DECLARATION OF JUDGE ELARABY

1. I have voted against the rejection of the request for the indication of provisional measures submitted by the Democratic Republic of the Congo, mainly because, in accordance with its Statute and its present jurisprudence, the Court should, in principle grant a request for provisional measures once the requirements of urgency on the one hand and likelihood of irreparable damage to the rights of one or both parties to a dispute, on the other, have been established. I am of the opinion that the Court has, under Article 41 of the Statute, a wide-ranging power of discretion to indicate provisional measures. The jurisprudence of the Court has progressively, albeit gradually, advanced from its earlier strict insistence on established jurisdiction to acceptance of prima facie jurisdiction as the threshold for the exercise of the Court's powers under Article 41 of the Statute. This progressive shift has not, in my view, been reflected in the Order.

2. I see Article 41 of the Statute as the point of departure. Article 41 (1) provides 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) stipulates that "notice of the measures suggested shall *forthwith* be given to the parties and to the Security Council" (emphasis added).

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

4. As far back as 1962 Judge G. Fitzmaurice wrote that:

> "The distinctive feature of the jurisdiction to indicate interim measures is not, however, that it involves any prejudgment of, or may prejudge the eventual decision, of the Court as to its substantive competence to decide the merits. It is that this exercise of jurisdiction involves a certain jurisdictional determination of its own, for its own purposes, before it can be exercised. In short, it involves both a ques-

> tion of merits and a preliminary question of jurisdiction, or rather perhaps of the propriety of exercising it; and this is not the case with any of the other possible exercises of preliminary jurisdiction." (Sir Gerald Fitzmaurice, "Hersch Lauterpacht — The Scholar as Judge, Part II", 38 *British Year Book of International Law*, 1962, p. 71.)

5. Judge Fitzmaurice also observed that:

> "The jurisdiction to indicate interim measures of protection is, so far as the International Court is concerned, part of the incidental jurisdiction of the Court, the characteristic of which is that it does not depend on any direct consent given by the parties to its exercise, but is an inherent part of the standing powers of the Court under its Statute. Its exercise is therefore governed, not by the consent of the parties (except in a remote sense) but by the relevant provisions of the Statute and the Rules of Court." (*The Law and Practice of the International Court of Justice: 1951-1954*, p. 304.)

I subscribe to this interpretation of the powers conferred by the Statute on the Court.

6. As for the circumstances of the case, the Court acknowledged the magnitude of the tragic events occurring in the Congo by referring to the eleven resolutions adopted so far by the Security Council. The Congo has relied in its request for the indication of provisional measures on a host of compromissory clauses which, if proven applicable, would have established the requisite prima facie jurisdiction. The Court has analysed each of these clauses and found that it does not have prima facie jurisdiction.

7. The Court however stated in paragraph 87, "both the Congo and Rwanda are parties to the Montreal Convention and have been since 6 July 1977 in the case of the Congo and 3 November 1987 in the case of Rwanda", and in paragraph 88, "the Congo has not however asked the Court to indicate any provisional measure relating to the preservation of rights which it believes it holds under the Montreal Convention". Yet in paragraph 88 it chose to conclude on this point that "accordingly the Court is not required, at this stage in the proceedings, to rule, even on a prima facie basis, on its jurisdiction under that Convention nor on the conditions precedent to the Court's jurisdiction contained therein" and then drew the general conclusion in paragraph 89 that "the Court does not in the present case have the prima facie jurisdiction necessary to indicate those provisional measures requested by the Congo".

8. It is factually accurate that the Congo did not specify what measures the Court has requested to adopt to safeguard its rights under the Montreal Convention. But the Congo did refer to the 1998 incident in which a Congo Airlines plane was shot down. In my view, a degree of inconsistency exists between the possible implication in paragraph 88 that

prima facie jurisdiction might exist and the conclusion in paragraph 89 that since the Congo did not ask the Court to indicate any provisional measures relating to the Montreal Convention, the Court is not required to rule on its jurisdiction. Somehow I find it difficult to reconcile this conclusion by the Court with the circumstances of the case particularly in light of its recent jurisprudence.

9. The Court was more flexible when it considered the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)* in July 2000. It then reached out to adopt a less formalistic interpretation of its mandate. In that case the Court twice asserted its power,

> "independently of requests for the indication of provisional measures submitted by the parties to preserve specific rights, . . . by virtue of Article 41 of the Statute . . . to indicate provisional measures with a view to preventing the aggravation or extension of the dispute whenever it considers that circumstances so require" (*I.C.J. Reports 2000,* p. 128, para. 44).

10. I hasten to add that I do realize that in the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda),* the assertion of jurisdiction was probably more solidly anchored than in the present case. I also recognize that the Court entertained a degree of doubt as to whether the conditions laid down in Article 14 of the Montreal Convention have been fully met so that a referral of the dispute to the International Court of Justice could be made in accordance with the Statute.

11. Notwithstanding such doubts, which I do not hesitate to confess that I share, the provisions of Article 14 of the Montreal Convention together with the reference to the shooting down of a Congolese plane in 1998 should have been considered adequate to establish a prima facie jurisdiction to indicate provisional measures. It is relevant to recall in this context that Judge H. Lauterpacht

> "leaned very definitely in the direction of the view that before the Court could grant a request for interim measures there must exist some *documentary* or instrumental basis for the view that the Court might be possessed of substantive jurisdiction relative to the eventual merits, such as an adjudication clause in a treaty, 'optional clause' declaration, etc.; and also that the particular case must at least not be clearly excluded in some way from the scope of any such clause or declaration — e.g. by a reservation." (Fitzmaurice, *op. cit.*, p. 74.)

The Montreal Convention should have therefore been regarded as a suitable instrumental basis to serve this purpose.

12. Thus, the criteria suggested by Judge H. Lauterpacht have, in my opinion, been satisfied with respect to the Montreal Convention. Indeed it was suggested by Mendelson in this context that

> "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.*" (M. H. Mendelson, "Interim Measures of Protection in Cases of Contested Jurisdiction", 46 *Brtish Year Book of International Law*, 1972-1973, p. 319.)

13. Another aspect of the Order which I also fail to appreciate is the absence of any reference to the Court's powers under Article 75 (2) of the Rules of Court. It will be recalled that in the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)* the Court stated that "pursuant to Article 75, paragraph 1, of its Rules, the Court may in any event decide to examine *proprio motu* whether the circumstances of the case require the indication of provisional measures" (*I.C.J. Reports 2000,* p. 127, para. 38) and reiterated its pronouncement that "Article 75, paragraph 2, of the Rules of Court empowers the Court to indicate measures that are in whole or in part other than those requested" *(ibid.*, p. 128, para. 43).

14. In conclusion, it is to be recalled that in the *Fisheries Jurisdiction (United Kingdom* v. *Iceland)* case in 1972 the Court first laid down what has now become settled jurisprudence. It stated that:

> "on a request for provisional measures the Court need not, before indicating them, finally satisfy itself that it has jurisdiction on the 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" (*I.C.J. Reports 1972,* p. 15, para. 15).

This positive approach was maintained and reflected in a different context in paragraph 91 of the Order, where the Court recognized the absence of a manifest lack of jurisdiction and dismissed Rwanda's request that the case be removed from the List. In my view, the cumulative effect of the absence of a manifest lack of jurisdiction, on the one hand, and the implied acceptance of prima facie jurisdiction under the Montreal Convention, on the other, should have been considered an adequate basis to found jurisdiction to indicate provisional measures.

15. I am therefore of the opinion that the circumstances of the case reflect an urgent need to protect the rights and interests of the Demo-

cratic Republic of the Congo. For the aforementioned reasons, I could not join the majority in voting in favour of rejection of the request for the indication of provisional measures.

(Signed) Nabil ELARABY.