

ARMED ACTIVITIES ON THE TERRITORY OF THE CONGO (DEMOCRATIC REPUBLIC OF THE CONGO v. UGANDA) (PROVISIONAL MEASURES)

Order of 1 July 2000

In an order issued in the case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), the Court unanimously held that “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 render in the case, or which might aggravate or extend the dispute before the Court or make it more difficult to resolve”.

The Court unanimously added that “both Parties must, forthwith, take all measures necessary to comply with all of their obligations under international law, in particular those under the United Nations Charter and the Charter of the Organization of African Unity, and with United Nations Security Council resolution 1304 (2000) of 16 June 2000”.

Finally, it unanimously stated that “both Parties must, forthwith, take all measures necessary to ensure full respect within the zone of conflict for fundamental human rights and for the applicable provisions of humanitarian law”.

The Court was composed as follows: President Guillaume; Judges Oda, Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal; Registrar Couvreur.

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The full text of the operative text of the Order reads as follows:

“47. For these reasons,

THE COURT,

Indicates, pending a decision in the proceedings instituted by the Democratic Republic of the Congo against the Republic of Uganda, the following provisional measures:

(1) Unanimously,

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 render in the case, or which might aggravate or extend the dispute before the Court or make it more difficult to resolve;

(2) Unanimously,

Both Parties must, forthwith, take all measures necessary to comply with all of their obligations under international law, in particular those under the United Nations Charter and the Charter of the Organization of African Unity, and with United Nations Security Council resolution 1304 (2000) of 16 June 2000;

(3) Unanimously,

Both Parties must, forthwith, take all measures necessary to ensure full respect within the zone of conflict for fundamental human rights and for the applicable provisions of humanitarian law.”

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Judges Oda and Koroma appended declarations to the Order.

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History of the proceedings and submissions of the Parties
(paras. 1-17)

On 23 June 1999, the Congo instituted proceedings against Uganda in respect of a dispute concerning “acts of *armed aggression* perpetrated by Uganda on the territory of the Democratic Republic of the Congo, in flagrant violation of the United Nations Charter and of the Charter of the Organization of African Unity”;

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In the Application the Congo founds the jurisdiction of the Court on the declarations made by the two States under Article 36, paragraph 2, of the Statute. It requests the Court to:

“Adjudge and declare that:

(a) Uganda is guilty of an act of aggression within the meaning of Article 1 of resolution 3314 of the General Assembly of the United Nations of 14 December 1974 and of the jurisprudence of the International Court of Justice, contrary to Article 2, paragraph 4, of the United Nations Charter;

(b) further, Uganda is committing repeated violations of the Geneva Conventions of 1949 and their Additional Protocols of 1977, in flagrant disregard of the elementary rules of international humanitarian law in conflict zones, and is also guilty of massive human rights violations in defiance of the most basic customary law;

(c) more specifically, by taking forcible possession of the Inga hydroelectric dam, and deliberately and regularly causing massive electrical power cuts, in violation of the provisions of Article 56 of the Additional Protocol of 1977, Uganda has rendered itself responsible for very heavy losses of life among the 5 million inhabitants of the city of Kinshasa and the surrounding area;

(d) by shooting down, on 9 October 1998 at Kindu, a Boeing 727 the property of Congo Airlines, thereby causing the death of 40 civilians, Uganda has also violated the Convention on International Civil Aviation signed at Chicago on 7 December 1944, the Hague Convention of 16 December 1970 for the Suppression of Unlawful Seizure of Aircraft and the Montreal Convention of 23 September 1971 for the Suppression of Unlawful Acts against the Safety of Civil Aviation.

Consequently, and pursuant to the aforementioned international legal obligations, to adjudge and declare that:

(1) all Ugandan armed forces participating in acts of aggression shall forthwith vacate the territory of the Democratic Republic of the Congo;

(2) Uganda shall secure the immediate and unconditional withdrawal from Congolese territory of its nationals, both natural and legal persons;

(3) the Democratic Republic of the Congo is entitled to compensation from Uganda in respect of all acts of looting, destruction, removal of property and persons and other unlawful acts attributable to Uganda, in respect of which the Democratic Republic of the Congo reserves the right to determine at a later date the precise amount of the damage suffered, in addition to its claim for the restitution of all property removed”.

On 19 June 2000 the Congo submitted to the Court a request for the indication of provisional measures by which it asked the Court to indicate as a matter of urgency the following provisional measures:

“(1) the Government of the Republic of Uganda must order its army to withdraw immediately and completely from Kisangani;

(2) the Government of the Republic of Uganda must order its army to cease forthwith all fighting or military activity on the territory of the Democratic Republic of the Congo and to withdraw immediately and completely from that territory, and must forthwith desist from providing any direct or indirect support to any State, group, organization, movement or individual engaged or preparing to engage in military activities on the territory of the Democratic Republic of the Congo;

(3) the Government of the Republic of Uganda must take all measures in its power to ensure that units, forces or agents which are or could be under its authority, or which enjoy or could enjoy its support, together with organizations or persons which could be under its control, authority or influence, desist forthwith from committing or inciting the commission of war crimes or any other oppressive or unlawful act against all persons on the territory of the Democratic Republic of the Congo;

(4) the Government of the Republic of Uganda must forthwith discontinue any act having the aim or effect of disrupting, interfering with or hampering actions intended to give the population of the occupied zones the benefit of their fundamental human rights, and in particular their rights to health and education;

(5) the Government of the Republic of Uganda must cease forthwith all illegal exploitation of the natural resources of the Democratic Republic of the Congo and all illegal transfer of assets, equipment or persons to its territory;

(6) the Government of the Republic of Uganda must henceforth respect in full the right of the Democratic Republic of the Congo to sovereignty, political independence and territorial integrity, and the fundamental rights and freedoms of all persons on the territory of the Democratic Republic of the Congo.

The Democratic Republic of the Congo would, at all events, respectfully remind the Court of the powers conferred upon it by Article 41 of its Statute and Article 75 of the Rules of Court, which authorize it in the present case to indicate all such provisional measures as it may deem necessary in order to bring to an end the intolerable situation which continues to obtain in the Democratic Republic of the Congo, and in particular in the Kisangani region”.

By letters dated 19 June 2000, the President of the Court addressed the Parties in the following terms.

“Acting in conformity with Article 74, paragraph 4, of the Rules of Court, I hereby draw the attention of both Parties to the need to act in such a way as to enable any Order the Court will make on the request for provisional measures to have its appropriate effects”.

Hearings were held on 26 and 28 June 2000.

Arguments of the Parties
(paras. 18-31)

The Court observes that at the hearings the Congo essentially reiterated the line of argument developed in its Application and in its request for the indication of provisional measures; citing the Court's jurisprudence, it argued more particularly that the requirements of urgency and of the risk of irreparable damage, conditions precedent for the indication of provisional measures, were satisfied in the present cases; adding that "[w]hen an armed conflict develops and endangers not only the rights and interests of the State but also the lives of its inhabitants, the urgency of provisional measures and the irreparable nature of the damage cannot be in doubt". The Congo further observed that "the fact that certain Ugandan high authorities have officially stated that they agree to withdraw their forces from the Kisangani region and that the beginnings of a withdrawal have in fact taken place can ... in no way call into question" the need for the indication of measures as a matter of urgency, and that "these statements [did not] concern ... the whole of Congolese territory"; the Congo also contended that there was "a sufficient connection between the measures requested and the rights protected"; it stated, on the basis of a comparison of the text for the request of the indication of provisional measures with that of the Application instituting the proceedings, that the "categories of act referred to are similar" and that the "rules of law applicable are similar"; the Congo further contended that the Court has *prima facie* jurisdiction "to entertain the dispute which is the subject matter of the Application", having regard to the declarations of acceptance of its compulsory jurisdiction deposited by the two Parties. The Congo stated finally that "[t]here is nothing in the political and diplomatic context of the present case which might prevent the Court from taking the measures which the circumstances require"; it pointed out that "the Security Council has adopted a resolution — resolution 1304 of 16 June 2000 — in which it was demanded that Uganda withdraw its forces not only from Kisangani but from all Congolese territory, without further delay"; and, referring to the Court's jurisprudence, it argued that "[i]t is not ... possible to derive from [the] parallel powers of the Security Council and of the Court any bar to the exercise by the latter of its jurisdiction".

Uganda, at the hearings, pointed out that Ugandan forces entered Eastern Congo in May 1997 at the invitation of Mr. Kabila, to work in collaboration with his forces to arrest the activities of the anti-Uganda rebels. Ugandan forces remained in Eastern Congo after Mr. Kabila became President, again at his invitation. This arrangement with President Kabila was formalized by written agreement dated 27 April 1998; Uganda added that it "has no territorial interests in the Democratic Republic of the Congo", that "[t]here is a complete political vacuum in Eastern Congo" and that "[t]here is no one else to restrain the anti-Uganda rebels or guarantee the security of Uganda's border"; Uganda further explained that "on its part, [it] has endeavoured to fulfil all its obligations laid down in the

Lusaka Agreement", concluded between the parties to the conflict and aimed at resolving the conflict and establishing a framework for peace in the region; that "both the Application and the request for provisional measures are based on preposterous allegations that are not backed by any evidence whatsoever before this Court"; and that "in the circumstances the request of the Democratic Republic of the Congo is inadmissible, this for the reason that as a matter of law the Court is prevented from exercising its powers under Article 41 of the Statute", because "the subject matter of the request for interim measures is essentially the same as the matters addressed by ... Security Council resolution [1304] of 16 June [2000]". Uganda argued in the alternative that "even if the Court had a *prima facie* competence by virtue of Article 41, there are concerns of propriety and judicial prudence which strongly militate against the exercise of the discretion which the Court has in the indication of interim measures". Uganda further argued that there was an "absence of any clear link between the request and the original claim", and that "the [Congo's] request [fails to satisfy] the requirement of urgency or the risk of irreparable damage" and that there cannot "be an element of urgency after the Congo has waited for almost a year before making a complaint".

Uganda finally stated that "the Lusaka Agreement is a comprehensive system of public order", "a binding international agreement that constitutes the governing law between and among the parties to the conflict"; that "[t]he Security Council and the Secretary-General have repeatedly declared that [this] Agreement is the only viable process for achieving peace within the Democratic Republic of the Congo and for achieving peace between the Democratic Republic of the Congo and its neighbours"; and that "the specific interim measures requested by Congo directly conflict with the Lusaka Agreement, and with the Security Council resolutions — including resolution 1304 ... — calling for implementation of the Agreement".

The Court's reasoning
(paras. 32-46)

The Court notes that the two Parties have each made a declaration recognizing the jurisdiction of the Court in accordance with Article 36, paragraph 2, of the Statute; Uganda on 3 October 1963 and the Congo on 8 February 1989; neither of the two declarations includes any reservation. The Court therefore considers that those declarations constitute a *prima facie* basis upon which its jurisdiction in the present case might be founded.

The Court takes note that in its request for the indication of provisional measures, the Congo refers to resolution 1304 (2000), adopted by the Security Council under Chapter VII of the United Nations Charter on 16 June 2000; the text of the said resolution is then quoted in full. The Court further notes Uganda's argument that the Congo's request for the indication of provisional measures concerns essentially the same issues as this resolution; that the said request is accordingly inadmissible; and that the request is, moreover, moot, since Uganda fully accepts the resolution in question

and is complying with it. It observes, however, that Security Council resolution 1304 (2000), and the measures taken in its implementation, do not preclude the Court from acting in accordance with its Statute and with the Rules of Court, recalling that

“while there is in the Charter

“a provision for a clear demarcation of functions between the General Assembly and the Security Council, in respect of any dispute or situation, that the former should not make any recommendation with regard to that dispute or situation unless the Security Council so requires, there is no similar provision anywhere in the Charter with respect to the Security Council and the Court. 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”.

The Court then observes that in the present case the Security Council has taken no decision which would *prima facie* preclude the rights claimed by the Congo from “be[ing] regarded as appropriate for protection by the indication of provisional measures”; nor does the Lusaka Agreement, to which Security Council resolution 1304 (2000) refers and which constitutes an international agreement binding upon the Parties, preclude the Court from acting in accordance with its Statute and with the Rules of Court. Neither is the Court precluded from indicating provisional measures in a case merely because a State which has simultaneously brought a number of similar cases before the Court seeks such measures in only one of them; and 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.

The Court then observes that its power to indicate provisional measures under Article 41 of the Statute has as its object to preserve the respective rights of the parties pending the decision of the Court, and presupposes that irreparable prejudice shall not be caused to rights which are the subject of dispute in judicial proceedings; and that the rights which, according to the Congo’s Application, are the subject of the dispute are essentially its rights to sovereignty and territorial integrity and to the integrity of its assets and natural resources, and its rights to respect for the rules of international humanitarian law and for the instruments relating to the protection of human rights.

The Court notes that, it is not disputed that Ugandan forces are present on the territory of the Congo, that fighting has taken place on that territory between those forces and the forces of a neighbouring State, that the fighting has caused a large number of civilian casualties in addition to substantial material damage, and that the humanitarian situation remains of profound concern; and that it is also not disputed that grave and repeated violations of human rights and international humanitarian law, including massacres and other atrocities, have been committed on the territory of the Democratic Republic of the Congo. In the circumstances,

the Court is of the opinion that persons, assets and resources present on the territory of the Congo, particularly in the area of conflict, remain extremely vulnerable, and that there is a serious risk that the rights at issue in this case may suffer irreparable prejudice. The Court consequently considers that provisional measures must be indicated as a matter of urgency in order to protect those rights; it observes 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. Having regard to the information at its disposal, and in particular the fact that the Security Council has determined, in its resolution 1304 (2000), that the situation in the Congo “continues to constitute a threat to international peace and security in the region”, the Court is of the opinion that there exists a serious risk of events occurring which might aggravate or extend the dispute or make it more difficult to resolve.

Declaration of Judge Oda

Judge Oda voted in favour of the Court’s Order only because he could not but agree that, in order to restore peace in the region, the measures indicated by the Court in this Order should be taken by the Parties — measures on which few would ever disagree. He believes, however, that the Court is *not* in a position at this time to grant provisional measures for the reason that the present case, brought unilaterally against Uganda on 23 June 1999, is — and has from the outset been — *inadmissible*.

Judge Oda suggests that the mere allegation by the Applicant that there has been “armed aggression” perpetrated by the Respondent in its territory does not mean that *legal disputes* exist between these Parties concerning (i) the alleged breach of the Applicant’s rights by the Respondent or the alleged failure of the Respondent to observe its international legal obligations to the Applicant, and (ii) the denial by the Respondent of the Applicant’s allegations. The Applicant in this case did not, in its Application, show us that both Parties had attempted to identify the *legal disputes* existing between them and to resolve those disputes by negotiation. Without such a mutual effort by the Parties, a mere allegation of armed aggression cannot be deemed suitable for judicial settlement by the Court.

Judge Oda points out that the United Nations Charter provides for the settlement, through the Security Council, of disputes raising issues of armed aggression and threats to international peace of the type seen in the present case. In fact, the Security Council, as well as the Secretary-General acting on its instructions, has made every effort over the past several years to ease the situation and restore peace in the region.

Judge Oda contends that the Application in the present case is inadmissible and believes that the present case lacks, even *prima facie*, the element of admissibility. The jurisprudence of the Court shows that judgments rendered by the Court and provisional measures indicated by it in advance of the merits phase have not necessarily been complied with by the respondent States or by the parties. If

Declaration of Judge Koroma

the Court agrees to be seized of the application or request for the indication of provisional measures of one State in such circumstances, then the repeated disregard of the judgments or orders of the Court by the parties will inevitably impair the dignity of the Court and raise doubt as to the judicial role to be played by the Court in the international community.

Judge Oda recalls that it is a principle that the Court's jurisdiction is founded on the consent of the States parties to the dispute and that declarations under the optional clause accepting the Court's compulsory jurisdiction may be made only if they arise from the bona fide will of the State. If the Court admits applications or grants requests for provisional measures, he is afraid that States that have accepted the compulsory jurisdiction of the Court under Article 36, paragraph 2, of the Court's Statute will be inclined to withdraw their declarations, and fewer States will accede to the compromissory clauses of multilateral treaties.

The fact that a State appearing before the Court in this case is not represented by a person holding high office in the Government acting as Agent (and such a situation has rarely been encountered in the history of the Court) reinforces Judge Oda's feeling that a question arises here as to whether the case is brought to the Court in the interest of the State involved or for some other reason.

In his declaration Judge Koroma stated that the Court had recognized and taken judicial notice that since the latest outbreak of conflict in the area between foreign troops, hundreds of Congolese have been killed and thousands wounded and the destruction of national assets had also taken place on a massive scale. It was, therefore, considered that unless urgent measures were taken the rights of the population might be further imperilled. He further stated that while the Order acknowledged that Security Council resolution 1304 (2000) of 16 June 2000 had called on *all* parties to cease hostilities, the Court, as a court of law, had to make its own determination of the events to see whether an order was warranted which should be cast in accordance with judicial norms. He then stated that the Order must, therefore, be seen in the light of Article 59 of the Statute of the Court and Article 94 of the United Nations Charter. He also considered the Order as part of the process of the judicial settlement of the dispute and of special significance to the Parties, who should refrain from any action which might aggravate or extend the dispute. He concluded by stating that the Order in no way prejudged the facts or merits of the case.