SEPARATE OPINION OF JUDGE IWASAWA

Where it is impossible to quantify the damage precisely, international courts and tribunals have applied equity infra legem *in determining the amount of compensation — In the present case, the Court adopts this line of reasoning and awards compensation "in the form of a global sum, within the range of possibilities indicated by the evidence and taking into account equitable considerations" — The Court decides this case in accordance with international law and not* ex aequo et bono *— Under the International Covenant on Civil and Political Rights, criminal investigation and prosecution are necessary remedies for violations of human rights protected by Articles 6 (right to life) and 7 (right not to be subjected to torture) — The Court could have given this as an additional reason to reject the DRC's request for satisfaction in the form of criminal investigation and prosecution.*

1. I voted in favour of the Court's decisions in the operative paragraph (paragraph 409 of the Judgment) and generally agree with the reasoning set out in the Judgment. The purpose of this opinion is to offer my views on certain aspects of the Judgment, namely its reliance on equitable considerations and its reference to criminal investigation and prosecution.

I. Equitable considerations

2. The present case concerns one of the deadliest and most destructive armed conflicts ever to take place in Africa. In its 2005 Judgment, the Court found that Uganda had violated the principle of non-use of force in international relations and the principle of non-intervention, as well as its obligations under international human rights law and international humanitarian law[1]. Its actions resulted in extensive damage to persons, including loss of life, as well as damage to property and damage related to natural resources. The armed conflict was also highly complex. There were numerous actors present in the DRC during the relevant period, including the armed forces of a number of States and irregular forces which acted in collaboration with some of those States (paragraphs 64-65 of the Judgment).

3. The Court observes that, when mass violations have occurred in the context of armed conflict, judicial and other bodies have awarded compensation on the basis of the evidence at their disposal. They have adopted less rigorous standards of proof for the quantification of damage and have reduced the levels of compensation in order to balance the uncertainties stemming from the application of lower standards of proof. In particular, the Court refers to the Final Award on Eritrea's Damages Claims rendered by the Eritrea-Ethiopia Claims Commission (the "EECC") in 2009 (paragraphs 107 and 123 of the Judgment).

4. In view of the magnitude and complexity of the armed conflict in the territory of the DRC and given that a large amount of evidence has been destroyed or rendered inaccessible over the years, the Court decides to proceed in the same manner in the present case. It observes that the standard of proof required to establish responsibility is higher than in the reparation phase, which calls for some flexibility (paragraphs 108 and 124 of the Judgment). The Court thus awards compensation "in the form of a global sum, within the range of possibilities indicated by the evidence and taking into account equitable considerations" (paragraphs 106, 166, 181, 193, 206, 225, 258 and 365). The Court notes that such an approach may be called for "where the evidence leaves no doubt that an

[1] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 280, para. 345, subparas. (1) and (3).

internationally wrongful act has caused a substantiated injury, but does not allow a precise evaluation of the extent or scale of such injury" (paragraph 106).

5. It should be emphasized that, in adopting this approach, the Court does not decide this case *ex aequo et bono* (Article 38, paragraph 2, of the Statute of the Court), as the Parties have not authorized it to do so. It decides this dispute "in accordance with international law" (Article 38, paragraph 1), determining the global sum on the basis of the legal principles and rules applicable to the assessment of reparations. While the Court, as a court of law, is obligated to quantify the damage based on the evidence before it, it is equally justified in taking into account equitable considerations.

6. In *Frontier Dispute (Burkina Faso/Republic of Mali)*, the Chamber of the Court acknowledged that it could not decide the case *ex aequo et bono* because the parties had not authorized it to do so. Nonetheless, it declared that it would have regard to "equity *infra legem*", describing it as "that form of equity which constitutes a method of interpretation of the law in force, and is one of its attributes"[2]. Equity *infra legem*, or equity under the law, refers to the power of courts to select from among possible interpretations of the law the one which achieves the most equitable result. International courts have the inherent power to apply equity *infra legem* without the specific authorization of the parties.

7. In *Frontier Dispute*, the Chamber recalled, in support of its position, a passage from the *Fisheries Jurisdiction* Judgments, in which the Court, urging the parties to negotiate an "equitable apportionment" of the fishing resources, stated: "It is not a matter of finding simply an equitable solution, but an equitable solution derived from the applicable law."[3]

8. In *Fisheries Jurisdiction*, the Court in turn referred to its Judgment in the *North Sea Continental Shelf* cases, in which it observed that rules of law on the delimitation of adjacent continental shelves were to be applied on a foundation of general precepts of justice and good faith, and stated that "it is not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles"[4]. It further stressed:

> "Whatever the legal reasoning of a court of justice, its decisions must by definition be just, and therefore in that sense equitable. Nevertheless, when mention is made of a court dispensing justice or declaring the law, what is meant is that the decision finds its objective justification in considerations lying not outside but within the rules, and in this field it is precisely a rule of law that calls for the application of equitable principles. There is consequently no question in this case of any decision *ex aequo et bono*"[5].

In *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, the Court further explained the function of equitable principles as follows:

> "[T]he legal concept of equity is a general principle directly applicable as law . . . [W]hen applying positive international law, a court may choose among several possible

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[2] *Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, pp. 567-568, para. 28.

[3] *Fisheries Jurisdiction (United Kingdom* v. *Iceland; Federal Republic of Germany* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 33, para. 78; p. 202, para. 69.

[4] *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, pp. 46-47, para. 85.

[5] *Ibid.*, p. 48, para. 88.

> interpretations of the law the one which appears, in the light of the circumstances of the case, to be closest to the requirements of justice. Application of equitable principles is to be distinguished from a decision *ex aequo et bono* . . . [The Court] is bound to apply equitable principles as part of international law"[6].

As these cases demonstrate, the equitable principles used by the Court in the context of maritime delimitation are a form of equity *infra legem*[7].

9. Similarly, having regard to equitable considerations in determining the amount of compensation, as the Court has done in the present case, is an application of equity *infra legem*, not a decision *ex aequo et bono*. This is also attested to by the Court's Advisory Opinion in *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against UNESCO*. In that case, the Executive Board of UNESCO alleged that the validity of the judgments of the ILO Administrative Tribunal was vitiated by excess of jurisdiction "on the ground that it awarded compensation *ex aequo et bono*"[8]. The ILO Tribunal had stated in its judgment "[t]hat redress [would] be ensured *ex aequo et bono* by the granting to the complainant of the sum set forth below"[9]. It was unfortunate that the Tribunal used the expression *ex aequo et bono* because it was in fact applying equity *infra legem*. The Court explained this point as follows:

> "It does not appear from the context of the judgment that the Tribunal thereby intended to depart from principles of law. The apparent intention was to say that, as the precise determination of the actual amount to be awarded could not be based on any specific rule of law, the Tribunal fixed what the Court, in other circumstances, has described as the true measure of compensation and the reasonable figure of such compensation"[10].

10. In many cases where it has been impossible to quantify the damage precisely, international tribunals have applied equity *infra legem* in determining the amount of compensation. They have done so when the treaty establishing the tribunal authorized it to decide in accordance with "equity" or to award "equitable compensation"[11]. However, even when they were not explicitly given

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[6] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 60, para. 71.

[7] See also *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment, I.C.J. Reports 1984*, p. 278, para. 59, p. 303, para. 123; *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, pp. 38-39, para. 45; *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark* v. *Norway), Judgment, I.C.J. Reports 1993*, p. 62, para. 54; *Delimitation of the Continental Shelf (United Kingdom/France), Decision of 30 June 1977*, United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. XVIII, pp. 45-46, para. 70, pp. 47-48, para. 75.

[8] *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against UNESCO, Advisory Opinion, I.C.J. Reports 1956*, p. 100.

[9] *Ibid.*

[10] *Ibid.*, referring to *Corfu Channel*, fn. 18 below.

[11] E.g. *Affaire Yuille, Shortridge et Cie (Portugal* contre *Royaume-Uni), décision du 21 octobre 1861*, in A. Lapradelle and N. Politis, *Recueil des arbitrages internationaux*, Vol. II (1855-1872), 1923, p. 108; *Affaire des propriétés religieuses (France, Royaume-Uni, Espagne* contre *Portugal), décision du 2 septembre 1920*, *RIAA*, Vol. I, p. 16; *John Gill (Great Britain)* v. *United Mexican States, Decision of 19 May 1931, RIAA*, Vol. V, p. 162, para. 12; *Dennis J. and Daniel Spillane (Great Britain)* v. *United Mexican States, Decision of 3 August 1931*, *RIAA*, Vol. V, p. 290, para. 7. Some tribunals used the expression *ex aequo et bono* in doing so, e.g. *The Orinoco Steamship Company Case (United States of America/Venezuela), Decision of 25 October 1910*, *RIAA*, Vol. XI, p. 240; *Norwegian Shipowners' Claims (Norway* v. *U.S.A.), Decision of 13 October 1922, RIAA*, Vol. I, p. 339.

authority to decide in accordance with "equity", they have not hesitated to apply equity *infra legem* in determining the amount of compensation[12].

In the *Loan Agreement between Italy and Costa Rica* arbitration, the Arbitration Agreement provided that the arbitral tribunal should decide the dispute "in accordance with the relevant rules of international law", pursuant to Article 33 of the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States, which, in the tribunal's words, "mirrors the well-known Article 38 of the Statute of the International Court of Justice on the sources of *jus gentium*"[13]. The tribunal relied on equity *infra legem* in determining the global sum of compensation in this case, noting that:

> "[t]he Arbitral Tribunal is called upon . . . to assess the global sum due . . . under the relevant rules of international law, and in particular the equitable principles deriving from the notion of justice, which govern international judicial and arbitral practice, taking account of all the circumstances"[14].

It emphasized that it was not deciding *ex aequo et bono*, stating that:

> "public international law is traditionally imbued with, or influenced by, equitable principles as modes of applying a rule *infra legem*, entailing the tangible adaptation of a norm to the particular circumstances of the case . . . It is important to avoid any confusion here between the role of equitable considerations within the system of applicable law and a decision *'ex aequo et bono'*, which 'is something quite different'"[15].

11. As concerns the EECC, Article 5, paragraph 13, of the 2000 Algiers Agreement, which established the Commission, provided: "In considering claims, the Commission shall apply relevant rules of international law. The Commission shall not have the power to make decisions *ex aequo et bono*."[16] In examining the compensation claims, the EECC recognized the difficulties associated with questions of proof, the evidence often being uncertain or ambiguous. Accordingly, it determined "the appropriate compensation for each . . . violation", which "requir[ed] exercises of judgment and

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[12] E.g. *Affaire de l'attaque de la caravane du Maharao de Cutch (Royaume-Uni* contre *Ethiopie), décision du 7 octobre 1927, RIAA*, Vol. II, p. 826; *Affaire Chevreau (France* contre *Royaume-Uni)*, *décision du 9 juin 1931, RIAA*, Vol. II, p. 1139; *Trail Smelter Case (United States of America/Canada)*, *Decision of 11 March 1941, RIAA*, Vol. III, pp. 1938-1939; *LIAMCO* v. *Libya*, *Decision of 12 April 1977, International Law Reports (ILR)*, Vol. 62, pp. 150-151. Some tribunals also used the expression *ex aequo et bono* in these cases, e.g. *Affaire Lacaze (France* contre *Argentine)*, *décision du 19 mars 1864*, in Lapradelle and Politis, *op. cit.*, p. 298; *Sapphire International Petroleums Ltd.* v. *National Iranian Oil Company, décision du 15 mars 1963, ILR*, Vol. 35, pp. 189-190.

[13] *Loan Agreement between Italy and Costa Rica (Dispute Arising under a Financial Agreement), Decision of 26 June 1998, RIAA*, Vol. XXV, p. 56, para. 16. *[This and all subsequent excerpts from the tribunal's decision have been translated by the Registry.]*

[14] *Ibid.*, pp. 74-75, para. 76.

[15] *Ibid.*, pp. 72-73, paras. 69-70, citing Judge Fitzmaurice, who stated that "[d]eciding a case on the basis of *rules* of equity . . . is something quite different from giving a decision *ex aequo et bono*". *Barcelona Traction, Light and Power Company, Limited (New Application: 1962), (Belgium* v. *Spain), Second Phase, Judgment, I.C.J. Reports 1970*, separate opinion of Judge Sir Gerald Fitzmaurice, p. 85, para. 36 (emphasis in the original). The original French of this part of the tribunal's decision reads as follows:

> "le droit international public est traditionnellement imprégné de, ou influencé par, des principes équitables comme modalités d'application *infra legem* de la règle, impliquant l'adaptation concrète d'une norme aux particularités de l'espèce . . . Il convient d'éviter ici une confusion entre ce rôle des considérations équitables relevant du système de droit applicable, d'une part, et le cas de la décision 'ex aequo et bono', qui sont 'deux choses entièrement différentes'".

[16] Agreement between the Government of the State of Eritrea and the Government of the Federal Democratic Republic of Ethiopia, 12 Dec. 2000, UN doc. A/55/686–S/2000/1183, 13 Dec. 2000, Annex, Art. 5, para. 13.

approximation". It "made the best estimates possible on the basis of the available evidence"[17]. While not expressly referring to equitable considerations, it is clear that the EECC took account of them in determining the amount of compensation.

12. In *Corfu Channel*, in fixing the amount of compensation, the Court considered what would be the "true measure of compensation", "reasonable" figures, and a "fair and accurate" estimate of the damage sustained[18]. This language indicates that the Court took account of equitable considerations in determining the amount of compensation.

13. In more recent compensation judgments, the Court has explicitly referred to equitable considerations. In *Diallo*, it stated that the "[q]uantification of compensation for non-material injury necessarily rests on equitable considerations" and noted that "[e]quitable considerations have guided" arbitral tribunals and regional human rights courts in "their quantification of compensation for non-material harm" [19]. In particular, it quoted a judgment of the European Court of Human Rights which stated that, for determining damage, "[i]ts guiding principle is equity"[20]. It also quoted a judgment of the Inter-American Court of Human Rights which affirmed that the amount of compensation for non-pecuniary damages may be determined "in reasonable exercise of its judicial authority and on the basis of equity"[21]. As for the material injury suffered by Mr. Diallo, given the circumstances of the case, including the shortcomings in the evidence, the Court "consider[ed] it appropriate to award an amount of compensation based on equitable considerations"[22].

14. In *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)*, the Court observed that in the *Diallo* case it had "determined the amount of compensation due on the basis of equitable considerations", recalling that "the absence of adequate evidence as to the extent of material damage will not, in all situations, preclude an award of compensation for that damage"[23]. It thus awarded "an amount that it consider[ed] approximately to reflect the value of the impairment or loss"[24].

15. In the present case, the Court cites a decision of the ICC Trial Chamber in the *Lubanga* case which "reckon[ed] *ex aequo et bono*" the harm suffered by each child soldier at US$8,000[25] (paragraph 205 of the Judgment). The Court refers to this decision merely as one example of the

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[17] EECC, *Eritrea's Damages Claims, Final Award*, *Decision of 17 August 2009, RIAA*, Vol. XXVI, p. 528, para. 37; EECC, *Ethiopia's Damages Claims, Final Award*, *Decision of 17 August 2009, ibid.*, p. 655, para. 37.

[18] *Corfu Channel (United Kingdom* v. *Albania), Assessment of Amount of Compensation, Judgment, I.C.J. Reports 1949*, p. 249.

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

[20] ECtHR, *Al-Jedda* v. *United Kingdom*, Judgment of 7 July 2011 (Grand Chamber), Application No. 27021/08, para. 114.

[21] IACtHR, *Cantoral Benavides* v. *Peru*, Judgment of 3 December 2001 (reparation and costs), Series C, No. 88, para. 53.

[22] *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012 (I)*, p. 337, para. 33. See also *ibid.*, p. 338, para. 36.

[23] *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.

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

[25] *The Prosecutor* v. *Thomas Lubanga Dyilo*, ICC-01/04-02/06, Trial Chamber II, Decision Setting the Size of the Reparation Award for which Thomas Lubanga Dyilo is Liable, 21 December 2017, para. 259.

methodologies for assigning a specific valuation of damage in respect of a child soldier. The Court does not decide this case, or any aspect thereof, *ex aequo et bono*.

II. Criminal investigation and prosecution

16. In the present case, the DRC argues that compensation is not sufficient to remedy fully the damage caused, and asks that Uganda be required to give satisfaction in the form of criminal investigation and prosecution of UPDF officers and soldiers. The Court rejects this request, explaining that there is no need to order such a specific measure because Uganda already has an obligation to investigate, prosecute and punish those responsible for grave breaches of the Geneva Conventions, pursuant to Article 146 of the Fourth Geneva Convention and Article 85 of the First Protocol Additional to the Geneva Conventions (paragraph 390 of the Judgment).

17. In its 2005 Judgment, the Court found that the UPDF had committed not only "grave breaches of international humanitarian law" but also "massive human rights violations" on the territory of the DRC[26]. The Court found *inter alia* that Uganda had violated Article 6, paragraph 1 (right to life), and Article 7 (right not to be subjected to torture) of the International Covenant on Civil and Political Rights (hereinafter the "ICCPR")[27]. In light of this finding, in rejecting the DRC's request for satisfaction, the Court could have given as an additional reason that Uganda already has an obligation to investigate, prosecute and punish those responsible for the violations of Articles 6 and 7 of the ICCPR, pursuant to Article 2, paragraph 3, of that instrument, read in conjunction with Articles 6 and 7.

18. Article 2, paragraph 3, of the ICCPR sets out the obligation of States parties to provide an effective remedy to the victims of human rights violations. In accordance with this clause, read in conjunction with Articles 6 and 7, criminal investigation and, where appropriate, prosecution are necessary remedies for violations of human rights protected by Articles 6 and 7. This interpretation of the ICCPR corresponds to the interpretation consistently maintained in the jurisprudence of the Human Rights Committee, the body established by the ICCPR to monitor its implementation[28].

(Signed) IWASAWA Yuji.

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[26] *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.

[27] *Ibid.*, p. 244, para. 219.

[28] E.g. Human Rights Committee, *Sathasvam & Saraswathi* v. *Sri Lanka*, 8 July 2008, Communication No. 1436/2005, para. 6.4; *Amirov* v. *Russian Federation*, 2 Apr. 2009, Communication No. 1447/2006, para. 11.2. See also *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 29 Mar. 2004, paras. 16, 18; *General Comment No. 36: Right to Life*, 30 Oct. 2018, para. 27.