Armed Activities on the Territory of the Congo Cases

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A. Factual Background and History of Proceedings

1 The → *International Court of Justice (ICJ)* had to deal with certain aspects of the Congolese civil war, which erupted in August 1998 (→ *Congo, Democratic Republic of the*). The present disputes are embedded in a general situation of post-colonial instability and insecurity in the Great Lakes Region (→ *Decolonization*; → *Great Lakes Region, Africa*). Since the 1980s anti-Congolese and anti-Ugandan rebels had been active in the border region between Zaire and Uganda. In May 1997 President Laurent-Désiré Kabila came to power in Zaire, which was renamed the Democratic Republic of Congo ('DRC'). At first, he closely cooperated with → *Rwanda* and Uganda. The latter was allowed to engage in military action against anti-Ugandan rebels in the border region. During 1998, however, Kabila sought to reduce the influence of Rwanda and Uganda. A military intervention led by Rwanda aiming to overthrow the Kabila regime provoked the Congolese civil war in August 1998 (→ *Armed Conflict, Non-International*; → *Intervention, Prohibition of*). At the same time, Ugandan troops began operating in large parts of the country. Hostilities implied large scale atrocities, and for several years there was a general situation of lawlessness throughout the DRC. Notwithstanding the Lusaka Ceasefire Agreement of 10 July 1999 (F Reyntjens 'Briefing: The Democratic of Congo, from Kabila to Kabila' [2001] 100 African Affairs 313), Ugandan and Rwandan troops engaged in heavy fighting in Kisangani in June 2000. Ugandan troops finally left the DRC in 2003.

2 The DRC seised the ICJ four times in this context. Proceedings against Rwanda, → *Burundi* and Uganda were initiated in 1999. While the applications against Rwanda and Burundi were withdrawn in 2001, a new application against Rwanda was filed in 2002.

3 On 23 June 1999 the DRC applied to the ICJ against Rwanda, Burundi and Uganda. Each application dealt essentially with alleged acts of armed → *aggression* (→ *Armed Attack*). In the cases concerning Rwanda and Burundi, the basis for jurisdiction of the ICJ was extremely weak (→ *International Courts and Tribunals, Jurisdiction and Admissibility of Inter-State Applications*; → *International Court of Justice, Rules and Practice Directions*). As neither Rwanda nor Burundi consented to the jurisdiction of the court under Art. 38(5) Rules of Court of the ICJ ('ICJ Rules'), the DRC invoked compromissory clauses contained in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [adopted 10 December 1984, entered into force 26 June 1987] 1465 UNTS 85) and in the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation [opened for signature 23 September 1971, entered into force 26 January] 974 UNTS 177) (→ *Civil Aviation, Offences against Safety*; → *Compromis*; → *Torture, Prohibition of*). In January 2001 the DRC notified the ICJ that it wished to discontinue these proceedings while reserving the right to invoke subsequently new grounds of jurisdiction of the ICJ. Rwanda and Burundi concurred in the discontinuance of the proceedings. The ICJ therefore applied Art. 89(2) ICJ Rules and removed both cases from the list by two orders of 30 January 2001 (*Case Concerning Armed Activities on the Territory of the Congo [Democratic Republic of the Congo v Burundi] [Order of 30 January 2001]* [2001] ICJ Rep 3; *Case Concerning Armed Activities on the Territory of the Congo [Democratic Republic of the Congo v Rwanda] [Order of 30 January 2001]* [2001] ICJ Rep 6) (→ *International Courts and Tribunals,*

Discontinuance of Cases). The DRC probably withdrew these applications because of insufficient chances to have the court's jurisdiction established.

4 In the proceedings against Uganda, by contrast, the jurisdiction of the ICJ under the optional clause contained in Art. 36(2) Statute of the International Court of Justice ('ICJ Statute') has not been contested in principle (→ *International Court of Justice, Optional Clause*). In June 2000 the DRC requested the indication of provisional measures (→ *Interim [Provisional] Measures of Protection*). The ICJ followed this request by order of 1 July 2000 (see para. 6 below). By order of 29 November 2001 the ICJ decided on the admissibility of three counter-claims advanced by Uganda (*Case Concerning Armed Activities on the Territory of the Congo [Democratic Republic of the Congo v Uganda] [Counter-Claims]* [2001] ICJ Rep 660). While it admitted two counter-claims (see paras 15–17 below), the third counter-claim was rejected because it lacked a sufficient *direct connection* with the principal claims in the sense of Art. 80(1) ICJ Rules. The judgment followed on 19 December 2005 (see paras 7–18 below).

5 In May 2002 the DRC filed a second application against Rwanda, regarding 'massive, serious and flagrant violations of human rights and of international humanitarian law' (*Case Concerning Armed Activities on the Territory of the Congo [New Application: 2002] [Democratic Republic of the Congo v Rwanda] [Jurisdiction and Admissibility]* [2006] ICJ Rep 562) this time (→ *Human Rights*; → *Humanitarian Law, International*). Simultaneously, it requested the ICJ to indicate provisional measures. By order of 10 July 2002 the ICJ found that it lacked prima facie jurisdiction and therefore rejected the request for provisional measures (*Case Concerning Armed Activities on the Territory of the Congo [New Application: 2002] [Democratic Republic of the Congo v Rwanda] [Provisional Measures, Order of 10 July 2002]* [2002] ICJ Rep 219). By judgment of 3 February 2006 the ICJ decided that it had no jurisdiction to consider the application (see paras 18–21 below).

B. Order of 1 July 2000

6 The provisional measures requested by the DRC in the proceedings against Uganda were essentially the same as the measures adopted by United Nations Security Council Resolution 1304 (2000) of 16 June 2000 (see also → *United Nations, Security Council*). The ICJ, in its order of 1 July 2000, reiterated its earlier jurisprudence stating that both the ICJ and the Security Council could 'perform their separate but complementary functions with respect to the same events' (*Case Concerning Armed Activities on the Territory of the Congo [Democratic Republic of the Congo v Uganda] [Provisional Measures]* at 126). Rather, the ICJ took United Nations Security Council Resolution 1304 (2000) of 16 June 2000 as an important source of information in order to conclude that the circumstances required it to indicate provisional measures. As the ICJ had the power to indicate provisional measures *proprio motu* (of own initiative), it addressed its measures not only to Uganda but also to the DRC and enjoined both parties, inter alia, 'to comply with all of their obligations under international law … and with United Nations Security Council resolution 1304 (2000)' (ibid 129).

C. Judgment of 19 December 2005

1. Use of Force and Self-Defence

7 In the judgment of 19 December 2005 in the *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* ('*Armed Activities [Congo v Uganda] Case*') the ICJ first dealt with illegal use of force by Uganda (→ *Use of Force, Prohibition of*). In interpreting the facts, the ICJ held that the DRC had withdrawn its consent to the presence of Ugandan troops at the latest in August 1998. While it was clear that Uganda had launched important military operations within the DRC after that date, the ICJ engaged in complicated → *fact-finding* as to the extent of Ugandan operations (→ *International Courts and Tribunals, Evidence*). In accordance with the judgment in the → *Military and Paramilitary Activities in and against Nicaragua Case (Nicaragua v United States of America) ('Nicaragua Case')*, preference was given to contemporaneous evidence from persons with direct knowledge. The ICJ paid particular attention to admission against interest, ie to evidence acknowledging facts unfavourable to the State represented by the person making them, whereas evidence given by senior officers with a view to the litigation before the ICJ was treated with great reserve. The ICJ then dealt with Uganda's allegation that the Lusaka Agreement of 10 July 1999, which provided for the withdrawal of foreign forces within 180 days, and subsequent disengagement plans constituted consent of the DRC to the presence of Ugandan troops. The ICJ held, however, that the agreement, which was based on the realities on the ground, sought to find a modus operandi for the parties without any intention of recognizing the situation on the ground as legal. Judge Parra-Aranguren disagreed on this point.

8 In a next step, the ICJ rejected Uganda's allegation to have acted in → *self-defence*. As Uganda had not claimed to use force against an anticipated attack, the ICJ did not pronounce on this point (→ *Self-Defence, Anticipatory*). The ICJ observed that Uganda had not reported to the Security Council any events requiring it to act in self-defence. The ICJ then relied on Art. 3(g) United Nations General Assembly Resolution 3314 (XXIX) of 14 December 1974 ('Definition of

Aggression') in order to establish the legal relevance of attacks led by rebel forces operating from the territory of the DRC. Lacking evidence that the rebels had been sent by the DRC or on behalf of the DRC, the ICJ found the attacks to be non-attributable to the DRC. The ICJ saw no need to pronounce on an alleged right of self-defence against large-scale attacks by irregular forces. It observed, however, that the taking of airports and towns at a far distance from the border seemed to fail any necessity and → *proportionality* standard. The ICJ was obviously reluctant to adopt a clear position concerning armed attacks by irregular forces. However, one might argue that the court implicitly rejected a right of self-defence against the territory of another State in response to acts of → *non-State actors* emanating from this territory but which are not attributable to the other State. Judges Koojmans and Simma disagreed. According to them armed action by non-State actors entitles a State to self-defence, if such action, because of its scale and effects, amounts to an armed attack and provided that the requirements of necessity and proportionality are met. Both judges referred in this context to developments triggered by the terrorist attacks of 11 September 2001 (→ *Terrorism*).

9 Only after having excluded a justification by virtue of self-defence, the ICJ turned over to the application of Art. 2(4) Charter of the United Nations ('UN Charter'; → *United Nations Charter*). The fact that other States were also responsible for the continued fighting in the DRC did not excuse Uganda whose military operations constituted 'grave violations' of Art. 2(4) UN Charter. The DRC alleged that Uganda was also responsible for acts committed by the Movement for the Liberation of Congo ('MLC'), a rebel group. Uganda only admitted limited assistance to the MLC. The ICJ relied on Arts 4, 5 and 8 Draft Articles on Responsibility of States for Internationally Wrongful Acts (GAOR 56th Session Supp 10, 38) ('Draft Articles on State Responsibility') adopted by the → *International Law Commission (ILC)* in 2001 in order to establish whether acts of the MLC were attributable to Uganda (→ *State Responsibility*). It found that the MLC was neither an organ of Uganda nor had it acted on the instructions of, or under the direction or control of Uganda. In applying Art. 8 Draft Articles on State Responsibility, the ICJ felt no need to engage in the debate of whether the *effective control* test, as laid down in the *Nicaragua Case*, was still valid (→ *Responsibility of States for Private Actors*). Simple reference was made to the *Nicaragua Case*, but not to the *overall control* test developed by the → *International Criminal Tribunal for the Former Yugoslavia (ICTY)* in the → *Tadić Case*. The ICJ added, however, that training and military support given by Uganda to the MLC violated the principle of non-intervention as laid down in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations (UNGA Res 2625 [XXV] [24 October 1970] GAOR 25th Session Supp 28, 121) ('Friendly Relations Declaration'; → *Friendly Relations Declaration [1970])* which was declaratory of → *customary international law*. The ICJ confined itself to referring to 'a grave violation of the prohibition on the use of force' (*Armed Activities [Congo v Uganda] Case* 327). It did not qualify the acts as aggression, although this had been claimed by the DRC. Judges Elaraby and Simma disagreed on this point. The reserve of the ICJ may be explained by deference to the Security Council which had qualified the conflict as 'a threat to peace, security and stability in the region' (ibid 324) without using the stronger term 'aggression'.

2. Belligerent Occupation, Human Rights and Humanitarian Law

10 With regard to further claims made by the DRC, the ICJ had to determine whether Uganda had been an occupying power in parts of the DRC (→ *Occupation, Belligerent*). It cited Art. 42 Hague Convention Respecting the Laws and Customs of Land Warfare (opened for signature 18 October 1907, entered into force 26 January 1910 [1908] 2 AJIL Supplement 90) as evidence of customary international law and confirmed that 'territory is considered to be occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised' (*Armed Activities [Congo v Uganda] Case* 329; → *Hague Peace Conferences [1899 and 1907]*). The ICJ held it therefore necessary to establish whether Ugandan armed forces 'were not only stationed in particular locations but also that they had substituted their own authority for that of the Congolese Government' (ibid). This was the case in the Ituri district but not in other parts of the DRC. Rather, these parts were controlled by rebel movements which were not under the control of Uganda. Therefore, Uganda's duty of vigilance in preventing violations of human rights and international humanitarian law by non-State actors only extended to the Ituri district. Judge Kooijmans criticized the narrow concept of belligerent occupation adopted by the ICJ as out-dated. According to his separate opinion, the outlawing of war has led more and more occupants not to introduce some kind of direct administration, but to seek arrangements where authority is said to be exercised by local entities or simply to refrain from establishing an administrative system. He therefore argued that an elimination of the DRC's authority which put Uganda in a position to substitute its own authority for that of the DRC was sufficient in order to make Uganda an occupying power.

11 As far as the DRC alleged violations of international standards with regard to the fighting between Ugandan and Rwandan troops in Kisangani in 2000, Uganda objected to the jurisdiction of the ICJ because Rwanda was an indispensable third party not present before the court. Relying on its judgment in the → *Certain Phosphate Lands in Nauru Case (Nauru v Australia)*, however, the ICJ found that the interests of Rwanda did not constitute the very subject-

matter of the decision to be rendered by the court. The claim was therefore admissible. On the merits, the ICJ found sufficient evidence for massive human rights violations and grave breaches of international humanitarian law including indiscriminate shelling (→ *Gross and Systematic Human Rights Violations*). It was also convinced that Ugandan armed forces had incited ethnic conflicts, had taken no action to prevent such conflicts and had trained child soldiers (→ *Children and Armed Conflict*). From a legal point of view, the ICJ confirmed that Uganda, under international customary law, was responsible for all acts committed by members of its armed forces even if they had acted contrary to their instructions or exceeded their authority. Following its → *Israeli Wall Advisory Opinion (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory)*, the ICJ held that both international humanitarian law and international human rights law had to be taken into consideration. In the court's view, Uganda had violated obligations of an occupying power which were binding as customary law. Uganda had also violated provisions of several international humanitarian law and human rights instruments. Although the ICJ had only to decide on violations committed by Uganda, it pointed out that 'actions of the various parties in the complex conflict … have contributed to the immense suffering faced by the Congolese population' (*Armed Activities [Congo v Uganda] Case* 341).

12 The DRC also alleged the illegal exploitation of natural resources by Uganda. While the ICJ did not find sufficient evidence of a governmental policy of Uganda directed at the exploitation of natural resources of the DRC, it stated that members of the Ugandan armed forces were involved in the looting, plundering and exploitation of these resources and that Ugandan authorities did not hinder this. These acts were attributable to Uganda. The ICJ accepted that the principle of permanent sovereignty over natural resources as expressed in a series of General Assembly resolutions was part of customary international law, but it held this principle to be inapplicable to the specific situation of looting, pillage and exploitation in the context of a military intervention (→ *Natural Resources, Permanent Sovereignty over*; → *United Nations, General Assembly*). Uganda had violated, however, the prohibition of → *pillage* under the *ius in bello*. At the same time, Uganda had violated its duty of vigilance in regard to those acts of members of its armed forces. As far as looting, plundering and illegal exploitation by rebel groups was at stake, Uganda had only violated its obligation as an occupying power to take appropriate measures to prevent these acts in the Ituri district.

3. Reparation and Non-Respect of Provisional Measures

13 The ICJ was also called to decide about the consequences arising from the breaches of international law. Since Uganda had already withdrawn from the DRC in 2003, the ICJ, deciding in 2005, did not uphold the DRC's request that Uganda should be called upon to cease its internationally wrongful acts. The DRC had also requested guarantees to be given by Uganda that it would not repeat the wrongful acts complained of. The ICJ referred, however, to the Tripartite Agreement on Regional Security in the Great Lakes signed on 26 October 2004 by the DRC, Rwanda and Uganda. The parties to this agreement, including Uganda, had not only assumed an obligation to respect the → *sovereignty* and territorial integrity of the other States Parties, but they had also undertaken a commitment to co-operate with them in order to fulfil their obligations. In the view of the ICJ such a legally binding commitment presented sufficient guarantees as required by the DRC. The ICJ found, however, that Uganda was under an obligation to make full reparation for all injury caused by its breaches of international law (→ *Reparations*; → *State Responsibility*). Determining the nature, form and amount of the reparation due was reserved for subsequent procedure.

14 Finally, the DRC had requested the ICJ to declare that Uganda had violated the order of the ICJ on provisional measures of 1 July 2000 (see para. 6 above). The ICJ reiterated the binding effect of orders on provisional measures. Although the DRC had put forward no specific evidence, the ICJ concluded that the breaches of international human rights law and international humanitarian law, which had taken place after 1 July 2000 and had been examined before, were contrary to the court's order.

4. Ugandan Counter-Claims

15 When dealing with the Ugandan counter-claims, the ICJ first had to address the admissibility of → *preliminary objections*. According to the ICJ such objections were not precluded by the order of 29 November 2001 (see para. 4 above) where the ICJ had only examined whether there was a direct connection of the counter-claim with the subject-matter of the principal claims as requested by Art. 80 Rules of Court. Under the first counter-claim the ICJ was asked to pronounce on Congolese support for anti-Ugandan insurgents before Kabila came to power, during the period of friendly relations when Kabila had come to power and after the outbreak of the Congolese civil war. The DRC contended that Uganda had renounced its right to invoke the international responsibility of the DRC for acts before Kabila had come to power because it had not invoked such responsibility before. However, the ICJ pointed out that 'waivers or renunciations of claims or rights must either be express or unequivocally implied' (*Armed Activities [Congo v Uganda] Case* 359) from State conduct, which was not the case here. On the merits the ICJ did not find sufficient evidence for Congolese support of anti-Ugandan rebels 'rising to a level engaging State responsibility' (ibid 361) before 1998. The ICJ then turned over to a duty of vigilance as laid down in the Friendly Relations Declaration (see para. 9 above). As neither the DRC—

Zaire before 1997—nor Uganda had brought an end to the presence of anti-Ugandan and anti-Zairean rebel groups in the border region, the ICJ held that the absence of action by Congolese authorities was not tantamount to tolerating or acquiescing in rebel activities (→ *Acquiescence*). Consequentially, simple failure to cope with rebels present on the territory of a State does not amount to a breach of international law. Judges Kooijmans and Tonka disagreed with the findings of the ICJ. According to them, the DRC had failed to prove that sufficient efforts to cope with the rebels had been made. As far as military action of the DRC in the period following August 1998 was at stake, the ICJ found that such military action would by justified as measure of self-defence under Art. 51 UN Charter.

16 Uganda's second counter-claim concerned acts of the Congolese armed forces against the Ugandan Embassy, Ugandan diplomats and other Ugandan nationals. According to the ICJ, the order of 29 November 2001 (see para. 4 above) did not preclude Uganda from invoking the Vienna Convention on Diplomatic Relations (adopted 18 April 1961, entered into force 24 April 1961 [500 UNTS 95]) (→ *Vienna Convention on Diplomatic Relations [1961]*). While use of force established the necessary connection within the meaning of Art. 80 ICJ Rules, the ICJ was not prevented from examining the special legal status of the embassy. Where persons without diplomatic status had been maltreated outside embassy premises, the general rules of international law relating to → *diplomatic protection* applied. As Uganda had not been able to identify the individuals concerned as Ugandan nationals (→ *Nationality*), the ICJ found this part of the counter-claim inadmissible. On the merits the ICJ found several breaches of the Vienna Convention on Diplomatic Relations.

5. Attitudes of Individual Judges

17 The ICJ decided with a large majority. Only the judge ad hoc designated by Uganda, Kateka, dissented on most parts of the judgment. Nevertheless, seven other judges also appended declarations or separate opinions to the judgment. The majority was criticized for sticking to out-dated concepts concerning self-defence against armed action by non-State actors (see para. 8 above) and belligerent occupation (see para. 10 above). The court was also criticized for its interpretation of the Lusaka Ceasefire Agreement (see para. 1 above), for its reluctance to qualify the Ugandan use of force as aggression (see para. 9 above) and for mistaking the burden of proof concerning Congolese efforts to cope with anti-Ugandan rebels (see para. 15 above). Moreover Judge Kooijmans made a point of the general situation of instability in the region marked by a partial failure of State authority (→ *Failing States*). He criticized the ICJ for only deciding on one bilateral interstate dispute without adequately reflecting 'the structural instability and insecurity in the region, the overall pattern of lawlessness and disorder and the reprehensible behaviour of all parties involved' (*Case Concerning Armed Activities on the Territory of the Congo [Democratic Republic of the Congo v Uganda] [Separate Opinion of Judge Kooijmans]* para. 14).

D. Judgment of 3 February 2006

18 In its judgment of 3 February 2006 the ICJ had to pronounce on seven compromissory clauses which the DRC had invoked in order to establish the jurisdiction of the court. The first clause to be relied on by the DRC was Art. IX Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951 [78 UNTS 277]) ('Genocide Convention'; → *Genocide*), but Rwanda had made a reservation to this Article (→ *Treaties, Multilateral, Reservations to*). Whereas a Rwandan *décret-loi* (emergency decree) of 1995 provided for a withdrawal of reservations to international agreements, this internal act had not been implemented at the international level. Short of a notification to the other States Parties or, in this case, to the depositary, the Rwandan reservation had not been withdrawn. The ICJ then analyzed a statement made by the Rwandan Minister of Justice before the → *United Nations Commission on Human Rights* in 2005, according to which 'past reservations not yet withdrawn [would] shortly be withdrawn'. (*Case Concerning Armed Activities on the Territory of the Congo [New Application: 2002] [Democratic Republic of the Congo v Rwanda] [Jurisdiction and Admissibility]* [2006] 583.) The ICJ held that a Minister of Justice, making an official statement on a human rights matter before the United Nations Commission on Human Rights, had in principle the power to bind her State (→ *Representatives of States in International Relations*). The statement was not, however, made in sufficiently specific terms in order to constitute a unilateral commitment having legal effect (→ *Unilateral Acts of States in International Law*). The DRC maintained that the reservation was invalid because the Genocide Convention contained norms of → *ius cogens*. According to the ICJ neither the *erga omnes* character nor the *ius cogens* character of the prohibition of genocide could by itself provide a basis for jurisdiction since the jurisdiction of the ICJ has always been based on the → *consent* of the parties (→ *Obligations erga omnes*). Finally, the ICJ did not regard the reservation as being incompatible with the object and purpose of the Convention (→ *Treaties, Object and Purpose*), although Judge Koroma dissented on that point. Hence the reservation was valid and the ICJ had no jurisdiction under Art. IX Genocide Convention.

19 The DRC had also invoked Art. 22 International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969 [666 UNTS 195]) ('Convention on Racial

Discrimination'; → *Racial and Religious Discrimination*), but Rwanda had made a reservation to this provision. The ICJ found that the reservation had not been withdrawn and that it was not invalid because the procedural requirements laid down in Art. 20(2) and (3) of the convention had not been met. Art. 29(1) Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981 [1249 UNTS 13]) gives jurisdiction to the ICJ if a dispute settlement by → *negotiation* has not been possible and after an attempt to submit the dispute to arbitration has failed (→ *Women, Non-Discrimination of*). According to the ICJ, none of these conditions was fulfilled. Judges Kooijmans and Al-Khasawneh disagreed as far as they saw sufficient attempts to settle the dispute by negations within the framework of international bodies. The ICJ also discarded Art. 75 WHO Constitution (→ *World Health Organization [WHO]*), Art. XIV UNESCO Constitution (→ *United Nations Educational, Scientific and Cultural Organization [UNESCO]*) and Art. 14(1) Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (see para. 3 above) because the conditions laid down in these compromissory clauses had not been met. The DRC had finally invoked Art. 66 → *Vienna Convention on the Law of Treaties (1969)* ('VCLT') which gives jurisdiction to the ICJ with regard to Arts 53 and 64 relating to conflicts between treaties and *ius cogens*. The ICJ held, however, that the VCLT, due to its non-retroactivity laid down in Art. 4, was not directly applicable to questions relating to the Genocide Convention and to the Convention on Racial Discrimination and that the rules contained in Art. 66 VCLT were not declaratory of customary international law.

20 The decision about the ICJ lacking jurisdiction was taken by 15 votes to two, Judge Koroma and Judge ad hoc Mavungu dissenting. Several judges joined their opinions and declarations to the judgment. Judge Koroma considered that the Rwandan reservation to Art. IX Genocide Convention did not meet the object and purpose test and had to be discarded. According to him, the possibility of invoking a State's responsibility for genocide before the ICJ was an essential element of the commitment to prevent and to punish the crime of genocide which constituted the object and purpose of the convention. Judges Higgins, Kooijmans, Elaraby, Owada and Simma, while not dissenting, further elaborated on the validity of reservations in a joint separate opinion. They concluded that the ICJ should reconsider the compatibility of reservations to Art. IX with the object and purpose of the Genocide Convention in more detail on a future occasion.

E. Assessment and Relevance

21 In the 2005 judgment in the *Armed Activities [Congo v Uganda] Case* the ICJ confirmed its previous case law on use of force and State responsibility. However, important questions remain unsolved. The ICJ reaffirmed that States are responsible for rebels under their control, but it did not decide whether the *Nicaragua* standard of effective control had to be replaced by the *Tadić* standard of overall control (see para. 9 above). Although the discussed cases concern civil war and foreign intervention therein, the ICJ judgment has to be seen in the light of the discussion on international terrorism. In the aftermath of 11 September 2001 it has been proposed to construe the provisions on the interdiction of force and on legitimate self-defence in a broader way. The ICJ, by contrast, confirmed the traditional and strict reading of Art. 2(4) and 51 UN Charter. While the court did not refer to international terrorism, it confirmed that self-defence presupposed an armed attack attributable to the aggressor State. Hence there are strong reasons to believe that the ICJ would not accept military actions against terrorists within the territory of a foreign State under a claim of self-defence unless terrorist conduct is attributable to that State under the established rules of international responsibility. As far as the relationship between the ICJ and the Security Council is concerned, it is quite clear that the ICJ, though not accepting any supremacy of the Security Council, was cautious to avoid conflicts with Security Council decisions both in the order of 1 July 2000 indicating provisional measures and in the final judgment.

22 The 2006 jurisdiction judgment is important for its dealing with the law of treaties and in particular with reservations and *ius cogens*. While the ICJ has recognized the existence of *ius cogens* norms for the first time, it resisted the temptation to derive far-reaching legal consequences from the concept of *ius cogens*. The judgment shows, however, that the law of reservations is far from being settled. Although the view that reservations to the jurisdiction of the court under Art. IX Genocide Convention are permissible is in line with the court's earlier jurisprudence (→ *Genocide Convention, Reservations [Advisory Opinion]*; → *Yugoslavia, Cases before the ICJ*), the ICJ missed a chance to present a convincing analysis of the convention's object and purpose as five judges rightly criticized in their joint separate opinion. Besides that, the court's affirmation that declarations of *certain officials* such as ministers of justice can bind their States adds to the debate on unilateral acts.

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