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Cour internationale de Justice

LA HAYE

International Court of Justice

THE HAGUE

ANNÉE 2005

Audience publique

tenue le lundi 4 juillet 2005, à 10 heures, au Palais de la Paix,

sous la présidence de M. Shi, président,

***en l'affaire des* Activités armées sur le territoire du Congo (nouvelle requête : 2002)**
(République démocratique du Congo c. Rwanda)

COMPTE RENDU

YEAR 2005

Public sitting

held on Monday 4 July 2005, at 10 a.m., at the Peace Palace,

President Shi presiding,

***in the case concerning* Armed Activities on the Territory of the Congo**
(New Application: 2002)
(Democratic Republic of the Congo *v.* Rwanda)

VERBATIM RECORD

Présents : M. Shi, président
M. Ranjeva, vice-président
MM. Koroma
Vereshchetin
Mme Higgins
MM. Parra-Aranguren
Kooijmans
Rezek
Al-Khasawneh
Buergenthal
Elaraby
Owada
Simma
Tomka
Abraham, juges
MM. Dugard
Mavungu Mvumbi-di-Ngoma, juges *ad hoc*

M. Couvreur, greffier

Present:	President	Shi
	Vice-President	Ranjeva
	Judges	Koroma
		Vereshchetin
		Higgins
		Parra-Aranguren
		Kooijmans
		Rezek
		Al-Khasawneh
		Buergenthal
		Elaraby
		Owada
		Simma
		Tomka
		Abraham
	Judges *ad hoc*	Dugard
		Mavungu Mvumbi-di-Ngoma
	Registrar	Couvreur

Le Gouvernement de la République démocratique du Congo est représenté par :

S. Exc. M[e] Honorius Kisimba Ngoy Ndalewe, ministre de la justice et garde des sceaux de la République démocratique du Congo,

comme chef de la délégation;

S. Exc. M. Jacques Masangu-a-Mwanza, ambassadeur extraordinaire et plénipotentiaire de la République démocratique du Congo auprès du Royaume des Pays-Bas,

comme agent;

M. Ntumba Luaba Lumu, secrétaire général du gouvernement,

comme coagent et conseil;

M. Lwamba Katansi,

M. Mukadi Bonyi,

M. Akele Adau,

comme conseils et avocats;

M[e] Crispin Mutumbe Mbuya, conseiller juridique du ministre de la justice et garde des sceaux,

M. Victor Musompo Kasongo, secrétaire particulier du ministre de la justice et garde des sceaux,

M. Nsingi-zi-Mayemba, premier conseiller d'ambassade de la République démocratique du Congo au Royaume des Pays-Bas,

Mme Marceline Masele, deuxième conseiller d'ambassade de la République démocratique du Congo au Royaume des Pays-Bas,

comme conseillers;

M. Richard Lukunda,

comme assistant des conseils et avocats.

Le Gouvernement de la République du Rwanda est représenté par :

M. Martin Ngoga, procureur général adjoint de la République du Rwanda,

comme agent;

S. Exc. M. Joseph Bonesha, ambassadeur de la République du Rwanda auprès du Royaume de Belgique et ambassadeur désigné auprès du Royaume des Pays-Bas,

comme agent adjoint;

The Government of the Democratic Republic of the Congo is represented by:

H. E. *Maître* Honorius Kisimba Ngoy Ndalewe, Minister of Justice and Keeper of the Seals of the Democratic Republic of the Congo,

as Head of Delegation;

H. E. Mr. Jacques Masangu-a-Mwanza, Ambassador Extraordinary and Plenipotentiary of the Democratic Republic of the Congo to the Kingdom of the Netherlands,

as Agent;

Professor Ntumba Luaba Lumu, Secretary-General to the Government,

as Co-Agent and Counsel;

Professor Lwamba Katansi,

Professor Mukadi Bonyi,

Professor Akele Adau,

as Counsel and Advocates;

Maître Crispin Mutumbe Mbuya, Legal Adviser to the Minister of Justice and Keeper of the Seals,

Mr. Victor Musompo Kasongo, Private Secretary to the Minister of Justice and Keeper of the Seals,

Mr. Nsingi-zi-Mayemba, First Adviser to the Embassy of the Democratic Republic of the Congo in the Kingdom of the Netherlands,

Ms Marceline Masele, Second Adviser to the Embassy of the Democratic Republic of the Congo in the Kingdom of the Netherlands,

as Advisers;

Mr. Richard Lukunda,

as Assistant to Counsel and Advocates.

The Government of the Republic of Rwanda is represented by:

Mr. Martin Ngoga, Deputy Prosecutor General of the Republic of Rwanda,

as Agent;

H.E. Mr. Joseph Bonesha, Ambassador of the Republic of Rwanda to the Kingdom of Belgium and Ambassador Designate to the Kingdom of the Netherlands,

as Deputy Agent;

M. Greenwood, C.M.G., Q.C., professeur de droit international à la *London School of Economics and Political Science*, membre du barreau d'Angleterre,

Mme Jessica Wells, membre du barreau d'Angleterre,

comme conseils;

Mme Susan Greenwood,

comme secrétaire.

Mr. Christopher Greenwood, Q.C., Professor of International Law at the London School of Economics and Political Science, member of the English Bar,

Ms Jessica Wells, member of the English Bar,

as Counsel;

Ms Susan Greenwood,

as Secretary.

The PRESIDENT: Please be seated. The sitting is open.

The Court meets today to hear the oral arguments of the Parties in the case concerning *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda)*.

Since the Court does not include upon the Bench a judge of the nationality of either of the Parties, both Parties have availed themselves of the right, under Article 31, paragraph 2, of the Statute, to choose a judge *ad hoc*. Judge Christopher John Robert Dugard, chosen by the Republic of Rwanda, and Judge Jean-Pierre Mavungu Mvumbi-di-Ngoma, chosen by the Democratic Republic of the Congo, were both installed as judges *ad hoc* in the case on 13 June 2002.

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I shall now recall the principal steps of the procedure so far followed in this case. On 28 May 2002, the Democratic Republic of the Congo instituted proceedings against the Republic of Rwanda in respect of a dispute concerning "massive, serious and flagrant violations of human rights and of international humanitarian law" allegedly resulting from acts of armed aggression perpetrated by Rwanda on the territory of the Democratic Republic of the Congo in flagrant breach of the sovereignty and territorial integrity of the latter, as guaranteed by the United Nations and OAU Charters.

In its Application, the Congo, referring to Article 36, paragraph 1, of the Statute, relied, in order to found the jurisdiction of the Court, on Article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination; Article 29, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women; Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide; Article 75 of the Constitution of the World Health Organization; Article XIV, paragraph 2, of the Constitution of the United Nations Educational, Scientific and Cultural Organization and Article 9 of the Convention on Privileges and Immunities of Specialized Agencies; Article 30, paragraph 1, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and Article 14, paragraph 1, of

the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation.

The Congo further contends that the Vienna Convention on the Law of Treaties established the jurisdiction of the Court to settle disputes arising from the violation of peremptory norms, *jus cogen,* in the area of human rights, as those norms are reflected in a number of international instruments.

On 28 May 2002, immediately after filing its Application, the Congo also submitted a request for the indication of provisional measures pursuant to Article 41 of the Statute of the Court and Articles 73 and 74 of its Rules.

At the hearings on the request for the indication of provisional measures submitted by the Congo, Rwanda asked the Court to remove the case from the List. By Order of 10 July 2002 the Court rejected the Congo's request for the indication of provisional measures and Rwanda's request that the case be removed from the List.

At a meeting held by the President of the Court with the Agents of the Parties on 4 September 2002, Rwanda proposed that the procedure provided for in Article 79, paragraphs 2 and 3, of the Rules of Court be followed, and that the questions of jurisdiction and admissibility in the case therefore be determined separately before any proceedings on the merits; the Congo stated that it would leave the decision in this regard to the Court. At the conclusion of the meeting the Parties agreed that, in the event that this procedure was followed, Rwanda would first present a Memorial dealing exclusively with the questions of jurisdiction and admissibility, to which the Congo would reply in a Counter-Memorial confined to the same questions.

By Order of 18 September 2002, the Court decided that the written pleadings would first be addressed to the questions of the jurisdiction of the Court to entertain the Application and of its admissibility and fixed 20 January 2003 and 20 May 2003 as the time-limits for the filing of a Memorial by Rwanda and a Counter-Memorial by the Congo, respectively. The Memorial and Counter-Memorial were filed within the time-limits so prescribed.

In accordance with directions given to him by the Court under Article 43 of the Rules of Court, the Registrar sent the notification provided for in Article 63, paragraph 1, of the Statute to all the States parties to the Convention on Discrimination against Women, the WHO Constitution,

the Unesco Constitution, the Montreal Convention and the Vienna Convention on the Law of Treaties.

In accordance with instructions given to him by the Court under Article 69, paragraph 3, of the Rules of Court, the Registrar also sent the notifications provided for in Article 34, paragraph 3, of the Statute and communicated copies of the written pleadings to the Secretary-General of the United Nations, in respect of the Convention on Discrimination against Women; to the Director-General of the WHO, in respect of the WHO Constitution; to the Director-General of Unesco, in respect of the Unesco Constitution; and to the Secretary General of the International Civil Aviation Organization, in respect of the Montreal Convention. He also asked the organizations concerned whether they intended to submit observations in writing within the meaning of Article 69, paragraph 3, of the Rules of Court. None of them expressed the wish to submit such observations.

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I would add that the Court, having ascertained the views of the Parties, has decided, pursuant to Article 53, paragraph 2, of its Rules, that copies of the pleadings and documents annexed will be made accessible to the public on the opening of the oral proceedings.

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I note the presence at the hearing of the Agents, counsel and advocates of both Parties.

In accordance with the arrangements on the organization of procedure which have been decided by the Court, the hearings will comprise a first and a second round of oral argument. Rwanda will present its first round of oral argument this morning, until 1 p.m. The Congo will present its first round of oral argument tomorrow morning at 10 o'clock. Rwanda will then present its oral reply on Wednesday 6 July at 3 p.m. For its part, the Congo will present its oral reply on Friday 8 July at 10 a.m.

May I take this opportunity to remind you that the time allotted to the Parties for their oral argument is a *maximum*, which they are under no obligation to use in full. On the contrary, the

Court would appreciate it if the Parties would kindly be as brief as necessary in presenting their respective cases, and that they duly bear in mind the requirements of paragraph 1 of Article 60 of the Rules of Court, which provides as follows:

> "The oral statements made on behalf of each party shall be as succinct as possible within the limits of what is requisite for the adequate presentation of that party's contentions at the hearing. Accordingly, they shall be directed to the issues that still divide the parties, and shall not go over the whole ground covered by the pleadings, or merely repeat the facts and arguments these contain."

This applies in particular to the second round of argument.

I now give the floor to Mr. Martin Ngoga, Agent of the Republic of Rwanda. Mr. Ngoga, you have the floor, please.

Mr. NGOGA:

1.1. Mr. President, Members of the Court, it is an honour for me to appear before you today as Agent of the Republic of Rwanda in the proceedings instituted by the Democratic Republic of the Congo.

1.2. May I begin by introducing the representatives of Rwanda in these proceedings. I am joined by the Deputy Agent, His Excellency Ambassador Joseph Bonesha, the Ambassador of Rwanda to the Kingdom of Belgium and Ambassador designate to the Kingdom of the Netherlands. Counsel for Rwanda today are Professor Christopher Greenwood, Q.C., and Professor of International Law at the London School of Economics, and Ms Jessica Wells, both of whom are members of the English Bar. The administrative member of the team is Ms Susan Greenwood.

1.3. Mr. President, this week's hearings before the Court are confined to the issues of jurisdiction and admissibility. They are not about the history of the conflicts which have ravaged the Great Lakes region since the genocide perpetrated against the people of Rwanda in 1994. Rwanda will not, therefore, take up the Court's time with a response to the factual allegations made by the Congo in its Application and in the various *Livres Blancs* which it has submitted to the Court and which it has sought to insinuate in its Counter-Memorial on preliminary objections. In taking this approach, it must not be thought that Rwanda considers these matters unimportant — a country which has suffered as much as Rwanda has done is all too aware of the enormity of the

allegations made in the present case. Nor do we accept for one minute the truth of the allegations made against Rwanda in this case. When the history of the region comes to be written, it will bear no resemblance to what is alleged by the Congo.

1.4. No, Mr. President, we pass these matters by for one reason — and one reason only: because no matter how tempting it is to set the record straight, the truth or falsehood of these allegations made by the Congo is irrelevant to the only questions which the Court has to decide in the present phase of the proceedings. Rwanda understands the injunction by the Court in its Practice Direction No. 6 that "where objections of lack of jurisdiction or of inadmissibility are being considered, oral proceedings are to be limited to statements on the objections". We are well aware of the pressures on the Court's time and have not come here to waste that time by arguing about matters which do not fall to be decided at this hearing or by engaging in political grandstanding. We mean to get straight to the heart of the issues before the Court, namely —

First, does the Court possess jurisdiction over the case which Congo seeks to bring before it? and

Secondly, is Congo's Application admissible?

1.5. On the first issue, Rwanda maintains that the position is simple. It is an elementary principle of international law — stated by the Court on numerous occasions — that the jurisdiction of the Court can be established only on the basis of the consent of the parties to the case. In the present case, Mr. President, we respectfully submit that none of the bases for jurisdiction invoked by the Congo in its Application, in its statements at the hearing in June 2002, or in its Counter-Memorial come anywhere near establishing the basis of consent necessary to found the jurisdiction of the Court. It is for the Congo — as the claimant in these proceedings — to show that jurisdiction exists. It has not done so and we ask the Court to declare accordingly that it lacks jurisdiction.

1.6. On the second issue, Rwanda maintains that the present Application is inadmissible on the ground that it is an abuse of the process of the Court for the Congo to seek to lay before the Court an Application which is essentially the same as the one which it filed in 1999 and then withdrew in 2001.

1.7. Rwanda's arguments on these issues will be developed by our counsel as follows. Professor Greenwood will first outline the nature of the jurisdictional issues before the Court and respond to the Congo's arguments concerning the effect of the Court's Order of 10 July 2002 and the new arguments on jurisdiction raised in the Congo's Counter-Memorial. He will then show why neither the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1971, nor the Convention on the Elimination of all Forms of Discrimination against Women, 1979, can provide a basis for jurisdiction in the present case.

1.8. Ms Wells will then demonstrate why jurisdiction cannot be founded upon either the Constitution of Unesco or the Statute of the World Health Organization. She will also deal briefly with two other treaties relied upon by Congo in its Application — the Genocide Convention and the Convention on the Elimination of Racial Discrimination.

1.9. Finally, Professor Greenwood will address you on the subject of admissibility and summarize the arguments of Rwanda.

1.10. Mr. President, I now ask you to call upon Professor Greenwood to present the first part of the argument of the Republic of Rwanda. Thank you.

The PRESIDENT: Thank you, Mr. Ngoga. I now give the floor to Professor Greenwood.

Mr. GREENWOOD:

1. Introduction

2.1. Mr. President, Members of the Court, may it please the Court. It is an honour to appear before you again on behalf of the Republic of Rwanda.

2.2. Mr. President, consistent with Article 60 of the Rules of the Court[1], which you drew to our attention in your opening address, Rwanda will deal only with those matters which it believes are still in issue between itself and the Congo.

2.3. It is a matter of regret that the written proceedings to date have not narrowed the issues between the Parties as much as one might have expected, let alone hoped. True, the Congo, in its Counter-Memorial, has concentrated on four treaties on which it now seeks to found the

[1]Art. 60 (1).

jurisdiction of the Court. But it has also expressly confirmed all of what it describes as its *"arguments jurisprudentiels et doctrinaux"* ("jurisprudential and doctrinal arguments") invoked at the oral proceedings in June 2002[2], even though in the case of several of those arguments it has elected to say nothing about them in its written pleadings.

2.4. Rwanda cannot, therefore, ignore those other arguments altogether. We will concentrate upon the grounds on which the Congo develops arguments in its Counter-Memorial and we will be as brief as possible on those other grounds of jurisdiction invoked in the Application. Nevertheless, Mr. President, for the avoidance of doubt, let me make clear that Rwanda stands by — and confirms — all of the arguments made in its Memorial of January 2003 and in the statements made on its behalf at the hearing of the Congo's request for provisional measures of protection in June 2002.

2. The nature of the jurisdictional issue

2.5. Mr. President, it is necessary to say something at the outset about the nature of the jurisdictional issue before the Court, for this is a matter on which the Congo has taken an approach very different from Rwanda — and, indeed, very different from that which is consistently taken by the Court.

2.6. We can, at least, start with a point of agreement. It is common ground that under Article 36, paragraph 6, of the Statute it is for the Court to determine whether or not it has jurisdiction. So, Rwanda entirely agrees with the Congo that it is for the Court today to exercise its *compétence de la compétence*[3]. But the *compétence de la compétence* is not, as the Congo appears to believe, an unlimited power for the Court to assert jurisdiction whenever it deems it appropriate to do so. It is the authority to decide, upon well established principles, whether one or more of the recognized grounds on which jurisdiction can be based is applicable to the case before it.

2.7. The most clearly established principle on which the jurisdiction of this Court is based is that that jurisdiction depends upon the consent of the parties to the case. The Court had occasion to remind the Congo and Rwanda of this elementary proposition in its Order rejecting the request for

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[2]Counter-Memorial of Congo, p. 9, para. 26.

[3]*Ibid.*, p. 4, para. 19.

provisional measures, when it said: "the Court has repeatedly stated that one of the fundamental principles of its Statute is that it cannot decide a dispute between States without the consent of those States to its jurisdiction . . ."[4].

2.8. This insistence upon the consent of the parties as an absolute precondition to the establishment of jurisdiction, is not in any way in opposition to the rule of law as the Congo suggests in its Counter-Memorial, it is rather the expression of a principle of international law which Professor Rosenne has described in the following terms:

> "There exists an uncontroverted principle of general international law according to which no State is obliged to submit any dispute with another State or to give an account of itself to any international tribunal. The agreement of the Parties to the dispute is the prerequisite to adjudication on the merits."[5]

2.9. That consent can, of course, be given in specific form, for the particular dispute, or more generally, but if the respondent State has not given a valid consent, then there is no jurisdiction. Mr. President, the Congo quite simply ignores this fundamental principle of the Court's jurisprudence. Instead it asserts in its Counter-Memorial that:

> "[L]a cour possède le pouvoir, à l'occasion d'une affaire de la nature de la présente qui se situe au seuil du troisième millénaire inaugurant ou, à tout le moins, augurant du règne des Droits de l'Homme, *de donner des dimensions nouvelles aux principes qui gouvernent sa compétence* ratione personae, ratione materiae, ratione temporis."[6]

2.10. And the Congo refers to the duties of States under the United Nations Charter and to what it describes as "le caractère extensif, mieux la tendance à l'extension de la compétence de la Cour", which it claims was manifested 30 years ago in the *Fisheries Jurisdiction* cases.

2.11. It is a grand piece of rhetoric, Mr. President, but behind the imposing facade there is an empty house. Quite apart from the fact that it ignores the consistent jurisprudence of the Court regarding the consensual basis of jurisdiction, the Congo's argument is based on a number of other false premises. Three short points will suffice to demonstrate its emptiness.

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[4]Order of 10 July 2002, para. 57. See also *Legality of Use of Force (Yugoslavia* v. *Belgium), Provisional Measures, I.C.J. Reports 1999 (I)*, p. 132, para. 20.

[5]Rosenne, *The Law and Practice of the International Court: 1920-1996* (Kluwer, 1997), Vol. II, p. 563.

[6]Counter-Memorial, pp. 4-5, para. 15.

2.12. First, let us take the Congo's reference to "une affaire de la nature de la présente" — a matter on which we heard much in the 2002 hearings and will doubtless hear much more tomorrow. In 2002 the Congo insisted that the gravity of the factual allegations and the *jus cogens* status of the norms which it claimed were being violated *demanded* that the Court take jurisdiction. But the nature of a case — whether measured by the gravity of the factual issues or the status of the rules of law said to have been violated — cannot create jurisdiction where none would otherwise exist. As the Court explained, both in its 2002 Order in the present case and a few years earlier in its 1999 Orders in the cases concerning *Legality of Use of Force*:

> "there is a fundamental distinction between the question of the acceptance by a State of the Court's jurisdiction and the compatibility of particular acts with international law; the former requires consent; the latter question can only be reached when the Court deals with the merits after having established its jurisdiction and having heard full legal arguments by both parties"[7].

2.13. Nor does the legal status of the norms make any difference. The *Legality of Use of Force* cases also concerned allegations regarding norms of *jus cogens* and norms which created obligations applicable *erga omnes*. As the Court said in its earlier Order in the present case "it does not follow from the mere fact that rights and obligations *erga omnes* are at issue in a dispute that the Court has jurisdiction to adjudicate upon that dispute"[8].

2.14. Secondly, Mr. President, the Congo's reference to the obligations of States under the Charter — a point which it does not develop beyond a general assertion in its Counter-Memorial — is entirely beside the point. The Court has already made clear — most recently in its decision in the case concerning the *Aerial Incident of 10 August 1999* — that "the United Nations Charter contains no specific provision of itself conferring compulsory jurisdiction on the Court"[9]. As for the British argument in the *Corfu Channel* case — to which the Congo refers in its Counter-Memorial — that argument concerned whether a resolution of the Security Council recommending that a dispute be submitted to the Court was sufficient to create jurisdiction. The Court held that it did not need to rule upon that argument as it possessed jurisdiction on other

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[7]Order of 10 July 2002, para. 92; case concerning *Legality of Use of Force (Yugoslavia* v. *Belgium), I.C.J. Reports 1999 (I)*, p. 124, para. 47.

[8]Order of 10 July 2002, para. 71.

[9]*I.C.J. Reports 2000*, para. 48.

grounds, although the British argument was rejected in a joint separate opinion by seven of the 16 judges. But more to the point, Mr. President, there is in this case no resolution of the Security Council recommending that a dispute be referred to the International Court of Justice. The *Corfu Channel* case simply does not assist the Congo in any way.

2.15. Lastly, Mr. President, Members of the Court may be puzzled by the suggestion that a tendency towards extensive jurisdiction — whatever that might mean — can be derived from the *Fisheries Jurisdiction* cases of 1974. The basis for jurisdiction in those cases was an express provision in bilateral treaties between Iceland and Germany and Iceland and the United Kingdom. The cases are a textbook example of consensual jurisdiction and it remains a mystery to us how the Congo imagines they assist it in developing its theory of a tendency to extension.

3. The grounds of jurisdiction advanced by Congo

2.16. So, Mr. President, however inconvenient it may be for the Congo, there is no new theory of jurisdiction which will free it from the need to establish that there is indeed a basis in consent for jurisdiction in this case. Consent can, of course, be manifested in many different ways — in a special agreement, by declaration under the optional clause, by *forum prorogatum* or by the acceptance of a treaty containing a clause conferring jurisdiction upon the Court.

2.17. There is no special agreement here. Rwanda, as is its right, has made no declaration under the optional clause. There is no basis for a serious argument about *forum prorogatum*. I say a "serious argument", because in paragraphs 22 and 23 of its Counter-Memorial, the Congo makes a half-hearted reference to *forum prorogatum* as that doctrine was articulated in the *Corfu Channel* case. But as the Court there made clear, *forum prorogatum* requires "a voluntary and indisputable acceptance of the Court's jurisdiction"[10]. In other words, the respondent State must plead to the merits of the case in such a way as to indicate an abandonment of any right to challenge the jurisdiction of the Court. There can be no question of Rwanda having done anything of the kind. On the contrary, both in 2002 and subsequently, Rwanda has consistently asserted that the Court has no jurisdiction and has appeared for the purpose of challenging that jurisdiction.

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[10] *I.C.J. Reports 1948*, p. 27. See also *Anglo-Iranian Oil Co., I.C.J. Reports 1952*, p. 114.

2.18. It follows that the only serious issues regarding jurisdiction concern the treaties invoked by the Congo, which contain disputes clauses providing for the jurisdiction of this Court. Let me briefly remind the Court what those treaties are —

(1) the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, 1984 ("the Torture Convention")[11];

(2) the Convention on the Elimination of all Forms of Racial Discrimination, 1965 ("the Racial Discrimination Convention")[12];

(3) the Convention on the Prevention and Punishment of the Crime of Genocide, 1948 ("the Genocide Convention")[13];

(4) the Convention on the Elimination of all Forms of Discrimination against Women, 1979 ("CEDAW")[14];

(5) the Statute of the World Health Organization[15];

(6) the Constitution of Unesco[16];

(7) the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1971 ("the Montreal Convention")[17]; and last

(8) the Vienna Convention on the Law of Treaties, 1969 ("the Vienna Convention")[18].

Mr. President, in your opening statement you also referred to the Convention on the Privileges and Immunities of the United Nations. But while that has been mentioned by the Congo, at the hearings in June 2002, the learned Agent of the Congo expressly disavowed any reliance on that Treaty as a ground for the jurisdiction of the Court; and on that basis Rwanda is not proposing

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[11]Memorial, Ann. 1

[12]*Ibid.*, Ann, 2.

[13]*Ibid.*, Ann. 3.

[14]*Ibid.*, Ann. 4.

[15]*Ibid.*, Ann. 5.

[16]*Ibid.*, Ann. 6.

[17]*Ibid.*, Ann. 7.

[18]*Ibid.*, Ann. 8.

to make any submissions regarding it in this first round. Obviously, if the position changes we will address the matter in our second round speech.

2.19. Now, if the Congo is to establish the jurisdiction of the Court in the present case, it must do so under one or more of these treaties. Nothing needs to be said about the Torture Convention, because Rwanda is not a party, so that is plainly not a basis for jurisdiction in this case.

2.20. So far as the other treaties are concerned, while their scope — and their provisions on jurisdiction — vary, they all have one feature in common. None of them contains what may be termed a general provision conferring jurisdiction comparable to that conferred by declarations under the optional clause, or by an instrument like the General Act. Instead, each gives jurisdiction — when it gives it at all — only on a restricted range of issues, generally confined to the "interpretation and application" or, in one case, the interpretation alone, of the specific treaty. It is incapable, Mr. President, of conferring jurisdiction over a dispute regarding the interpretation or application of *any other* treaty, or over a dispute about the application of a rule of customary international law. Thus, the Montreal Convention can confer jurisdiction only in respect of a dispute regarding the interpretation or application of the provisions of the Montreal Convention. It is irrelevant to a claim for violation of the United Nations Charter or the customary international law on the protection of natural resources.

2.21. Mr. President, it needs only a glance at the Congolese Application in the present case to show that most of what it is about could never fall within any of the treaties invoked by the Congo, even if the Congo could show that it has complied with the preconditions laid down by those treaties for seising the Court — and we will show this morning that it cannot do that. The heart of the present case, Mr. President — its central element — is an allegation by the Congo that Rwanda is guilty of aggression, contrary to Article 2 , paragraph 4, of the Charter of the United Nations. It is an allegation which Rwanda most emphatically rejects but, more importantly for present purposes, it is an allegation which could not — on any analysis — fall within the jurisdictional provisions of any of the treaties on which the Congo relies.

2.22. The same is true of the Congo's allegations of violations of the Charter of the African Union, the 1949 Geneva Conventions, the International Covenant on Civil and Political Rights, the

Universal Declaration of Human Rights — and I give examples, rather than a comprehensive list. None of these allegations could fall within any of the jurisdictional provisions on which the Congo now seeks to rely. The same is true of the Congo's claim that Rwanda has plundered its natural resources, for that claim must rest upon customary international law and not upon any of the treaties invoked by the Congo.

2.23. It follows, Mr. President, that the issue between the Congo and Rwanda can, in fact, be narrowed down. It comes to this: given that most of the claims made in the Congo's Application fall outside the jurisdiction of the Court on any analysis, can some part of the claim be brought within one of the relatively short list of jurisdictional provisions on which the Congo relies? Rwanda says that it cannot.

4. The effect of the Court's Order of 10 July 2002

2.24. Now, these issues were, of course, considered on a prima facie basis in the Court's Order of 10 July 2002. In that Order, the Court held: first, that none of the treaties invoked by the Congo appeared, prima facie, to confer jurisdiction upon the Court to indicate the measures sought[19]. The only qualification — and it is a very slight one — is that the Court did not need to make a finding regarding prima facie jurisdiction under the Montreal Convention, because it held that none of the provisional measures requested by the Congo concerned rights claimed under that Convention in any event[20].

That was the first ruling. The second ruling of the Court is that it could not be said that there was such a manifest lack of jurisdiction as to justify removing the case from the Court's List[21].

2.25. In other words, the situation after the 2002 Order was comparable to that which existed after the Court's 1999 provisional measures Orders in the eight *Legality of Use of Force* cases which remained on the Court's List, as opposed to the two (against Spain and the United States of America) which the Court removed from its List in 1999.

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[19]Order of 10 July 2002, para. 89.

[20]*Ibid.*, para. 88.

[21]*Ibid.*, para. 91.

2.26. Nevertheless, Mr. President, in its Counter-Memorial, the Congo affects to find in the Court's ruling on the second of these two points some support for its contention that the Court should find that it has jurisdiction over the Congolese claims[22].

2.27. With respect, Mr. President, that cannot be right. Consistent with the approach it has always taken in the past, the Court made clear, in its 2002 Order, that "the findings reached by the Court in the present proceedings in no way prejudge the question of the jurisdiction of the Court to deal with the merits of the case or any questions relating to the admissibility of the Application, or relating to the merits themselves"[23]; and the Court added, in quite important language, that its findings "leave unaffected the right of the Governments of the Congo and of Rwanda to submit their arguments in respect of those questions"[24].

2.28. Quite apart from this explicit statement by the Court, simple common sense shows that a finding by the Court that there is not a manifest absence of jurisdiction, especially when coupled with a finding that there is no prima facie basis for jurisdiction cannot afford any support to the State which seeks to establish the jurisdiction of the Court.

2.29. Of course, the corollary of that proposition is that the 2002 Order does not dispose of the jurisdictional issues in Rwanda's favour either. We quite accept that. But there is one respect in which the decision that the treaties invoked by the Congo do not prima facie afford a basis for the jurisdiction of the Court has important implications for the current phase of the proceedings. A ruling of this kind, made on a request for the indication of provisional measures, is not a definitive ruling on jurisdiction for the very good reason that rulings on provisional measures are necessarily made swiftly, in response to a claim of urgency and without the detailed pleading by the parties which would be expected in a preliminary objections phase or a hearing on the merits. The Court, therefore, leaves it open to the parties to submit fresh arguments or evidence relevant to the jurisdictional issue at a later phase of the proceedings.

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[22]Counter-Memorial, paras. 18-21.

[23]Order of 10 July 2002, para. 90.

[24]*Ibid.*.

2.30. It was therefore entirely open to the Congo in its Counter-Memorial to address fresh arguments to the Court, or to adduce evidence which was not before the Court in 2002, to try to persuade the Court that, notwithstanding its ruling on a prima facie basis the Court should now hold that jurisdiction does in fact exist. But, Mr. President, a State which has lost on the jurisdictional issue at the provisional measures phase of a case, as the Congo lost in 2002, cannot expect to secure a decision in its favour at a preliminary objections phase unless it does present fresh arguments or adduce new evidence. If that State merely repeats — or even just refers back to — its arguments at the provisional measures stage and offers nothing more, then logic and juridical consistency mean that there is only one answer which can be given — just as there was no prima facie basis for jurisdiction at the earlier phase, so there can be no definitive basis for jurisdiction now.

2.31. This consideration is important in the present case, because the Congo has chosen to address no new argument to the Court regarding several of the grounds of jurisdiction which it has invoked and has merely referred back to its arguments in the 2002 proceedings[25]. For example, it has said nothing whatever in its Counter-Memorial regarding its assertion that Article 66 of the Vienna Convention on the Law of Treaties could afford a basis for jurisdiction. That argument was comprehensively rejected by the Court in paragraphs 73 to 75 of the July 2002 Order and the Congo has made no effort whatever to meet any of the criticisms of the argument contained in those parts of the Order. In those circumstances (as well as for the reasons advanced in paragraphs 3.75 to 3.76 of the Memorial), Rwanda respectfully submits that this head of jurisdiction must be rejected. And I shall say no more about it.

2.32. Similarly, in other parts of the Order, the Court pointed to the fact that the Congo had failed to adduce sufficient evidence to show that the preconditions imposed by particular treaties for seising the Court had been met. The Congo has, of course, had ample opportunity in preparing its Counter-Memorial to put such evidence (if, indeed, it existed) before the Court but it has not done so. The result is, Mr. President, that, when the Court now comes to take a definitive decision as to whether those preconditions for seisin have been met, it has before it only the material which

[25]Counter-Memorial, para. 26.

it found unconvincing in 2002. Well, that material has not become any more convincing with the passage of three years.

2.33. I shall, however, develop this point further in relation to the compromissory clauses of the two treaties most directly affected, namely the Convention on the Elimination of Discrimination against Women and the Montreal Convention on Crimes against Aircraft, to which I will now turn.

5. The Convention on the Elimination of Discrimination against Women

2.34. Let me turn, first, to the Convention on the Elimination of Discrimination against Women.

2.35. The provision on which the Congo seeks to base the jurisdiction of the Court is Article 29, paragraph 1, which is in the following terms

> "Any dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court."

And, as we will see, Mr. President, the terms of Article 14 of the Montreal Convention are very similar, almost identical to Article 29 of this Convention.

2.36. This clause adopts an approach to the settlement of disputes which (with minor variations) is common to a great many multilateral conventions. Under this type of clause, the Court is not the primary forum for the settlement of a dispute. On the contrary, the first sentence of the provision makes clear that there must first be an attempt to settle the dispute by negotiation. If that fails, then, at the request of either party, the dispute *shall* be submitted to arbitration. The language is mandatory. Only if it proves impossible for the parties to agree upon the organization of the arbitration, does the second sentence make possible recourse to the Court. The Court's role is, therefore, as a forum of last resort or a "long stop", which cannot come into play unless and until there has been a good faith attempt to settle the dispute by negotiation and an attempt to organise an arbitration of that dispute.

2.37. Mr. President, we say that Article 29 (1) lays down four requirements which must be satisfied before the Court has jurisdiction.

— *First*, there must be a dispute between the parties concerning the interpretation or application of the Convention;

— *secondly*, it must have proved impossible to settle that dispute by negotiation;

— *thirdly*, one of the parties must have made a request for the submission of the dispute to arbitration and the parties must have been unable to agree upon the organization of the arbitration; and

— *lastly*, six months must normally have elapsed from the date of the request for arbitration before proceedings can be commenced in the Court.

2.38. Mr. President, the Congo disputes almost every point in this analysis, so it is very much an issue between the Parties today. Its arguments on these issues are scattered throughout the second half of its Counter-Memorial and are not always easy to follow. With respect, they are at times contradictory. Nevertheless, in so far as Rwanda has been able to piece them together, the Congo's arguments suggest that there are six matters which remain in dispute between the Parties regarding the issue of jurisdiction under this Convention.

1. Rwanda's objections go to jurisdiction not admissibility

2.39. The first question is whether Rwanda's objections are really jurisdictional objections at all. In its Counter-Memorial, the Congo contends that they are really objections which go only to the admissibility of the Application and not to jurisdiction. Mr. President, that argument is contrary both to principle and to the way in which the Court has consistently treated such issues in the past.

2.40. So far as principle is concerned, the reasoning is simple. As the Court has repeatedly made clear, its jurisdiction is dependent upon the consent of the parties. The parties may attach conditions to that consent, conditions which may be of a substantive or a procedural character. Where a party has attached such conditions, then the jurisdiction of the Court will exist if — but only if — those conditions have been satisfied. The States party to the Convention on the Elimination of Discrimination against Women chose to attach both substantive and procedural conditions to their consent to the jurisdiction of the Court. Substantively, they stipulated that consent was given only in respect of a particular category of disputes. Procedurally, they stipulated that consent was given only once the prior steps of negotiation and an attempt to arbitrate the

dispute had been taken and had proved unsuccessful. Since those conditions limit the consent to jurisdiction, a submission that they have not been complied with is an objection to the jurisdiction of the Court and not an argument as to admissibility.

2.41. This logic was recognized by the Court in its 2002 Order in the present case, when it described the requirements of entering into negotiations and undertaking arbitration proceedings as the "preconditions on the seisin of the Court set by Article 29 of the Convention"[26].

2.42. The Court had earlier adopted the same approach in the case concerning the *Aerial Incident at Lockerbie* between Libya and the United States of America, a case in which jurisdiction was asserted by Libya on the basis of Article 14 (1) of the Montreal Convention — which, as I say, is in very similar terms to Article 29 of this Convention. In that case, the Court treated the United States objections that the requirement of undertaking arbitration proceedings had not been met as a jurisdictional objection. It did of course reject the objection on the facts but there was no doubt that it treated it as going to jurisdiction and not to admissibility[27].

2. Rwanda's objections concern the specific requirement of the Convention, not a general duty to negotiate or arbitrate before seising the Court

2.43. The second point in issue between the Parties concerns the Congo's argument that there is no general rule of international law which compels States to negotiate or have recourse to arbitration before seising the Court[28]. Well, Mr. President, that proposition may very well be correct but it has no bearing whatever on the arguments in this case. Rwanda has never suggested that general international law imposes such a limitation upon the jurisdiction of the Court. Its objection is altogether different. What Rwanda maintains is that — whatever the position may be under general international law — the specific treaty provision on which the Congo is trying to found jurisdiction in this case makes an attempt to negotiate a settlement of the dispute under that Convention, and an attempt to undertake arbitration proceedings, preconditions to the seisin of the Court. In the case of the Convention on the Elimination of Discrimination against Women, it is

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[26]Order of 10 July 2002, para. 79.

[27]*I.C.J. Reports 1998,* p. 115, paras. 19 and 20.

[28]Counter-Memorial, paras. 104-113.

obvious from the express language of Article 29 (1) that that is the case. The learned authors quoted by the Congo are not addressing this issue at all but the quite different question — and it is a question which, interesting as it is, has no bearing on the issues before the Court today — of whether the Charter of the United Nations or customary international law imposes a general obligation upon States to pursue one method of peaceful settlement before they pursue another. In tackling that issue, the Congo is tilting at a windmill. It is not responding to the arguments brought by Rwanda.

3. The four preconditions laid down by Article 29 (1) are separate and cumulative

2.44. The Congo also takes exception to the four separate conditions identified by Rwanda as flowing from the language of Article 29 (1)[29]. The Congo prefers a simpler analysis into two conditions which it puts in its Counter-Memorial in these terms:

> "1) le différend doit impliquer l'application or l'interprétation de la convention intéressée;
>
> 2) l'impossibilité d'organiser une procédure d'arbitrage, étant entendu que l'échec n'en devient patent qu'au terme de six mois à partir de la demande d'arbitrage"[30].

2.45. Mr. President, there is really very little in this. The first condition set down by the Congo is essentially the same as the first condition identified by Rwanda. The second Congolese condition simply rolls into one: the third and fourth conditions identified by Rwanda. It doesn't really matter whether you treat them as one or two separate elements. The only substantive difference — but it is an important one — is that the Congolese approach ignores the requirement of negotiation altogether. Mr. President, the difference between Rwanda and the Congo on this point is quite simply a matter of whether Article 29 (1) means what it says. That provision confers jurisdiction on the Court only in respect of a dispute which is not settled by negotiation. It is implicit in that provision that a good faith attempt to try to resolve the dispute by negotiation must be made if this condition is ever to be satisfied. Indeed, an analysis of the *travaux préparatoires* of the Convention shows that Article 29 (1) was adopted in its present form after at least one State had

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[29]Counter-Memorial, paras. 30-31.

[30]*Ibid.*, para. 31.

insisted that the text should be explicit "on the question of negotiations prior to the appeal to the International Court of Justice"[31].

2.46. So, Mr. President, while we accept that in the present case nothing turns on whether one treats the requirement to attempt arbitration and the six months' rule as one requirement — as the Congo does — or two — as Rwanda did — we maintain that there is no escaping the fact that the Congo must meet each of the following requirements if it is to establish the jurisdiction of the Court —

First, that there is an identified dispute between the Congo and Rwanda regarding the interpretation or application of the Convention;

Secondly, that the Congo has attempted without success to settle *that* dispute by negotiation; and

Thirdly, that the Congo has requested arbitration of *that* dispute and the Congo and Rwanda were unable to agree upon the organization of the arbitration.

2.47. These requirements are cumulative. The Congo's jurisdictional argument fails unless it can satisfy all three. Moreover, it is the Congo which bears the burden of proof in respect of any facts needed to establish that a requirement has been met. Although this appears to come as a surprise to the Congo, which has complained that Rwanda is seeking to transfer the burden of proof with regard to the content of negotiations[32], it is a well-established principle of international law that, as the Court put it in the *Nicaragua* case, "it is the litigant seeking to establish a fact who bears the burden of proving it"[33], and it is for the claimant State to prove that the preconditions for seisin the Court have been satisfied.

2.48. Rwanda maintains that the Congo has manifestly failed to discharge that burden with respect to *any*, let alone *all*, of the three requirements. And I will look at each of them in turn.

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[31]Rehof, *Guide to the Travaux Préparatoires of the United Nations Convention on the Elimination of All Forms of Discrimination against Women* (Martinus Nijhoff, 1993), p. 239.

[32]Counter-Memorial, para. 58.

[33]*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, I.C.J. Reports 1984*, p. 437, para. 101.

4. The requirement of a dispute regarding the interpretation or application of the Convention on the Elimination of Discrimination against Women

2.49. Let us first consider the requirement that there be a dispute regarding the interpretation or application of the Convention on the Elimination of Discrimination against Women.

2.50. The Court has frequently had to consider this requirement of the identification of a dispute as a precondition to seisin of the Court. And its approach has consistently been to insist that, as it put it in the *South West Africa* cases:

> "[I]t is not sufficient for one party to a contentious case to assert that a dispute exists with the other party. A mere assertion is not sufficient to prove the existence of a dispute any more than a mere denial of the existence of the dispute proves its non-existence. Nor is it adequate to show that the interests of the two parties to such a case are in conflict. It must be shown that the claim of one party is positively opposed by the other."[34]

2.51. But in the present case, Mr. President, the Congo has never asserted a claim under the Convention which Rwanda could positively oppose. It argues — in the Counter-Memorial[35] — that it repeatedly complained of Rwanda's conduct but it has offered no evidence that it made a claim (in any form or forum) specifically alleging a violation of the Convention on the Elimination of Discrimination against Women.

2.52. Now, it is true that, as Judge Higgins pointed out in her separate opinion in the 2002 proceedings, the practice of human rights tribunals faced with a complaint by an individual petitioner that a State has violated a particular human rights convention has been not to insist that the individual must first identify the precise provision of the treaty. Since the 2002 proceedings, I thought long and hard about the implications of that practice for the present phase of this case. In my submission, there are three reasons why that practice does not operate to relieve the Congo of the duty to specify the nature of the dispute between itself and Rwanda in relation to the Convention and to do so as a precondition to the seisin of the Court.

2.53. The first reason is that the practice to which Judge Higgins referred was developed in the context of claims brought by individuals against States. There is an inevitable inequality between the parties to such proceedings which it is entirely appropriate for the tribunal to seek to

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[34] *South West Africa* cases, *I.C.J. Reports 1962*, p. 328.

[35] Counter-Memorial, paras. 46-51.

redress. But that consideration is not present in this case, which concerns proceedings between two equal, independent, and sovereign States.

2.54. The second consideration is that in her separate opinion, Judge Higgins said "there is no reason for the International Court of Justice, *in establishing whether it has prima facie jurisdiction for purposes of the indication of provisional measures,* to suggest a more stringent test"[36]. In the present phase of the proceedings, however, the issue is different. The question today is whether the Congo has satisfied the preconditions for the seisin of the Court, a task entirely different from that which confronts a human rights tribunal faced with an individual petition. As we have seen, those conditions include a good faith attempt to resolve *the dispute* by negotiation, a request for arbitration of *the dispute*, an attempt to organize an arbitration in respect of *the dispute*. Those conditions could not be complied with unless the dispute to which they relate has first been identified with sufficient precision.

2.55. The third consideration, Mr. President, is that Article 29 (1) confers jurisdiction upon the Court in terms effectively identical to those of a large number of other treaties, most of which are not directly concerned with human rights. Thus, the language of Article 29 (1) was apparently taken from that of the equivalent provision in the International Convention against the Taking of Hostages[37]. The practice of human rights tribunals would not be relevant to the interpretation of such clauses in a treaty like the Hostages Convention, or the Montreal Convention, and it is difficult to see that there is a case for placing a different interpretation upon identical or near-identical language on the preconditions for seisin of the Court, depending on whether the treaty in which the language appears is a human rights treaty or not.

2.56. Accordingly, it is Rwanda's case that in order to found jurisdiction under Article 29, it is essential that the Congo has identified the precise dispute between itself and Rwanda relating to the interpretation or application of the Convention. That it had plainly failed to do.

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[36]Emphasis added.

[37]Rehof, *op. cit.*, p. 239.

5. The requirement of negotiations

2.57. Fifthly, even if the Congo had identified a dispute between itself and Rwanda relating to the Convention, Article 29 requires that the Congo must have attempted to resolve that dispute by negotiations. I emphasize *that dispute*, because it is plain that the Congo is labouring under a considerable misapprehension regarding the nature of this requirement and the argument which Rwanda is making.

2.58. The Congo appears to believe, both from its 2002 argument and its Counter-Memorial, that all that it need show is that it attempted to negotiate with Rwanda, about something, without needing to show what it was that it attempted to negotiate about. Thus, the Congo points to a series of meetings, identified in paragraph 51 of the Court's Order of 10 July 2002, at which it claims that the two States attempted to negotiate a settlement of the armed conflict between them. But, Mr. President, that is a very different matter from demonstrating that there was an attempt to negotiate a settlement of a specific dispute about the interpretation or application of the Convention on the Elimination of Discrimination against Women and it is only the attempt to negotiate *that* dispute which is relevant to satisfying the conditions of Article 29 (1).

2.59. The Congo's confusion on this point is plain from its misquotation of a passage in the Rwandan Memorial. At paragraph 102 of its Counter-Memorial, the Congo criticizes Rwanda for saying, in paragraph 3.65 of the Memorial, that "the reality is that the Congo has made no attempt to negotiate with Rwanda". What Rwanda actually said was this:

> *"Although the Congo has referred to the alleged impossibility of negotiating a peaceful settlement with Rwanda, the Congo has here confused the settlement of the armed conflict, the nub of the allegation it makes, with the settlement of the specific dispute which it asserts under the Montreal Convention.* The reality is that the Congo has made no attempt to negotiate with Rwanda *on the allegations about the destruction of the Boeing 727."*[38]

And it is that last phrase that Congo leaves out in its quotation from what we said. The point under the Montreal Convention is identical in this respect to the point on the Convention on the Elimination of Discrimination Against Women.

2.60. The Congo's failure to grasp this critical point of the distinction between negotiating a settlement of the armed conflict and negotiating about a specific dispute on a particular treaty is

[38]Italicized passages omitted from the Congo's quotation of the Rwandan Memorial.

then demonstrated in even starker form in paragraph 103 of its Counter-Memorial, when the Congo says this:

> "La République démocratique du Congo fait vigoureusement observer que le train d'allégations ci-dessus du Rwanda, en tant qu'elles visent à nier l'existence de toute négociation, et même de toute tentative de négociation de la part de la République démocratique du Congo, prennent à contre-pied la conviction de la Cour."

So what Rwanda is saying flies in the face of what the Court said in 2002. But what was it that the Court had said and that the Congo then goes on to quote? The Court's comment — in paragraph 79 of its Order — was this:

> "at this stage in the proceedings the Congo has not shown that its attempts to enter into negotiations or undertake arbitration proceedings with Rwanda [and the Court then refers back to paragraph 51 of the Order which the Congo accepts as a summary of the evidence put before it][39] *concerned the application of Article 29 of the Convention on Discrimination against Women*"[40].

2.61. In other words, yes, the Court was accepting that there had been negotiations. Rwanda accepts that as well. But those negotiations and attempts to undertake arbitration had not been shown to concern the application of the specific treaty on which the Congo now relies. In otherwise, Mr. President, the Court was there upholding precisely the point which Rwanda made in 2002 and has repeated in its Memorial, namely that the negotiations into which the Congo and Rwanda entered were about the conflict as a whole, not about a specific dispute under the Convention on the Elimination of Discrimination against Women and those negotiations did not, therefore, satisfy the requirements of Article 29 (1).

2.62. The Court's ruling was, of course, that the Congo had failed to show *at the provisional measures stage*, that the negotiations concerned the application of the Convention. It was open to the Congo to adduce fresh evidence in its Counter-Memorial (if, of course, such evidence existed) to show that the negotiations were in fact concerned with the application of that Convention. But it has made no attempt whatever to do so. The Congo has attached only a handful of documents to its Counter-Memorial. None of those documents gives even a hint that the negotiations between the Congo and Rwanda at any point concerned the application of the Convention on the Elimination of

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[39]See Counter-Memorial, para. 57.

[40]Emphasis added.

Discrimination Against Women. The Congo has, therefore, failed to adduce a single piece of evidence — a single piece — in support of its case beyond what it had already produced to the Court in 2002. The Court found that evidence insufficient and unconvincing then and I submit that it must reach the same conclusion on that same evidence now.

2.63. Let me just add one word before I move on about the ten documents annexed to the Counter-Memorial. All but one of them is at a very high level of generality and is irrelevant to the issue currently under consideration. The one exception is the letter of 14 January 2002 from the Ministry of Posts, Telephones and Telecommunications of the Congo to the Secretary-General of the International Telecommunications Union. In that letter the Congo protests about the use of the international telephone prefixes for Rwanda and Burundi in telephone calls to certain parts of the Congo. Now, quite why the Congo chose to annex that document to its pleadings in this case is something of a mystery to me and it may well be something of a mystery to the Members of the Court as well. It is certainly difficult to see how the letter could possibly assist the Congo's case on jurisdiction under any of the treaties on which it relies. But it would be wrong to assume that the letter is wholly irrelevant to the issues currently before the Court, for what it shows is that even in the middle of an armed conflict, the Congo was perfectly well able to raise a detailed, technical issue of this kind. And if it could write a letter specifically about telephone prefixes, it was surely not beyond it to raise in negotiations, expressly, a dispute about specific provisions of the Convention on the Elimination of Discrimination against Women or to request arbitration of that dispute. But the fact of the matter is, it has not produced a single piece of evidence to suggest that it did anything of the kind.

6. The requirement of arbitration

2.64. Lastly, Mr. President, even if the Congo had attempted to resolve a specific dispute concerning the Convention by negotiation, that would only confer jurisdiction upon the Court if the Congo had first requested arbitration of that dispute and the Parties had been unable, within six months of the date of the request, to agree upon the organization of the arbitration. This requirement, first to seek arbitration, is a central part of the scheme of Article 29, paragraph 1, of this Convention, as it is of a great many other disputes clauses in multilateral treaties. But the

Congo made no attempt whatever to request arbitration of any dispute under the Convention. There could be no discussions on organization of an arbitration because no request for that arbitration was ever made.

2.65. Again, Mr. President, the Congo appears to be labouring under the illusion that all it has to do is to show that it suggested some form of arbitration about some form of dispute. But the Court has already rejected that approach in its Order of 2002. What is required is — the Court was clear then — that the Congo should have made a request for arbitration of the specific dispute under the specific Convention, but it did not do so and it has adduced not one piece of evidence to develop its case beyond what it was three years ago at the provisional measures stage.

2.66. The Congo complains that it had no diplomatic relations with Rwanda and that Rwanda was reluctant to sit down at the table and talk to it. The record, incidentally, is rather different. But even if the Congo's allegations were true, that is not enough to lead to a different result. In the first place, the Congo made the same point in 2002 and it was not considered sufficient then. It is also noticeable that the Congo accepts that negotiations on a variety of matters did take place during the relevant time between the two States but it has been unable to point to any request for arbitration in connection with the Convention at any of those negotiating sessions. Finally, Mr. President, it is striking to note the contrast between the present case and the *Lockerbie* dispute between Libya and the United States. There were no diplomatic relations between Libya and the United States at the relevant time in the *Lockerbie* case either, and there were far fewer negotiating contacts between those two governments than there were in 2002 between Rwanda and the Congo. Yet Libya made a request for arbitration of a specific dispute under the Montreal Convention, and it was that fact which the Court relied upon in its 1998 Judgment to reject the jurisdiction objection raised by the United States and to hold that Libya had complied with the arbitration provision in Article 14, paragraph 1, of the Montreal Convention.

6. The Montreal Convention

2.67. Mr. President, let me, in conclusion, say a few words about the Montreal Convention. I can be far briefer here, as many of the arguments are the same as those I have just set out in relation to the Convention on the Elimination of Discrimination against Women.

2.68. The provision of the Montreal Convention on which the Congo seeks to rely is Article 14, paragraph 1: "Any dispute between two or more Contracting States concerning the interpretation or application of this Convention which cannot be settled through negotiation, shall, at the request of one of them, be submitted to arbitration." And then the second sentence on organization of the arbitration and the six-months' rule is identical to Article 29 (1). The only difference between the first sentences of the two provision is that Article 14 refers to a dispute which *cannot be settled through negotiation*, whereas Article 29 (1) speaks of a dispute which *is not settled by negotiation*. For the reasons already given, we submit that nothing turns on that distinction.

2.69. Mr. President, Rwanda has set out its detailed jurisdictional arguments on the Montreal Convention three times. First, in its pleadings in the Congo's first Application in 1999, which was then discontinued by the Congo in 2001. Secondly, in our oral submissions in the present case in 2002; and thirdly, in paragraphs 3.45 to 3.71 of our Memorial. The Congo has at no point sought to refute those detailed arguments except by the blandest and most general of assertions.

2.70. The fact is that the Congo has completely failed to meet any of the requirements laid down by Article 14 as preconditions to seising the Court.

2.71. The Congo did not define with any degree of precision a dispute concerning the application of the Montreal Convention between itself and Rwanda. In its complaint to ICAO regarding the shooting down of this aircraft, it alleged that the plane was shot down not by Rwanda but by Congolese rebel forces. It then made identical allegations against Uganda and has continued to pursue those allegations against Uganda in the case which is currently under consideration by the Court without, so far as we have been able to discover, at any time making any attempt to reconcile its allegations against the two States. For good measure, incidentally, it also made an identical allegation against Burundi in an application to this Court in 1999, which it discontinued in 2001.

2.72. What it did not do, Mr. President, after the ICAO Council adopted a declaration on the matter in 1999, was to make any attempt to negotiate on this issue with Rwanda, nor any request for arbitration with Rwanda of a dispute under the Montreal Convention. It had the opportunity to do so, it chose not to take it. The simple fact is that the Congo has failed to satisfy the

preconditions for seising the Court in accordance with Article 14 and the Court accordingly lacks jurisdiction under that provision also.

2.73. Mr. President, that concludes my argument regarding jurisdiction, although I would ask you to give me the floor at the end of this morning to address you, very briefly, on the subject of admissibility and to sum up Rwanda's case. I imagine that this would be a convenient moment for the Court to adjourn for a coffee break and when it resumes I would invite you to call upon Ms Jessica Wells to address you.

The PRESIDENT: Thank you, Professor Greenwood. it is indeed time for the Court to adjourn for ten minutes, after which I will give the floor to Ms Wells.

The Court adjourned from 11.20 to 11.40 a.m.

The PRESIDENT: Please, be seated. Now, I give the floor to Ms Jessica Wells.

Ms WELLS:

1. Introduction

3.1. Mr. President, Members of the Court. May it please the Court. May I begin by saying that it is an honour for me to appear before this Court on behalf of Rwanda. As the learned Agent of Rwanda has outlined, I shall develop our submissions in relation to four of the Conventions on which the Congo seeks to found the jurisdiction of this Court. I intend to deal first with the Genocide Convention and the Convention on the Elimination of all Forms of Racial Discrimination. I will then proceed to our submissions on the respective Constitutions of the World Health Organization and Unesco.

2. The Genocide Convention

3.2. I do not propose to discuss at great length either the Genocide Convention or the Racial Discrimination Convention. Our submissions on both Conventions are substantially the same, and the arguments were fully aired before this Court during the oral proceedings at the provisional measures phase. We only return to them now because the Congo has maintained its claim to jurisdiction in respect of them.

3.3. It is not disputed, Mr. President, that both the Congo and Rwanda are parties to the Genocide Convention, nor that Article IX of that Convention contains a provision for the submission of a range of disputes to the Court. However, Rwanda, on acceding to the Convention, entered a full reservation to Article IX[41]. Accordingly, the Genocide Convention cannot, in this instance, found the jurisdiction of the Court.

3.4. At the provisional measures phase, the Congo raised a number of arguments in response to Rwanda's reservation to Article IX. I do not wish to detain the Court with a lengthy recital of the Congo's arguments and Rwanda's counter-arguments. Both are fully elaborated in our Memorial of January 2003[42]. I would simply wish to remind the Court of its response to the Congo's arguments contained in the Order of 10 July 2002. The Court's conclusions, at paragraphs 71 and 72, can be summarized as follows:

(1) The *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things.

(2) It does not follow from the mere fact that rights and obligations *erga omnes* are at issue in a dispute that the Court has jurisdiction to adjudicate upon that dispute.

(3) The Genocide Convention does not prohibit reservations.

(4) The Congo did not object to Rwanda's reservation at the time it was made.

(5) The reservation does not bear on the substance of the law, but only on the Court's jurisdiction. Therefore it does not appear to be contrary to the object and purpose of the Convention.

(6) Finally, it is immaterial that the International Criminal Tribunal for Rwanda was established at Rwanda's request.

(7) And it is likewise immaterial that Article 120 of the Rome Statute of the International Criminal Court prohibits all reservations to that Statute.

3.5. Mr. President, the Congo has failed to respond to any of these points in its Counter-Memorial. It is respectfully submitted that the logical result of the Court's determinations

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[41]The full text of the Rwandan reservation can be found at tab 9, p. 140 of the annexes to the Memorial of Rwanda.

[42]Paras 3.13-3.23.

in 2002 must be that the Rwandan reservation is valid. Consequently, Article IX of the Genocide Convention cannot be relied upon to found the jurisdiction of the Court.

3.6. This conclusion is consistent with the approach of the Court to the similar reservations of Spain and the United States of America in the *Legality of the Use of Force* cases[43]. In those cases the Court decided that the Genocide Convention "manifestly does not constitute a basis of jurisdiction in the present case" and it removed the cases from the Court's List. In its Order of July 2002, the Court in the present case did not consider that there was a manifest lack of jurisdiction and it refused to accede to Rwanda's request to remove the case from its List. It should be noted, however, that this conclusion was addressed to the totality of the Congo's alleged bases of jurisdiction. It does not, therefore, detract from the clarity of the Court's 2002 findings in relation to Article IX of the Genocide Convention. Neither does it detract, in our respectful submission, from the inevitability of a conclusion of lack of jurisdiction at this stage of the proceedings.

3. The Convention on the Elimination of All Forms of Racial Discrimination

3.7. Mr. President, the position is essentially the same in relation to the Racial Discrimination Convention. Again, it is not disputed that both States are parties to this Convention, nor that it contains, in Article 22, a compromissory clause. Once again, however, on acceding to this Convention, Rwanda entered a full reservation to that compromissory clause[44]. Consequently, Rwanda again submits that Article 22 cannot be relied upon as a basis for the Court's jurisdiction in the present case.

3.8. In the oral proceedings of June 2002, the Congo argued that Rwanda's reservation to Article 22 was "unacceptable, because it would amount to granting Rwanda the right to commit the acts prohibited by the Convention with complete impunity". It was further argued by the Congo that this would be contrary to the object and purpose of the Convention. It should be noted that no further arguments have been put forward by the Congo in its Counter-Memorial.

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[43]*Yugoslavia* v. *Spain*; *I.C.J. Reports 1999 (I)*, p. 61; *Yugoslavia* v. *United States of America, I.C.J. Reports 1999 (I)*, p. 196.

[44]The full text of the Rwandan reservation can be found at tab 9, p. 103 of the annexes to the Memorial of Rwanda.

3.9. It is admitted by Rwanda that Article 20, paragraph 2, of the Racial Discrimination Convention prohibits reservations which are incompatible with its object or purpose. But, Mr. President, it is unnecessary to enter into a detailed examination as to whether Rwanda's reservation is incompatible in *this* case. Article 20, paragraph 2, provides a simple mechanism for determining the incompatibility of a reservation — namely if two thirds of the States parties to the Convention raise an objection to it. At paragraph 67 of its Order of 10 July 2002, the Court confirmed that the Rwandan reservation had not attracted the requisite number of objections. The Court further noted that "the reservation does not appear to be incompatible with the object and purpose of the Convention" and that the Congo itself did not object to the reservation when it acceded to the Convention in 1976.

3.10. Mr. President, as with the Genocide Convention, it is respectfully submitted that the conclusions of the Court of 10 July 2002 speak for themselves and that it is unnecessary for me to detain the Court any longer this morning with further discussion on the point. The Rwandan reservation is valid, and, accordingly, Article 22 cannot provide a basis for the jurisdiction of the Court.

I will now move to consider the Constitution of the World Health Organization.

4. The Constitution of the World Health Organization

3.11. In response to the Congo's attempts to base the jurisdiction of the Court on Article 75 of the WHO Constitution, Rwanda relies on two distinct arguments. First, the Congo has failed to establish the applicability of the WHO Constitution to its claim against Rwanda. Secondly, as with the Convention for the Elimination of Discrimination Against Women and the Montreal Convention, Article 75 establishes preconditions to the jurisdiction of the Court. In our submission, these preconditions have not been satisfied.

3.12. Article 75 provides as follows:

> "Any question or dispute concerning the interpretation or application of this Constitution which is not settled by negotiation or by the Health Assembly shall be referred to the International Court of Justice in conformity with the Statute of the Court, unless the parties concerned agree on another mode of settlement."

3.13. Turning first to the applicability of the Constitution. This submission itself divides into two limbs. First, although the Congo alleges that Rwanda has breached the WHO Constitution, it

does not specify which particular obligation, if any, Rwanda is alleged to have flouted. Both in the oral proceedings of June 2002 and in its Memorial, Rwanda has invited the Congo to elaborate on this issue. The Congo's Counter-Memorial makes no effort to do so. The only provision of the WHO Constitution to which the Congo has ever referred is Article 2. In its Order of July 2002, this Court noted that "an initial examination of that Constitution shows that Article 2 thereof, relied upon by the Congo, places obligations on the Organization, not on the Member States[45]".

3.14. A closer examination of the structure of the Constitution confirms that this is indeed the case[46].

3.15. The appropriate starting place for this review is Article 2 itself. This provision simply contains a list of 22 "functions of the Organization" which are necessary to achieve the Organization's objective. It is clear, both from the wording itself and from the nature of the listed functions in Article 2, that it does not impose any direct obligation on States themselves. This conforms with the broad approach of the Constitution which, as the name suggests, establishes the basic institutions, competences and working methods of the WHO, but does not *per se* address substantive matters of world health. It is clear from Chapter V of the Constitution that direct obligations on Member States were intended to arise by means of conventions, agreements and regulations proposed or adopted by the Health Assembly.

3.16. Secondly, the allegations made by the Congo do not appear to give rise to a dispute relating to the interpretation or application of the Constitution. It is clear from the Application that the Congo considers this dispute to be founded on the alleged acts of aggression of Rwanda. For instance, on the very first page of the Application, the Congo states that:

> "Ces atteintes graves et flagrantes découlent des actes d'agression armée perpétrés par le Rwanda sur le territoire de la République démocratique du Congo en violation flagrante de la souveraineté et de l'intégrité territoriale de la République démocratique du Congo, garantie par les Chartes des Nations Unies et de l'Organisation de l'unité africaine."

This is but one example of a refrain that is repeated throughout the Application.

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[45] At paragraph 82.

[46] The Constitution of the WHO is at tab 5, page 37 of the annexes to the Memorial of Rwanda.

3.17. This situation is analogous to that which faced this Court in relation to the WHO's request for an advisory opinion on the legality of the use by a State of nuclear weapons in armed conflict[47]. In considering whether it had jurisdiction to give an advisory opinion, the Court had to address whether the question posed fell within the scope of the WHO's proper activities. In finding that it did not, the Court noted that:

> "the question put to the Court . . . relates . . . *not to the effects* of the use of nuclear weapons on health, but to the *legality* of the use of such weapons *in view of their health and environmental effects.* Whatever those effects might be, the competence of the WHO to deal with them is not dependent on the legality of the acts that caused them."[48]

3.18. The Court further found that the responsibilities of the WHO are limited to the sphere of public health. Broader issues relating to the use of force were within the competence of the United Nations itself and accordingly not within the responsibility of specialized agencies such as the WHO.

3.19. Mr. President, applying this reasoning, by analogy, to the present case, it is clearly not enough for the Congo simply to assert that adverse consequences to health have resulted from the situation on its territory. The essence of the Congo's case concerns the legality of the acts for which Rwanda is alleged to be responsible. It does not concern the interpretation or application of the WHO Constitution.

3.20. Rwanda's second main submission on the WHO Constitution is of a procedural nature, namely that the preconditions in Article 75 have not been satisfied. The first question which arises is whether these preconditions are cumulative or alternative. That is to say, whether, before a dispute can be referred to the Court, it is necessary that both negotiations and settlement by the Health Assembly be attempted, or whether it is sufficient if just one of these methods has been utilized. The Congo, at paragraph 63 of its Counter-Memorial, argues that the latter interpretation is the correct one — that the parties are free to choose one or other method, and do not have to try one *after* the other. In its Order of July 2002, the Court did not directly address this point, but

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[47] *I.C.J. Reports 1996 (I)*, p. 66, paras. 21-27.

[48] *Ibid.*, para. 21.

simply stated that, "at this stage in the proceedings the Congo has also not shown that the preconditions on the seisin of the Court . . . have been satisfied[49]".

3.21. Mr. President, in our submission, the natural reading of Article 75 is that the two methods of dispute resolution are cumulative. This point can perhaps best be demonstrated in the following manner: the issue which Article 75 seeks to resolve is whether this Court can exercise jurisdiction over a given dispute. To answer this, Article 75 poses a further question, namely, has the dispute been resolved by either negotiations or the Health Assembly? Unless *both* mechanisms have been tried, this question cannot be answered. If the Health Assembly has not been given an opportunity, it is simply not possible to say whether or not the dispute has been resolved by it.

3.22. This interpretation is fortified by a matter which the Congo itself raises in its Counter-Memorial, at paragraph 65. In this paragraph, the possibility of irreconcilable judgments is discussed. The Congo appears to be suggesting that Article 75 creates a potential problem of inconsistent decisions being reached — presumably by the Health Assembly and by the Court. However, if the preconditions in Article 75 are viewed as cumulative, the possibility of irreconcilable judgments can never arise. For, on this interpretation, Article 75 establishes a strict order of precedence, under which the Court could not assume jurisdiction before the Health Assembly had had an opportunity to resolve the dispute. If the Health Assembly reaches a decision, therefore, that will, in itself, prevent the Court from considering the dispute.

3.23. Mr. President, to an extent, it is unnecessary for the Court to decide whether the preconditions are alternative or cumulative. For, in the submission of Rwanda, it is clear that neither have been satisfied. There has never been any suggestion that any reference has been made to the Health Assembly. Indeed, the Congo expressly acknowledges this, at paragraph 64 of its Counter-Memorial, where it notes that "the Congo . . . opted for negotiations". In relation to those negotiations, however, the Congo does not elaborate on any specific attempts to reach a negotiated settlement of a dispute regarding the interpretation or application of the WHO Constitution. At page 24 of its Application, the Congo simply asserts that:

> "La perpétration et la continuation des actes de guerre empêchant tout règlement de ce différend par voie de négociations, la République démocratique du

[49]Para. 82.

Congo demande à la Cour de se déclarer compétente sur base de l'article 75 de la Constitution de l'OMS."

3.24. It appears that in this context, it relies on the same arguments which it has made in relation to the Convention on the Elimination of Discrimination against Women and the Montreal Convention, that is to say that any negotiation was impossible because Rwanda refused to participate. This issue has already been addressed by Professor Greenwood and it is unnecessary for me to repeat his submissions. I would merely reiterate that it is not sufficient for the Congo simply to assert that negotiation generally was impossible. The Congo must show that it has attempted, in good faith, to negotiate a solution to *this particular dispute.*

5. The Constitution of Unesco

3.25. Finally, Mr. President, I turn to the Constitution of Unesco. The Congo relies upon Article XIV, paragraph 2, which provides that: "Any question or dispute concerning the interpretation of this Constitution shall be referred for determination to the International Court of Justice or to an arbitral tribunal, as the General Conference may determine under its rules of procedure."

3.26. As with Article 75 of the WHO Constitution, Rwanda will make submissions of both a substantive and procedural nature.

3.27. Addressing first the substantive arguments: it will be noted that Article XIV, paragraph 2, is limited to disputes concerning the *interpretation* of the Constitution. It does not extend to disputes concerning the *application* of the Constitution. This is narrower than the compromissory clauses which have thus far been under discussion. In its Application, the Congo summarizes its allegations under the Unesco Constitution as follows: "Par le fait de la guerre, la République démocratique du Congo est aujourd'hui incapable de remplir ses missions au sein de l'Unesco . . ."[50] At its highest, this would only amount to a dispute concerning the application of the Constitution.

3.28. At paragraph 85 of its Order of July 2002, the Court stated that Article XIV, paragraph 2, provides for the referral of disputes only in respect of the interpretation of the Constitution. It further noted that this did not appear to be the object of the Congo's Application.

[50]Application, p. 26.

Unesco was invited by the Court to make written submissions on this point. But in its letter to the Court dated 13 October 2003, Unesco declined this invitation on the basis that it concurred entirely with the view of the Court as expressed in paragraph 85 of the Order. No new arguments or evidence have been presented by the Congo since that Order to suggest that its allegations do indeed concern the interpretation of the Constitution.

3.29. Mr. President, even if Article XIV (2) were not limited to matters of interpretation, the Congo has once again failed to explain how the Unesco Constitution is applicable to this dispute. Rwanda's submissions on this point essentially mirror the points which I have previously discussed in relation to the WHO Constitution. I will therefore run through them more briefly. First, it is repeated that the essence of the Congo's case is the alleged acts of aggression committed by Rwanda. Secondly, the Congo has failed to make clear which, if any, obligation under the Unesco Constitution has been breached. In the Application[51] the Congo refers to Article I. But again this simply outlines the purposes and functions of the organization. It does not impose any direct obligations on the Member States. Again, this is true of the Constitution as a whole. Its function is to establish the principal organs and working methods of Unesco. Detailed policies and programmes are promulgated by the General Conference[52]. It follows that the Unesco Constitution is not, and cannot be, relevant to the dispute before the Court.

3.30. Mr. President, I will now turn to our submissions on the procedural requirements of Article XIV (2). Article XIV is again more limited than the other compromissory clauses under consideration. The other Conventions provide that once any preconditions have been satisfied, the States parties themselves may refer a dispute to the Court. Article XIV is different. Reference to the Court may only be made "as the General Conference may determine under its Rules of Procedure". Rule 38 of those Rules is the relevant provision for these purposes[53]. It provides for questions concerning the interpretation of the Constitution to be referred to the Legal Committee.

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[51]Page 27.

[52]Article IV (B) Unesco Constitution (tab 6, p. 59 of the Annexes to the Memorial of Rwanda). The only obligations imposed directly on Member States by the Constitution are: a duty to make arrangements for national co-operating bodies (Article VII (1)) and to submit reports, as determined by the General Conference (Article VIII).

[53]At tab 10, p. 160 of the Annexes to the Memorial of Rwanda.

The Legal Committee may then either "decide by a simple majority to recommend to the General Conference that any question concerning the interpretation of the Constitution be referred to the International Court of Justice" (Rule 38 (3)), or the Legal Committee may: "In cases where the Organization is party to a dispute . . .decide by a simple majority, to recommend to the General Conference that the case be submitted for final decision to an arbitral tribunal, arrangements for which shall be made by the Executive Board." (Rule 38 (4).)

3.31. Mr. President, it is abundantly clear from Rule 38 that States do not have the power, under Article XIV, unilaterally to refer a dispute to the Court. Such a reference can only be made via the Legal Committee and the General Conference. The Congo has at no time suggested that these procedures have been adhered to.

3.32. It is to be noted that in its Counter-Memorial, the Congo aligns Article XIV of the Unesco Constitution with Article 75 of the WHO Constitution. It appears to assume that the provisions are identical, and it discusses them in the same breath. But, as has been demonstrated, Article XIV is, in fact, much narrower. It has carefully defined parameters. Simply to focus on the alleged attempts at general negotiations is consequently particularly inadequate in this context. It remains the case that the Congo has made no attempt to demonstrate that the preconditions in Article XIV for the jurisdiction of the Court have been satisfied.

3.33. Mr. President, it is Rwanda's contention that none of the four Conventions which I have discussed this morning is capable of founding the jurisdiction of the Court. I would now respectfully ask you to call upon Professor Greenwood to conclude our submissions.

The PRESIDENT: Thank you, Ms Wells. I now give the floor to Professor Greenwood.

Mr. GREENWOOD:

4.1. Thank you, Mr. President. There is one remaining matter on which I wish to address the Court before I briefly sum up the arguments of Rwanda in this first round of oral argument. The one remaining matter concerns admissibility.

1. The inadmissibility of the present Application

4.2. Rwanda's main submission is that the Court lacks jurisdiction in respect of the Congolese Application. In the alternative, however, we make a secondary submission that the Application is inadmissible. The basis for this submission is that the Application is an abuse of the process of the Court.

4.3. The Court will recall that in 1999 the Congo made identical applications against Burundi, Rwanda and Uganda. The case between the Congo and Uganda has, of course, proceeded to a hearing on the merits earlier this year.

4.4. With regard to the case against Rwanda, the 1999 Application sought to base jurisdiction upon the Torture Convention, which is not in force for Rwanda, the Genocide Convention, in respect of which the Rwandan reservation excludes the jurisdiction of the Court, and the Montreal Convention, the requirements for which have not been satisfied and which would, in any event, have related to only one tiny part of the Application.

4.5. The Government of Rwanda could have waited until the Congo had deposited its Memorial and then challenged the jurisdiction of the Court but since it was apparent that there was no jurisdiction in respect of the 1999 Application, Rwanda raised its preliminary objections at the earliest possible moment and the Court ordered that pleadings should first be addressed to the issues of jurisdiction and admissibility. Rwanda filed its Memorial on these issues on 21 April 2000. After obtaining an extension of time for its own pleadings, the Congo suddenly withdrew its Application — without ever having responded to the jurisdictional objections of Rwanda — and the Court discontinued the case by an Order dated 30 January 2001.

4.6. Then in May 2002, the Congo made a fresh application which is in most material respects identical to the Application of 1999. Most important, Mr. President, in spite of the fact that by May 2002 the proceedings between the Congo and Uganda were well under way, the Congo simply repeated exactly what it had said in its 1999 Application regarding the allegations of the shooting down of an aircraft at Kindu in October 1998, again making no mention of the fact that it was already pursuing the identical claim against Uganda and without offering any word of explanation as to how it could reconcile these two claims. Nor, so far as we have been able to

discover, has the Congo offered the Court any explanation in its pleadings in the case against Uganda of how it comes to be making the same allegation against Rwanda.

4.7. Mr. President, both by alleging the same incident was separately imputable to two States (three if one also takes into account the discontinued proceedings against Burundi) and by making a fresh application substantially identical to its earlier, discontinued one with the addition only of a few asserted bases of jurisdiction which are as weak as those originally invoked, the Congo is, quite simply, playing fast and loose with the Court.

4.8. Contrary to what the Congo suggests in its Counter-Memorial, we are not saying that the Court's Order of 30 January 2001 discontinuing the earlier case of itself precludes the Congo from making a fresh application[54]. Nor are we saying that a State that has withdrawn an application may never introduce a fresh application against the same defendant in respect of the same subject, where there is a material change of circumstances, such as, for example, the failure of settlement negotiations. But we do say that a State which brings an application to the Court, is faced with a jurisdictional objection and backs away from responding to that objection, preferring to withdraw its application, should not be permitted to make all of the same allegations — including all the same jurisdictional arguments — in a fresh application simply because it sees a tactical advantage in doing so.

4.9. Mr. President, I recognize the novelty of this submission but the Court is the guardian of its own procedures and has both a right and a duty to protect its integrity as an institution. In Rwanda's submission, that gives it the power to prevent its process being abused by a State which makes, then withdraws, then makes again the same allegations and which makes the same allegations against more than one respondent State without any word of explanation as to the relationship between those different allegations. It is that which, in our submission, makes the Application in the present case inadmissible.

4.10. Before I leave the question of admissibility, let me just clarify one matter. The Congo devotes a not inconsiderable portion of its Counter-Memorial to rejecting an argument that the Pretoria Agreement of 2002 renders the present Application inadmissible. That is an argument

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[54]Counter-Memorial, paras. 84-86.

which Rwanda has never made and does not seek to make now. It need not, therefore, trouble the Court further. We referred to the Pretoria Agreement not in respect of admissibility but solely in order to show that the situation had changed factually since the hearings in June 2002.

2. Summary of the Rwandan arguments

4.11. Mr. President, let me then summarize where we stand. In our submission, the Congo's case on jurisdiction is quite simply hopeless. Rwanda maintains that the Court lacks jurisdiction to rule on Congo's claims against it for seven reasons.

4.12. *First*, the Congo seeks to rely upon an approach to jurisdiction which is plainly contrary to the jurisprudence of the Court and which ignores the fundamental principle that jurisdiction can only be derived from the consent of the parties.

4.13. *Secondly*, one of the treaties relied upon by the Congo — the Torture Convention — is not even in force for Rwanda.

4.14. *Thirdly*, two of the other treaties relied upon by the Congo — the Racial Discrimination and Genocide Conventions — cannot afford a basis for the jurisdiction of the Court, because, as Ms Wells has just shown you, Rwanda has entered reservations to the provisions concerning jurisdiction, reservations which are similar to ones already upheld by the Court, are plainly valid and to which the Congo made no objection whatever until it turned up at the oral hearings here in 2002.

4.15. *Fourthly*, neither Article 29 of the Convention on the Elimination of Discrimination against Women, nor Article 14 of the Montreal Convention can provide a basis for the jurisdiction of the Court in the present case, because the Congo has failed to establish that it has complied with the preconditions for the seisin of the Court contained in either provision.

4.16. *Fifthly*, the Statute of the WHO cannot afford a basis for jurisdiction because the Congo has not shown either that its case falls within the substantive obligations imposed upon States by that Statute or that the preconditions for seisin of the Court have been satisfied.

4.17. *Sixthly*, the Constitution of Unesco is manifestly inapplicable to this case, which is not about the interpretation of that Constitution and which has not been brought in the manner prescribed by the Constitution and the Rules of Procedure adopted thereunder.

4.18. *Lastly,* Mr. President, the Vienna Convention on the Law of Treaties has nothing whatever to do with the present case and cannot afford a basis for jurisdiction.

4.19. For these reasons, Mr. President, Rwanda asks the Court to adjudge and declare that it lacks jurisdiction in respect of the claims brought by the Congo or, in the alternative, to declare that the Congolese Application is inadmissible.

Mr. President, that concludes the first round submissions on behalf of Rwanda.

The PRESIDENT: Thank you, Professor Greenwood.

This marks the end of today's sitting. The Court will meet again tomorrow, 5 July, at 10 a.m. to hear the first round of oral argument of the Democratic Republic of the Congo on the questions of jurisdiction and admissibility. Thank you.

The Court is adjourned.

The Court rose at 12.25 p.m.

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