

DECLARATION OF JUDGE BUERGENTHAL

Language of paragraphs 54 through 56 and 93 inappropriate — Absence of jurisdiction to address subject-matter — Text gives credence, whether intended or not, to claims of one Party — Court’s powers limited to exercise of judicial functions — “Feel-good” provisions not within scope of jurisdiction.

1. I agree with the Court’s decision rejecting the Democratic Republic of the Congo’s request for provisional measures as well as the decision not to remove the case from the Court’s List.

2. My purpose in appending this declaration to the instant Order is to express my disagreement with the inclusion in the Court’s Order of the language found in paragraphs 54-56 and 93. My objection to these paragraphs is not to the high-minded propositions they express. Instead, I consider that they deal with matters the Court has no jurisdiction to address once it has ruled that it lacks prima facie jurisdiction to issue the requested provisional measures.

3. These paragraphs read as follows:

“54. Whereas the Court is deeply concerned by the deplorable human tragedy, loss of life, and enormous suffering in the east of the Democratic Republic of the Congo resulting from the continued fighting there;

55. Whereas the Court is mindful of the purposes and principles of the United Nations Charter and of its own responsibilities in the maintenance of peace and security under the Charter and the Statute of the Court;

56. Whereas the Court finds it necessary to emphasize that all parties to proceedings before it must act in conformity with their obligations pursuant to the United Nations Charter and other rules of international law, including humanitarian law; whereas the Court cannot in the present case over-emphasize the obligation borne by the Congo and Rwanda to respect the provisions of the Geneva Conventions of 12 August 1949 and of the first Protocol additional to those Conventions, of 8 June 1977, relating to the protection of victims of international armed conflicts, to which instruments both of them are parties;

.
93. Whereas, 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; whereas in particular they are

required to fulfil their obligations under the United Nations Charter; whereas the Court cannot but note in this respect that the Security Council has adopted a great number of resolutions concerning the situation in the region, in particular resolutions 1234 (1999), 1291 (2000), 1304 (2000), 1316 (2000), 1323 (2000), 1332 (2000), 1341 (2001), 1355 (2001), 1376 (2001), 1399 (2002) and 1417 (2002); whereas the Security Council has demanded on many occasions that 'all the parties to the conflict put an . . . end to violations of human rights and international humanitarian law'; and whereas it has *inter alia* reminded 'all parties of their obligations with respect to the security of civilian populations under the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949', and added that 'all forces present on the territory of the Democratic Republic of the Congo are responsible for preventing violations of international humanitarian law in the territory under their control'; whereas the Court wishes to stress the necessity for the Parties to these proceedings to use their influence to prevent the repeated grave violations of human rights and international humanitarian law which have been observed even recently."

4. The Court's function is to pronounce itself on matters within its jurisdiction and not to voice personal sentiments or to make comments, general or specific, which, despite their admittedly "feel-good" qualities, have no legitimate place in this Order.

5. Who, for example, would not be "deeply concerned by the deplorable human tragedy, loss of life, and enormous suffering in the east of the Democratic Republic of the Congo resulting from the continued fighting there"? (Order, para. 54.) But the expression of this concern in a formal Order of the Court presupposes that the Court has the requisite jurisdiction to deal with that subject-matter. Having determined that it lacks that jurisdiction, it should not pronounce itself with regard to that subject-matter.

6. In paragraph 55, the Court declares that it "is mindful of the purposes and principles of the United Nations Charter and of its own responsibilities in the maintenance of peace and security under the Charter". Of course, how could it be otherwise? But what is the point of this statement? Is it an *apologia* for the Court's lack of jurisdiction to do what it would like to do in this case? If so, I wonder whether it is appropriate. But more importantly, the Court's own "responsibilities in the maintenance of peace and security under the Charter" are not general. They are strictly limited to the exercise of its judicial functions in cases over which it has jurisdiction. In making the above statement, the Court is not performing these functions because of its lack of jurisdiction. The paragraph reads like a preamble to a resolution of the United Nations

General Assembly or Security Council, where it would be entirely appropriate. It is not in this Order.

7. As for paragraph 56, the fact that this statement is even-handed in that it addresses both Parties to the case does not make it any more appropriate than it would be if it had been addressed to only one of them. It is inappropriate, first, because the Court has no jurisdiction in this case to call on the States parties to respect the Geneva Conventions or the other legal instruments and principles mentioned in the paragraph. Second, since the request for preliminary measures by the Democratic Republic of the Congo sought a cessation by Rwanda of activities that might be considered to be violations of the Geneva Conventions, the Court's pronouncement in paragraph 56 can be deemed to lend some credence to this claim.

8. This latter conclusion is strengthened by the language of paragraph 93, which bears close resemblance to the language the Court would use if it had granted the provisional measures request. The fact that the paragraph is addressed to both Parties is irrelevant, for in comparable circumstances the Court has issued provisional measures formulated in similar language addressed to both Parties although they were requested by only one of them. See, for example, *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, para. 47. Besides, the Court lacks jurisdiction in this case to address this appeal to both Parties every bit as much as it would were it to address it to only one of them.

9. Whether intended or not, the Court's pronouncements in the foregoing paragraphs, particularly in paragraphs 56 and 93, might be deemed to lend credence to the factual allegations submitted by the Party seeking the provisional measures. In the future, they might also encourage States to file provisional measures requests, knowing that, despite the fact that they would be unable to sustain the burden of demonstrating the requisite prima facie jurisdiction, they would obtain from the Court some pronouncements that could be interpreted as supporting their claim against the other Party.

10. The foregoing reasons lead me to the conclusion that it was not proper as a matter of law for the Court to include the above paragraphs in this Order.

(Signed) Thomas BUERGENTHAL.