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The International Court of Justice and Recent Orders on Provisional Measures

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I. INTRODUCTION

In a speech to the General Assembly of the United Nations on 4 November 2004, Judge Shi Jiuyong, the President of the International Court of Justice, noted that since August 2003, the "level of activity [of the Court] is unprecedented in [its] history".[1] An important element of this activity has seen the Court being called upon to increasingly interpret and apply the law governing the indication of provisional measures. Indeed the Court recently saw fit to alter one of its Practice Directions in light of "the increasing tendency of parties to request the indication of provisional measures".[2] This trend is due partly to especially complex factual circumstances that have given rise to recent proceedings instituted before the Court, and partly to a growing recognition of the more immediate role that states perceive the Court as being able to play in inter-state disputes. This is particularly so where the circumstances call for prompt action.

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[1] See International Court of Justice, "The International Court of Justice is capable of 'reacting urgently and efficiently', President Shi tells United Nations General Assembly" (Press Release 2004/32, 4 November 2004).

[2] See International Court of Justice, "The International Court of Justice takes measures for increasing its productivity" (Press Release 2004/30, 30 July 2004) that discusses *inter alia* an amendment to Practice Direction XI.

In recent years, the Republic of the Congo has on two separate occasions made an application for an indication of provisional measures. The applications were considered by the Court in *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the D.R.C. v. Rwanda)*[3] and *Certain Criminal Proceedings in France (Republic of the Congo v. France).*[4] In both cases, the Applicant's requests for provisional measures were unsuccessful but for different reasons. Mexico has also recently made a similar application in *Avena and other Mexican Nationals (Mexico v. United States).*[5] This request was granted but the measures indicated by the Court were limited to specific circumstances considerably narrower than those sought by the applicant.

This article will review these three applications and present some observations on the Court's use of its powers to indicate provisional measures and on how this power should be used in the future.

II. THE CASES

In *D.R.C. v. Rwanda,* the Democratic Republic of the Congo alleged that Rwanda was internationally responsible for "massive, serious and flagrant violations of human rights and of international humanitarian law" in the territory of the D.R.C. and in breach of its sovereignty and territorial integrity. The D.R.C. based its claims principally on alleged breaches by Rwanda of international law found under several significant conventions, including the Charter of the United Nations[6] and the 1948 Genocide Convention.[7] The D.R.C. requested that the Court order the immediate and unconditional withdrawal of Rwanda's armed forces from the Congo

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[3] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the D.R.C. v. Rwanda) (Request for Provisional Measures)* (2002) 41 I.L.M. 1175.

[4] *Certain Criminal Proceedings in France (Republic of the Congo v. France) (Request for the Indication of a Provision Measure)* (2003) 42 I.L.M. 852.

[5] *Avena and Other Mexican Nationals (Mexico v. United States of America) (Request for Provisional Measures)* (2004) 42 I.L.M. 309.

[6] *Charter of the United Nations*, opened for signature 26 June 1945, 892 U.N.T.S. 119 (entered in force 24 October 1945).

[7] *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 78 U.N.T.S. 277 (entered in force 12 January 1951).

territory in addition to the payment of compensation for damage and removal of property imputable to Rwanda.[8]

In *Mexico v. United States,* Mexico alleged that the United States had breached Article 36(1) (b) of the 1963 Vienna Convention on Consular Relations[9] when its officials did not inform 54 Mexican nationals on death row in the United States of their rights under the Convention. During the proceedings, the United States admitted that this was correct in some of the cases. It also became clear that three Mexicans (Reyna, Ramos and Aguilera) faced imminent execution, possibly within weeks or months. Mexico claimed that the United States had violated its international legal obligations to Mexico both in Mexico's own right and in its right to protect its nationals under Articles 5 and 36 respectively of the Vienna Convention. As a result, Mexico requested the Court to order the United States to prevent the execution of Mexican nationals pending final judgment on the merits of the case.[10]

In *Congo v. France*, the Republic of the Congo alleged that France was internationally responsible for violating the principle of sovereign equality when France exercised its authority on the territory of the Congo. The Congo claimed that France had done this by unilaterally "attributing to itself universal jurisdiction in criminal matters and by arrogating to itself the power to prosecute and try" the President of the Congo and other

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[8] Ibid. The D.R.C. had, on 23 June 1999, brought an earlier claim against Rwanda (*Armed Activities on the Territory of the Congo (D.R.C. v. Rwanda)*), Burundi (*Armed Activities on the Territory of the Congo (D.R.C. v. Burundi)*) and Uganda (*Armed Activities on the Territory of the Congo (D.R.C. v. Uganda)*) before the International Court of Justice. On 30 January 2001, at the request of the D.R.C., the proceedings against Rwanda and Burundi respectively were discontinued: see International Court of Justice, "*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Burundi) and (Democratic Republic of the D.R.C. v. Rwanda)*: The two cases are removed from the List at the request of the Democratic Republic of the Congo" (Press Release 2001/02, 1 February 2001). The date of the public hearings in the proceedings against Uganda, originally set down to open on 10 November 2003, was postponed and has not been rescheduled at the time of writing this article: see International Court of Justice, "*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*: The public hearings scheduled to open on Monday 10 November 2003 have been postponed" (Press Release 2003/39, 7 November 2003).

[9] *Vienna Convention on Consular Relations*, opened for signature 18 April 1961, 59 U.N.T.S. 261 (entered in force 19 March 1967).

[10] *Mexico v. United States*, above n. 5, para. 18.

Congolese nationals for alleged crimes against humanity and torture under the French Code of Criminal Procedure.[11] The Congo also claimed that this process violated the criminal immunity of a foreign head of state. The dispute had arisen after the French judicial authorities had instituted investigation and prosecution measures following a complaint lodged against certain Congolese nationals for their actions. Consequently, the Congo sought "an order for the immediate suspension of the proceedings being conducted [in France] by the investigating judge" against the President and the others.[12]

III. JURISDICTION

It is a fundamental principle underpinning the competence of the International Court of Justice that it cannot deal with a particular matter unless all the parties concerned have submitted to its jurisdiction. This underscores the consensual nature of its jurisdiction as required by Articles 36-37 of the Court's Statute.[13] In the context of proceedings on the merits, this principle has been determinative of a number of cases, including *Portugal v. Australia*,[14] where the Court concluded that it could not proceed with the case since it would involve a determination of a third party's (in this case, Indonesia's) actions without that party having consented to the Court's jurisdiction.[15] The Court confirmed, "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".[16]

This principle applies equally in situations where an applicant is seeking an indication of provisional measures from the Court, which by definition takes place even before the Court can proceed to consider the merits of the

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[11] *Congo v. France*, above n. 4, para. 10. Under the French Code of Criminal Procedure, pursuant to certain international conventions that France is party to, "a person who has committed, outside the territory of the Republic, any of the offences enumerated in [the Code], may be prosecuted and tried by the French courts if that person is present in France": ibid., para. 12.

[12] Ibid., para. 4.

[13] Statute of the International Court of Justice 1976 Year Book of the United Nations 1052 (in force 24 October 1945).

[14] *East Timor (Portugal v. Australia)* [1995] I.C.J. Rep. 90.

[15] Ibid., para. 34.

[16] Ibid., para. 26.

case. Utilising almost identical language as above, the Court in *D.R.C. v. Rwanda* recalled that it had "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".[17] In this case, the Court also stated that it did not automatically have jurisdiction under its Statute over legal disputes between states parties to it or between other states entitled to appear before it,[18] due to this fundamental principle requiring consent and submission to jurisdiction.[19] It was the lack of such jurisdiction that caused the Court to decide that it could not consider the Congo's application for provisional measures.

The Court also confirmed that it would not indicate provisional measures if the relevant provisions invoked by an applicant to support such jurisdiction did not show *prima facie* that there was a basis for jurisdiction.[20] This accords with its earlier jurisprudence in 1993 in *Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)*.[21] On that basis, owing both to the urgent nature of provisional measures (particularly in the preservation of the respective rights of both parties to be subsequently determined,[22] and the prevention of irreparable prejudice to those rights)[23] and the fact that the Court was not required at that point to deal definitively with the issue of jurisdiction,[24] the Court could indicate measures of protection in the interim. In other words, in such applications the Court need not satisfy itself at this stage of the proceedings that it had jurisdiction on the merits.[25] Using words almost identical to those used in *Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)*,[26] *D.R.C. v.*

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[17] *D.R.C. v. Rwanda*, para. 57.
[18] Ibid.
[19] Ibid.; *Legality of Use of Force (Yugoslavia v. Belgium) (Provisional Measures)* [1999] 1 I.C.J. Rep. 132, para. 20.
[20] Ibid.
[21] *Application of the Genocide Convention (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))* [1993] 1 I.C.J. Rep. 3, para. 14.
[22] *Request for Interpretation of the Judgment of 11 June 1998 in the Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria) (Preliminary Objections)* [1999] 1 I.C.J. Rep. 2.
[23] *LaGrand (Germany v. United States of America)* [1999] 1 I.C.J. Rep. 1.
[24] See generally *Mexico v. United States*, para. 48.
[25] See, for example, *Congo v. France*, para. 20.
[26] *Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)* [1993] 1 I.C.J. Rep. 3, para. 14.

Rwanda[27] and *Mexico v. United States*,[28] the Court in *Congo v. France* held that:

> [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, yet it ought not to indicate such measures unless the provisions invoked by the applicant appear, prima facie, to afford a basis on which the jurisdiction of the Court might be established.[29]

As mentioned above, in *D.R.C. v. Rwanda* the request for provisional measures had been based, *inter alia*, on allegations involving Rwanda's illegal conduct in Congolese territory in breach of the D.R.C.'s sovereignty and territorial integrity.[30] Despite the D.R.C. presenting a large number of international instruments that, it argued, had founded the Court's jurisdiction (including the 1948 Genocide Convention and 1984 Convention on Torture),[31] the Court rejected them as not supporting jurisdiction *prima facie*.

It is also noteworthy that, as discussed below, the Court was unwilling to transcend the bounds of its Statute (Article 41) when determining jurisdiction. When arguing jurisdiction in *D.R.C. v. Rwanda*, the D.R.C. had contended:

> [In] light of the two criteria of the urgency of the measures to be decided upon and the irreparable nature of the consequences of the repetition of the criminal acts committed by Rwanda, the jurisdiction of the Court should be established on the basis, in addition to the fundamental provisions of Article 41 of its Statute, of

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[27] *D.R.C. v. Rwanda*, para. 58; citing *Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)*.

[28] *Mexico v. United States*, para. 38.

[29] *Congo v. France*, para. 20.

[30] *D.R.C. v. Rwanda*, para. 8.

[31] *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature on 4 February 1985, 1465 U.N.T.S. 85 (entered in force 26 June 1987); and *D.R.C. v. Rwanda*, para. 72.

> the rule of "due diligence" with respect to Rwanda's conduct vis-à-vis its international undertakings.[32]

Despite the evidence of the D.R.C. pointing to the urgency of the situation including the human suffering that was taking place, this was also rejected. Indeed, the Court not only concluded that there was no *prima facie* jurisdiction,[33] but that there was in fact a "manifest lack of jurisdiction".[34] As a matter of general principle, the Court noted that even where jurisdiction was established, it should not indicate measures to protect disputed rights other than those that "might ultimately form the basis of a judgment in the exercise of that jurisdiction".[35]

Unlike *D.R.C. v. Rwanda,* the Court in *Congo v. France* found that it had jurisdiction to deal with the Congo's application. In this case, the Congo had alleged that France had breached the territorial integrity of the Congo under Article 2(1) of the United Nations Charter by unilaterally attributing to itself universal jurisdiction in criminal matters. It had also alleged that France had arrogated to itself the power to prosecute and try the Congo's authorities (including the President and a Minister) for crimes committed in the Congo. Accordingly, this violated *inter alia* the criminal immunity of a foreign head of state contrary to customary international law.

In *Congo v. France,* the Court's jurisdiction was based on the consent of France that had been given subsequent to the Congo's initial application to the Court but prior to the date on which the Court issued its reasons for rejecting the request for provisional measures. In a historic move, the Congo's application had not invoked any provision to found jurisdiction but argued the existence of jurisdiction based "upon a consent thereto yet to be given by France" pursuant to Article 38(5) of the Rules of Court.[36] Although the Congo had filed its application on December 2002, France did not accept the Court's jurisdiction until 8 April 2003 by letter. Consequently, until the Court received this consent, it could not be

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[32] Ibid., para. 19.
[33] Ibid., para. 89.
[34] Ibid., para. 91.
[35] *D.R.C. v. Rwanda*, para. 58.
[36] *Congo v. France*, para. 21.

convened to deal with the request as a matter of urgency under Article 74 of the Rules of Court.[37]

As observed above, *Congo v. France* was the first time in the Court's history when Article 38(5) of the Rules of Court was used. Article 38(5) provides:

> When the Applicant State proposes to found the jurisdiction of the Court upon a consent thereto yet to be given or manifested by the State against which such application is made, the application shall be transmitted to that State. It shall not however be entered in the General List, nor any action be taken in the proceedings, unless and until the State against which such application is made consents to the Court's jurisdiction for the purposes of the case.

After establishing jurisdiction, the Court proceeded to determine if provisional measures would be appropriate in the circumstances to preserve the rights of both parties pending a final determination of the dispute. Departing somewhat from the claims of the applicant, the Court stated that this requirement presupposed that "irreparable prejudice" should not be caused to the legal rights of the parties. It found that the actions of France were not a cause of irreparable prejudice to the rights that the Congo had claimed were at issue. The Congo could not show how the French criminal proceedings would affect it internally or in its international relations in a practical sense. The Congo also could not show evidence of serious prejudice or threat of prejudice. As a result, the Court denied its request.

In *Mexico v. United States,* the Court found that it had jurisdiction based on Article 36(1) of the Court's Statute and Article I of the Optional Protocol concerning the Compulsory Settlement of Disputes, which accompanied the 1963 Vienna Convention on Consular Relations.[38] In this case, Mexico had alleged that the United States had breached the 1963 Vienna Convention on Consular Relations in the arrest, detention, trial, conviction and sentencing of 54 Mexican nationals on death row in the

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[37] Ibid., para. 7.

[38] *Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes*, opened for signature on 24 April 1963, 596 U.N.T.S. 487 (entered into force on 19 March 1967): *Mexico v. United States*, para. 1.

United States because they had not been informed of their rights under the Convention. By such omission, Mexico contended that the United States had "violated its international legal obligations to Mexico, in its own right and in the exercise of its right of consular protection of its nationals".[39]

IV. THE LEGAL BASIS FOR APPLICATION

Generally, the law on provisional measures is set out in Article 41 of the Court's Statute and Articles 73-75 of the Rules of Court. More specifically, the basis for the request is to be found in Article 41(1) of the Statute and Articles 73(2) and 74(1)-(2) of the Rules. These provisions provide the criteria for the Court to determine *prima facie* its jurisdiction to entertain the request.

Article 41(1) of the Statute provides:

> The Court shall have the power to indicate, *if it considers that circumstances so require,* any provisional measures which ought to be taken to *preserve the respective rights of either party.*[40]

Article 74 of the Rules indicates the need for urgency to underpin the request. It recognises the nature and purpose of provisional measures if the "circumstances so require" in Article 41(1). Article 74(1)-(2) provides:

5. A request for the indication of provisional measures shall have priority over all other cases.

6. The Court, if it is not sitting when the request is made, shall be convened forthwith for the purpose of proceeding to a decision on the request *as a matter of urgency.*[41]

Further, Article 73(2) of the Rules provides:

> The request shall specify the reasons therefor, *the possible consequences if it is not granted*, and *the measures requested* ...[42]

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[39] Ibid., para. 8(1).
[40] Emphasis added.
[41] *Mexico v. United States*, para. 8(1).

In *Congo v. France,* the Court had stated that the object of provisional measures was to:[43]

> preserve the respective rights of the parties pending the decision of the Court, and ... it follows that the Court must concern itself with the preservation of such measures of the rights which may subsequently be adjudged by the Court to belong either to the Applicant or to the Respondent; and ... such measures are justified solely if there is urgency.

Accordingly, the key criteria for the indication of provisional measures may be presented as follows: (a) if the "circumstances so require"; (b) "to preserve the respective rights of either party"; (c) "urgency"; (d) "the possible consequences" if [the request] is not granted"; and (e) "the measures sought". Of these, "the two essential preconditions for the indication of a provisional measure, according to the Court's jurisprudence [are] urgency and irreparable prejudice".[44]

It is therefore important to consider each key criterion in turn.

A. If the Circumstances so Require

The reference to the "circumstances" of the case requires a subjective determination on whether provisional measures should be indicated. In this sense, it is linked to the other criteria, particularly those on urgency and the preservation of the respective rights of the parties.

In *Mexico v. United States,* the Court granted Mexico's request in relation to three Mexican nationals (Reyna, Ramos and Aguilera). It drew a distinction between them and the other 51 Mexicans on death row since the former were "at risk of execution in the coming months, or possibly even weeks".[45] The Court observed that the rest, "although currently on death row, [were] not in the same position as the three persons identified".[46] However, the Court added that if "the circumstances

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[42] Emphasis added.
[43] *Congo v. France*, para. 22.
[44] Ibid., para. 19.
[45] *Mexico v. United States*, para. 55.
[46] Ibid., para. 56.

require" in relation to them, it "may, if appropriate", indicate provisional measures subsequently.[47] This is consistent with the powers of the Court under Article 75(1) and (3) of the Rules of Court, which provides:

1. The Court may at any time decide to examine *proprio motu* whether the circumstances of the case require the indication of provisional measures which ought to be taken or complied with by any or all of the parties.

(.....)

3. The rejection of a request for the indication of provisional measures shall not prevent the party which made it from making a fresh request in the same case based on new facts.

In contrast, in *Congo v. France,* the Court did not find that the circumstances warranted the indication of provisional measures. However, it went on to confirm that, if required:[48]

> 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 ...[49]

B. To Preserve the Respective Rights of Either Party

To preserve the respective rights of both parties, the Court would have to determine if there was prejudice or threat of prejudice to those rights, the existence and scope of which were yet to be determined by the Court on the merits of the case. In fact, as discussed below, the Court would require the prejudice or threat of prejudice to be *serious* in nature.

In *Congo v. France,* the Congo had argued that the criminal proceedings in France were "damaging to the traditional links of Franco-Congolese

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[47] Ibid.

[48] *Congo v. France*, para. 39.

[49] See ibid., where the Court contrasted the decision in *Land and Maritime Frontier between Cameroon and Nigeria (Cameroon v. Nigeria) (Provisional Measures)* [1996] 1 I.C.J. Rep. 22, para. 41; *Frontier Dispute (Burkina Faso v. Mali) (Provisional Measures)* [1986] I.C.J. Rep. 9, para. 18.

friendship".[50] It argued further that if the provisional measures it requested were not granted, the criminal proceedings in France would continue to cause irreparable prejudice "to the honour and reputation of the highest authorities of the Congo, and to the internal peace in the Congo, to the international standing of the Congo and to Franco-Congolese friendship".[51]

The Court agreed that the purpose of any provisional measure was to preserve the Congo's claimed rights and to ensure that those rights did not suffer "irreparable prejudice".[52] However, in this case the Court noted that it was not informed in what "practical respect there has been any deterioration internally or in the international standing of the Congo" since the French criminal proceedings had begun.[53] In fact, in considering the request, the Court seemed to raise the requirement of prejudice or threat of prejudice one notch by adding that the evidence should demonstrate "any *serious* prejudice or threat of prejudice of this nature".[54]

As a result, the Court held that on the evidence "at the present time there was no risk of irreparable prejudice" against the President and other authorities of the Congo.[55] The Court's conclusion was the same concerning the other alleged violations the Congo had raised.[56]

C. Urgency

In *Mexico v. United States,* Mexico had argued that for the condition of urgency to be satisfied it was sufficient if "there was a 'likely' threat of irreparable prejudice".[57] However, *Congo v. France* has shown that a "likely threat" is insufficient and a *real* urgency must exist.

In *Congo v. France,* the Court held that in a request for interim protection, under Article 41 it must concern itself with the preservation of those

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[50] *Congo v. France*, para. 26.
[51] Ibid., para. 27.
[52] Ibid., para. 29.
[53] Ibid.
[54] *Congo v. France*, para. 29. Emphasis added.
[55] Ibid., para. 35.
[56] For example, ibid.
[57] Ibid., para. 43.

respective rights of the parties that might subsequently be adjudged by the Court and that "such measures [were] justified solely if there [was] urgency". However, in this case the evidence presented by the applicant did not meet the level of "urgency" needed.[58] The Court had observed:[59]

> [It] is common ground between the parties that no acts of investigation have been taken in the French criminal proceedings against the other Congolese personalities named in the Application ... nor in particular has any application been made to question them as witnesses.

On the contrary, in *Mexico v. United States,* the imminent execution of Reyna, Ramos and Aguilera "in the "coming months, or possibly even weeks" had galvanised the Court to grant provisional measures to them.[60] As no prevailing urgency existed in relation to the other 51 Mexican nationals (even though there was a threat), similar provisional measures were not extended to them.[61] The Court had accepted the evidence of the United States that since the proceedings were continuing, review and reconsideration were still available in all 51 cases, and none of them was scheduled for execution.[62]

The Court also made an observation on the importance of timeliness in relation to provisional measures. It stated:[63]

> [The] sound administration of justice requires that a request for the indication of provisional measures founded on Article 73 of the Rules of Court be submitted in good time.

In *D.R.C. v. Rwanda,* generally the urgency concerned the withdrawal of Rwandan forces from Congolese territory. The D.R.C. had argued that this was necessary even before the massacres, killings and acts of oppression of the Congolese population could cease.[64] As an objective observation, those circumstances would appear to meet the requisite level

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[58] Ibid., para. 22.
[59] Ibid., para. 17.
[60] Ibid., para. 55.
[61] Ibid., para. 56.
[62] Ibid., para. 31.
[63] *Mexico v. United States*, para. 54; see also *LaGrand*, para. 19.
[64] *D.R.C. v. Rwanda*, para. 11.

of urgency. However, since the Court had determined that it did not even have *prima facie* jurisdiction in relation to the D.R.C.'s request, it was in no position to form any definitive view on the legal consequences that might flow from the evidence presented.

D. The Possible Consequences if the Request is Not Granted

The Court is most concerned that the applicant should not suffer irreparable prejudice if provisional measures were not granted. This relates back to the impossibility of determining definitively the respective rights of the parties on the merits as a matter of urgency. Hence, the need for provisional protection.

In *Mexico v. United States,* Mexico had claimed that the provisional measures sought were "justified" to protect its "paramount interests in the life and liberty of its nationals and to ensure the Court's ability to order the relief sought".[65] If not, "Mexico would forever be deprived of the opportunity to vindicate its rights and those of its nationals."[66] Mexico added that the Court had recognised this in *LaGrand* to "constitute irreparable prejudice."[67] The Court held that since the dispute went to the merits of the case and could not be settled at this stage of the proceedings:

> the Court must accordingly address the issue of whether it should indicate provisional measures to preserve any rights that [might] subsequently be adjudged on the merits to be those of the Applicant ...[68]

For this reason, the Court accordingly accepted that Reyna, Ramos and Aguilera would suffer irreparable prejudice and consequences but this did not apply to the other 51 Mexican nationals.

In *Congo v. France,* the Court had framed the Congo's request in the following terms:

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[65] *Mexico v. United States*, para. 13.
[66] Ibid., para. 12.
[67] Ibid.
[68] Ibid., para, 46.

> [The] Court is not now called upon to determine the compatibility with the rights claimed by the Congo of the procedure so far followed in France, but only the risk or otherwise of French criminal proceedings causing irreparable prejudice to such claimed rights.[69]

The Congo's submission on irreparable prejudice had referred to:

> the continuation and exacerbation of the prejudice already caused to the honour and reputation of the highest authorities of the Congo, and to internal peace in the Congo, to the international standing of the Congo and for Franco-Congolese friendship.[70]

However, the Court concluded that no such risk existed and the irreparable damage as claimed above "would not be caused".[71] In fact, there was "no urgent need for provisional measures to preserve the rights of the Congo".[72] It noted:

> [The Court] had not been informed in what practical respect there has been any deterioration internally or in the international standing of the Congo, or in Franco-Congolese relations, since the institution of the French criminal proceedings, nor has any evidence been placed before the Court or any *serious* prejudice or threat of prejudice of this nature.[73]

In *D.R.C. v. Rwanda,* the applicant had argued that a denial of provisional measures "would have humanitarian consequences which could never be made good again...in the short term or in the long term".[74] As mentioned above, this would have represented significant concerns, but the Court held that it could not rule on this matter since it lacked jurisdiction.

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[69] *Congo v. France*, para. 34.
[70] Ibid., para. 27.
[71] Ibid., paras. 29, 35.
[72] Ibid., para. 37.
[73] Ibid., para. 29. Emphasis added.
[74] *D.R.C. v. Rwanda*, para. 11.

E. Measures Sought

Generally, the measures sought to be indicated should be appropriate and befit the applicant's complaint.

In *Congo v. France,* the Congo had requested the Court to declare that France should annul the measures of investigation and prosecution that had been conducted.[75] The Congo had also sought an order requiring France to suspend immediately the proceedings being conducted by the investigating judge in France.[76] However, the Court was not required to deal with this matter in any substantive way because it had concluded that provisional measures were not needed in the circumstances.

On the other hand, the Court noted that independently of requests for provisional measures to preserve specific rights, the Court could under Article 41 of its Statute indicate provisional measures to prevent the aggravation or extension of a dispute if it deemed that the circumstances required it.[77]

In *Mexico v. United States,* Mexico had requested the Court to order the United States to: (a) restore the *status quo ante;* (b) take necessary and sufficient steps to fulfil the intention of Article 36 of the Vienna Convention; (c) take steps to establish a meaningful remedy at law for the violations of the rights afforded to Mexico and its nationals under the Convention; and (d) guarantee Mexico that the illegal acts would not be repeated.[78] In the end, the Court indicated provisional measures to a more limited extent, restricting them to requiring the United States "to take all measures necessary to ensure" that the three Mexicans at immediate risk

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[75] Ibid., para. 2.
[76] Ibid., para. 4.
[77] Ibid., para. 39. However in this case the Court found that this was not necessary: ibid.
[78] Ibid., para. 8(5).

not be executed "pending final judgment in these proceedings",[79] with the United States to inform the Court of the steps taken to implement this particular order.[80] The measures largely mirrored the more substantive provisional measures that were indicated in *LaGrand*, which had involved a similar claim by Germany that United States authorities had breached the 1963 Vienna Convention on Consular Relations.[81]

Assuming that the Court found that it had jurisdiction in *D.R.C. v. Rwanda*, it would have been required to consider the many measures the D.R.C. had sought under three broad headings even before the measures could be deemed "appropriate" and "befitting": (a) Rwanda's withdrawal from Congolese territory and stopping the war of aggression in and against the D.R.C.; (b) recognition of the D.R.C.'s inalienable sovereign right; and (c) prevention of irreparable harm in the D.R.C.[82]

V. CONCLUDING OBSERVATIONS

First, the three cases discussed indicate that the Court is consistent in its application and legalistic interpretation of the rules on provisional measures. Secondly, the cases show that the approach and jurisprudence of the Court on this matter are quite settled and the fundamentals remain the same. For example, before the Court could entertain such an application it must be shown to have jurisdiction. This is an absolutely pivotal notion underpinning the Court that is entirely consistent with its functioning within the international legal system. Thirdly, the Court has considered urgency and irreparable damage to be two essential conditions

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[79] On 31 March 2004, the Court delivered its judgment on the merits of the dispute, finding that the United States had breached its obligations under the *Vienna Convention on Consular Relations* concerning 51 of the Mexican nationals. The Court concluded that a review and reconsideration of their convictions and sentences by the United States would constitute adequate reparation for the violations of the Convention: see International Court of Justice, "The Court finds that the United States of America has breached its obligations to Mr. Avena and 50 other Mexican nationals and to Mexico under the Vienna Convention on Consular Relations" (Press Release 2004/16, 31 March 2004).

[80] *Mexico v. United States*, para. 59.

[81] *LaGrand*, para. 29.

[82] *D.R.C. v. Rwanda*, para. 13.

for provisional measures.[83] It may be argued that this introduces some more subjective elements for consideration, maybe providing the Court with some degree of flexibility when determining the issue of jurisdiction. Finally, the cases show that as the Court evolves it has the opportunity to consider new aspects such as that seen in *Congo v. France* on the historic application of Article 38(5) of the Rules of Court.

As discussed above, the Court described jurisdiction in *D.R.C. v. Rwanda* as a "fundamental principle" of its Statute. For this reason, although "the circumstances" in that case were such that they could have *prima facie* fulfilled the criteria of urgency and so forth, the Court could not deal with the application because it did not have jurisdiction as a precondition. This was despite the Court being "deeply concerned" by the events in the D.R.C. including the deplorable human tragedy, loss of life and continued fighting there.[84] The Court had drawn an important distinction between the question of a state's acceptance of its jurisdiction and the "compatibility" of certain actions with international law. The former requires consent whereas the latter can only be dealt with after the Court has considered the merits of the case, which in turn can only occur after jurisdiction has been established and the legal arguments of the parties heard.[85]

The criteria that should be fulfilled before a request is granted are spelt out in the governing provisions. The applicant should show that there are rights to be preserved and there should be evidence of prejudice or threat of prejudice. Further, *Congo v. France* has suggested that such prejudice or threat of prejudice should be "serious" in nature and connected to this is the criterion of urgency. *Mexico v. United States* has clearly demonstrated that this criterion should be given its literal meaning to include imminence. These criteria when bound together should show irreparable damage and linked to it are the two criteria of "[if] the circumstances so require" and "possible consequences". In *Congo v. France,* these two criteria were given subjective and fact-oriented

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[83] *Congo v. France*, para. 19.
[84] *D.R.C. v. Rwanda*, para. 54.
[85] Ibid., para. 92.

characteristics, with insufficient evidence based on facts leading the Court to rule that they had not been satisfied.[86]

Although the Court held that it did not have jurisdiction in *D.R.C. v. Rwanda* to deal with the application, it stated that it could not "over-emphasise" the obligation of the parties to respect the provisions of the Geneva Conventions and the First Additional Protocol.[87] Moreover, whether or not states accept its jurisdiction, they continue to be bound by the United Nations Charter in particular and are responsible for acts attributable to them that violate international law.[88]

In this regard, the Court emphasised:[89]

> [All] parties in proceedings before it must act in conformity with their obligations pursuant to the United Nations Charter and other rules of international law, including international humanitarian law.

Yet, as discussed above, the Court determined that it could essentially do nothing to address the apparently horrific circumstances that were presented to it. This is unsatisfactory. Indeed, Judge Koroma found it necessary to declare:

> In my view, if ever a dispute warranted the indication of interim measures of protection, this is it.[90]

The Court was, of course, faced with a dilemma. It could not indicate provisional measures without having first held that at least *prima facie* jurisdiction existed. Only then could the issue of "urgency" be considered. Yet the circumstances of the case would show that this could have unacceptable consequences. The evidence raised by the applicant would, if accurate, reflect significant violations of international legal obligations that Rwanda had owed to the D.R.C. They would also appear to fall

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[86] In *Congo v. France,* there was no evidence before it regarding acts of investigation against the Congolese authorities in French criminal proceedings, nor was there evidence of serious prejudice or threat of prejudice: *Congo v. France*, para. 29.
[87] *D.R.C. v. Rwanda*, para. 56.
[88] Ibid., para. 93.
[89] Ibid., para. 56.
[90] *D.R.C. v. Rwanda*, Declaration of Judge Koroma, para. 16.

squarely within the object and purpose of at least some of the instruments raised by the D.R.C. to support the jurisdiction of the Court.

Moreover, there was clearly a situation of urgency requiring immediate action to prevent further human suffering. In these circumstances, perhaps the Court could and should have taken a more "holistic" view of its jurisdiction and, equally significantly, its role "in maintaining international peace and security, including human security and the right to life".[91]

The statements made by the Court seem to sound like "an *apologia* for the Court's lack of jurisdiction" — a description offered by Judge Buergenthal,[92] who was critical of such pronouncements of "personal sentiments" by the Court.[93] They highlight how the legalistic approach of the Court resulted in the fact that it might not indicate provisional measures even "if it considers that the *circumstances* so require" that they should be granted. This is unfortunate particularly since the Court in *D.R.C. v. Rwanda* was not required to make a definitive determination of the question of jurisdiction at that stage of the proceedings.

While some will applaud the legalistic approach taken by the Court in *D.R.C. v. Rwanda* and in its approach to the question of the indication of provisional measures, it gives rise to unfortunate consequences in the broader context of international law. In view of what appears to be an increasing trend in the future towards state requests for an indication of provisional measures, it seems appropriate to consider amending the rules governing the powers of the Court to indicate such measures so that this process is empowered to fulfil more effectively important aspects of the Court's role and promote more effectively fundamental principles of international law. MJIL

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[91] Ibid., para. 11.
[92] *D.R.C. v. Rwanda*, Declaration of Judge Buergenthal, para. 6.
[93] Ibid., para. 4.