or fulfilment of the Convention, is to be regarded as being incompatible with the object and purpose of the Convention.”

2. We have voted in favour of the *dispositif* (para. 128). However, some issues underlying paragraph 67 have concerned us greatly.

3. Our intention in this short opinion is twofold: to draw attention to the significance of certain recent aspects of the Court’s jurisprudence in the matter of reservations; and to examine the underlying reason for the Court’s repeated finding that a reservation to Article IX of the Genocide Convention is not contrary to the object and purpose of that treaty.

4. In recent years there has been a tendency for some States, and certain commentators, to view the Court’s 1951 Advisory Opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* as stipulating a régime of inter-State *laissez-faire* in the matter of reservations, in the sense that while the object and purpose of a convention should be borne in mind both by those making reservations and those objecting to them, everything in the final analysis is left to the States themselves.

5. In our view a proper reading of the 1951 Advisory Opinion suggests that this conclusion is too sweeping. The Court in 1951 was answering

certain specific questions put to it by the General Assembly; what it said has to be understood against that background.

6. There were three questions put to the Court, the first two of which have relevance for present purposes. Problems had arisen, especially as regards the depository functions of the United Nations Secretary-General, due to the fact that objections had been made by some States parties to the Convention to reservations made by other States. Although the questions put to the Court were formulated in abstract terms, in reality they concerned reservations that had been made relating to Article IX, which provides for the jurisdiction of the Court to the settlement of disputes relating to the Genocide Convention. The Court was asked (i) if a reserving State can be regarded as a party to the Convention while still maintaining its reservation, if the reservation is objected to by one or more parties to the Convention but not by others, and (ii) if so, what is the effect of a reservation as between the reserving State and (a) the parties that objected to the reservation and (b) those that accepted it. (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 16.)

7. These questions all started from the assumption that, although there was no express provision in the Genocide Convention on this matter, reservations could in principle be made. The Court satisfied itself from the *travaux préparatoires* and other factors that reservations were indeed not in principle prohibited (*ibid.*, pp. 22-23). It then turned to the specific question of "what kind of reservations may be made" (*ibid.*, p. 23). Emphasizing the special characteristics of the Genocide Convention, and the desirability of universal adherence to it, the Court famously determined that

"it is the compatibility of a reservation with the object and purpose of a Convention that must furnish the criteria for the attitude of a State in making the reservation on accession as well as for the appraisal by a State in objecting to the reservation" (*ibid.*, p. 24).

The Court did not accept that a reservation to a multilateral treaty was conditional on the assent of all the parties (*ibid.*, p. 25).

8. Turning to the second question, the Court found that

"[as] no State can be bound by a reservation to which it has not consented, it necessarily follows that each State objecting to it will or will not, on the basis of its individual appraisal within the limits of the criteria of the object and purpose stated above, consider the reserving State to be a party to the Convention" (*ibid.*, p. 26).

9. The Court in 1951 was clearly not unaware of the hazards inherent in its answers, in the sense that they would entail a veritable web of diverse reciprocal commitments within the framework of a multilateral convention. (See on this point the joint dissenting opinion of Judges Guer-

rero, Sir Arnold McNair, Read and Hsu Mo, *I.C.J. Reports 1951*, pp. 31 *et seq.*) The Court's Opinion conceded that 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" (*ibid.*, p. 23). And it acknowledged that "the disadvantages which result from this possible divergence of views . . . are real" (*ibid.*, p. 26).

10. In the event, the problems which the Court could already envisage in 1951 have turned out to be vastly greater than it could have foreseen. The Genocide Convention stood virtually alone in the sphere of human rights in 1951. Since then it has been added to by a multitude of multi-lateral conventions, to which States have not hesitated to enter a plethora of reservations — often of a nature that gives serious concern as to compatibility with the object and purpose of the treaty concerned. And the vast majority of States, who the Court in 1951 envisaged would scrutinize and object to such reservations, have failed to engage in this task. (There are currently 28 reservations entered by States to the Genocide Convention, with 18 States making objections; 57 States have entered reservations to the International Convention on the Elimination of All Forms of Racial Discrimination, with 26 States making objections; 75 States have entered reservations to the Convention on the Elimination of All Forms of Discrimination against Women, with 18 States making objections; 58 States have entered reservations to the International Covenant on Civil and Political Rights, with 17 States making objections; 45 States have entered reservations to the International Covenant on Economic, Social and Cultural Rights, with 10 States making objections; and 74 States have filed reservations to the International Convention on the Rights of the Child, with 13 States filing objections. See records maintained by the Office of the United Nations High Commissioner for Human Rights, <http://www.ohchr.org/English/bodies/index.htm>, updated to 13 December 2005.)

11. The assumption of the Court in 1951 that

"it is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in making the reservation on accession as well as for the appraisal by a State in objecting to the reservation" (*ibid.*, p. 24),

with a view to balancing the freedom to make reservations and the scrutiny and objections of other States, has turned out to be unrealized: a mere handful of States do this. For the great majority, political considerations would seem to prevail.

12. The Court itself was not in 1951 asked to pronounce on the compatibility of particular reservations to the Genocide Convention with its object and purpose — nor indeed whether its answers as to the role of States in making and responding to reservations precluded it from doing

so. Since 1951 many other issues relating to reservations have emerged, that equally were not and could not have been before the Court at that time. Among them are whether, in particular, a role as regards assessment of compatibility with object and purpose is to be assigned to monitoring bodies established under United Nations multilateral human rights treaties. Another related question not asked of the Court in 1951 concerns the scope of powers given to courts at the centre of great human rights treaties, such as the Inter-American Court on Human Rights, the European Court of Human Rights, and, for the future, the African Court on Human and Peoples' Rights. The Court in 1951 had no occasion to address the application of the law of treaties to issues of severability in the context of reservations to human rights treaties. And the Vienna Convention on the Law of Treaties, concluded in 1969, is not wholly unambiguous on these points especially in its Article 19. There are many other issues concerning reservations that were not covered by the Court's Advisory Opinion in 1951, either because they had not been put to the Court or because they had not yet arisen in State practice.

13. The Court's Advisory Opinion in 1951 thus did not settle all matters relating to reservations. To observe this reality is not to attempt to fragment a mythical overarching law on all questions of reservations. The Court's Advisory Opinion in 1951 set out the law as to what it was asked, and no more; and did not foreclose legal developments in respect of hitherto uncharted waters in the future.

14. The issue raised here relates to reservations generally, and not just those to human rights treaties — though this category has perhaps attracted the greatest attention. There now exists a substantial practice and a vast literature as regards many of these problems. A separate opinion attached to a judgment of the Court is neither the time nor the place for a scholarly, and inevitably very lengthy, assessment of this practice and literature. The study of reservations to treaties, in all its complexity, is under preparation in the International Law Commission. (On the issues under consideration in this opinion, see, in particular, Second Report on Reservations to Treaties, by Mr. Alain Pellet, Special Rapporteur, Report of the International Law Commission to the General Assembly on the work of its Forty-ninth Session, *Yearbook of the International Law Commission*, Vol. II, Part Two (1997), pp. 44-57 (Chapter V: "Reservations to Treaties"); Tenth Report on Reservations to Treaties, by Mr. Alain Pellet, Special Rapporteur, Report of the International Law Commission, Fifty-seventh Session, United Nations docs. A/CN.4/558 (1 June 2005), A/CN.4/558/Add.1 (14 June 2005), A/CN.4/558/Add.2 (30 June 2005).)

15. In the meantime certain new trends in practice are also discernible. Both the European Court of Human Rights, and the Inter-American Court of Human Rights, have not followed the “laissez faire” approach attributed to the International Court’s Advisory Opinion of 1951; they have each themselves pronounced upon the compatibility of specific reservations to the European Convention on Human Rights and the American Convention on Human Rights, respectively. They have not thought that it was simply a matter of bilateral sets of obligations, left to individual assessment of the States parties to the Convention concerned. (See in particular, *Belilos v. Switzerland*, Judgment of 29 April 1988, 10 Eur. Ct. H.R. (Ser. A) (1988); *Loizidou v. Turkey*, Judgment of 23 March 1995, Preliminary Objections, 310 Eur. Ct. H.R. (Ser. A) (1995); *The Effect of Reservations on the Entry into Force of the American Convention*, Advisory Opinion OC-2/82, Inter-Am. Ct. Hum. Rts. (Ser. A), No. 2 (1982); *Restrictions to the Death Penalty*, Advisory Opinion OC-3/83, Inter-Am. Ct. Hum. Rts. (Ser. A), No. 3 (1983); see also *Rawle Kennedy v. Trinidad and Tobago*, Human Rights Committee, Communication No. 845, United Nations doc. CCPR/C/67D/845/1999 (31 December 1999).)

16. The Human Rights Committee in General Comment No. 24 (52) has sought to provide some answers to contemporary problems in the context of the International Covenant on Civil and Political Rights, with its analysis being very close to that of the European Court of Human Rights and the Inter-American Court. The practice of such bodies is not to be viewed as “making an exception” to the law as determined in 1951 by the International Court; we take the view that it is rather a development to cover what the Court was never asked at that time, and to address new issues that have arisen subsequently.

17. In 1999 the Court issued Orders dismissing the cases brought by Yugoslavia against Spain and against the United States. The Court satisfied itself with stating:

“Whereas the Genocide Convention does not prohibit reservations; whereas Yugoslavia did not object to the United States reservation to Article IX; and whereas the said reservation had the effect of excluding that Article from the provisions of the Convention in force between the Parties.” (See *Legality of Use of Force (Yugoslavia v. Spain)*, *Provisional Measures, Order of 2 June 1999*, *I.C.J. Reports 1999 (II)*, p. 761, at p. 772, paras. 32 and 33, and *Legality of Use of Force (Yugoslavia v. United States of America)*, *Provisional Measures, Order of 2 June 1999*, *I.C.J. Reports 1999 (II)*, p. 916, at p. 924, paras. 24 and 25.)

18. Spain had contented itself with submitting that Article IX was inapplicable in the mutual relations between Spain and Yugoslavia. The United States, interestingly, had gone beyond this and contended that its

reservation was not contrary to the object and purpose of the Convention. Yugoslavia (in contrast to the present case) had not introduced any argument during the pleadings that the reservations were contrary to the object and purpose of the Convention. So the Court did not pronounce on that issue.

19. In its Order of 10 July 2002 in the present case, the Court did not limit itself to recalling the fact that the Congo had not objected to Rwanda's reservation. It sought also briefly to respond to various other arguments made by the Congo including the claim that such a reservation was contrary to the object and purpose of the Convention. In paragraph 72 the Court stated that:

“whereas that reservation does not bear on the substance of the law, but only on the Court's jurisdiction; whereas it therefore does not appear contrary to the object and purpose of the Convention” (see *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Provisional Measures, Order of 10 July 2002, I.C.J. Reports 2002*, p. 246, para. 72).

20. The Court thus added its own assessment as to the compatibility of Rwanda's reservation with the object and purpose of the Genocide Convention. Paragraph 67 of the present Judgment contains no more generalized finding.

21. The Court has in the present Judgment on jurisdiction again gone beyond noting a reservation by one State and a failure by the other to object. The terms of paragraph 67 (quoted in paragraph 1 above) are not entirely identical to the comparable paragraph 72 in the 2002 Order on provisional measures. We believe it is now clear that it had not been intended to suggest that the fact that a reservation relates to jurisdiction rather than substance necessarily results in its compatibility with the object and purpose of a convention. Much will depend upon the particular convention concerned and the particular reservation. In some treaties not all reservations to specific substantive clauses will necessarily be contrary to the object and purpose of the treaty. Some such reservations to particular substantive clauses in, for example, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, may be of this character. Conversely, a reservation to a specific “procedural” provision in a certain convention, could be contrary to the treaty's object and purpose. For example, the treaty bodies set up under certain United Nations conventions may well be central to the whole efficacy of those instruments. As the Human Rights Committee pointed out in General Comment 24, the periodic submission of reports by States parties to the Committee, and its examination thereof, are at the heart of the covenant system. If a State purported to accept the substantive obligations of the Covenant, but refused to report on them or to participate in the examination of

States reports by the Committee, that could be contrary to the object and purpose of the Covenant. The same might well be true of other monitoring bodies in instruments whose whole efficacy turns upon the State reporting system.

22. Human Rights courts and tribunals have not regarded themselves as precluded by this Court's 1951 Advisory Opinion from doing other than noting whether a particular State has objected to a reservation. This development does not create a "schism" between general international law as represented by the Court's 1951 Advisory Opinion, a "deviation" therefrom by these various courts and tribunals.

23. Rather, it is to be regarded as developing the law to meet contemporary realities, nothing in the specific findings of the Court in 1951 prohibiting this. Indeed, it is clear that the practice of the International Court itself reflects this trend for tribunals and courts themselves to pronounce on compatibility with object and purpose, when the need arises.

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24. We now turn to our second point. While we voted in favour of paragraph 128 of this Judgment, it has become apparent to us that some issues do require further consideration.

25. It is a matter for serious concern that at the beginning of the twenty-first century it is still for States to choose whether they consent to the Court adjudicating claims that they have committed genocide. It must be regarded as a very grave matter that a State should be in a position to shield from international judicial scrutiny any claim that might be made against it concerning genocide. A State so doing shows the world scant confidence that it would never, ever, commit genocide, one of the greatest crimes known.

26. Judicial settlement of claims relating to genocide is highly desirable. At the same time, it cannot be said that the entire scheme of the Genocide Convention would necessarily collapse if some States make reservations to Article IX. Were it so, adherence to the jurisdiction of the Court could have been made compulsory, as is now the case as regards the European Convention on Human Rights in relation to the European Court of Human Rights. The International Court in 1951 held that no prohibition against reservations was to be inferred from the silence in the Genocide Convention itself. Further, it did so fully aware that the reservations in question in fact related to Article IX. In that context it may be recalled that the Convention defines Genocide (Art. II), and identifies acts that "shall be punishable" (Art. III). Articles IV to VII concern measures to be undertaken by States to punish persons charged with genocide, primarily by enacting legislation within their own territory.

There is also reference to trial by “such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction”. The International Court of Justice is clearly not the penal tribunal envisaged to try and punish individuals.

27. No doubt these are the considerations that the Court has had in mind in its findings, thus far, that a reservation to Article IX is not incompatible with the objects and purposes of the Convention.

28. There are other elements, however, that continue to concern us. While the Court is not a monitoring body under a treaty in the normal sense of that term (that is to say, it does not receive obligatory reports from States upon which it examines them for compliance), it nonetheless does have an important role under the Genocide Convention. Under that Convention it is States who are the monitors of each other’s compliance with prohibition on genocide. Article IX then gives a State who believes another State is committing genocide the chance to come to the Court. Article IX speaks not only of disputes over the interpretation and application of the Convention, but over the “fulfilment of the Convention”. Further, the disputes that may be referred to the Court under Article IX “include[e] those relating to the responsibility of a State for genocide”.

29. It is thus not self-evident that a reservation to Article IX could not be regarded as incompatible with the object and purpose of the Convention and we believe that this is a matter that the Court should revisit for further consideration.

*(Signed)* Rosalyn HIGGINS.

*(Signed)* Pieter H. KOOIJMANS.

*(Signed)* Nabil ELARABY.

*(Signed)* Hisashi OWADA.

*(Signed)* Bruno SIMMA.