

SEPARATE OPINION OF JUDGE SIMMA

The Court should have called the Ugandan invasion of a large part of the DRC's territory an act of aggression — The Court should not have avoided dealing with the issue of self-defence against large-scale cross-boundary armed attacks by non-State actors but rather it should have taken the opportunity to clarify a matter to the confused state of which it has itself contributed — Against the background of current attempts to deprive certain persons of the protection due to them under international humanitarian and human rights law, the Court should have found that the private persons maltreated at Kinshasa Airport in August 1998 did enjoy such protection, and that Uganda would have had standing to raise a claim in their regard irrespective of their nationality.

1. Let me emphasize at the outset that I agree with everything the Court is saying in its Judgment. Rather, what I am concerned about are certain issues on which the Court decided to say nothing. The first two matters in this regard fall within the ambit of the use of force in the context of the claims of the Democratic Republic of the Congo; the third issue concerns the applicability of international humanitarian and human rights law to a certain part of Uganda's second counter-claim.

1. THE USE OF FORCE BY UGANDA AS AN ACT OF AGGRESSION

2. One deliberate omission characterizing the Judgment will strike any politically alert reader: it is the way in which the Court has avoided dealing with the explicit request of the DRC to find that Uganda, by its massive use of force against the Applicant has committed an act of aggression. In this regard I associate myself with the criticism expressed in the separate opinion of Judge Elaraby. After all, Uganda invaded a part of the territory of the DRC of the size of Germany and kept it under its own control, or that of the various Congolese warlords it befriended, for several years, helping itself to the immense natural riches of these tormented regions. In its Judgment the Court cannot but acknowledge of course that by engaging in these "military activities" Uganda "violated the principle of non-use of force in international relations and the principle of non-intervention" (Judgment, para. 345 (1)). The Judgment gets toughest in paragraph 165 of its reasoning where it states that "[t]he unlawful military intervention by Uganda was of such a magnitude and duration that the Court considers it to be a grave violation of the prohibition of the use of force expressed in Article 2, paragraph 4, of the Charter". So, why not

call a spade a spade? If there ever was a military activity before the Court that deserves to be qualified as an act of aggression, it is the Ugandan invasion of the DRC. Compared to its scale and impact, the military adventures the Court had to deal with in earlier cases, as in *Corfu Channel*, *Military and Paramilitary Activities in and against Nicaragua* or *Oil Platforms*, border on the insignificant.

3. It is true that the United Nations Security Council, despite adopting a whole series of resolutions on the situation in the Great Lakes region (cf. paragraph 150 of the Judgment) has never gone as far as expressly qualifying the Ugandan invasion as an act of aggression, even though it must appear as a textbook example of the first one of the definitions of “this most serious and dangerous form of the illegal use of force” laid down in General Assembly resolution 3314 (XXIX). The Council will have had its own — political — reasons for refraining from such a determination. But the Court, as the principal *judicial* organ of the United Nations, does not have to follow that course. Its very *raison d’être* is to arrive at decisions based on law and nothing but the law, keeping the political context of the cases before it in mind, of course, but not desisting from stating what is manifest out of regard for such non-legal considerations. This is the division of labour between the Court and the political organs of the United Nations envisaged by the Charter!

2. SELF-DEFENCE AGAINST LARGE-SCALE ARMED ATTACKS BY NON-STATE ACTORS

4. I am in agreement with the Court’s finding in paragraph 146 of the Judgment that the “armed attacks” to which Uganda referred when claiming to have acted in self-defence against the DRC were perpetrated not by the Congolese armed forces but rather by the Allied Democratic Forces (ADF), that is, from a rebel group operating against Uganda from Congolese territory. The Court stated that Uganda could provide no satisfactory proof that would have sustained its allegation that these attacks emanated from armed bands or regulars sent by or on behalf of the DRC. Thus these attacks are not attributable to the DRC.

5. The Court, however, then finds, that for these reasons the legal and factual circumstances for the exercise of a right to self-defence by Uganda against the DRC were not present (Judgment, para. 147). Accordingly, the Court continues, it has no need to respond to the contentions of the Parties as to whether and under what conditions contemporary interna-

tional law provides for a right of self-defence against large-scale attacks by irregular forces (Judgment, para. 147).

6. Thus, the reasoning on which the Judgment relies in its findings on the first submission by the DRC appears to be as follows:

- since the submission of the DRC requests the Court (only) to find that it was Uganda’s use of force against the DRC which constituted an act of aggression, and
- since the Court does not consider that the military activities carried out from Congolese territory onto the territory of the Respondent by anti-Ugandan rebel forces are attributable to the DRC,
- and since therefore Uganda’s claim that its use of force against the DRC was justified as an exercise of self-defence, cannot be upheld,

it suffices for the Court to find Uganda in breach of the prohibition of the use of force enshrined in the United Nations Charter and in general international law. The Applicant, the Court appears to say, has not asked for anything beyond that. Therefore, it is not necessary for the Court to deal with the legal qualification of either the cross-boundary military activities of the anti-Ugandan groups as such, or of the Ugandan countermeasures against these hostile acts.

7. What thus remains unanswered by the Court is the question whether, even if not attributable to the DRC, such activities could have been repelled by Uganda through engaging these groups also on Congolese territory, if necessary, provided that the rebel attacks were of a scale sufficient to reach the threshold of an “armed attack” within the meaning of Article 51 of the United Nations Charter.

8. Like Judge Kooijmans in paragraphs 25 ff. of his separate opinion, I submit that the Court should have taken the opportunity presented by the present case to clarify the state of the law on a highly controversial matter which is marked by great controversy and confusion — not the least because it was the Court itself that has substantially contributed to this confusion by its *Nicaragua* Judgment of two decades ago. With Judge Kooijmans, I regret that the Court “thus has missed a chance to fine-tune the position it took 20 years ago in spite of the explicit invitation by one of the Parties to do so” (separate opinion of Judge Kooijmans, para. 25).

9. From the *Nicaragua* case onwards the Court has made several pronouncements on questions of use of force and self-defence which are problematic less for the things they say than for the questions they leave open, prominently among them the issue of self-defence against armed attacks by non-State actors.

10. The most recent — and most pertinent — statement in this context is to be found in the (extremely succinct) discussion by the Court in its *Wall* Opinion of the Israeli argument that the separation barrier under

construction was a measure wholly consistent with the right of States to self-defence enshrined in Article 51 of the Charter (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 194, para. 138). To this argument the Court replied that Article 51 recognizes the existence of an inherent right of self-defence in the case of an armed attack by one State against another. Since Israel did not claim that the attacks against it were imputable to a foreign State, however, Article 51 of the Charter had no relevance in the case of the wall (*ibid.*, para. 139).

11. Such a restrictive reading of Article 51 might well have reflected the state, or rather the prevailing interpretation, of the international law on self-defence for a long time. However, in the light of more recent developments not only in State practice but also with regard to accompanying *opinio juris*, it ought urgently to be reconsidered, also by the Court. As is well known, these developments were triggered by the terrorist attacks of September 11, in the wake of which claims that Article 51 also covers defensive measures against terrorist groups have been received far more favourably by the international community than other extensive re-readings of the relevant Charter provisions, particularly the “Bush doctrine” justifying the pre-emptive use of force¹. Security Council resolutions 1368 (2001) and 1373 (2001) cannot but be read as affirmations of the view that large-scale attacks by non-State actors can qualify as “armed attacks” within the meaning of Article 51.

12. In his separate opinion, Judge Kooijmans points to the fact that the almost complete absence of governmental authority in the whole or part of the territory of certain States has unfortunately become a phenomenon as familiar as international terrorism (separate opinion of Judge Kooijmans, para. 30). I fully agree with his conclusions that, if armed attacks are carried out by irregular forces from such territory against a neighbouring State, these activities are still armed attacks even if they cannot be attributed to the territorial State, and, further, that it “would be unreasonable to deny the attacked State the right to self-defence merely because there is no attacker State and the Charter does not so require” (*ibid.*)².

13. I also subscribe to Judge Kooijmans’s opinion that the lawfulness

¹ Th. Bruha and Ch. Tams, “Self-Defence against Terrorist Attacks. Considerations in the Light of the ICJ’s ‘Israeli Wall’ Opinion”, in K. Dicke *et al* (eds.), *Weltinnenrecht. Liber Amicorum Jost Delbrück*, 2005, pp. 84-112, at p. 97.

² Referring to Y. Dinstein, *War, Aggression, and Self-Defence*, 3rd ed., 2001, p. 216.

of the conduct of the attacked State in the face of such an armed attack by a non-State group must be put to the same test as that applied in the case of a claim of self-defence against a State, namely, does the scale of the armed action by the irregulars amount to an armed attack and, if so, is the defensive action by the attacked State in conformity with the requirements of necessity and proportionality? (Separate opinion of Judge Kooijmans, para. 31.)

14. In applying this test to the military activities of Uganda on Congolese territory from August 1998 onwards, Judge Kooijmans concludes — and I agree — that, while the activities that Uganda conducted in August in an area contiguous to the border may still be regarded as keeping within these limits, the stepping up of Ugandan military operations starting with the occupation of the Kisangani airport and continuing thereafter, leading the Ugandan forces far into the interior of the DRC, assumed a magnitude and duration that could not possibly be justified any longer by reliance on any right of self-defence. Thus, at this point, our view meets with, and shares, the Court's final conclusion that Uganda's military intervention constitutes "a grave violation of the prohibition on the use of force expressed in Article 2, paragraph 4, of the Charter" (Judgment, para. 165).

15. What I wanted to demonstrate with the preceding reasoning is that the Court could well have afforded to approach the question of the use of armed force on a large scale by non-State actors in a realistic vein, instead of avoiding it altogether by a sleight of hand, and still arrive at the same convincing result. By the unnecessarily cautious way in which it handles this matter, as well as by dodging the issue of "aggression", the Court creates the impression that it somehow feels uncomfortable being confronted with certain questions of utmost importance in contemporary international relations.

3. THE MALTREATMENT OF PERSONS AT NDJILI INTERNATIONAL AIRPORT AND INTERNATIONAL HUMANITARIAN AND HUMAN RIGHTS LAW

16. My third observation relates to the maltreatment inflicted on certain persons by Congolese soldiers at Ndjili International Airport in Kinshasa in August 1998.

In its second counter-claim, Uganda alleged, *inter alia*, that by maltreating certain individuals other than Ugandan diplomats when they attempted to leave the country following the outbreak of the armed conflict, the DRC violated its obligations under the "international minimal standard relating to the treatment of foreign nationals lawfully on State territory", as well as "universally recognized standards of human rights concerning the security of the human person" (Counter-Memorial of Uganda (CMU), paras. 405-407). The Court concluded in paragraph 333 of its Judgment that in presenting this part of the counter-claim Uganda

was attempting to exercise its right to diplomatic protection with regard to its nationals. It followed that Uganda would need to meet the conditions necessary for the exercise of diplomatic protection as recognized in general international law, that is, the requirement of Ugandan nationality of the individuals concerned and the prior exhaustion of local remedies. The Court observed that no specific documentation could be found in the case file identifying the persons as Ugandan nationals. The Court thus decided that, this condition not being met, the part of Uganda's counter-claim under consideration here was inadmissible. It thus upheld the objection of the DRC to this effect (Judgment, para. 345 (11)).

17. My vote in favour of this part of the Judgment only extends to the inadmissibility of Uganda's claim to diplomatic protection, since I agree with the Court's finding that the preconditions for a claim of diplomatic protection by Uganda were not met. I am of the view, however, that the Court's reasoning should not have finished at this point. Rather, the Court should have recognized that the victims of the attacks at the Ndjili International Airport remained legally protected against such maltreatment irrespective of their nationality, by other branches of international law, namely international human rights and, particularly, international humanitarian law. In its Judgment the Court has made a laudable effort to apply the rules developed in these fields to the situation of persons of varying nationality and status finding themselves in the war zones, in as comprehensive a manner as possible. The only group of people that remains unprotected by the legal shield thus devised by the Court are the 17 unfortunate individuals encountering the fury of the Congolese soldiers at the airport in Kinshasa.

18. I have to admit that the way in which Uganda presented and argued the part of its second counter-claim devoted to this group struck me as somewhat careless, both with regard to the evidence that Uganda mustered and to the quality of its legal reasoning. Such superficiality might stem from the attempts of more or less desperate counsel to find issues out of which they think they could construe what to them might look like a professionally acceptable counter-claim³, instead of genuine concern for the fate of the persons concerned.

³ This is not the first case giving me this impression; cf. my separate opinion in the case concerning *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, *I.C.J. Reports 2003*, pp. 342-343, para. 36.

19. Be this as it may, I will take the opportunity of Uganda's claim concerning the events at the airport further to develop the thesis presented at the outset, namely that it would have been possible for the Court in its Judgment to embrace the situation in which these individuals found themselves, on the basis of international humanitarian and human rights law, and that no legal void existed in their regard. The reader might ask himself why I should give so much attention to an incident which happened more than seven years ago, whose gravity must certainly pale beside the unspeakable atrocities committed in the war in the Congo. I will be very clear: I consider that legal arguments clarifying that in situations like the one before us no gaps exist in the law that would deprive the affected persons of any legal protection, have, unfortunately, never been as important as at present, in the face of certain recent deplorable developments.

20. Let me, first, turn to the relevance of international humanitarian law to the incident at Ndjili International Airport.

To begin with, the fact that the airport was not a site of major hostilities in the armed conflict between the DRC and Uganda does not present a barrier to the application of international humanitarian law to the events which happened there. There are two reasons for this.

21. First, the key issue in finding whether international humanitarian law should apply also in peaceful areas of the territory of a belligerent State is whether those areas are somehow connected to the conflict. This was indeed the case with Ndjili International Airport because the individuals maltreated there found themselves in a situation of evacuation from armed conflict. The Note of Protest sent by the Embassy of Uganda to the Ministry of Foreign Affairs of the DRC on 21 August 1998 — which the Court considers reliable evidence in paragraph 339 of its Judgment — states that individuals and Ugandan diplomats were at Ndjili International Airport in the context of an evacuation (CMU, Ann. 23). This evacuation was necessary due to the armed conflict taking place in the DRC. Therefore, the events at the airport were factually connected to the armed conflict. The airport was not a random peaceful location completely unconnected to that conflict. Quite the contrary, it was the point of departure for an evacuation rendered necessary precisely by the armed conflict. During that evacuation, the airport became the scene of violence by Congolese forces against the evacuees.

22. Article 80 (1) of the Rules of Court states that: "A counter-claim may be presented provided that it is *directly connected* with the subject-matter of the claim of the other party and that it comes within the jurisdiction of the Court." (Emphasis added.) In its Order of 29 November 2001, the Court found the second counter-claim admissible under the

Article 80 “direct connection” test, stating that “each Party holds the other responsible for various acts of oppression allegedly *accompanying an illegal use of force*; . . . these are facts of the same nature, and . . . the Parties’ claims form part of the same factual complex” (para. 40; emphasis added). Therefore the Court had already determined, in its Order under Article 80, that the events at the airport formed part of the “same factual complex” as the armed conflict which constitutes the basis of the main claim. Hence, international humanitarian law should apply to the counter-claim as it does to the main claim.

23. Second, the application of international humanitarian law to the events at the airport would be consistent with the understanding of the scope of international humanitarian law developed by the ICTY Appeals Chamber. In *Prosecutor v. Tadić*, the Appeals Chamber stated:

“Armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between . . . such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal armed conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law *continues to apply in the whole territory of the warring States* or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.” (No. IT-94-1, Decision of the Appeals Chamber on the defence motion for interlocutory appeal on jurisdiction, para. 70 (2 October 1995); emphasis added.)

The Appeals Chamber also noted that “the temporal and geographical scope of both internal and international armed conflicts extends beyond the exact time and place of hostilities” (*ibid.*, para. 67). Later in the same case, a Trial Chamber analysed the phrase “when committed in armed conflict”, which qualifies the unlawful acts set out in Article 5 of the Statute of the ICTY, and concluded that “it is not necessary that the acts occur in the heat of battle” (*Prosecutor v. Duško Tadić*, No. IT-94-1-T, Trial Chamber, Opinion and Judgment, para. 632 (7 May 1997)). Similarly, a Trial Chamber of the ICTY has stated that “there does not have to be actual combat activities in a particular location for the norms of international humanitarian law to be applicable” (*Prosecutor v. Delalić, Mucić, Delić, & Landžo*, No. IT-96-21-T, Trial Chamber Judgment, para. 185 (16 November 1998)).

24. I turn, next, to the substantive rules of international humanitarian

law applicable to the persons in question. The provision which first comes to mind is Article 4 of the Fourth Geneva Convention of 1949. According to Article 4, persons who “at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals” are considered “protected persons” under the Convention. If the individuals maltreated by the DRC at Ndjili International Airport were considered protected persons under Article 4 of the Fourth Geneva Convention, the behaviour of the Congolese soldiers would have violated several provisions of that Convention, including Article 27 (requiring that protected persons “shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity”), Article 32 (prohibiting the infliction of physical suffering on protected persons), Article 33 (prohibiting reprisals against protected persons and their property), and Article 36 (requiring that evacuations of protected persons be carried out safely).

25. However, the qualification of the 17 individuals at the airport as “protected persons” within the meaning of Article 4 meets with great difficulties. As I stated above, Uganda was not able to prove that these persons were its own nationals; in fact we have no information whatsoever as to their nationality. In this regard, Article 4 of the Fourth Geneva Convention states that:

“Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.”

The individuals under consideration might have been nationals of a neutral State or those of a co-belligerent (like Rwanda), and we do not know whether their home State maintained normal diplomatic relations with the DRC at the time of the incident. Against this factual background — or rather, the lack thereof — it would not have been possible for the Court to regard them as “protected persons”.

26. But this is not the end of the matter. The gap thus left by Geneva Convention Article 4 has in the meantime been — deliberately — closed by Article 75 of Protocol I Additional to the Geneva Conventions of 1949. This provision enshrines the fundamental guarantees of international humanitarian law and reads in pertinent part as follows:

“1. In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party

to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article . . .

2. The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents:

- (a) violence to the life, health, or physical or mental well-being of persons, in particular:
 -
 - (iii) corporal punishment;
 -
- (b) outrages upon personal dignity, in particular humiliating and degrading treatment, . . .”

The Commentary of the International Committee of the Red Cross to Article 75 specifically notes that this provision was meant to provide protection to individuals who, by virtue of the exceptions listed in Article 4 of the Fourth Geneva Convention, did not qualify as “protected persons”. Thus, the Commentary makes clear that Article 75 provides protection to both nationals of States not parties to the conflict and nationals of allied States, even if their home State happened to have normal diplomatic representation in the State in whose hands they find themselves⁴. The Commentary emphasizes that “[i]f . . . there were . . . cases in which the status of . . . protected person were denied to certain individuals, the protection of Article 75 must be applied to them as a minimum”⁵.

27. The conclusion just arrived at has been confirmed recently in an Opinion of the European Commission for Democracy through Law (Venice Commission) established by the Council of Europe⁶. This Opinion was prepared to answer the question whether the new challenges posed by international terrorism, and the claims made by the United States in the wake of September 11 to the effect that the United States could deny certain persons the protection of the Geneva Conventions because they were “enemy unlawful combatants”, rendered necessary a further development of international humanitarian law. According to the Venice Commission, Article 75 of Protocol I Additional to the Geneva Conventions, as well as common Article 3 to the Geneva Conventions (on which *infra*)

“are based on the assumption that nationals of States which are not

⁴ *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Y. Sandoz, Ch. Swinarski, B. Zimmermann (eds.), 1987, p. 869.

⁵ *Ibid.*, p. 867.

⁶ Adopted by the Venice Commission at its 57th Plenary Session, Venice, 12-13 December 2003, Opinion No. 245/2003, doc. No. CDL-AD (2003) 018, paras. 34 ff.

Parties to the conflict or nationals of co-belligerent States do not need the full protection of GC IV since they are normally even better protected by the rules on diplomatic protection. Should, however, diplomatic protection not be (properly) exercised on behalf of such third party nationals, International Humanitarian Law provides for protection under Article 75 P I and common Article 3 so that such persons do not remain without certain minimum rights.”⁷

Thus, also according to the Venice Commission, there is “in respect of these matters . . . no legal void in international law”⁸.

28. Further, it can safely be concluded that the fundamental guarantees enshrined in Article 75 of Additional Protocol I are also embodied in customary international law⁹.

29. Attention must also be drawn to Article 3 common to all four Geneva Conventions, which defines certain rules to be applied in armed conflicts of a non-international character. As the Court stated in the *Nicaragua* case:

“There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court’s opinion, reflect what the Court in 1949 called ‘elementary considerations of humanity’ (*Corfu Channel, Merits, I.C.J. Reports 1949*, p. 22 . . .).” (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 114, para. 218.)

As such, the Court in *Nicaragua* found these rules applicable to the international dispute before it. The same is valid in the present case. In this regard, the decision of the *Tadić* Appeals Chamber discussed above is also of note. In relation to common Article 3, it stated that “the rules contained in Article 3 also apply outside the narrow geographical context of the actual theatre of combat operations” (*Prosecutor v. Tadić, Decision of the Appeals Chamber on the defence motion for interlocutory appeal on jurisdiction*, para. 69; see *supra*, para. 23).

30. In addition to constituting breaches of international humanitarian

⁷ *Op. cit.* footnote 6, para. 38.

⁸ *Ibid.*, para. 85.

⁹ For a highly relevant reference in this regard (cf. *supra*, para. 19), United States Army, *Operational Law Handbook* (2002), International and Operational Law Department, The Judge Advocate General’s School, United States Army, Charlottesville, Virginia, issued 15 June 2001, Chap. 2, p. 5. See also, more generally, A. Roberts, “The Laws of War in the War on Terror”, *Israel Yearbook on Human Rights*, Vol. 32 (2002), pp. 192-245.

law, the maltreatment of the persons in question at Ndjili International Airport was also in violation of international human rights law. In paragraph 216 of its Judgment, the Court recalls its finding in the Advisory Opinion of 9 July 2004 on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, according to which “the protection offered by human rights conventions does not cease in case of armed conflict . . .” (*I.C.J. Reports 2004*, p. 178, para. 106). In its Advisory Opinion, the Court continued:

“As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.” (*Ibid.*)

In my view, the maltreatment of the individuals at the airport falls under the third category of the situations mentioned: it is a matter of both international humanitarian and international human rights law.

31. Applying international human rights law to the individuals maltreated by the DRC at Ndjili International Airport, the conduct of the DRC would violate provisions of the International Covenant on Civil and Political Rights of 19 December 1966, the African Charter on Human and Peoples’ Rights of 27 June 1981, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984, to all of which both the DRC and Uganda are parties. Specifically, under the International Covenant on Civil and Political Rights, the conduct of the DRC would violate Article 7 (“No one shall be subjected to . . . cruel, inhuman or degrading treatment or punishment”), Article 9, paragraph 1 (“Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law”), Article 10, paragraph 1 (“All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person”), and Article 12, paragraphs 1 and 2 (“1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement . . . 2. Everyone shall be free to leave any country, including his own”).

Under the African Charter, the conduct of the DRC would violate Article 4 (“Human beings are inviolable. Every human being shall be entitled to respect for . . . the integrity of his person. No one may be arbitrarily deprived of this right”), Article 5 (“Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly . . . cruel, inhuman or degrading punishment and

treatment shall be prohibited”), Article 6 (“Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained”), as well as Article 12, paragraphs 1 and 2 (“1. Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law. 2. Every individual shall have the right to leave any country including his own, and to return to his country . . .”). Finally, although the conduct of the DRC at Ndjili International Airport did not rise to the level of torture, it was nevertheless in violation of Article 16, paragraph 1, of the Convention against Torture which reads as follows:

“Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”

32. The jurisdiction of the Court being firmly established, there remains the issue of standing to raise violations of international humanitarian and human rights law in the case of persons who may not have the nationality of the claimant State. In the present case, regarding Uganda’s counterclaim, the issue does not present itself in a technical sense because Uganda has not actually pleaded a violation of either of these branches of international law in relation to the persons in question. But if Uganda had chosen to raise these violations before the Court, it would undoubtedly have had standing to bring such claims.

33. As to international humanitarian law, Uganda would have had standing because, as the Court emphasized in its Advisory Opinion on the *Wall*:

“Article 1 of the Fourth Geneva Convention, a provision common to the four Geneva Conventions, provides that ‘The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.’ It follows from that provision that every State party to that Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with.” (*I.C.J. Reports 2004*, pp. 199-200, para. 158.)

The Court concluded that given the character and the importance of the rights and obligations involved, there is an obligation on all States parties to the Convention to respect and ensure respect for violations of the international humanitarian law codified in the Convention (*ibid.*, p. 200, paras. 158-159). The same reasoning is applicable in the instant case.

There cannot be any doubt that the obligation (not only to respect but also) to ensure respect for international humanitarian law applies to the obligations enshrined both in common Article 3 and in Protocol I Additional to the Geneva Conventions.

34. The ICRC Commentary to common Article 1 of the Conventions arrives at the same result in its analysis of the obligation to respect and to ensure respect, where it is stated that:

“in the event of a Power failing to fulfil its obligations [under the Convention], the other Contracting Parties (neutral, allied or enemy) may, and should, endeavour to bring it back to an attitude of respect for the Convention. The proper working of the system of protection provided by the Convention demands in fact that the Contracting Parties should not be content merely to apply its provisions themselves, but should do everything in their power to ensure that the humanitarian principles underlying the Conventions are applied universally.”¹⁰

Thus, regardless of whether the maltreated individuals were Ugandans or not, Uganda had the right — indeed the duty — to raise the violations of international humanitarian law committed against the private persons at the airport. The implementation of a State party’s international legal duty to ensure respect by another State party for the obligations arising under humanitarian treaties by way of raising it before the International Court of Justice is certainly one of the most constructive avenues in this regard.

35. As to the question of standing of a claimant State for violations of human rights committed against persons which might or might not possess the nationality of that State, the jurisdiction of the Court not being at issue, the contemporary law of State responsibility provides a positive answer as well. The International Law Commission’s 2001 draft on Responsibility of States for Internationally Wrongful Acts provides not only for the invocation of responsibility by an injured State (which quality Uganda would possess if it had been able to establish the Ugandan nationality of the individuals at the airport) but also for the possibility that such responsibility can be invoked by a State other than an injured State. In this regard, Article 48 of the draft reads as follows:

“Article 48

Invocation of Responsibility by a State Other than an Injured State

1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:

¹⁰ *Commentary to the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War*, J. S. Pictet (ed.), 1958, p. 16.

- (a) The obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or
 - (b) The obligation breached is owed to the international community as a whole.
2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:
- (a) Cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and
 - (b) Performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.
3. The requirements for the invocation of responsibility by an injured State under articles 43, 44 and 45 apply to an invocation of responsibility by a State entitled to do so under paragraph 1.”¹¹

The obligations deriving from the human rights treaties cited above and breached by the DRC are instances *par excellence* of obligations that are owed to a group of States including Uganda, and are established for the protection of a collective interest of the States parties to the Covenant.

36. With regard to the customary requirement of the exhaustion of local remedies, this condition only applies if effective remedies are available in the first place (cf. ILC Article 44 (b) and the commentary thereto). In view of the circumstances of the airport incident and, more generally, of the political situation prevailing in the DRC at the time of the Ugandan invasion, I tend to agree with the Ugandan argument that attempts by the victims of that incident to seek justice in the Congolese courts would have remained futile (cf. paragraph 317 of the Judgment). Hence, no obstacle would have stood in the way for Uganda to raise the violation of human rights of the persons maltreated at Ndjili International Airport, even if these individuals did not possess its nationality.

37. In summary of this issue, Uganda would have had standing to bring, and the Court would have had jurisdiction to decide upon a claim both under international humanitarian law and international human rights law for the maltreatment of the individuals at the airport, irrespective of the nationality of these individuals. The specific construction of the rights and obligations under the Fourth Geneva Convention as well

¹¹ Report of the ILC on the Work of its Fifty-third Session, *Official Records of the General Assembly, Fifty-sixth Session, Suppl. No. 10 (A/56/10)*, p. 56.

as the relevant provisions of Protocol I Additional to this Convention not only entitles every State party to raise these violations but even creates an obligation to ensure respect for the humanitarian law in question. The rules of the international law of State responsibility lead to an analogous result as concerns the violations of human rights of the persons concerned by the Congolese soldiers. Uganda chose the avenue of diplomatic protection and failed. A reminder by the Court of the applicability of international humanitarian and human rights law standards and of Uganda's standing to raise violations of the obligations deriving from these standards by the DRC would, in my view, not have gone *ultra petita partium*.

38. Let me conclude with a more general observation on the community interest underlying international humanitarian and human rights law. I feel compelled to do so because of the notable hesitation and weakness with which such community interest is currently manifesting itself vis-à-vis the ongoing attempts to dismantle important elements of these branches of international law in the proclaimed "war" on international terrorism.

39. As against such undue restraint it is to be remembered that at least the core of the obligations deriving from the rules of international humanitarian and human rights law are valid *erga omnes*. According to the Commentary of the ICRC to Article 4 of the Fourth Geneva Convention, "[t]he spirit which inspires the Geneva Conventions naturally makes it desirable that they should be applicable 'erga omnes', since they may be regarded as the codification of accepted principles"¹². In its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* the Court stated that "a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and 'elementary considerations of humanity' . . .", that they are "to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law" (*I.C.J. Reports 1996 (I)*, p. 257, para. 79). Similarly, in the *Wall* Advisory Opinion, the Court affirmed that the rules of international humanitarian law "incorporate obligations which are essentially of an *erga omnes* character" (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 199, para. 157).

40. As the Court indicated in the *Barcelona Traction* case, obligations *erga omnes* are by their very nature "the concern of all States" and, "[i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection" (*Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970*, p. 32, para. 33). In the same vein, the International Law Commission has

¹² *Op. cit.* footnote 10, p. 48.

stated in the Commentaries to its Articles on the Responsibility of States for Internationally Wrongful Acts that there are certain rights in the protection of which, by reason of their importance, “all States have a legal interest . . .” (A/56/10 at p. 278)¹³.

41. If the international community allowed such interest to erode in the face not only of violations of obligations *erga omnes* but of outright attempts to do away with these fundamental duties, and in their place to open black holes in the law in which human beings may be “disappeared” and deprived of any legal protection whatsoever for indefinite periods of time, then international law, for me, would become much less worthwhile.

(Signed) Bruno SIMMA.

¹³ Concerning the specific question of standing in case of breaches of obligations *erga omnes* the Institute of International Law, in a resolution on the topic of obligations of this nature adopted at its Krakow Session of 2005, accepted the following provisions:

Article 3

In the event of there being a jurisdictional link between a State alleged to have committed a breach of an obligation *erga omnes* and a State to which the obligation is owed, the latter State has standing to bring a claim to the International Court of Justice or other international judicial institution in relation to a dispute concerning compliance with that obligation.

Article 4

The International Court of Justice or other international judicial institution should give a State to which an obligation *erga omnes* is owed the possibility to participate in proceedings pending before the Court or that institution and relating to that obligation. Specific rules should govern this participation.”