# 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

In an Order in the case concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo *v.* Rwanda), the Court rejected the request for the indication of provisional measures submitted by the Democratic Republic of the Congo (hereinafter "the Congo").

In its Order, the Court concludes that "[it] does not in the present case have the prima facie jurisdiction necessary to indicate those provisional measures requested by the Congo". The decision was taken by fourteen votes to two.

The Court also found, by fifteen votes to one, "that it cannot grant Rwanda's request that the case be removed from the List".

The Court was composed as follows: President Guillaume; Vice-President Shi; Judges Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby; Judges ad hoc Dugard, Mavungu; Registrar Couvreur.

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The full text of the operative paragraph of the Order reads as follows:

"94. For these reasons,

THE COURT,

(1) By fourteen votes to two,

*Rejects* the request for the indication of provisional measures submitted by the Democratic Republic of the Congo on 28 May 2002;

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal; Judge ad hoc Dugard;

AGAINST: Judge Elaraby; Judge ad hoc Mavungu;

(2) By fifteen votes to one,

*Rejects* the submissions by the Rwandese republic seeking the removal of the case from the Court's List;

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby; Judge ad hoc Mavungu;

AGAINST: Judge ad hoc Dugard."

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Judges Koroma, Higgins, Buergenthal and Elaraby appended declarations to the Order of the Court; Judges ad hoc Dugard and Mavungu appended separate opinions to the Order of the Court.

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*Background information*

In its Order, the Court recalls that, on 28 May 2002, the Congo had instituted proceedings against Rwanda in respect of a dispute concerning "massive, serious and flagrant violations of human rights and of international humanitarian law" alleged to have been committed "in breach of the 'International Bill of Human Rights', other relevant international instruments and mandatory resolutions of the United Nations Security Council". The Court recalls that, in the Application the Congo stated that "[the] flagrant and serious violations [of human rights and of international humanitarian law]" of which it complains "result 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".

The Court stresses that the Congo has recalled that it made a declaration recognizing the compulsory jurisdiction of the Court in accordance with Article 36, paragraph 2, of the Statute of the Court; and that it stated that the Rwandan Government "has made no such declaration of any sort".

The Court adds that referring to Article 36, paragraph 1, of the Statute, the Congo has 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 of 7 March 1966 (hereinafter the "Convention on Racial Discrimination"), Article 29, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women of 18 December

1979 (hereinafter the "Convention on Discrimination against Women"), Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 (hereinafter the "Genocide Convention"), Article 75 of the Constitution of the World Health Organization of 22 July 1946 (hereinafter the "WHO Constitution"), Article XIV, paragraph 2, of the Constitution of the United Nations Educational, Scientific and Cultural Organization of 16 November 1945 (hereinafter the "UNESCO Constitution") (as well as Article 9 of the Convention on the Privileges and Immunities of the Specialized Agencies of 21 November 1947, which is "also applicable to UNESCO"), Article 30, paragraph 1, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 (hereinafter the "Convention against Torture"), and Article 14, paragraph 1, of the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 23 September 1971 (hereinafter the "Montreal Convention"). The Congo furthermore maintains that the 1969 Vienna Convention on the Law of Treaties gives the Court jurisdiction to settle disputes arising from the violation of peremptory norms (*jus cogens*) in the area of human rights, as those norms are reflected in a number of international instruments.

The Court recalls that on the same day the Congo had submitted a request for the indication of provisional measures.

*Reasoning of the Court*

In its Order, the Court first emphasizes that it "is deeply concerned by the deplorable human tragedy, loss of life, and enormous suffering in the east of the Democratic Republic of the Congo resulting from the continued fighting there". Mindful of the purposes and principles of the United Nations Charter and of its own responsibilities in the maintenance of peace and security under the Charter and its Statute, the Court "finds it necessary to emphasize that all parties to proceedings before it must act in conformity with their obligations pursuant to the United Nations Charter and other rules of international law, including humanitarian law". The Court considers that it "cannot in the present case over-emphasize the obligation borne by the Congo and Rwanda to respect the provisions of the Geneva Conventions of 12 August 1949 and of the first Protocol additional to those Conventions, of 8 June 1977, relating to the protection of victims of international armed conflicts, to which instruments both of them are parties".

The Court then points out that it "does not automatically have jurisdiction over legal disputes between States" and 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". Moreover it cannot indicate provisional measures without its jurisdiction in the case being established prima facie (at first sight).

*Jurisdiction of the Court*

With regard to its jurisdiction, the Court observes that, in accordance with Article 36, paragraph 2, of the Statute, the Congo (then Zaire), by means of a declaration dated 8 February 1989, recognized the compulsory jurisdiction of the Court in relation to any State accepting the same obligation; that Rwanda on the other hand has not made such a declaration; that the Court accordingly will consider its prima facie jurisdiction solely on the basis of the treaties and conventions relied upon by the Congo pursuant to Article 36, paragraph 1, of the Statute, providing: "The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force."

- The Convention against Torture

The Court notes that the Congo has been a party to that Convention since 1996, but that Rwanda stated that it is not, and has never been, party to the 1984 Convention against Torture. The Court finds that such is indeed the case.

- The Convention on Racial Discrimination

The Court first notes that both the Congo and Rwanda are parties to the Convention on Racial Discrimination; that however Rwanda's instrument of accession to the Convention includes a reservation reading as follows: "The Rwandese Republic does not consider itself as bound by article 22 [the dispute settlement clause] of the Convention." It also notes that in the present proceedings the Congo has challenged the validity of that reservation. The Court observes that the Convention on Racial Discrimination prohibits reservations incompatible with its object and purpose; that under Article 20, paragraph 2, of the Convention, "[a] reservation shall be considered incompatible ... if at least two-thirds of the States Parties to this Convention object to it"; that such has not been the case in respect of Rwanda's reservation concerning the jurisdiction of the Court; that that reservation does not appear incompatible with the object and purpose of the Convention; and that the Congo did not object to that reservation when it acceded to the Convention. The Court concludes that Rwanda's reservation is prima facie applicable.

- The Genocide Convention

The Court first notes that both the Congo and Rwanda are parties to the Genocide Convention; that however Rwanda's instrument of accession to the Convention, includes a reservation worded as follows: "The Rwandese Republic does not consider itself as bound by article IX [the dispute settlement clause] of the Convention." It also notes that in the present proceedings the Congo has challenged the validity of that reservation. The Court observes "that the rights and obligations enshrined by the Convention are rights and obligations *erga omnes*" and that, as it already

had occasion to point out, "the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things" and that 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. The Court then takes note of the fact that the Genocide Convention does not prohibit reservations; that the Congo did not object to Rwanda's reservation when it was made; and that that reservation does not bear on the substance of the law, but only on the Court's jurisdiction. The Court finds that that reservation therefore does not appear contrary to the object and purpose of the Convention.

- The Vienna Convention on the Law of Treaties

The Court considers that Article 66 of the Vienna Convention on the Law of Treaties must be read in conjunction with Article 65, entitled "Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty". It observes that the Congo does not maintain at the present time that there is a dispute, which could not be resolved under the procedure prescribed in Article 65 of the Vienna Convention, between it and Rwanda concerning a conflict between a treaty and a peremptory norm of international law; and that the object of Article 66 is not to allow for the substitution of the judicial settlement, arbitration and conciliation procedures under the Vienna Convention on the Law of Treaties for the settlement machinery for disputes relating to the interpretation or application of specific treaties, notably when a violation of those treaties has been alleged.

- The Convention on Discrimination against Women

The Court first notes that both the Congo and Rwanda are parties to the Convention on Discrimination against Women. It then considers that at this stage in the proceedings the Congo has not shown that its attempts to enter into negotiations or undertake arbitration proceedings with Rwanda concerned the application of Article 29 of the Convention on Discrimination against Women; and that neither has the Congo specified which rights protected by that Convention have allegedly been violated by Rwanda and should be the object of provisional measures. The Court concludes that the preconditions on the seisin of the Court set by Article 29 of the Convention therefore do not appear prima facie to have been satisfied.

- The WHO Constitution

The Court first notes that both the Congo and Rwanda are parties to the WHO Constitution and that both are thus members of that Organization. The Court considers however that at this stage in the proceedings the Congo has also not shown that the preconditions on the seisin of the Court set by Article 75 of the WHO Constitution have been satisfied; and that moreover an initial examination of that Constitution shows that Article 2 thereof, relied on by the Congo, places obligations on the Organization, not on the member States.

- The UNESCO Constitution

The Court notes that in its Application the Congo invokes Article I of the Constitution and maintains that "[o]wing to the war, the Democratic Republic of the Congo today is unable to fulfil its missions within UNESCO ...". It takes note of the fact that both the Congo and Rwanda are parties to the UNESCO Constitution.

The Court observes however that Article XIV, paragraph 2, provides for the referral, under the conditions established in that provision, of disputes concerning the UNESCO Constitution only in respect of the interpretation of that Constitution; that that does not appear to be the object of the Congo's Application; and that the Application does not therefore appear to fall within the scope of that Article.

- The Montreal Convention

The Court first notes that both the Congo and Rwanda are parties to the Montreal Convention. It considers that the Congo has not however asked the Court to indicate any provisional measure relating to the preservation of rights which it believes it holds under the Montreal Convention; and that accordingly the Court is not required, at this stage in the proceedings, to rule, even on a prima facie basis, on its jurisdiction under that Convention nor on the conditions precedent to the Court's jurisdiction contained therein.

*Conclusions*

The Court concludes that it follows from the preceding considerations taken together that the Court does not in the present case have the prima facie jurisdiction necessary to indicate those provisional measures requested by the Congo.

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However, 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; and they leave unaffected the right of the Governments of the Congo and of Rwanda to submit their arguments in respect of those questions; in the absence of a manifest lack of jurisdiction, the Court finds that it cannot grant Rwanda's request that the case be removed from the List.

The Court finally recalls that "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".

It underlines that whether or not States accept the jurisdiction of the Court, they remain in any event responsible for acts attributable to them that violate

international law; that in particular they are required to fulfil their obligations under the United Nations Charter; that the Court cannot but note in this respect that the Security Council has adopted a great number of resolutions concerning the situation in the region, in particular resolutions 1234 (1999), 1291 (2000), 1304 (2000), 1316 (2000), 1323 (2000), 1332 (2000), 1341 (2001), 1355 (2001), 1376 (2001), 1399 (2002) and 1417 (2002); that the Security Council has demanded on many occasions that "all the parties to the conflict put an ... end to violations of human rights and international humanitarian law"; and that it has inter alia reminded "all parties of their obligations with respect to the security of civilian populations under the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949", and added that "all forces present on the territory of the Democratic Republic of the Congo are responsible for preventing violations of international humanitarian law in the territory under their control". The Court stresses the necessity for the Parties to these proceedings to use their influence to prevent the repeated grave violations of human rights and international humanitarian law which have been observed even recently.

*Declaration of Judge Koroma*

Judge Koroma voted in favour of the Order because, in his view, it has attempted to address some of the concerns at the heart of the request.

Referring to the allegations and contentions of each of the Parties, he observes that from the information submitted to the Court it is apparent that real, serious threats do exist to the population of the region concerned, including the threat to life.

Judge Koroma is aware that the Court has set out certain criteria to be satisfied before granting a request for the indication of provisional measures. Among these are that there must be prima facie or potential jurisdiction, urgency, and the risk of irreparable harm if an order is not granted. But these criteria, in his view, have to be considered in the context of Article 41, which authorizes the Court to "indicate", if it considers that the *circumstances* so require, any provisional measure which ought to be taken to preserve the respective rights of either party, and of the Court's role in maintaining international peace and security, including human security and the right to life.

In Judge Koroma's view, the Court, although it has been unable to grant the request for want of prima facie jurisdiction, has, in paragraphs 54, 55, 56 and 93 of the Order, rightly and judiciously expressed its deep concern over the deplorable human tragedy, loss of life and enormous suffering in the east of the Democratic Republic of the Congo resulting from the fighting there. It has also rightly emphasized that whether or not States accept the jurisdiction of the Court, they remain, in any event, responsible for acts attributable to them that violate international law and that they are required to fulfil their obligations under the United Nations Charter and in respect of the relevant Security Council resolutions.

Judge Koroma concludes by stating that, if ever a dispute warranted the indication of interim measures of protection, this is it. But he is of the opinion that, while it was not possible for the Court to grant the request owing to certain missing elements, the Court has, in accordance with its *obiter dicta* in the cited paragraphs, nevertheless discharged its responsibilities in maintaining international peace and security and preventing the aggravation of the dispute. The position taken by the Court can only be viewed as constructive, without however prejudging the merits of the case. It is a judicial position and it is in the interest of all concerned to hearken to the call of the Court.

*Declaration of Judge Higgins*

I do not agree with one of the limbs relied on by the Court in paragraph 79 of its Order. It is well established in international human rights case law that it is not necessary, for the purpose of establishing jurisdiction over the merits, for an applicant to identify which specific provisions of the treaty said to found jurisdiction are alleged to be breached. See, for example, the findings of the Human Rights Committee on *Stephens* v. *Jamaica* (United Nations, *Official Records of the General Assembly, Fifty-first Session, Supplement No. 40* (A/51/40)); *B.d.B. et al. v. The Netherlands (ibid., Forty-fourth Session, Supplement No. 40* (A/45/40)); and many other cases. *A fortiori* is there 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. It should rather be for the Court itself, in accordance with the usual practice, to see whether the claims made by the Congo and the facts alleged could prima facie constitute violations of any particular clause in the Convention on the Elimination of All Forms of Discrimination against Women, the instrument relied on by the Congo as providing the Court with jurisdiction over the merits.

However, as I agree with the other elements in paragraph 79, and with the legal consequence that flows from them, I have voted in favour of the Order.

*Declaration of Judge Buergenthal*

While agreeing with the Court's decision, Judge Buergenthal disagrees with the inclusion in the Court's Order of the language found in its paragraphs 54-56 and 93. He does not object to the high-minded propositions they express, but considers that they deal with matters the Court has no jurisdiction to address once it has ruled that it lacks prima facie jurisdiction to issue the requested provisional measures.

In his view, the Court's function is to pronounce itself on matters within its jurisdiction and not to voice personal sentiments or to make comments, general or specific, which, despite their admittedly "feel-good" qualities, have no legitimate place in this Order.

Judge Buergenthal emphasizes that the Court's own "responsibilities in the maintenance of peace and security

under the Charter", which it invokes in paragraph 55, are not general. They are strictly limited to the exercise of its judicial functions in cases over which it has jurisdiction. Hence, when the Court, without having the requisite jurisdiction, makes pronouncements such as those found in paragraph 55, for example, which read like preambles to resolutions of the United Nations General Assembly or Security Council, it is not acting like a judicial body.

As for paragraph 56, Judge Buergenthal believes that the fact that this statement is even-handed in that it addresses both Parties to the case, does not make it any more appropriate than it would be if it had been addressed to only one of them. It is inappropriate, first, because the Court has no jurisdiction in this case to call on the States parties to respect the Geneva Conventions or the other legal instruments and principles mentioned in the paragraph. Second, since the request for preliminary measures by the Democratic Republic of the Congo sought a cessation by Rwanda of activities that might be considered to be violations of the Geneva Conventions, the Court's pronouncement in paragraph 56 can be deemed to lend some credence to this claim. The latter conclusion is strengthened by the language of paragraph 93, which bears close resemblance to some of the language the Court would most likely employ if it had granted the provisional measures request. The fact that the paragraph is addressed to both Parties is irrelevant, for in comparable circumstances the Court has issued provisional measures formulated in similar language addressed to both Parties although they were requested by only one of them.

Judge Buergenthal considers that, whether intended or not, the Court's pronouncements, particularly those in paragraphs 56 and 93, might be deemed to lend credence to the factual allegations submitted by the party seeking the provisional measures. In the future, they might also encourage States to file provisional measures requests, knowing that, even though they would be unable to sustain the burden of demonstrating the requisite prima facie jurisdiction, they would obtain from the Court some pronouncements that could be interpreted as supporting their claim against the other party.

*Declaration of Judge Elaraby*

1. He voted against the rejection of the request for the indication of provisional measures submitted by the Democratic Republic of the Congo, principally because, in accordance with its Statute and its present jurisprudence, the Court should, in principle grant a request for provisional measures once the requirements of urgency on the one hand and likelihood of irreparable damage to the rights of one or both parties to a dispute, on the other, have been established. He is of the opinion that the Court has, under Article 41 of the Statute, a wide-ranging power of discretion to indicate provisional measures.

The jurisprudence of the Court has progressively, albeit gradually, advanced from its earlier strict insistence on established jurisdiction to acceptance of prima facie jurisdiction as the threshold for the exercise of the Court's powers under Article 41 of the Statute. This progressive shift has not, in his view, been reflected in the Order.

2. His reading of the two subparagraphs together convinces him that the Court is vested with a wide scope of discretion to decide on the circumstances warranting the indication of provisional measures. The reference to the Security Council underlines the prominence of the link between the Court and the Council in matters related to the maintenance of international peace and security. The Statute moreover does not attach additional conditions to the authority of the Court to grant provisional measures. In point of fact, the jurisdiction of the Court need not be established at this early stage of the proceedings.

3. In his view, the Montreal Convention should have been regarded as a suitable instrumental basis to provide a prima facie jurisdiction for the indication of provisional measures.

4. He is of the opinion that the circumstances of the case reflect an urgent need to protect the rights and interests of the Democratic Republic of the Congo.

*Separate opinion of Judge Dugard*

In his separate opinion Judge Dugard endorses the Court's Order that the Congo has failed to show, prima facie, a basis on which the jurisdiction of the Court might be established and that, as a consequence, its request for provisional measures should be rejected. He disagrees, however, with the Court's Order that the case should not be removed from its List.

Judge Dugard maintains that a case should be removed from the Court's List where there is no reasonable possibility that the applicant might in future be able to establish the jurisdiction of the Court in the dispute submitted to it on the basis of the treaties invoked for jurisdiction, on the ground that in such a case there is a manifest lack of jurisdiction — the test employed by the Court in previous decisions for moving a case from its List.

An examination of the treaties invoked by the Congo to found jurisdiction in this case leads him to conclude that they manifestly cannot provide a basis for jurisdiction. Consequently, he maintains that the case should have been removed from the List.

Judge Dugard warns that, as a result of the finding of the Court in the *LaGrand* case in 2001 that an Order for provisional measures is legally binding, there is a likelihood that the Court will be inundated with requests for provisional measures. In order to guard against an abuse of this procedure the Court should adopt a strict approach to applications in which the basis for jurisdiction is manifestly unfounded by removing such cases from the List.

Judge Dugard expresses his support for the general comments made by the Court on the tragic situation in the eastern Congo. He stresses that these comments deploring the suffering of people in the eastern Congo resulting from the conflict in that region and calling upon States to act in conformity with international law are addressed to both

Rwanda and the Congo, and in no way prejudge the issues in this case.

*Separate opinion of Judge Mavungu*

Judge Mavungu approves of the general terms of the Order of the Court. However, owing to the nature of the dispute, the Court, in his view, could have prescribed provisional measures notwithstanding the narrowness of the bases of the Court's jurisdiction.

His opinion addresses two main questions: the basis of the Court's jurisdiction and the requirements governing the indication of provisional measures. In respect of the first question, he notes that the Democratic Republic of the Congo advanced several legal grounds to establish the Court's jurisdiction: the Congo's February 1989 declaration recognizing the compulsory jurisdiction of the Court, certain compromissory clauses and norms of jus cogens. Several of the grounds asserted by the Applicant could not found the jurisdiction of the Court: the Congo's 1989 declaration, the UNESCO Constitution of 1946 and the 1984 Convention against Torture. In accordance with the Court's settled jurisprudence, its jurisdiction can be established only on the basis of States' consent.

On the other hand, he considers that the Court's jurisdiction could be founded prima facie under the compromissory clauses appearing in the WHO Constitution, the Montreal Convention of 1971 and the 1979 Convention on Discrimination against Women. The Rwandese Republic's reservation in respect of the jurisdictional clause in Article IX of the 1948 Genocide Convention is, in his view, contrary to the object and purpose of that Convention.

In accordance with Article 41 of the Statute and Article 73 of the Rules of Court, as well as the Court's well-settled jurisprudence, the granting of provisional measures is dependent on various factors: urgency, preservation of the rights of the parties, non-aggravation of the dispute and prima facie jurisdiction. He believes that those conditions have been satisfied in the present case and that this should have led the Court to indicate several provisional measures.