CR 2005/19

Cour internationale de Justice

LA HAYE

International Court of Justice

THE HAGUE

ANNÉE 2005

Audience publique

tenue le mercredi 6 juillet 2005, à 15 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 Wednesday 6 July 2005, at 3 p.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 Counsellor, Embassy of the Democratic Republic of the Congo in the Kingdom of the Netherlands,

Ms Marceline Masele, Second Counsellor, 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 now open.

The Court meets today to hear the second round of oral argument of the Republic of Rwanda. Rwanda will take the floor this afternoon to present its reply on the questions of jurisdiction and admissibility. Thus, I shall now give the floor to Professor Greenwood.

Mr. GREENWOOD: Mr. President, Members of the Court. May it please the Court.

1. Introduction

1.1. In your closing remarks yesterday, Mr. President, you encouraged the Parties to be brief in their second round speeches. I am more than happy to follow your injunction and do not expect to take more than an hour. Rwanda is able to be brief in large part because the Congo said little to which we need to reply. Despite the very clear limits of this hearing and the principle that allegations about the merits of a case are irrelevant to jurisdiction, counsel for the Congo treated the Court — if "treated" is the appropriate term — to one comment after another about the allegations they *would* make if the case *were* being heard on the merits. Mr. President, Rwanda is not going to engage in these games of accusation and counter-accusation made without proof or purpose.

1.2. Nor are we going to descend to the kind of abuse that was being hurled at us yesterday. Allegations of bad faith are not to be made lightly in an international court and should never be made without clear and convincing evidence. The way in which counsel for the Congo bandied about such allegations yesterday without offering a shred of evidence in support of them was as ill-judged as it was intemperate. Rwanda utterly rejects, Mr. President, the suggestion that it has acted in anything other than good faith at any point in these proceedings. But the Congo's allegations add nothing except a sour taste to the arguments on the issues before the Court and I am going to say nothing more about them.

1.3. The simple truth is that for a State to raise objections to the jurisdiction of the Court on the basis that that State has not given its consent to the Court's jurisdiction is not a political argument, as was maintained yesterday[1]. It is not a delaying tactic, it is not a sign of weakness on

[1]CR 2005/18, pp. 33 *et seq*.

the merits, as was suggested by Professor Akele Adau[2]. Still less is it an abuse of the process of the Court. It is a perfectly normal expression of the right of a State not to be required, in Professor Rosenne's words, to give an account of itself before an international tribunal unless it has consented to do so[3]. To raise an objection of that kind is not a matter of bad faith. Nor, with respect, does Rwanda need to be invited — as counsel for the Congo rather patronizingly put it yesterday[4] — to "rejoin the international community" by making an unqualified acceptance of the Court's jurisdiction, any more than the ten defendants to the *Legality of Use of Force* cases needed such an invitation, let alone the more than 100 other States which have not made declarations under the optional clause. And to make a preliminary objection requires no high-level gymnastics, as one of counsel for the Congo suggested, although I must say that I am personally rather flattered that he should have thought me capable of gymnastics of any kind, whether on the high wire or anywhere else. Now that London has been awarded the 2012 Olympics it opens up the vista of an entirely new career for me!

1.4. I do not propose to say anything today about the rather extraordinary argument on *forum prorogatum* which we heard yesterday[5] other than to say this, that if it is right, then there is no way that a State can challenge the jurisdiction of this Court without conceding that the Court has jurisdiction. The only safe course, if my learned friend is correct, is for a respondent State not to appear before the Court at all. Well, it is hardly an attractive argument, Mr. President, is it? It takes us back to the bad days of the early 1970s when States contesting jurisdiction boycotted the Court's proceedings. And since it is a suggestion which flies in the face of the Statute, the Rules, nearly 60 years of consistent jurisprudence in this Court and simple common sense, I am going to say nothing more about it.

1.5. Nor need I return for more than a minute or so to our submissions on the effect of the Court's Order in 2002. I did not say — as Professor Akele Adau thought I said — that a State which had lost on prima facie jurisdiction could never win at the jurisdictional phase. In fact I

---

[2]CR 2005/18, pp. 17-18, paras. 31-32.

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

[4]CR 2005/18, p. 38, para. 9.

[5]CR 2005/18, pp. 16-18.

went to some lengths to say the opposite[6]. What I did say, Mr. President, was that a State which had lost on prima facie jurisdiction could not expect to convince the Court to take a different decision at the jurisdictional phase unless it could produce better arguments than it had done on provisional measures and, where necessary, adduce fresh evidence to satisfy the Court that it had met the preconditions of seisin. The Congo has done neither.

1.6. As for Professor Katansi's theory of the "absence of a manifest lack of jurisdiction"[7], this thesis — with great respect — confuses two entirely separate questions: whether there is a sufficient ground for striking a case from the Court's List *before* a substantive hearing on jurisdiction, and whether there is *enough* to *found* jurisdiction of the Court. A State can avoid having its case struck from the List at what may be termed the "pre-preliminary phase" by showing that there is no manifest lack of jurisdiction. But that is not enough when we come to the jurisdictional stage itself. The Court does not possess jurisdiction simply because there is an absence of a manifest *lack* of jurisdiction; it possesses jurisdiction only if there is a positive *presence* of jurisdiction.

1.7. So, Mr. President, I shall confine my remarks this afternoon to four issues on which it is necessary to say a little more in response to yesterday's speeches:

— *first,* the reliance on the Vienna Convention on the Law of Treaties as a basis for jurisdiction;

— *secondly,* the question of Rwanda's reservation to Article IX of the Genocide Convention;

— *thirdly,* whether or not the Congo has shown that it has satisfied the preconditions to seisin in the Convention on the Elimination of All Forms of Discrimination against Women, the WHO Statute and the Montreal Convention; and

— *lastly,* whether the Congo's fresh Application is inadmissible as an abuse of process.

2. The Vienna Convention on the Law of Treaties is not a basis for jurisdiction

1.8. I can be very brief, Mr. President, on the subject of the Vienna Convention, which made an unexpected return to the forefront of the Congo's submissions yesterday[8] having been ignored

---

[6]Compare my actual words at CR 2005/17, pp. 21-22 (paras. 2.29-2.32) with the misquotation at CR 2005/18, p. 11, para. 7.

[7]CR 2005/18, pp. 31-32.

[8]CR 2005/18, pp. 44-47.

completely in the Congo's Counter-Memorial. Rwanda has already shown that Article 66 of the Vienna Convention is not a provision which confers jurisdiction over disputes about alleged violations of rules of international law, simply on the basis that those rules have the status of *jus cogens.* Article 66 is confined to a far narrower issue of disputes about whether a particular treaty is contrary to a norm of *jus cogens*. That argument was accepted by the Court in its 2002 Order and it was not challenged by the Congo yesterday[9].

1.9. What *did* emerge yesterday, during the speech of Professor Ntumba, was an entirely fresh argument. In essence, it was as follows:

(1) the first proposition is that a treaty includes the reservations thereto;

(2) the second proposition, that the Congo maintains that Rwanda's reservation to the Genocide Convention — and presumably its reservation to the Racial Discrimination Convention — is contrary to a rule of *jus cogens*; and

(3) therefore, there is a dispute between the Parties as to the compatibility of a treaty with a norm of *jus cogens* which can fall within the scope of Article 66[10].

1.10. Mr. President, there is a very short answer to that argument. The Genocide Convention entered into force between Rwanda and the Congo when Rwanda became party to it in 1975. The Racial Discrimination Convention entered into force between the two States when the Congo became party in 1976. But the Vienna Convention did not enter into force for the two States, or, indeed for anyone else, until January 1980. Now Article 4 of the Vienna Convention provides:

> "Without prejudice to the application of any of the rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by States *after the entry into force of the present Convention with regard to such States.*"[11]

1.11. The provisions of Article 66, being jurisdictional rather than substantive, are plainly not declaratory of a rule of customary law. They can therefore bind States only as a matter of treaty and only in accordance with the terms of the treaty. In accordance with Article 4, the provisions of Article 66 are not retroactive. It follows that Article 66 could not apply in any event

---

[9] *Order of 10 July 2002*, *I.C.J. Reports 2002*, p. 246, para. 75.

[10] CR 2005/18, p. 46, paras. 38-40.

[11] Emphasis added.

to a dispute between the Congo and Rwanda regarding the validity of Rwanda's reservation, even if Professor Ntumba's argument were otherwise impeccable.

1.12. Moreover, Mr. President, even if Article 66 *were* retroactive, what good would that do the Congo in the present case? None. All that it could do — even on the Congo's own argument — is to give the Court jurisdiction over whether Rwanda's reservation is valid. But Rwanda accepts that the Court can rule on that question anyway as part of its task of determining whether the Genocide Convention affords a basis of jurisdiction. Article 66 adds nothing on that point and it could not confer jurisdiction over any of the allegations contained in the Congo's Application.

1.13. As for the validity of the reservation, Mr. President, the Congo again challenged that by arguing that the prohibition of genocide was a rule of *jus cogens*. So it is. But as the Court pointed out in its Order in 2002, Rwanda's reservation "does not bear on the substance of the law, but only on the Court's jurisdiction"[12] and it is only the substantive norm which has the status of *jus cogens*. Nor is Rwanda by any means alone in making a reservation to Article IX of the Genocide Convention. There are reservations identical in effect from States as diverse as Argentina and the People's Republic of China, Malaysia and Algeria, not to mention Spain and the United States (the validity of whose reservations the Court has already upheld in its 1999 Orders in the *Legality of Use of Force* cases). Indeed, the Court held in those cases in 1999 that the effect of the reservations of Spain and the United States was that there was a manifest lack of jurisdiction against those two countries. Consistent with that decision, the Court's decision in the present case, that there was not a manifest lack of jurisdiction, can be explained only by reference to the other treaties invoked by the Congo and not to the Genocide Convention.

3. The Genocide Convention is not a basis for jurisdiction

1.14. So, let me turn then to the Genocide Convention itself as a basis for jurisdiction. It seems to be common ground that the issue between the Parties here turns on the Rwandan reservation to Article IX. In 2002 the Congo challenged the validity of this reservation but its

[12] *I.C.J. Reports 2002*, pp. 245-246, paras. 71-72.

challenge was rejected by the Court[13]. The Congo did not mention the Genocide Convention in its Counter-Memorial but my learned friend, Ms Wells, dealt with the Congolese argument from 2002 in her submissions[14], because the Congo's Counter-Memorial contained a general preservation of all Congo's earlier arguments.

1.15. Yesterday, however, we heard an entirely new line of argument on the Genocide Convention from Professor Akele Adau[15] and Professor Bonyi[16]. They suggested to the Court that Rwanda had withdrawn its reservation ten years ago. Mr. President, that is not the case.

1.16. Rwanda has never sent any notice of withdrawal of its reservation to the depositary (the Secretary-General of the United Nations) or taken any action on the international plane to withdraw its reservation. For that reason, its reservation is still listed by the Secretary-General in the list of reservations and declarations by States concerning the Convention. And that, in my submission, could be an end of the matter and should be an end of the matter, for it is these formal actions on the international plane which are the definitive statement of a State's views regarding its treaty obligations.

1.17. However, counsel for the Congo based their argument on certain actions said to have taken place within a domestic, Rwandan context. They relied, first, on a reference in a textbook, *The Introduction to Rwandan Law,* by two Canadian authors, Professor Schabas and Professor Imbleau. That book, after recording the fact that the reservation had been made in 1975, states the following:

> "Rwanda later undertook, in the Arusha Peace Agreement, to withdraw its reservations to international human rights treaties (Arusha VII, Article 15), and in 1996 it adopted legislation authorizing this (D-L 014/01) of February 15, 1995."

That passage appears at page 189 of the English language version of this book published in 1997. Now, I believe that yesterday my learned friend, counsel for the Congo, gave a different reference, which we assume to be to the French translation of this book that appeared two years later.

---

[13]Order of 10 July 2002, *I.C.J. Reports 2002*, pp.245-246, paras. 71-72.

[14]CR 2005/17, pp. 35-37.

[15]CR 2005/18, pp. 22-23.

[16]CR 2005/18, pp. 49-50.

Unfortunately we have been unable to verify this because the French translation has been taken out of the Peace Palace Library and it has not been possible to get a copy from anywhere else.

1.18. Let us examine the statement in the book a little more closely. First, a word about the Arusha Agreement. This is not a treaty — indeed it is not an international instrument of any kind. It is an agreement, or to be more precise, a package of agreements concluded in August 1993, that is to say, shortly before the genocide which tore Rwandan society apart, between the then Government of Rwanda and the Rwandan Patriotic Front. Arusha provided for the establishment of a "Broad-based Transitional Government" and Article 15 of Annex VII provides:

> "The Broad-based Transitional Government shall ratify all International Conventions, Agreements and Treaties on Human Rights, which Rwanda has not yet ratified. It shall waive all reservations entered into by Rwanda when it adhered to some of these international instruments."

1.19. There is no mention of the Genocide Convention as such, no indication of whether what was in issue included reservations to jurisdictional provisions as well as substantive provisions. Moreover, the Arusha Agreement is not an undertaking by the Republic of Rwanda to another State or to the outside world at large. It is an internal agreement between different political movements within Rwanda — an agreement which was never implemented in the form originally envisaged, because of the genocide launched in 1994 by opponents of the Agreement.

1.20. The Arusha Agreement was implemented within Rwanda, in a different context, by the new coalition Government which took power after the overthrow of the *génocidaires* in the second half of 1994. In February 1995, shortly after the defeat of the *génocidaires*, the then President of Rwanda issued Decree Law 014-15 of 1995. That decree, which like Article 15 of the Arusha Agreement was in very general terms, authorized the withdrawal of *all* reservations entered into by Rwanda to *all* international agreements. It could not have been more general.

1.21. But Mr. President, what the book by Schabas and Imbleau does not appreciate, is that under the constitutional instruments then in force in Rwanda, a decree of this kind had to be approved by Parliament — at that time called the Transitional National Assembly — at its session immediately following the adoption of the decree, a fact that is reflected in Article 20 of the Arusha Agreement. The session immediately following the adoption of Decree 014-15 took place between 12 April and 11 July 1995. The decree was not approved and therefore lapsed. Moreover, a decree

not approved at the session immediately following its adoption cannot be approved at a subsequent session of Parliament.

1.22. The result is, Mr. President, that the Government of Rwanda never took action to withdraw the reservation to Article IX of the Genocide Convention because the internal legal authorization which would have enabled it to do so was not approved by Parliament. Moreover, by the time the events to which the Congolese Application relates, that internal legal authorization could not have been approved. There was no withdrawal of the reservation to the Genocide Convention (or the reservation to the Racial Discrimination Convention) and no undertaking by Rwanda to any other State or States that those reservations would be withdrawn.

1.23. It is unfortunate that Schabas and Imbleau, neither of whom of course is a Rwandan lawyer, should have misunderstood this point, although given the difficulties in ascertaining what was happening in Rwanda in 1993 to 1995 it is entirely understandable. I have to say it is also unfortunate that this somewhat technical issue of Rwandan law should have been raised so late in these proceedings. That fact has prevented Rwanda from giving the normal degree of assistance to the Court which is to be expected of a State that finds its own municipal law put in issue in proceedings here. I do not doubt, however, that this is a point which came to counsel for the Congo at the last minute as there is nothing to indicate, Mr. President, that the Congo was even aware of Decree 014-15 until very recently. I am sure if it had been, it would have included reference to it in its Counter-Memorial. So there is nothing to suggest that the Congo at any stage thought that it could rely upon the decree or the internal agreement at Arusha as any form of undertaking by Rwanda to withdraw its reservation.

1.24. Counsel for the Congo referred yesterday to one more text — a speech delivered by the Minister of Justice of Rwanda to the United Nations Human Rights Commission on 17 May this year[17]. We have been unable overnight — and without, I'm afraid, a proper citation — to track down an official record of the relevant meeting but I have read the relevant part of the Minister's speaking notes and have spoken overnight to the Minister of Justice. As the quotation from her speech read out to you yesterday by my learned friend Professor Bonyi makes clear, what the

[17]CR 2005/18, p. 50, para. 16.

Minister said was that Rwanda has an intention to lift unspecified reservations to unspecified human rights treaties at some time in the future. Two points need to be made about that statement. First, it is manifestly inconsistent with Rwanda having already lifted the same reservations ten years earlier. Secondly, a statement of intention of this kind made, not by a Foreign Minister or Head of Government with automatic authority to bind the State in matters of international relations, but by a Minister of Justice, cannot bind the State to lift a particular reservation, and indeed could never have been intended to bind the State, still less could it have the effect of actually operating to lift the reservations in question. Nor, with respect, would any statement given in such a forum nearly three years after the present case had been brought have an effect on whether jurisdiction existed, a question which the Court has made clear has to be judged by reference to the situation as it existed at the date the Application was filed — a point made, for example, in the *Lockerbie* cases in 1998.

4. The Democratic Republic of the Congo has failed to comply with the preconditions for seisin in the Convention on the Elimination of Discrimination against Women, the Montreal Convention and the WHO Statute

1.25. Let me turn, Mr. President, to the question whether the Congo has complied with the preconditions for seisin of the Court in the Convention on the Elimination of Discrimination against Women Article 29, the Montreal Convention Article 14 and the WHO Statute Article 75.

1.26. I will not repeat the arguments which Ms Wells and I set out on Monday and which are detailed in Rwanda's Memorial regarding the steps which need to be taken. We will only note that the Congo made no serious response to those arguments in its statements yesterday. I want instead to concentrate today on two matters — what Congo said yesterday about negotiation and what it failed to say about arbitration.

1.27. First, the Congo's comments on negotiations. The Congo's arguments on this issue were set out by Professor Ntumba[18]. The essence of his argument can again be summed up in three propositions —

(1) the form which negotiations take is immaterial. Bilateral, direct negotiations are not the only negotiations which could satisfy the requirements of the relevant conventions;

---

[18]CR 2005/18, pp. 38-44.

(2) the attempts which the Congo made to negotiate regarding the armed conflict included, according to Professor Ntumba, adequate reference to the specific issues arising under the Convention on the Elimination of Discrimination against Women, the Montreal Convention and the WHO Statute; and

(3) negotiations were rendered hopeless — there was no future for them — as a result of the approach of Rwanda.

1.28. So far as the first of those three points is concerned, Rwanda agrees that it is the substance of negotiations and not the form which is important. But the substance needs a good deal more examination than counsel for the Congo gave it yesterday. To satisfy the requirements of the three compromissory clauses, what must be involved is an attempt to settle a dispute by negotiation, not a mere recitation of complaints. The fact that the Congo may have accused Rwanda of violating a treaty provision is not an attempt to negotiate a settlement of a dispute regarding the application of that treaty. Still less is a statement by the European Union or a report by a non-governmental organization able to substitute for an attempt to negotiate a settlement by the two Parties. Moreover, as Rwanda has consistently maintained — without ever receiving a serious answer from the Congo — the substance must consist of an attempt to settle a specific dispute arising under the relevant treaty, and not simply some overall situation.

1.29. So far as the second limb of Professor Ntumba's argument is concerned, the Congo's approach ever since 2002 could be characterized in these terms: "of course we raised specific issues under these conventions with Rwanda, but we are not going to offer you a single piece of documentary proof to that effect — so you are just going to have to take what we say on trust". That approach was unsuccessful in 2002, the Court holding — by a very large majority — that the Congo had not satisfied the Court that it had attempted to resolve a dispute regarding the interpretation or application of any of the three Conventions[19]. Moreover, Judge *ad hoc* Mavungu, who dissented on this point, commented himself that the Congo had failed to produce any evidence in relation to this matter[20].

---

[19] *I.C.J. Reports 2002*, p. 247, para. 79 (CEDAW), and p. 248, para. 82 (WHO Statute).

[20] *I.C.J. Reports 2002*, p. 280, para. 29.

1.30. Mr. President, the Congo then had nearly a year before it had to deposit its Counter-Memorial in which to gather the evidence that it had sought to negotiate these specific issues with Rwanda. But it has offered the Court nothing at all beyond what the Court found unsatisfactory in 2002. Nothing. There is a good reason for that, Mr. President. There is no such evidence, because the Congo never *did* attempt to negotiate with Rwanda a specific dispute under any of the three treaties with which we are now concerned. But in any case, Congo has chosen to take its stand on precisely the same ground on which it failed in 2002 and it must take the consequences of that choice. In our submission, the only possible finding today is that, just as the Congo had failed to satisfy the Court that it had complied with the requirement of attempting to achieve a negotiated settlement in 2002, so it has failed to do so in 2005.

1.31. Then there is the third point — the suggestion that negotiations would have been fruitless in any event. The Congo insists that all its attempts to negotiate the wider conflict were blocked by Rwanda. Since it also insists — and that, of course, is the second point I have just examined — that negotiations on the specific "treaty disputes" were somehow "rolled up" in these broader negotiations, the conclusion the Court is offered is that negotiations on the treaty disputes would have been obviously fruitless as well.

1.32. But that issue has to be determined as at the date on which the Application was lodged. That new Application was lodged on 28 May 2002, so what was the position regarding negotiations and the prospect for negotiations at the end of May 2002? According to the Security Council Mission to the Great Lakes region, it was better than it had been before — better than it had been ever before. On 13 May 2002, two weeks before the Congo deposited its Application, that Mission reported that it was "encouraged by the generally positive reception accorded to the proposal to convene, at an appropriate time, an international conference on security, development and peace in the Great Lakes region"[21]. A year earlier, on 29 May 2001, the Mission had reported on the talks it had held with all interested parties, including the Governments of the Congo and Rwanda and concluded as follows:

[21]United Nations doc. S/2002/537, p. 5, para. 31.

> "The Security Council Mission found much that was encouraging in its visit to the Great Lakes region. For the first time since the outbreak of the conflict, the outlines of a solution appeared to be taking shape."[22]

And in February 2002, the Tenth Report of MONUC, the peacekeeping operation, also commented on the prospect for a negotiated settlement. Counsel for the Congo has referred to that report for a comment on the fact that no substantive issues were discussed at the Blantyre summit, in Malawi. What they omitted to mention was that the same report contained this passage: "On 3 February, President Kagame [the President of Rwanda] called for a meeting of all signatories to the Lusaka Agreement to move the peace process forward."[23]

1.33. Of course, Mr. President, the Mission was concerned with the wider conflict. It was not looking at a dispute about the interpretation or application of the Montreal Convention, for example. But it is the Congo which has insisted that negotiations about the wider conflict *necessarily* involved negotiations about the more specific "treaty disputes" it claims to have identified. Yesterday, Mr. President, counsel for the Congo treated us to a nice metaphor about the number of kitchen utensils you had to have to cook a meal. Let me reply in kind. We have a saying in Britain that "you cannot have your cake and eat it" — more prosaically, "you cannot have it both ways". If Congo is going to insist on treating negotiations about the wider conflict as though they were negotiations about the specific treaty disputes, then it must accept that a breakthrough in the negotiations about the wider conflict at the very time that it was lodging its Application fatally undermines its claim that any further negotiation would have been fruitless.

1.34. And there was a breakthrough, Mr. President. Only a few weeks later — on 30 July 2002 — the Parties to the present case together with other regional actors concluded the Pretoria Agreement which enabled amongst other things the complete withdrawal of Rwandan forces from the Congo[24] and the absorption of part of the Congolese opposition into the Government.

1.35. The other main point I want to make about the Convention on the Elimination of Discrimination against Women and the Montreal Convention concerns something which counsel for the Congo ignored yesterday. Both Article 29 (1) of the Convention on the Elimination of

---

[22]United Nations doc. S/2001/521, p. 15, para. 111.

[23]United Nations doc. S/2002/169, p. 6, para. 34.

[24]Memorial, Annex 11.

Discrimination against Women and Article 14 of the Montreal Convention are quite clear on one point. If a dispute regarding the interpretation or application of the Conventions cannot be settled by negotiation, then it *shall* be submitted to arbitration at the request of one of the parties. Only if the parties are unable to agree on the organization of the arbitration within six months of the request being made does either clause confer jurisdiction upon this Court.

1.36. It follows, Mr. President, that even if the Court were to accept everything that counsel for the Congo told you yesterday about negotiations, the Congo would still have to satisfy you that it had complied with the requirement of first attempting recourse to arbitration. But the most thorough search of the transcript of yesterday's hearings shows that the word "arbitration" was not mentioned once by counsel for the Congo. Not once. The Congo has nothing to say about its attempts to refer to arbitration any dispute under the Montreal Convention or the Convention on the Elimination of Discrimination against Women for the simple reason that it never made any such attempt.

1.37. It could have done so. For example, after the declaration of the ICAO Council in relation amongst other things to the alleged shooting down of the aircraft at Kindu, if the Congo had considered that there was a dispute between itself and Rwanda regarding the application of the Montreal Convention, it could have made a request for arbitration either then or at some other time before 28 May 2002 when it filed its new Application. In other words, if it considered that the ICAO Council declaration did not settle the dispute in a negotiated way, it could have made a request for arbitration. But it did not do so, and you have been offered not one *hint* in any document that the Government of the Congo even *thought* about the possibility of referring such a dispute to arbitration, let alone attempted to do so. And the same is true, Mr. President, of any dispute which the Congo may have believed existed regarding the application of the Convention on the Elimination of Discrimination against Women.

1.38. Mr. President, the failure to request arbitration — quite apart from any of the other considerations put to this Court — is fatal to the Congo's claim to jurisdiction under the Montreal Convention or under the Convention on the Elimination of Discrimination against Women.

1.39. It is true that it does not apply to Article 75 of the WHO Statute. But the Congo yesterday made no answer to Ms Wells's submissions that it has failed to show any connection

between the obligations which the Statute imposes upon States and the situation between the Congo and Rwanda. Nor has it dealt with the fact that the Health Assembly was never asked to achieve a settlement of any dispute between the two States regarding the interpretation or application of the WHO Statute. So the claim under that treaty is fatally undermined as well, as the Court found it was in 2002.

Mr. President, yesterday Professor Katansi quoted a Japanese author with the longstanding international fable of the Emperor's clothes, where only the little boy is able to point out that the Emperor is not in fact wearing a fine suit, he is actually completely naked. And Professor Katansi said this Court is not an emperor without clothes. But, Mr. President, there *is* an emperor without clothes walking this Court at the moment. But is not the Court itself, it is the Congo's argument on jurisdiction.

5. Abuse of process

1.40. Let me turn very briefly to the subject of abuse of process and admissibility. The submission Rwanda makes that the new 2002 Application by the Congo is an abuse of process is not one which we make lightly. We accept, Mr. President, that a State which withdraws an application is not invariably debarred from renewing that application. That was the case in, for example, the *Barcelona Traction Company* case in 1964, where the renewed application was brought after the failure of settlement talks that had led to the withdrawal of the original application by Belgium.

1.41. But there is no such background here. Professor Bonyi disputed our claim that the Congo had backed away from its original application because it recognized that there was no jurisdiction. But our analysis on this point is supported by the letter written by the representatives of the Congo to the Court on 15 January 2001, in which they gave notice that the Congo wished to discontinue its earlier Application. They said this:

> "Au vu des arguments développés par le Rwanda dans son mémoire sur la compétence, je prends acte que le Gouvernement rwandais n'accepte pas de se défendre devant la Cour sur les arguments de fond développés par la République démocratique du Congo dans sa requête introduite le 23 juin 1999."

It was for that reason that the letter stated that the Congo was withdrawing its Application. It is, of course, true that the same letter contains a reservation of the right for the Congo to bring a fresh application on other grounds of jurisdiction.

1.42. But Mr. President, what the Congo did was to introduce a new Application which included verbatim *all* of the material in the old Application, repeated *all* of the old grounds of jurisdiction, including, I might add, a Convention which we had shown was not in force for Rwanda anyway. It is that which we say the Court should not permit. In particular in the case of the Montreal Convention, the allegations on that issue, in the new Application, are identical to the allegations in the Application of 1999. No fresh jurisdictional ground is advanced in respect of that allegation, nor could it be. Now, Mr. President, if the Court permits a State to make an application of that kind, finds that its jurisdiction is challenged by the Respondent, can very properly and indeed encouraged by the Court in its Rules, takes its preliminary objections as early as possible and then the Applicant, having seen the jurisdictional case it is going to have to meet, is allowed simply to withdraw its case, take it away, improve its arguments, massage its grounds for jurisdiction a bit, and then bring forward the same Application a few years later, having forced the Respondent to go to the expense of pleading out the jurisdictional case, when the Applicant has incurred no expense in depositing a memorial on the merits, and having forced the respondent State to set out in public what its jurisdictional arguments are, so that the Applicant is well prepared next time it brings an application, then that is going to send a very clear message to potential respondent States: if you are faced with a claim in the International Court where jurisdictional grounds are very doubtful, do not take a preliminary objection straight away and help to clear a case that has no jurisdictional merit off the Court's List; keep your powder dry, make your opponent plead its case out on the merits, only then take a preliminary objection.

Mr. President, that is not, we say, in the interests of the Court, and it is not in the interests of States. It is for that reason that we maintain that the Court should not allow itself to be used for a kind of litigation version of guerrilla warfare, of hit-and-run tactics. If the Court does that, then it does both itself and the parties which may appear in front of it a grave disservice. At the very least, Mr. President, we say that a State should not be permitted to bring *exactly* the same allegations

forward again, on the same jurisdictional basis, without offering at least *some* reason, other than its own tactical advantage, for having done so.

6. Conclusion

1.43. Mr. President, we conclude by saying that the Congo has failed to satisfy the Court in relation to the preconditions for the seisin of the Court under any of the treaties on which it relies. The inevitable result is that the Court lacks jurisdiction. Our alternative argument is that the Application is inadmissible, at least to the extent that it repeats what was in the original Application, offers no new jurisdictional basis of a new kind and no explanation.

1.44. I now ask you to call upon the Agent of Rwanda to read out Rwanda's formal submissions to the Court.

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

Mr. NGOGA:

2.1. Mr. President, I shall now read the closing submissions of Rwanda, a signed copy of which I have given to the Registrar.

For the reasons given in our written preliminary objections and at the oral hearings, the Republic of Rwanda requests the Court to adjudge and declare that:

(1) it lacks jurisdiction over the claims brought against the Republic of Rwanda by the Democratic Republic of the Congo; and

(2) in the alternative, the claims brought against the Republic of Rwanda by the Democratic Republic of the Congo are inadmissible.

2.2. That concludes the oral presentation of Rwanda.

The PRESIDENT: Thank you, Mr. Ngoga. The Court takes note of the final submissions which you have now read on behalf of the Republic of Rwanda with respect to the questions of jurisdiction and admissibility.

Oral arguments will resume on Friday 8 July at 10 a.m. in order for the Congo to present its reply.

Thank you, the sitting is closed.

The Court rose at 4 p.m.

_____