JOINT DECLARATION OF JUDGES SHI AND KOROMA

Serious doubts regarding interpretation of the Genocide Convention "by implication" that a State could be held directly to have committed crime of genocide — Convention envisages the trial and punishment of individuals for the crime of genocide rather than the criminal responsibility of the State as a State — Task of treaty interpretation is to determine meaning of its provisions as intended at the time of the treaty's negotiation and conclusion — Article 31 of the Vienna Convention on the Law of Treaties: a treaty should be interpreted in accordance with the ordinary meaning of its terms in their context and in the light of its object and purpose — Convention binds States Parties to undertake to prevent and to punish persons responsible for committing genocide.

Intrinsic humanitarian value of the Judgment's conclusion and the overriding legal imperative established by Article I of the Convention for a State to do what it properly can, within its means and the law, to try to prevent genocide when there is a serious danger of its occurrence of which the State is or should be aware — Obligation to prevent requires identification of a clear missed moment of opportunity to act — Chapter VII Security Council resolutions clearly warned of the imminent and serious humanitarian risk posed by any advance of Bosnian Serb paramilitary units on Srebrenica and its surroundings — Mr. Milošević could and should have exerted whatever pressure he had at his disposal to try to prevent the genocide at Srebrenica.

1. We entertain more than serious doubts regarding the interpretation given to the Genocide Convention in the Judgment to the effect that a State can be held directly to have committed the crime of genocide. This interpretation is not only highly questionable but also inconsistent with the object and purpose of the Convention, as well as its wording and plain meaning. As an international criminal instrument, the Convention envisages the trial and punishment of individuals for the crime of genocide. It does not impose criminal responsibility on the State as a State. Indeed, it could not have done so at the time it was adopted given that the notion of crime of State was not part of international law and even today general international law does not recognize the notion of the criminal responsibility of the State. We therefore do not subscribe to an expansive interpretation of the Convention producing an outcome which is contrary to its plain meaning. The Court has stressed that "[i]nterpretation must be based above all upon the text of the treaty" (*Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 22, para. 41). It should be further emphasized that the purpose of interpreting a treaty is to determine the meaning of its provisions which

the parties must be taken to have intended at the time the treaty was negotiated and concluded, and not to achieve a desired outcome. Accordingly, it is not within the power of the Court to give an arbitrary and subjective interpretation to a treaty contrary to its plain meaning and the intention of the parties.

2. According to the canons of interpretation reflected in Article 31 of the Vienna Convention on the Law of Treaties, a treaty should be interpreted in accordance with the ordinary meaning of its terms in their context and in the light of its object and purpose. Those same rules give primacy to the intention of the parties at the time the treaty was concluded, and in particular the meaning attached by them to the words and phrases at the time. According to Jennings and Watts:

> "A treaty is to be interpreted in the light of general rules of international law in force at the time of its conclusion — the so-called inter-temporal law. This follows from the general principle that a juridical fact must be appreciated in the light of the law contemporary with it. Similarly, a treaty's terms are normally to be interpreted on the basis of their meaning at the time the treaty was concluded, and in the light of circumstances then prevailing.
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> Nevertheless, in some respects the interpretation of a treaty's provisions cannot be divorced from developments in the law subsequent to its adoption. Thus, even though a treaty when concluded did not conflict with any rule of *jus cogens*, it will become void if there subsequently emerges a new rule of *jus cogens* with which it is in conflict. Similarly, the concepts embodied in a treaty may be not static but evolutionary, in which case their 'interpretation cannot remain unaffected by the subsequent development of law . . . Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.'
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> While these considerations may in certain circumstances go some way towards negating the application of the inter-temporal law, that law will still, even in such circumstances, provide at least the starting-point for arriving at the proper interpretation of the treaty." (*Oppenheim's International Law*, Vol. I, 1992, pp. 1281-1282; footnotes omitted.)

3. The object and purpose of the Genocide Convention is to prevent and to punish the crime of genocide, and, reflecting the Nuremberg principles, the Convention is directed against individuals and not the State. The Convention binds States parties to punish persons responsible for committing genocide and genocidal acts. Article II of the Convention defines the crime of genocide, while Article III sets out the punishable offences in relation to the crime. Article IV provides for the punishment of persons committing any of the acts enumerated in Article III, be they constitutionally responsible rulers, public officials or private individuals. The Convention thus contemplates the prosecution and punishment of

individuals, rather than the State. States parties' responsibilities are spelled out in different terms, regarding which Article V requires the parties to enact the necessary legislation to give effect to the provisions of the Convention and, in particular, to provide effective penalties for persons guilty of genocide or other acts set out in Article III. Article VI requires that persons charged with genocide or any other such punishable acts shall be tried by competent national or international tribunals. Article VII states that genocide is not to be considered a political crime and requires parties to extradite the accused, while Article VIII provides that:

> "Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article III."

4. It is with respect to these specific provisions concerning legislation, extradition, trial, and punishment of individuals alleged to have committed the crime of genocide that the State party may be held to be in breach of the Convention. States parties' obligations, as well as the object and purpose of the Convention, thus are aimed at preventing and punishing *individuals* who commit the crime of genocide and there was no intention that a State party should punish itself for the crime of genocide. According to Hersch Lauterpacht:

> "The Convention on the Prevention and Punishment of the Crime of Genocide approved by the General Assembly in 1948 lays down that genocide, whether committed in time of peace or war, is a crime under international law which the Parties undertake to prevent and to punish and that the persons responsible for that crime shall be punished 'whether they are constitutionally responsible rulers, public officials or private individuals'. *The Convention thus subjected individuals to the direct obligation and sanction of international law.*" (*International Law and Human Rights*, 1950, p. 44; emphasis added; footnote omitted.)

Hence, Article I of the Convention has to be interpreted in the light of Article VI and the attempt in the Judgment to sever Article I of the Convention from Articles IV, V, VI, VII and VIII, in order to reach the outcome stated in the Judgment, is to us legally unsustainable and contrary to the object and purpose of the Convention, the meaning of the text of the Convention and the real intention of the parties. It is contrary to the intention of the Contracting Parties when the Judgment interprets Article I of the Convention to mean by implication or logic (paragraph 166 of the Judgment) that the Convention imposes upon a State the obligation not to commit genocide. If a State can commit the crime of genocide, then surely it would have to be viewed as being able to commit other crimes, including murder. But such a situation is neither acceptable nor recognized as part of present-day international law. As stated earlier,

"interpretation" by implication or logic cannot replace the overriding rule that primary regard must be given to the intention of the parties at the time the treaty was concluded. Moreover, in our view, if the Convention was intended to establish an obligation of such grave import as one that could entail some form of criminal responsibility or punishment of a State by an international tribunal such as this Court for genocide, this would have been expressly stipulated in the Convention, but the Convention did not do so. We take the view that it is in order to avoid attributing genocide to the State itself that the Convention provides in Article IV, "[p]ersons committing genocide or any of the other acts enumerated in Article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals", thus putting the responsibility for the crime on the individual. A proposed amendment to the effect that such acts committed by individuals acting on behalf of the State would be considered a breach of the Convention, and that such cases should be submitted to the International Court of Justice, which would order the cessation of the acts and payment of reparation to the victims, was rejected during the drafting negotiations on the basis of the view that the purpose of the Convention was to punish genocide, and any other responsibility than criminal would be out of place in such a convention. The Court is not vested with penal jurisdiction, nor is it equipped to exercise such jurisdiction in this case. In other words, the Convention does not entitle the Court to hold a criminal trial, nor impose on the State an obligation to pay damages (punitive or otherwise) or to provide for them in its domestic legislation. Hence, an earlier attempt — like that made in the present Judgment — to transform the essentially individual criminal concept of genocide, as was conceived in the Convention, into one whereunder a State may be held responsible for committing genocide was rejected during the negotiation of the Convention (see United Nations, *Official Records of the General Assembly, Third Session, Part I, Sixth Committee, Annex,* doc. A/C.6/236 and Corr.1). Such an important obligation, in our view, would have been expressly stated in the Convention if such had been the intention of the Contracting Parties.

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5. Notwithstanding our disagreement with the interpretation reached "by implication" that Article I of the Convention imposes an obligation on the State not to commit genocide, we have voted in favour of the findings regarding the prevention of genocide in Srebrenica in July 1995, as we believe in the intrinsic humanitarian value of the conclusion reached by the Court and recognize the overriding legal imperative established by Article I of the Convention, namely: the duty of a State to do what it properly can, within its means and the law, to try to prevent genocide when there is a serious danger of its occurrence of which the State is or should be aware. (See also *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J.*

Reports 1951, p. 23: "[t]he principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation".)

6. We believe that the conclusion reached in the Judgment in connection with the prevention obligation would have been legally secure if anchored on the relevant Security Council resolutions, instead of the various hypotheses put forward in the Judgment. The present formulations do not clearly specify what opportunities the Respondent had to prevent the genocide, while the Security Council had in fact very clearly warned of the imminent and serious humanitarian risk posed by any advance of Bosnian Serb paramilitary units on Srebrenica and its surroundings. That finding a breach of the obligation to prevent requires the identification of a clear *missed moment of opportunity* to act has been underscored by the European Court of Human Rights in its interpretation of the positive obligation to protect human life contained in Article 2, paragraph 1, of the European Convention for the Protection of Human Rights and Fundamental Freedoms (see *Osman* v. *United Kingdom*, Judgment of 28 October 1998, Reports 1998-VIII, p. 3159). With regard to the relevant Security Council resolutions, we would recall that the Security Council, in resolution 819 (16 April 1993), noted the provisional measures ordered by the Court in 1993, stating, *inter alia*, that the FRY should take all measures within its power to prevent the commission of the crime of genocide. Resolution 819 went on to condemn "ethnic cleansing" and to express specific concern over the "pattern of hostilities" by Bosnian Serb paramilitary units that by "direct consequence" had led to an ongoing "tragic humanitarian emergency" in Srebrenica. Acting under Chapter VII, the Council then demanded that "Srebrenica and its surroundings" be treated as a safe area free from any attack and that the besieged population be permitted to receive appropriate humanitarian relief. The Council's decision with respect to "Srebrenica and its surroundings", together with its specific concern about war crimes and the deteriorating humanitarian situation in Srebrenica, certainly suggests some real opportunities for the Bosnian Serb leadership to have acted to try to prevent the genocide. Awareness of a specific risk may have been raised as early as 2 July 1995 (the date of the plan to reduce "the enclave to the urban area"), or on 6 July when the attack on Srebrenica's surroundings actually began. A specific risk undeniably existed by 12 July when Srebrenica had fallen but the mass killings had not yet begun and the Security Council, acting under Chapter VII, passed resolution 1004 (1995) demanding that the Bosnian Serb forces cease their offensive and withdraw from the Srebrenica safe area immediately and that all parties respect the Agreement of 18 April 1993 (essentially implementing resolution 819) (1993).

7. Mr. Milošević, even though it has not been proved that he had effective control over the Bosnian Serb leadership, could and should have exerted whatever pressure he had at his disposal, given the humanitarian directives concerning Srebrenica that were the focus of Chapter VII Security Council decisions in resolutions 819 (16 April 1993) and 1004 (12 July 1995).

(Signed) SHI Jiuyong.

(Signed) Abdul G. KOROMA.