CORRESPONDENCE

TO THE EDITORS IN CHIEF:

The April 2003 issue of the *American Journal of International Law* contains a report by John R. Crook entitled *The 2002 Judicial Activity of the International Court of Justice.* He refers on page 357 to my declaration in the *Case Concerning Armed Activities on the Territory of the Congo* (New Application: 2002) (Democratic Republic of the Congo v. Rwanda).[1]

Mr. Crook wrote that I "argued that the Court should have indicated provisional measures even absent proof of prima facie jurisdiction."[2] I regret to say that his conclusion is not correct. In the sole paragraph of the declaration that he quotes, I did write that "the jurisdiction of the Court need not be established at this early stage of the proceedings."[3] There was no claim that provisional measures may be indicated in the absence of prima facie jurisdiction. Indeed, the rest of the declaration emphasized that prima facie jurisdiction has to be established, and the Court, in my view, implied in paragraph 87 that it had been established.

I argued that "the provisions of Article 14 of the Montreal Convention together with the reference to the shooting down of a Congolese plane in 1998 should have been considered *adequate to establish a* prima facie *jurisdiction to indicate provisional measures.*"[4] I also cited Judge Hersch Lauterpacht to the effect that "before the Court could grant a request for interim measures *there must exist some . . . basis for the view that the Court might be possessed of substantive jurisdiction relative to the eventual merits.*"[5] I then quoted the 1972 *Fisheries Jurisdiction* case for the proposition that "on a request for provisional measures the Court need not, before indicating them, finally satisfy itself that it has jurisdiction on the merits of the case, *yet it ought not to act under Article 41 of the Statute if the absence of jurisdiction on the merits is manifest.*"[6] In this case, I went on to conclude that "the cumulative effect of the absence of a manifest lack of jurisdiction, on the one hand, and the implied acceptance of *prima facie* jurisdiction under the Montreal Convention, on the other, should have been considered an adequate basis to found jurisdiction to indicate provisional measures."[7]

In point of fact, the Court observed in paragraph 89 that it "does not in the present case have the *prima facie* jurisdiction necessary to indicate *those* provisional measures requested by the Congo."[8] The implication is clearly that the Court acknowledges that the absence of prima facie jurisdiction extends only to the provisional measures requested by the Congo.

It should therefore be clear that the declaration did *not* argue that the Court should have indicated provisional measures even absent proof of prima facie jurisdiction. The main thrust of my argument was that even if the Congo did not request provisional measures relating to

[1] Armed Activities on the Territory of the Congo (New Application: 2002) (Dem. Rep. Congo v. Rwanda), Provisional Measures, Declaration of Judge Elaraby (Int'l Ct. Justice July 10, 2002), 41 ILM 1175 (2002) [hereinafter Declaration].

[2] John R. Crook, *The 2002 Judicial Activity of the International Court of Justice,* 97 AJIL 352, 357 (2003).

[3] Declaration, *supra* note 1, para. 3.

[4] *Id.,* para. 11 (emphasis added).

[5] *Id.* (quoting Gerald Fitzmaurice, *Hersch Lauterpacht—The Scholar as Judge. Part II,* 1962 BRIT. Y.B. INT'L L. 1, 74 (emphasis added)).

[6] *Id.,* para. 14 (quoting Fisheries Jurisdiction (UK v. Ice.; FRG v. Ice.), Interim Protection, 1972 ICJ REP. 12, 15, para. 15 (Aug. 17) (emphasis added)).

[7] *Id.*

[8] Armed Activities on the Territory of the Congo, *supra* note 1, para. 89 (emphasis added).

the Montreal Convention, the Court could have indicated such measures *proprio motu* on the basis of Article 75 of the Rules of Court.

NABIL ELARABY
Judge, International Court of Justice

John Crook replies:

My apologies to Judge Elaraby for the mis-description of his position in the sentence he points to. This partly resulted from attempting to describe thoughtful and subtle positions in a few words for purposes of a short survey. I had thought, incorrectly as Judge Elaraby now makes clear, that the sentence reflected a powerful current in his declaration, which begins by indicating that the Court should in principle order provisional measures whenever urgency and likelihood of irreparable damage are established, without referring to jurisdiction. Important parts of the ensuing analysis seemed to flow in the same direction, emphasizing (in paragraph 3) the Court's "wide scope of discretion," and stressing (in the same paragraph) that the Statute "does not attach additional conditions to the authority . . . to grant provisional measures. In point of fact, the jurisdiction of the Court need not be established at this early stage of the proceedings."

Judge Elaraby, of course, is the ultimate authority on the matter, and I am grateful to him for taking the time to read my survey of the Court's work and to correct the record.

TO THE EDITORS IN CHIEF:

David Marcus's piece, *Famine Crimes in International Law* (97 AJIL 245 (2003)), has much in it to command the attention of genocide scholars.

His proposition that there be a second degree of famine crimes has long been advocated by scholars of genocide for genocide itself. The senior scholar of genocide, Yehuda Bauer, has argued that there are two crimes of genocide: first, "genocide"—the planned destruction of a group by various means, including enslavement; second, "holocaust"—the planned physical annihilation of the group.[1]

Helen Fein, one founder of the study of comparative genocide, detailed elements of the crime of genocide by attrition six years ago.[2] Unfortunately, famine crimes are only one of its components.

Genocide by attrition is proscribed by the United Nations Genocide Convention, yet its elements are nearly unknown and never enforced. Documentarians do not ask survivors about their menstrual periods or lice infestations. From my tiny corner of the very large body of evidence, I would like to describe elements of the crime in the genocide of attrition that took place in Cambodia between 1975 and 1979. Attrition entails, among other things, famine, birth control through famine, and the diseases of sewage, unburied bodies, and typhus-bearing lice. The forced removal of Cambodian children five years old and up to Khmer Rouge work groups, and the subsequent universal Khmer Rouge exhortation to betray their parents' class in "self-criticism" sessions, with fatal results, may arguably be construed as a violation of the UN proscription (Art. II(e) of the Convention) against the removal of children to destroy the group.

[1] FRANK CHALK & KURT JONASSOHN, THE HISTORY AND SOCIOLOGY OF GENOCIDE: ANALYSES AND CASE STUDIES 20 (1990).

[2] Helen Fein, *Genocide by Attrition 1939–1993—The Warsaw Ghetto, Cambodia, and Sudan: Links Between Human Rights, Health, and Mass Death*, *in* 2 HEALTH AND HUMAN RIGHTS 2, 10–45 (1997). Among elements of the crime of genocide by attrition, Fein notes forced relocation; deprivation of populations; epidemics of nutrition-related disease as well as malaria, tuberculosis, typhus, meningitis; rape, castration, prevention of marriage; coercive assimilation of children; contamination of water supply; withholding of fuel; overwork, and overcrowding. Fein notes that 700,000 Jews, or 13.7% of the dead, died of hunger and diseases attributable to conditions in Nazi ghettoes, *id.* at 12; of the estimated 2.2 million Cambodian dead, an estimated one quarter died of starvation and one quarter of disease, *id.* at 19; of 1.3 million southern Sudanese dead, many died of famine or disease preventable by available medication. Some 75,000 Dinka children were sold into slavery in the north, as proscribed by the UN convention on genocide. *See* Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, Art. 2(e), 78 UNTS 227 (entered into force Jan. 12, 1951).