## DECLARATION OF JUDGE SALAM

*Agreement with the stated principles of evidence in reparations proceedings —Disagreement with the Court in the application of those principles —Rigidity and excessive formalism of the Court in the assessment of evidence submitted by the DRC — Indistinct and insufficiently justified reparation method.*

1. Although I generally agree with the principles and rules applicable to the assessment of reparations in this case and to the questions of proof set out by the Court under the heading "General considerations", I believe that a better application of those principles, both in the assessment of the evidence and in the determination of the amount of reparation due, could have made it possible to achieve a fairer compensation.

2. In terms of principles, the Judgment pertinently emphasizes that although the Court has previously recalled that, "as a general rule, it is for the party which alleges a fact in support of its claims to prove the existence of that fact", it has also indicated that this is not an absolute principle, applicable in all circumstances. Indeed, the Court has held that "this general rule may be applied flexibly in certain circumstances, where, for example, the respondent may be in a better position to establish certain facts" (*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Compensation, Judgment, I.C.J. Reports 2018 (I),* p. 26, para. 33; *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012 (I),* p. 332, para. 15), depending on "the subject-matter and the nature of each dispute brought before the Court" and "the type of facts which it is necessary to establish for the purposes of the decision of the case" (*Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010 (II),* p. 660, para. 54).

3. Additionally, the Court claims that it is not ignoring the evidentiary difficulties that occur "in most situations of international armed conflict" and that it recalls in paragraphs 66 and 67 of the Judgment. Following this, the Court affirms that it "will take the context of this case into account when determining the extent of the injury and assessing the reparation owed" (paragraph 68 of the Judgment).

4. This flexible approach is particularly suitable for reparation procedures when, as in the present case, the Court has established at an earlier stage of the proceedings the existence of "massive human rights violations and grave breaches of international humanitarian law" (*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005,* p. 239, para. 207). This conclusion is shared by many international courts which, in similar circumstances, have generally shown reasonable flexibility on this issue in order to be able to guarantee fair compensation to the victims.

5. The Court thus aptly recalls the case law of the Appeals Chamber of the International Criminal Court ("ICC") in the *Katanga* case, which concerned facts occurring in the same armed conflict and where the Appeals Chamber took into account the inability of victims to provide documentary evidence in support of all the alleged harms in light of the prevailing circumstances in the Democratic Republic of the Congo ("DRC") (paragraph 123 of the Judgment).

6. Along the same lines, I also note that, in the *Lubanga* case (2015), the ICC Appeals Chamber observed that, with regard to the evidentiary standard in the reparations phase, it was appropriate to apply more flexible criteria than the requirement of "beyond [all] reasonable doubt", and that several factors had to be taken into consideration, including recognizing the difficulty victims face in obtaining evidence in support of their claims due to its destruction[1]. Similarly, in the reparations procedure in the *Ntaganda* case, the Appeals Chamber recalled that the "appropriate" standard of proof depended on the particular circumstances of the case[2], taking into consideration the difficulty involved in obtaining evidence as well. Therefore, in order to determine the standard of proof applicable in the reparations proceeding, the Appeals Chamber took into account the distinguishing features of the case, "specifically the difficulty victims may face in obtaining evidence in support of their claim due to the destruction or the unavailability of evidence in the relevant circumstances"[3]. The Appeals Chamber thus underscored the relevance of the standard of proof known as the "balance of probabilities". All that is required is for the court to be satisfied that it is more probable than not that the plaintiff suffered harm resulting from one of the crimes for which the defendant was convicted[4].

7. A similar approach was followed by the Eritrea-Ethiopia Claims Commission, which avoided using a "mechanical process" with an overly demanding standard of proof pertaining to alleged damages that would, as such, have deprived the victims of fair compensation, while also preventing excessive requests[5]. As the Commission noted,

> "in connection with particular claims, the evidence regarding such matters as the egregiousness or seriousness of the unlawful action, the numbers of persons injured or property destroyed or damaged by that action, and the financial consequences of such injury, destruction or damage, is often uncertain or ambiguous. In such circumstances, the Commission has made the best estimates possible on the basis of the available evidence. Like some national courts and international legislators, it has recognized that when obligated to determine appropriate compensation, it must do so even if the process involves estimation, or even guesswork, within the range of possibilities indicated by the evidence."[6]

8. This approach is consistent with the fundamental principles of justice as recalled by the arbitral tribunal in the *Trail Smelter* case:

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[1] *The Prosecutor* v. *Thomas Lubanga Dyilo*, ICC-01/04-01/06, Appeals Chamber, Amended Order for Reparations, Annex A of the Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012, 3 March 2015 (ICC-01/04-01/06-3129-AnxA), para. 22.

[2] *The Prosecutor* v. *Bosco Ntaganda*, ICC-01/04-02/06, Trial Chamber VI, Reparations Order, 8 March 2021, para. 77.

[3] *The Prosecutor* v. *Germain Katanga*, ICC-01/04-01/07, Trial Chamber II, Order for Reparations pursuant to Article 75 of the Statute, 24 March 2017, para. 47.

[4] *Ibid*., paras. 46-50.

[5] Eritrea-Ethiopia Claims Commission, *Ethiopia's Damages Claims, Final Award*, Decision of 17 August 2009, United Nations, *Reports of the International Arbitral Awards (RIAA)*, Vol. XXVI, paras. 37, 40, 98 and 328.

[6] *Ibid.*, para. 37.

> "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."[7]

9. As previously mentioned, the Court claims that it is aware of the difficulties relating to questions of proof which arise "in most situations of international armed conflict", as it recalls in paragraphs 66 and 67 of the Judgment. The Court also states that it "will take the context of this case into account when determining the extent of the injury and assessing the reparation owed" (paragraph 68 of the Judgment).

10. However, in the remainder of the Judgment, the Court does not seem to have applied the above principles satisfactorily or to have sufficiently taken into consideration the context of this case, which ultimately prevents it from arriving at a just and equitable compensation.

11. Indeed, while it is careful to point this out, the Court does not sufficiently take into consideration the fact that the conflict occurred several decades ago, rendering the accessibility of relevant official documents more difficult; that evidence could have been destroyed as a result of the war or the elapsed time; that the DRC may have lacked the necessary resources to conduct investigations on its own territory; and that the low level of education of a majority of the victims and especially the administrative context of the country prevented an effective accounting of all the damage suffered, including the loss of human life via official death certificates or hospital records.

12. First, in assessing the evidence submitted by the DRC, the Court has been too strict, even severe, when highlighting the deficiencies in the evidence submitted by the Applicant, without really taking into consideration the context of the case. There is no doubt that the DRC has not always been able to provide evidence of a high degree of certainty in support of its claims. In fact, the Applicant acknowledges this in a certain way when reminding the Court of the situation in which it had to collect the evidence, notably highlighting "its lack of resources, the continuing conflict on its territory, the trauma suffered by a large number of victims and their low level of education, the destruction and loss of evidence and other related difficulties" (paragraph 62 of the Judgment).

13. To my great regret, the Court does not seem to take full account of this context which should have led it to acknowledge, as it did in the *Corfu Channel* case, that the DRC, which was unable to furnish direct proof, could "be allowed a more liberal recourse to inferences of fact and circumstantial evidence" (*Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 18).

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[7] *Trail Smelter (United States, Canada), Awards of 16 April 1938 and 11 March 1941, RIAA*, Vol. III, p. 1920.

14. Thus, although the Court states in paragraph 159 of the Judgment that it is "aware that detailed proof of specific events that have occurred in a devastating war, in remote areas, and almost two decades ago, is often not available", it nevertheless considers, and in a rather paradoxical way, that, "notwithstanding the difficult situation in which the DRC found itself, more evidence relating to loss of life could be expected to have been collected since the Court delivered its 2005 Judgment". Similarly, it reiterates in paragraph 242, in relation to damage to property, that "notwithstanding the difficult situation in which the DRC found itself, more evidence could be expected to have been collected by the DRC since the Court delivered its 2005 Judgment". The Court's position is far from "taking into account" the "context" of the situation in the DRC which, even after 2005, remained unstable, with conflicts of varying intensity, and where the Government lacked total control over the entire territory, as underscored by numerous Security Council resolutions and reports by the United Nations Organization Mission in the Democratic Republic of the Congo ("MONUC"), which became the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo ("MONUSCO") on 1 July 2010.

15. Next, the Court's admonition of the DRC stands in sharp contrast to its attitude concerning Uganda's lack of co-operation, as the occupying Power, in the search for and collection of evidence in the context of these proceedings; this being the case even though the Court had recalled — as I pointed out before — that in certain circumstances, the burden of proof could be reversed, or at least shared between the parties, with the respondent's active participation in the establishment of certain facts necessary to settle a dispute (*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Compensation, Judgment, I.C.J. Reports 2018 (I)*, p. 26, para. 33; *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012 (I)*, p. 332, para. 15).

16. Indeed, the nature of the present dispute required the Respondent to establish certain elements of the case. Given that it was the occupying Power in Ituri when many of the events that needed to be established occurred, Uganda is undoubtedly in a better position to do so than the DRC, which would have had the onerous task of reconstructing evidence damaged by the war, the occupation of part of its territory and the elapsed time. However, the Respondent did not do so. It merely pointed to the deficiencies in the evidence provided by the DRC and noted that the conclusions of the Court-appointed experts were unfounded or arbitrary. This attitude of Uganda has, naturally, rendered an already arduous task for the Court even more difficult. Surprisingly, the Judgment limited itself to taking note of this situation without drawing the necessary conclusions from it.

17. Turning to the question of compensation, the Court recalls, rightly in my view, in paragraph 106 of the Judgment, that it may "on an exceptional basis, award compensation in the form of a global sum, within the range of possibilities indicated by the evidence and taking account of equitable considerations". Such an approach can be justified when the evidence unambiguously leads to the conclusion that an internationally wrongful act has caused proven harm but where such evidence does not allow for a precise evaluation of the extent or magnitude of such harm (see *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012 (I)*, p. 334 para. 21, pp. 334-335, para. 24, and p. 337, para. 33; *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).

18. While the Judgment proceeds at length to a rigorous analysis of the various methods used by the Parties and by the Court-appointed experts to assess the extent of damage to be compensated and to determine the amount of compensation owed for each head of damage, it does not, however,

clearly set out its method of calculating the compensation to be granted, apart from mentioning rather vague and general considerations such as "[t]aking into account all the available evidence", "the methodologies proposed to assign a value to personal injuries" and "its jurisprudence and the pronouncements of other international bodies". It remains that these considerations are not sufficient and/or convincing explanations.

19. The majority's position also appears to me to be questionable in terms of the approach followed for the allocation of the compensation due to the DRC. In particular, I do not agree with the decision to opt for "global" sums for all damage caused to persons, property or natural resources, without distinguishing among the different heads of damage within each of these three categories. For instance, with regard to damage to persons, the Court begins by carrying out a separate analysis of each damage alleged by the DRC, namely the loss of human life, injuries to persons, rape and sexual violence, the recruitment and deployment of child soldiers, and population displacements. However, having done so, the Court does not explain why it considers it appropriate to award a "single" lump sum for "all" damage to persons, instead of awarding separate compensation for each of the different heads of damage.

20. The fact that the Court refrains from fixing a specific amount of compensation for each of the various heads of damage seems all the more problematic since, recalling its 2012 case law in *Ahmadou Sadio Diallo*, the Court indicates that "any reparation is intended, as far as possible, to benefit all those who suffered injury resulting from internationally wrongful acts" (paragraph 102 of the Judgment). The awarded reparation should, from this point of view, benefit as much as possible the victims, groups of victims and communities who suffered harm resulting from the internationally wrongful acts of Uganda. Indeed, as recommended by the United Nations General Assembly, it is fitting to adopt, in cases of serious violations of international human rights law and international humanitarian law, as in the present case, a "victim-oriented" approach (resolution 60/147, 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, 16 Dec. 2005, doc. A/RES/60/147).

21. It is therefore to be regretted that, by not distinguishing between the separate types of injuries in each of the different categories of damage, the Court has not helped in the appropriate distribution of the compensation awarded to the DRC to repair the injury suffered by the victims and communities harmed as a result of Uganda's internationally wrongful acts.

22. Indeed, how should the DRC distribute the US$225,000,000 among the families of the deceased, the injured, the rape victims, the child soldiers and the displaced persons? Similarly, the US$40,000,000 granted for property damage leaves the DRC to resolve for itself the thorny issue of determining what share should be reserved for the restoration and reconstruction of public buildings, and thus paid to the State treasury, and what part should relate to private property. Should the Court's exercise of its discretionary power in defining the amount of reparation necessarily be followed by arbitrariness in the DRC's distribution of that amount? It seems to me that, on this point, the Court could have taken a more satisfactory approach for the sake of the victims.

23. Finally, it is reasonable to ask whether, in view of the rigidity and excessive formalism the Court has shown in its assessment of the evidence, as well as the lack of sufficient consideration it has accorded to the specific context of this case, which I have sought to emphasize in this declaration, the global sum awarded in compensation by the Court, especially in respect of damage to persons and property, remains far from reflecting the extent and gravity of the damage suffered by the DRC as a result of Uganda's violations of the "principle of non-use of force in international relations", the "principle of non-intervention", as well as "massive human rights violations and grave breaches of international humanitarian law" (*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 239, para. 207 and p. 280, para. 345, subpara. (1)). As such, to my great regret, the Court has deprived itself of the means that would allow it to ensure "reparation in an adequate form" (*Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9*, p. 21).

*(Signed)* Nawaf SALAM.