DISSENTING OPINION OF JUDGE *AD HOC* MAVUNGU

[Translation]

Preliminary objections — Jurisdiction of the Court and admissibility of the Application — Compromissory clauses — Necessary preconditions for seisin of the Court — Existence of a dispute — Diplomatic negotiations — Recourse to arbitration.

Introduction

1. In its Order of 10 July 2002 on the request for the indication of provisional measures (*Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), I.C.J. Reports 2002*, p. 219), the Court dismissed both Parties' claims, holding that the necessary conditions for the indication of provisional measures (urgency, safeguard of the parties' rights, non-aggravation of the dispute, prima facie jurisdiction of the Court) did not exist in the present case. It likewise rejected the Republic of Rwanda's submission that the case should be removed from the Court's List.

The balance achieved by the Court in 2002 has now been lost as a result of the Judgment on the preliminary objections. Just as I was of the opinion that the Court could have indicated certain provisional measures in reliance on certain of the bases of jurisdiction invoked by the Democratic Republic of the Congo (DRC), so I believe that, at this stage of the proceedings, the Court could have established its jurisdiction and addressed the merits of the case.

2. Neither the general public nor specialist commentators will understand how the Court could arrive at two opposing rulings in two cases sharing the same characteristics. There can be no doubt whatsoever that the DRC nourishes the same grievances against Uganda as it does against Rwanda. For no apparent reason, Uganda's counsel espoused Rwanda's cause:

> "the requests of the Democratic Republic of the Congo relating to activities or situations involving the Republic of Rwanda or its agents are inadmissible . . ." (*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005,* p. 186, para. 24).

3. When delivering its Judgment on 19 December 2005 in the case between the DRC and Uganda, the Court was at pains to note the complexity of the situation in the Great Lakes region of Africa. It also focused on the need to achieve a comprehensive settlement of the region's problems:

> "The Court is aware of the complex and tragic situation which has long prevailed in the Great Lakes region. There has been much suffering by the local population and destabilization of much of the region . . . The Court is aware, too, that the factional conflicts within the DRC require *a comprehensive settlement to the problems of the region*." (*I.C.J. Reports 2005*, p. 190, para. 26; emphasis added.)

4. The Court's ruling at the preliminary objections stage, resulting in removal of the case from the List, means that no decision will be made from an international law perspective on the Parties' claims and no closure reached in the minds of the various victims, who still await redress.

The ideal approach would have been to settle the entire litigation between the DRC and two of its neighbours, Uganda and Rwanda, in the present case, in order to work effectively towards the restoration and consolidation of peace in the region[1].

5. The Court, principal judicial organ of the United Nations, has set limits to its action in the legal settlement of disputes between the countries of the Great Lakes region:

> "[T]he task of the Court must be to respond, on the basis of international law, to the particular legal dispute brought before it. As it interprets and applies the law, it will be mindful of the context, but its task cannot go beyond that." (*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005,* p. 190, para. 26.)

6. In disputing the Court's jurisdiction and the admissibility of the Application submitted by the DRC, the Republic of Rwanda raised two preliminary objections[2]. It was of the opinion that the bases of jurisdiction cited by the DRC (Article 22 of the Convention on Racial Discrimination; Article 29, paragraph 1, of the Convention on Discrimination against Women; Article IX of the Genocide Convention; Article 75 of the Constitution of the WHO; Article XIV, paragraph 2, of the Unesco Constitution; Article 9 of the Convention on Privileges and Immunities; Article 30, paragraph 1, of the Convention against Torture; Article 14, paragraph 1, of the Montreal Convention; peremptory norms *(jus cogens)* in the area of human rights and *forum prorogatum*) could not

[1] For an analysis of the Court's role in settling disputes, see Mohammed Bedjaoui, "La place de la Cour internationale de Justice dans le système général du maintien de la paix institué par la Charte des Nations Unies", *Recueil des cours de l'Académie de droit international de La Haye*, Vol. 8, 1996, pp. 541-548; Mvumbi-di-Ngoma Mavungu, *Le règlement judiciaire des différends interétatiques en Afrique*, 1992.

[2] Regarding preliminary objections, see Georges Abi-Saab, *Les exceptions préliminaires dans la procédure de la Cour internationale*, 1967.

found the jurisdiction of the Court (see Judgment, para. 15).

In any event, even assuming that one of the titles or rules of customary international law were to be accepted by the Court, the DRC's Application would be "nevertheless inadmissible" *(ibid.)*.

7. Pursuant to Article 79 of its Rules, the Court suspended proceedings on the merits of the case in order to examine these preliminary objections. Their examination could result in removal of the case from the List in the event of the Court concluding that it lacked the jurisdiction to hear the dispute submitted to it or that the Application was inadmissible *ratione materiae*, *ratione temporis* or *ratione loci*[3].

In the instant case, the Court confined itself to addressing the issue of its jurisdiction. Not having accepted any of the grounds of jurisdiction advanced by the DRC, the Court considered that it was unnecessary to take matters any further by considering the Application's admissibility.

8. Certain final findings in the Judgment justify the present dissenting opinion. As I pointed out in 2002, during the proceedings on provisional measures, while it is true that not all the titles and rules of customary international law advanced by the DRC were capable of establishing the Court's prima facie jurisdiction, there were, however, compromissory clauses upon which the Court could have based itself for this purpose (*Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Provisional Measures, Order of 10 July 2002, I.C.J. Reports 2002*, pp. 277 *et seq.*).

9. In the present case, I am not convinced that the Court has analysed in depth the compromissory clauses contained in the following international treaties: the Constitution of the WHO, the Montreal Convention and the Convention on Discrimination against Women. Furthermore, the Republic of Rwanda remained deliberately vague as to whether it had withdrawn its reservation to the Genocide Convention, in light both of its own constitutional law and of the declaration of the Rwandan Justice Minister at the sixty-first session of the United Nations Commission on Human Rights in Geneva on 17 March 2005.

1. The Constitution of the World Health Organization

10. Article 75 of the WHO Constitution states:

> "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

[3] Regarding the Court's jurisdiction see Maurice Arbour, *Droit international public*, 3rd ed., 1997; Pierre-Marie Dupuy, *Droit international public*, 5th ed., Nguyen Quoc Dinh, Patrick Daillier, Alain Pellet, *Droit international public*, 6th ed., 1999.

concerned agree on another mode of settlement."

11. The first precondition fixed by this compromissory clause is the existence of "any question or dispute concerning the interpretation or application" of the WHO Constitution.

12. The Court ruled that

> "the DRC has not shown that there was a question concerning the interpretation or application of the WHO Constitution on which itself and Rwanda had opposing views, or that it had a dispute with that State in regard to this matter" (Judgment, para. 99).

13. The Permanent Court of International Justice defined a dispute as "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons" (*Mavrommatis Palestine Concessions (Greece* v. *United Kingdom), Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11).

In the event of a dispute between two or more States, the words "two persons" should be read as "two or more States".

In a number of cases, the Court has had to clarify and amplify the notion of a dispute. To establish the existence of a dispute, "[i]t must be shown that the claim of one party was positively opposed by the other" (*South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328); moreover, "[w]hether there exists an international dispute is a matter for objective determination" (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase), Advisory Opinion, I.C.J. Reports 1950*, p. 74; *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995,* p. 100, para. 22; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 17, para. 22; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 122-123, para. 21).

14. In the present case, the question or dispute must concern the interpretation or application of the WHO Constitution.

15. Both the spirit and the letter of the WHO Constitution establish overriding obligations towards the Organization. As I had previously submitted,

> "any State which becomes a Member of the WHO has a duty not only to co-operate with the organization to assist in fulfilling the mission assigned to it, but also to act in order to provide the population with the best possible level of health. Any failure to uphold the right to health is contrary to the object and purpose of the WHO Constitution. It would be wrong to assert that this Constitution does

not lay down any obligations for Member States." (*Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Provisional Measures, Order of 10 July 2002, I.C.J. Reports 2002,* p. 279, para. 28 seperate opinion of Judge Mavungu.)

16. On repeated occasions, the DRC made various protests regarding the deterioration of the state of the Congolese population's health during the armed conflict.

In his speech to the fifty-seventh session of the United Nations Commission on Human Rights on 30 March 2001, President Joseph Kabila stated:

> "According to data provided by NGOs such as the International Rescue Committee and by agencies of the United Nations, around 2,500,000 Congolese have lost their lives in the occupied territories, victims directly and indirectly of aggression . . .
>
> Countless numbers of killings have occurred among the peaceable Congolese civilian populations. Numerous barbarous and savage acts have taken place such as . . . rapes, *the deliberate spreading of AIDS* . . ." (Emphasis added.)

The various White Papers, previously published by the DRC's Ministry of Human Rights, record numerous violations of human rights, including health-related questions. Both Rwanda and Uganda are cited in this respect. By way of example, paragraph 45 of the First White Paper, distributed as a working document to the Security Council, states the following:

> "Museveni and Kagame are committing acts which are beyond all understanding in the pursuit of their strategy of exterminating the Congolese civilian population in the occupied areas. For example, 2,000 Ugandan soldiers suffering from acquired immunodeficiency syndrome (AIDS) or infected with the human immunodeficiency virus (HIV) were sent to the front in Orientale Province, their mission to rape women and girls with the aim of spreading the disease. Need it be recalled that Uganda and Rwanda have the sorry distinction of having Africa's largest number of AIDS sufferers and HIV-infected persons . . ." *[Translation by the United Nations Secretariat.]*

The Fourth White Paper also describes the deterioration in health conditions in the occupied territories[4]. This has been confirmed by several humanitarian organizations (Oxfam, Save the Children, Christian Aid,

[4] See Fourth White Paper, Ministry of Human Rights, Kinshasa, February 2002, pp. 34 *et seq*.

etc.), the European Parliament (14 June 2002 resolution), the Special Rapporteur on the human rights situation in the DRC[5], etc.

17. Violations of human rights, including health-related questions, have been the subject of exchanges between the Parties in regional and international bodies (OAU, Security Council, General Assembly, Commission on Human Rights, etc.).

18. In protecting the inviolable core of human rights, the priority lies less in specifying the conventional provisions breached than in denouncing these serious attacks on human dignity in order to put an end to them. It is surely unreasonable to blame the Applicant for having in certain cases omitted in its protests in international forums to cite the norms or conventional provisions that underpinned them.

19. In view of the foregoing, a dispute between the two Parties as to application of the WHO Constitution definitely existed. WHO Member States commit themselves to

> "the attainment by all people to the highest possible level of health, to regarding the achievement of the highest achievable standard of health as a fundamental right of every person on the planet, a recognition of health as fundamental to peace, and of the duty of State co-operation to achieve this ideal . . ." (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 146, dissenting opinion of Judge Weeramantry).

20. *The second precondition* fixed by Article 75 of the WHO Constitution is the recourse to negotiations or the World Health Assembly prior to seisin of the Court.

21. Without supporting its argument, the Court finds:

> "even if the DRC had demonstrated the existence of a question or dispute falling within the scope of Article 75 of the WHO Constitution, it has in any event not proved that the other preconditions for seisin of the Court established by that provision have been satisfied, namely that it attempted to settle the question or dispute by negotiation with Rwanda or that the World Health Assembly had been unable to settle it" (Judgment, para. 100).

"The Court concludes from the foregoing that Article 75 of the WHO Constitution cannot serve to found its jurisdiction in the present case." (*Judgement*, para. 101.)

22. The state of conflict prevailing between the two Parties was not conducive to direct negotiations in order to settle the totality of the disputes between them. Both the DRC and Rwanda have acknowledged having engaged in negotiations prior to the seisin of the Court.

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[5] See in particular the reports of 20 September 2000, 1 February 2001 and 27 March 2001.

23. In a document dated 18 October 2000, entitled "Responses and Preliminary Objections of the Republic of Rwanda", submitted to the African Commission on Human and Peoples' Rights on 24 October 2000, in response to Communication 227/99 filed by the DRC, Rwanda stated the following:

> "the acts reported . . . (acts constituting violations of numerous international humanitarian rights and/or international humanitarian law instruments) have repeatedly been brought by the Democratic Republic of the Congo to the attention of international organs, *including*:
>
> — meetings of the United Nations General Assembly;
> — meetings of the Security Council;
> — sessions of the United Nations Commission on Human Rights".
>
> "Communication 227/99 must be declared inadmissible on the basis of the fact that the allegations in question have been the subject *of intense discussions and negotiations before the competent organs of the United Nations and the Organization of African Unity*." (CR 2005/20, pp. 13-14, para. 16; emphasis added.)

24. The DRC, for its part, confirmed that negotiations had taken place between the two Parties with a view to achieving a comprehensive settlement to the conflict, including the organization of arbitration (CR 2002/38, pp. 10-11).

25. In my previous opinion, I had occasion to state:

> "When a jurisdiction clause provides for recourse to prior diplomatic negotiations, it is self-evident that the parties have to comply therewith. This requirement is rather an obligation of conduct than of result . . . The Court has moreover given a wide interpretation to the notion of 'diplomatic negotiations' (exchanges of views: diplomatic notes, protests, discussions within an international organization, talks)." (Footnote: "See *inter alia Right of Passage over Indian Territory, I.C.J. Reports 1960*, pp. 148-149; *South West Africa, Preliminary Objections, I.C.J. Reports 1962,* pp. 344 *et seq.*; *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Provisional Measures, Order of 31 March 1988, I.C.J. Reports 1988*, pp. 99 *et seq.*") (*Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Provisional Measures, Order of 10 July 2002, I.C.J. Reports 2002*; p. 280, para. 30, separate opinion of Judge Mavungu.)

26. Both Parties having confirmed that various negotiations took place in international forums on human rights violations, including those relating to the health of the Congolese population, the Court was bound to take note of that fact.

27. The third and last precondition stipulated by the compromissory clause is that the question or dispute "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".

28. In the present case, it was apparent from the arguments advanced by the two Parties that the dispute could not be settled by diplomatic negotiations, much less by the organization of arbitration. The Republic of Rwanda disputed the admissibility of the Communication filed with the African Commission on Human and Peoples' Rights by the DRC. Seisin of the Court by an application instituting proceedings, in accordance with Article 36, paragraph 1, of its Statute, was the only option still available to the Applicant.

29. In view of the foregoing, the Court should have found that it had jurisdiction to examine the merits of the dispute.

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

30. The compromissory clause in the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 23 September 1971 was also invoked by the DRC as a base of jurisdiction for the Court. Article 14, paragraph 1, of this Convention sets three preconditions for seisin of the Court: the existence of a dispute concerning the interpretation or application of the Convention; the Parties must have attempted to settle the dispute by negotiation, or by arbitration.

31. With respect to the *first precondition*, the DRC accused Rwanda and Uganda ("the allied aggressors") of shooting down a Congo Airlines Boeing 727 after take-off from Kindu (Maniema province) on 9 October 1998. All of the passengers (37 women and children) and the three crew members lost their lives as a result of this unlawful act.

32. The DRC issued a number of protests on this matter, in particular in its White Papers[6] and in the Memorial which it filed with the African Commission on Human and Peoples' Rights[7].

Moreover, it filed a complaint against Rwanda and Uganda with the President of the ICAO Council by a letter dated 20 October 1998. The representatives of both Parties in the present case participated in the organization's deliberations without voting rights.

Article 1 of the Montreal Convention stipulates that:

"[a]ny person commits an offence if he unlawfully and intentionally:

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[6] See First White Paper, Human Rights Ministry, Kinshasa, December 1998, pp. 10-11, para. 67; Second White Paper, April 1999, p. 35.

[7] DRC's Memorial with respect to Communication filed with the African Commission on Human and Peoples' Rights, Human Rights Ministry, Kinshasa, 2000, p. 11, note 13.

— performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft; or
— destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight."

The States parties to the Montreal Convention are obliged to punish such acts by severe penalties (Art. 3).

33. The declaration of the ICAO Council following consideration of the request filed by the DRC is very clear:

> "the unlawful seizure of aircraft and other acts of unlawful interference against civil aviation, including acts aimed at destruction of aircraft, have serious adverse effects on the safety, efficiency and regularity of international civil aviation, endanger the lives of aircraft passengers and crew, and undermine the confidence of the peoples of the world in the safety of international civil aviation" (para. 2).

34. In view of the discussions organized under the aegis of the ICAO, there can be no doubt whatsoever that a dispute existed between the two Parties prior to seisin of the Court.

35. *The second precondition* is the organization of negotiations. I am of the opinion that the negotiations organized within international bodies, in the present case by the ICAO Council, can be regarded as official negotiations between the two Parties.

It should be noted that the Court has broadly interpreted the notion of "negotiations": exchange of views, diplomatic Notes, protests, discussions within an international organization, talks (*South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, pp. 344 *et seq.*; *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, pp. 99 *et seq.*).

36. *The third and last precondition* concerns requests for 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."

In other words, seisin of the Court by one of the parties can only take place when it has proved impossible to organize arbitration, six months after the date when it was requested.

37. In its consistent jurisprudence, the Court has had the opportunity to define in precise terms the formal condition for requesting arbitration.

The lack of an agreement between the two Parties on the organization of arbitration cannot be assumed. The existence of such a disagreement can only be shown by an offer of arbitration made by the Applicant to which the Respondent has not responded. (See *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, I.C.J. Reports 1998*, p. 17, para. 21; *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), I.C.J. Reports 1998*, p. 122, para. 20.)

38. Since the three preconditions are cumulative, the DRC had to demonstrate that it had proposed to Rwanda that this dispute be submitted to arbitration.

However, during the proceedings on the request for the indication of provisional measures, the DRC told the Court that it had been impossible to organize an arbitration owing to the lack of co-operation from Rwanda. The proposals made in July 2001 (Lusaka), September 2001 (Durban), January 2002 (Blantyre) and March 2002 (Lusaka) were reportedly met with refusals by the Republic of Rwanda.

39. There can be no doubt that the armed conflict in the DRC gave rise to a number of different disputes regarding violations of human rights and/or basic international humanitarian law. A request for arbitration could not focus all the attention on one precise dispute at the expense of all others. Strict adherence to legal formalities was not appropriate when defending human rights.

The exceptional circumstances of the conflict and the Respondent's attitude prior to seisin of the Court, as well as during the current proceedings, should have led the Court to find that it had jurisdiction as arbiter of last resort.

3. The Convention on the Elimination of All Forms of Discrimination against Women

40. Article 29, paragraph 1, of the Convention on Discrimination against Women includes a compromissory clause, which reads as follows:

> "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."

41. This clause specifies the preconditions for seisin of the Court: the

existence of a dispute, the impossibility of settling the dispute by negotiation and a request for arbitration. These conditions are similar to those in the Montreal Convention (see above). With the exception of a few minor differences, the conclusions that I have reached in my analysis of that Convention can equally be applied to this one.

42. The Court did not see fit to decide whether the various human rights violations committed against the women of the Congo in the conflict zones — sexual violence, the deliberate spreading of the HIV/AIDS virus, the burial of women alive, etc. — were covered by the Convention on the Elimination of All Forms of Discrimination against Women.

43. In its various protests, the DRC emphasized the specific violations concerning Congolese women [8]. The dispute between the two Parties concerns the application of the Convention.

44. With respect to prior negotiations, the Court has found on a number of occasions that talks within international bodies can be regarded as negotiations.

45. It is true that the African Commission on Human and Peoples' Rights is not *strictu sensu* an arbitral body. However, in the circumstances of the present case, its seisin by a Communication by the DRC and the adversarial process between the two Parties that took place within it could be regarded as an attempt at arbitration. We should not lose sight of the fact that the Commission was established within the Organization for African Unity (OAU) to hear human rights disputes between Members of that pan-African organization.

46. The foregoing elements could have allowed the Court to find that it had jurisdiction and to rule on the merits of the case.

(Signed) Jean-Pierre MAVUNGU.

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[8] See White Paper, Vol. 3, pp. 39 *et seq.*; Vol. 4, pp. 41 *et seq.*; Special Number, pp. 26 *et seq.*