SEPARATE OPINION OF JUDGE SEBUTINDE

This is not a proper case for the Court to exercise its function under Article 50 of the Statute of the Court and Article 67 of the Rules of Court as it is not a case involving "technical complexities" that the Court cannot handle without recourse to external experts — The Parties to this case have had ample opportunity to tender sufficient evidence before the Court in order to enable it to perform its judicial function without assistance from experts — The proposed terms of reference of the experts contained in the Order have the effect of unfairly interfering with the allocation of the burden of proof and tilting the balance in favour of one Party to the detriment of the other, contrary to the principles of a fair hearing and equality of arms — Alternatively, the terms of reference have the effect of inappropriately delegating the judicial function to the experts.

Introduction

1. In accordance with the well-settled principle of *onus probandi incumbit actori*, it is the duty of the party that asserts certain facts to establish the existence of such facts[1]. I am constrained to write this separate opinion because, in my respectful view, this is not a proper case in which the Court should appoint experts to exercise its powers under Article 50 of the Statute of the Court and Article 67 of the Rules of Court. In particular, I disagree with the role assigned to the Court's experts in this case, as contained in the "terms of reference". Since 13 May 2015, when the Democratic Republic of the Congo filed its "New Application" requesting the Court to reopen proceedings in order to determine the amount of reparations due to it from the Republic of Uganda, both Parties have had ample opportunity over the last five years to tender whatever evidence they deem necessary or sufficient (including facts, data and methodology) to prove their respective claims. What remains is not for the Court to seek further evidence outside that already submitted by the Parties, but rather to perform its judicial function by examining the evidence already on record and determining the reparations due. In my opinion, this is not a case involving "complex issues" that require technical, scientific or specialized knowledge or expertise that is outside the realm of normal judicial expertise. The proposed terms of reference of the experts contained in the Order have the effect of unfairly assisting one of the Parties in buttressing its evidence and discharging its evidentiary burden where that evidence may be wanting, contrary to the principles of a fair hearing and equality of arms. Alternatively, the terms of reference have the effect of inappropriately delegating the judicial function to the experts. The fact that the Parties will have an opportunity to comment on the experts' report or to cross-examine those experts during oral proceedings, offers little comfort in the circumstances of the present case.

Circumstances justifying Court-appointed experts

2. From the outset I wish to make it clear that I am not generally opposed to the Court exercising its powers pursuant to Article 50 of the Statute of the Court and Article 67 of the Rules of Court to appoint experts, where circumstances so warrant.

3. Article 50 of the Statute of the Court provides:

> "The Court may, at any time, entrust any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion."

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[1] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay) Judgment, I.C.J. Reports 2010 (I)*, p. 71, para. 162.

4. Article 67 of the Rules of Court provides:

> "1. If the Court considers it necessary to arrange for an enquiry or an expert opinion, it shall, after hearing the parties, issue an order to this effect, defining the subject of the enquiry or expert opinion, stating the number and mode of appointment of the persons to hold the enquiry or of the experts, and laying down the procedure to be followed. Where appropriate, the Court shall require persons appointed to carry out an enquiry, or to give an expert opinion, to make a solemn declaration.
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> 2. Every report or record of an enquiry and every expert opinion shall be communicated to the parties, which shall be given the opportunity of commenting upon it."

5. Faced with increasingly complex cases, the International Court of Justice (ICJ) (as well as its predecessor, the Permanent Court of International Justice — PCIJ) has sparingly drawn on its powers under the above provisions, appointing experts only in "complex cases" requiring technical, scientific or specialized knowledge or expertise that is outside the realm of normal judicial expertise. While the above provisions appear to give the Court unfettered discretion when appointing experts, the Court has been careful to ensure that the experts appointed are neutral and that it does not inadvertently shift the burden of proof from the parties, or delegate the judicial function to those experts. This is due, in part, to the fact that jurisdiction of the Court is based on the consent of the States appearing before it. It is also for this reason that the Court consults the parties to a case and takes into account their views before appointing experts. A careful balance should be drawn whereby, on the one hand, the Court must have adequate knowledge of the underlying issues in order to identify and apply the correct rules of international law to the case at hand, whilst on the other, expert opinion must be limited only to those complex issues requiring technical, scientific or specialized knowledge or expertise that is outside the realm of normal judicial expertise. This is, of course, without prejudice to the rights of the parties themselves to adduce their own expert evidence to prove their case.

6. The jurisprudence of the Court is instructive regarding the type of cases in which the Court has appointed experts pursuant to Article 50 of the Statute of the Court and Article 67 of the Rules of Court.

The Court's jurisprudence

7. After the *Factory at Chórzow* case, in which the PCIJ appointed experts to provide an expert opinion regarding the data tendered by Germany for assessment of reparations payable by Poland in respect of a factory at Chórzow, but which expert opinion was rendered redundant after the parties reached a settlement[2], the first case before the ICJ involving Court-appointed experts was the *Corfu Channel* case[3]. That case is particularly pertinent because it not only involved complex technical issues outside the realm of normal judicial expertise, but in addition, Albania, the respondent State, chose not to appear. As a result, the Court held *ex parte* proceedings pursuant to Article 53 of the Statute of the Court, which provision enjoins the Court to ensure, *inter alia*, that "the claim is well founded in fact and law". Notwithstanding Albania's non-appearance, the Court ensured that the respondent State received copies of the experts' reports and had ample opportunity to respond to the experts' findings, although Albania chose not to respond. In addition, both parties were given the opportunity to make suggestions to the experts regarding any points to which their

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[2] *Factory at Chorzów, Order of 25 May 1929, P.C.I.J., Series A, No. 19*, p. 13.

[3] *Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 4.

investigations and experiments should be directed, as well as to submit written observations upon the experts' findings.

8. In October 1946 two Royal Navy ships belonging to the United Kingdom struck mines in Albanian territorial waters whilst passing through the North Corfu Channel. As a result of the damage, loss of life and injuries caused by the explosions, the United Kingdom claimed that Albania had breached its obligations under international law and was obliged to pay reparations. A key issue was whether Albania had — or ought to have had — knowledge of a minelaying operation being carried out in its territorial waters. Such knowledge would engage Albania's responsibility arising from its obligation to warn passing ships of the imminent danger posed by the minefields in accordance with "elementary considerations of humanity . . ., the principle of the freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States"[4]. The Court considered that this knowledge could be inferred from two aspects, namely, *(a)* Albania's attitude before and after the event, and *(b)* the feasibility of Albanian authorities observing minelaying operations from the Albanian coast. While the Court gleaned Albania's attitude from witness statements, the actions of Albanian authorities and the lack of an investigation following the incidents[5], it relied heavily on two expert reports commissioned under Article 50 of the Court's Statute for the second aspect of its findings. This latter aspect was one requiring specialized knowledge or expertise outside the realm of normal judicial expertise. In its Order under Article 50[6], the Court submitted the following question to a panel of three naval experts:

> "[Y]ou are requested to examine . . . the possibility of mooring those mines with those means without the Albanian authorities being aware of it, having regard to the extent of the measures of vigilance existing in the Saranda region".

9. In addition, the experts conducted site visits to Saranda in Albania in order to undertake experiments and make observations that could provide conclusive answers to the Court's questions. Heavily relying upon the experts "indisputable conclusion" that Albania must have had knowledge of the minelaying activities if they had kept normal lookouts at various points along their coastline[7], the Court concluded that the Albanian Government must have had the requisite knowledge and that by failing to warn the British warships of the minefield, Albania's responsibility was engaged[8].

10. The Court subsequently commissioned two members of the Royal Netherlands Navy to "examine the figures and estimates stated in the last submissions filed by the Government of the United Kingdom regarding the amount of its claim for the loss of the *Saumarez* and the damage caused to the *Volage*" and to file an Article 50 report[9]. The Order appointing the experts did not request them to advise on the amount of the United Kingdom's claim for "loss of life" or "injuries to life and limb" as the Court considered the quantum regarding these claims to be in the realm of normal judicial expertise. On 17 December 1949, the experts concluded that the claim submitted by the United Kingdom "may be taken as a fair and accurate estimate of the damage sustained". The Court agreed with the experts' findings.

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[4] *Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 22.

[5] *Ibid.*, p. 18.

[6] *Corfu Channel (United Kingdom* v. *Albania), Order of 17 December 1948, I.C.J. Reports 1947-1948*, p. 126.

[7] *Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 22.

[8] *Ibid*., p. 23.

[9] *Corfu Channel (United Kingdom* v. *Albania), Assessment of Amount of Compensation, Judgment, I.C.J. Reports 1949*, p. 247.

11. In the *Gulf of Maine (Canada/United States of America)* case[10], the parties referred their dispute to the Court by way of a special agreement or *compromis* between themselves. The parties asked a Chamber of the Court to determine "the course of the single maritime boundary that divides the continental shelf and fisheries zones of Canada and the United States of America", in and reaching from, the Gulf of Maine. Both parties not only requested the Chamber to appoint a technical expert to assist it in carrying out this task[11], but actually co-nominated a former commander of the British Royal Navy to serve as the expert to the Chamber. Although the *compromis* made no reference to Article 50 of the Statute of the Court, the Chamber explicitly referred to the article in its Order[12] appointing the expert, thereby giving the latter primacy over the former. Based on the expert's findings, the Chamber drew a maritime boundary in the Gulf of Maine area based not on strict equidistance but on geometrical calculations and data set out in the expert's report.

12. Lastly and more recently, in *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica* v. *Nicaragua)*[13] the Court had to decide the question of sovereignty concerning the northern part of Isla Portillos, a matter not addressed in its earlier 2015 Judgment[14]. In its 2015 Judgment, the Court interpreted the "1858 Treaty of Limits" as providing that "the territory under Costa Rica's sovereignty extends to the right bank of the Lower San Juan River as far as its mouth in the Caribbean Sea"[15]. However, the absence of "detailed information," which had been observed in the 2015 Judgment, had left the geographical situation of the area in question somewhat unclear with regard to the configuration of the coast of Isla Portillos, in particular regarding the existence of maritime features off the coast and the presence of a channel separating the wetland from the coast[16]. The Court — after hearing from both parties, neither of whom objected to the idea — appointed two independent experts who conducted two site visits of the area in question (during the dry and rainy seasons) and informed the Court as to "the state of the coast between the points suggested by either party as the starting-point of their maritime boundary in the Caribbean Sea". The experts were accompanied by two staff members of the Court serving as the Secretariat, as well as by a delegation from each party.

13. The assessment of the Court-appointed experts, which was not challenged by the parties, "dispelled all uncertainty about the present configuration of the coast and the existence of a channel linking the San Juan River with Harbor Head Lagoon". The experts ascertained that "off the coastline, there are no features above water even at low tide" and that, west of Harbor Head Lagoon, "the coast is made up of a broad sandy beach with discontinuous and coast-parallel enclosed lagoons in the backshore", while "[i]n the westernmost portion, close to the mouth of the San Juan River, there are no lagoons with free-standing water in the backshore". Significantly, the experts observed that "there is no longer any water channel connecting the San Juan River with

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[10] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment, I.C.J. Reports 1984*, pp. 252-256.

[11] *Ibid*., p. 253.

[12] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Appointment of Expert, Order of 30 March 1984, I.C.J. Reports 1984*, p. 165.

[13] *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica* v. *Nicaragua)* and *Land Boundary in the Northern Part of Isla Portillos (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2018 (I)*, p. 139.

[14] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Judgment, I.C.J Reports 2015 (II)*, p. 665.

[15] *Ibid.*, p. 703, para. 92.

[16] *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica* v. *Nicaragua)* and *Land Boundary in the Northern Part of Isla Portillos (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2018 (I)*, p. 167, para. 70.

Harbor Head Lagoon"[17]. Based on the experts' report, the Court determined that "Costa Rica has sovereignty over the whole of Isla Portillos up to where the San Juan River reaches the Caribbean Sea", and that "the starting-point of the land boundary is the point at which the right bank of the San Juan River reaches the low-water mark of the coast of the Caribbean Sea . . . located at the end of the sandpit constituting the right bank of the San Juan River at its mouth"[18].

14. The above cases clearly demonstrate that in exercising its powers pursuant to Article 50 of the Statute of the Court and Article 67 of the Rules of Court, the following minimum parameters are met, namely, *(a)* the Court resorts to appointing experts only in "complex cases" requiring technical, scientific or specialized knowledge or expertise that is outside the realm of normal judicial expertise; *(b)* that the role of Court-appointed experts is limited to providing specialized information or insight into the scientific or technical intricacies of the evidence already submitted by the parties and that their input should not interfere with the allocation of the burden of proof or tilt the balance in favour of one party or the other; *(c)* that the ultimate task of discharging the judicial function rests with the Court, and must not be delegated to the experts; *(d)* that prior consultations between the Court and the concerned parties (concerning the identity of the experts and their terms of reference) are held and, as far as possible, the consent (through a *compromis*) or at least acquiescence of both parties is obtained before the appointment of the experts; *(e)* that the experts appointed by the Court are neutral; *(f)* that the experts' reports are availed to the parties for their comment; and *(g)* that the parties are availed every opportunity to put questions to the experts, before the Court makes its conclusions. In the present case, I am not satisfied that the above minimum parameters have been met.

Factual background to the Order

15. Much of the relevant procedural history has been accurately rehearsed in the Order. It will be recalled however, that the Court in its 2005 Judgment in the *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)* case — while reserving the question of reparation due to each of the Parties for determination during a subsequent phase of the proceedings (in the event that the Parties failed to agree thereupon) — made it clear that at the reparations stage, the onus would be upon the DRC "to demonstrate and prove the exact injury that was suffered as a result of specific actions of Uganda constituting internationally wrongful acts for which it is responsible"[19]. Similarly the Court stated regarding the responsibility of the DRC for the breach of its international obligation to guarantee the inviolability of Uganda's diplomatic premises, for the maltreatment of Ugandan diplomats at the Ugandan Embassy in Kinshasa, for the maltreatment of Ugandan diplomats at Ndjili International Airport, and for attacks on the seizure of property and archives from Ugandan diplomatic premises, the onus would be upon Uganda to demonstrate "the specific circumstances of these violations as well as the precise damage suffered by Uganda and the extent of the reparation to which it is entitled"[20].

16. It will also be recalled that at this stage of the proceedings, each Party has had ample opportunity to discharge its burden of proof by adducing sufficient evidence of the reparations due to it as a result of the internationally wrongful acts committed against it by the other, as

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[17] *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica* v. *Nicaragua)* and *Land Boundary in the Northern Part of Isla Portillos (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2018 (I),* pp. 167-168, para. 71.

[18] *Ibid.*

[19] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 257, para. 260.

[20] *Ibid*., p. 279, para. 344.

demonstrated in the "procedural history" part of the Order. In this regard, the DRC filed an Application[21] and each Party filed a Memorial[22] and Counter-Memorial[23]. Thereafter, the Court granted the Parties a further opportunity to clarify certain evidentiary issues by answering specific questions contained in a letter from the Court dated 11 June 2018. The Parties filed their responses to the questions raised by the Court by 1 November 2018. Furthermore, the DRC revised its responses to these questions on 12 November 2018 and again on 20 November 2018 in what it referred to as its "final version". Each Party then filed its comments on the other Party's answers within the time-limit fixed by the Court (see paragraph 5 of the Order). It now remains for the Court to perform its judicial function by assessing that evidence and determining the reparations due.

The terms of reference proposed by the Court

17. In my view, the terms of reference that the Court has proposed for the experts have the effect of unfairly assisting the DRC in augmenting its claim and unfairly buttressing its evidence where it may be wanting, contrary to the principles of a fair hearing and equality of arms. Alternatively, they have the effect of inappropriately delegating the judicial function to the experts. As noted in paragraphs 10 and 11 of the Order, while the DRC is favourably disposed to the Court seeking expert opinion at this stage of the proceedings, Uganda on the other hand is of the view that "the questions before the Court are not of the sort contemplated for the appointment of experts pursuant to Article 50 of the Statute and Article 67, paragraph 1 of the Rule of Court". Accordingly, Uganda

> "strongly objects to the proposal to appoint an expert or experts for the stated purpose because it amounts to relieving the DRC of the primary responsibility to prove her claim (or any particular heads of claim), and assigning that responsibility to third parties, to the prejudice of Uganda and in violation of the relevant principles of international law".

18. With regard to the term of reference entitled "loss of human life", I particularly take issue with the Court requesting the experts to make "a global estimate of the lives lost among the civilian population (broken down by manner of death) due to the armed conflict on the territory of the [DRC] in the relevant period" and to determine "the scale of compensation due for the loss of individual human life". The Court has already sought and received this information directly from the DRC through the pleadings and the answers to some of the questions it posed to the Parties. The Court should not be seen to unfairly assist either Party in augmenting its claim or buttressing its evidence where it may be wanting, to the detriment of the other and contrary to the principles of a fair hearing and equality of arms. In my view, the type of issues arising from the evidence relating to reparations for loss of life are those within the realm of normal judicial expertise and do not require technical, scientific or specialized knowledge or expertise. Alternatively, this term of reference has the effect of inappropriately delegating the judicial function — namely, the analysis of the evidence on record and determination of the quantum of reparations arising from loss of human life — to the experts.

19. Similarly, the term of reference with regard to "loss of natural resources" is inappropriate. The Court already has evidence on record from the DRC regarding this head of claim. By asking the experts again to "approximate the quantity of natural resources such as gold,

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[21] Application of the DRC dated 8 May 2015.

[22] See DRC's Memorial dated 28 September 2016 and Uganda's Memorial dated 28 September 2016.

[23] See DRC's Counter-Memorial dated 6 February 2018 and Uganda's Counter-Memorial dated 6 February 2018.

diamond, coltan and timber unlawfully exploited during the occupation by Ugandan armed forces" and to "evaluate the damage" arising therefrom, the Court is in effect asking the experts to unfairly assist the DRC in augmenting its claim and discharging its evidentiary burden where its own evidence may be wanting, contrary to the principles of a fair hearing and equality of arms. In my view, the type of issues arising from the evidence relating to reparations for loss of natural resources does not require technical, scientific or specialized knowledge or expertise that is outside the realm of normal judicial expertise. Alternatively, this term of reference has the effect of inappropriately delegating the judicial function — namely, the analysis of the evidence on record and determination of the quantum of reparations arising from loss of natural resources — to the experts.

20. Lastly, the term of reference with regard to "property damage" is inappropriate. The Court already has evidence on record from the DRC regarding this head of claim. By asking the experts again to "approximate the number and type of properties damaged or destroyed by Ugandan armed forces" and to "approximate the cost of rebuilding the kind of schools, hospitals and private dwellings destroyed . . ." arising therefrom, the Court is unfairly assisting the DRC in augmenting its claim and buttressing its evidence where it may be wanting, contrary to the principles of a fair hearing and equality of arms. In my view, the type of issues arising from the evidence relating to reparations for property loss does not require technical, scientific or specialized knowledge or expertise that is outside the realm of normal judicial expertise. Alternatively, this term of reference has the effect of inappropriately delegating the judicial function — namely, the analysis of the evidence on record and determination of the quantum of reparations arising from property damage — to the experts.

Conclusion

21. In conclusion, I respectfully disagree that this is a proper case for the Court to exercise its function under Article 50 of the Statute of the Court and Article 67 of the Rules of Court.

(Signed) Julia SEBUTINDE.