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Summary
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Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)

Jurisdiction of the Court and Admissibility of the Application

Summary of the Judgment of 3 February 2006

History of the proceedings and submissions of the Parties (paras. 1-13)

The Court begins by recapitulating the various stages of the proceedings.

On 28 May 2002 the Government of the Democratic Republic of the Congo (hereinafter "the DRC") filed in the Registry of the Court an Application instituting proceedings against the Republic of Rwanda (hereinafter "Rwanda") in respect of a dispute concerning "massive, serious and flagrant violations of human rights and of international humanitarian law" alleged to have been committed "in breach of the 'International Bill of Human Rights', other relevant international instruments and mandatory resolutions of the United Nations Security Council". In the Application the DRC stated that "[the] flagrant and serious violations [of human rights and of international humanitarian law]" of which it complained "result from acts of armed aggression perpetrated by Rwanda on the territory of the Democratic Republic of the Congo in flagrant breach of the sovereignty and territorial integrity of [the latter], as guaranteed by the Charters of the United Nations and the Organization of African Unity".

In order to found the jurisdiction of the Court, the DRC, referring to Article 36, paragraph 1, of the Statute, invoked in its Application: Article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965 (hereinafter the "Convention on Racial Discrimination"); Article 29, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination Against Women of 18 December 1979 (hereinafter the "Convention on Discrimination Against Women"); Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 (hereinafter the "Genocide Convention"); Article 75 of the Constitution of the World Health Organization of 22 July 1946 (hereinafter the "WHO Constitution"); Article XIV, paragraph 2, of the Constitution of the United Nations Educational, Scientific and Cultural Organization of 16 November 1945 (hereinafter the "Unesco Constitution") and Article 9 of the Convention on the Privileges and Immunities of the Specialized Agencies of 21 November 1947 (hereinafter the "Convention on Privileges and Immunities"); Article 30, paragraph 1, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 (hereinafter the "Convention against Torture"); and Article 14, paragraph 1, of the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 23 September 1971 (hereinafter the "Montreal Convention").

The DRC further contended in its Application that Article 66 of the Vienna Convention on the Law of Treaties of 23 May 1969 established the jurisdiction of the Court to settle disputes arising from the violation of peremptory norms (jus cogens) in the area of human rights, as those norms were reflected in a number of international instruments.

On 28 May 2002 the DRC also submitted a request for the indication of provisional measures pursuant to Article 41 of the Statute of the Court and Articles 73 and 74 of its Rules. Since the Court included upon the Bench no judge of the nationality of the Parties, each of them availed itself of the right conferred upon it by Article 31 of the Statute to choose a judge ad hoc to sit in the case. The DRC chose Mr. Jean-Pierre Mavungu, and Rwanda Mr. Christopher John Robert Dugard. At the hearings on the request for the indication of provisional measures held on 13 and 14 June 2002, Rwanda asked the Court to remove the case from the List for manifest lack of jurisdiction. By Order of 10 July 2002 the Court found that it lacked prima facie jurisdiction to indicate the provisional measures requested by the DRC. The Court also rejected Rwanda's request that the case be removed from the List.

At a meeting held on 4 September 2002 by the President of the Court with the Agents of the Parties, Rwanda proposed that the procedure provided for in Article 79, paragraphs 2 and 3, of the Rules of Court be followed, and that the questions of jurisdiction and admissibility in the case therefore be determined separately before any proceedings on the merits. The DRC stated that it would leave the decision in this regard to the Court. By Order of 18 September 2002 the Court decided that the written pleadings would first be addressed to the questions of the jurisdiction of the Court and of the admissibility of the Application and fixed time-limits for the filing of a Memorial by Rwanda and a Counter-Memorial by the DRC. Those pleadings were filed within the time-limits so prescribed. In its Counter-Memorial (and later in the hearings) the DRC asserted two additional bases of jurisdiction: the doctrine of forum prorogatum and the Court's Order of 10 July 2002 on the DRC's request for the indication of provisional measures.

Public hearings were held between 4 and 8 July 2005, at which the following submissions were presented by the Parties:

On behalf of the Rwandan Government,

at the hearing of 6 July 2005:

> "For the reasons given in our written preliminary objection and at the oral hearings, the Republic of Rwanda requests the Court to adjudge and declare that:
>
> 1. it lacks jurisdiction over the claims brought against the Republic of Rwanda by the Democratic Republic of the Congo; and
>
> 2. in the alternative, that the claims brought against the Republic of Rwanda by the Democratic Republic of the Congo are inadmissible."

On behalf of the Congolese Government,

at the hearing of 8 July 2005:

> "May it please the Court,
>
> 1. to find that the objections to jurisdiction and admissibility raised by Rwanda are unfounded;
>
> 2. consequently, to find that the Court has jurisdiction to entertain the case on the merits and that the Application of the Democratic Republic of the Congo is admissible as submitted;

3. to decide to proceed with the case on the merits."

Object of the present proceedings limited to the questions of the Court's jurisdiction and the admissibility of the DRC's Application (para. 14)

The Court notes first of all that at the present stage of the proceedings it cannot consider any matter relating to the merits of the dispute between the DRC and Rwanda. In accordance with the decision taken in its Order of 18 September 2002, the Court is required to address only the questions of whether it is competent to hear the dispute and whether the DRC's Application is admissible.

Examination of the bases of jurisdiction put forward by the DRC (paras. 15-125)

The Court begins its examination of the 11 bases of jurisdiction put forward by the DRC. It recalls the Parties' arguments in respect of them and reaches the following conclusions:

(1) 1984 Convention against Torture (para. 16)

The Court points out that it had noted Rwanda's statement that it "is not, and never has been, party" to this Convention. Observing that the DRC did not raise any argument in response to this contention, the Court accordingly concludes that the DRC cannot rely upon this Convention as a basis of jurisdiction.

(2) Convention on Privileges and Immunities (para. 17)

The Court recalls that, in its Order of 10 July 2002, it stated that the DRC did not appear to found the jurisdiction of the Court on this Convention, and that the Court was accordingly not required to take the instrument into consideration in the context of the request for the indication of provisional measures. Since the DRC has also not sought to invoke this Convention in the present phase of the proceedings, the Court does not take it into consideration in its Judgment.

(3) Forum prorogatum (paras. 19-22)

The DRC argues on this point that the willingness of a State to submit a dispute to the Court may be apparent not only from an express declaration but also from any conclusive act, in particular from the conduct of the respondent State subsequent to seisin of the Court. In particular it contends that "the Respondent's agreement to plead implies that it accepts the Court's jurisdiction". For its part Rwanda contends that the DRC's argument is without foundation, since in this case there has been no "voluntary and indisputable acceptance of the Court's jurisdiction". Rwanda points out that it has, on the contrary, consistently asserted that the Court has no jurisdiction and that it has appeared solely for the purpose of challenging that jurisdiction.

In the present case the Court notes that Rwanda has expressly and repeatedly objected to its jurisdiction at every stage of the proceedings. Rwanda's attitude therefore cannot be regarded as "an unequivocal indication" of its desire to accept the jurisdiction of the Court in a "voluntary and indisputable" manner. The fact, as the DRC has pointed out, that Rwanda has "fully and properly participated in the different procedures in this case, without having itself represented or failing to appear", and that "it has not refused to appear before the Court or make submissions", cannot be interpreted as consent to the Court's jurisdiction over the merits, inasmuch as the very purpose of this participation was to challenge that jurisdiction.

(4) Court's Order of 10 July 2002 (paras. 23-25)

To found the jurisdiction of the Court, the DRC also relies on one of the Court's findings in its Order of 10 July 2002, whereby it stated that, "in the absence of a manifest lack of jurisdiction, the Court cannot grant Rwanda's request that the case be removed from the List". In the DRC's view, this finding of an "absence of a manifest lack of jurisdiction" could be interpreted as an acknowledgement by the Court that it has jurisdiction. On this point, for its part Rwanda recalls that in this same Order the Court clearly stated that the findings reached by it at that stage in the proceedings in no way prejudged the question of its jurisdiction to deal with the merits of the case.

The Court observes on this subject that, given the urgency which, ex hypothesi, characterizes the consideration of requests for the indication of provisional measures, it does not normally at that stage take a definitive decision on its jurisdiction. It does so only if it is apparent from the outset that there is no basis on which jurisdiction could lie, and that it therefore cannot entertain the case. According to the Court, the fact that it did not conclude in its Order of 10 July 2002 that it manifestly lacked jurisdiction cannot therefore amount to an acknowledgment that it has jurisdiction. On the contrary, the Court points out that from the outset it had serious doubts regarding its jurisdiction to entertain the DRC's Application, for in that same Order it justified its refusal to indicate provisional measures by the lack of prima facie jurisdiction. In declining Rwanda's request to remove the case from the List, the Court simply reserved the right fully to examine further the issue of its jurisdiction at a later stage.

(5) Article IX of the Genocide Convention (paras. 28-70)

The Court notes that both the DRC and Rwanda are parties to the Genocide Convention, the DRC having acceded on 31 May 1962 and Rwanda on 16 April 1975. The Court observes, however, that Rwanda's instrument of accession to the Convention, as deposited with the Secretary-General of the United Nations, contains a reservation worded as follows: "The Rwandese Republic does not consider itself as bound by Article IX of the Convention." Article IX provides: "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."

The Court also notes that the Parties take opposing views on two questions: first, on whether, in adopting "Décret-loi No. 014/01 of 15 February 1995 withdrawing all reservations entered by the Rwandese Republic at the accession, approval and ratification of international instruments", Rwanda effectively withdrew its reservation to Article IX of the Genocide Convention and, secondly, on the question of the legal effect of the statement by Rwanda's Minister of Justice at the Sixty-first Session of the United Nations Commission on Human Rights, according to which, "[t]he few [human rights] instruments not yet ratified" by Rwanda at that date "will shortly be ratified" and reservations "not yet withdrawn will shortly be withdrawn".

In regard to the first question, the Court notes that Décret-loi No. 014/01 was adopted on 15 February 1995 by the President of the Rwandese Republic following an Opinion of the Council of Ministers and was countersigned by the Prime Minister and Minister of Justice of the Rwandese Republic. Article 1 of this décret-loi, which contains three articles, provides that "[a]ll reservations entered by the Rwandese Republic in respect of the accession, approval and ratification of international instruments are withdrawn"; Article 2 states that "[a]ll prior provisions contrary to the present décret-loi are abrogated"; while Article 3 provides that "[t]his décret-loi shall enter into force on the day of its publication in the Official Journal of the Rwandese Republic". The décret-loi was published in the Official Journal of the Rwandese Republic and entered into force.

The validity of this décret-loi under Rwandan domestic law has been denied by Rwanda. However, in the Court's view the question of the validity and effect of the décret-loi within the

domestic legal order of Rwanda is different from that of its effect within the international legal order. Thus a clear distinction has to be drawn between a decision to withdraw a reservation to a treaty taken within a State's domestic legal order and the implementation of that decision by the competent national authorities within the international legal order, which can be effected only by notification of withdrawal of the reservation to the other States parties to the treaty in question. It is a rule of international law, deriving from the principle of legal security and well established in practice, that, subject to agreement to the contrary, the withdrawal by a Contracting State of a reservation to a multilateral treaty takes effect in relation to the other Contracting States only when they have received notification thereof. This rule is expressed in Article 22, paragraph 3 (a), of the Vienna Convention on the Law of Treaties.

The Court observes that in this case it has not been shown that Rwanda notified the withdrawal of its reservations to the other States parties to the "international instruments" referred to in Article 1 of décret-loi No. 014/01, and in particular to the States parties to the Genocide Convention. Nor has it been shown that there was any agreement whereby such withdrawal could have become operative without notification. In the Court's view, the adoption of that décret-loi and its publication in the Official Journal of the Rwandese Republic cannot in themselves amount to such notification. In order to have effect in international law, the withdrawal would have had to be the subject of a notice received at the international level.

The Court notes that, as regards the Genocide Convention, the Government of Rwanda has taken no action at international level on the basis of the décret-loi. It observes that this Convention is a multilateral treaty whose depositary is the Secretary-General of the United Nations, and it considers that it was normally through the latter that Rwanda should have notified withdrawal of its reservation. The Court notes that it has no evidence that Rwanda sent any such notice to the Secretary-General.

The Court finds that the adoption and publication of décret-loi No. 014/01 of 15 February 1995 by Rwanda did not, as a matter of international law, effect a withdrawal by that State of its reservation to Article IX of the Genocide Convention.

In respect of the second question, that of the legal effect of the statement made on 17 March 2005 by Ms Mukabagwiza, Minister of Justice of Rwanda, the Court begins by examining Rwanda's argument that it cannot be legally bound by the statement in question inasmuch as a statement made not by a Foreign Minister or a Head of Government "with automatic authority to bind the State in matters of international relations, but by a Minister of Justice, cannot bind the State to lift a particular reservation". In this connection, the Court observes that, in accordance with its consistent jurisprudence, it is a well-established rule of international law that the Head of State, the Head of Government and the Minister for Foreign Affairs are deemed to represent the State merely by virtue of exercising their functions, including for the performance, on behalf of the said State, of unilateral acts having the force of international commitments. The Court notes, however, that with increasing frequency in modern international relations other persons representing a State in specific fields may be authorized by that State to bind it by their statements in respect of matters falling within their purview. This may be true, for example, of holders of technical ministerial portfolios exercising powers in their field of competence in the area of foreign relations, and even of certain officials.

In this case, the Court notes first that Ms Mukabagwiza spoke before the United Nations Commission on Human Rights in her capacity as Minister of Justice of Rwanda and that she indicated inter alia that she was making her statement "on behalf of the Rwandan people". The Court further notes that the questions relating to the protection of human rights which were the subject of that statement fall within the purview of a Minister of Justice. It is the Court's view that the possibility cannot be ruled out in principle that a Minister of Justice may, under certain circumstances, bind the State he or she represents by his or her statements.

In order to determine the legal effect of that statement, the Court examines its actual content as well as the circumstances in which it was made. The Court recalls that a statement of this kind can create legal obligations only if it is made in clear and specific terms. The Court observes that in her statement the Minister of Justice of Rwanda did not refer explicitly to the reservation made by Rwanda to Article IX of the Genocide Convention. The statement merely raises in general terms the question of Rwandan reservations and simply indicates that "past reservations not yet withdrawn will shortly be withdrawn", without setting out any precise time-frame for such withdrawals. It follows that the statement was not made in sufficiently specific terms in relation to the particular question of the withdrawal of reservations. Given the general nature of its wording, the statement cannot therefore be considered as confirmation by Rwanda of a previous decision to withdraw its reservation to Article IX of the Genocide Convention, or as any sort of unilateral commitment on its part having legal effects in regard to such withdrawal; at most, it can be interpreted as a declaration of intent, very general in scope.

The Court lastly addresses Rwanda's argument that the statement by its Minister of Justice could not in any event have any implications for the question of the Court's jurisdiction in this case, since it was made nearly three years after the institution of the proceedings. In this connection, the Court recalls that it has consistently held that, while its jurisdiction must surely be assessed on the date of the filing of the act instituting proceedings, the Court should not, however, penalize a defect in procedure which the Applicant could easily remedy. In the present case, if the Rwandan Minister's statement had somehow entailed the withdrawal of Rwanda's reservation to Article IX of the Genocide Convention in the course of the proceedings, the DRC could on its own initiative have remedied the procedural defect in its original Application by filing a new Application. This argument by Rwanda must accordingly be rejected.

The Court then turns to the DRC's argument that Rwanda's reservation is invalid. In order to show that Rwanda's reservation is invalid, the DRC maintains that the Genocide Convention has "the force of general law with respect to all States" including Rwanda, inasmuch as it contains norms of jus cogens. Rwanda observes inter alia that, although, as the DRC contends, the norms codified in the substantive provisions of the Genocide Convention have the status of jus cogens and create rights and obligations erga omnes, that does not in itself suffice to "confer jurisdiction on the Court with respect to a dispute concerning the application of those rights and obligations".

The Court reaffirms in this regard that "the principles underlying the [Genocide] Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation" and that a consequence of that conception is "the universal character both of the condemnation of genocide and of the co-operation required 'in order to liberate mankind from such an odious scourge' (Preamble to the Convention)". It follows that "the rights and obligations enshrined by the Convention are rights and obligations erga omnes". The Court observes, however, as it has already had occasion to emphasize, that "the erga omnes character of a norm and the rule of consent to jurisdiction are two different things", and that the mere fact that rights and obligations erga omnes may be at issue in a dispute would not give the Court jurisdiction to entertain that dispute. The same applies to the relationship between peremptory norms of general international law (jus cogens) and the establishment of the Court's jurisdiction: the fact that a dispute relates to compliance with a norm having such a character, which is assuredly the case with regard to the prohibition of genocide, cannot of itself provide a basis for the jurisdiction of the Court to entertain that dispute. Under the Court's Statute that jurisdiction is always based on the consent of the parties. The Court adds that Rwanda's reservation to Article IX of the Genocide Convention bears on the jurisdiction of the Court, and does not affect substantive obligations relating to acts of genocide themselves under that Convention. In the circumstances of the present case, the Court cannot conclude that Rwanda's reservation, which is meant to exclude a particular method of settling a dispute relating to the interpretation, application or fulfilment of the Convention, is to be regarded as being incompatible with the object and purpose of the Convention. The Court further notes that, as a matter of the law of treaties, when Rwanda acceded to the Genocide Convention and made the reservation in question, the DRC made no objection to it.

The Court concludes from the foregoing that, having regard to Rwanda's reservation to Article IX of the Genocide Convention, this Article cannot constitute a basis for jurisdiction in the present case.

(6) Article 22 of the Convention on Racial Discrimination (paras. 71-79)

The Court notes that both the DRC and Rwanda are parties to the Convention on Racial Discrimination, the DRC having acceded thereto on 21 April 1976 and Rwanda on 16 April 1975. Rwanda's instrument of accession to the Convention, as deposited with the United Nations Secretary-General, does however include a reservation reading as follows: "The Rwandese Republic does not consider itself as bound by article 22 of the Convention". Under that article: "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."

The Court first addresses the DRC's argument that the reservation has "lapsed or fallen into desuetude as a result of the undertaking, enshrined in the Rwandan Fundamental Law, to 'withdraw all reservations entered by Rwanda when it adhered to . . . international instruments'" relating to human rights. Without prejudice to the applicability mutatis mutandis to the Convention on Racial Discrimination of the Court's reasoning and conclusions in respect of the DRC's claim that Rwanda withdrew its reservation to the Genocide Convention, the Court observes that the procedures for withdrawing a reservation to the Convention on Racial Discrimination are expressly provided for in Article 20, paragraph 3, of that Convention, which states: "Reservations may be withdrawn at any time by notification to this effect addressed to the Secretary-General. Such notification shall take effect on the date on which it is received." However, there is no evidence before the Court of any notification by Rwanda to the United Nations Secretary-General of its intention to withdraw its reservation. The Court accordingly concludes that the respondent State has maintained that reservation.

Regarding the DRC's argument that the reservation is invalid, the Court notes that the Convention on Racial Discrimination prohibits reservations incompatible with its object and purpose. The Court observes in this connection that, under Article 20, paragraph 2, of the Convention, "[a] reservation shall be considered incompatible . . . if at least two-thirds of the States Parties to [the] Convention object to it". The Court notes, however, that such has not been the case as regards Rwanda's reservation in respect of the Court's jurisdiction. Without prejudice to the applicability mutatis mutandis to Rwanda's reservation to Article 22 of the Convention on Racial Discrimination of the Court's reasoning and conclusions in respect of Rwanda's reservation to Article IX of the Genocide Convention, the Court is of the view that Rwanda's reservation to Article 22 cannot therefore be regarded as incompatible with that Convention's object and purpose. The Court observes, moreover, that the DRC itself raised no objection to the reservation when it acceded to the Convention.

In relation to the DRC's argument that the reservation is without legal effect because, on the one hand, the prohibition on racial discrimination is a peremptory norm of general international law and, on the other, such a reservation is in conflict with a peremptory norm, the Court refers to its reasoning when dismissing the DRC's similar argument in regard to Rwanda's reservation to Article IX of the Genocide Convention.

The Court concludes from the foregoing that, having regard to Rwanda's reservation to Article 22 of the Convention on Racial Discrimination, this instrument cannot constitute a basis for jurisdiction in the present case.

(7) Article 29, paragraph 1, of the Convention on Discrimination Against Women (paras. 80-93)

The Court notes that both the DRC and Rwanda are parties to the Convention on Discrimination Against Women, the DRC having ratified it on 17 October 1986 and Rwanda on 2 March 1981. It also notes that Article 29 of this Convention gives the Court jurisdiction in respect of any dispute between States parties concerning its interpretation or application, on condition that: it has not been possible to settle the dispute by negotiation; that, following the failure of negotiations, the dispute has, at the request of one such State, been submitted to arbitration; and that, if the parties have been unable to agree on the organization of the arbitration, a period of six months has elapsed from the date of the request for arbitration.

In the view of the Court, it is apparent from the language of Article 29 of the Convention that these conditions are cumulative. It must therefore consider whether the preconditions on its seisin set out in the said Article 29 have been satisfied in this case.

The Court however first addresses the DRC's argument that the objection based on non-fulfilment of the preconditions set out in the compromissory clauses, and in particular in Article 29 of the Convention, is an objection to the admissibility of its Application rather than to the jurisdiction of the Court. The Court recalls in this regard that its jurisdiction is based on the consent of the parties and is confined to the extent accepted by them. When that consent is expressed in a compromissory clause in an international agreement, any conditions to which such consent is subject must be regarded as constituting the limits thereon. The Court accordingly considers that the examination of such conditions relates to its jurisdiction and not to the admissibility of the application. It follows that in the present case the conditions for seisin of the Court set out in Article 29 of the Convention on Discrimination Against Women must be examined in the context of the issue of the Court's jurisdiction. This conclusion applies mutatis mutandis to all of the other compromissory clauses invoked by the DRC.

The Court then considers whether in this case there exists a dispute between the Parties "concerning the interpretation or application of [that] Convention" which could not have been settled by negotiation. It notes that the DRC made numerous protests against Rwanda's actions in alleged violation of international human rights law, both at the bilateral level through direct contact with Rwanda and at the multilateral level within the framework of international institutions such as the United Nations Security Council and the Commission on Human and Peoples' Rights of the Organization of African Unity. The Court recalls that, in its Counter-Memorial and at the hearings, the DRC presented these protests as proof that "the DRC has satisfied the preconditions to the seisin of the Court in the compromissory clauses invoked". Whatever may be the legal characterization of such protests as regards the requirement of the existence of a dispute between the DRC and Rwanda for purposes of Article 29 of the Convention, that Article requires also that any such dispute be the subject of negotiations. The Court states that the evidence has not satisfied it that the DRC in fact sought to commence negotiations in respect of the interpretation or application of the Convention.

It adds that the DRC has also failed to prove any attempts on its part to initiate arbitration proceedings with Rwanda and that the Court cannot accept the DRC's argument that the impossibility of opening or advancing in negotiations with Rwanda prevented it from contemplating having recourse to arbitration; since this is a condition formally set out in Article 29 of the Convention on Discrimination Against Women, the lack of agreement between the parties as to the organization of an arbitration cannot be presumed. The existence of such disagreement can follow only from a proposal for arbitration by the applicant, to which the respondent has made no answer or which it has expressed its intention not to accept. The Court has found nothing in the file which would enable it to conclude that the DRC made a proposal to Rwanda that arbitration proceedings should be organized, and that the latter failed to respond to that proposal.

It follows from the foregoing that Article 29, paragraph 1, of the Convention on Discrimination Against Women cannot serve to found the jurisdiction of the Court in the present case.

(8) Article 75 of the WHO Constitution (paras. 94-101)

The Court observes that the DRC has been a party to the WHO Constitution since 24 February 1961 and Rwanda since 7 November 1962 and that both are thus members of that Organization. The Court further notes that Article 75 of the WHO Constitution provides for the Court's jurisdiction, under the conditions laid down therein, over "any question or dispute concerning the interpretation or application" of that instrument. The Article requires that a question or dispute must specifically concern the interpretation or application of the Constitution. In the opinion of the Court, the DRC has not shown that there was a question concerning the interpretation or application of the WHO Constitution on which itself and Rwanda had opposing views, or that it had a dispute with that State in regard to this matter.

The Court further notes that, even if the DRC had demonstrated the existence of a question or dispute falling within the scope of Article 75 of the WHO Constitution, it has not proved that the other preconditions for seisin of the Court established by that provision have been satisfied, namely that it attempted to settle the question or dispute by negotiation with Rwanda or that the World Health Assembly had been unable to settle it.

The Court accordingly concludes that Article 75 of the WHO Constitution cannot serve to found its jurisdiction in the present case.

(9) Article XIV, paragraph 2, of the Unesco Constitution (paras. 102-109)

The Court notes that both the DRC and Rwanda are parties to the Unesco Constitution and have been since 25 November 1960 in the case of the DRC and 7 November 1962 in the case of Rwanda, and that both are thus members of that Organization. The Court further observes that Article XIV, paragraph 2, of the Unesco Constitution provides for the referral, under the conditions established therein, of questions or disputes concerning the Constitution, but only in respect of its interpretation. The Court considers that such is not the object of the DRC's Application. It finds that the DRC has in this case invoked the Unesco Constitution and Article I thereof for the sole purpose of maintaining that "[o]wing to the war", it "today is unable to fulfil its missions within Unesco". The Court is of the opinion that this is not a question or dispute concerning the interpretation of the Unesco Constitution. Thus the DRC's Application does not fall within the scope of Article XIV of the Constitution.

The Court further considers that, even if the existence of a question or dispute falling within the terms of the above provision were established, the DRC has failed to show that the prior procedure for seisin of the Court pursuant to that provision and to Article 38 of the Rules of Procedure of the Unesco General Conference was followed.

The Court accordingly concludes that Article XIV, paragraph 2, of the Unesco Constitution cannot found its jurisdiction in the present case.

(10) Article 14, paragraph 1, of the Montreal Convention (paras. 110-119)

The Court notes that both the DRC and Rwanda are parties to the Montreal Convention and have been since 6 July 1977 in the case of the DRC and 3 November 1987 in the case of Rwanda, that both are members of the ICAO, and that the Montreal Convention was already in force between them at the time when the Congo Airlines aircraft is stated to have been destroyed above Kindu, on 10 October 1998, and when the Application was filed, on 28 May 2002. The Court also notes that Article 14, paragraph 1, of the Montreal Convention gives the Court jurisdiction in

respect of any dispute between Contracting States concerning the interpretation or application of the Convention, on condition that: it has not been possible to settle the dispute by negotiation; that, following the failure of negotiations, the dispute has, at the request of one such State, been submitted to arbitration; and that, if the parties have been unable to agree on the organization of the arbitration, a period of six months has elapsed from the date of the request for arbitration. In order to determine whether it has jurisdiction under this provision, the Court must therefore first ascertain whether there is a dispute between the Parties relating to the interpretation or application of the Montreal Convention which could not have been settled by negotiation.

The Court observes in this regard that the DRC has not indicated to it which are the specific provisions of the Montreal Convention which could apply to its claims on the merits. In its Application the DRC confined itself to invoking that Convention in connection with the destruction shortly after take-off from Kindu Airport of a civil aircraft belonging to Congo Airlines. Even if it could be established that the facts cited by the DRC might, if proved, fall within the terms of the Convention and gave rise to a dispute between the Parties concerning its interpretation or application, and even if it could be considered that the discussions within the Council of the ICAO amounted to negotiations, the Court finds that, in any event, the DRC has failed to show that it satisfied the conditions required by Article 14, paragraph 1, of the Montreal Convention concerning recourse to arbitration: in particular, it has not shown that it made a proposal to Rwanda that arbitration proceedings should be organized, and that the latter failed to respond to that proposal.

The Court considers that Article 14, paragraph 1, of the Montreal Convention cannot therefore serve to found its jurisdiction in the present case.

(11) Article 66 of the Vienna Convention on the Law of Treaties (paras. 120-125)

To found the jurisdiction of the Court in the present case, the DRC relies finally on Article 66 of the Vienna Convention on the Law of Treaties, which provides inter alia that "[a]ny one of the parties to a dispute concerning the application or the interpretation of article 53 or 64", relating to conflicts between treaties and peremptory norms of general international law, "may, by a written application, submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration".

The Court recalls that the DRC explained at the hearings that Article 66 of the Vienna Convention on the Law of Treaties, to which Rwanda is a party, allows the Court to rule on any dispute concerning "the validity of a treaty which is contrary to a norm of jus cogens". In this regard the DRC argued that reservations to a treaty form an integral part thereof, and that they must accordingly "avoid either being in direct contradiction with a norm of jus cogens, or preventing the implementation of that norm". According to the DRC, Rwanda's reservation to Article IX of the Genocide Convention, as well as to "other similar provisions and compromissory clauses, seeks to prevent the . . . Court from fulfilling its noble mission of safeguarding peremptory norms, including the prohibition of genocide", and must therefore be regarded as "null and void".

In reply to Rwanda's reliance at the hearings on Article 4 of the Vienna Convention, which provides that the Convention applies only to treaties which are concluded by States after its entry into force with regard to such States, the DRC contended that "the supremacy and mandatory force of the norms referred to in this Convention (Articles 53 and 64) bind States irrespective of any temporal consideration or any treaty-based link"; according to the DRC, the rule can therefore "have retroactive effect in the overriding interest of humanity".

The Court recalls that Article 4 of the Vienna Convention on the Law of Treaties provides for the non-retroactivity of that Convention in the following terms: "Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which

are concluded by States after the entry into force of the present Convention with regard to such States."

In this connection, the Court notes first that the Genocide Convention was adopted on 9 December 1948, the DRC and Rwanda having acceded to it on 31 May 1962 and 16 April 1975 respectively; and that the Convention on Racial Discrimination was adopted on 21 December 1965, the DRC and Rwanda having acceded on 21 April 1976 and 16 April 1975 respectively. The Court notes secondly that the Vienna Convention on the Law of Treaties entered into force between the DRC and Rwanda only on 3 February 1980, pursuant to Article 84, paragraph 2, thereof. The Conventions on Genocide and Racial Discrimination were concluded before the latter date. Thus in the present case the rules contained in the Vienna Convention are not applicable, save in so far as they are declaratory of customary international law. The Court considers that the rules contained in Article 66 of the Vienna Convention are not of this character. Nor have the two Parties otherwise agreed to apply Article 66 between themselves.

Finally, the Court deems it necessary to recall that the mere fact that rights and obligations erga omnes or peremptory norms of general international law (jus cogens) are at issue in a dispute cannot in itself constitute an exception to the principle that its jurisdiction always depends on the consent of the parties.

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Lack of jurisdiction to entertain the Application; no need for the Court to rule on its admissibility (para. 126)

The Court concludes from all of the foregoing considerations that it cannot accept any of the bases of jurisdiction put forward by the DRC in the present case. Since it has no jurisdiction to entertain the Application, the Court is not required to rule on its admissibility.

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Fundamental distinction between the acceptance by States of the Court's jurisdiction and the conformity of their acts with international law (para. 127)

While the Court has come to the conclusion that it cannot accept any of the grounds put forward by the DRC to establish its jurisdiction in the present case, and cannot therefore entertain the latter's Application, it stresses that it has reached this conclusion solely in the context of the preliminary question of whether it has jurisdiction in this case — the issue to be determined at this stage of the proceedings. The Court is precluded by its Statute from taking any position on the merits of the claims made by the DRC. However, as the Court has stated on numerous previous occasions, there is a fundamental distinction between the question of the acceptance by States of the Court's jurisdiction and the conformity of their acts with international law. Whether or not States have accepted the jurisdiction of the Court, they are required to fulfil their obligations under the United Nations Charter and the other rules of international law, including international humanitarian and human rights law, and they remain responsible for acts attributable to them which are contrary to international law.

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Operative paragraph (para. 128)

The full text of the operative paragraph reads as follows:

"For these reasons,

THE COURT,

By fifteen votes to two,

Finds that it has no jurisdiction to entertain the Application filed by the Democratic Republic of the Congo on 28 May 2002.

IN FAVOUR: President Shi; Vice-President Ranjeva; Judges Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Simma, Tomka, Abraham; Judge ad hoc Dugard;

AGAINST: Judge Koroma; Judge ad hoc Mavungu."

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Judge KOROMA appends a dissenting opinion to the Judgment of the Court; Judges HIGGINS, KOOIJMANS, ELARABY, OWADA and SIMMA append a joint separate opinion to the Judgment of the Court; Judge KOOIJMANS appends a declaration to the Judgment of the Court; Judge AL-KHASAWNEH appends a separate opinion to the Judgment of the Court; Judge ELARABY appends a declaration to the Judgment of the Court; Judge ad hoc DUGARD appends a separate opinion to the Judgment of the Court; Judge ad hoc MAVUNGU appends a dissenting opinion to the Judgment of the Court.

Dissenting opinion of Judge Koroma

In his dissenting opinion, Judge Koroma analyses Rwanda's reservation to Article IX of the Genocide Convention, arguing that if the Court had undertaken such an analysis, it would have found the reservation contrary to the object and purpose of the Convention and jurisdiction is therefore proper under Article IX of the Genocide Convention.

Judge Koroma points out that the dispute settlement clause in Article IX relates not only to the interpretation or application of the Convention but also to the fulfilment of the Convention. Recalling the language of Article IX "including those relating to the responsibility of a State for genocide", Judge Koroma emphasizes that the monitoring function given to the Court by that Article extends to disputes relating to State responsibility for genocide.

Judge Koroma recalls the gravity of the DRC's allegations to the effect that Rwandan forces, directly or through their Rassemblement congolais pour la démocratie (RCD/Goma) agents, committed acts of genocide against 3,500,000 Congolese, by carrying out large-scale massacres, assassinations and other murders targeting well-identified groups.

He notes that, while a reservation to a treaty clause concerning dispute settlement or the monitoring of the implementation of the treaty is not, in itself, incompatible with the object and purpose of the treaty, it is incompatible if the provision to which the reservation relates constitutes the raison d'être of the treaty. In this regard, the object and purpose of the Genocide Convention is the prevention and punishment of the crime of genocide, and this encompasses holding a State responsible whenever it is found to be in breach of its obligations under the Convention.

Analysing the structure of the Genocide Convention, Judge Koroma notes that unlike Articles IV, V, VI, and VII, Article IX is the only provision of the Genocide Convention with specific language concerning the responsibility of a State for genocide. Because the power of the Court to enquire into disputes between Contracting Parties relating to the responsibility of a State for genocide derives from Article IX, that provision is crucial to fulfilling the object and purpose of the Convention.

Judge Koroma then explains that the DRC's failure to object to Rwanda's reservation at the time it was made is not sufficient to prevent the Court from examining the reservation, as human rights treaties like the Genocide Convention are not based on reciprocity between States but instead serve to protect individuals and the international community at large. He draws a parallel to General Comment 24 of the Human Rights Committee, which noted: "The absence of protest by States cannot imply that a reservation is either compatible or incompatible with the object and purpose of the Covenant."

Judge Koroma observes that, while the question of reservations to Article IX of the Genocide Convention came up in connection with the provisional measures orders against Spain and the United States in the case concerning Legality of Use of Force, the Court did not conduct a full examination of the compatibility of a reservation to Article IX with the object and purpose of the Convention because the issue had not been raised by Yugoslavia. Judge Koroma contrasts the present case — in which both Parties raised and argued the question — concluding that the Court was thus entitled to examine Rwanda's reservation in detail in the light of the object and purpose of the Convention.

Judge Koroma emphasizes that, in considering Rwanda's position on Article IX, the Court should have taken due account of the principle of good faith. In this regard, Rwanda's prior

declarations on the importance of human rights treaties must be juxtaposed with its present attempt to avoid scrutiny of its own conduct. Similarly, it is neither morally right nor just for Rwanda to shield itself from judicial scrutiny under Article IX of the Convention for the very same conduct for which it successfully urged the establishment of an international tribunal for the prosecution of persons responsible for genocide and other serious violations of international humanitarian law.

This prior conduct and the principle of good faith lead Judge Koroma to take the view that, given the nature of the Convention, and the gravity of the allegation before the Court, Rwanda should have accepted the jurisdiction of the Court based on the principle of forum prorogatum, thereby allowing it to adjudicate the merits of the case. He notes that genocide has been declared "the crime of all crimes" and "the principles underlying the [Genocide] Convention" characterized as "principles which are recognized by civilized nations as binding on States, even without any conventional obligation". In his view, the letter as well as the spirit of the Convention must be respected at all times.

The Court's pronouncements fostered high hopes and expectations that the object and purpose of the Convention would be fulfilled. This case presented an opportunity to apply the Convention and its principles. In Judge Koroma's view, apart from Article IX of the Genocide Convention, sufficient material, including various other compromissory clauses, was put before the Court for it to have been able to entertain the dispute. He also notes that the Court could have exercised jurisdiction under the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation and the Convention on the Elimination of All Forms of Discrimination Against Women.

Joint separate opinion of Judges Higgins, Kooijmans, Elaraby, Owada and Simma

Judges Higgins, Kooijmans, Elaraby, Owada and Simma in their joint separate opinion emphasize that a proper reading of the Court's 1951 Advisory Opinion shows that there is no incompatibility between certain developments in the practice of human rights courts and bodies and the law as there stated by the International Court.

The concordance of practice is evidenced by the International Court's Order of 10 July 2002, at paragraph 72, and again at paragraph 67 of the present Judgment.

In their view the Court had in mind certain factors in deciding on several recent occasions that a reservation to Article IX of the Genocide Convention is not incompatible with the object and purpose of that treaty. While these factors are entirely understandable, there are other elements within Article IX which make it less than self-evident that a reservation thereto might not be incompatible with the object and purpose of the Genocide Convention.

The authors of the joint separate opinion suggest that the Court should revisit this matter for further consideration.

Declaration of Judge Kooijmans

In his declaration Judge Kooijmans sets out why he is of the view that the Court has been unduly restrictive in concluding that one of the conditions on its jurisdiction has not been met. Article 29, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination Against Women provides that a dispute can be brought before the Court only if negotiations have been unsuccessful and a subsequent effort to settle it through arbitration has also turned out to be fruitless.

The Court recognizes that, by bringing the conflict with its neighbours to the attention of the Security Council, the DRC can be said to have tried to initiate negotiations in a multilateral context. In its complaints the DRC did not, however, explicitly refer to the Convention on Discrimination Against Women.

Judge Kooijmans observes that the DRC in its protests referred to alleged violations of a great number of treaty-based human rights norms, including norms providing for the protection of women. In view of the facts that the complaints were made in a general context and that they were ignored by Rwanda, the Court should have concluded that the DRC's attempt to enter into negotiations had been to no avail.

In holding as it has in the present case, the Court has made it more difficult for States to satisfy the condition of prior negotiations required in many compromissory clauses.

Separate opinion of Judge Al-Khasawneh

While Judge Al-Khasawneh concurred that the Court lacked jurisdiction, he felt compelled to append a separate opinion in view of the continuing doubts he had with respect to the Court's reasoning regarding the requirement (contained in Article 29 of the Convention on Discrimination Against Women) that prior negotiations should be attempted before referral to the Court.

The Court acknowledged that such negotiations took place but found them irrelevant in view of the fact that they did not refer to the interpretation or application of the Convention on Discrimination Against Women.

Judge Al-Khasawneh believed that such a requirement was not realistic as a matter of diplomatic practice especially in multifaceted disputes and where context was important, i.e., it is not usual before the Security Council, for example, to itemize complaints on a treaty-by-treaty basis.

What was important was the substantive relevance of the treaty. There was no doubt in his mind that the Convention on Discrimination Against Women was relevant in view of the comment of the monitoring committee which found violence against women to constitute discrimination. More importantly, the jurisprudence of the Court favoured a broad interpretation of compromissory clauses, e.g., in the Ambatielos (Greece v. United Kingdom) case the requirement was one of a defensible argument on relevance. In other cases the test of reasonable or tangible connection was devised. He felt there was no need to refer expressly to a particular treaty in prior negotiations and a general reference as was the case to complaints made by DRC to the African Commission on Human and Peoples' Rights and to the Security Council constituted prior negotiations. He was nevertheless able to concur with the majority view that the Court lacked jurisdiction because another condition under Article 29, namely arbitration was not met.

Declaration of Judge Elaraby

Judge Elaraby agrees with the finding of the Court. Although sound in law, he believes the finding that the Court lacks jurisdiction highlights certain important limitations of the contemporary international legal system. Unlike in situations where both States have recognized the compulsory jurisdiction of the Court, independent grounds of jurisdiction are necessary in the instant case for the Court to examine the merits of the Application. However, none of the grounds which the DRC has advanced to this end grant the Court jurisdiction.

Judge Elaraby acknowledges the gravity of the situation in this case as well as the complexity of the circumstances in the Great Lakes region. Although he agrees that the consensual

nature of the Court's jurisdiction prevents it from considering the substantive issues, he emphasizes the duty of States to settle their disputes peacefully and in accordance with international law. In this respect, Judge Elaraby highlights the importance of States recognition of the compulsory jurisdiction of the Court and the efforts that have been made to this effect.

In conclusion, Judge Elaraby expresses a hope that States must prioritize international adjudication as a vital means of peaceful settlement of disputes in accordance with the principles and purposes of the Charter of the United Nations.

Separate opinion of Judge ad hoc Dugard

In his separate opinion Judge ad hoc Dugard endorses the Court's finding that it has no jurisdiction to entertain the Application filed by the Democratic Republic of the Congo. He comments on two issues raised by the present Judgment.

The Court has for the first time acknowledged the existence of peremptory norms (jus cogens) in its Judgment. Judge Dugard welcomes this acknowledgment and states that norms of jus cogens have an important role to play in the judicial process. He argues that in most instances such norms will be used to guide the Court in the exercise of its judicial choice between competing precedents, conflicting State practices and different general principles of law. In order to illustrate this point he examines a number of earlier decisions of the Court in which norms of jus cogens might have been invoked. Norms of jus cogens per se cannot, however, confer jurisdiction on the Court as the principle of consent as the basis of the Court's jurisdiction is founded in the Court's Statute (Art. 36) and may itself be described as a norm of general international law accepted and recognized by the international community of States as a whole.

Judge Dugard then examines the argument of the Applicant that it has engaged in negotiations in international bodies in respect of the Convention on the Elimination of All Forms of Discrimination Against Women and that these negotiations show that the dispute is not capable of settlement, as required by the compromissory clause of the Convention for the establishment of jurisdiction. Judge Dugard concludes that the Applicant has failed to show that it has clearly identified the Convention on the Elimination of All Forms of Discrimination Against Women as the basis of its complaint in "conference or parliamentary diplomacy" in international bodies. It has therefore failed to satisfy the requirement contained in Article 29 of the Convention that the dispute cannot be settled by negotiation. Judge Dugard distinguishes the decision of the Court in the South West Africa cases (South West Africa (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962).

Dissenting opinion of Judge ad hoc Mavungu

The Democratic Republic of the Congo (DRC) invoked a number of bases in order to establish the Court's jurisdiction. While it is true that not all of these bases are relevant in order to found such jurisdiction, three clauses at least could have been accepted for this purpose. These are Article 75 of the Constitution of the WHO, Article 14 of the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, read in conjunction with the Chicago Convention on Civil Aviation, and Article 29 of the Convention on Discrimination Against Women.

The Court's failure to take account of the above matters provides grounds for a dissenting opinion.
