SEPARATE OPINION OF JUDGE MAVUNGU

[Translation]

INTRODUCTION

1. The Court's findings on the request for the indication of provisional measures submitted by the Democratic Republic of the Congo show — if that were needed — how complex this case is. There are those who may not understand why the Court, principal judicial organ of the United Nations, was not able to indicate provisional measures, including in particular measures having a military dimension[1], in view of the humanitarian tragedies and serious violations, both of human rights and of the basic principles of international humanitarian law, that have been witnessed on its territory[2]. The Court notes, moreover, that it is deeply concerned by the human tragedy in the eastern provinces of the Democratic Republic of the Congo resulting from the fighting there (paragraph 54 of the Order).

2. Some may also not understand why the Court should have ordered provisional measures in the "parallel case" between the Democratic Republic of the Congo and Uganda (*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Provisional Measures, Order of 1 July 2000, I.C.J. Reports 2000*, p. 111), but not in the case at issue between the Democratic Republic of the Congo and Rwanda. The complaints lodged against both States by the Congo are substantially the same.

3. In its Order of 1 July 2000, the Court indicated the following measure in particular:

> "Both Parties must, forthwith, prevent and refrain from any action, and in particular any armed action, which might prejudice the rights of the other Party in respect of whatever judgment the Court may

[1] For an analysis of the issue, see Raymond Ranjeva, "La prescription par la Cour internationale de Justice de mesures conservatoires à portée militaire", in Emile Yakpo and Tahar Boumedra (eds.), *Liber Amicorum Judge Mohammed Bedjaoui*, 1999, pp. 449-459.

[2] See in particular the report by Mr. Roberto Garretón, Special Rapporteur on the human rights situation in the Democratic Republic of the Congo, presented at the 57th session of the United Nations Human Rights Commission of 1 February 2001; tenth report of the Secretary-General on the mission of the United Nations in the Democratic Republic of the Congo, S/2002/169, of 15 February 2002; Security Council resolution 1417 (2002) of 14 June 2002; resolution of the European Parliament of 14 June 2002 on the situation in the Democratic Republic of the Congo.

render in the case, or which might aggravate or extend the dispute before the Court or make it more difficult to resolve." (*I.C.J. Reports 2000*, p. 129, para. 47 (1).)

4. There is no such indication in the present case. However, the Court did point out that, "whether or not States accept the jurisdiction of the Court, they remain in any event responsible for acts attributable to them that violate international law". It further noted that the Security Council has adopted a number of resolutions concerning the situation in the region whereby it demanded an end to violations of human rights and of international humanitarian law (paragraph 93 of the Order).

5. According to its established case law, the Court can only indicate provisional measures if it has prima facie jurisdiction and if so required by the circumstances of a given case: the degree of urgency, the protection of the rights of parties, the need to contain or not to aggravate the dispute (see *infra*). In the present case, the Court did not indicate provisional measures because the provisions relied on by the Applicant do not appear to furnish a prima facie basis for its jurisdiction.

6. Whilst approving the general tenor of the Order, I can only partially agree with its operative provisions. I believe that the Court could have established its prima facie jurisdiction on the basis of at least two compromissory clauses and indicated certain provisional measures or, at the very least, could have indicated such measures *proprio motu* in the light of the deplorable human tragedy, the losses of human life and the terrible suffering in the east of the Democratic Republic of the Congo as a result of the fighting there (paragraph 54 of the Order). My argument will be substantiated in the following paragraphs.

7. The complexity of the case submitted to the Court stems from several elements, and in particular the following: the prior procedural history of the case[3], the arguments raised to establish the Court's jurisdiction[4], the number of provisional measures sought and the nature of

[3] The first Application instituting proceedings by the Democratic Republic of the Congo against Rwanda was lodged on 23 June 1999, before being withdrawn on 15 January 2001.

[4] The Democratic Republic of the Congo relied on a number of legal grounds to establish the jurisdiction of the Court: general jurisdiction (United Nations Charter, Statute of the Court, case law of the Court); jurisdiction pursuant to specific international treaties (International Convention on the Elimination of All Forms of Racial Discrimination, Convention on the Prevention and Punishment of the Crime of Genocide, Convention on the Elimination of All Forms of Discrimination against Women, the Constitution of the World Health Organization, the Constitution of Unesco, the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation); jurisdiction derived from the supremacy of peremptory norms — *jus cogens* — (International Bill of Human Rights, African Charter on Human and Peoples' Rights, Convention on the Rights of the Child, etc.).

certain of them[5] and, lastly, the extent of the violations of human rights and of the basic rules of international humanitarian law[6].

8. My argument will address two fundamental questions: the foundation of the Court's jurisdiction (I) and the conditions for the indication of provisional measures (II).

I. The Foundation of the Court's Jurisdiction

9. It is a general principle of international law that no State may be brought before an international court by another State without its consent[7]. This principle was upheld by the Washington Committee of Jurists responsible for drafting the Statute of the International Court of Justice when they abandoned the idea of providing therein for the automatic compulsory jurisdiction of the Court in favour of jurisdiction being subject to the acceptance of States[8]. The Committee feared that the institution of automatic compulsory jurisdiction might impede the ratification of the Charter, and indeed of the Statute, by a large number of States and in particular by most of the major powers[9]. A provision for acceptance of an optional compulsory jurisdiction clause appeared to be the most appropriate solution: the Court's jurisdiction is thus both optional and compulsory[10].

10. The Court has had occasion to assert and reconfirm the principle of State consent in a number of cases. Thus in the case concerning *East Timor (Portugal* v. *Australia)* it stated:

> "The Court recalls in this respect that one of the fundamental principles of its Statute is that it cannot decide a dispute between States without the consent of those States to its jurisdiction." (*I.C.J. Reports 1995*, p. 101, para. 26.)

11. When proceedings before the Court are instituted by means of an

[5] The Democratic Republic of the Congo called for no less than 19 measures, including some that related to the merits of the case (e.g., "fair and equitable compensation for the damage suffered").

[6] There is a certain discrepancy between the extent of the violations of human rights and of international humanitarian law and the narrowness of the Court's jurisdiction to indicate provisional measures.

[7] In the same vein, see Michel Dubisson, *La Cour internationale de Justice*, 1964, p. 152; Shabtai Rosenne, *The Law and Practice of the International Court*, 1965, p. 313.

[8] See Article 36, paragraph 1, of the Statute of the International Court of Justice. This Article is essentially the same, save in certain very minor respects, as Article 36 of the Statute of the Permanent Court of International Justice (P.C.I.J.).

[9] See Dubisson, *op. cit.*, p. 145.

[10] See Article 36, paragraphs 1 and 2, of the Statute.

application, the latter must indicate, in addition to the parties to the dispute and subject-matter, "the legal grounds upon which the jurisdiction of the Court is said to be based"[11].

12. However, in the last resort, any question relating to the Court's jurisdiction must be settled by the Court itself[12]:

> "The Court points out that the establishment or otherwise of jurisdiction is not a matter for the parties but for the Court itself. Although a party seeking to assert a fact must bear the burden of proving it (see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 437, para. 101), this has no relevance for the establishment of the Court's jurisdiction, which is a 'question of law to be resolved in the light of the relevant facts' (*Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 76, para. 16)." (*Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 450, para. 37.)

13. The Democratic Republic of the Congo, in its Application instituting proceedings, its request for the indication of provisional measures and its oral arguments at the public hearings of 13 and 14 June 2002, submitted a number of legal grounds for the jurisdiction of the Court, and in particular: its declaration of acceptance of the compulsory jurisdiction of the Court, and various compromissory clauses and peremptory norms *(jus cogens)*.

1. The Congolese Declaration of Acceptance of the Compulsory Jurisdiction of the Court

14. Article 36, paragraph 2, of the Statute provides:

> "The States parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes . . ."

15. Under this provision, commonly known as the "optional compul-

[11] See Article 40, paragraph 1, of the Statute and Article 38, paragraphs 1 and 2, of the Rules.

[12] Article 36, paragraph 6, of the Statute stipulates that: "In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court."

sory jurisdiction clause"[13], any State party to the Statute may accept the Court's jurisdiction and thereby give the Court general compulsory jurisdiction over the disputes provided for in Article 36, paragraph 2, of the Statute.

16. The above-mentioned optional clause is simply a restatement of the clause contained in the Statute of the Permanent Court of International Justice, which only differed in that it allowed States the possibility of accepting the Court's jurisdiction in either all or only certain of the categories of legal disputes provided for in Article 36, whereas acceptance under the Statute of the International Court of Justice covers all such disputes.

17. The optional clause régime leaves it up to the States parties to the Statute to choose whether or not to make such a declaration. In accordance with this principle the Democratic Republic of the Congo accepted the compulsory jurisdiction of the Court by a declaration of 8 February 1989, whose terms are as follows:

> "The Executive Council of the Republic of Zaire [currently the Government of the Democratic Republic of the Congo] recognizes as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the International Court of Justice in all legal disputes concerning:
>
> *(a)* the interpretation of a treaty;
> *(b)* any question of international law;
> *(c)* the existence of any fact which, if established, would constitute a breach of an international obligation;
> *(d)* the nature or extent of the reparation to be made for the breach of an international obligation.
>
> . . . . . ."

18. Whilst the declaration of acceptance of the Court's compulsory jurisdiction is a unilateral instrument, the declarant State nevertheless establishes a true consensual relationship with the other States parties to the optional clause system. The Rwandese Government has, however, never made any optional declaration under Article 36, paragraph 2, of the Statute. As a result, the Court's jurisdiction cannot be founded on the declaration by the Congolese Government. This was indeed admitted by the Congo in oral argument:

[13] For further analysis of this issue see *inter alia*: Dubisson, *op. cit.*, pp. 159 *et seq.*; Edvard Hambro, "Some Observations on the Compulsory Jurisdiction of the International Court of Justice", *British Year Book of International Law*, Vol. 25, 1948, pp. 133-157; "The Jurisdiction of the International Court of Justice", *Recueil des cours de l'Académie de droit international de La Haye (RCADI)*, Vol. 76, 1950, pp. 125-215; Jean-Pierre Quéneudec, "Les Etats africains et la compétence de la CIJ", *Annales africaines 1967*, pp. 27-50; Humphrey Waldock, "Decline of the Optional Clause", *British Year Book of International Law*, Vol. 32, 1955-1956, pp. 244-287.

"The Government of the Democratic Republic of the Congo is aware that the present case or, more precisely, that the jurisdiction of the Court in this case, cannot be established either on the basis of a special agreement, which does not exist here, or on acceptance of the compulsory jurisdiction of the Court, the Republic of the Congo having made a declaration of acceptance while Rwanda has hitherto refrained from doing so." (CR 2002/36, p. 32.)

19. The existence of declarations accepting the compulsory jurisdiction of the Court between the parties to a dispute is thus indispensable in order for the Court's jurisdiction to be founded on such instruments. Even then, the Court's jurisdiction can arise only from a comparison between the broadest declaration and the most restrictive one, with the latter prevailing as the lowest common denominator[14]. In the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, the Court based its finding of prima facie jurisdiction on the Congolese declaration of 8 February 1989 and on the Ugandan declaration of 3 October 1963:

"Whereas the Court considers that the declarations made by the Parties in accordance with Article 36, paragraph 2, of the Statute constitute a prima facie basis upon which its jurisdiction in the present case might be founded." (*I.C.J. Reports 2000*, p. 123, para. 34.)

2. The Compromissory Clauses

20. The Democratic Republic of the Congo relied on a number of compromissory clauses for purposes of establishing the Court's jurisdiction. These clauses can be divided into three categories in the light of the reservations submitted by Rwanda, the grounds of defence raised by the Parties and the evolution of international law: those clauses which establish the Court's jurisdiction, those clauses capable of establishing the Court's jurisdiction and those clauses incapable of establishing the Court's jurisdiction.

A. Clauses establishing the Court's jurisdiction

21. I consider that three treaties should be placed under this heading: the Constitution of the World Health Organization of 22 July 1946, the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 23 September 1971 and the Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979.

22. The Rwandese Government has made no reservations with respect to the compromissory clauses providing for the jurisdiction of the Court

[14] For an analysis of the declarations by African States, see *inter alia* Mvumbi-di-Ngoma Mavungu, *Le règlement judiciaire des différends interétatiques en Afrique*, 1992, pp. 156 *et seq.*

contained in the above-mentioned treaties. The Court's jurisdiction was disputed on the grounds that the prior conditions for its seisin were not fulfilled, that there was no element of urgency, or that the Democratic Republic of the Congo had not stipulated in its Application which rights had been violated in the light of any particular convention.

(1) The Constitution of the World Health Organization (WHO)

23. The Constitution of the WHO of 22 July 1946 contains a compromissory clause which reads as follows:

> "Any question or dispute concerning the interpretation or application of this Constitution which is not settled by negotiation or by the Health Assembly shall be referred to the International Court of Justice in conformity with the Statute of the Court, unless the parties concerned agree on another mode of settlement." (Art. 75.)

24. Rwanda contested the jurisdiction of the Court founded on Article 75 of the WHO Constitution on the following grounds:

> "The Congo has made no attempt to identify which provision of the Constitution it considers to be in issue. Nor has it made any effort to satisfy the procedural condition for seising the Court . . . Article 75 confers jurisdiction on the Court if — and only if — the dispute in question has not been settled by negotiation or by the Health Assembly . . . The Congo has made no attempt to do so. That being the case, Article 75 cannot afford a basis for jurisdiction in the present case." (CR 2002/37, p. 24.)

25. The decline in the health of the Congolese population and in medical infrastructures as a result of the war has been condemned by various institutions, both public and private. The consequences of this situation include: losses of human life, the widespread propagation of the HIV/AIDS virus, the re-emergence of diseases previously eradicated (tuberculosis, leprosy, onchocercosis or river blindness, sleeping sickness, cholera, etc.), and the appearance of other diseases (cretinism, etc.). The National Vaccination Days (NVD) in the campaign against polio, which involve some 13 million children living in Congolese territory, are often disturbed in the areas of conflict.

26. In a report of 2001 the humanitarian organizations Oxfam, Save the Children and Christian Aid noted the following:

> "Prior to start of the conflict in 1998, available health data showed that the existing infrastructure was already failing to deliver quality, affordable care to the majority of the DRC's population. The war has made this situation even worse. Hospitals, clinics, and health posts have been destroyed, medication cannot be delivered, and routine vaccination programmes have been disrupted. Many people

struggle to pay for health services; some cannot afford to pay at all. Moreover, many people now live in such difficult conditions that they run a much greater risk of falling ill."[15]

27. In the same vein, the European Parliament, in its resolution of 14 June 2002 on the situation in the Democratic Republic of the Congo, reported on the worsening of social conditions as a result of the continuing fighting:

"Whereas the three-and-a-half year conflict in the DRC has dramatically increased the rates of malnutrition and mortality in that country, with 70 per cent of the people living in the war affected areas having no access to health care or adequate food supplies." (Preamble, point D.)

28. These statements clearly establish a link between the situation of conflict and the population's worsening living conditions. It is true that the WHO Constitution provides primarily for obligations to be fulfilled by the organization itself[16]. However, any State which becomes a Member of the WHO has a duty not only to co-operate with the organization to assist in fulfilling the mission assigned to it, but also to act in order to provide the population with the best possible level of health. Any failure to uphold the right to health is contrary to the object and purpose of the WHO Constitution[17]. It would be wrong to assert that this Constitution does not lay down any obligations for Member States. In his dissenting opinion in the case concerning *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Judge Weeramantry raised the issue of the obligations of States under the WHO Constitution:

"Quite apart from their responsibilities under customary international law and any other conventions to which they are parties, the States that are parties to the WHO Constitution, which is itself an international treaty, accepted certain principles and obligations.

. . . . . .

There is thus a commitment to the attainment by all people to the highest possible level of health, to regarding the achievement of the

[15] "No End in Sight: The Human Tragedy of the Conflict in the Democratic Republic of the Congo", Activity Report, August 2001, p. 20; see also Garretón, *op. cit.*, p. 32.

[16] Article 1 stipulates that the objective of the WHO is "the attainment by all peoples of the highest possible level of health".

[17] For an analysis of the right to health as a human right, see Mohammed Bedjaoui, "Le droit à la santé, espoirs, réalités, illusions", in *Journal international de bioéthique*, Vol. 9, No. 3, 1998, pp. 33-38. Article 12 of the International Covenant on Economic, Social and Cultural Rights, of 16 December 1966, enshrines the right to health.

highest achievable standard of health as a fundamental right of every person on the planet, a recognition of health as fundamental to peace, and of the duty of State co-operation to achieve this ideal." (*I.C.J. Reports 1996 (I)*, p. 146.)[18]

29. The dispute between the Democratic Republic of the Congo and Rwanda concerns the application of the WHO Constitution in the case of alleged violations of the obligations thereunder. Article 75 lays down a prior condition before the Court can be seised: negotiation *or* the intervention of the Health Assembly. In oral argument, the Democratic Republic of the Congo, without providing any evidence therefor, informed the Court of various negotiations between the two Parties with a view to achieving a global settlement of the armed conflict on Congolese territory, including by the organization of arbitration (CR 2002/38, pp. 10-11). Very possibly the discussions between the Congolese and Rwandan authorities did not specifically concern the obligations of their respective States under the WHO Constitution, but rather the upholding of human rights and of international humanitarian law, as well as the withdrawal of foreign troops from Congolese territory and the conditions for such withdrawal. The allegations by the Democratic Republic of the Congo concerning the violations of the right to health form part of the overall violations of human rights and of international humanitarian law. It may therefore be reasonably considered that the Parties attempted to settle the dispute by negotiation[19].

30. When a jurisdiction clause provides for recourse to prior diplomatic negotiations, it is self-evident that the parties have to comply therewith. This requirement is rather an obligation of conduct than of result. In the light of the Court's case law, it is for the Court itself to rule *proprio motu* on compliance or non-compliance with that obligation. The Court has moreover given a wide interpretation to the notion of "diplomatic negotiations" (exchanges of views: diplomatic notes, protests, discussions within an international organization, talks)[20].

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[18] The preamble to the WHO Constitution provides:

"The health of all peoples is fundamental to the attainment of peace and security and is dependent upon the fullest co-operation of individuals and States . . . Governments have a responsibility for the health of their peoples."

[19] Concerning the legal value of the principle of recourse to prior diplomatic negotiations, see Georges Abi-Saab, *Les exceptions préliminaires dans la procédure de la Cour internationale*, 1967, p. 125; Paul Guggenheim, *Traité de droit international public*, Vol. II, 1953, p. 148; Charles De Visscher, *Aspects récents du droit procédural de la Cour internationale de Justice*, 1966, p. 86; Jacques Soubeyrol, "La négociation diplomatique, élément du contentieux international", *Revue générale de droit international public*, Vol. 68, 1964, p. 323; Waldock, *op. cit.*, p. 266.

[20] See *inter alia Right of Passage over Indian Territory, I.C.J. Reports 1960*, pp. 148-149; *South West Africa, Preliminary Objections, I.C.J. Reports 1962*, pp. 344 *et seq.*; *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), I.C.J. Reports 1988*, pp. 99 *et seq.*

31. The attitude of each Party during the prior negotiations is crucial in order to assess whether or not this requirement has been met:

> "Negotiations do not of necessity always presuppose a more or less lengthy series of notes and despatches; it may suffice that a discussion should have been commenced, and this discussion may have been very short; this will be the case if a deadlock is reached, or if finally a point is reached at which one of the Parties definitely declares himself unable, or refuses, to give way, and there can therefore be no doubt that the dispute cannot be settled by diplomatic negotiation." (*Mavrommatis Jerusalem Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 13.)

32. Article 75 of the Constitution of the WHO provides that the dispute "shall be referred to the International Court of Justice in conformity with the Statute of the Court, unless the parties concerned agree on another mode of settlement". It was apparent from the Parties' oral pleadings that the dispute was not capable of settlement by arbitration, nor could it be referred to the Court by a special agreement for judicial settlement. The only remaining option was seisin of the Court by an application instituting proceedings.

(2) The Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation

33. The Democratic Republic of the Congo also relied upon Article 14, paragraph 1, of the Montreal Convention of 1971 to establish the jurisdiction of the Court. The compromissory clause contained in that Article provides for prior conditions to be met before seisin of the Court: the dispute must pertain to the interpretation or to the application of the Convention; the parties must have attempted to settle the dispute by means of negotiation or arbitration[21].

34. It should be observed that Rwanda has made no reservation to the above-mentioned compromissory clause. Accordingly, two essential elements have to be considered in order to establish the jurisdiction of the Court and to lead it to indicate one or more provisional measures on the basis of the Montreal Convention: on the one hand, fulfilment of the conditions precedent and, on the other, satisfaction of the conditions

[21] In the case concerning *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America)*, the Court refused to grant the Libyan request for the indication of provisional measures:

> "the requested provisional measures should not be indicated because Libya had not presented a prima facie case that the provisions of the Montreal Convention provide a possible basis for jurisdiction inasmuch as the six-month period prescribed by Article 14, paragraph 1, of the Convention had not yet expired when Libya's Application was filed; and that Libya had not established that the United States had refused to arbitrate" (*Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992*, p. 122, para. 25).

that govern provisional measures (urgency, the protection of the rights of the parties and the need to avoid any aggravation of the dispute).

35. The arguments in the previous section concerning prior diplomatic negotiations may also be applied here. In regard to arbitration, it would appear that the Democratic Republic of the Congo met with refusal by Rwanda, despite the proposals in this regard stated to have been made in July 2001 (Lusaka), September 2001 (Durban), January 2002 (Blantyre) and March 2002 (Lusaka). Prima facie, the dispute was not susceptible of settlement by arbitration: there was or should have been no other option than to refer it to the Court.

36. Establishment of its jurisdiction is not sufficient in itself for the Court to indicate provisional measures. The applicant has to show, in a given case, that the conditions governing such measures are met. Not only did the Democratic Republic of the Congo fail "to ask the Court to indicate any provisional measure relating to the preservation of rights which it believes it holds under the Montreal Convention", but in addition the disputed event dates back to 9 October 1998. The urgency which justifies the indication of provisional measures would thus seem to have disappeared. The occasion for consideration of the incident would be during the examination of the merits of the case, unless the current intensity of air traffic between Kinshasa and the eastern provinces, following the signing on 19 April 2002 at Sun City of a political agreement (between the Congolese Government, civil society, the unarmed political opposition and the armed political opposition (with the exception of the RCD/Goma)) justifies the indication of a preventive measure for the protection of commercial aircraft and their passengers.

37. Some clarification of the imputability of the wrongful act is called for. The international responsibility of a State derives from the violation of a norm and from the attribution of such violation to that State. In the present case, the shooting-down of the Boeing 727 (belonging to the company Congo Airlines) on 9 October 1998 in Kindu (Maniema Province) was attributed not only to Rwanda, but also to Uganda and to Burundi. In its Memorial of 20 April 2000[22], Rwanda denied the Congo's charges on the ground that three States could not be accused of one and the same act.

38. Since the start of the armed conflict in Congolese territory, in August 1998, Rwanda, Uganda and Burundi have been accused by the

[22] Rwanda submitted a Memorial to the Court, on 21 April 2000, after the first Application had been lodged by the Democratic Republic of the Congo, and stated therein:

> "Moreover, Rwanda notes that Congo has made identical allegations in respect of the same incident against both Burundi and Uganda in its separate applications against those two States." (Memorial of the Rwandese Republic, 21 April 2000, p. 13, para. 2.19.)

Democratic Republic of the Congo of involvement in armed activities on its territory. It follows that, depending on the circumstances, the responsibility of those States may be established either individually or collectively.

(3) The Convention on the Elimination of All Forms of Discrimination against Women

39. Article 29, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979 was cited by the Democratic Republic of the Congo for the purpose of establishing the Court's prima facie jurisdiction. The following rights are claimed to have been impaired or nullified: the right to life, the right to physical and mental integrity, the right to dignity, the right to health etc. In its oral pleadings, the Democratic Republic of the Congo cited violations of human rights and of international humanitarian law of which women had been the victims: sexual violence, systematic spread of the AIDS virus etc. Further, 15 women were alleged to have been buried alive at Mwenga (South Kivu Province) in November 1999[23].

40. All of these acts are claimed to be contrary to Article 1 of the Convention, which provides that discrimination against women

> "shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women . . ., on a basis of equality between men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field".

41. Could Article 29, paragraph 1, of the Convention on Discrimination against Women apply in this case? The compromissory clause contained in that Article is identical to that in Article 14, paragraph 1, of the Montreal Convention of 1971 (see *supra*). *Mutatis mutandis*, the same reasoning is equally applicable here.

42. However, it has to be shown that the above-mentioned allegations against the Respondent are covered by the spirit and letter of the 1979 Convention. It is true that the allegations made by the Democratic Republic of the Congo concern violations of the basic rules of international humanitarian law, particularly in light of Article 27, paragraph 2, of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949[24] and Article 76, paragraph 1, of Additional Protocol I to the Geneva Conventions relating to

[23] See CR 2002/37, p. 23.

[24] Article 27, paragraph 2, provides: "Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault."

the Protection of Victims of International Armed Conflicts of 8 June 1977[25].

43. It is likewise true that the Convention of 18 December 1979 was adopted in order to provide better protection to women by prohibiting any discrimination between men and women of whatever kind. To this end the States parties have undertaken to "take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise" (Art. 2 *(d)*).

44. Generally, the main aims of the 1979 Convention are to protect the dignity of women and to allow them full enjoyment of their rights. On an extensive interpretation, it may be concluded that every violation of a right suffered by a woman by reason of being a woman would be covered by the Convention. Here, the Applicant is not seeking to have the alleged violations extended also to men in order that the discrimination should cease, but to secure the cessation of violent acts allegedly committed against women — in this case by armed groups — because they are being targeted as women.

45. The issue of the Court's territorial or *ratione loci* jurisdiction over violations of human rights alleged to have taken place on the territory of the Applicant and attributable to the Respondent has not been raised at this stage of the proceedings. It is generally accepted that a State party to a convention can incur responsibility if it commits a wrongful act contrary to that convention on the territory of another State party. Thus in the case of *Loizidou* v. *Turkey* the European Court of Human Rights, interpreting the term "jurisdiction" in Article 1 of the European Human Rights Convention, stated the following: "the responsibility of a Contracting Party may also arise when as a consequence of military action — whether lawful or unlawful — it exercises effective control of an area outside its national territory"[26].

46. Addressing the issue of the territorial or *ratione loci* jurisdiction of the African Commission on Human and Peoples' Rights, Fatsah Ouguergouz takes the view that:

> "Neither the African Charter nor the Commission's Rules address this question. It is, however, implicit that the Commission can deal with violations of human and peoples' rights occurring on the territory of any State party to the African Charter. Nor is it excluded that it can also deal with a violation of a human right attributable to

[25] Article 76, paragraph 1, of Additional Protocol I incorporates the text of Article 27, paragraph 2, of the Fourth Convention.

[26] Cited by Vincent Berger, *Jurisprudence de la Cour européenne des droits de l'homme*, 2000, p. 554; see also Gérard Cohen-Jonathan, *La convention européenne des droits de l'homme*, 1989, p. 94.

a State party even if that violation took place outside the territory subject to the latter's jurisdiction."[27]

47. Thus there can be no dispute as to the Court's jurisdiction *ratione loci* on account of internationally wrongful acts allegedly committed by one State on the territory of another, even in the case of human rights violations.

B. Provisions capable of founding the Court's jurisdiction

48. Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 was invoked by the Democratic Republic of the Congo as a basis for the Court's jurisdiction. That compromissory clause reads as follows:

> "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."

49. When it became party to the 1948 Convention, Rwanda made a reservation excluding the Court's jurisdiction: "the Rwandese Republic does not consider itself bound by Article IX of the Convention". That reservation raises a number of issues. Is it compatible with the object and purpose of the Convention? Is the Democratic Republic of the Congo entitled to object to Rwanda's reservation, 27 years after the latter's accession to the Convention? Is the Court entitled to construe the 1948 Convention taking account of the development of international law in this area, particularly in light of the entry into force of the Rome Statute of the International Criminal Court of 17 July 1998?

50. The Democratic Republic of the Congo has objected to Rwanda's reservation on the ground that the Genocide Convention contains norms of *jus cogens*: genocide is a crime under international law. The Congo likewise considers that Rwanda, having successfully asked the Security Council for the creation of an *ad hoc* international criminal court to try and punish crimes committed on Rwandan territory in 1994, is not entitled to take two attitudes to genocide:

> "In the present case Rwanda cannot, *a fortiori*, reject the jurisdiction of the International Court of Justice having requested

[27] *La charte africaine des droits de l'homme et des peuples*, 1993, p. 316. Having been seised of a communication-complaint by the Democratic Republic of the Congo on 24 February 1999 against Burundi, Uganda and Rwanda regarding massive grave violations of human and peoples' rights allegedly committed by the armed forces of those countries on Congolese territory, the African Commission on Human and Peoples' Rights declared communication 227/99 admissible under Articles 47, 48, 49, 50, 51 of the Charter and 97, 99 and 100 of the Rules of Procedure.

(S/1994/1115) and procured the creation by the international community of an *ad hoc* international criminal tribunal to try the Rwandan perpetrators of genocide in 1994. To conclude otherwise would leave beyond the scope of judicial intervention the serious acts of genocide committed against Congolese populations and the international community of which Rwanda stands accused." (CR 2002/36, p. 52.)

51. Relying on the Court's jurisprudence in the cases concerning *Legality of Use of Force (Yugoslavia* v. *Spain)* / *(Yugoslavia* v. *United States of America)*[28], Rwanda rejected the argument put forward by the Democratic Republic of the Congo. It does not deny that the substantive provisions prohibiting genocide have the status of *jus cogens*, but it contends that the jurisdictional clause in Article IX does not have that characteristic (see CR 2002/37, p. 16).

52. Contrary to the position under other compromissory clauses, the only forum provided in Article IX of the 1948 Convention for the settlement of any dispute relating thereto is the Court. As a result, any State which, on becoming party to that Convention, makes a reservation to the jurisdictional clause would escape judicial sanction in the event that its representatives or agents should commit acts constituting the crime of genocide.

53. It is well established that a reservation to an international treaty is acceptable only if it is not incompatible with the object and purpose of that treaty[29]. It is true, as the Court points out, that the Genocide Convention does not prohibit reservations (see paragraph 72 of the Order). But that does not mean that States may make whatever reservations they please. Moreover, the Court stated as much in its Advisory Opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*:

> "It has nevertheless been argued that any State entitled to become a party to the Genocide Convention may do so while making any reservation it chooses by virtue of its sovereignty. The Court cannot share this view. It is obvious that so extreme an application of the idea of State sovereignty could lead to a complete disregard of the object and purpose of the Convention." (*I.C.J. Reports 1951*, p. 24.)

54. The object and purpose of the 1948 Convention is, on the one

[28] In those cases, the Court was unable to establish its jurisdiction, even prima facie, on the ground that Spain and the United States had made reservations to the Article IX jurisdictional clause (see *I.C.J. Reports 1999 (II)*, p. 772; *ibid.*, p. 916).

[29] See Article 19 *(c)* of the Vienna Convention on the Law of Treaties of 23 May 1969. On reservations, see *inter alia* Suzanne Bastid, *Les traités dans la vie internationale. Conclusion et effets*, 1985, pp. 71-77. Pierre-Henri Imbert, *Les réserves aux traités multilatéraux*, 1979; Daniel Kappeler, *Les réserves dans les traités internationaux*, 1957; José-Maria Ruda, "Reservations to Treaties", *RCADI*, Vol. 146, 1975, pp. 139-148.

hand, to clarify the notion of genocide and, on the other, to induce States parties to prevent any act of genocide and, in the event of failure to do so, to punish it. The mechanism for the settlement of disputes between States provided for by the Convention is an essential element in its application, and thus in ensuring its respect by States parties. In this regard Maurice Arbour notes:

> "The object and purpose of the Genocide Convention is clearly the punishment of Genocide. But can it be said that certain articles concerning the application of the Convention, such as obligatory recourse to the International Court of Justice in the case of disputes, are necessarily excluded from the scope of the Convention's object and purpose?"[30]

55. Without settling the question raised by Maurice Arbour, and adhering to its jurisprudence on the matter, the Court stated: "that reservation does not bear on the substance of the law, but only on the Court's jurisdiction; whereas it therefore does not appear contrary to the object and purpose of the Convention" (see paragraph 72 of the Order).

56. The Court will undoubtedly have to return to this issue when it considers the merits of the case. As principal judicial organ of the United Nations, the Court is under a duty to make its contribution to the punishment of genocide, since this is a "crime under international law" (see Article I of the Convention). It should be noted that Article 120 of the Rome Statute does not allow of any reservation.

57. It would seem that the Court is in a dilemma: to declare any reservation to the Article IX jurisdictional clause incompatible with the object and purpose of the Convention would be to create a veritable "revolution". Not only would such a position represent a break with its previous case law[31], but it could result in States parties to the Convention which have excluded the Court's jurisdiction by making reservations to the jurisdictional clause denouncing the Convention under Article XIV. A choice will have to be made.

58. The international community has endowed the Court with a key role in the punishment of genocide. Neither negotiation nor arbitration would be appropriate mechanisms for dealing with a dispute between States in this regard:

> "The Genocide Convention is one of the rare cases where the possibility of intervention by the International Court of Justice may be regarded as an essential condition in order to render the Convention effective. For the Court represents the only means of recourse against

[30] *Droit international public*, 3rd ed., 1997, p. 89.

[31] See the cases concerning *Legality of Use of Force (Yugoslavia* v. *Spain) (Yugoslavia* v. *United States of America), I.C.J. Reports 1999 (II)*, pp. 772 and 916.

violations of a treaty the object of which is precisely to prohibit States from committing certain acts."[32]

59. The Court's jurisdiction will also have to be assessed in light of the facts presented by the Applicant as constituting genocide (see CR 2002/36, pp. 22-24, 44-48).

C. Provisions not capable of founding the Court's jurisdiction

60. Certain of the compromissory clauses cited by the Applicant cannot, for various reasons, constitute a basis for the Court's jurisdiction. This is true in particular of the Constitution of Unesco (Art. XIV, para. 2) and the Convention against Torture and Other Cruel, Inhuman or Degrading Punishments or Treatments (Art. 30. para. 1).

(1) The Unesco Constitution

61. The Unesco Constitution of 16 November 1945 provides in Article XIV, paragraph 2:

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

62. This jurisdictional clause is confined to disputes concerning the *interpretation* of the Constitution. Moreover, seisin of the Court is made subject to special conditions. In the present case the Democratic Republic of the Congo accuses Rwanda of hindering the exercise of the right to education in the areas of Congolese territory which it controls. That dispute concerns the actual application of the Constitution and not the interpretation of some provision thereof[33].

63. As regards the protection of human rights under Unesco, the latter's Executive Board has set up a Committee on Conventions and Recommendations. The task of that Committee is to examine periodic reports from member States on the application of conventions and recommendations at the request of the Executive Board.

64. In its decision 104 EX/3.3 of 1978, the Executive Board gave the Committee power to examine communications concerning the exercise of human rights in respect of matters falling within Unesco's competence (the campaign against discrimination in education, for example). Such communications can come from private individuals or from associations which consider themselves to have been victims of a violation of human

[32] Imbert, *op. cit.*, p. 344; see also Joe Verhoeven, "Le crime de génocide. Originalité et ambiguïté", *Revue belge de droit international*, 1991/1, pp. 5-26.

[33] For Rwanda's argument see CR 2002/37, pp. 18-19. See also the Court's position in paragraph 85 of the Order.

rights in a field covered by Unesco's remit. The communications must provide relevant evidence, be submitted within a reasonable time and show that attempts have been made to exhaust local remedies[34].

(2) The Convention against Torture

65. There are a number of reports of torture and cruel, inhuman or degrading treatment on the territory of the Democratic Republic of the Congo as a result of the armed conflict[35]. The right of every individual not to be subjected to torture or to cruel treatment forms part of the "inviolable core" of human rights which every State must respect, whether or not it is party to the Convention against Torture. That Convention enshrines norms of *jus cogens*.

66. The Democratic Republic of the Congo is party to the Convention against Torture, whereas Rwanda is not. This raises the problem of whether the jurisdictional clause provided for in Article 30, paragraph 1, is opposable to the Rwandese Republic. While it is true that peremptory norms are applicable *erga omnes*, a compromissory clause is not opposable to a State which is not party to a convention containing that clause. The Court's jurisdiction has to be accepted, either generally, or specifically:

> "the Court has repeatedly stated 'that one of the fundamental principles of its Statute is that it cannot decide a dispute between States without the consent of those States to its jurisdiction' (*East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 101, para. 26)" (*Legality of Use of Force (Yugoslavia* v. *Canada), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (I)*, p. 266, para. 19).

67. The opposability of a norm of *jus cogens* is one thing, the rule regarding consent to the Court's jurisdiction, whether under a compromissory clause or any other instrument, is quite another[36]. It is a well-established principle that the Court's jurisdiction derives from the consent of the parties[37].

II. The Conditions for the Indication of Provisional Measures

68. The hearings at which the Parties made their oral presentations took place at a time when the Security Council was examining a request

[34] See Nicholas Valticos, "Les mécanismes internationaux de protection des droits de l'homme", in *International Law: Achievements and Prospects*, general editor Mohammed Bedjaoui, 1991, 2 vols., Vol. 2, p. 1228.

[35] See in particular Garretón, *op. cit.*; White Paper (4 vols.) published by the Democratic Republic of the Congo, Ministry for Human Rights, 1999-2002.

[36] See *East Timor (Portugal* v. *Australia), I.C.J. Reports 1995*, p. 102, para. 29.

[37] See Ian Brownlie, *Principles of Public International Law*, 3rd ed., 1979, pp. 716-717.

by the Democratic Republic of the Congo for reclassification of the mandate of the United Nations Mission to the Congo (MONUC)[38] as well as the possibility of extending that mandate[39]. Some might query the compatibility of two United Nations organs being seised of the same matter. In other words, was the Court entitled to indicate provisional measures at a time when the Security Council was considering developments in the armed conflict in the Democratic Republic of the Congo, notably in light of the events which occurred in Kisangani in May 2002?

69. Under Article 24 of the United Nations Charter, the Security Council has primary responsibility for the maintenance of international peace and security. That responsibility is only *primary* and not exclusive. The other organs of the United Nations also contribute to the maintenance of international peace and security, by virtue of their statutory and implicit powers. The Court has an important role to play as principal judicial organ of the United Nations; it is the "guardian of international law". In this regard, Laurence Boisson de Chazournes notes:

> "The course of the history of the International Court of Justice is marked by cases which have enabled it to contribute to the development and consolidation of the international legal order and to establish a solid basis for its contribution to the maintenance of international peace and security."[40]

70. Thus there was nothing to prevent the Court from indicating provisional measures once the relevant conditions were satisfied. The Court's action is complementary to that of the Security Council in regard to the maintenance of international peace and security: "The Council has functions of a political nature assigned to it, whereas the Court exercises purely judicial functions. Both organs can therefore perform their separate but complementary functions with respect to the same events." (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, pp. 434-435; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 19, para. 33; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Provisional Measures, Order of 1 July 2000, I.C.J. Reports 2000*, p. 126, para. 36.)

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[38] The Democratic Republic of the Congo wants MONUC to become a peacekeeping mission under Chapter VII of the Charter.

[39] MONUC's mandate was extended to 30 June 2003. See Security Council resolution 1417 (2002) of 14 June 2002.

[40] "Les ordonnances en indication de mesures conservatoires dans l'affaire relative à l'*Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovinie c. Yougoslavie)*", *Annuaire français de droit international*, 1993, p. 514; see also pp. 534-536.

71. The indication of provisional measures is subject to a number of conditions: urgency, preservation of the rights of the parties, the need not to aggravate the dispute and prima facie establishment of the Court's jurisdiction.

72. In the present case the request by the Democratic Republic of the Congo comprises 19 items (see paragraph 13 of the Order). The contrast is striking between the scope of the measures sought and the narrowness of the Court's bases of jurisdiction. Thus the measures requested cover almost every aspect of the armed conflict in the Democratic Republic of the Congo: withdrawal of foreign troops, cessation of looting of natural resources and other assets, respect for human rights and international humanitarian law, restoration of the sovereignty and territorial integrity of the Democratic Republic of the Congo, etc.[41]

1. Urgency

73. When seising the Court under Article 41 of the Statute and Article 73 of the Rules, the applicant must demonstrate the urgency of the request for the indication of provisional measures, since its consideration takes priority over all other cases. The Court is under an obligation to decide on such a request as a matter of urgency[42].

74. The urgency of the request is a fundamental requirement in the case of provisional measures[43]. In the present case the Democratic Republic of the Congo seised the Court on 28 May 2002, as a result, in particular, of the events which occurred in Kisangani on 14 and 15 May 2002:

> "From 14 to 15 May 2002 in Kisangani, massive grave and flagrant violations of human rights were committed by Rwandan troops and by Congolese and Rwandan troops of the RCD-Goma in reprisal for the legitimate claims of the civil population and of a small number of uniformed individuals, who were simply calling for the departure of Rwandan troops from Congolese territory. Numerous independent sources, including MONUC and RHODECIC, report over 50 persons killed and some ten wounded. Other sources indicate that on that day several policemen and soldiers were killed in cold

[41] See the various Security Council resolutions, *inter alia*: 1234 (1999), 1304 (2000), 1341 (2001), 1355 (2001), 1376 (2001), 1399 (2002), 1417 (2002).

[42] See Article 74, paragraphs 1 and 2, of the Rules of Court. In the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, the Court stated that "such measures are only justified if there is urgency" (*I.C.J. Reports 2000*, p. 127, para. 39); see also *LaGrand (Germany* v. *United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999 (I)*, p. 15, para. 22.

[43] See Pierre-Marie Martin, "Renouveau des mesures conservatoires: les ordonnances récentes de la Cour internationale de Justice", *Journal du droit international*, Vol. 102, 1975, p. 51; Joe Verhoeven, *Droit international public*, Law Faculty of the Université catholique de Louvain, 2000, p. 767.

blood, on the pretext that they had been in communication with the rebels on account of their having belonged to the former Zairian Armed Forces (FAZ)."[44]

75. Over and above the events in Kisangani, the Democratic Republic of the Congo in fact cited the entirety of its dispute with Rwanda since the start of the war. Hence the difficulty of identifying the urgency of certain measures requested of the Court.

2. Preservation of the Parties' Rights

76. Provisional measures do not prejudge the parties' rights on the merits and must have as their purpose the preservation of those rights, in order to prevent any irreparable harm. The Court has had occasion to recall this principle in a number of cases:

> "Whereas the power to indicate provisional measures which is conferred on the Court by Article 41 of the Statute presupposes the possibility of irreparable damage being caused to the rights at issue in judicial proceedings and has therefore as its purpose to safeguard the rights of each Party pending the delivery of the Court's decision on the merits." (*Frontier Dispute (Burkina Faso/Republic of Mali), Provisional Measures, Order of 10 January 1986, I.C.J. Reports 1986*, p. 8, para. 13; see also *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Provisional Measures, Order of 1 July 2000, I.C.J. Reports 2000*, p. 127, para. 39.)

77. Clearly, the Democratic Republic of the Congo was seeking to limit the irreparable, there having already been fatalities; for Rwanda, the preservation of its rights required avoiding being imputed *ab initio* with alleged massive serious violations of human rights. In its oral pleadings, the Respondent placed the emphasis rather on issues of the Court's jurisdiction (see CR 2002/37).

3. Non-aggravation of the Dispute

78. Whether or not the parties so request, the Court is entitled to indicate provisional measures in order to avoid any aggravation of the dispute. Any extension of the dispute may set at naught the Court's efforts to contribute to international peace and security by settling international disputes by peaceful means, by applying the law. The Court thus has a discretionary power to indicate provisional measures with a view to restricting the scope of a dispute:

> "Considering that, independently of the requests for the indication

[44] Request for the indication of provisional measures, 28 May 2002, pp. 16-17.

of provisional measures submitted by the Parties to preserve specific rights, the Court possesses by virtue of Article 41 of the Statute the power to indicate provisional measures with a view to preventing the aggravation or extension of the dispute whenever it considers that circumstances so require." (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Provisional Measures, Order of 15 March 1996, I.C.J. Reports 1996 (I)*, pp. 22-23, para. 41.)

79. The Court is bound to indicate provisional measures, or in any event ought to do so, whenever there is a war situation or where there are serious violations of human rights or of international humanitarian law. Thus the Court has indicated measures having a military dimension in a number of cases[45], refusing to grant them where they were not appropriate[46].

4. The Court's Prima Facie Jurisdiction

80. Establishment of the Court's jurisdiction, even prima facie, lies at the heart of the Congo's case. It is the essential, primary condition, from which all the others flow. The Court refused to indicate provisional measures because, following a consideration of the grounds of law presented by the Applicant, it was not apparent that its jurisdiction was established. This approach is consistent with its established case law:

"Whereas, on a request for the indication of provisional measures the Court need not, before deciding whether or not to indicate them, finally satisfy itself that it has jurisdiction on the merits of the case, but whereas it may not indicate them unless the provisions invoked by the Applicant appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded." (*LaGrand (Germany* v. *United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999 (I)*, p. 13, para. 13.)[47]

[45] See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Provisional Measures, Order of 10 May 1984, I.C.J. Reports 1984*, p. 169; *Frontier Dispute (Burkina Faso/Republic of Mali), Provisional Measures, Order of 10 January 1986, I.C.J. Reports 1986*, p. 554; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro)), Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 3; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Provisional Measures, Order of 15 March 1996, I.C.J. Reports 1996*, p. 13; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Provisional Measures, Order of 1 July 2000, I.C.J. Reports 2000*, p. 111.

[46] See Ranjeva, *op. cit.*, p. 459.

[47] See also *Legality of Use of Force (Yugoslavia* v. *Canada), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (I)*, p. 266, para. 21.

81. As I have already stated, the contrast is striking between the provisional measures sought by the Applicant and the grounds of law invoked to found the Court's jurisdiction. I am of the opinion that certain provisional measures could have been indicated, having regard to the nature of the dispute, even if the basis of jurisdiction was a narrow one.

(Signed) Jean-Pierrre MAVUNGU.