II. ARMED ACTIVITIES ON THE TERRITORY OF THE CONGO (NEW APPLICATION: 2002) (*DEMOCRATIC REPUBLIC OF THE CONGO* v *RWANDA*) PROVISIONAL MEASURES, ORDER OF 1 JULY 2002[1]

A. Introduction

Since 1998, a war has ravaged one of Africa's largest countries, the Democratic Republic of the Congo ('DRC'). Africa's 'Great War' is said to have involved nine national armies and an unknown number of militia groups, and has reportedly claimed more lives than any other in the last four years. Estimates of the death toll range from 3 to 3.5 million. On 28 May 2002, the DRC instituted proceedings before the International Court of Justice ('the Court') against Rwanda alleging 'massive, serious and flagrant violations of human rights and international humanitarian law', and requested certain provisional measures.[2] On 10 July 2002, the Court rejected the DRC's request for provisional measures, as it considered that it did not have *prima facie* jurisdiction to determine the merits of the case.[3] However, the Court also rejected Rwanda's request that the case be removed from the list, as the Court considered that its lack of jurisdiction was not 'manifest'.[4] This note reviews the history of the conflict and the litigation, before considering the DRC's request for provisional measures and the grounds of jurisdiction upon which it sought to rely. The Order is then analysed, and this note concludes that the Court was right to reject the DRC's request, but it should have gone further and removed the case from the list.

B. Background to the Litigation

The conflict which has engulfed the DRC is very complex, and for present purposes, the background might be summarised as follows. The violence originated in 1994, when the genocide in neighbouring Rwanda saw close to one million Tutsis murdered by the Hutu-dominated Rwandan government. The genocide was brought to a halt when a Tutsi milita invaded from Uganda, causing the Hutus to move into Zaïre, which is today known as the DRC. The Hutus found shelter in Zaïre, and this encouraged Rwanda, Uganda and Burundi to send in forces. Several other foreign forces then intervened, including Zimbabwe, Angola and Namibia.[5]

The DRC originally instituted proceedings against Rwanda on 23 June 1999, when it requested the Court to adjudge and declare that Rwanda was guilty of acts of armed aggression, massacres, human rights abuses, that Rwanda was in violation of international humanitarian law, and that by shooting down a Boeing 727 of Congo Airlines,

[1] Thanks to Ben Olbourne, Christian J Tams, Catherine Tracey and Professor Malcolm Evans for their comments on an earlier draft of this note.

[2] *Armed Activities on the Territory of the Congo (New Application: 2002) (DRC v Rwanda) (Provisional Measures)*, Order of 10 Jul 2002, paras 1, 7. (Hereafter referred to as the 'Order'). All Court documents can be accessed at <http://www.icj-cij.org>.

[3] Order, paras 89, 94.

[4] Ibid, paras 91, 94.

[5] For background, see the information on the website of the Mission of the United Nations Organisation in the Democratic Republic of the Congo: <http://www.monuc.org>; and Georges Nzongola-Ntalaja, *The Congo — From Leopold to Kabila: A People's History* (2002).

Rwanda was in breach of civil aviation conventions. This Application was mirrored by substantially identical proceedings against both Uganda and Burundi. Despite the signing in July and August 1999 of the Lusaka Ceasefire Agreement, the violence soon resumed, and UN Security Council resolutions which urged the withdrawal of Rwandan troops were not heeded.[6] In January 2001 the new leader of the DRC, Joseph Kabila, agreed to a UN-supervised ceasefire, but troop withdrawals did not proceed as planned. Also in January 2001, the DRC discontinued the proceedings brought against Rwanda and Burundi (but not against Uganda).[7] The current proceedings, initiated on 28 May 2002 against Rwanda alone, are in large part similar to the 1999 Application.

Unlike the 1999 Application, in the 2002 Application the DRC also requested the indication of wide-ranging provisional measures, including that Rwanda and its agents and auxiliaries be required to cease and desist from all acts of aggression, human rights abuses and plundering of resources in the DRC, and the immediate withdrawal of Rwandan forces. It also requested the Court to adjudge and declare that Rwanda had violated several significant international human rights instruments; and that Rwanda must pay reparation to the DRC 'on account of the injury to persons, property, the economy and the environment as a result of . . . violations of international law'. In addition, the DRC requested the Court to order an embargo on the supply of arms to Rwanda and 'on [the natural resources] and assets deriving from the systematic plunder and illegal exploitation of the wealth of the [DRC] lying within its occupied part.'[8]

C. The DRC's Request for Provisional Measures

The Court's power to indicate provisional measures is found in Article 41 of the Court's Statute. In order for the Court to exercise its jurisdiction to indicate provisional measures, it is well established that several conditions must be satisfied; the first of these is that the Court must consider that it has *prima facie* jurisdiction over the merits of the case.[9] It is this condition which proved to be the stumbling block for the DRC.[10] Although Rwanda had not accepted the jurisdiction of the Court under Article 36(2) of the Statute, the DRC submitted that the Court had jurisdiction due to compromissory clauses in eight multilateral treaties. In its Order, the Court rejected each of the DRC's submissions. There were five species of objection made by Rwanda to the DRC's attempts to found the jurisdiction of the Court, which are now identified.

The first type of objection made by Rwanda to the grounds of jurisdiction invoked by the DRC concerned Article 22 of the 1966 *Convention on the Elimination of All Forms of Racial Discrimination*, and Article IX of the 1948 *Convention on the Prevention and Punishment of the Crime of Genocide*. These provisions allow for disputes concerning the interpretation or application of the relevant convention to be submitted to the Court at the request of any of the parties to the dispute. Rwanda had made reservations to these

[6] SC Res 1304 (15 June 2000); SC Res 1376 (9 Nov 2001); SC Res 1399 (19 Mar 2002).

[7] *Armed Activities on the Territory of the Congo (DRC v Rwanda)*, Order of 30 Jan 2001 ICJ Rep 2001, 6; *Armed Activities on the Territory of the Congo (DRC v Burundi)*, Order of 30 Jan 2001 ICJ Rep 2001, 3.

[8] Order, para 13.

[9] *Nuclear Tests* case *(Australia v France), Interim Protection* ICJ Rep 1973, 99, 101, [13]; *Nuclear Tests* case *(New Zealand v France), Interim Protection* ICJ Rep 1973, 135, 137, [14].

[10] Order, para 89.

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conventions, in which it stated that 'it did not consider itself as bound' by the dispute settlement provisions.[11] The DRC challenged the validity of both reservations, and argued that the effect of the reservations was to undermine the purpose of the treaties. The Court held that neither reservation was incompatible with the relevant convention's object and purpose, and accordingly, both were *prima facie* applicable.[12] With respect to the *Genocide Convention*, the Court held that even though 'the rights and obligations enshrined by the Convention are rights and obligations *erga omnes*', there was a distinction between the *erga omnes* character of an obligation and the rule of consent to jurisdiction.[13]

The second species of objection made by Rwanda related to the DRC's invocation of the compromissory clauses in the1979 *Convention on the Elimination of All Forms of Discrimination Against Women* (Article 29(1)), the 1971 *Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation* (Article 14), and the 1946 *Constitution of the World Health Organisation* (Article 75). Each of these provisions may found the jurisdiction of the Court, but they require the state invoking it first to attempt to resolve any dispute by other peaceful means, such as by negotiation or arbitration. Rwanda argued these preconditions had to be satisfied before the jurisdiction of the court could be 'founded, even on a *prima facie* basis', and submitted that the DRC had made 'no attempt whatever' to satisfy these conditions.[14] The DRC argued that in the absence of diplomatic relations, such attempts at negotiation would have been futile.[15] Rwanda, however, noted that frequent meetings had taken place between the two countries; it submitted that the DRC had had every opportunity to raise the issues addressed in the Application, but it had not done so.[16] The Court upheld Rwanda's submission with respect to *CEDAW* and the *WHO Constitution*.[17] In connection with *CEDAW*, the Court also noted that the DRC had not 'specified which rights … have allegedly been violated by Rwanda and should be the object of provisional measures.'[18] As regards the *Montreal Convention*, the Court simply found that as the DRC had not asked the Court to indicate any provisional measures relating to the preservation of rights under that convention, the Court was not required to rule on its jurisdiction under this instrument.[19]

Rwanda's third species of objection concerned the DRC's reliance on art XIV(2) of the 1945 *Constitution of UNESCO*, which provided for disputes to be referred to the Court. Rwanda argued that this instrument could not act as a basis of jurisdiction, as Article XIV referred only to disputes concerning the *interpretation*, not the application, of the Constitution. The Court agreed, finding that this did not appear to be the object of the DRC's Application, and upheld Rwanda's objection.[20]

The fourth type of objection made by Rwanda concerned the DRC's invocation of Article 30(1) of the 1984 *Convention against Torture and other Cruel, Inhuman or*

[11] Order, paras 65 and 69. [12] Ibid, para 67.

[13] Ibid, para 71, thus following the approach in *East Timor (Portugal v Australia)* ICJ Rep 1995, 90, para 29. The DRC also made two subsidiary arguments concerning the validity of the Rwandan reservation to the *Genocide Convention*; the Court rejected these with little discussion (para 72).

[14] Order, paras 43–4. [15] Ibid, para 44. [16] Ibid.

[17] Ibid, paras 79, 82.

[18] Ibid, para 79; but cf the Declaration of Judge Higgins who stated that it was not necessary for the DRC to have identified the provisions breached, and it was for Court itself to see whether the claims made by the Congo raised issues under the Convention.

[19] Ibid, para 88. [20] Ibid, para 85.

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Degrading Treatment or Punishment to found the jurisdiction of the Court. The Court disposed of this argument quickly; it found that Rwanda was not, and had never been, party to the convention, and it accordingly did not provide a basis of jurisdiction.[21]

Finally, the DRC submitted that as Rwanda was alleged to have breached *jus cogens* norms, the Court's jurisdiction could be founded on Article 66(a) of the 1969 *Vienna Convention on the Law of Treaties*, which provides for unilateral submission to the Court of disputes concerning conflicts between treaties and peremptory norms of international law. The Court also rejected this as a basis of jurisdiction, as there was no such dispute between the DRC and Rwanda.[22]

Having found that it lacked a *prima facie* basis of jurisdiction to determine the merits of the dispute, the Court rejected the DRC's request for provisional measures. However, the Court stopped short of acceding to Rwanda's request to remove the case from the list, stating that it could not do so 'in the absence of a manifest lack of jurisdiction'.[23] Judge *ad hoc* Mavungu filed a separate opinion, and Judge Elaraby a declaration, both disagreeing with the Order rejecting the DRC's request for provisional measures, whilst Judge *ad hoc* Dugard gave a separate opinion in which he held that the case should be removed from the list. Judges Buergenthal, Koroma and Higgins also appended declarations to the Order.

D. Comment on the Court's Order

In rejecting the DRC's request for provisional measures, the Court undoubtedly made the correct decision. The Court clearly lacked jurisdiction to order provisional measures on three grounds. First, the Court had no *prima facie* jurisdiction to determine the merits of the case. Second, the Court only has jurisdiction to order provisional measures which are 'needed to protect rights which might form the subject matter of a judgment under the treaty or treaties which the Court determines afford a *prima facie* basis for its jurisdiction'.[24] Even after a preliminary review of the measures requested, it can be seen that they clearly fall outside the scope of the subject-matter of the treaties relied on to found jurisdiction. None of the provisional measures requested, for instance, related to the preservation of specific rights under the *Montreal Convention*, *CEDAW* or the *WHO Constitution*. Judge *ad hoc* Mavungu, in his separate opinion, considered that the jurisdiction of the Court could be founded on 'at least two' of these conventions, but even he conceded that the contrast was 'striking' between the provisional measures requested and the instruments invoked to found the jurisdiction of the Court.[25] Third, the order sought by the DRC was arguably not an order for provisional measures, but rather an interim judgment on the merits. Provisional measures are intended to have a purely conservatory character, and preserve the rights of the parties pending the decision on the merits;[26] the request for reparations, embargoes and declarations that Rwanda had violated international law surely exceeded these boundaries.

Consequently, the Court was correct to reject the request for provisional

[21] Ibid, para 61. [22] Ibid, para 75. [23] Ibid, para 91.
[24] *Application of the Convention for the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v Yugoslavia) (Provisional Measures)* ICJ Rep 1993, 325, 342, paras 35–6.
[25] Separate opinion of Judge *ad hoc* Mavungu, para 80.
[26] *Factory at Charzów*, Order of 21 Nov 1927, PCIJ Ser A, No 12, 10.

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measures. While it is arguable that the preconditions of urgency and the need to prevent irreparable harm were satisfied—the humanitarian crisis and reports of systematic rape and mass killings are difficult to ignore—the Court simply did not have jurisdiction to indicate any provisional measures. All that the Court could do—and its power to do even this was questioned by Judge Buergenthal[27]—was to express its concern at 'the deplorable human tragedy, loss of life, and enormous suffering' in the DRC, emphasise that all parties 'must act in conformity with their obligations pursuant to the United Nations Charter and other rules of international law', and remind parties of the Security Council resolutions demanding 'all parties to the conflict put an . . . end to violations of human rights and international humanitarian law'.[28]

Two, related, issues raised by the Application are worth emphasising: the Rwandan arguments that the DRC was guilty of an 'abuse of the Court's process', and that the case should be removed from the list.[29] The argument relating to an 'abuse of process' stemmed from the fact that in the 1999 Application, the DRC had accused Burundi, Uganda and Rwanda of the same violations of international law, such as the shooting down of a Boeing 727 owned by Congo Airlines. Rwanda noted that there had been no 'indication whatever of the basis on which three different states were accused of one and the same action'.[30] In the present proceedings, the DRC again alleged that Rwanda had shot down the aircraft which was a subject and is still a subject, in the case of the proceedings against Uganda of the 1999 Application. This, according to Rwanda, was 'an abuse of process'.[31] While neither the Court's Statute nor its Rules include mention of this concept, such a finding by the Court might, as suggested by Rwanda, play a part in a decision to remove the case from the list, as is the case before the International Tribunal for the Law of the Sea ('ITLOS').[32] Rwanda recognised that its submission that the case be removed from the Court's list was an 'exceptional step', but relied on the Court's decisions in the *Legality of the Use of Force* cases brought by Yugoslavia against Spain and the United States in 1999 as a basis for making the request.[33] In those cases, the Court ordered that the cases be removed from the list, explaining that:

> the Court manifestly lacks jurisdiction to entertain Yugoslavia's Application . . . within a system of consensual jurisdiction, to maintain on the General List a case upon which it appears certain that the Court will not be able to adjudicate on the merits would most assuredly not contribute to the sound administration of justice.[34]

In the DRC's request, each of the grounds of jurisdiction relied upon have, thus far, proved to be *prima facie* baseless. In his separate opinion, Judge *ad hoc* Dugard stated that the '[t]he Applicant is clutching at straws to found jurisdiction in this matter', and concluded that '[t]he Court should show its displeasure for this strategy by striking the Application from the list.'[35] He noted the Court's reasoning in the *Legality of Use of Force* cases, and observed that the Court had not expounded 'any general test for

[27] Declaration of Judge Buergenthal; cf Declaration of Judge Koroma.
[28] Order, paras 54, 56, 93.
[29] Ibid, paras 49–50.
[30] Verbatim Record, 13 June 2002, 3:00 pm, 24.
[31] Order, para 49.
[32] See 1982 *United Nations Convention on the Law of the Sea*, Art 294.
[33] Verbatim Record, 13 June 2002, 3:00 pm, 28.
[34] *Legality of the Use of Force (Yugoslavia v Spain) (Provisional Measures)* ICJ Rep 1999, 761, paras 35, 40(2); *Legality of the Use of Force (Yugoslavia v US)* ICJ Rep 1999, 916, paras 29, 34(2).
[35] Separate Opinion of Judge *ad hoc* Dugard, para 12.

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deciding when it "manifestly" lacked jurisdiction'.[36] Judge *ad hoc* Dugard suggested a test of 'reasonableness', such that a case should be removed from the list where there was

> no reasonable possibility, based on the facts and circumstances of the unsuccessful Application, that the Applicant will at some future date be able to establish the jurisdiction of the Court on the instruments invoked for jurisdiction in the Application for provisional measures.'[37]

This seems to be a useful guide for future requests that cases be removed from the Court's list at the provisional measures stage. Given that none of the grounds of jurisdiction relied on by the DRC appear to afford a basis of jurisdiction , as was the case in the *Legality of Use of Force* cases, it is hard to imagine that there is a 'reasonable possibility' that the Application will be able to progress much further.

A final point might also be noted. In his declaration, Judge Elaraby argued that the Court should, in principle, grant requests for provisional measures whenever there was an urgent need coupled with the likelihood of irreparable prejudice to the interests of the parties. In his separate opinion, Judge *ad hoc* Dugard stressed the need for a cautious approach given that provisional measures are, following the *LaGrand* case,[38] binding on the parties. The more cautious approach has prevailed, and should this set the pattern for the future, the *LaGrand* decision might yet become something of a pyrrhic victory for the proponents of provisional measures.

E. Conclusion

The Court made the right decision to reject the DRC's request for provisional measures, but it was a little over-cautious in rejecting Rwanda's request for the case to be removed from the list. Although the Court's Statute lacks any reference to the concept of 'abuse of process' or removing a case from the list, it appears that the DRC's Application was little more than an attempt to use the Court as a forum for mobilising public opinion. It is unlikely that this dispute will be resolved by adjudication; the DRC's inability to identify any disputes with respect to the eight conventions relied upon for jurisdictional purposes is indicative of the prospects of judicial settlement. On 30 July 2002, a peace agreement was reached between the DRC and Rwanda.[39] Although the violence has not halted completely,[40] such diplomatic efforts are more likely to bring an end to Africa's 'Great War'.

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[36] Ibid, para 5. [37] Ibid, para 6.

[38] *LaGrand* (*Germany v United States of America*), Judgment, ICJ Rep 2001, 466, paras 92–116. For comment see Martin Mennecke and Christian J Tams, '*LaGrand* Case (*Germany v United States of America*)' (2002) 51 *ICLQ* 449.

[39] 'Congo and Rwanda Sign Peace Deal', BBC News, 30 July 2002 at <http://news.bbc.co.uk/1/hi/world/Africa/2160522.stm>.

[40] 'DR Congo–Rwanda Peace Deal under Threat' BBC News, 23 Aug 2002 at <http://news.bbc.co.uk/1/hi/world/Africa/2211862.stm>.

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