SEPARATE OPINION OF JUDGE YUSUF

Disagreement with reasoning leading to determination of amounts of compensation — Disagree also with radical reversal of burden of proof — It requires Uganda to prove double negative fact with respect to injuries in Ituri — A requirement not supported by practice of the Court — Also, inconsistent with nature of duty of vigilance incumbent upon occupying Power as obligation of conduct — Determination of "global sums" by reference to equitable considerations and "range of possibilities indicated by evidence" leaves much to be desired — Equitable considerations not a substitute for a reasoned analysis — Gives impression of decision ex aequo et bono *without Parties' consent — Overly narrow approach to reparations ignores that damage caused by Uganda's conduct was to human beings — Individuals and communities should have been primary beneficiaries of certain types of reparations — State-centred approach to reparation ignores recent developments in human rights and international humanitarian law — "Global sums" makes distribution of funds by DRC to affected communities and individuals more difficult — Collective reparations would constitute more appropriate form of reparation for certain heads of damage.*

I. Introductory remarks

1. I have voted with reluctance in favour of the *dispositif* of this Judgment. The overall amount of compensation awarded by the Court seems reasonable, given the circumstances that have characterized these proceedings. I do not, however, agree with the reasoning that led to this decision or, with regard to certain aspects, the lack of appropriate analysis or explanation; and the radical reversal of the burden of proof which requires the Republic of Uganda ("Uganda") to prove a double negative fact with respect to injuries that occurred in Ituri. I also disagree with the manner in which the various components of the award were determined; and the designation of the State of the Democratic Republic of Congo ("DRC") as the sole beneficiary of compensation, thus paying little or no attention to the rights of communities and individuals to reparation for harm suffered as a result of gross violations of human rights and international humanitarian law by Uganda during the armed conflict.

2. This phase of the proceedings in the case concerning *Armed Activities on the Territory of the Congo* offered the Court a unique opportunity to make a substantial contribution to the development of the jurisprudence on reparations for injury in international law. It is a pity that such an opportunity has been missed. It is of course regrettable that the Applicant did not present sufficient evidence that would enable the Court to come to clear conclusions with respect to the damage caused by Uganda's wrongful conduct, and the valuation of that damage. I am, however, of the view that the Court could have done better despite the fact that satisfactory evidence was not put at its disposal.

II. Evidence and burden of proof

3. In its 2005 Judgment, the Court stated that, failing agreement between the Parties,

> "The DRC would thus be given the opportunity 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*. It goes without saying, however, as the Court has had the opportunity to state in the past, 'that in the phase of

> the proceedings devoted to reparation, neither Party may call in question such findings in the present Judgment as have become *res judicata*'"[1] (emphasis added).

This standard is consistent with the express acknowledgement made by the DRC in the oral hearings at the time that "for the purposes of determining the extent of reparation it must specify the nature of the injury and establish the causal link with the initial wrongful act"[2].

4. The Court had given ample opportunity to the Applicant to demonstrate and prove the injury that was suffered as a result of the wrongful actions of Uganda for which it was found responsible in 2005. The Parties had more than ten years to resolve the issue of reparation through negotiations, during which they could have collected evidence and information to assist their negotiations, or for the purposes of litigation if these negotiations were to fail. After the filing of the Parties' pleadings, the Court also availed itself of its powers, under Article 62, paragraph 1, of its Rules, to elicit further information from the Parties, requesting additional information, evidence and explanations with respect to the various heads of damages and the methodologies proposed by the Parties.

5. As noted in various parts of the Judgment, the DRC has failed to furnish appropriate evidence with respect to the injuries suffered and "the evidence included in the case file by the DRC is, for the most part, insufficient to reach a precise determination of the amount of compensation due" (paragraph 125). Faced with this situation, the Court had to take into account other sources of evidence, such as the reports of the United Nations, and those of other intergovernmental organizations and governmental commissions, including the Porter Judicial Commission of Inquiry established by Uganda. It also took into consideration the reports of the Court-appointed experts where it considered them relevant. This is all well and good. The Court could not have done otherwise under the present circumstances in order to fulfil its judicial function.

6. However, with regard to the injuries that occurred in Ituri, the Judgment's reasoning is predicated on a radical reversal of the burden of proof upon the Respondent. According to paragraph 78,

> "it is for Uganda to establish, in this phase of the proceedings, that a particular injury alleged by the DRC in Ituri was not caused by Uganda's failure to meet its obligations as an occupying Power. In the absence of evidence to that effect, it may be concluded that Uganda owes reparation in relation to such injury."

7. The same standard of proof is expressed at various points throughout the Judgment, concerning the causal nexus between the internationally wrongful acts and the injury suffered (paragraph 95), the burden and standard of proof (paragraph 118), the determination of the extent of the loss of life and other damage to persons in Ituri (paragraphs 149, 155, 161 and 226) as well as damage to property and public infrastructure in Ituri (paragraphs 241 and 257).

8. In essence, the Judgment requires Uganda to prove a double negative fact, namely that every "particular injury" in Ituri that is alleged by the DRC was "not caused" by its "failure" as the occupying Power. If Uganda fails to do so, the Court will make inferences *both* that the injury alleged

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[1] *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.

[2] *Ibid.*, p. 256, para. 258; see also CR 2005/5, p. 53 (original p. 57), para. 20 (Salmon) ("The [DRC] does not deny that, for purposes of determining the extent of the reparation, it must specify the nature of the injury and establish the causal link with the initial wrongful act.") *[Translation by the Registry.]*

by the DRC has occurred, *and* that this particular injury was causally linked to Uganda's "failure" to comply with its obligations in Ituri. Such a strict standard places upon Uganda the task of identifying all instances of alleged injury that occurred in Ituri after so many years (even if Uganda is no longer in effective control of that territory); tracing the original cause of that injury to the responsible actor (whether within its sphere of control at the time, or not), and demonstrating the absence of a causal nexus between that damage and its own conduct. Thus, so long as the Applicant makes a prima facie allegation with respect to a "particular injury" in Ituri, the *entire* burden of proof is placed on the shoulders of the Respondent to disprove these allegations and, in the absence of evidence, an injury causally linked to Uganda's failures is presumed to have been proven.

9. It is to be noted, however, that even though the standard is repeatedly articulated in several paragraphs of the Judgment as mentioned above, it is not analysed anywhere in the Judgment with respect to the various heads of damage such as loss of life, personal injuries, property loss or natural resources. The Judgment mentions very briefly in two concluding paragraphs (paragraphs 161 and 226) that Uganda did not produce evidence to establish that "particular injuries" alleged by the DRC were "not caused" by its "failures" without any analysis of the evidence Uganda was expected to produce in accordance with this standard. This raises the question as to the purpose of the repeated assertion of this standard in the Judgment if it was not going to be applied to the facts of the case and to the evidence expected from Uganda.

10. In an effort to justify this unprecedented and exceptional evidentiary burden placed on Uganda, references are made in the Judgment to the *Corfu Channel* and the *Diallo* cases. However, none of the Judgments in those cases provides support to such a radical reversal of the burden of proof. Paragraphs 120 and 157 of the Judgment refer to the Judgment in the *Corfu Channel* case in support of the proposition that the Court may have "a more liberal recourse to inferences of fact and circumstantial evidence" in cases where a State that "would normally bear the burden of proof has lost effective control over the territory where crucial evidence is located on account of the belligerent occupation of its territory by another State"[3]. This is quite true, but the standard of proof applied in the present Judgment differs from the principles enunciated in *Corfu Channel* with respect to the allocation of the burden of proof. In the latter case, the Court stated that, when the victim of a breach of international law is unable to furnish direct proof of facts giving rise to responsibility due to the exclusive territorial control exercised by another State within its frontiers (as is the case here, with respect to the wrongful occupation of Ituri), the Court may resort to "a more liberal recourse to inferences of fact and circumstantial evidence" as indirect evidence that an injurious event has occurred within that territory.

11. The Court, however, was clear that such reasonable inferences did not involve a reversal of the burden of proof of the kind contemplated in paragraph 78 of the Judgment:

> "It is true, as international practice shows, that a State on whose territory or in whose waters an act contrary to international law has occurred, may be called upon to give an explanation. It is also true that that State cannot evade such a request by limiting itself to a reply that it is ignorant of the circumstances of the act and of its authors. The State may, up to a certain point, be bound to supply particulars of the use made by it of the means of information and inquiry at its disposal. *But it cannot be concluded from the mere fact of the control exercised by a State over its territory and waters that that State necessarily knew, or ought to have known, of any unlawful act perpetrated therein, nor yet that it necessarily knew, or should have known, the authors. This fact, by itself*

[3] *Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 18.

> *and apart from other circumstances, neither involves* prima facie *responsibility nor shifts the burden of proof*."[4] (Emphasis added.)

Thus, in *Corfu Channel* the Court made a distinction between, on the one hand, drawing adverse inferences where a State having effective control over a certain territory fails to produce explanations and information at its disposal to demonstrate that it complied with its international obligations and, on the other hand, the reversal of the burden of proof upon the respondent, which is required to disprove the allegations of the applicant with adequate evidence. This distinction, which is crucial to the sound administration of justice and the equitable distribution of the burden of proof, is totally ignored in the Judgment.

12. Regarding the *Ahmadou Sadio Diallo* case, paragraph 116 of the Judgment refers to the fact that the rule *onus probandi incumbit actori* has been applied "flexibly" in cases where the respondent was in a better position to establish certain facts that lay within its control. In the merits phase of *Diallo*, the Court held that

> "where, as in these proceedings, it is alleged that a person has not been afforded, by a public authority, certain procedural guarantees to which he was entitled, *it cannot as a general rule be demanded of the Applicant that it prove the negative fact which it is asserting*. A public authority is generally able to demonstrate that it has followed the appropriate procedures and applied the guarantees required by law — if such was the case — by producing documentary evidence of the actions that were carried out."[5] (Emphasis added.)

13. This passage calls for certain observations. As a preliminary remark, paragraph 116 of the Judgment refers to the *Diallo* Judgment in the compensation phase as opposed to the Judgment on the merits, thus giving the impression that the Court reversed the burden of proof for the purposes of establishing the injury suffered by Mr. Diallo within the territory of the DRC. But in the compensation phase of *Diallo*, the Court did not shift the burden of proof to the DRC in order to demonstrate that the injury alleged by Guinea had not been "caused" by its "failure" to comply with its procedural human rights obligations. On the contrary, it rejected Guinea's claims to compensation for the pecuniary damage caused by the loss of luxury goods, bank accounts, and the loss of professional remuneration during Mr. Diallo's unlawful detentions and after his expulsion, specifically due to the *applicant's* — not the respondent's — failure to produce adequate evidence[6]. Conversely, the two sums of compensation awarded (for non-pecuniary harm and personal effects) were not premised on the shifting of the evidentiary burden, but rather on the evidence presented *by the applicant* and equitable considerations[7]. It follows that the *Diallo* Judgment in the compensation phase does not provide a basis for the radical reversal of the burden of proof enunciated in paragraph 78 of the Judgment.

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[4] *Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 18.

[5] *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010 (II)*, pp. 660-661, para. 55.

[6] *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012 (I)*, p. 338, para. 34 ("Guinea has put forward no evidence whatsoever" to support its claim for luxury goods and "[f]or these reasons, the Court rejects Guinea's claims as to the loss of high-value items not specified on the inventory") and para. 35 ("Guinea offers no details and no evidence to support its claim" for bank accounts and "[t]hus, it has not been established that Mr. Diallo lost any assets held in his bank accounts in the DRC"); pp. 340 *et seq*., paras. 41-43, 46 and 50 (noting that "Guinea offers no evidence to support the claim" for loss of earnings and that "Guinea has not proven to the satisfaction of the Court that Mr. Diallo suffered a loss of professional remuneration").

[7] *Ibid.*, pp. 334-335, paras. 24-25 (for non-material injury); pp. 337-338, paras. 32-33, 36 (for personal belongings).

14. Nor does the *Diallo* Judgment in the merits phase provide support for this legal proposition. In fact, the Court did not place the entire burden of proof on the respondent's shoulders; rather, it dismissed certain allegations of exceptional gravity made by Guinea in the absence of proof; it did not presume the occurrence of these facts on the basis of the DRC's failure to produce evidence to disprove them[8]. Furthermore, the Court's reasoning in paragraph 54 of the merits Judgment of *Diallo* was guided by a marked concern not to require the applicant in those proceedings to demonstrate "negative facts" in relation to incidents that occurred outside its territory or control (see paragraph 12 above). It is on *that* basis that the Court shifted the burden on the respondent to establish, for specific factual issues raised in the applicant's claims (but by no means the entirety of these claims), that it complied with its procedural obligations under international human rights law[9] and consular law[10].

15. Thus, it seems quite odd to rely on the principles enunciated in *Diallo* as the basis for requiring Uganda to establish *two* negative facts (i.e. that an unspecified injury was "not caused" by "its failure"). A more reasonable application of the principle enunciated in *Diallo* would have been to require Uganda to establish positive facts lying within its sphere of control, namely that it took adequate and effective measures to prevent in Ituri the injuries alleged by the Applicant, in line with its duty of vigilance.

16. The radical reversal of the burden of proof is also inconsistent with the nature of the duty of vigilance incumbent upon the occupying Power as an obligation of due diligence, rather than an obligation of result. The nature of the primary obligation that has been breached is of key import to the allocation of the burden of proof. As stated in *Diallo*, and subsequently reaffirmed in *Croatia* v. *Serbia* with regard to alleged genocidal acts, "[t]he determination of the burden of proof is in reality *dependent on the subject-matter and the nature of each dispute brought before the Court*; it varies according to the type of facts which it is necessary to establish for the purposes of the decision of the case"[11].

17. It follows that when the Court decides how to allocate the burden of proof between the parties, it must pay close attention to the nature of the primary obligation that has been breached and the circumstances of each case. In the present case, the Court found that Uganda was responsible in Ituri for the violation of Article 43 of the Hague Regulations of 1907, which reads as follows:

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[8] *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010 (II)*, p. 671, paras. 88-89 (noting that Guinea had "failed to demonstrate convincingly that Mr. Diallo was subjected to [inhuman and degrading] treatment during his detention" and that "[t]here [wa]s no evidence to substantiate the allegation that he received death threats").

[9] *Ibid.*, pp. 668-669, para. 79 (noting that the DRC had "produced no evidence" to prove that the Congolese authorities sought to determine whether it was necessary to detain Mr. Diallo, or that his detention was reviewed every 48 hours, as required by Congolese law); p. 669, para. 82 (noting that the DRC had "never been able to provide grounds which might constitute a convincing basis for Mr. Diallo's expulsion"); p. 670, para. 84 (noting that the DRC had "failed to produce a single document or any other form of evidence to prove" that Mr. Diallo had been informed, at the time of arrest, of the reasons for his arrest).

[10] *Ibid.*, p. 673, para. 96 (noting that the DRC had not provided "the slightest piece of evidence to corroborate" its claim that it had orally informed Mr. Diallo of the possibility of seeking consular assistance from his State).

[11] *Ibid.*, p. 660, para. 54. See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015 (I)*, pp. 73-74, paras. 172 and 174 ("In the present case, neither the subject-matter nor the nature of the dispute makes it appropriate to contemplate a reversal of the burden of proof. It is not for Serbia to prove a negative fact, for example the absence of facts constituting the actus reus of genocide").

> "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."[12]

18. Article 43 of the Hague Regulations of 1907 imposes a duty of vigilance upon the occupying Power to ensure respect for public order and safety in the occupied territory both by its own forces and private parties[13]. As the Court stated in 2005, Uganda was under an obligation under that provision

> "to take all the measures in its power to restore, and ensure, as far as possible, public order and safety in the occupied area, while respecting, unless absolutely prevented, the laws in force in the DRC. This obligation comprised the duty to secure respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third party.
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> The Court, having concluded that Uganda was an occupying Power in Ituri at the relevant time, finds that Uganda's responsibility is engaged both for any acts of its military that violated its international obligations and for any lack of vigilance in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory, including rebel groups acting on their own account."[14]

19. In line with this interpretation, the "duty of vigilance" incumbent upon the occupying Power by Article 43 of the Hague Regulations is not an obligation to achieve a particular result at all times and whatever the circumstances[15], but an obligation of conduct, which required Uganda to "take appropriate measures" to prevent wrongful acts committed by private persons in Ituri district, such as pillaging, looting and violations of human rights and humanitarian law[16]. Pursuant to that duty, Uganda was not responsible for every kind of injury or damage that might have occurred in Ituri at all times and places during its occupation, but only for those damages and injuries that could have been averted, had Uganda taken adequate and effective measures of diligence — the existence of which should normally be within Uganda's ability to prove to the Court.

20. It follows, in my view, that the shifting of the evidentiary burden for the purposes of quantification of damage cannot go beyond what was required by Uganda under the primary rule. As

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[12] Convention (IV) respecting the Laws and Customs of War on Land, The Hague, 18 October 1907, Annex: Regulations concerning the Laws and Customs of War on Land, Sect. III, Art. 43.

[13] Eritrea-Ethiopia Claims Commission, *Partial Award: Central Front — Eritrea's Claims 2, 4, 6, 7, 8 & 22, Decision of 28 April 2004,* United Nations, *Reports on International Arbitral Awards (RIAA)*, Vol. XXVI, pp. 138-139, para. 67 ("Whether or not Ethiopian military personnel were directly involved in the looting and stripping of buildings in the town, Ethiopia, as the Occupying Power, was responsible for the maintenance of public order, for respecting private property, and for preventing pillage. Consequently, Ethiopia is liable for permitting the unlawful looting and stripping of buildings in the town during the period of its occupation.")

[14] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 231, paras. 178-179.

[15] See, *mutatis mutandis, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 221, para. 430 ("[a] State does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide").

[16] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 253, paras. 248 and 250.

noted in the Commentary to Article 36 of the International Law Commission's ("ILC") Articles on Responsibility of States for Internationally Wrongful Acts, the principles to be applied in the quantification of damages "will vary, depending upon the content of particular primary obligations"[17]. When determining the allocation of the burden of proof, Uganda may only be required to prove what was required of it by Article 43 of the Hague Regulations, i.e. that it took "all the measures in [its] power to restore, and ensure, as far as possible, public order and safety". The Court cannot expect Uganda to disprove each and every injury in Ituri alleged by the DRC, or prove that such injury was "not caused" by its "failures". To do so is to extend *ex post facto* the scope of Uganda's primary obligations under the law of occupation through the mechanism of responsibility.

21. In light of the foregoing, I am of the view that a more balanced outcome could have been achieved through a nuanced allocation of the burden of proof, which would be more in tune with the content of the primary obligation in question that has been breached. In accordance with the *onus probandi* rule, it should fall upon the DRC to establish the extent of the injuries suffered in Ituri, as the Court held with respect to other regions of the DRC's territory and in paragraph 260 of the 2005 Judgment. In line with Article 43 of the 1907 Hague Regulations, Uganda would bear the onus to prove that it took measures in compliance with its duty of vigilance, or that the injury would have occurred even if Uganda had taken adequate and effective measures. The burden would then shift to the DRC to disprove Uganda's contentions. This would be without prejudice to the rule that the distribution of the burden of proof "does not relieve the other party of its duty to co-operate 'in the provision of such evidence as may be in its possession that could assist the Court in resolving the dispute submitted to it'"[18]. In line with the *Corfu Channel* principle, the Court would then be at liberty to draw reasonable inferences from the Parties' submissions. It is regrettable that the Court has not opted for this approach in the present circumstances.

III. Assessment and valuation of damage

22. In view of the deficiencies or, in certain cases, total lack of evidence presented by the DRC, the Court had to make extensive use of information in United Nations reports on the conflict in the DRC and, with respect to certain heads of damage, to rely on the reports of the experts appointed by it in evaluating the damage and the amount of compensation due (paragraph 31). However, in several instances, the Court had to conclude that neither the materials at its disposal nor the reports of the Court-appointed experts provided sufficient evidence to assess the damage suffered by the DRC or by the persons in its territory or to quantify such damage, sometimes even on an approximative basis (see, for example, paragraphs 179, 190 and 363-364). In an attempt to fill this void, the Court resorts to two concepts, the reasons for the use of which are neither adequately explained in the Judgment nor are they necessarily always clearly articulated in order to arrive at the determination of compensation in the form of "global sums". These concepts are "equitable considerations" and the "range of possibilities indicated by the evidence".

23. The Judgment refers to equitable considerations as the basis of awarding compensation in the form of a lump sum nine times (cf. paragraphs 106, 164, 166, 181, 193, 206, 225, 258 and 365). Equity is also implied in different parts of the Judgment, related to the difficulties faced by the DRC in the collection of evidence, the non-punitive character of compensation, the potential onerousness of compensation for Uganda and the "reasonableness" of compensation. At the same time, the Judgment uses an obscure concept of the "range of possibilities indicated by the evidence" (cf.

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[17] *Yearbook of the International Law Commission, 2001*, Vol. II, Part Two, p. 100, commentary to Article 36.

[18] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015*, p. 73, para. 173; *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I),* p. 71, para. 163.

paragraphs 106, 126, 166, 181, 193, 206, 223, 225, 258, 275 and 365), a term hitherto unknown in the jurisprudence of the Court which leaves much to be desired.

24. Of course, it is not disputed that the Court may, for the purposes of determining compensation for an internationally wrongful act, rely upon equitable considerations in order to reach a fair and reasonable amount of compensation[19]. However, there is an essential difference between determining compensation by reference to equitable considerations, and determining compensation *ex aequo et bono*, within the meaning of Article 38, paragraph 2, of the Statute. A decision *ex aequo et bono* is to be understood as equity *contra legem*[20], that is to say a decision arrived at not on the basis of certain rules of international law applicable between the parties, but rather "as a matter of abstract justice"[21]. By contrast, equitable considerations are of an essentially legal character (equity *infra legem*) and should be understood within the legal framework governing the judicial function of the Court. They cannot serve as the basis to dispense with the applicable rules altogether, or not to provide reasons for their applicability. The Court should have made an attempt at explaining how it intends to apply equity within the general framework of State responsibility and the procedural framework governing the fact-finding procedure before it.

25. Unfortunately, the Judgment seems to rely upon equitable considerations as a substitute for a reasoned analysis that would identify the evidence presented by the Parties as corroborating — albeit in an approximative manner — the extent of the injury caused by Uganda, and a cognizable method for the valuation of that injury. Instead of specifying a method of valuation deemed to be appropriate, the Judgment utilizes equitable considerations as a convenient shorthand in order to reach what is referred to in the Judgment as "global sums" (paragraphs 106-107).

26. This includes a "single global sum" of US$225,000,000 for the loss of life and other damage caused to persons[22] (paragraph 226), a "global sum" of US$40,000,000 for damage to public and private property (paragraph 258) and a "global sum" of US$60,000,000 for damage caused by the exploitation of natural resources (paragraphs 364-366). It is not, however, possible to understand from the text of the Judgment how the Court has arrived at these figures. There is no indication as to how the different components of these sums were determined, or the way in which these figures may be justified by the facts. Thus, the impression to the reader is that the Court has arrived at these figures by way of *ex aequo et bono*, not on the basis of law and evidence.

27. Equitable considerations are relevant primarily for the quantification of damages where the nature of the harm or the circumstances of the dispute make it difficult or impossible to define the value of harm with a high degree of certainty. In such circumstances, it would be contrary to the principle of equity to deny compensation to the injured party for objective circumstances that cannot be attributed to its fault or sphere of responsibility. As the Court recognized in the case concerning *Certain Activities Carried Out by Nicaragua in the Border Area* relying on the *Trail Smelter* case:

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[19] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Compensation, Judgment, I.C.J. Reports 2018 (I)*, pp. 26-27, para. 35; *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012 (I)*, p. 337, para. 33.

[20] *Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 567, para. 28.

[21] *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 47, para. 85; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992*, pp. 390-391, para. 47.

[22] See, in particular, paragraph 66 of the Judgment for the loss of life, paragraph 181 for non-lethal injuries, paragraph 193 for rape and sexual violence, paragraph 206 for child soldiers; and paragraph 225 for the displacement of persons.

> "Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate."[23]

28. Nevertheless, recourse to equitable principles is not unfettered. Indeed, it "should not be used to make good the shortcomings in a claimant's case by being substituted for evidence which could have been produced if it actually existed"[24]. Nor can equitable considerations be used as an excuse to depart from the Court's judicial function. Pursuant to Article 56 of the Court's Statute, a judgment shall state the reasons on which it is based. This obligation stems from the inherently judicial character of the Court[25]. It contributes not only to greater transparency in the Court's decision-making function, but also to the authority and persuasiveness that its Judgments command in the field of international law.

29. While the Court has in the past had recourse to equitable considerations for the purposes of quantification of damage, it has never used them as a device to award "global sums" without providing an explanation of how these amounts were reached. In the case of *Ahmadou Sadio Diallo*, the Court dismissed those claims which it found not to have been proven with sufficient evidence. It then awarded compensation for the non-material damage caused to Mr. Diallo and the pecuniary loss for his personal belongings, relying, on the one hand, on the practice of regional human rights courts and tribunals on this topic and the circumstances surrounding Mr. Diallo's treatment[26]; and, on the other hand, an approximation of the value of the assets of Mr. Diallo's apartment based on the inventory of his apartment and his personal property in the DRC, as well as the practice of human rights bodies on the same topic[27].

30. Similarly, in *Certain Activities Carried Out by Nicaragua in the Border Area*, the Court did not award a "global sum", but itemized amounts of compensation, namely, *(a)* US$120,000 for the impairment or loss of environmental goods and services; *(b)* US$2,708.39 for the restoration costs claimed by the Republic of Costa Rica in respect of the internationally protected wetland; and *(c)* US$236,032.16 for costs and expenses incurred by Costa Rica as a direct consequence of the Republic of Nicaragua's unlawful activities on Costa Rican territory. Whilst the latter two categories

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[23] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Compensation, Judgment, I.C.J. Reports 2018 (I),* p. 27, para. 35, citing *Trail Smelter case (United States, Canada), 16 April 1938 and 11 March 1941, RIAA,* Vol. III, p. 1920.

[24] *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Compensation, I.C.J. Reports 2012 (I)*, declaration of Judge Greenwood, p. 393, para. 5.

[25] Cf. *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1954*, pp. 52-53.

[26] *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012 (I),* pp. 334-335, paras. 24-25.

[27] *Ibid.*, pp. 337-338, paras. 31-33 and 36.

were premised on a detailed scrutiny of the respective invoices, documents and expenses submitted by the parties[28], with respect to the first category the Court considered that it was

> "appropriate to approach the valuation of environmental damage from the perspective of the ecosystem as a whole, by adopting an overall assessment of the impairment or loss of environmental goods and services prior to recovery, rather than attributing values to specific categories of environmental goods and services and estimating recovery periods for each of them"[29].

31. Notwithstanding this language that might imply recourse to equitable considerations, the Court distinguished between the identification of the injury and its valuation and made clear which heads of loss were dismissed within that claim for lack of proof[30]. With respect to valuation, the Court rejected the two methods proposed by the Parties and instead addressed the "corrected analysis" to Costa Rica's method (presented by Nicaragua) which provided a basis for the Court's valuation[31].

32. Contrary to the practice of the Court, the Judgment does not offer either an approximative identification of the injury caused by Uganda to the DRC, nor does it proffer a methodological basis upon which the "global sums" were arrived at. With respect to the identification of the injury, the Judgment discusses the evidence presented by the Parties, but does not provide any conclusions on the estimates arrived by the Court (except with respect to heads of damage on the loss of life and population displacement, cf. paragraphs 162, 166 and 223 of the Judgment) that might have served as the basis of these "global sums". In most instances — again, with the exception of loss of life and population displacement — no precise numbers are given. In fact, the Judgment acknowledges that it is "impossible to determine, even approximately, the number of persons injured" (paragraphs 179 and 181); that "it is impossible to derive even a broad estimate of the number of victims of rape and other forms of sexual violence from the reports and other data available to it" (paragraph 190); that "[t]he evidence presented by the DRC does not permit the Court to assess the extent of the damage even approximately" with respect to property damage in and outside Ituri (paragraphs 246 and 251); and that "the available evidence is not sufficient to determine a reasonably precise or even an approximate number of animal deaths for which Uganda owes reparation" (paragraphs 363 and 364). Instead, the Judgment refers to the "range of possibilities indicated by the evidence" (paragraphs 106, 126, 166, 181, 193, 206, 223, 225, 258, 275 and 365) to justify these "global sums". But it does not explain what this "range" is.

33. In fact, the impression is given that the "range of possibilities" pertains not so much to the *extent* of the injury, but the general *adequacy* of the evidence to sustain the claim. If this "range of possibilities" is a broad estimate of the numbers of victims killed or injured on the basis of the evidence, or of the property or resources destroyed or looted during the conflict, the Statute requires the Court to specify what these estimates are, even at a broad brush. Otherwise, the application of such a vague concept may be understood as an attempt to dispense with the proper consideration and

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[28] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Compensation*, *Judgment, I.C.J. Reports 2018 (I)*, pp. 41-45, paras. 92-105 (in relation to expenses incurred for fuel and maintenance services for police aircraft used to reach and overfly the northern part of Isla Portillos, as well as the cost of obtaining a report from UNITAR/UNOSAT); pp. 48-53, paras. 115-132 (in relation to expenses for overflights and the purchase of satellite images); and p. 56, para. 146 (in relation to the cost incurred for the construction of a dyke across the 2013 eastern *caño*).

[29] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Compensation*, *Judgment, I.C.J. Reports 2018 (I)*, p. 37, para. 78.

[30] *Ibid.*, p. 36, para. 74 (namely, natural hazards mitigation and soil formation/erosion control).

[31] *Ibid.*, pp. 38-39, para. 86.

proof of facts, or of classes of facts, in the assessment of damage. In any event, such an obscure term does not seem appropriate, in my view, for compensation proceedings. A *smörgåsbord* of possibilities cannot serve as a substitute for a legal standard in the assessment and valuation of damage.

34. Similar considerations apply to the valuation of the unparticularized injuries. Paragraphs 164 and 180 refer to the awards of the Ethiopia-Eritrea Claims Commission ("EECC") for the proposition that "large per capita awards for non-material damage, which may be justified in individual cases, would be inappropriate in a situation involving significant numbers of unidentified and hypothetical victims". But the Judgment does not explain on what methodological basis the valuation was based for the purposes of the "global sums". If the Court opted for smaller per capita awards than those applied in individual human rights cases, at least an attempt ought to have been made at articulating the methodological premise of these lump sums. It is only with respect to decisions *ex aequo et bono* that the Court is not required to provide reasons.

35. In light of the foregoing, I am of the view that the mere reference to "equitable considerations" cannot serve as an excuse for the Court to dispense with the requirement to state the reasons underlying its decisions. The Court may propose an equitable remedy and apply it; but it has to explain why and on what basis it intends to apply it. It cannot simply refer to it as the be-all and end-all of the assessment of injury or the determination of compensation without any reasoning.

36. Indeed, a decision on compensation that does not identify the extent of the harm, the applicable valuation method and the extent to which other factors might have influenced the quantification of damage does not conform to the requirements of Article 56 of the Statute and may be considered as a decision *ex aequo et bono* under Article 38, paragraph 2. However, the Parties in the present case have not given their consent to such a decision.

IV. An overly narrow approach to reparations

37. In its 2005 Judgment, the Court stated that,

> "[u]pon examination of the case file, given the character of the internationally wrongful acts for which Uganda has been found responsible (illegal use of force, violation of sovereignty and territorial integrity, military intervention, occupation of Ituri, violations of international human rights law and of international humanitarian law, looting, plunder and exploitation of the DRC's natural resources), the Court considers that those acts resulted in injury to the DRC and to persons on its territory"[32].

This recognition by the Court of injuries caused not only to the DRC but also to "persons on its territory" should have found application in the reparations phase through the award of different types of reparations depending on the nature and scope of the injury and on the addressees of the reparation. This is not unfortunately the case. The Judgment seems to be stuck in a time warp as it reflects the State-centred approach to reparation reminiscent of the law of diplomatic protection, while acknowledging gross violations of human rights and humanitarian law the victims of which should be entitled to compensation or other forms of reparation independently of their State. Recent developments in human rights and international humanitarian law have led to a widespread

[32] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 257, para. 259.

recognition that, with regard to claims arising from an injury suffered by an individual or a community, reparation should accrue to the injured individual or community[33].

38. In the 2001 Articles on the Responsibility of States for Internationally Wrongful Acts, the ILC stated in Article 33, paragraph 2, that the provisions of Part Two were "without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State"[34]. In the commentary to that provision, the ILC referred to the Court's Judgment in *LaGrand*, and added that,

> "[w]hen an obligation of reparation exists towards a State, reparation does not necessarily accrue to that State's benefit. For instance, a State's responsibility for the breach of an obligation under a treaty concerning the protection of human rights may exist towards all the other parties to the treaty, *but the individuals concerned should be regarded as the ultimate beneficiaries and in that sense as the holders of the relevant rights.* Individual rights under international law may also arise outside the framework of human rights."[35] (Emphasis added.)

Similarly, in the commentary to Article 28 (titled "Legal consequences of an internationally wrongful act"), the ILC explained that a wrongful act may entail obligations towards other non-State actors:

> "Article 28 does not exclude the possibility that an internationally wrongful act may involve legal consequences in the relations between the State responsible for that act and persons or entities other than States. This follows from article 1, which covers all international obligations of the State and not only those owed to other States. Thus, *State responsibility extends, for example, to human rights violations and other breaches of international law where the primary beneficiary of the obligation breached is not a State*. . . . In other words, the provisions of Part Two are without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State, and article 33 makes this clear."[36] (Emphasis added.)

39. More recently, in the Draft Articles on Prevention and Punishment of Crimes against Humanity, the ILC referred to the "right of a victim of a crime against humanity to obtain reparation", obliging States to have or enact necessary laws, regulations, procedures or mechanisms to enable victims to pursue claims against and secure redress for the harm they have suffered from those who are responsible for the harm, be it the State itself or some other actor[37]. This is further reinforced by resolution 60/147 of the United Nations General Assembly titled "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law" (hereinafter "Basic Principles and Guidelines")[38]. Principle 11 expressly recognized that individual victims of gross violations of international human rights law and serious violations of international humanitarian law

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[33] See, for example, United Nations General Assembly, resolution 60/147 of 16 December 2005, "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law", UN doc. A/RES/60/147, Annex.

[34] *Yearbook of the International Law Commission, 2001*, Vol. II, Part Two, p. 94, Article 33, paragraph 2.

[35] *Ibid.*, p. 95, commentary to Article 33, citing *LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 494, para. 77.

[36] *Ibid.*, pp. 87-88, commentary to Article 28.

[37] ILC, "Draft articles on Prevention and Punishment of Crimes Against Humanity", UN doc. A/74/10, 15 May 2019, pp. 102 and 106-109, Article 12, paragraph 3, and commentary to Article 13, comments (16)-(24).

[38] See also United Nations, Commission on Human Rights, *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*: Final report submitted by Special Rapporteur Mr. Theo van Boven, UN doc. E/CN.4/Sub.2/1993/8, 2 July 1993, paras. 131-135.

have a "right" to "[e]qual and effective access to justice" and "[a]dequate, effective and prompt reparation for harm suffered".

40. At the oral hearings, the Agent and counsel for the DRC addressed the arrangements for a fund established by the Government of the DRC in the expectation of compensation for the wrongful acts committed by Uganda, and stated that "the DRC reiterates that it is willing to take due account of any guidance that the Court may wish to provide on the organization and functioning of that fund"[39]. This request by the DRC offered the Court an opportunity to go beyond the timid *dictum* in the *Diallo* Judgment[40] and to state clearly and unequivocally that, for heads of damage such as loss of life, injuries to persons, rape, conscription of child soldiers, destruction of private property and displacement of populations, the individuals and communities that directly suffered the injury are the addressees and beneficiaries of the compensation awarded by the Court for such damages. Instead of making such a clear statement, the Court has adopted again a *Diallo*-like formula in paragraph 408 of the Judgment, taking note of the statements made by the DRC during the oral proceedings. In doing so, the Court has opted for the easy solution, by awarding global sums to the State, totally ignoring the fact that the damage caused by Uganda's wrongful conduct was, above all, to human beings. This might have been due in part to the overly narrow approach adopted in the Judgment with regard to reparations.

41. Indeed, the one-size-fits-all approach to reparation, adopted in the form of "global sums" with respect to three cumulative heads of damage, does not adequately do justice to the injuries suffered by individuals and communities that had been well documented in the 2005 Judgment of the Court. Nor does the fact that the State of the DRC is the sole addressee of the aggregated compensation, awarded under those three "global sums", ensure that those individuals and communities will be adequately compensated. As the Court stated in the case concerning *Avena and other Mexican nationals*,

> "[w]hat constitutes 'reparation in an adequate form' clearly varies depending upon the concrete circumstances surrounding each case and the precise nature and scope of the injury, since the question has to be examined from the viewpoint of what is the 'reparation in an adequate form' that corresponds to the injury"[41].

42. The Judgment does not provide any explanation as to how these "global sums" were arrived at, and what exact figures are to be assigned to their distinct components, except for the estimate with regard to the loss of life. As a result, it is simply impossible to parse through the various heads of loss (at least between the funds intended for the public purse and those intended for private individuals). Consequently, it is not possible to identify, for example, how much money should be assigned to the fund established by the DRC for the purposes of distributing the compensation awarded by the Court to the actual victims or their beneficiaries, for which types of injury, for how many victims, and for how much value. This could have helped the DRC itself to disburse fairly and effectively, through the fund it has established, the compensation allocated to the individuals and communities concerned.

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[39] CR 2021/11, pp. 72-73, para. 20 (Mingashang) *[translation by the Registry]*.

[40] *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012 (I)*, p. 334, para. 57 ("[t]he Court recalls that the sum awarded to Guinea in the exercise of diplomatic protection of Mr. Diallo is intended to provide reparation for the latter's injury").

[41] *Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004 (I)*, p. 59, para. 119, citing *Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9*, p. 21.

43. It is therefore my view that one of the inadequacies of the reparation awarded by the Court in this case flows from the overly narrow approach to reparations adopted in the Judgment and the lack of consideration of the communities, collectivities and individuals who have directly suffered as a result of the wrongful acts of Uganda through loss of life, personal injuries, destruction of private properties, conscription of child soldiers and the displacement of population. These individuals and communities have not yet recovered from the impact of the violent conflict on their lives. Their plight, therefore, deserved to be taken into account by adopting different forms of reparation that would fit their different circumstances and by clearly indicating that they were the direct addressees of these reparations. To this end, a wide range of forms of reparation, depending on the specific head of alleged injury, was available to the Court and could have been used without necessarily altering the interstate nature of the proceedings. They include individual and collective reparations, compensation, rehabilitation and non-pecuniary satisfaction.

44. The possibility of collective reparations, for example, has been envisaged in the Inter-American System of Human Rights[42], the ILC in the Draft Articles on Crimes Against Humanity[43], and the Rules of Procedure and Evidence of the International Criminal Court ("ICC")[44]. Collective reparations may be most appropriate for the provision of institutionalized assistance, in the form of vocational schools, hospitals, clinics and counselling services in their respective communities, to individuals who suffered twenty or twenty-five years ago personal injuries, rape and sexual violence, or conscription as child soldiers, as well as for the reconstruction of public buildings such as schools, hospitals and places of worship.

45. With regard to child soldiers, in particular, a set of principles and guidelines on children associated with armed forces or armed groups adopted by UNICEF in 2007 (the "Paris Principles")[45], state that "[d]irect cash benefits to released or returning children are not an appropriate form of assistance, as experience has repeatedly shown"[46]. Instead, a better approach might be alternative measures such as "[i]nclusive programming which supports children who have been recruited or used as well as other vulnerable children"[47]. This kind of "collective post-conflict reparations" may also be found in the practice of the ICC Trust Fund for Victims with respect to Uganda and the DRC.

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[42] Inter-American Court of Human Rights (IACtHR), *Case of the Mayagna (Sumo) Awas Tingni Community* v. *Nicaragua (Merits, Reparations, and Costs)*, Judgment of 31 August 2001, para. 167 (providing for works or services of collective interest for the benefit of the Awas Tingni Community in the amount of US$50,000); see also IACtHR, *Case of the Plan de Sánchez Massacre* v. *Guatemala (Reparations)*, Judgment of 19 November 2004, paras. 93, 106-108, 117 and 125 (7) (providing for the free of charge medical treatment required by the victims, a specialized program of psychological and psychiatric treatment, adequate housing to the surviving victims, and communal programmes for the benefit of the entire community).

[43] ILC, "Draft articles on Prevention and Punishment of Crimes Against Humanity", UN doc. A/CN.4/L.935, 15 May 2019, Art. 12, para. 3 (referring to "reparation for material and moral damages, on an individual or *collective* basis, consisting, as appropriate, of . . . *rehabilitation*"; emphases added).

[44] ICC, Rules of Procedure and Evidence, *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002*, Rule 97, para. 1: "Taking into account the scope and extent of any damage, loss or injury, the Court may award reparations on an individualized basis or, where it deems it appropriate, on a *collective* basis or both." (Emphasis added.) For a summary of the practice of the ICC, see ICC, Trial Chamber I, *The Prosecutor* v. *Thomas Lubanga Dyilo*, ICC-01/04-01/06, Corrected version of the "Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable" of 21 December 2017 (public redacted version), paras. 33, 36, 192-194, 246-248, 288, 294-296; Trial Chamber VIII, *The Prosecutor* v. *Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15, Reparations Order of 17 August 2017, operative clause, subpara. 1.

[45] UNICEF, "The Paris Principles. Principles and Guidelines on Children Associated with Armed Forces or Armed Groups", February 2007, available at http://www.refworld.org/docid/465198442.html (accessed 28 January 2021).

[46] *Ibid.*, Principle 7.35.

[47] *Ibid.*, Principle 7.30.

46. Thus, despite the inter-State nature of the proceedings, and in light of recent developments with regard to remedies for gross violations of human rights and international humanitarian law, it was possible to envisage different forms of reparation, that take into account the sensitivities involved in these categories of injury, particularly twenty or twenty-five years after the events, and the need for a fair and effective redress of the harm caused. This approach would have strengthened the performance of the obligation to make reparation in the interest of the beneficiaries of the obligation breached and would effectively enable such reparation to accrue to the injured individuals and communities. In the present case, it would also have given the DRC authorities the guidance that they had formally requested the Court to provide them with on the functioning of the fund they have established.

(Signed) Abdulqawi Ahmed YUSUF.

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