SEPARATE OPINION OF JUDGE DUGARD

Circumstances to be considered in deciding when to remove case from the List — Manifest lack of jurisdiction warranting removal from List when no reasonable possibility that jurisdiction may be established in subsequent proceedings — Grounds advanced for jurisdiction in present proceedings manifestly unfounded — Need to remove Application from List — Expression of concern that Court's even-handed comments on situation might be improperly interpreted.

1. While I agree with the Order of the Court rejecting the request for the indication of provisional measures submitted by the Democratic Republic of the Congo, I am unable to agree with the Order of the Court that the case should not be removed from the Court's List.

2. For many years there has been a debate over the question whether an Order for provisional measures, made under Article 41 of the Statute of the International Court of Justice, is binding or not. In the *LaGrand* case, the Court gave its answer: such an Order is binding upon States (*LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, pp. 498-508, paras. 92-116). As a consequence of this decision, provisional measures will assume a greater importance than before and there will be a greater incentive on the part of States to request such measures. In these circumstances, the Court should be cautious in making Orders for provisional measures where there are serious doubts about the basis for jurisdiction and strict in its response to requests for provisional measures where the jurisdictional basis for the claim is manifestly unfounded. If it fails to adopt such an approach, the Court will be inundated with requests for provisional measures.

3. The Court has expressed itself clearly on the need for caution in the granting of provisional measures where there is inadequate basis for the exercise of jurisdiction on the merits of the case[1]. In the case concerning *Legality of Use of Force (Yugoslavia* v. *Belgium)* the Court stated that it ought not to grant a request for provisional measures "unless the provisions invoked by the applicant appear, prima facie, to afford a basis on which the jurisdiction of the Court might be established" (*Legality of Use*

[1] For a survey of this jurisprudence, see the separate opinion of Judge Higgins in the case concerning *Legality of Use of Force (Yugoslavia* v. *Belgium), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (I)*, pp. 164-168, paras. 12-25.

of Force (Yugoslavia v. *Belgium), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (I),* p. 132, para. 21). This test is endorsed by the Court in its present Order (para. 58).

4. The jurisprudence of the Court is less clear on the action it should take, if any, where the Applicant requesting provisional measures has failed to establish, prima facie, a basis for jurisdiction. No doubt this is because before the cases concerning the *Legality of Use of Force* between Yugoslavia and ten NATO States in 1999, there was no case in which the Applicant requesting provisional measures had failed to establish a prima facie basis for jurisdiction. In these cases the Court addressed the question of what to do in such circumstances and held that two of the ten Applications, those brought by Yugoslavia against Spain and the United States, should be removed from the List of cases before the Court. In these two cases the Court held that where it "manifestly" lacked jurisdiction, by reason, *inter alia*, of the reservations by Spain and the United States of America to the Genocide Convention excluding the jurisdiction of the Court, the cases should be removed from the List because

> "within a system of consensual jurisdiction, to maintain on the General List a case upon which it appears certain that the Court will not be able to adjudicate on the merits would most assuredly not contribute to the sound administration of justice" (*Legality of Use of Force (Yugoslavia* v. *Spain), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (II)*, p. 773, para. 35; *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. 925, para. 29).

In the eight other Applications brought by Yugoslavia against NATO States, which were parties to the Genocide Convention but had failed to exclude the Court's jurisdiction by reservation, the Court held that although "at this stage of the proceedings" it could not find that the acts imputed by Yugoslavia to the respondent States fell within the provisions of the Genocide Convention, and could thus afford a basis for the exercise of jurisdiction under Article IX of the Convention, it might be possible for Yugoslavia to develop its position in this respect at a later stage. Hence it refused to remove the cases from the List.

5. It is not my intention to explore the reasoning of the Court on this matter. Suffice it to say that the Court reached its decision in these cases on the circumstances of these cases without attempting to expound any general test for deciding when it "manifestly" lacked jurisdiction. Several formulations which give greater guidance were, however,

advanced by individual judges in these cases. Judge Higgins stated that where

> "it is clear beyond doubt that no jurisdiction exists in a particular case, good administration of justice requires that the case be immediately struck off the List *in limine*" (*Legality of Use of Force (Yugoslavia* v. *Belgium), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (I)*, p. 169, para. 29).

Judge Gaja, in considering "the situation in which the Applicant invokes a jurisdictional clause in a treaty, but has not shown that a reasonable connection exists between the dispute submitted to the Court and the treaty including the clause", maintained that in such circumstances the case should be struck off the List "only if no such connection could be established at subsequent stages of the proceedings" (*Legality of Use of Force (Yugoslavia* v. *Italy), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (I)*, p. 502). He continued by stating that

> "When on the contrary a reasonable connection may conceivably appear in the future, it would be too drastic a solution to remove the case from the List. The applicant State should therefore be given an opportunity to develop its position in a memorial — whether or not its arguments are meritorious." *(Ibid.)*

Judge Oda, in holding that all ten of Yugoslavia's Applications against NATO States should be struck off the List, reasoned that where the Court finds in an Application for provisional measures that "there is not even a prima facie basis of jurisdiction", this

> "should be interpreted as a ruling that it has no jurisdiction whatsoever to entertain the Applications, without leaving any room to retain these cases and to deal with the issue of jurisdiction in the future" (*Legality of Use of Force (Yugoslavia* v. *Belgium), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (I)*, p. 159, para. 27).

6. Judge Oda's suggestion that once the Court has found that there is no prima facie basis for jurisdiction in an Application for provisional measures the case should automatically be struck off the List is probably too drastic a response as it fails to allow for a consideration of the circumstances of individual cases. It seems wiser therefore to adopt guidelines for the interpretation of the test of "manifest lack of jurisdiction" which would enable the Court to consider the factors such as the history of the Application, the likelihood that the Applicant will be able to show in future that there exists a reasonable connection between the dispute and the treaty invoked to found jurisdiction (as suggested by Judge Gaja) and the prospects of any preconditions for the establishment of jurisdiction being met. Such guidelines might be subsumed in a test of

reasonableness; a case should be removed from the List where there is no reasonable possibility, based on the facts and circumstances of the unsuccessful Application, that the Applicant will at some future date be able to establish the jurisdiction of the Court on the instruments invoked for jurisdiction in the Application for provisional measures.

7. In the present case the Court has rightly held that the instruments invoked by the Applicant, prima facie, provide no basis for jurisdiction. It does not, however, go so far as to hold that there is a "manifest lack of jurisdiction" warranting the removal of the Application from the List (Order, para. 91). The Court gives no clear reason for this finding, but suggests that the failure of the Applicant to meet preconditions for the establishment of jurisdiction or to show a connection between the dispute before the Court and the treaties relied upon for jurisdiction "at this stage in the proceedings" (Order, paras. 79, 82 and 88) might be remedied at a later stage of the proceedings (Order, para. 90). In my view, such a finding sets too low a threshold for "manifest lack of jurisdiction" in the circumstances of the present case, and sets a dangerous precedent for the Court.

8. In the present Application the Congo has relied on eight instruments to found jurisdiction, six of which *manifestly* do not provide the remotest basis for jurisdiction — as shown by the Court in its Order. The Convention against Torture of 1984 provides no basis for jurisdiction as Rwanda is not a party to this Convention (Order, para. 61). The Convention on Racial Discrimination of 1966 and the Genocide Convention of 1948 provide no basis for jurisdiction as Rwanda has by reservation excluded the jurisdiction of the Court (Order, paras. 67 and 72). The Vienna Convention on the Law of Treaties is inapplicable as there is no dispute whatsoever between the Congo and Rwanda concerning a conflict between a treaty and peremptory norm of international law, as provided for in Articles 53 and 66 (Order, para. 75). The Unesco Constitution is likewise inapplicable as there is no dispute whatsoever between the Congo and Rwanda over the interpretation of the Unesco Constitution as contemplated by Article XIV, paragraph 2, of this Constitution (Order, para. 85). The Constitution of the World Health Organization places obligations on the World Health Organization and not on member States to promote health (Arts. 1 and 2). Article 75 of the Constitution of the WHO could not therefore give the Court jurisdiction over a dispute concerning an allegation that a State had undermined the health of persons in another country (Order, para. 82).

9. This leaves only the compromissory clauses in the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (hereinafter Montreal Convention) and the Convention on the Elimination of All Forms of Discrimination against Women (hereinafter

Convention on Discrimination against Women) as possible grounds for the establishment of jurisdiction.

10. The claim that Article 14 of the Montreal Convention provides a basis for jurisdiction must be seen in its historical context. In 1999 the Congo brought an Application before the Court similar to the present one in which it sought to found the jurisdiction of the Court on the compromissory clause in the Montreal Convention, alleging that in 1998 a civil aircraft had been shot down by the forces of Rwanda, Uganda or Burundi. Following Rwanda's Memorial in response to this allegation, in which it denied that the Congo had defined the nature of the dispute or complied with the preconditions of negotiation or arbitration laid down in Article 14 of the Convention, the Congo notified the Court on 15 January 2001 that it wished to discontinue the proceedings but that it "reserved the right to invoke subsequently new grounds of jurisdiction of the Court" (*I.C.J. Yearbook 2000-2001,* No. 55, p. 286). In the present Application the Congo again argued that the Court had jurisdiction over the dispute under Article 14 of the Montreal Convention on the basis of the shooting down of the civil aircraft in 1998, but made no request to indicate any provisional measure relating to rights under the Montreal Convention (Order, para. 88). Nor did it even suggest that it had made any attempt at negotiation or arbitration in respect of the dispute over the shooting down of the aircraft in 1998, before or after the withdrawal of its earlier Application in January 2001, despite Rwanda's warning in its Memorial of 2000 that failure to do this constituted a flaw in its argument on jurisdiction. The accumulation of objections to the establishment of jurisdiction under Article 14 of the Montreal Convention — non-compliance with the preconditions for jurisdiction, failure to specify the nature of the dispute or to request provisional measures relating to rights under the Convention and the resurrection of a complaint of 1998 in the form of a cause of action for urgent measures in 2002 — surely indicates that the Montreal Convention *manifestly* does not constitute a basis for the establishment of jurisdiction. It is "clear beyond doubt that no jurisdiction exists" in this case on the basis of the Montreal Convention — in the words of Judge Higgins (see paragraph 5 above). Moreover, the discontinuance of proceedings based on this jurisdictional ground in 2001 and the rejection of this jurisdictional argument in the present proceedings demonstrates that there is no real possibility that a reasonable connection between the dispute submitted to the Court and Article 14 of the Montreal Convention could be established at subsequent stages of the proceedings (see the comment by Judge Gaja, paragraph 5 above).

11. It is clear that women have suffered disproportionately in the con-

flict in the eastern part of the Congo. They have been subjected to rape, torture, mutilation and murder and deliberately infected with HIV by forces employing sexual violence as an instrument of terror and war. Crimes of this kind are the concern of international humanitarian law which brings "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity" within the definition of crime against humanity (Art. 7, para. 1, of the Rome Statute of the International Criminal Court, 1998) and provides for individual criminal responsibility and punishment for such crimes. Whether the Convention on Discrimination against Women, which obliges States to adopt measures to eliminate discrimination against women in their law and practice, but imposes no effective procedures for its enforcement (such as the procedure for inter-State disputes to be found in Article 11 of the Convention on Race Discrimination), is an appropriate instrument for the protection of women in armed conflict remains uncertain.

The Court was not, however, required to consider this matter as the Congo failed to indicate, even on a prima facie basis, that it had complied with the preconditions for the establishment of the Court's jurisdiction under Article 29 of the Convention (Order, para. 79). There was no evidence of a dispute between the Congo and Rwanda over the interpretation or application of the Convention; no evidence of an attempt to settle any dispute under the Convention by negotiation; and no evidence of an attempt to submit any dispute under this Convention to arbitration. The sad truth is that the dispute between the Congo and Rwanda is not about women's rights or the treatment of women but about the armed conflict in the Congo. This was made clear by the Congo in its oral reply when, in response to Rwanda's argument that there had been no negotiation or request for arbitration as required by the compromissory clause in the Convention on Discrimination against Women, it stated that Rwanda had rejected Congo's proposals for "the settlement of certain specific armed conflicts" at a number of conferences and meetings (Order, para. 51).

In these circumstances it is clear that there is no reasonable possibility that Article 29 of the Convention on Discrimination against Women will provide a jurisdictional basis for the present dispute between the Congo and Rwanda over the armed conflict in the eastern Congo. It manifestly provides no basis for jurisdiction as there is no reasonable possibility that the Applicant will in future be able to establish a connection between the dispute before the Court and Article 29.

12. I have endeavoured to show that none of the eight instruments advanced by the Applicant to found jurisdiction in the present proceedings, viewed separately, offers, prima facie, a basis for jurisdiction in the

present dispute, either now or in future. The absence of jurisdiction is therefore manifest. This conclusion is even stronger if one views the eight instruments cumulatively. The Applicant is clutching at straws to found jurisdiction in this matter. It has clutched at eight straws in the hope that their cumulative effect might compensate for the failure of each one individually to offer a basis for jurisdiction. The Court should show its displeasure for this strategy by striking the Application from the List.

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13. Both Rwanda and the Congo have suffered seriously in the past decade as a result of civil strife and armed conflict. The present Order makes no judgment on the conduct of either Party. It rightly expresses concern about the human suffering in the region of the eastern Congo and calls upon States in the region to abide by the rule of law (Order, paras. 54-56 and 93). It is not possible to infer that, because Rwanda is the Respondent in the present proceedings, the comments of the Court apply more to it than tc the Congo. Nor may it be suggested that because Rwanda has declined to accept the Court's jurisdiction in this matter that it has anything to hide. It has simply exercised its right not to submit to the Court's jurisdiction, a right which forms the cornerstone of the present international order in which judicial settlement is premised on consent (Order, paras. 57 and 92).

The Court's call to States to act in conformity with international law, particularly international humanitarian law, applies to all States in the region, including both the Congo and Rwanda. It does not in any way prejudge the issues raised in the present proceedings.

(Signed) John DUGARD.