INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING ARMED ACTIVITIES ON THE TERRITORY OF THE CONGO (NEW APPLICATION 2002)

(DEMOCRATIC REPUBLIC OF THE CONGO *v.* RWANDA)

MEMORIAL OF RWANDA

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PART I

INTRODUCTION

1.1 On 28 May 2002, the Democratic Republic of the Congo (hereinafter referred to as "the Congo") filed an Application instituting proceedings against the Republic of Rwanda ("Rwanda"). This was the second Application which the Congo has filed against Rwanda. An earlier Application, filed on 23 June 1999 ("the 1999 Application"), was withdrawn by the Congo by letter of 15 January 2001, which resulted in an Order of the Court of 31 January 2001, noting the discontinuance of the proceedings and ordering the removal of the case from the Court's list. While the two sets of proceedings are, in theory, separate, large parts of the two Applications are identical. Moreover, both the fact of the earlier Application and the circumstances of the discontinuance of the earlier proceedings have implications for the present case.

1.2 What the Congo perceives to be the nature of the present case is revealed in the opening section of the Application, entitled "Des parties et de l'objet du différend".[1] The Government of the Congo there states that it commenced the proceedings –

> ... en raison des violations massives, graves et flagrantes des droits de l'homme et du droit international humanitaire, au mépris de la "Charte internationale des droits de l'homme", d'autres instruments internationaux pertinents et résolutions impératives du Conseil de Sécurité de l'ONU. Ces atteintes graves et flagrantes découlent des actes d'agression armée perpétrés par le Rwanda sur le territoire de la République Démocratique du Congo en violation flagrante de la souveraineté et de l'intégrité territoriale de la République Démocratique du Congo, garantie par les chartes de l'ONU et de l'OUA.

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[1] Application, Part 0, p. 1.

1.3 The Application then accuses Rwanda of violations of the law relating to the use of force and non-intervention, the law of armed conflict, the law of human rights and the international law of natural resources.

1.4 The nature of the case, as perceived by the Congo, is also reflected in the relief sought. At the close of its Application, the Congo asks the Court to –

> Dire et juger que:
>
> (a) le Rwanda a violé et viole la Charte de l'ONU (article 2, paragraphes 3 et 4) en violant les droits de l'homme qui sont le but poursuivi par les Nations Unies au terme du maintien de la paix et de la sécurité internationales, de même que les articles 3 et 4 de la Charte de l'OAU;
>
> (b) le Rwanda a violé la Charte internationale des droits de l'homme ainsi que les principaux instruments protecteurs des droits de l'homme dont notamment la Convention sur l'élimination des discriminations à l'égard des femmes, la Convention internationale sur l'élimination de toutes les formes de discrimination raciale, la Convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants, la Convention sur la prévention et la répression du crime de génocide du 9 décembre 1948, la Constitution de l'OMS, le Statut de l'UNESCO;
>
> (c) en abattant à Kindu, le 09 octobre 1998, un Boeing 727, propriété de la compagnie Congo Airlines, et en provoquant ainsi la mort de quarante personnes civiles, le Rwanda a également violé la charte de l'ONU, la convention relative à l'aviation civile internationale du 07 décembre 1944 signée à Chicago, la convention de la Haye du 16 décembre 1970 pour la répression de la capture illicite d'aéronefs et la convention de Montréal du 23 septembre 1971 pour la répression d'actes illicites dirigés contre la sécurité de l'aviation civile;
>
> (d) en tuant, massacrant, violant, égorgeant, crucifiant, le Rwanda s'est rendu coupable d'un génocide de plus de 3,500,000 Congolais, ajoutées les victimes des récents massacres dans la Ville de Kisangani, et a violé le droit sacré à la vie prévu dans la Déclaration Universelle des Droits de l'Homme et dans le Pacte international sur les droits civils et politiques, la Convention sur la prévention et la répression du crime de génocide, et d'autres instruments jurisdiques internationaux pertinents;

En conséquence, et conformément aux obligations juridiques internationales susmentionnées, dire et juger que:

(1) toute force armée rwandaise à la base de l'agression doit quitter sans délai le territoire de la République Démocratique du Congo; afin de permettre à la population congolaise de jouir pleinement de ses droits à la paix, à la sécurité, à ses ressources et au développement;

(2) le Rwanda a l'obligation de faire en sorte que ses forces armées et autres se retirent immédiatement et sans condition du territoire congolais;

(3) la République Démocratique du Congo a droit à obtenir du Rwanda le dédommagement de tous actes de pillages, destructions, massacres, déportations de biens et des personnes et autres méfaits qui sont imputables au Rwanda et pour lesquels la République Démocratique du Congo se réserve le droit de fixer ultérieurement une évaluation précise des préjudices, outre la restitution des biens emportés.[2]

1.5 While the Memorial thus refers to a broad range of treaty provisions and customary law principles which Rwanda is accused of violating, the central element of the case is the allegation of aggression. That is made clear on page 7 of the Application, where the Congo, after listing the treaties on which it relies, states that –

> La République Démocratique du Congo considère que toutes ces atteintes trouvent leur cause fondamentale dans la persistance et l'aggravation de la violation de l'article 2 paras 3 et 4 de la Charte de l'ONU et de l'article 3 de la Charte de l'OUA; autrement dit du non-respect de sa souveraineté; de son intégrité territoriale et de son indépendance.

It is this allegation which plainly constitutes the heart of the Congo's case.

1.6 On the same day as it filed its Application, the Congo filed a Request for the Indication of Provisional Measures of Protection. The Court held hearings in respect of this Request on 13 and 14 June 2002. At those hearings, the Agent and

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[2] Application, Part V, pp. 32-34.

counsel of Rwanda contended that there was no *prima facie* basis for the jurisdiction of the Court and, therefore, that a fundamental condition for the indication of provisional measures had not been satisfied. By an Order of 10 July 2002, the Court, by fourteen votes to two, held that "the Court does not in the present case have the *prima facie* jurisdiction necessary to indicate those provisional measures requested by the Congo"[3] and rejected the request. The Court, however, declined Rwanda's request that the case be removed from the list.

1.7 At the meeting held between the President of the Court and the representatives of the Parties on 4 September 2002, the Agent of Rwanda repeated that the Government of Rwanda considered that the Court lacked jurisdiction to entertain the Congo's Application and proposed that the procedure laid down in Article 79, paragraphs 2 and 3, of the Rules of Court (as amended) be followed, with the questions of jurisdiction and admissibility being determined separately and before any proceedings on the merits. The Agent of the Congo did not oppose that proposal. Accordingly, by an Order dated 18 September 2002, the Court decided that the written proceedings should first be addressed to the questions of the jurisdiction of the Court to entertain the Application and to its admissibility. It fixed 20 January 2003 as the time-limit for Rwanda to file a Memorial dealing exclusively with those questions and 20 May 2003 for the Counter-Memorial of the Congo.

1.8 In accordance with that Order, the present Memorial deals exclusively with questions of jurisdiction and admissibility. Except where they bear upon these questions, Rwanda has not entered into any discussion of the factual allegations set forth in the Application and the "Livres Blancs" which accompanied it. Rwanda has accordingly confined itself to a brief treatment of certain factual matters, including developments since the hearings on the Request for Provisional Measures, which are relevant to the questions of jurisdiction and admissibility. These are the subject of Part II of this Memorial. Beyond that, Rwanda merely

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

wishes to place on record that it does not accept the allegations made by the Congo in the Application and the "Livres Blancs".

1.9 Rwanda submits that the issues before the Court at the present stage of the proceedings are very simple and can be dealt with quite shortly. In its Application and at the oral hearings on its Request for Provisional Measures, the Congo sought to base the jurisdiction of the Court on the following –

(1) the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, 1984 ("the Torture Convention");[4]

(2) the Convention on the Elimination of all Forms of Racial Discrimination, 1965 ("the Racial Discrimination Convention");[5]

(3) the Convention on the Prevention and Punishment of the Crime of Genocide, 1948 ("the Genocide Convention");[6]

(4) the Convention on the Elimination of all Forms of Discrimination against Women, 1979 ("CEDAW");[7]

(5) the Statute of the World Health Organization;[8]

(6) the Constitution of UNESCO;[9]

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4 Annex 1

5 Annex 2.

6 Annex 3.

7 Annex 4.

8 Annex 5.

9 Annex 6.

(7) the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1971 ("the Montreal Convention");[10] and finally

(8) rules of *jus cogens*, imposing obligations *erga omnes*, in connection with which the Congo refers to the Vienna Convention on the Law of Treaties, 1969.[11]

1.10 Rwanda contends that none of these instruments or rules of customary international law can found the jurisdiction of the Court in the present case. This contention is developed in Part III of this Memorial. Accordingly, Rwanda submits that the Court lacks jurisdiction to entertain the Application.

1.11 Alternatively, Rwanda contends that, even if one or more of the treaties invoked by the Congo, confers jurisdiction in respect of any part of the Application, the Application is nevertheless inadmissible. Rwanda's argument regarding the inadmissibility of the Application is set out in Part IV of this Memorial.

1.12 Since the Congo's Application is in many respects a repetition of the 1999 Application, Rwanda also confirms the arguments set out in its Memorial filed in 2000 in response to that earlier Application.

1.13 Rwanda's submissions are contained in Part V of this Memorial.

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[10] Annex 7.

[11] Annex 8.

PART II

FACTS RELEVANT TO THE PRESENT PHASE OF THE PROCEEDINGS

2.1 As stated in Part I, Rwanda considers it inappropriate to enter into debate with the Congo regarding the factual allegations in the Application and the "Livres Blanc" which accompanied it. Rwanda does not accept the allegations made therein but their truth or falsity are irrelevant to the issues which arise on the preliminary objections of Rwanda set out in this Memorial.

2.2 The factual background to the involvement of Rwanda in the Congo was set out by the Agent of Rwanda in the oral hearings in June 2002, to which the Court is invited to turn.[12]

2.3 Since those oral hearings were held, the Government of Rwanda and the Government of the Congo have concluded, on 30 July 2002, a Peace Agreement ("the Pretoria Agreement"),[13] which provided for the withdrawal from the Congo of all Rwanda forces and the active co-operation of the Congolese Government in removing the threat posed to Rwanda by the Interahamwe and former Rwandan Armed Forces personnel in the Congo.

2.4 Rwanda implemented its part of the Pretoria Agreement in September/October 2002 and has now withdrawn all its forces from the territory of the Congo, as confirmed by the Third Party Verification Mission and the United Nations Security Council.[14]

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[12] See the speeches of Mr Gahima at CR 2002/37, 6-10 and CR 2002/39, pp. 11-13.

[13] United Nations Doc. S/2002/914, Annex 11.

[14] Security Council resolution 1445 (2002), Annex 12.

PART III

THE COURT LACKS JURISDICTION TO ENTERTAIN THE APPLICATION

A. Principles of Jurisdiction

3.1 It is well established in the jurisprudence of the Court 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" (*Case concerning East Timor*).[15] Accordingly, as the Court held in its Orders of 2 June 1999 in the ten *Cases concerning Legality of Use of Force*, "the Court can therefore exercise jurisdiction only between States parties to a dispute who not only have access to the Court but also have accepted the jurisdiction of the Court, either in general form or for the individual dispute concerned".[16] This principle was reaffirmed and applied by the Court in its Order of 10 July 2002 in the present case.[17]

3.2 Moreover, when that consent has been given, the jurisdiction of the Court is limited to matters falling within the scope of the provision in which that consent is expressed. It is for that reason that when the Court has found that it has jurisdiction only on the basis of a treaty provision, such as Article 14(1) of the Montreal Convention or Article IX of the Genocide Convention, it has held that it lacks jurisdiction over any allegation contained in the Application which falls outside the scope of that treaty.[18] As Judge *ad hoc* Lauterpacht put it,

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[15] *Case concerning East Timor (Portugal* v. *Australia)* ICJ Reports, 1995, p. 90, at para. 26.

[16] See, e.g., *Case concerning Legality of Use of* Force (*Yugoslavia* v. *Belgium),* ICJ Reports, 1999, p. 124, at para. 20.

[17] Order of 10 July 2002, para. 57.

[18] See, e.g., *Case concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom)*

> The Court can only act in a case if the parties, both applicant and respondent, have conferred jurisdiction upon it by some voluntary act of consent. ... Whatever form the consent may take, the range of matters that the Court can then deal with is limited to the matters covered by that consent.[19]

In accordance with that principle, the Court has held (most recently in the *Oil Platforms*[20] and *Lockerbie*[21] cases) that when an applicant asserts that jurisdiction is based upon a dispute settlement provision in a treaty dealing with a specific subject-matter, the Court must examine the application and the treaty provision in question at the stage of preliminary objections, in order to determine whether the dispute, as pleaded by the applicant, falls within the scope of the jurisdictional provision of the treaty.

3.3 In accordance with these principles, it is for the Congo to establish –

(a) that both the Congo and Rwanda have accepted the jurisdiction of the Court, either in general form or for the purpose of the individual dispute or type of dispute which the Congo wishes to bring before the Court; and

(b) that, if there is indeed an instrument in force between the Congo and Rwanda by which both States have accepted the jurisdiction of

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(Preliminary Objections), ICJ Reports, 1998, p. 8 at para. 36 and Joint Declaration of Judges Guillaume and Fleischhauer at p.50 (Article 14(1) of the Montreal Convention), and *Case concerning the Application of the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Federal Republic of Yugoslavia) (Further Provisional Measures)*, ICJ Reports, 1993, p. 325, at para. 26 (Article IX of the Genocide Convention).

[19] *Case concerning the Application of the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Federal Republic of Yugoslavia) (Further Provisional Measures)*, ICJ Reports, 1993, p. 325, at p. 412.

[20] *Case concerning Oil Platforms (Islamic Republic of Iran* v. *United States of America)(Preliminary Objections)*, ICJ Reports, 1996, p. 803, at para. 16.

[21] *Case concerning 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)*, ICJ Reports, 1998, p. 8; *Case concerning 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)*, ICJ Reports, 1998, p. 114.

the Court, the dispute set out in the present Application falls within the scope of that acceptance.

3.4 There is no question of Rwanda having accepted the jurisdiction of the Court in general form. Although the Congo refers to its own declaration under Article 36(2) of the Statute of the Court, the Court confirmed, in its Order of 10 July 2002, [22] that Rwanda has made no such declaration. Accordingly, Article 36(2) cannot afford a basis for the jurisdiction of the Court. That jurisdiction can be established, if at all, only on the basis of Article 36(1).

3.5 In Part II of its Application, the Congo advances eight grounds for the jurisdiction of the Court under Article 36(1).[23] These are summarised in paragraph 1.8 of this Memorial. Rwanda considers that none of the grounds advanced by the Congo in fact confers jurisdiction on the Court to entertain all, or any part of, the present Application. This Memorial will consider each of the grounds advanced by the Congo in turn. For the avoidance of doubt, Rwanda wishes to make clear that it confirms all of the submissions which its agent and counsel made with regard to this issue at the oral hearings on the Request for Provisional Measures.

B. The Convention against Torture

3.6 The Congo refers to the Torture Convention, 1984, Article 30(1) of which contains a provision for the reference to the Court of disputes concerning the interpretation or application of the Convention.[24] Rwanda is not, however, a party

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22 Para. 59.

23 At the oral hearings on 13 and 14 June 2002, The Congo disavowed any intention of relying on the United Nations Convention on the Privileges and Immunities of the Specialized Agencies, 1947, or the Headquarters Agreement between MONUC and The Congo as bases for the jurisdiction of the Court (Order of 10 July 2002, para. 62). Rwanda will therefore make no further comment with regard to them.

24 Annex 1.

to this Convention.[25] Accordingly, the Torture Convention manifestly cannot provide a basis for the jurisdiction of the Court.

C. The Racial Discrimination Convention

3.7 The Congo also relies on the Racial Discrimination Convention, [26] Article 22 of which provides that –

> Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement.

3.8 Rwanda acceded to this Convention on 16 April 1975 and the Congo on 21 April 1976 and the Convention is therefore binding on both States.[27] Rwanda, however, entered the following reservation on accession –

> The Rwandese Republic does not consider itself as bound by article 22 of the Convention.

If this reservation is valid, then the Convention cannot afford a basis for the jurisdiction of the Court in the present case, for the reservation excludes Article 22 in its entirety.

3.9 At the oral hearings in June 2002, the Congo argued that the Rwandan reservation was invalid, because it would "prevent the attainment of the very purposes and object of the treaty" and allow Rwanda to violate the Convention with impunity.[28] The Congo's argument appears, therefore, to be that the reservation is

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25 Order of 10 July 2002, para. 61.

26 Annex 2.

27 Order of 10 July 2002, para. 65.

28 Order of 10 July 2002, para. 25.

impermissible, because it is said to be contrary to the object and purpose of the Convention.[29]

3.10 The Convention clearly envisages that States may make reservations to it. Article 20(1) sets out a procedure for the Secretary-General of the United Nations to notify States of any reservations made and prescribes a period of ninety days within which objections to any reservation must be made. Article 20(2) then provides that –

> A reservation incompatible with the object and purpose of this Convention shall not be permitted, nor shall a reservation the effect of which would inhibit the operation of any of the bodies established by this Convention be allowed. A reservation shall be considered incompatible or inhibitive if at least two-thirds of the States Parties to this Convention object to it.

The second sentence of Article 20(2) thus provides an authoritative means of determining whether a particular reservation is incompatible with the object and purpose of the Convention.

3.11 Rwanda is not alone in having entered a reservation to Article 22. According to the United Nations Treaty Collection records, twenty-one other States currently maintain reservations to that provision, while a number of others had originally made such reservations but have subsequently withdrawn them.[30] As the Court observed in its order of 10 July 2002, the Rwandan reservation did not attract objections from two-thirds of the States Parties to the Convention. Indeed, the Congo itself did not object to the reservation (or, for that matter, to the similar reservations made by other States).[31] It follows that the reservation must be regarded as valid under the test laid down by the Convention. It is, therefore, unnecessary to determine whether the reservation would have been regarded as compatible with the object and purpose of the Convention under general

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29 Vienna Convention on the Law of Treaties, 1969, Article 19(c); Annex 8.

30 Annex 9.

31 Order of 10 July 2002, para. 67. See also Annex 9.

principles of the law of treaties, although, for the reasons given in connection with Rwanda's reservation to the Genocide Convention, [32] it is clear that it would also be valid under those general principles. Nor is it necessary to consider what would be the effect of a determination that the Rwandan reservation was invalid; in particular, whether the effect would be that Rwanda could not be regarded as party to the Convention on the ground that the reservation expressed a condition precedent to its consent to be bound.

3.12 Rwanda's reservation to Article 22 thus means that the Racial Discrimination Convention cannot afford a basis for the jurisdiction of the Court in the present case.

D. The Genocide Convention

3.13 The Congo also relies on Article IX of the Genocide Convention, 1948,[33] which provides that –

> Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

3.14 The Congo acceded to the Convention on 31 May 1962 and Rwanda on 16 April 1975 and the Convention is currently in force between the two States.[34] On becoming party to the Convention, however, Rwanda entered the following reservation –

> The Rwandese Republic does not consider itself as bound by article IX of the Convention.[35]

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32 Discussed in paras. 3.13 to 3.23, below.

33 Annex 3.

34 Order of 10 July 2002, para. 69.

35 Annex 9.

If this reservation is valid, then the Convention cannot afford a basis for the jurisdiction of the Court in the present case, for the reservation excludes Article IX in its entirety.

3.15 The Congo argues that the reservation is incompatible with the object and purpose of the Convention and therefore invalid. It also contends that the reservation is invalid on the ground that the Convention contains rules which have the status of *jus cogens* and which create obligations *erga omnes*. The Congo also maintains that Article 120 of the Statute of the International Criminal Court ("ICC"), which prohibits reservations to the Statute of the ICC, is indicative of an evolution in international law to the point where a reservation concerning genocide should now be regarded as inoperative. Finally, the Congo argues that Rwanda is precluded or estopped from relying on the reservation, because Rwanda had itself asked the United Nations Security Council to create an international criminal tribunal to try individuals accused of participation in the genocide which occurred in Rwanda in 1994.[36]

3.16 There are several reasons why these arguments are without foundation and were rightly rejected by the Court in determining whether a *prima facie* basis for jurisdiction existed.[37]

3.17 First, the undoubted fact that the norms codified in the substantive provisions of the Convention have the status of *jus cogens* and create rights and obligations *erga omnes* (as the Court has repeatedly stated [38]) is entirely separate from the question whether the Convention confers jurisdiction on the Court in a dispute between two or more States. Thus, the Court held in the *East Timor* case that the fact that a particular norm creates rights and obligations *erga omnes* does not in

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36 The Congo's arguments are summarised in paragraph 22 of the Order of 10 July 2002.

37 Order of 10 July 2002, para. 72.

38 See, most recently, paragraph 71 of the Order of 10 July 2002 and the decisions cited therein.

itself suffice to confer jurisdiction on the Court with respect to a dispute concerning the application of those rights and obligations.[39]

3.18 Secondly, the Congo's allegation that Rwanda's reservation is incompatible with the object and purpose of the Genocide Convention is quite simply untenable. The reservation relates not to the substantive obligations of the parties to the Convention but to a procedural provision. It is therefore inherently unlikely that such a reservation could be incompatible with the object and purpose of the Convention.

3.19 Moreover, Rwanda is by no means the only State party to the Genocide Convention to have entered a reservation to Article IX. According to the United Nations Treaty Collection records, fourteen other States currently maintain reservations to that provision, while a number of others had originally made such reservations but have subsequently withdrawn them.[40] While a small minority of States objected to those reservations, the majority of the 133 States parties did not do so. Indeed, the Congo did not object to the Rwandan reservation at the time it was made and gave no indication, prior to the oral hearings of June 2002, that it might have any objection to that reservation.

3.20 In the *Cases concerning Legality of Use of Force,* the Court itself considered reservations by Spain and the United States of America which were substantially identical to that of Rwanda.[41] On the basis of those reservations, the Court concluded, by large majorities, not only that there was no *prima facie* basis for jurisdiction but also that the absence of jurisdiction was manifest and the cases should therefore be removed from the Court's List. The latter decision clearly demonstrates that the Court considered there was no room for doubt about the

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39 *Case concerning East Timor* (*Portugal* v. *Australia*), ICJ Reports, 1995, p. 90 at para. 29.

40 Annex 9.

41 *Case concerning Legality of Use of Force (Yugoslavia* v. *Spain)*, ICJ Reports, 1999, p. 761 at paras. 32-33 and *Case concerning Legality of Use of Force (Yugoslavia* v. *United States of America)*, ICJ Reports, 1999, p. 916 at paras. 24-25.

validity and effect of the Spanish and United States reservations. There is plainly no basis for distinguishing between those reservations and that of Rwanda.

3.21 Thirdly, Article 120 of the Statute of the ICC (to which Rwanda is neither a party nor a signatory) has no bearing whatever on this issue. The fact that the States which drew up the Statute chose to prohibit all reservations to that treaty in no way affects the right of States to make reservations to other treaties which, like the Genocide Convention, do not contain such a prohibition.

3.22 Finally, the creation of the International Criminal Tribunal for Rwanda to try individuals for crimes which include genocide is an entirely separate matter from the jurisdiction of this Court to hear disputes between States. There can be no question of an otherwise valid reservation to Article IX being rendered "inoperative", because the reserving State supported the creation by the Security Council of a criminal tribunal with jurisdiction over individuals.

3.23 Article IX of the Genocide Convention cannot, therefore, provide a basis for the jurisdiction of the Court in the present case.

E. The Convention on the Elimination of all Forms of Discrimination against Women

3.24 The Congo relies, next, upon the Convention on the Elimination of all Forms of Discrimination against Women. Article 29(1) of that Convention provides that –

> 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.

3.25 As is the case with Article 14(1) of the Montreal Convention (which is considered below), this provision clearly lays down a number of preconditions which must be satisfied before the jurisdiction of the Court can be founded:-

(1) there must be a dispute between the parties concerning the interpretation or application of the Convention;

(2) it must have proved impossible to settle that dispute by negotiation;

(3) one of the parties must have requested that the dispute be submitted to arbitration and the parties must have been unable to agree upon the organization of the arbitration; and

(4) six months must have elapsed from the date of the request for arbitration.

3.26 These conditions are not formalities. Article 29(1) does not make the Court the primary forum for the resolution of the disputes to which it applies – that forum is arbitration, and even arbitration is to be invoked only where a dispute has not been settled by negotiation. The role of the Court is as a guarantor in the event that the provisions for negotiation and arbitration fail, that is to say if the parties to the dispute are unable to resolve their differences by negotiation and cannot agree on the organization of the arbitration. The failure to settle the dispute by negotiation and the failure to agree upon the organization of the arbitration are essential conditions precedent to the creation of jurisdiction in the Court. It is therefore incumbent upon any Applicant State wishing to seise the Court under Article 29 to demonstrate that the conditions laid down in that provision have been met.

3.27 None of these conditions has been satisfied in the present case. With regard to the first requirement – that there must be a dispute between the Congo and Rwanda regarding the interpretation or application of the Convention – the Court has repeatedly made clear that the existence of a dispute is an objective question and does not depend on the mere assertion of the Applicant. In one frequently quoted passage, the Court has said that –

> ... it is not sufficient for one party to a contentious case to assert that a dispute exists with the other party. A mere assertion is not sufficient to prove the existence of a dispute any more than a mere denial of the existence of the dispute proves its non-existence. Nor is it adequate to show that the interests of the two parties to such a case are in conflict. It must be shown that the claim of one party is positively opposed by the other. (*South West Africa Cases*, ICJ Reports, 1962, p. 319, at p. 328.)

3.28 In the present case, there has been no claim by the Congo, prior to its filing of the Application. At no time did the Congo advance any claim that Rwanda was in breach of the Convention or suggest that there was a dispute regarding the interpretation of any provision of the Convention. Rwanda quite simply has no idea which provisions of this Convention the Congo considers to be in issue or what aspect of their interpretation or application the Congo considers to be in issue. To borrow the language used by the Court in the passage quoted above, the Congo has made no claim which Rwanda can positively oppose.

3.29 It is true that, as pointed out by Judge Higgins in her Separate Opinion appended to the Order of 10 July 2002, there is a well established practice in human rights tribunals that it is not necessary for an individual making an application to such a tribunal to identify in his or her application which specific provisions of the treaty in question are alleged to have been breached. Given the inequalities in proceedings between an individual and a State and the difficulties which often confront the individual applicant in such a case, that practice is no doubt justifiable and even desirable in cases brought by individuals.

3.30 Those considerations are not, however, applicable to the question whether the International Court of Justice has jurisdiction in proceedings instituted by one State against another under Article 29 of the present Convention. In such proceedings there is no inequality between the parties. Moreover, in contrast to the jurisdiction of human rights tribunals, the International Court of Justice has jurisdiction under Article 29 (and the similar provisions in a number of other treaties) only where a dispute has proved impossible of solution by other means. For that to be the case, some identification of the dispute must have occurred

United States of America).[42] In that case, the Court noted that Libya – whose contacts with the United States of America were a great deal more tenuous and infrequent than those of Congo with Rwanda – had proposed arbitration under the relevant provision of the Montreal Convention (which is in substantially the same terms as Article 29(1) of the present Convention [43]) and that this proposal had received no answer.[44] There is nothing comparable here.

3.35 The Congo's failure to comply with the essential preconditions imposed by Article 29, means that that provision cannot furnish a basis for the jurisdiction of the Court in the present case.

F. The Constitution of the World Health Organization

3.36 The Congo also relies upon Article 75 of the WHO Constitution,[45] which provides that –

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

Both the Congo and Rwanda are members of the WHO.

3.37 Article 75 cannot, however, establish the jurisdiction of the Court in the present case for three reasons. First, Article 75 clearly imposes preconditions on the seisin of the Court, namely that –

(1) there must be a dispute concerning the interpretation or application of the Constitution;

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42 ICJ Reports, 1998, p. 115.

43 See paras. 3.45 to 3.71, below.

44 ICJ Reports, 1998, p. 115, at para. 20.

45 Annex 5.

(2) settlement of that dispute by negotiation must have proved impossible; and

(3) settlement of that dispute by the Health Assembly must have proved impossible.

3.38 In the present case, there has been no hint by the Congo, prior to its initiation of the present proceedings before the Court that there was any dispute between itself and Rwanda regarding the interpretation or application of the WHO Constitution, nor has there been any attempt by the Congo to resolve such a dispute either by negotiation or by reference to the Health Assembly. For the reasons given in connection with CEDAW, the general assertion that negotiation is impossible is not enough. Moreover, even if it were sufficient, that would be no excuse for the failure of the Congo to bring the dispute which it now claims to exist before the Health Assembly. Article 75 of the Constitution confers jurisdiction on the Court if, and only if, these conditions are satisfied. That is patently not the case here.

3.39 Secondly, it is difficult to see how the present case can be formulated as a dispute regarding the interpretation or application of the Constitution of the WHO. As the Congo has itself pointed out, the case is all about allegations of aggression.[46] Yet these are not matters which fall within the competence of the WHO as the Court made clear in its Advisory Opinion on *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*.[47]

3.40 Thirdly, the one provision of the WHO Constitution to which the Congo makes reference is Article 2. Yet, as the Court pointed out in its Order of 10 July 2002, that provision imposes obligations upon the WHO itself rather than upon the member States.[48]

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[46] See para. 1.5, above.

[47] ICJ Reports, 1996, p. 66 at paras. 26-27.

[48] Order of 10 July 2002, para. 82.

G. The Constitution of UNESCO

3.41 The Congo further relies on Article XIV of the Constitution of UNESCO, [49] which provides that –

> Any question or dispute concerning the interpretation of this Constitution shall be referred for determination to the International Court of Justice or to an arbitral tribunal, as the General Conference may determine under its rules of procedure.

Both Rwanda and the Congo are members of UNESCO.

3.42 However, Article XIV confers jurisdiction only in respect of the *interpretation* of the Constitution and there is no hint of any dispute between the Congo and Rwanda regarding interpretation of that instrument.

3.43 Moreover, Article XIV provides for reference to the Court only "as the General Conference may determine under its Rules of Procedure". Rule 38 of those Rules, [50] entitled "Interpretation of the Constitution," provides, in paragraph 3, that the Legal Committee –

> may decide by a simple majority to recommend to the General Conference that any question concerning the interpretation of the Constitution be referred to the International Court of Justice for an advisory opinion.

Paragraph (4) then provides that –

> In cases where the Organization is party to a dispute, the Legal Committee may decide, by a simple majority, to recommend to the General Conference that the case be submitted for final decision to an arbitral tribunal, arrangements for which shall be made by the Executive Board.

3.44 As envisaged by the Constitution, therefore, the Rules make express provision for the manner in which questions and disputes concerning the interpretation of the UNESCO Constitution may be referred to the Court. There is no question of the

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49 Annex 6.

50 Annex 10.

procedures laid down in the Rules having been followed here. Article XIV(2) of the Constitution affords no other basis for the jurisdiction of the Court and cannot, therefore, furnish a basis for the jurisdiction of the Court in the present case.

H. The Montreal Convention

3.45 As in its 1999 Application, the Congo invokes Article 14(1) of the Montreal Convention,[51] which provides that –

> Any dispute between two or more Contracting States concerning the interpretation or application of this Convention which cannot be settled through negotiation, shall, at the request of one of them, be submitted to arbitration. 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.

3.46 The Montreal Convention is a treaty in force between the Congo and Rwanda.[52] The Convention is, therefore, capable of constituting a basis for the jurisdiction of the Court in proceedings between the Congo and Rwanda. It can do so, however, only in respect of a dispute concerning the interpretation or application of the Montreal Convention and, even then, only provided that the conditions laid down Article 14(1) have been met.

3.47 Article 14(1) lays down a series of requirements, each of which must be met before that provision can confer jurisdiction upon the Court:-

(1) there must be a dispute between the parties concerning the interpretation or application of the Montreal Convention;

(2) the dispute must be one which cannot be settled by negotiation;

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[51] Annex 7.

[52] The Congo became a party to the Convention on 6 July 1977. Rwanda became a party on 3 November 1987.

(3) one of the parties must have requested that the dispute be submitted to arbitration and the parties must have been unable to agree upon the organization of the arbitration; and

(4) six months must have elapsed from the date of the request for arbitration.

3.48 Whether there is, indeed, a dispute between the Congo and Rwanda concerning the interpretation or application of the Montreal Convention is a question for objective determination.[53] As the Court held in the *Oil Platforms* case,[54] it is not enough that the applicant State asserts that a dispute exists under a treaty such as the Montreal Convention, while the respondent State denies that it does. The Court must ascertain whether the violations of the Convention pleaded by the applicant State do, or do not, fall within the provisions of the Convention and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain. The burden is on the applicant State to demonstrate that there is a dispute falling within the title of jurisdiction on which that State has chosen to rely.

3.49 The point was expressed in the following way by the Permanent Court in the *Mavrommatis Palestine Concessions* case,[55] itself cited by the present Court in *Oil Platforms*. There the Permanent Court had to consider Article 26 of the Mandate for Palestine which provided for jurisdiction over any dispute "relating to the interpretation or the application of the provisions of the Mandate". The Court indicated that, bearing in mind that its jurisdiction was limited and based on consent, it needed to satisfy itself that "the suit before it, in the form in which it has been submitted and on the basis of the facts hitherto established, falls to be

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53 See, e.g., the Advisory Opinion of the Court on the *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, ICJ Reports, 1988, p. 12 at p. 27.

54 ICJ Reports, 1996, p. 803, at para. 16.

55 (1924) PCIJ Series A. No.2.

decided by application of the clauses of the Mandate".[56] The present Court, in the *Case concerning Military and Paramilitary Activities in and against Nicaragua (Preliminary Objections)*,[57] expressed the requirement in terms of the existence of "a reasonable connection" [58] between the treaty and the claims submitted to the Court.

3.50 These requirements are reinforced and strengthened where they are associated with specific procedural requirements such as those contained in Article 14 of the Montreal Convention. Article 14 clearly implies that a particular allegation will be identified with some precision in diplomatic exchanges between the parties, that a request will have been made that the dispute thereby generated be submitted to arbitration under the Convention, and that, after six months, the parties must have been unable to agree on the arrangements for the arbitration. This Court is not the primary forum for the resolution of disputes under the Convention: that forum is arbitration. The Court's role is as a guarantor in the event that the provisions for arbitration fail for any reason. The combination of the jurisdictional and procedural provisions of the Montreal Convention clearly implies that a dispute will have been clearly characterized by the parties, or at least one of them, as one concerning the Montreal Convention, and that attempts to arbitrate the dispute, *in that character*, will have failed. Having regard to Article 14, it is not open to a Claimant, as it were incidentally and implicitly, to put in issue the Montreal Convention in the course of proceedings raising a wider dispute or set of allegations. Yet that is precisely what the Congo seeks to do here. It characterizes the dispute as one concerning "acts of armed aggression" and its "Statement of Facts" as pleaded reveals no allegation which, even if true, could raise a question under the Convention. Whatever the position may be in cases where this Court has primary jurisdiction under a treaty, it is not open to a

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56 Ibid., p.16.

57 ICJ Reports 1984, p.392.

58 Ibid., p. 427 (para. 81).

party incidentally and indirectly to raise issues under the Montreal Convention in this way.

3.51 The scope of the Montreal Convention is clearly and precisely defined. That Convention concerns the suppression of unlawful acts against the safety of civil aviation. As its Preamble and Article 1 make clear, the Convention establishes a mechanism for combatting terrorist offences against civil aircraft. Article 1 provides that:

> 1. Any person commits an offence if he unlawfully and intentionally:
>
> (a) 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
>
> (b) 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; or
>
> (c) places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight; or
>
> (d) destroys or damages air navigation facilities or interferes with their operation, if any such act is likely to endanger the safety of aircraft in flight; or
>
> (e) communicates information which he knows to be false, thereby endangering the safety of an aircraft in flight.
>
> 2. Any person also commits an offence if he:
>
> (a) attempts to commit any of the offences mentioned in paragraph 1 of this Article; or
>
> (b) is an accomplice of a person who commits or attempts to commit any such offence.

3.52 Article 2 and Article 4 prescribe some of the circumstances in which the Convention applies. Article 4(1) provides that it "shall not apply to aircraft used

in military, customs or police services". Article 3 provides that each Contracting State undertakes to make the offences mentioned in Article 1 punishable by severe penalties. Articles 5, 6, 7 and 8 make provision for the establishment and exercise of criminal jurisdiction over persons accused of offences under Article 1. Article 7 lays down the principle *aut dedere, aut punire*. Article 9 deals with joint air transport operating organizations. Article 10(1) provides that "Contracting States shall, in accordance with international and national law, endeavour to take all practicable measures for the purpose of preventing the offences mentioned in Article 1." Articles 10(2), 11 and 12 deal with various aspects of inter-State assistance in respect of offences. Article 13 deals with reporting to the International Civil Aviation Organization.

3.53 It follows that the range of disputes over which the Court can derive jurisdiction from Article 14(1) of the Montreal Convention is strictly confined. It is for the Congo, as the applicant State which seeks to found the jurisdiction of the Court on Article 14(1) of the Montreal Convention, to establish that there is a dispute between itself and Rwanda which falls within the scope of this provision.

3.54 It is manifest that the vast majority of issues raised in the Congolese Application have nothing whatever to do with the Montreal Convention and that the Convention cannot furnish a basis for jurisdiction in respect of the allegations in the Statement of Facts (which nowhere even mentions matters related to the Montreal Convention).

3.55 Notwithstanding its statement that -

> l'actuel differend entre la République Démocratique du Congo et le Rwanda concerne bien évidemment l'interprétation et l'application des conventions précitées, [59]

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[59] Application, p. 27; the treaties referred to are the Montreal Convention and the Torture Convention.

the only attempt the Congo has made to identify a Montreal Convention dispute is the allegation, made not in the "Statement of Facts" but in the prayer for relief at the end of the Application,[60] regarding the shooting down of a Boeing 727 belonging to Congo Airlines at Kindu airport on 9 October 1988. It follows that the only dispute in respect of which the Montreal Convention *might* furnish a basis for jurisdiction is one relating to this alleged incident. Nevertheless, for the reasons set out below, Rwanda maintains that the Court lacks jurisdiction to entertain the Congo's Application even in relation to this matter.

3.56 First, the sole allegation regarding the Montreal Convention in the 1999 Application related to this same incident. In its Memorial, filed in response to that Application, Rwanda demonstrated that Article 14(1) of the Montreal Convention could not afford a basis for the jurisdiction of the Court in relation to that incident. The Memorial was evidently sufficiently convincing to the Congo that it withdrew its Application. While the Congo reserved its right to make a fresh Application invoking other bases for jurisdiction, it cannot now be allowed simply to repeat exactly the same allegation as in 1999 and rely upon exactly the same basis for jurisdiction. None of the new grounds of jurisdiction invoked by the Congo (even if, which is not the case, they might afford a basis for jurisdiction in respect of other aspects of the case) have any bearing on the alleged aircraft incident. In respect of that incident, the Congo is simply seeking to revive the earlier proceedings which it had discontinued in recognition of the absence of jurisdiction. In doing so, it is abusing the process of the Court.

3.57 Secondly, the deficiencies in the Congo's 1999 Application are equally present in the new Application. In this respect, Rwanda respectfully refers to its earlier Memorial and repeats the arguments made therein. For the sake of brevity, these will not be repeated in full but merely summarised here. The Court is invited to refer to the earlier Rwandan Memorial for additional argument on the point.

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[60] Application, p. 32.

3.58 The Congo has not adequately defined the dispute said to exist between itself and Rwanda regarding the interpretation or application of the Montreal Convention and to satisfy the requirements laid down by the Court in the passage from the *South West Africa* cases quoted in paragraph 3.27, above.

3.59 The incident said to have occurred at Kindu was the subject of a complaint by the Congo to ICAO. [61] Although this complaint was discussed by the ICAO Council, the Congo's representations to the Council did nothing to clarify its allegations. In particular, the Congo alleged at the time that the aircraft was shot down not by Rwandan forces but by rebels supported by Rwanda. It made identical allegations against Uganda (and, though not to ICAO but only in a 1999 Application – now discontinued – to the Court, against Burundi). No indication was given of the basis on which Rwanda might be said to be responsible for the acts of these rebels and the identical allegations made against Uganda and Burundi were incompatible with the allegations against Rwanda.

3.60 It is also noticeable that the Declaration adopted by the Council of ICAO on 10 March 1999 [62] contained no specific reference to the incident at all, let alone any suggestion that there might have been any violation of the Montreal Convention by Rwanda, or that there might be a dispute between the Congo and Rwanda concerning the interpretation or application of the Convention.

3.61 Although the Council stated that there was an obligation under Article 3 *bis* of the Chicago Convention to refrain from the use of weapons against civil aircraft in flight, the only mention of the Montreal Convention is the statement in paragraphs 5 and 6:

> 5. The protection of civil aviation from acts of unlawful interference has been enhanced by the Tokyo Convention (1963), the Hague Convention (1970), the Montreal Convention (1971) and the 1988

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61 See Annexes 13 and 14.

62 Annex 16.

Protocol Supplementary to the Montreal Convention of 1971, as well as by Annex 17 to the Convention on International Civil Aviation.

6. The Council urges all States in exercising their authority under the Convention on International Civil Aviation and the aviation security conventions *to be guided by the principles, rules, standards and recommended practices laid down in these Conventions* and in the Annexes to the Convention on International Civil Aviation.

(emphasis added)

A statement at this level of generality (a) does not involve any endorsement whatever of the Congolese allegation; (b) does not involve any condemnation of any specific State, and (c) lends no support to the claim that there exists a dispute regarding the interpretation or application of the Montreal Convention.

3.62 Indeed, the Council's statement does not appear to address the Congo's allegation at all. Whatever the Rwandese troops might (or might not) have done to support the anonymous Congolese rebels who allegedly shot down a plane in the Congo, those troops were not exercising any "authority under the Convention on International Civil Aviation and the aviation security conventions". The Council addressed its resolution (using the terms "urges" and "guided") to *all* States. It may be inferred that it was embarrassed by the complete lack of specificity of the Congolese complaint and wished simply to reaffirm existing aviation standards for all States, so that the matter could be declared closed. The Council took no further action of any sort. Its conduct here is in marked contrast to its consideration of cases where a State was credibly alleged to have been involved in aggression against civilian aircraft and a real dispute did exist.

3.63 This is not, therefore, a case in which "the claim of one party is positively opposed by the other".[63] Despite the opportunity of the ICAO debate and the specific requirements of Article 14 of the Montreal Convention, the Congo has not set out its claim with sufficient particularity for Rwanda to be able to oppose

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63 *South West Africa case*, para. 3.28, above.

it. It has accordingly not satisfied the requirements for establishing the jurisdiction of the Court under Article 14(1) of the Montreal Convention.[64]

3.64 Even if there existed between the Congo and Rwanda a dispute regarding the interpretation or application of the Montreal Convention, the Congo must still establish that the procedural requirements of Article 14(1) of the Convention have been met. It cannot do so now, any more than it could in the earlier proceedings.

3.65 The first such requirement is that the dispute is one which *cannot* be settled by negotiation. The Congo has failed to show that that is the case. Although the Congo has referred to the alleged impossibility of negotiating a peaceful settlement with Rwanda, the Congo has here confused the settlement of the armed conflict, the nub of the allegation it makes, with the settlement of the specific dispute which it asserts exists under the Montreal Convention. The reality is that the Congo has made no attempt to negotiate with Rwanda on the allegations about the destruction of the Boeing 727. It has not lacked opportunity to do so. In the three and a half years which elapsed between the alleged incident of 9 October 1998 and the filing of the current Application, representatives of the two governments have met on numerous occasions. At none of these meetings was the question of an alleged breach of the Montreal Convention raised. In addition, the Congo has addressed the United Nations Security Council, the General Assembly and the Human Rights Commission about the conflict without ever mentioning either the Montreal Convention or the alleged incident at Kindu. There have also been numerous opportunities for the Congo to raise this issue bilaterally or in a multilateral forum. It has not done so.

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[64] Conceivably the Congo might, in its Observations on these Preliminary Objections, seek to specify and particularise the allegations it makes which are said to raise issues under the Montreal Convention. But it is one thing to provide further detail in respect of an allegation sufficiently pleaded in advance so as to raise an issue under Article 14, and another to try to repair fatal defects in a pleading *en revanche*. Having regard to the terms of Article 14, the latter course is not open to the Congo in respect of the Montreal Convention. This Court's jurisdiction under the Convention cannot be attracted solely by particulars provided only in the course of subsequent pleadings, if the Application itself fails to raise a specific allegation which enlivens the Court's jurisdiction.

3.66 Nor does the fact that the Congo raised this matter with ICAO alter the fact that it has made no attempt to settle its alleged dispute by negotiation. The Congo is, of course, entitled to raise whatever issues it chooses in ICAO. However, ICAO was not, in this instance, a forum for negotiations. The Congo did not use the occasion of the ICAO discussion of its complaint against Rwanda to propose bilateral negotiations or to suggest a negotiated settlement of any kind. Instead, it used ICAO as a forum in which to make a complaint against Rwanda. It did not invoke the ICAO dispute settlement mechanism, as it had done on a previous occasion when an aircraft was allegedly shot down in 1991.[65] As has been seen, the Council of ICAO neither established the facts nor identified a dispute between the Congo and Rwanda concerning the application of the Montreal Convention. Its resolution was in the most anodyne terms.

3.67 It is true that in the *Lockerbie* case, the Court held that the dispute between Libya and the United Kingdom could not be settled by negotiation, even though the two countries had not held negotiations on the subject.[66] As the Court expressly noted, however, in that case the United Kingdom had:

> ... always maintained that the destruction of the Pan Am aircraft did not give rise to any dispute between the Parties regarding the interpretation or application of the Montreal Convention, and that, for that reason, in the [United Kingdom's] view, there was nothing to be settled by negotiation under the Convention.[67]

That is not the case here. Rwanda has at no time rejected negotiations.

3.68 Article 14(1) of the Montreal Convention makes the jurisdiction of the Court contingent upon (a) one of the parties to the dispute having requested arbitration

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[65] See Annexes 13, 14 and 15.

[66] *Libya* v. *United Kingdom,* ICJ Reports, 1998, p. 3 at para. 21; *Libya* v. *United States of America,* ICJ Reports, 1998, p. 115 at para. 20.

[67] *Libya* v. *United Kingdom,* ICJ Reports, 1998, p. 3 at para. 21; *Libya* v. *United States of America,* ICJ Reports, 1998, p. 115 at para. 20.

and (b) the Parties having been unable, within a six month period, to agree upon the organization of the arbitration.

3.69 In the present case, the Congo has never suggested, either in bilateral communications, in ICAO, or before any other multilateral body that the dispute be referred to arbitration. It is apparent, therefore, that another essential requirement of Article 14(1) has not been satisfied.

3.70 Once again, the facts of the present case are markedly different from those of the *Lockerbie* case. In that case, the conclusion of the Court that the dispute was not one which could be referred to arbitration under the Convention was based upon a finding that Libya had written to the United Kingdom and the United States of America requesting arbitration under the Convention and had received no reply. Moreover, the two States had made clear, in the course of debates in the Security Council, that they had no intention of agreeing to arbitration.[68] In the present case, there was no request for arbitration by the Congo and nothing in the conduct of Rwanda could be portrayed as a rejection of arbitration, in contrast to the stance adopted by the Respondents in the *Lockerbie* cases.

3.71 It follows that the requirements set out in Article 14(1) of the Montreal Convention have not been met. Those requirements may be procedural but they are not formalities. They are essential preconditions to the creation of jurisdiction for the Court. The Congo's failure to satisfy them means that Article 14(1) -- which could, in any event, have conferred jurisdiction only in respect of a very small part of the Application -- does not provide a basis for the jurisdiction of the Court over any part of the Application.

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[68] *Libya* v. *United Kingdom*, ICJ Reports, 1998, p. 3 at para. 21 ; *Libya* v. *United States of America*, ICJ Reports, 1998, p. 115 at para. 20.

I. Jus Cogens Norms and the Vienna Convention on the Law of Treaties

3.72 Finally, the Congo asserts that the rules of *jus cogens* which it accuses Rwanda of violating themselves provide a basis for the jurisdiction of the Court. The Congo's reliance on this concept is wholly misplaced. It ignores the principle – consistently emphasised in the jurisprudence of the Court – that the Court's jurisdiction is based exclusively upon consent. That principle was emphasised most recently in the *Cases concerning Legality of Use of Force*, cases which involved allegations of violation of *jus cogens* rules. The Court there stated that –

> ... the Court can [therefore] exercise jurisdiction only between States parties to a dispute who not only have access to the Court but also have accepted the jurisdiction of the Court, either in general form or for the individual dispute concerned. [69]

3.73 One consequence of that principle, as the Court stated in the same case, is 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. [70]

The fact that the norm which a State is accused of having violated has the status of *jus cogens* does not alter that distinction. In particular, it does not act as a substitute for the consent of the Respondent State, so as to create jurisdiction where none would otherwise exist.

3.74 Nor is the Court given jurisdiction over a State because the norm which that State is accused of violating creates obligations *erga omnes*. As the Court stated in the

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[69] *Case concerning Legality of Use of Force (Yugoslavia v. Belgium)*, ICJ Reports, 1999, p. 124, para 20.

[70] Ibid., para. 47.

East Timor decision, "the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things". [71]

3.75 In an attempt to circumvent these very clear statements of principle, the Congo refers to Article 66 of the Vienna Convention on the Law of Treaties, 1969. That provision, however, has no bearing on the present case. Contrary to what the Congolese Application and Request suggest, Article 66 does not provide for any dispute regarding contravention of a rule of *jus cogens* to be referred to the Court. On the contrary, as the Court held in its Order of 10 July 2002, Article 66 is concerned with a very specific kind of dispute regarding one effect of norms of *jus cogens*.[72]

3.76 Article 66 is part and parcel of the machinery for the settlement of disputes regarding the interpretation and application of the Vienna Convention. It provides for the jurisdiction of the Court only in respect of disputes regarding the validity of a treaty which is said to contravene a rule of *jus cogens*. There is no such dispute here and Article 66 of the Vienna Convention can no more supply the basis for jurisdiction in the present case than can the substantive norms of *jus cogens* to which the Congo refers.

3.77 It is therefore submitted that none of the grounds of jurisdiction relied on by the Congo affords a genuine basis for the jurisdiction of the Court to entertain the Application of the Congo.

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71 *Case concerning East Timor*, ICJ Reports, 1995, p. 90, para 29.

72 Order of 10 July 2002, para. 75.

PART IV

ADMISSIBILITY

4.1 Even if the Court had jurisdiction, Rwanda maintains that the present Application is inadmissible.

4.2 The new Application filed by the Congo is in substance largely a repetition of its 1999 Application. A comparison of the two applications demonstrates that the Congo has done little beyond adding a few further allegations and references to selected events which occurred, or are said to have occurred, in the two and a half years since the 1999 Application was filed.

4.3 While the Congo has added a number of new grounds on which it seeks to establish the jurisdiction of the Court, these do not, for the reasons given in Part III, succeed in doing so. Moreover, the Congo has made virtually no attempt to link the allegations in its Statement of Facts and list of alleged violations of international law to the treaties on which it attempts to found jurisdiction. The references to the Torture Convention and the Montreal Convention are substantially unchanged, notwithstanding that the Congo chose to discontinue the earlier proceedings in circumstances which implicitly acknowledged the lack of jurisdiction under those instruments.

4.4 Rwanda maintains that there must be some finality to litigation. For a State to file an application, withdraw it in the face of objections to the jurisdiction of the Court, then seek to bring a fresh application two years later against the same respondent and based on the same allegations is an abuse of the process of the Court and renders the Application inadmissible.

PART V

CONCLUSIONS AND SUBMISSIONS

5.1 For the reasons given in Part III of this Memorial, Rwanda contends that the Court lacks jurisdiction to entertain the Application of the Congo. Of the eight bases for jurisdiction advanced by the Congo –

(1) the Torture Convention is not in force between Rwanda and the Congo and thus cannot be a basis for jurisdiction in proceedings between them;

(2) jurisdiction under the Racial Discrimination Convention and the Genocide Convention is excluded by Rwanda's reservations;

(3) principles of *jus cogens* and the provisions of the Vienna Convention on the Law of Treaties cannot afford a basis for the jurisdiction of the Court in the present case which does not concern the validity of a treaty;

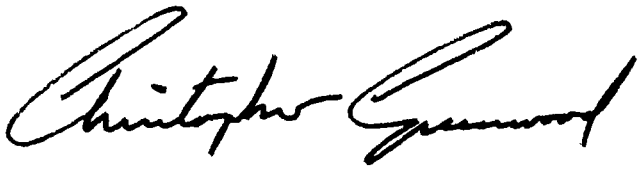
(4) the WHO Statute and the UNESCO Constitution, though in force between Rwanda and the Congo have nothing to do with the present case and the procedural requirements for seising the Court under those instruments have not been followed; and

(5) the Congo has failed to comply with the preconditions for seising the Court under the CEDAW and the Montreal Convention.

5.2 Alternatively, the present Application is inadmissible as it is an attempt to revive the earlier proceedings which the Congo chose to discontinue.

5.3 Accordingly, Rwanda requests the Court to adjudge and declare that –

The Court lacks jurisdiction to entertain the claims brought by the Democratic Republic of the Congo. In addition, the claims brought by the Democratic Republic of the Congo are inadmissible.



16 January 2003

Christopher Greenwood

Deputy Agent of Rwanda

List of Annexes

Annex Number	Title and Reference
1	Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, 1984 ("the Torture Convention")
2	Convention on the Elimination of all Forms of Racial Discrimination, 1965 ("the Racial Discrimination Convention")
3	Convention on the Prevention and Punishment of the Crime of Genocide, 1948 ("the Genocide Convention")
4	Convention on the Elimination of all Forms of Discrimination against Women, 1979 ("CEDAW")
5	Statute of the World Health Organization
6	Constitution of UNESCO
7	Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1971 ("the Montreal Convention")
8	Extract from the Vienna Convention on the Law of Treaties, 1969, Articles 65-67 ("the Vienna Convention")
9	Extract from UN Treaty Collection: Reservations to the Racial Discrimination Convention and Genocide Convention
10	Extract from UNESCO Rules of Procedure

11 Pretoria Peace Agreement, (United Nations Document S/2002/914)

12 UN Security Council Resolution 1445 (2002)

13 International Civil Aviation Organization Document, (PRES AK/639)

Attachment A

Letter from Minister of Transport and Communications of Congo to the President of the Council of ICAO (9 October 1998)

Attachment B

Letter from the President of the Council of ICAO to the Minister of Transport and Communications of Congo (3 November 1998)

Attachment C

Letter from Minister of Transport and Communications of Congo to the President of the Council of ICAO (20 December 1998)

Attachment D

Letter from the Embassy of the Congo to the President of the Council of ICAO (2 February 1999)

Attachment E

Letter from the Minister of Transport and Communication of Congo to the President of the Council of ICAO (2 February 1999)

14 International Civil Aviation Organization Council Minute, (C-MIN 156/9)

15 International Civil Aviation Organization Council Record of 9th Meeting, 10th March 1999, (C-DEC 156/9)

16 International Civil Aviation Organization Council Declaration adopted at the 9th Meeting 10th March 1999