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

(Congo v Rwanda)[1]

REQUEST FOR INDICATION OF PROVISIONAL MEASURES

I. INTRODUCTION

On 28 May 2002, the Congo instituted proceedings against Rwanda in the International Court of Justice alleging Rwanda's "massive, serious and flagrant violations of human rights and of international humanitarian law"[2] on Congolese territory. The Congo also asked the Court to indicate provisional measures based on urgency and risk of irreparable harm, arguing that the Court had jurisdiction in this matter.[3] In reply, Rwanda claimed that the Court had no jurisdiction and requested the case's removal from the Court's List. On 1 July 2002, the Court agreed with Rwanda and rejected the Congo's request for provisional measures stating that it did not have a *prima facie* jurisdiction to make such an order. As a result, it was unnecessary to address the issue of urgency or irreparable harm.

II. BACKGROUND

In May 1997, Mr Kabila started a campaign in the eastern borders of the Congo that became a source of conflict ever since. The region is the Great Lakes region where three rivers (the Congo, Tshopo and Lindhi) meet. The conflict caused the borders the Congo shared with three states (Burundi, Uganda and Rwanda) to become unsafe and the Mobuto government in the Congo fled leaving behind a political vacuum and encouraging militia activity there. At Kabila's invitation the three states began to infiltrate the region by armed activity to try to secure it.[4]

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[1] [2002] International Court of Justice Reports (not yet published). The text of this case is available on the Court's website at <www.icj-cji.org/icjwww/idocket /icrw/icrframe.htm>. Also refer International Court of Justice, Press Release 2002/19, 10 July 2002.

[2] Order of the Court para 1.

[3] See Article 41 of the Court's Statute and Articles 73-74 of the Rules of Court: ibid para 7.

[4] See generally the Order of the Court.

When the activities escalated near the Congan city of Kisangani, on 23 June 1999 the Congo instituted proceedings against those states for "violations of international humanitarian law and human rights violations"[5] on its territory, including the death of several thousand civilians.[6] However, on 15 January 2001, the Congo discontinued proceedings against Burundi and Rwanda[7] following the signing of the Lusaka Peace Agreement.[8] Despite this agreement, the Congo claimed that more than 3.5 million people within its territory were killed,[9] the most recent occurring in Kisangani on 14 May 2002. Therefore, this formed the basis for the Congo's new request for provisional measures against Rwanda.

III. THE CONGO'S CLAIMS

The Congo asked the Court to order the immediate and unconditional withdrawal of Rwanda's armed forces from its territory including the payment of compensation for the damage and removal of property imputable to Rwanda.[10] In its application, the Congo sought a swift declaration of international law as it applied to the parties' particular rights stating that the request was urgent and the issues needed a more immediate response than the usual processes would allow normally. Further, Article 41 of the Court's Statute gave a broad discretionary power to indicate provisional measures and Rule 74 of the Rules of Court bound it to act immediately.[11] Article 41 described the breadth of the discretion:

> The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.

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[5] Ibid para 4.

[6] Kisangani has a population of more than 500,000, two strategically placed airports and a flourishing diamond market: see Human Rights Watch, "War crimes in Kisangani", August 2002, Section III at <www.hrw.org/reports/2002/drc2/DRC0802-02.htm> (visited November 2002).

[7] Ibid.

[8] Order of the Court para 30; International Court of Justice, Press Release 2002/15, 28 May 2002 at <www.icj-cij.org/> (visited November 2002).

[9] Ibid para 6.

[10] Ibid.

[11] A request for provisional measures had priority over all other cases: ibid para 1.

The Congo argued that the Court had to address three main issues concerning the indication of provisional measures: (1) it should be satisfied that it had jurisdiction to hear the matter; (2) it had to consider the urgency of the circumstances; and (3) it had to assess the likelihood of irreparable harm being caused to the rights of the parties if an order was not made.

Although Rwanda did not accept the Court's compulsory jurisdiction under Article 36(2) of the Court's Statute, the Congo referred to the *Nuclear Tests Cases*[12] where the Court held:[13]

> [It] need not, before indicating them, finally satisfy itself that it has jurisdiction on the merits of the case, and yet ought not to indicate such measures unless the provisions invoked by the Applicant, appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded.

The Congo therefore presented provisions in other conventions to found such jurisdiction:

1. Article XIV(2) of the 1945 Constitution of the United Nations Educational, Scientific and Cultural Organization (UNESCO Constitution);
2. Article 75 of the 1946 Constitution of the World Health Organization (WHO Constitution);
3. Article 9 of the 1947 Convention on the Privileges and Immunities of the Specialized Agencies (which also applies to UNESCO);
4. Article IX of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention);
5. Article 30(1) of the 1948 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture);
6. Article 22 of the 1966 International Convention on the Elimination of All Forms of Racial Discrimination (Convention on Racial Discrimination);

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[12] [1974] International Court of Justice Reports 253.
[13] Ibid 101.

7. 1969 Vienna Convention on the Law of Treaties (which gives the Court jurisdiction to settle disputes arising from the violation of peremptory norms or *jus cogens* in the area of human rights as those norms are reflected in a number of international instruments);
8. Article 14(1) of the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal Convention);[14] and
9. Article 29(1) of the 1979 Convention on the Elimination of All Forms of Discrimination against Women (Convention on Discrimination against Women).[15]

When addressing the two remaining issues of urgency and irreparable harm, the Congo referred to the summary executions that took place in Kisangani since 14 May 2002. It contended that a failure to make a provisional order would have humanitarian consequences that could never be made good again.[16] It reiterated the killing of thousands of civilians in Kisangani between May and June 2000 while the Lusaka Peace Agreement was still in force[17] and noted the United Nations Security Council resolutions urging Rwandan forces to withdraw.[18] In essence, it argued that no later action could possibly correct the detrimental effects that were sure to result from the prevailing situation.

IV. RWANDA'S REPLY

Rwanda denied that the Court had jurisdiction to hear the application on the basis that it did not consent to the latter's jurisdiction. It stated that any "allegation of a violation of *jus cogens* could not act as a substitute for consent where none would otherwise exist".[19] It added that due to the reservations it made to the international agreements or due to it not

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[14] The Congo claimed that Rwanda breached the convention when it shot down a Congo Airlines Boeing 727 on 9 October 1998 in Kindu killing 40 civilians.

[15] The Congo claimed that Rwanda breached the convention by committing wide-spread sexual violence against Congolese women and children "as a means of warfare": see Article I.

[16] Order of the Court point no 11.

[17] Ibid para 10.

[18] The Security Council resolutions were 1304 (2000) of 15 June 2000; 1375 (2001) of 9 November 2001; and 1399 (2002) of 19 March 2002: International Court of Justice, Transcript of the Hearing, CR 2002/36 at 10.

[19] Order of the Court at point no 36.

being a party to them, jurisdiction could not be established on a *prima facie* basis. This resulted in a manifest lack of jurisdiction and it asked the Court to strike down the Congo's application.

The Court's Order on provisional measures is presented below. However, the case is still pending on the merits of the Congo's claims. On 18 September 2002, the Court fixed a schedule for the disputing states' written memorials to be filed and requested them to emphasise its jurisdictional competence to hear the case.[20] The Congo and Rwanda must do this by 20 January and 20 May 2003 respectively.

V. THE COURT'S DECISION

The Court was composed of Guillaume P; Shi V-P; Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby JJ; Dugard and Mavungu JJ *ad hoc*.[21] Koroma, Higgins, Buergenthal and Elaraby JJ appended declarations to the Court's Order while Dugard and Mavungu JJ *ad hoc* append separate opinions.

In its Order of 1 July 2002, the Court found (by 14:2 votes) that it did not have the *prima facie* jurisdiction needed to indicate the provisional measures the Congo had sought. The Court also found (by 15:1 votes) that it could not grant Rwanda's request that the case be removed from the List.

(a) The Obligations

The Court began its judgment by emphasising concern for the "deplorable human tragedy, loss of life, and enormous suffering" in the Congo's eastern region due to the continued fighting there. It referred to the states' obligations under the United Nations Charter and other rules of international law, including humanitarian law. In particular, it referred to the parties' obligation under the 1949 Geneva Conventions and the 1977 Additional Protocol I relative to the protection of victims of international armed conflicts. Both the Congo and Rwanda are party to those instruments.

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[20] International Court of Justice Press Release 2002/22, 20 September 2002.
[21] The ad hoc judges were appointed under Article 31 of the Court's Statute.

(b) The Court's Jurisdiction

Before the Court could indicate provisional measures its jurisdiction had to be established *prima facie*. In 1989, the Congo (then Zaire) by declaration recognised the Court's compulsory jurisdiction under Article 36(2) of its Statute in relation to any state accepting the same obligation. However, since Rwanda made no such declaration, the Court had to consider the treaties and conventions that the Congo had relied upon to found its jurisdiction. Under Article 36(1) of the Statute:

> 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.

(i) 1945 UNESCO Constitution

Claiming that both states were party to this treaty, the Congo invoked Article I maintaining that the conflict prevented it from fulfilling its missions within UNESCO. However, the Court held that since Article XIV(2) provided for disputes concerning the Constitution only on its interpretation and since this was not the object of the Congo's application, Article 1 did not apply.

(ii) 1946 WHO Constitution

Both states were party to this treaty and members of this organisation. However, Article 2 placed obligations on the WHO, not on member states. Consequently, the Congo did not satisfy the preconditions on the seisin of the Court set by Article 75.

(iii) 1948 Genocide Convention

Although both states were party to this Convention, the Congo had challenged the validity of Rwanda's reservation on the dispute resolution clause found in Article IX. The Court observed that the Convention had enshrined its rights and obligations as rights and obligations *erga omnes*, noting that a norm's *erga omnes* character and the rule of consent to jurisdiction were two different things. Further, it did not follow that if rights and obligations *erga omnes* were at issue in a dispute, the Court would have jurisdiction to adjudicate in the matter.

The Court noted that the Convention allowed reservations and that the Congo did not object to Rwanda's reservation when it was made. Since the reservation did not affect the substantive law but only its jurisdiction, the Court found that Rwanda's reservation was valid and not contrary to the Convention's object and purpose.

(iv) 1984 Convention against Torture

The Court found that although the Congo was a party to the Convention since 1996, Rwanda was not. As a result, the Convention could not be a basis for the Court's jurisdiction.

(v) 1965 Convention on Racial Discrimination

Although both states were party to the Convention, Rwanda had raised its reservation on the dispute settlement clause in Article 22. The Congo argued that the reservation was invalid. The Court noted that the Convention disallowed reservations that were incompatible with its object and purpose and under Article 20(2) a reservation was deemed incompatible if at least two-thirds of the Convention's parties objected to it. However, in this case the reservation was *prima facie* valid because it did not seem incompatible with the object and purpose of the Convention and the Congo did not object to it when Rwanda entered it.

(vi) 1969 Vienna Convention on the Law of Treaties

The Court stated that Article 66 should be read with Article 65 on "Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty". It observed that the Congo did not maintain that there was a current dispute that could not be resolved under Article 65 on a conflict between a treaty and a peremptory norm of international law. Neither did the Congo maintain that the object of Article 66 was not to allow the judicial settlement, arbitration and conciliation procedures under the Convention to be substituted for the dispute's settlement machinery on the interpretation or application of specific treaties, notably when a violation of those treaties was alleged.

(vii) 1971 Montreal Convention

Although both states were party to this Convention, the Court found that the Congo did not seek the indication of provisional measures to preserve its rights under it. Accordingly, the Court need not at this stage in the proceedings rule on its jurisdiction under the Convention or on the conditions precedent to its jurisdiction found therein, even on a *prima facie* basis.

(viii) 1979 Convention on Discrimination against Women

Although both states were party to this Convention, the Congo did not seek arbitration with Rwanda under Article 29 to settle their dispute. Further, it did not specify which rights Rwanda had violated under the Convention to become the object of provisional measures. The Court therefore held that the Congo did not *prima facie* satisfy the preconditions on the seisin of the Court set by Article 29.

(c) The Court's Conclusions

Taking into account all the above considerations, the Court held that it did not have the *prima facie* jurisdiction needed to indicate the provisional measures the Congo requested. The Court would only have jurisdiction if the parties had access to the Court and accepted its jurisdiction either in general form or for the individual dispute concerned.[22] However, the present findings did not prejudge this issue to deal with any question on the application's admissibility, the merits of the case or the merits themselves. Further, the Court held that its lack of jurisdiction prevented it from granting Rwanda's request to remove the case from its List. It stated:

> [T]here 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.

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[22] See Legality of Use of Force (Yugoslavia v Belgium), Provisional Measures [1999] 1 International Court of Justice Reports 132 para. 20.

As a result, whether or not states accepted the Court's jurisdiction, they were still responsible for acts that violated international law and attributable to them. They were also required to fulfil their United Nations Charter obligations. The Court also noted that the Security Council had many resolutions on the conflict in the region,[23] and it had demanded several times that all parties involved should stop the violations of human rights and international humanitarian law. They were also reminded of their obligations concerning the civilian population's security under the 1949 Geneva Convention IV relative to the Protection of Civilian Persons in Time of War. The Court added that all forces presently in Congolese territory were responsible for preventing such violations in the territory they controlled and stressed the importance of the parties to use their influence to prevent the violations complained of.

VI. DECLARATION OF HIGGINS J

Higgins J agreed with the majority's reasoning except for the more stringent test the Court had employed when determining its *prima facie* jurisdiction.[24] She stated that it was "well established in international human rights law" that when assessing jurisdiction on the merits of a case, the applicant was not required to identify specifically those treaty provisions allegedly breached. Instead, it was for the Court to determine if the Congo's claims and the facts alleged constituted *prima facie* violations of any particular clause in the 1979 Convention on Discrimination against Women, for instance. She referred to the Human Rights Committee findings in *BdB et al v The Netherlands*[25] and *Stephens v Jamaica.*[26]

VII. DECLARATION OF BUERGENTHAL J

Buergenthal J agreed with the majority decision but directed his comments on the inappropriateness of the Court to "voice personal

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[23] Especially Resolutions 1234 (1999), 1291 (2000), 1304 (2000), 1316 (2000), 1323 (2000), 1332 (2000), 1341 (2001), 1355 (2001), 1376 (2001), 1399 (2002) and 1417 (2002).

[24] Refer Order of the Court para 79.

[25] United Nations, Official Records of the General Assembly, 44th Session, Supplement No 40 (A/45/40).

[26] Ibid, 51st Session, Supplement No 40 (A/51/40).

sentiments or to make comments, general or specific, which, despite their admittedly "feel-good" qualities, have no legitimate place in this Order." This sentiment involved the majority's stated concern for the "deplorable human tragedy" that had unfolded,[27] its acknowledgement of its own "responsibilities in the maintenance of peace and security"[28] and the necessity to "emphasize that all parties must act in conformity with their obligations pursuant to the United Nations Charter and other rules of international law".[29] He recalled that the Security Council had adopted several resolutions on the matter[30] and suggested that it was a more appropriate organ to express that type of concern.

VIII. DECLARATION OF KOROMA J

Koroma J agreed with the majority on both submissions but felt that Article 41 of the Court's Statute could lead it to focus on the "circumstances" presented. This, in his view, should set a context for the majority to consider the necessary criteria in a different light. As a result, he felt that it would be more appropriate to consider "*prima facie or* potential jurisdiction, urgency, *and* the risk or irreparable harm."[31] He also stated that it was appropriate for the Court to make sympathetic (subjective) comments on the loss of life and suffering of Congolese civilians.[32] He stated that it was "apparent from the information submitted to the Court that real, serious threats [did] exist to the population of the region concerned",[33] and hence the occurrence could be acknowledged.

IX. DECLARATION OF ELARABY J

Elaraby J disagreed with the majority of the Court on both Orders. His reading of Article 41 of the Court's Statute was different and he sought to reinforce his viewpoint through earlier jurisprudential approaches.

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[27] Order of the Court para 54.
[28] Ibid para 55.
[29] Ibid para 56.
[30] Ibid para 93.
[31] Emphasis added. See Koroma J's Declaration para 11.
[32] Ibid para 12.
[33] Ibid para 10.

Elaraby J held that the Congo's request for the indication of provisional measures should not be rejected because, in accordance with the Court's Statute and present jurisprudence, it should in principle grant a request for provisional measures once the requirements of urgency and likelihood of irreparable damage to the rights of one or both disputing parties was established. The Court had a wide-ranging power of discretion under Article 41 to indicate provisional measures. Further, the Court's jurisprudence had gradually advanced from its earlier strict insistence on established jurisdiction to acceptance of *prima facie* jurisdiction as the threshold under that provision. This progressive shift was not reflected in the Order.[34]

Article 41 was the point of departure for him. Article 41(1) provided that "[t]he Court shall have the power to indicate, *if it considers* that *circumstances so require*, any provisional measures which ought to be taken to preserve the respective rights of either party", while Article 41(2) stipulated that "notice of the measures suggested shall *forthwith* be given to the parties and to the Security Council" (emphasis added). Those two provisions, taken together, vested it with a wide discretion to decide on the circumstances warranting provisional measures. The reference to the Security Council underlined the prominence of its link with the Security Council in matters on the maintenance of international peace and security. In fact, the Statute did not attach additional conditions to its authority to grant provisional measures and its jurisdiction need not be established early in the proceedings.[35]

Although it was factually true that the Congo did not specify what measures the Court could adopt to safeguard its rights under the Montreal Convention, the Congo had referred to the 1998 incident in which a Congo Airlines aircraft was shot down. As a result, the Court's conclusion that the Congo had not specifically asked it to indicate any provisional measure to preserve its rights under the Convention was difficult to reconcile.[36] The Court had been more flexible in *Armed Activities on the Territory of the Congo*[37] where it adopted a less formalistic interpretation of its mandate. In that case, it had twice

[34] At para 1.

[35] Ibid paras 2-3. See also Fitzmaurice, "Hersch Lauterpacht –The scholar as judge, Part II" (1962) 38 British Year Book of International 71.

[36] See generally paras 4-8.

[37] [2000] International Court of Justice Reports 128 para 44.

asserted its power independently of requests for the indication of provisional measures under Article 41 to prevent the aggravation or extension of a dispute when it considered that the circumstances required it.[38]

Earlier, Lauterpacht J was of the opinion that the Court could grant a request for interim measures if there was some *documentary* or instrumental basis such as an adjudication clause in a treaty, "optional clause" or declaration and so forth. Further, the particular case should not have been clearly excluded from the scope of any such clause or declaration, for example by a reservation.[39] In that sense, the Montreal Convention in the present case should have been regarded as an instrumental basis. Further, Mendelson stated:[40]

> To lay down in advance a hard-and-fast rule for dealing with one of these factors – the possibility of jurisdiction – is to fail sufficiently to take into account the great variability of the others from case to case. If the other circumstances suggest very strongly that interim measures should be indicated, the Court may be justified in indicating them even in the face of substantial – though not overwhelming – doubts as to its *substantive jurisdiction.*

Article 75(2) of the Rules of Court was another aspect the Court failed to address. In *Armed Activities on the Territory of the Congo* it stated that under Article 75(1) it could examine *proprio motu* whether the circumstances of the case required provisional measures to be indicated, and Article 75(2) empowered it to do so in any event in whole or in part.

Finally, in *Fisheries Jurisdiction* the Court first laid down what was now settled jurisprudence, stating:[41]

> [O]n a request for provisional measures the Court need not, before indicating them, finally satisfy itself that it has jurisdiction on the

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[38] Ibid.

[39] Fitzmaurice, "Hersch Lauterpacht – The scholar as judge, Part II" (1962) 38 British Year Book of International 71, 74.

[40] Mendelson, "Interim measures of protection in cases of contested jurisdiction" (1972-1973) 46 British Year Book of International Law 319.

[41] [1972] International Court of Justice Reports 15 para 15.

merits of the case, yet it ought not to act under Article 41 of the Statute if the absence of jurisdiction on the merits is manifest.

In the present case, the cumulative effect of the absence of a manifest lack of jurisdiction and the implied acceptance of *prima facie* jurisdiction under the Montreal Convention should therefore have been an adequate basis to found jurisdiction to indicate provisional measures.[42]

X. SEPARATE OPINION OF DUGARD J *AD HOC*[43]

Judge Dugard disagreed with the majority decision to keep the case listed for further jurisdictional consideration on the merits. As affirmed in *LaGrand,*[44] Article 41 of the Court's Statute was binding upon states that had accepted the Court's jurisdiction.[45] He suggested that if a more flexible approach were taken, states would seek this type of order more and the Court would be more cautious in granting provisional measures.

Dugard J believed that the Court should have recognised that there was a manifest lack of jurisdiction. The Order given had set "too low a threshold for the finding of a "manifest lack of jurisdiction", a dangerous precedent for the Court.[46] The mere fact that the Congo had relied on eight international instruments and failed manifestly on six occasions should have been sufficient to make that ruling. As a result, the case should have been struck from the list, which would make more pertinent the Court's approach to issues of jurisdiction, urgency and irreparable harm.

XI. CONCLUDING REMARKS

On 30 July 2002, just 20 days after the Court's Order on provisional measures was delivered, the Congo and Rwanda signed a Peace Accord in Pretoria, South Africa.[47] Present at the signing was United Nations

[42] Ibid para 14.
[43] The Separate Opinion of Mavungu J *ad hoc* was delivered in French.
[44] (Germany v United States) [2001] International Court of Justice Reports 32-41 paras 92-116.
[45] "Democratic Republic of the Congo v Rwanda", International Court of Justice. New Application: 2002; 10 July General List No. 126. Para 2 of Separate Opinion.
[46] Para 7 of the Separate Opinion.
[47] United Nations Chronicle, Online Edition, Rustem Ertegun, "Accord Signed

Secretary General Kofi Annan and the South African Foreign Minister Nkosazana Dlamini-Zuma. While this may be seen as a positive step towards potential peace, it is recognised that it is by no means an answer, but the beginning of a long and complicated process.

This case shows that the Court is now approaching claims for provisional measures more stringently and adopting a jurisdictional test on a *prima facie* basis even though its Statute and Rules of Court do not require this. That was why, in spite of the urgency of the situation in the Congo (more than three million deaths), the Court felt that it had to be very mindful of the fundamental principle governing submissions to its jurisdiction. In this case, even human rights violations and accusations of genocide could not override this fundamental consideration based on state sovereignty.

If the Court continues with this approach (as opposed to a more discretionary approach) when assessing applications for provisional measures it may discourage states from requesting this type of Order. When considering applying for an indication of provisional measures they would have to be sure that the Court has *prima facie* jurisdiction and be able to present at least one precise basis for such an Order.

Towards Ending Congolese Conflict", 20 August 2002, at <www.un.org/Pubs/chronicle/2002/issue3/081902_rwanda_congo_accord.html> (visited 25 November 2002).