

## SEPARATE OPINION OF JUDGE KOROMA

*Doubts about the Order — Wider ramifications of dispute in the light of legal principles and changed circumstances — Application not without merit — Requirements for indication of provisional measures — Risk of injury — Its amelioration by change of functions — Whether rights of the Democratic Republic of the Congo were affected — Legal issues to be addressed if matter gets to the merits.*

I voted in favour of this Order, not without some doubts and hesitations, because of the wider ramifications surrounding the case itself and the legal principles involved. The case involves fundamental principles of law, national and wider community interests and, not least, the circumstances which arose since the Court became seised of the Application for provisional measures.

Given the competing legal principles and the prevailing circumstances, the request by the Applicant for the indication of provisional measures, in order to preserve its rights, cannot be judged to be without merit, let alone “moot”, without object or frivolous. There are serious issues which would require adjudication should the matter reach the merits phase.

Flowing from its Statute and its jurisprudence, the Court will grant a request for an interim measure of protection if a dispute exists and if the requirements of urgency and likelihood of irreparable harm to the parties’ rights or interests are established. In other words, the Court will indicate provisional measures where a dispute exists between the parties and the requirements of urgency and irretrievable damage are present and real.

According to the Application, both the existence and execution of the international warrant — the subject-matter of the dispute — would not only have an adverse effect on Mr. Yerodia Ndombasi in the performance of his functions as Foreign Minister, but will also cause irretrievable damage to his rights. In my view, the risk of that happening could not be said not to have existed. But that risk notwithstanding, Mr. Ndombasi ceased to be entrusted with the portfolio of Foreign Minister, as a result of a Cabinet reshuffle in Kinshasa. This development could not have been without significance for the Court in determining whether or not to grant the request for provisional measures as far as Mr. Ndombasi was concerned. The Court, rightly, in my view, took judicial cognizance of this development, as it was part of the case of the Democratic Republic of the Congo that the existence of the arrest warrant prevented

Mr. Ndombasi from performing his functions as Foreign Minister, which in turn ran the risk of having a negative impact on the rights of the Democratic Republic of the Congo in the conduct of its foreign policy. The Court concluded that, with Mr. Ndombasi no longer serving as Foreign Minister, the urgency which had attended his functions as Foreign Minister had become somewhat diminished or reduced. While it is not unreasonable to reach this conclusion as far as Mr. Ndombasi is concerned, I wonder if this response is adequate as far as the sovereign rights of the Congo as sovereign State are concerned. I also entertain some doubts regarding the extent of the injury which may have been caused to the interests of the Democratic Republic of the Congo as a result of the issue of the warrant and the international responsibility of the Kingdom of Belgium for this.

Finally, the Order also acknowledges the willingness of the Parties to act in good faith, in addressing the difficulties caused by the issuance of the arrest warrant with a view to achieving a resolution of the dispute, if called upon to do so by the Court. In my view, the Court should have embodied this plea within the confines of the Order. The jurisprudence of this Court, as well as that of its predecessor, the Permanent Court, has made exhortatory calls on parties not to take steps capable of prejudicing the rights claimed or of aggravating the dispute submitted to the Court (*Electricity Company of Sofia and Bulgaria, Judgment, 1939, P.C.I.J., Series A/B, No. 79, p. 199*). A similar call would, in my view, have been useful and in accordance with the judicial function of the Court.

Against this background, and in view of the importance of the legal issues involved, the Court's finding that the object of the claim has not disappeared, together with its decision to consider the case with the utmost despatch, is both judicious and appropriate under the circumstances.

(Signed) Abdul G. KOROMA.

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