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INTRODUCTORY NOTE TO ARMED ACTIVITIES ON THE TERRITORY OF THE CONGO (DEM. REP. CONGO V. UGANDA) (REPARATIONS JUDGMENT) (I.C.J.)

BY MANUEL J. VENTURA*

[February 9, 2022]

Introduction

On February 9, 2022, the International Court of Justice (ICJ) handed down its reparations judgment in the *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* case.[1] This followed from its December 19, 2005 merits judgment, which found that Uganda and the Democratic Republic of the Congo (DRC) had violated international law vis-à-vis each other and were obliged to make reparations to each other.[2] The ICJ ultimately held that, over five annual instalments of US$65 million from September 1, 2022 until September 1, 2026, Uganda was to pay the DRC a total of US$325 million for damage to persons, damage to property, and damage related to natural resources.[3]

Background

The reparations judgment marked the culmination of protracted litigation that began on June 23, 1999, when the DRC filed suit against Burundi, Rwanda, and Uganda seeking to hold them responsible for acts that had been carried out (and that continued to be carried out) by various armed forces on its territory.[4] On December 19, 2005, the merits judgment found that from August 1998 to June 2003, Uganda—with respect to the DRC—had violated the prohibition on the use of force and the principle of non-intervention; carried out killings, torture, and inhumane treatment against DRC civilians and destroyed their property; failed to distinguish between civilian and military targets and protect civilians; incited ethnic conflict; violated international human rights law and international humanitarian law as the occupying power in Ituri District of the DRC; looted, plundered, and exploited the DRC's natural resources; and failed to prevent such acts during its occupation.[5] The ICJ also found that the DRC had violated its obligations to Uganda by attacking the Ugandan Embassy in the DRC; mistreating Ugandan diplomats; failing to provide effective protection to Ugandan diplomats; and failing to prevent the seizure of archives and property from said Ugandan Embassy.[6] In accordance with the merits judgment, the parties were to seek agreement on reparations, failing which the matter would be settled by the ICJ.[7]

The DRC and Uganda conducted reparations negotiations through to March 19, 2015, but could not agree on the applicable principles and modalities. As a result, on May 13, 2015, the DRC instituted ICJ proceedings and ultimately sought US$11,347,958,354 in compensation plus interest; by way of satisfaction, US$100 million for all non-material damage, US$25 million for the establishment of a reconciliation fund, and the criminal investigation/prosecution of culpable Ugandan soldiers; and costs.[8] Uganda submitted that the ICJ's findings on its responsibility for violating international law were appropriate satisfaction, thereby providing sufficient reparation; denied any other forms of reparation; and argued that each party should bear its own costs.[9] On October 12, 2020, the ICJ appointed four experts to provide it with an opinion on the heads of damage concerning the loss of human life, loss of natural resources, and damage to property.

The International Court of Justice's Reparations Judgment

The ICJ distinguished between the events that occurred in Ituri District and beyond Ituri District. With respect to Ituri District, it held that, as the occupying power at the time, Uganda had a duty of vigilance over events occurring therein, including those carried out by rebel groups. Because the merits judgment had found that Uganda failed to take measures to ensure respect for human rights and international humanitarian law in Ituri District, it fell on Uganda to demonstrate that the particular injury to the DRC that occurred therein was not caused by its failure to

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fulfil its occupation obligations. Absent such evidence, Uganda owed the DRC reparations for the injury.[10] The same was true with respect to the looting, plundering, and exploitation of Ituri District's natural resources.[11]

For events beyond Ituri District, because the merits judgment had found that various rebel groups were not under Uganda's control and that Uganda did not breach any vigilance duty with respect to their conduct, reparations could not be awarded for the damage caused by these groups.[12] However, because Uganda had supported the Congo Liberation Movement (MLC) and the Congo Liberation Army (ALC) (which had operated beyond Ituri District), and the merits judgment had found that this violated international law, reparations could be owed, provided that the relevant injury to the DRC on a case-by-case basis was sufficiently causally linked to such support.[13] Importantly, in this context, the ICJ held that the requisite sufficiently direct and certain causal nexus between an internationally wrongful act and the injury suffered could vary depending on the international rule violated, and the nature and extent of the injury.[14] The ICJ stated that while some of the damage that occurred in the DRC beyond Ituri District resulted from a combination of acts and omissions of rebel groups and other states that had operated therein, this was insufficient to exempt Uganda from an obligation to make reparations.[15] In such situations, the obligation to make reparations could, depending on the circumstances, be allocated in full to a single actor or be distributed among multiple actors.[16]

Although the ICJ recognized that the exact extent of the damage caused was subject to uncertainty, this did not bar it from determining a compensation amount; it could, exceptionally, award a global sum within the range of possibilities dictated by the evidence in light of equitable considerations.[17] The ICJ further determined that in cases involving large groups of victims of armed conflict, it was permissible to award a global sum for certain categories of injury even if it did not, in all probability, reflect the totality of the damage actually suffered.[18] Such cases also called for the adoption of less-rigorous standards of proof, with any compensation award being reduced to account for this lower standard of proof.[19] Thus, the DRC did not have to prove exact injury suffered by specific persons or precise property at particularized locations at an exact time; the ICJ could award compensation on the basis of its appreciation of the extent of the damage without this information.[20]

The ICJ recalled that although it would normally fall on a claimant state to prove the injury it had suffered, this was not an absolute rule and would depend on the circumstances of the case.[21] Here, it fell upon Uganda to prove that the injury suffered by the DRC in Ituri District did not result from its failure to fulfill its occupying power obligations.[22] The DRC retained the burden to prove its injury on its territory beyond Ituri District, even if the armed conflict complicated the establishment of facts.[23] However, considering the passage of time and the amount of evidence that had been destroyed or was no longer accessible, the ICJ determined that the standard of proof in the reparations phase called for some flexibility.[24]

The ICJ found that while the DRC's evidence could not establish the precise amount of compensation, it could consider investigative reports to assist in this endeavour, including those from United Nations organs and the court-appointed experts where relevant.[25] In view of the circumstances of the case and the passage of time, the ICJ determined that it would assess the existence and extent of the damage suffered by the DRC within a range of possibilities as per the evidence and based on reasonable estimates, taking into account whether factual findings were supported by more than one evidentiary source.[26] However, the injury claimed by the DRC had to fall within the scope of the categories of damage established in the merits judgment.[27]

Based on these findings and the evidence on the record, the ICJ assessed the DRC's compensation claims. They were divided into four heads of damages, most with subcategories: (1) damage to persons; (2) damage to property; (3) damage related to natural resources; and (4) macroeconomic damage. While a complete outline of the ICJ's intricate (and long) analysis is beyond the scope of this introductory note, the DRC was successful, to various degrees, with respect to the first three categories, but unsuccessful in its macroeconomic damage claim and was therefore awarded a total of US$325 million, consisting of US$225 million for damage to persons, US$40 million for damage to property, and US$60 million for damage related to natural resources.[28] Uganda was found to have the capacity to pay this total amount, thereby rendering moot the need to assess the possible financial burden of the amount on, and the economic circumstances of, Uganda.[29]

As for the DRC's satisfaction claims, the ICJ first noted that Uganda had existing obligations under the Fourth Geneva Convention (1949) and the First Additional Protocol to the Geneva Conventions (1977) to investigate,

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prosecute, and punish violations of international humanitarian law and that, accordingly, there was no need to order the requested satisfaction since this was already encompassed by an existing international obligation.[30] Second, the claim for monies to create a fund to promote reconciliation between the Hema and Lendu groups in Ituri District was rejected because the material damage caused by the ethnic conflict was encompassed by the compensation awarded for damage to persons and property.[31] Finally, the DRC's monetary claim for non-material harm was rejected in light of international practice and because it was already included in the global sums awarded for the various heads of damage.[32]

Further, the ICJ saw no reason to depart from the usual practice under Article 64 of the ICJ Statute whereby each party would bear its own costs (unless otherwise decided).[33] Additionally, the DRC's claim for pre-judgment interest was denied as the amounts it had awarded for the various heads of damage already took into account the passage of time.[34] But the ICJ determined that if Uganda was late on its payments, post-judgment interest would be payable at an accrued annual rate of 6 percent on any overdue amount.[35]

Commentary

It is not often that violations of international law of the magnitude and scope of those in this case are brought for adjudication. It is also not always the case that, upon a judgment being delivered by an international court for the kind of conduct at issue here, the defendant state actually ends up paying reparations.[36] One might have expected such an outcome here given that, in the wake of the reparations judgment, Uganda issued a statement calling the judgment "unfair and wrong," "deeply unclear," and "an undue interference . . . in African affairs generally," and opined that it did "not contribute to peace and security, or the spirit of cooperation between the two countries" or "inspire confidence in the Court as [a] fair and credible arbiter of international disputes."[37] But on September 1, 2022, as widely reported, Uganda paid its first annual US$65 million instalment. It should be commended for abiding by the international rule of law.

In the not-too-distant past, the idea that massive monetary claims between states arising from armed conflict would be put by consent to a bench of international judges sitting at a permanent international court—where an uncertain outcome was guaranteed—might have seemed far-fetched or fanciful. As such, this case represents a further step toward the peaceful settlement of international disputes and shows than even the most complex of claims can be adjudicated if the political will exists. It also marks a big step in the ICJ's awarding of monetary reparations, which have been few and far between in its history; this case was the first time it had done so in the context of armed conflict and is by far the largest sum it has ever awarded. The sparse precedent in this area was evident from the ICJ's analysis of the applicable law, where it relied, in key parts, on the principles elucidated in the arbitration award issued by the Eritrea–Ethiopia Claims Commission—the only comparable modern example where reparations were awarded for similar violations of international law as those before the ICJ.

Notwithstanding, given the ICJ's authoritative character in international law, the reparations judgment will likely become the benchmark for how all future cases of this kind will be adjudged. In this respect, the way the ICJ arrived at the compensation figures it awarded when the precise damage inflicted and value of said damage was far from clear, together with its reliance on "global sums" for heads of damage rather than for each identified subcategory, can be criticized. Indeed, when compensation is awarded in this fashion, it is hard to scrutinize the result: the reader has no way to know how much the ICJ individually valued and apportioned, for example, loss of life, injuries to persons, and rape and sexual violence (all subcategories under the overall head of damage to persons). Exacerbating this is the fact that the ICJ did not articulate exactly how the monetary amounts for the global sums were determined. This is not to say that this is an easy task, but simply to note that litigants are entitled to reasons for judicial outcomes. One could question whether adequate reasons have been given when global sums are awarded for various heads of damage without a clear roadmap of how the sums were reached and without an itemized breakdown of their components. In these circumstances, the cynic might suggest that the precise chosen sums were plucked out of thin air, even if they did indeed fall within a range of identified "possibilities." Regardless, it is notable that the final compensation figure awarded represented only approximately 3 percent of what the DRC had originally claimed in this category.

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Similarly, the ICJ's detailed elucidation of various principles on the law of evidence and standard of proof will reverberate far beyond the present case. But perhaps even more importantly, the ICJ appears to have loosened the casual nexus requirement: whereas before it had been understood that a sufficiently direct and certain causal link between a claimed injury and a violation of international law was necessary for the awarding of reparations, now the ICJ has said that this can vary, effectively depending on the case being brought. No doubt most, if not all, subsequent claimants in ICJ reparations cases will seek to test this by arguing that their facts merit a deviation away from the "traditional" understanding of the causal nexus. Time will tell whether such a loosening will only be reserved for cases concerning armed conflict.

ENDNOTES

1 Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment (Feb. 9, 2022), https://www.icj-cij.org/public/files/case-related/116/116-20220209-JUD-01-00-EN.pdf [hereafter Reparations Judgment]. Six additional opinions were also handed down: Judge *Ad Hoc* Daudet delivered a dissenting opinion, Judges Tomka and Salam delivered separate declarations, while individual separate opinions were delivered by Judges Iwasawa, Robinson, and Yusuf. Due to space constraints, they will not be discussed in this introductory note.

2 *See generally* Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168 (Dec. 19, 2005) [hereafter Merits Judgment].

3 Reparations Judgment, ¶¶ 405–406, 409. Given that Uganda waived its reparations claim against the DRC during the proceedings (*see Id.* ¶¶ 47, 58), it shall not be further discussed.

4 On January 30, 2001, at the DRC's request, the ICJ discontinued the proceedings against Burundi and Rwanda. On May 28, 2002, Uganda re-initiated proceedings against Rwanda, but on February 3, 2006, the ICJ ruled that it did not have jurisdiction to entertain the new application: Armed Activities on the Territory of the Congo (New Application: 2002) (Dem. Rep. Congo v. Rwanda), Jurisdiction of the Court and Admissibility of the Application, Judgment, 2006 I.C.J. 6 (Feb. 3, 2006).

5 *See* Merits Judgment, at 280-281, ¶ 345.

6 *See Id.* at 282, ¶ 345.

7 *See Id.* at 281, 282, ¶ 345.

8 Reparations Judgment, ¶ 46.

9 *Id.* ¶ 45.

10 *Id.* ¶ 78.

11 *Id.* ¶ 79.

12 *Id.* ¶ 82.

13 *Id.* ¶¶ 83–84.

14 *Id.* ¶ 93.

15 *Id.* ¶ 97.

16 *Id.* ¶ 98.

17 *Id.* ¶ 106.

18 *Id.* ¶¶ 107–108.

19 *Id.* ¶¶ 107–108.

20 *Id.* ¶ 114.

21 *Id.* ¶¶ 115–117.

22 *Id.* ¶ 118.

23 *Id.* ¶ 119.

24 *Id.* ¶¶ 123–124.

25 *Id.* ¶ 125.

26 *Id.* ¶ 126.

27 *Id.* ¶ 131.

28 *Id.* ¶¶ 226, 257–258, 364–366, 381–384.

29 *Id.* ¶ 407.

30 *Id.* ¶ 390.

31 *Id.* ¶ 391.

32 *Id.* ¶ 392.

33 *Id.* ¶ 396.

34 *Id.* ¶ 401.

35 *Id.* ¶ 402.

36 As occurred after the ICJ's merits judgment in *Nicaragua*: Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14 (June 27, 1984).

37 Statement of the Government of Uganda Regarding the Judgment of the International Court in the Case Concerning Armed Activities on the Territory of the Congo (*DRC v. Uganda*), RIPA 34/100/01 (Feb. 10, 2022), https://www.mofa.go.ug/files/downloads/STATEMENT%20(1).pdf

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ARMED ACTIVITIES ON THE TERRITORY OF THE CONGO (DEM. REP. CONGO V. UGANDA) (REPARATIONS JUDGMENT) (I.C.J.)*

[February 9, 2022]

9 FÉVRIER 2022

ARRÊT

ACTIVITÉS ARMÉES SUR LE TERRITOIRE DU CONGO (RÉPUBLIQUE DÉMOCRATIQUE DU CONGO c. OUGANDA)

ARMED ACTIVITIES ON THE TERRITORY OF THE CONGO (DEMOCRATIC REPUBLIC OF THE CONGO *v.* UGANDA)

9 FEBRUARY 2022

JUDGMENT

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ABBREVIATIONS, ACRONYMS AND SHORT FORMS

ACLED	Armed Conflict Location & Event Data Project
ADRASS	Association pour le développement de la recherche appliquée en sciences sociales (Association for the Development of Applied Research in Social Sciences)
ALC	Armée de libération du Congo (Congo Liberation Army)
Collier and Hoeffler assessment	Assessment prepared by Mr. Paul Collier and Ms Anke Hoeffler, at the request of Uganda, on a study carried out in 2016, at the request of the DRC, estimating the macroeconomic damage caused by the 1998-2003 war
Congolese Commission of Inquiry	Expert Commission established by the Congolese Government in 2008 to identify the victims and assess the damage they suffered as a result of Uganda's unlawful armed activities
DRC	Democratic Republic of the Congo
EECC	Eritrea-Ethiopia Claims Commission
FRPI	Forces de résistance patriotique en Ituri (Patriotic Resistance Force in Ituri)
HRW	Human Rights Watch
ICC	International Criminal Court
ICCN	Institut congolais pour la conservation de la nature (Congolese Institute for Nature Conservation)
ILC	International Law Commission
ILC Articles on State Responsibility	The International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts
Inter-Agency Report	Report of the (United Nations) inter-agency assessment mission to Kisangani
IRC	International Rescue Committee
Kinshasa study	Study carried out in 2016, at the request of the DRC, by two experts from the University of Kinshasa to estimate the macroeconomic damage caused by the 1998-2003 war
Mapping Report	Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003, published in 2010 by the Office of the High Commissioner for Human Rights
MLC	Mouvement de libération du Congo (Congo Liberation Movement)
MONUC	Mission de l'Organisation des Nations Unies en République démocratique du Congo (United Nations Organization Mission in the Democratic Republic of the Congo)

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Porter Commission Report	Final report of the Judicial Commission of Inquiry into Allegations into Illegal Exploitation of Natural Resources and Other Forms of Wealth in the Democratic Republic of Congo 2001 (November 2002)
SNEL	Société nationale d'électricité (National Electricity Company)
UBOS	Ugandan Bureau of Statistics
UCDP	Uppsala Conflict Data Program
UNCC	United Nations Compensation Commission
UNPE	United Nations Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo
UPC	Union des patriotes congolais (Union of Congolese Patriots)
UPDF	Uganda Peoples' Defence Forces
2005 Judgment	Judgment of the Court on the merits in the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)* (*I.C.J. Reports 2005*, p. 168)

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INTERNATIONAL COURT OF JUSTICE

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2022

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General List
No. 116

9 February 2022

ARMED ACTIVITIES ON THE TERRITORY OF THE CONGO (DEMOCRATIC REPUBLIC OF THE CONGO *v.* UGANDA)

REPARATIONS

Determination of the amount of reparation by the Court following failure by the Parties to settle this question by agreement — 2005 Judgment and elements on which it was based.

*

Context.

Case concerning one of the most complex and deadliest armed conflicts on the African continent — Numerous actors involved in conflict, including armed forces of various States and irregular forces — Violation of fundamental principles and rules of international law — Difficulty of establishing the course of events due to the passage of time.

* *

Principles and rules applicable to the assessment of reparations.

Article 31 of the ILC Articles on State Responsibility — Status of Ituri as an occupied territory and duty of vigilance of Uganda — For Uganda to establish that a particular injury in Ituri was not caused by failure to meet its obligations as an occupying Power — No reparation for damage caused by rebel groups outside Ituri since they were not under Uganda's control — Reparation for damage caused by Uganda's unlawful support of armed groups.

*

Causal nexus.

Must be sufficiently direct and certain — May vary depending on the primary rule violated and nature and extent of the injury — Difficulties of establishing causal nexus in case of damage resulting from war and in case of concurrent causes or multiple actors — Importance of distinguishing between Ituri and other areas when analysing causal nexus.

*

Nature, form and amount of reparation.

Obligation to make full reparation — Compensatory nature of reparation — Intended to benefit all those who suffered injury — Absence of adequate evidence of extent of material damage does not necessarily preclude award of

compensation — Court may, on an exceptional basis, award compensation in the form of a global sum where the evidence leaves no doubt that an internationally wrongful act has caused a substantial injury, but does not allow a precise evaluation of the extent or scale of such injury — Less rigorous standards of proof adopted by judicial or other bodies in proceedings with large numbers of victims who have suffered serious injury in situations of armed conflict and, in this context, levels of compensation reduced in order to account for lower standard of proof — Question whether account should be taken of financial burden imposed on responsible State.

*

Questions of proof.

Court may form an appreciation of extent of damage without specific information about each victim or property affected.

Burden of proof — Party alleging a fact generally bears burden of proof — Rule must be applied flexibly in situations where respondent may be in better position to establish certain facts — Burden of proof varies depending on subject-matter and nature of dispute — It is for the Court to evaluate all evidence produced by the Parties — In occupied Ituri, it is for Uganda to establish that a given injury was not caused by its failure to meet its obligations as occupying Power — In other areas, litigant seeking to establish a fact generally bears burden of proof.

Standard of proof — May vary from case to case and may depend on gravity of acts alleged — Question of weight to be given to different kinds of evidence — Practice of international bodies that have addressed reparation for mass violations in context of armed conflict — Standard of proof at merits phase higher than at phase on reparation — Evidence in case file often insufficient to reach precise determination of amount of compensation due — Court must take account of investigative reports, in particular those from United Nations organs — Porter Commission Report — Mapping Report — Reports by Court-appointed experts.

*

Forms of damage subject to reparation.

2005 Judgment determined Uganda's obligation to repair — Court's task at present stage is to rule on nature and amount of reparation owed — Claims for reparation must fall within scope of prior findings on liability.

* *

Compensation claimed be the DRC.

Damage to persons.

Loss of life — On the basis of evidence reviewed, Court's conclusion that neither the materials presented by the DRC, nor the reports provided by the Court-appointed experts or prepared by United Nations bodies are sufficient to determine a precise or even approximate number of civilian deaths for which Uganda owes reparation — Evidence presented to Court suggests number of deaths attributable to Uganda falls in range of 10,000 to 15,000 persons — Valuation — Court will award compensation for loss of civilian lives as part of global sum for all damage to persons.

Injuries to persons — On the basis of evidence, Court is unable to determine an approximate estimate of number of civilians injured — Available evidence confirms occurrence of significant number of injuries in many localities — Valuation — Court will award compensation for personal injuries as part of global sum for all damage to persons.

Rape and sexual violence — Sexual violence is frequently underreported and difficult to document — Impossible to derive even broad estimate of number of victims from the available evidence — Rape and other forms of sexual violence committed on large and widespread scale — Valuation — Court will award compensation for rape and sexual violence as part of global sum for all damage to persons.

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Recruitment and deployment of child soldiers — Limited evidence supporting DRC's claims regarding number of child soldiers — Various indications confirm that a significant number of children were recruited or deployed as child soldiers in Ituri — Claim not limited to Ituri — Valuation — Court will award compensation for recruitment and deployment of child soldiers as part of global sum for all damage to persons.

Displacement of populations — Evidence presented does not establish a sufficiently certain number of displaced persons for whom compensation could be awarded separately —Uganda owes reparations in relation to significant number of displaced persons — Displacements in Ituri alone appear to have been in range of 100,000 to 500,000 persons — Valuation — Court will award compensation for displacement of persons as part of global sum for all damage to persons.

Global sum of US$225,000,000 awarded for loss of life and other damage to persons.

*

Damage to property.

Ituri — Evidence presented does not permit even to approximate extent of damage — Report of Court-appointed expert does not provide any relevant additional information — Mapping Report and other United Nations reports establish convincing record of large-scale pillaging in Ituri — Valuation.

Outside Ituri — Insufficient evidence regarding which damage to property was caused by Uganda — Evidence presented does not permit even to approximate extent of damage — Report of Court-appointed expert does not provide any relevant additional information — Valuation — Account taken of available evidence in arriving at global sum for all damage to property.

Société nationale d'électricité (SNEL) — Given Government's close relationship with SNEL, DRC could have been expected to provide evidence substantiating its claim — DRC has not discharged its burden of proof regarding claim for damage to SNEL.

Military property — Given direct authority of Government over its armed forces, DRC can be expected to substantiate its claims more fully — Claim dismissed for lack of evidence.

Global sum of US$40,000,000 awarded for damage to property.

*

Damage related to natural resources.

Outside Ituri, Uganda owes reparation for damage related to natural resources where UPDF involved — In Ituri, Uganda owes reparation for all acts of looting, plundering or exploitation of natural resources — Methodological approach of Court-appointed expert is convincing — Value extracted by civilians from natural resources in Ituri.

Minerals — Uganda responsible for damage resulting from looting, plundering and exploitation of gold, diamonds and coltan — Methodological approach taken by the Court-appointed expert is convincing overall — Court to award compensation for gold, diamonds and coltan as part of global sum for damage to natural resources — Given limited evidence relating to tin and tungsten, these two minerals not taken into account in determining compensation.

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Fauna — Uganda liable to make reparation for damage in part of Okapi Wildlife Reserve and Virunga National Park in Ituri, where it was occupying Power — Court to take damage to fauna into account when awarding global sum for damage to natural resources.

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Global sum of US$60,000,000 awarded for damage to natural resources.

*

Macroeconomic damage.

DRC has not demonstrated sufficiently direct and certain causal nexus between the conduct of Uganda and alleged macroeconomic damage — DRC has not provided a basis for arriving at even rough estimate of possible macroeconomic damage — Claim rejected.

* *

Satisfaction.

Request relating to conduct of criminal investigations or prosecutions — No need for the Court to order any additional specific measure of satisfaction — Request to order payment for creation of fund to promote reconciliation between Hema and Lendu in Ituri — Material damage caused by ethnic conflicts in Ituri already covered by compensation awarded for damage to persons and property — Request to order payment for non-material harm — No basis for such request as non-material harm is already included in the claims for compensation for different forms of damage.

* *

Other requests.

No sufficient reason that would justify departing from the general rule in Article 64 of the Statute — No need to award pre-judgment interest — Post-judgment interest of 6 per cent will accrue on any overdue amount — No reason for the Court to remain seised of the case.

* *

Total sum of US$325,000,000 awarded — Sum to be paid in five annual instalments of US$65,000,000 — Court satisfied that total sum and terms of payment remain within capacity of Uganda to pay; therefore no need to consider the question whether account should be taken of financial burden imposed on responsible State.

JUDGMENT

Present: President DONOGHUE; *Vice-President* GEVORGIAN; *Judges* TOMKA, ABRAHAM, BENNOUNA, YUSUF, XUE, SEBUTINDE, BHANDARI, ROBINSON, SALAM, IWASAWA, NOLTE; *Judge* ad hoc DAUDET; *Registrar* GAUTIER.

In the case concerning armed activities on the territory of the Congo,

between

the Democratic Republic of the Congo,

represented by

H.E. Mr. Bernard Takaishe Ngumbi, Deputy Prime Minister, Minister of Justice, Keeper of the Seals a.i.,

as Head of Delegation;

H.E. Mr. Paul-Crispin Kakhozi, Ambassador of the Democratic Republic of the Congo to the Kingdom of Belgium, the Kingdom of the Netherlands, the Grand Duchy of Luxembourg and the European Union,

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as Agent;

Mr. Ivon Mingashang, member of the Brussels and Kinshasa/Gombe Bars, Professor and Head of the Department of Public International Law and International Relations at the Faculty of Law, University of Kinshasa,

as Co-Agent and Legal Counsel;

Ms Monique Chemillier-Gendreau, Emeritus Professor of Public Law and Political Science at the University Paris Diderot,

Mr. Mathias Forteau, Professor of Public Law at the University Paris Nanterre,

Mr. Pierre Bodeau-Livinec, Professor of Public Law at the University Paris Nanterre,

Ms Muriel Ubéda-Saillard, Professor of Public Law at the University of Lille,

Ms Raphaëlle Nollez-Goldbach, Director of Studies in Law and Public Administration at the Ecole normale supérieure, Paris, in charge of research at the French National Centre for Scientific Research (CNRS),

Mr. Pierre Klein, Professor of International Law at the Université libre de Bruxelles,

Mr. Nicolas Angelet, member of the Brussels Bar and Professor of International Law at the Université libre de Bruxelles,

Mr. Olivier Corten, Professor of International Law at the Université libre de Bruxelles,

Mr. Auguste Mampuya Kanunk'a-Tshiabo, Emeritus Professor of International Law at the University of Kinshasa,

Mr. Jean-Paul Segihobe Bigira, Professor of International Law at the University of Kinshasa and member of the Kinshasa/Gombe Bar,

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Ms Michelle Butler, Barrister, Matrix Chambers, London,

as Counsel and Advocates;

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Mr. Paul Clark, Barrister, Garden Court Chambers, London,

as Counsel;

Mr. François Habiyaremye Muhashy Kayagwe, Professor at the University of Goma,

Mr. Justin Okana Nsiawi Lebun, Professor of Economics at the University of Kinshasa,

Mr. Pierre Ebbe Monga, Legal Counsel at the Ministry of Foreign Affairs of the Democratic Republic of the Congo,

Ms Nicole Ntumba Bwatshia, Professor of International Law at the University of Kinshasa and Principal Adviser to the President of the Republic in Legal and Administrative Matters,

Mr. Andrew Maclay, Managing Director, Secretariat International, London,

as Advisers;

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Mr. Stefano D'Aloia, PhD student at the Université libre de Bruxelles,

Ms Marta Duch Gimenéz, Lecturer at the Université catholique de Louvain,

as Assistants,

and

the Republic of Uganda,

represented by

The Hon. William Byaruhanga, SC, Attorney General of the Republic of Uganda, as Agent (until 4 February 2022);

The Hon. Kiryowa Kiwanuka, Attorney General of the Republic of Uganda, as Agent (from 4 February 2022);

H.E. Ms Mirjam Blaak Sow, Ambassador of the Republic of Uganda to the Kingdom of Belgium, the Kingdom of the Netherlands, the Grand Duchy of Luxembourg and the European Union,

as Deputy Agent;

Mr. Francis Atoke, Solicitor General,

Mr. Christopher Gashirabake, Deputy Solicitor General,

Ms Christine Kaahwa, acting Director Civil Litigation,

Mr. John Bosco Rujagaata Suuza, Commissioner Contracts and Negotiations,

Mr. Jeffrey Ian Atwine, Principal State Attorney,

Mr. Richard Adrole, Principal State Attorney,

Mr. Fadhil Mawanda, Principal State Attorney,

Mr. Geoffrey Wangolo Madete, Senior State Attorney,

Mr. Alex Byaruhanga, Senior State Attorney,

as Counsel;

Mr. Dapo Akande, Professor of Public International Law, University of Oxford, Essex Court Chambers, member of the Bar of England and Wales,

Mr. Pierre d'Argent, Professor of International Law at the Université catholique de Louvain, member of the Institut de droit international, Foley Hoag LLP, member of the Brussels Bar,

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Mr. Benjamin Salas Kantor, Attorney at Law, Foley Hoag LLP, member of the Bar of the Supreme Court of the Republic of Chile,

Mr. Ysam Soualhi, Researcher, Centre Jean Bodin, University of Angers,

as Counsel;

H.E. Mr. Arthur Sewankambo Kafeero, acting Director, Regional and International Affairs, Ministry of Foreign Affairs,

Col. Timothy Nabaasa Kanyogonya, Director of Legal Affairs, Chieftaincy of Military Intelligence — Uganda Peoples' Defence Forces, Ministry of Defence, as Advisers,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

1. On 23 June 1999, the Democratic Republic of the Congo (hereinafter the "DRC") filed in the Registry of the Court an Application instituting proceedings against the Republic of Uganda (hereinafter "Uganda") in respect of a dispute concerning "acts of *armed aggression* perpetrated by Uganda on the territory of the Democratic Republic of the Congo, in flagrant violation of the United Nations Charter and of the Charter of the Organization of African Unity" (emphasis in the original). In order to found the jurisdiction of the Court, the Application relied on the declarations made by the two Parties accepting the Court's compulsory jurisdiction under Article 36, paragraph 2, of the Statute of the Court.

2. Since the Court included upon the Bench no judge of the nationality of the Parties at the time of the filing of the Application, each Party availed itself of its right under Article 31 of the Statute to choose a judge *ad hoc* to sit in the case. The DRC first chose Mr. Joe Verhoeven, who resigned on 15 May 2019, and then Mr. Yves Daudet. Uganda chose Mr. James L. Kateka. Following the election to the Court, with effect from 6 February 2012, of Ms Julia Sebutinde, a Ugandan national, Mr. Kateka ceased to sit as judge *ad hoc* in the case, in accordance with Article 35, paragraph 6, of the Rules of Court.

3. By an Order of 21 October 1999, the Court fixed 21 July 2000 and 21 April 2001, respectively, as the time-limits for the filing of the Memorial of the DRC and the Counter-Memorial of Uganda. Those pleadings were filed within the time-limits thus prescribed.

4. Uganda's Counter-Memorial included counter-claims. By an Order of 29 November 2001, the Court found that two of the three counter-claims submitted by Uganda were admissible as such and formed part of the proceedings on the merits. By the same Order, the Court directed the submission of a Reply by the DRC and a Rejoinder by Uganda. By an Order of 29 January 2003, it authorized the submission of an additional pleading by the DRC relating solely to the counter-claims. Those pleadings were filed within the time-limits fixed by the Court.

5. Public hearings were held on the merits of the case from 11 to 29 April 2005.

6. In its Judgment dated 19 December 2005 (hereinafter the "2005 Judgment"), the Court found, *inter alia*, with respect to the claims brought by the DRC, that

> "the Republic of Uganda, by engaging in military activities against the Democratic Republic of the Congo on the latter's territory, by occupying Ituri and by actively extending military, logistic, economic and financial support to irregular forces having operated on the territory of the DRC, violated the principle of non-use of force in international relations and the principle of non-intervention" (*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, subpara. (1) of the operative part);
>
> "the Republic of Uganda, by the conduct of its armed forces, which committed acts of killing, torture and other forms of inhumane treatment of the Congolese civilian population, destroyed villages and civilian buildings, failed to distinguish between civilian and military targets and to protect the civilian population in fighting with other combatants, trained child soldiers, incited ethnic conflict and failed to take measures to put an end to such conflict; as well as by its failure, as an occupying Power, to take measures to respect and ensure respect for human rights and international humanitarian law in Ituri district, violated its obligations under international human rights law and international humanitarian law" (*ibid.*, p. 280, para. 345, subpara. (3) of the operative part); and
>
> "the Republic of Uganda, by acts of looting, plundering and exploitation of Congolese natural resources committed by members of the Ugandan armed forces in the territory of the Democratic Republic of the Congo and by its failure to comply with its obligations as an occupying Power in Ituri district to prevent acts of looting, plundering and exploitation of Congolese natural resources, violated obligations owed to the Democratic Republic of the Congo under international law" (*ibid.*, pp. 280-281, para. 345, subpara. (4) of the operative part).

With respect to these violations, the Court found that Uganda was under an obligation to make reparation to the DRC for the injury caused (*ibid.*, p. 281, para. 345, subpara. (5) of the operative part).

7. In relation to the counter-claims presented by Uganda, the Court found that

> "the Democratic Republic of the Congo, by the conduct of its armed forces, which attacked the Ugandan Embassy in Kinshasa, maltreated Ugandan diplomats and other individuals on the Embassy premises, maltreated Ugandan diplomats at Ndjili International Airport, as well as by its failure to provide the Ugandan Embassy and Ugandan diplomats with effective protection and by its failure to prevent archives and Ugandan property from being seized from the premises of the Ugandan Embassy, violated obligations owed to the Republic of Uganda under the Vienna Convention on Diplomatic Relations of 1961" (2005 Judgment, *I.C.J. Reports 2005*, p. 282, para. 345, subpara. (12) of the operative part).

With respect to these violations, the Court found that the DRC was under an obligation to make reparation to Uganda for the injury caused (*ibid.*, p. 282, para. 345, subpara. (13) of the operative part).

8. The Court further decided in its 2005 Judgment that, failing agreement between the Parties, the question of reparations due would be settled by the Court (*ibid.*, pp. 281-282, para. 345, subparas. (6) and (14) of the operative part).

9. By letters dated 26 January and 3 July 2009, the Registrar asked the Parties to provide information concerning any negotiations they might be holding for the purpose of settling the question of reparations. Information was received from the DRC by a letter dated 6 July 2009 and from Uganda by a letter dated 18 July 2009. In particular, Uganda referred to an agreement concluded by the Parties at Ngurdoto (Tanzania) on 8 September 2007, which established a framework for an amicable settlement of the question of reparations.

10. Between 2009 and 2015, the Parties continued to keep the Court informed about the status of their negotiations. They held various meetings, including four at the ministerial level. At the end of the fourth and final ministerial meeting, held in Pretoria, South Africa, from 17 to 19 March 2015, the Parties acknowledged that they had

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been unable to agree on the principles and modalities to be applied in order to determine the amount of reparation due. Given the lack of consensus at the ministerial level, the matter was referred to the Heads of State for further guidance, within the framework of the Ngurdoto Agreement.

11. On 13 May 2015, the DRC submitted to the Court a document dated 8 May 2015 and entitled "New Application to the International Court of Justice", in which its Government stated in particular that

> "the negotiations on the question of reparation owed to the Democratic Republic of the Congo by Uganda must now be deemed to have failed, as is made clear in the joint communiqué signed by both Parties in Pretoria, South Africa, on 19 March 2015; it therefore behoves the Court, as provided for in paragraph 345 (6) of the Judgment of 19 December 2005, to reopen the proceedings that it suspended in the case, in order to determine the amount of reparation owed by Uganda to the Democratic Republic of the Congo, on the basis of the evidence already transmitted to Uganda and which will be made available to the Court".

12. At a meeting held by the President of the Court with the representatives of the Parties on 9 June 2015, pursuant to Article 31 of the Rules, the Co-Agent of the DRC, after outlining the history of the negotiations held by the Parties with a view to reaching an amicable settlement on the question of reparations, stated that his Government was of the view that the said negotiations had failed and that it was because of that failure that the DRC had decided to seise the Court again. At the same meeting, the Agent of Uganda indicated that his Government was of the view that the conditions for referring the question of reparations to the Court had not been met and that the request made by the DRC in the Application filed on 13 May 2015 was therefore premature.

13. During the meeting of 9 June 2015, the President ascertained the views of the Parties on how much time they would need for the preparation of the written pleadings on the question of reparations, should the Court decide to authorize such pleadings. The Co-Agent of the DRC stated that a time-limit of three and a half to four months would be sufficient for his Government to prepare its Memorial. The Agent of Uganda, citing the highly complex nature of the questions to be decided, mentioned a time-limit of 18 months from the filing of the DRC's Memorial for the preparation of a Counter-Memorial by his Government.

14. By an Order of 1 July 2015, the Court decided to resume the proceedings in the case with respect to the question of reparations. It fixed 6 January 2016 as the time-limit for the filing of a Memorial by the DRC on the reparations which it considers to be owed to it by Uganda, and for the filing of a Memorial by Uganda on the reparations which it considers to be owed to it by the DRC.

15. By an Order of 10 December 2015, the President of the Court, at the request of the DRC, extended to 28 April 2016 the time-limit for the filing of the Parties' Memorials on the question of reparations. Following an additional request from the DRC, by an Order of 11 April 2016, the Court extended that time-limit to 28 September 2016. The Memorials were filed within the time-limit thus extended.

16. By an Order of 6 December 2016, the Court fixed 6 February 2018 as the time-limit for the filing, by each Party, of a Counter-Memorial responding to the claims presented by the other Party in its Memorial. The Counter-Memorials of the Parties were filed within the time-limit thus fixed.

17. By letters dated 11 June 2018, the Registrar informed the Parties that, pursuant to Article 62, paragraph 1, of its Rules, the Court wished to obtain further information on certain issues it had identified. A list of questions was attached to the Registrar's letter and the Parties were asked to provide their responses to those questions by 11 September 2018 at the latest. The Parties were further informed that they would then each have until 11 October 2018 to communicate any comments they might wish to make on the responses of the other Party. Those time-limits were subsequently extended at the request of the Parties. Both Parties filed their responses on 1 November 2018. The DRC, however, transmitted reorganized versions of its responses on 12 and 20 November 2018, in view of certain problems with the annexes that had been submitted. By a letter dated 24 November 2018, the DRC indicated that the document filed on 20 November 2018 constituted the "final version" of its responses. The DRC then submitted comments on Uganda's responses on 4 January 2019, and Uganda submitted comments on the DRC's responses on 7 January 2019.

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18. By letters dated 4 September 2018, the Parties were informed that the hearings on the question of reparations would take place from 18 to 22 March 2019. By a letter dated 11 February 2019, the DRC asked the Court to postpone the hearings by some six months. By a letter dated 12 February 2019, Uganda indicated that it neither opposed nor consented to the DRC's request, and that it was content to commit the matter to the Court's judgment. By letters dated 27 February 2019, the Parties were notified that the Court had decided to postpone the opening of the hearings to 18 November 2019.

19. By a joint letter dated 9 November 2019 and filed in the Registry on 12 November 2019, the Parties requested that the hearings due to open on 18 November 2019 be postponed for a period of four months "in order to afford [their] countries a further opportunity to attempt to amicably settle the question of reparations by bilateral agreement". By letters dated 12 November 2019, the Parties were informed that the Court had decided to postpone the opening of the oral proceedings and that it would determine, at the appropriate time, new dates for the hearings, taking into account the Parties' request and its own schedule of work for 2020.

20. By letters dated 9 January 2020, the Registrar indicated to the Parties that the Court would appreciate receiving information from either or both of them on the status of their negotiations. The Court subsequently received several communications from the Parties providing such information. Having regard to those communications and taking into account the fact that the four-month period of negotiations requested by the Parties had lapsed, the Parties were informed, by letters dated 23 April 2020, that the Court intended to hold hearings in the case during the first trimester of 2021.

21. By letters dated 8 July 2020, the Registrar informed the Parties that, while continuing to examine the full range of heads of damage claimed by the Applicant and the defences invoked by the Respondent, the Court considered it necessary to arrange for an expert opinion, pursuant to Article 67, paragraph 1, of its Rules, with respect to the following three heads of damage for the period between 6 August 1998 and 2 June 2003: loss of human life, loss of natural resources and property damage. The Parties were also informed that the Court had fixed 29 July 2020 as the time-limit within which they could present, in accordance with Article 67, paragraph 1, of the Rules of Court, their respective positions regarding any such appointment, in particular their views on the subject of the expert opinion, the number and mode of appointment of the experts and the procedure to be followed. By the same letter, the Registrar indicated that any comments that either Party might wish to make on the response of the other Party should be communicated by 12 August 2020 at the latest.

22. By a letter dated 15 July 2020, Uganda observed that "the questions before the Court are not of the sort contemplated" under Article 50 of the Statute of the Court and Article 67, paragraph 1, of the Rules relating to the appointment of experts. Therefore, it

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

23. By a letter dated 24 July 2020, the DRC stated that it was "favourably disposed towards the Court's proposal that, for the three heads of damage referred to [in the Registrar's letter of 8 July 2020], there should be recourse to an expert opinion". It added that recourse to an expert opinion was "without prejudice to the judicial role of the Court" and that it was "ultimately for the Court, and not the experts, to decide on the compensation owed by Uganda to the Democratic Republic of the Congo". The DRC also transmitted its views on the mode of appointment of the experts and expressed the opinion that the procedure to be followed should correspond to the established practice of the Court.

24. By a letter dated 12 August 2020, Uganda provided its comments on the views expressed by the DRC regarding the expert opinion envisaged by the Court in the case, reiterating its objections to the appointment of experts. It stated that "there is no evidence for the experts to assess or opine on. What remains is for the Court to make the determination as to whether the evidence submitted by the DRC meets the required standard based on its own assessment of the evidence vis-à-vis the applicable principles of international law".

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25. By an Order dated 8 September 2020, having duly taken into account the views of the Parties, the Court decided to arrange for an expert opinion, pursuant to Article 67 of its Rules, regarding certain heads of damage alleged by the Applicant, namely, loss of human life, loss of natural resources and property damage. The Order set out the following terms of reference for the experts:

> "I. Loss of human life
>
> *(a)* Based on the evidence available in the case file and documents publicly available, particularly the United Nations Reports mentioned in the 2005 Judgment, what is the global estimate of the lives lost among the civilian population (broken down by manner of death) due to the armed conflict on the territory of the Democratic Republic of the Congo in the relevant period?
>
> *(b)* What was, according to the prevailing practice in the Democratic Republic of the Congo in terms of loss of human life during the period in question, the scale of compensation due for the loss of individual human life?
>
> II. Loss of natural resources
>
> *(a)* Based on the evidence available in the case file and documents publicly available, particularly the United Nations Reports mentioned in the 2005 Judgment, what is the approximate quantity of natural resources, such as gold, diamond, coltan and timber, unlawfully exploited during the occupation by Ugandan armed forces of the district of Ituri in the relevant period?
>
> *(b)* Based on the answer to the question above, what is the valuation of the damage suffered by the Democratic Republic of the Congo for the unlawful exploitation of natural resources, such as gold, diamond, coltan and timber, during the occupation by Ugandan armed forces of the district of Ituri?
>
> *(c)* Based on the evidence available in the case file and documents publicly available, particularly the United Nations Reports mentioned in the 2005 Judgment, what is the approximate quantity of natural resources, such as gold, diamond, coltan and timber, plundered and exploited by Ugandan armed forces in the Democratic Republic of the Congo, except for the district of Ituri, and what is the valuation of those resources?
>
> III. Property damage
>
> *(a)* Based on the evidence available in the case file and documents publicly available, particularly the United Nations Reports mentioned in the 2005 Judgment, what is the approximate number and type of properties damaged or destroyed by Ugandan armed forces in the relevant period in the district of Ituri and in June 2000 in.Kisangani?
>
> *(b)* What is the approximate cost of rebuilding the kind of schools, hospitals and private dwellings destroyed in the district of Ituri and in Kisangani?"

26. By the same Order, the Court decided that the expert opinion would be "entrusted to four independent experts appointed by Order of the Court after hearing the Parties". It was also noted that, before taking up their duties, the experts would make the following declaration:

> "I solemnly declare, upon my honour and conscience, that I will perform my duties as expert honourably and faithfully, impartially and conscientiously, and will refrain from divulging or using, outside the Court, any documents or information of a confidential character which may come to my knowledge in the course of the performance of my task."

27. By letters dated 10 September 2020, the Registrar informed the Parties of the Court's decision and of the fact that the Court had identified four potential experts to carry out the expert mission, namely, in alphabetical order,

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Ms Debarati Guha-Sapir, Mr. Michael Nest, Mr. Geoffrey Senogles and Mr. Henrik Urdal, whose curricula vitae were appended to those letters. The Registrar invited the Parties to communicate to the Court any observations they might wish to make on the choice of experts by 18 September 2020 at the latest.

28. By a letter dated 17 September 2020, the DRC indicated that it had no objection to the four experts proposed by the Court.

29. By a letter dated 18 September 2020, Uganda asked the Court, *inter alia*, to extend the time-limit for its observations on the potential experts identified by the Court. The President of the Court decided to extend that time-limit to 25 September 2020.

30. By a letter dated 25 September 2020, Uganda presented its observations on the experts proposed by the Court, stating that it objected to the selection of three of them on various grounds.

31. By an Order dated 12 October 2020, having duly considered the views of the Parties, the Court decided to appoint the following four experts:

- Ms Debarati Guha-Sapir, of Belgian nationality, Professor of Public Health at the University of Louvain (Belgium), Director of the Centre for Research on the Epidemiology of Disasters, Brussels (Belgium), member of the Belgian Royal Academy of Medicine;
- Mr. Michael Nest, of Australian nationality, Environmental Governance Advisor for the European Union's Accountability, Rule of Law and Anti-corruption Programme in Ghana and former conflict minerals analyst for United States Agency for International Development and Deutsche Gesellschaft für Internationale Zusammenarbeit projects in the Great Lakes Region of Africa;
- Mr. Geoffrey Senogles, of British nationality, Partner at Senogles & Co, Chartered Accountants, Nyon (Switzerland); and
- Mr. Henrik Urdal, of Norwegian nationality, Research Professor and Director of the Peace Research Institute Oslo (Norway).

The experts subsequently made the solemn declaration provided for in the Order of 8 September 2020 (see paragraph 26 above).

32. By letters dated 1 December 2020, the Parties were informed that the Court had fixed 22 February 2021 as the date for the opening of the hearings on the question of reparations.

33. By letters dated 21 December 2020, the Registrar communicated to the Parties copies of the report filed by the experts appointed in the case. Each Party was given until 21 January 2021 to submit any written observations it might wish to make on that report.

34. By letters dated 24 December 2020, the Registrar transmitted to the Parties corrigenda received from the Court-appointed experts to their report.

35. By a letter dated 23 December 2020, Uganda requested that the hearings due to open on 22 February 2021 be postponed to "after 17 March 2021". By a letter dated 7 January 2021, the DRC indicated that its Government had no objection to the postponement. Taking into account the above-mentioned request and the views expressed by the DRC on this question, the Court decided to postpone to 20 April 2021 the opening of the hearings in the case.

36. By a letter dated 13 January 2021, Uganda requested that the time-limit for the submission to the Court of any observations the Parties might wish to make on the experts' report, originally fixed for 21 January 2021, be extended to 14 February 2021. By a letter dated 17 January 2021, the DRC indicated that it "c[ould] see no justification for extending the time-limit for the submission by each Party of its written observations on the experts' report". By letters dated 18 January 2021, the Registrar informed the Parties that, in view of the fact that, with the agreement of the Parties, the hearings had been postponed to April 2021, the President of the Court had decided to extend to 15 February 2021 the time-limit for the submission, by the Parties, of their observations on the said report.

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37. Under cover of a letter dated 14 February 2021, the Co-Agent of the DRC communicated to the Court his Government's written observations on the experts' report. Uganda furnished its written observations on the said report on 15 February 2021. Each Party's observations were communicated to the experts, who responded to them in writing on 1 March 2021; their response was immediately transmitted to the Parties. The latter were asked to indicate to the Registry, by 15 March 2021 at the latest, whether they wished to put questions to the experts at the hearings.

38. By a letter dated 6 March 2021, the Co-Agent of the DRC indicated that his Government wished to put questions to the experts at the hearings.

39. By a letter dated 16 March 2021, the Agent of Uganda stated that his Government reserved the right to put questions to the experts at the hearings. By a letter dated 6 April 2021, he indicated that his Government wished to put questions to the experts during the hearings.

40. Pursuant to Article 53, paragraph 2, of its Rules, the Court, after ascertaining the views of the Parties, decided that copies of the written pleadings on reparations and the documents annexed thereto, the responses of the Parties to the questions put by the Court and the comments on those responses would be made accessible to the public on the opening of the oral proceedings. It subsequently decided to make the experts' report and related documents accessible to the public.

41. Public hearings on the question of reparations were held from 20 to 30 April 2021. The oral proceedings were conducted in a hybrid format, in accordance with Article 59, paragraph 2, of the Rules of Court and on the basis of the Court's Guidelines for the Parties on the Organization of Hearings by Video Link, adopted on 13 July 2020 and communicated to the Parties on 23 December 2020. Prior to the opening of the hybrid hearings, the Parties were invited to participate in comprehensive technical tests. During the oral proceedings, a number of judges were present in the Great Hall of Justice, while others joined the proceedings via video link, allowing them to view and hear the speaker and see any demonstrative exhibits displayed. Each Party was permitted to have up to four representatives present in the Great Hall of Justice at any one time and was offered the use of an additional room in the Peace Palace from which members of the delegation were able to participate via video link. Members of the delegations were also given the opportunity to participate via video link from other locations of their choice.

42. During the above-mentioned hearings, the Court heard the oral arguments and replies of:

For the DRC:
H.E. Mr. Paul-Crispin Kakhozi,
Ms Monique Chemillier-Gendreau,
Ms Muriel Ubéda-Saillard,
Ms Raphaëlle Nollez-Goldbach,
Mr. Jean-Paul Segihobe Bigira,
Mr. Pierre Bodeau-Livinec,
Mr. Nicolas Angelet,
Mr. Auguste Mampuya Kanunk'a-Tshiabo,
Mr. Ivon Mingashang,
Mr. Mathias Forteau,
Mr. Philippe Sands,
Mr. Olivier Corten.

For Uganda:
The Hon. William Byaruhanga,
Mr. Sean Murphy,
Mr. Pierre d'Argent,
Mr. Lawrence H. Martin,
Mr. Dapo Akande,
Mr. Yuri Parkhomenko,
Mr. Alain Pellet.

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43. The experts appointed in the case (see paragraph 31 above) were heard at two public hearings, in accordance with Article 65 of the Rules of Court. Questions were put by counsel of the Parties to each of the experts. Members of the Court put questions to Mr. Urdal and Ms Guha-Sapir.

44. At the hearings, a Member of the Court put a question to the Parties, to which replies were given orally, in accordance with Article 61, paragraph 4, of the Rules of Court.

*

45. In the written proceedings on the question of reparations, the following submissions were presented by the Parties:

On behalf of the Government of the DRC,

in the Memorial:

> "For the reasons set out above, and subject to any changes made to its claims in the course of the proceedings, the Democratic Republic of the Congo requests the Court to adjudge and declare that:
>
> *(a)* Uganda is required to pay the DRC the sum of US$13,478,122,950 (thirteen billion four hundred and seventy-eight million one hundred and twenty-two thousand nine hundred and fifty United States dollars) in compensation for the damage resulting from the violations of international law found by the Court in its Judgment of 19 December 2005;
>
> *(b)* compensatory interest will be due on that amount at a rate of 6 per cent, payable from the date on which the present Memorial was filed;
>
> *(c)* Uganda is required to pay the DRC the sum of US$125 million by way of giving satisfaction for all non-material damage resulting from the violations of international law found by the Court in its Judgment of 19 December 2005;
>
> *(d)* Uganda is required, by way of giving satisfaction, to conduct criminal investigations and prosecutions of the officers and soldiers of the UPDF involved in the violations of international humanitarian law or international human rights norms committed in Congolese territory between 1998 and 2003;
>
> *(e)* in the event of non-payment of the compensation awarded by the Court on the date of the judgment, moratory interest will accrue on the principal sum at a rate to be determined by the Court;
>
> *(f)* Uganda is required to reimburse the DRC for all the costs incurred by the latter in the context of the present case."

in the Counter-Memorial:

> "For the reasons set out above, the Democratic Republic of the Congo requests the Court, without any prejudicial recognition by the Democratic Republic of the Congo of the legal principles set out in the Memorial of Uganda, to adjudge and declare that:
>
> *(a)* the Court's finding of the DRC's international responsibility in its Judgment of 19 December 2005 constitutes an appropriate form of reparation for the injury arising from the following wrongful acts as found in that same Judgment: *(a)* the maltreatment by Congolese forces of individuals on Uganda's diplomatic premises and of Ugandan diplomats at Ndjili International Airport; *(b)* the invasion, seizure and long-term occupation of the official residence of the Ambassador of Uganda in Kinshasa; and *(c)* the seizure of public and personal property from Uganda's diplomatic premises in Kinshasa;

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(b) Uganda is entitled to payment of a sum of US$982,797.73 by the DRC, an amount not contested by the DRC in the context of the proceedings before the Court, in compensation for the injury resulting from the invasion, seizure and long-term occupation of Uganda's Chancery compound in Kinshasa;

(c) the compensation thus awarded to Uganda will be offset against that awarded to the DRC on the basis of its principal claims in the present case."

On behalf of the Government of Uganda,

in the Memorial:

"On the basis of the facts and law set forth in this Memorial, Uganda respectfully requests the Court to adjudge and declare that:

(1) With respect to the loss, damage or injury arising from (a) the maltreatment of persons by Congolese forces on Uganda's diplomatic premises and of Ugandan diplomats at Ndjili Airport; (b) the invasion, seizure and long-term occupation of the residence of the Ambassador of Uganda in Kinshasa; and (c) the seizure of public and personal property from Uganda's diplomatic premises in Kinshasa, the Court's formal findings of the DRC's international responsibility in the 2005 Judgment constitute an appropriate form of satisfaction, providing reparation for the injury suffered.

(2) With respect to the loss, damage or injury arising from the invasion, seizure and long-term occupation of Uganda's Chancery compound in Kinshasa, the DRC is obligated to make monetary compensation to the Republic of Uganda in the total amount of US$982,797.73."

in the Counter-Memorial:

"On the basis of the facts and law set forth in this Counter-Memorial, Uganda respectfully requests the Court to adjudge and declare that:

(1) the Court's formal findings of Uganda's international responsibility in the 2005 Judgment constitute an appropriate form of satisfaction, providing reparation for the injury suffered;

(2) all other reparation sought by the DRC is denied; and

(3) each Party shall bear its own costs of these proceedings."

46. At the oral proceedings, the following submissions were presented by the Parties:

On behalf of the Government of the DRC,

"For the reasons set out in its written pleadings and oral arguments, the Democratic Republic of the Congo requests the Court to adjudge and declare that:

(1) With regard to the claims of the Democratic Republic of the Congo:

(a) Uganda is required to pay the Democratic Republic of the Congo in compensation for the damage resulting from the violations of international law found by the Court in its Judgment of 19 December 2005:

– no less than four billion three hundred and fifty million four hundred and twenty-one thousand eight hundred United States dollars (US$4,350,421,800) for personal injury;

– no less than two hundred and thirty-nine million nine hundred and seventy-one thousand nine hundred and seventy United States dollars (US$239,971,970) for damage to property;

– no less than one billion forty-three million five hundred and sixty-three thousand eight hundred and nine United States dollars (US$1,043,563,809) for damage to natural resources;

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– no less than five billion seven hundred and fourteen million seven hundred and seventy-five United States dollars (US$5,714,000,775) for macroeconomic damage.

(b) compensatory interest will be due on heads of claim other than those for which the amount of compensation awarded by the Court, based on an overall assessment, already takes account of the passage of time, at a rate of 4 per cent, payable from the date of the filing of the Memorial on reparation;

(c) Uganda is required, by way of giving satisfaction, to pay the Democratic Republic of the Congo the sum of US$25 million for the creation of a fund to promote reconciliation between the Hema and Lendu in Ituri, and the sum of US$100 million for the non-material harm suffered by the Congolese State as a result of the violations of international law found by the Court in its Judgment of 19 December 2005;

(d) Uganda is required, by way of giving satisfaction, to conduct criminal investigations and prosecutions of the individuals involved in the violations of international humanitarian law or international human rights norms committed in Congolese territory between 1998 and 2003 for which Uganda has been found responsible;

(e) in the event of non-payment of the compensation awarded by the Court on the date of the judgment, moratory interest will accrue on the principal sum at a rate of 6 per cent;

(f) Uganda is required to reimburse the Democratic Republic of the Congo for all the costs incurred by the latter in the context of the present case.

(2) With regard to Uganda's counter-claim, and without any prejudicial recognition by the Democratic Republic of the Congo of the legal principles set out in the Memorial of Uganda:

(a) the Court's finding of the Democratic Republic of the Congo's international responsibility in its Judgment of 19 December 2005 constitutes an appropriate form of reparation for the injury arising from the wrongful acts as found in the same Judgment;

(b) Uganda is otherwise entitled to payment of the sum of US$982,797.73 (nine hundred and eighty-two thousand seven hundred and ninety-seven United States dollars and seventy-three cents) by the Democratic Republic of the Congo, an amount not contested by the Democratic Republic of the Congo in the context of the proceedings before the Court, in compensation for the injury resulting from the invasion, seizure and long-term occupation of Uganda's Chancery compound in Kinshasa;

(c) the compensation thus awarded to Uganda will be offset against that awarded to the Democratic Republic of the Congo on the basis of its principal claims in the present case.

(3) The Court is further requested to declare that the present dispute will not be fully and finally resolved until Uganda has actually paid the reparations and compensation ordered by the Court. Until that time, the Court will remain seised of the present case."

On behalf of the Government of Uganda,

"The Republic of Uganda respectfully requests that the Court:

(1) Adjudge and declare that:

(a) The DRC is entitled to reparation in the form of compensation only to the extent it has discharged the burden the Court placed on it in paragraph 260 of the 2005 Judgment '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';

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(b) The Court's finding of Uganda's international responsibility in the 2005 Judgment otherwise constitutes an appropriate form of satisfaction; and

(c) Each Party shall bear its own costs of these proceedings; and

(2) Reject all other submissions of the DRC."

*

47. At the end of the hearings, the Agent of Uganda informed the Court that his Government "officially waive[d] its counter-claim for reparation for the injury caused by the conduct of the DRC's armed forces, including attacks on the Ugandan diplomatic premises in Kinshasa and the maltreatment of Ugandan diplomats".

*

* *

I. INTRODUCTION

48. In view of the failure by the Parties to settle the question of reparations by agreement, it now falls to the Court to determine the nature and amount of reparations to be awarded to the DRC for injury caused by Uganda's violations of its international obligations, pursuant to the findings of the Court set out in the 2005 Judgment. The Court begins by recalling certain elements on which it based that Judgment.

49. In its 2005 Judgment, the Court first pointed to the "complex and tragic situation which ha[d] long prevailed in the Great Lakes region" and also noted that there had been "much suffering by the local population and destabilization of much of the region". The Court explained, however, that its task was "to respond, on the basis of international law, to the particular legal dispute brought before it" and that, "[a]s it interpret[ed] and applie[d] the law, it w[ould] be mindful of context, but its task [could] not go beyond that" (*I.C.J. Reports 2005*, p. 190, para. 26).

50. The Court found, in that Judgment, that Uganda had violated several obligations incumbent on it under international law and that it was therefore under an obligation to make reparation to the DRC for the injury caused (see paragraph 6 above). The Court will recall here only the basic facts and conclusions that led it to hold Uganda internationally responsible. The Court will recall the context and other relevant facts of the case in more detail when setting out certain general considerations with respect to the question of reparations (Part II, Section A, paragraphs 61-68 below) and when addressing the DRC's claims for various forms of damage (Parts III and IV, paragraphs 132-392 below).

51. In its 2005 Judgment, the Court found that, from mid-1997 to the first half of 1998, Uganda was allowed by the Government of the DRC to engage in military action against anti-Ugandan rebels in the eastern part of Congolese territory. However, the Court concluded that any consent by the DRC to the presence of Ugandan troops on its territory had been withdrawn by 8 August 1998 at the latest. From August 1998 until June 2003, Uganda conducted unlawful military operations in the east of the DRC, as well as in other parts of the country. In so doing, it took control of several locations in the provinces of North Kivu, Orientale and Equateur (*I.C.J. Reports 2005*, pp. 206-207, paras. 78-81). The Uganda Peoples' Defence Forces (hereinafter the "UPDF") conducted military operations in a large number of locations (*ibid.*, p. 224, para. 153), including in Kisangani, where it engaged in large-scale fighting against Rwandan forces, particularly in August 1999 and in May and June 2000 (*ibid.*, p. 207, para. 80). From August 1998 until June 2003, the forces of other States were also present on the DRC's territory, as were irregular forces, some of which were supported by Uganda.

52. The Court concluded that Uganda was an "occupying Power", within the meaning of the term as understood in the *jus in bello*, in Ituri district at the relevant time (*ibid.*, p. 231, para. 178). It found that Uganda's responsibility was thus 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

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occupied territory, including rebel groups acting on their own account (*ibid.*, p. 231, para. 179). The Court also found that Uganda was internationally responsible for acts of looting, plundering and exploitation of the DRC's natural resources committed by members of the UPDF in the territory of the DRC, including in Ituri, and for failing to comply with its obligations as an occupying Power in Ituri in respect of all acts of looting, plundering and exploitation of natural resources in the occupied territory (*ibid.*, p. 231, para. 250).

53. The Court further concluded that Uganda,

> "by engaging in military activities against the Democratic Republic of the Congo on the latter's territory, by occupying Ituri and by actively extending military, logistic, economic and financial support to irregular forces having operated on the territory of the DRC, violated the principle of non-use of force in international relations and the principle of non-intervention" (*ibid.*, p. 280, para. 345, subpara. (1) of the operative part).

54. The Court found that "massive human rights violations and grave breaches of international humanitarian law were committed by the UPDF on the territory of the DRC" during the conflict (*ibid.*, p. 239, para. 207). The Court further found that the UPDF had failed to protect the civilian population and to distinguish between combatants and non-combatants in the course of fighting against other troops (*ibid.*, p. 240, para. 208). It considered that there was persuasive evidence that, in Ituri district, the UPDF had incited ethnic conflicts and taken no action to prevent such conflicts (*ibid.*, p. 240, para. 209). Moreover, the Court found that there was convincing evidence that child soldiers had been trained in UPDF training camps and that the UPDF had failed to prevent the recruitment of child soldiers in areas under its control (*ibid.*, p. 241, para. 210).

55. The Court concluded on the basis of these findings that Uganda,

> "by the conduct of its armed forces, which committed acts of killing, torture and other forms of inhumane treatment of the Congolese civilian population, destroyed villages and civilian buildings, failed to distinguish between civilian and military targets and to protect the civilian population in fighting with other combatants, trained child soldiers, incited ethnic conflict and failed to take measures to put an end to such conflict; as well as by its failure, as an occupying Power, to take measures to respect and ensure respect for human rights and international humanitarian law in Ituri district, violated its obligations under international human rights law and international humanitarian law" (2005 Judgment, *I.C.J. Reports 2005*, p. 280, para. 345, subpara. (3) of the operative part).

56. Finally, the Court found that "officers and soldiers of the UPDF, including the most high-ranking officers, [had been] involved in the looting, plundering and exploitation of the DRC's natural resources and that the military authorities [had] not take[n] any measures to put an end to these acts" (*ibid.*, p. 251, para. 242). It also held that Uganda's obligations as an occupying Power in Ituri district required it to take appropriate measures to prevent the looting, plundering and exploitation of natural resources in the occupied territory, not only by members of its military but also by private persons. In the view of the Court, it was apparent "that rather than preventing the illegal traffic in natural resources, including diamonds, high-ranking members of the UPDF facilitated such activities by commercial entities" (*ibid.*, p. 253, paras. 248-249).

57. In this regard, the Court concluded that Uganda,

> "by acts of looting, plundering and exploitation of Congolese natural resources committed by members of the Ugandan armed forces in the territory of the Democratic Republic of the Congo and by its failure to comply with its obligations as an occupying Power in Ituri district to prevent acts of looting, plundering and exploitation of Congolese natural resources, violated obligations owed to the Democratic Republic of the Congo under international law" (*ibid.*, pp. 280-281, para. 345, subpara. (4) of the operative part).

58. In its 2005 Judgment, the Court also ruled that the DRC had violated obligations owed to Uganda under the Vienna Convention on Diplomatic Relations of 1961 and that the DRC was under an obligation to make reparation to Uganda for the injury caused (see paragraph 7 above). In this regard, however, as recalled above, at the hearing of

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30 April 2021, the Agent of Uganda stated that Uganda had decided to waive its counter-claim for reparation (see paragraph 47). Therefore, the Court is now seised of the sole question of the reparation owed by Uganda to the DRC.

*

59. In the present phase of the proceedings, the DRC asks the Court to adjudge and declare that Uganda must pay compensation under four heads of damage, namely damage to persons, damage to property, damage related to natural resources, and macroeconomic damage. Under each of the first three heads of damage, the DRC makes claims with respect to several forms of damage. In particular, the first head of damage (damage to persons) includes the DRC's claims for loss of life, injuries to persons, rape and sexual violence, recruitment and deployment of child soldiers and displacement of populations. The DRC also seeks several measures of satisfaction.

II. GENERAL CONSIDERATIONS

60. The Court will first recall the context of the present case (Section A). It will then examine, in light of that context, the principles and rules applicable to the assessment of reparations in this case (Section B), questions of proof (Section C) and the forms of damage subject to reparation (Section D).

A. CONTEXT

61. The Court notes that the Parties have attached great importance to the context in which Uganda's internationally wrongful acts and the injury suffered by the DRC occurred. However, they disagree about how much weight should be attached to that context by the Court in assessing the various forms of damage and the amounts of compensation owed.

* *

62. The DRC, which regards this case as "unprecedented" before the Court, argues that the Court must take the context into consideration when assessing the evidence relating to each head of damage. It highlights the time that has elapsed since the events concerned occurred, 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. Finally, it contends that, "in view of the particular nature of war-related damage, which, by definition, cannot be identified and evaluated systematically, the DRC has . . . been obliged to make assessments which, while general, are based on a variety of solid and reliable evidence".

63. Uganda is of the view that the DRC cannot simply plead difficulties in gathering evidence in order not to have to do so or to shift the burden of proof onto Uganda. The Respondent considers demonstrably untrue the assertion that it is not possible to gather evidence of damage relating to war. It cites as examples Iraq's invasion and occupation of Kuwait and Eritrea's invasion and occupation of northern Ethiopia, which did not prevent evidence or witness testimony from being presented before the relevant commissions. Uganda also contends that such evidence was gathered for certain reparation claims before the International Criminal Court (hereinafter the "ICC") for the same conflict as that at issue in these proceedings.

* *

64. The Court considers that the context of the present case is particularly relevant for the analysis of the facts. First and foremost, this case concerns one of the most complex and deadliest armed conflicts to have taken place on the African continent. There were numerous actors operating on the territory of the DRC between 1998 and 2003, including the armed forces of various States, as well as irregular armed forces that often acted in collaboration with the intervening States. The Court recalls that the DRC filed Applications instituting proceedings against Burundi and Rwanda in 1999. At the request of the DRC, the proceedings against Burundi were discontinued (see *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Burundi), Order of 30 January 2001, I.C.J.*

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Reports 2001, p. 4), while the Court ruled that it did not have jurisdiction to entertain the Application instituting proceedings against Rwanda (*Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 53, para. 128).

65. The Court emphasizes that this case is characterized by Uganda's violation of some of the most fundamental principles and rules of international law, namely the principles of non-use of force and of non-intervention, international humanitarian law and basic human rights. Its actions resulted in massive infringements of those rights and serious violations of international humanitarian law, in the form of, *inter alia*, killings, injuries, cruel and inhuman treatment, damage to property and the plundering of Congolese natural resources. The entire district of Ituri fell under the military occupation and effective control of Uganda. In Kisangani, Uganda engaged in large-scale fighting against Rwandan forces.

66. The Court observes that the time that has elapsed between the current phase of the proceedings and the unfolding of the conflict, namely some 20 years, makes the task of establishing the course of events and their legal characterization even more difficult. The Court notes, however, that the Parties have been aware since the 2005 Judgment that they could be called upon to provide evidence in reparation proceedings.

67. The Court is mindful of the fact that evidentiary difficulties arise, to a certain extent, in most situations of international armed conflict. However, questions of reparation are often resolved through negotiations between the parties concerned. The Court can only regret the failure, in this case, of the negotiations through which the Parties were to "seek in good faith an agreed solution" based on the findings of the 2005 Judgment (*I.C.J. Reports 2005*, p. 257, para. 261).

68. The Court will take the context of this case into account when determining the extent of the injury and assessing the reparation owed (see Parts III and IV below). It will first examine the principles and rules applicable to the assessment of reparations in the present case, before addressing questions of proof and the forms of damage subject to reparation.

B. The principles and rules applicable to the assessment of reparations in the present case

69. The Court recalls that, in its 2005 Judgment, it found that Uganda was under an obligation to make reparation for the damage caused by internationally wrongful acts (actions and omissions) attributable to it:

> "259. The Court observes that it is well established in general international law that a State which bears responsibility for an internationally wrongful act is under an obligation to make full reparation for the injury caused by that act (see *Factory at Chorzów, Jurisdiction, 1927, P.C.I.J., Series A, No. 9*, p. 21; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 81, para. 152; *Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004*, p. 59, para. 119). Upon 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. Having satisfied itself that this injury was caused to the DRC by Uganda, the Court finds that Uganda has an obligation to make reparation accordingly." (2005 Judgment, *I.C.J. Reports 2005*, p. 257, para. 259.)

70. As regards reparation, Article 31 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (hereinafter the "ILC Articles on State Responsibility"), which reflects customary international law, provides that:

> 1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
>
> 2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State."

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71. In its 2005 Judgment, the Court set out the scope of the subsequent phase of the proceedings, should the Parties fail to agree on reparations:

> "260. The Court further considers appropriate the request of the DRC for the nature, form and amount of the reparation due to it to be determined by the Court, failing agreement between the Parties, in a subsequent phase of the proceedings. 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*' (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 143, para. 284)." (*I.C.J. Reports 2005*, p. 257, para. 260.)

72. In view of the foregoing, the Court will determine the principles and rules applicable to the assessment of reparations in the present case, first, by distinguishing between the different situations that arose during the conflict in Ituri and in other areas of the DRC (Subsection 1); second, by analysing the required causal nexus between Uganda's internationally wrongful acts and the injury suffered by the Applicant (Subsection 2); and, finally, by examining the nature, form and amount of reparation (Subsection 3).

1. The principles and rules applicable to the different situations that arose during the conflict

73. The Parties disagree about the scope of Uganda's obligation to make reparation for the injury suffered in two different situations: in the district of Ituri, under Ugandan occupation, and in other areas of the DRC outside Ituri, including Kisangani where Ugandan and Rwandan armed forces were operating simultaneously.

(a) In Ituri

74. The Parties hold opposing views on whether the reparation owed by Uganda to the DRC extends to damage caused by third parties in the district of Ituri.

75. Recalling Uganda's status as an occupying Power, as established by the Court in its 2005 Judgment, the DRC contends that the Respondent's responsibility is engaged for all the damage caused by third parties in Ituri. In the Applicant's view, Uganda violated its duty of vigilance as an occupying Power. The DRC adds that, as an occupying Power, the Respondent was under an obligation to uphold international law by protecting the population, including from the acts of rebel groups in Ituri.

76. According to the DRC, Uganda cannot demand from it precise and detailed evidence of the injury suffered in Ituri when, as the occupying Power in that district, Uganda was itself at the root of the situation that led to the disappearance of evidence.

77. Uganda, for its part, claims that the conflict between the Hema and the Lendu in Ituri predated its intervention by over a century. It submits that the DRC must prove the causal nexus between Uganda's breaches of its obligations as an occupying Power in Ituri and the damage inflicted in that district by individuals or groups, whether or not they were supported by the Respondent. Relying on the Court's decision in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro*), the Respondent argues that it is necessary to demonstrate with a sufficient degree of certainty that the damage caused by third parties, whose conduct is not attributable to it, would not have occurred had it duly discharged its obligations as an occupying Power.

* *

78. The Court considers that the status of the district of Ituri as an occupied territory has a direct bearing on questions of proof and the requisite causal nexus. As an occupying Power, Uganda had a duty of vigilance in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory,

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including rebel groups acting on their own account. Given this duty of vigilance, the Court concluded that the Respondent's responsibility was engaged "by its failure . . . to take measures to . . . ensure respect for human rights and international humanitarian law in Ituri district" (2005 Judgment, *I.C.J. Reports 2005*, p. 231, paras. 178-179, p. 245, para. 211, and p. 280, para. 345, subpara. (3) of the operative part). Taking into account this conclusion, 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.

79. With respect to natural resources, the Court recalls that, in its 2005 Judgment, it considered that Uganda, as an occupying Power, had an "obligation to take appropriate measures to prevent the looting, plundering and exploitation of natural resources in the occupied territory [by] private persons in [Ituri] district" (*ibid.*, p. 253, para. 248). The Court found that Uganda had "fail[ed] to comply with its obligations under Article 43 of the Hague Regulations of 1907 as an occupying Power in Ituri in respect of all acts of looting, plundering and exploitation of natural resources in the occupied territory" (*ibid.*, p. 253, para. 250) and that its international responsibility was thereby engaged (*ibid.*, p. 281, para. 345, subpara. (4) of the operative part). The reparation owed by Uganda in respect of acts of looting, plundering and exploitation of natural resources in Ituri is addressed below (see paragraph 275).

(b) Outside Ituri

80. As regards damage that occurred outside Ituri, the DRC is of the view that Uganda must make good any damage caused by Ugandan forces or by irregular forces supported by Uganda, namely the Congo Liberation Movement (hereinafter the "MLC") and its armed wing, the Congo Liberation Army (hereinafter the "ALC"). According to the Applicant, this damage could not have been caused without Uganda's support. The Applicant adds that the reparation owed by Uganda must also cover damage resulting from the actions of other irregular forces in the area that received support from the Respondent. While the Applicant acknowledges that some of the damage that occurred in Kisangani may be the result of a multiplicity of causes, including the actions of Uganda, it contends that this damage would not have occurred had Uganda not entered Congolese territory in breach of international law. The DRC claims compensation for the entirety of this injury. Furthermore, the Applicant mentions other damage caused by both the internationally wrongful conduct of Uganda and that of other States or certain groups that were not supported by Uganda, damage for which the DRC seeks partial (45 per cent) reparation from Uganda.

81. Uganda claims that reparation must be limited to the injury caused directly by members of its armed forces and that the burden of proof rests with the Applicant in this regard. With respect to injury caused by the actions of irregular forces, the Respondent contends that even when it provided support to those groups, Uganda can be found to owe reparation for such injury only if the Applicant proves that it "was suffered as a result of" Uganda's illegal support. It adds that it is not enough to assert *in abstracto* that the injury attributable to the rebel groups would not have occurred without Uganda's support.

* *

82. The Court recalls the findings in its 2005 Judgment that the rebel groups operating in the territory of the DRC outside of Ituri were not under Uganda's control, that their conduct was not attributable to it and that Uganda was not in breach of its duty of vigilance with regard to the illegal activities of such groups (*I.C.J. Reports 2005*, p. 226, paras. 160-161, pp. 230-231, para. 177, and p. 253, para. 247). Consequently, no reparation can be awarded for damage caused by the actions of those groups.

83. The Court found, in the same Judgment, that, even if the MLC was not under the Respondent's control, the latter provided support to the group (*ibid.*, p. 226, para. 160), and that Uganda's training and support of the ALC violated certain obligations of international law (*ibid.*, p. 226, para. 161). The Court will take this finding into account when it considers the DRC's claims for reparation.

84. It falls to the Court to assess each category of alleged damage on a case-by-case basis and to examine whether Uganda's support of the relevant rebel group was a sufficiently direct and certain cause of the injury. The extent of the damage and the consequent reparation must be determined by the Court when examining each injury concerned. The same applies in respect of the damage suffered specifically in Kisangani, which the Court will consider in Part III.

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2. The causal nexus between the internationally wrongful acts and the injury suffered

85. The Parties differ on whether reparation should be limited to the injury directly linked to an internationally wrongful act or should also cover the indirect consequences of that act.

* *

86. The DRC argues that the Respondent must make good any damage demonstrated to be a consequence of its internationally wrongful conduct. It adds that Uganda is obliged to make reparation for the entire injury, whether it resulted directly from its internationally wrongful conduct or was caused by an uninterrupted chain of events. In the Applicant's view, the perpetrator of the internationally wrongful act is bound to make reparation for any damage that would not have occurred had the internationally wrongful act not been committed, regardless of the existence of intervening causes between the internationally wrongful act and the damage. It holds Uganda responsible for all the damage inflicted, including that resulting from acts committed by irregular forces such as the MLC. According to the DRC, whatever the location of the armed rebel groups, they would not have been able to commit acts of looting, destruction and other atrocities without support from Uganda.

87. The Applicant considers that the foreseeability of the damage should be taken into account. In its view, Uganda could not have failed to foresee that its acts would produce damage, and it should therefore be required to make reparation. The DRC adds that this reparation is owed even if certain intervening causes attributable to third parties occurred between the internationally wrongful act and the damage.

88. Uganda contends that the causal nexus must be assessed differently depending on the internationally wrongful act at issue.

89. As regards the principle of non-intervention, Uganda draws attention to the imputability of the acts committed by irregular armed groups. It points out that the Court, in its 2005 Judgment, ruled that the wrongful acts committed by various armed groups supported by Uganda could not be attributed to it. It further asserts that the DRC has failed to establish that Uganda's support for those groups was the direct and certain cause of a specific injury attributable to them. Although the Respondent admits that the political or financial support provided to certain groups, to the extent that it was established, could be characterized as wrongful, it contends that this does not automatically and without further proof make such support the direct and certain cause of the wrongful acts committed by these groups. Uganda relies on the 2005 Judgment to argue that it has in no way been established that it created those armed groups or controlled their operations, nor has it been established that those groups were acting on its instructions or under its direction or control. The Respondent adds that it did not have a duty of vigilance on Congolese territory outside Ituri and, consequently, that the damage inflicted by other forces on that territory could not be connected to an alleged lack of vigilance on the part of Uganda.

90. As regards the régime of occupation in the district of Ituri, the Respondent insists that it falls to the DRC to demonstrate a causal nexus between Uganda's breach of its obligations as an occupying Power and the damage inflicted in that district by individuals or groups. It adds that the DRC has failed to show that certain measures were not taken by Uganda to prevent damage by third parties.

91. With respect to the principle of non-use of force, the Respondent argues that it falls to the DRC to demonstrate a direct and certain causal nexus between the internationally wrongful act and the injury. It considers unfounded the DRC's position that a causal nexus can be established simply by the fact that the damage would not have occurred "but for" Uganda's violation of the *jus ad bellum*.

92. Finally, relying on the Judgment rendered by the Court on 26 February 2007 in.the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)* (*I.C.J. Reports 2007 (I)*, p. 234, para. 462), Uganda claims that even if it had taken the necessary measures, the damage caused by third parties in Ituri would still have occurred.

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93. The Court may award compensation only when an injury is caused by the internationally wrongful act of a State. As a general rule, it falls to the party seeking compensation to prove the existence of a causal nexus between the internationally wrongful act and the injury suffered. In accordance with the jurisprudence of the Court, compensation can be awarded only if there is "a sufficiently direct and certain causal nexus between the wrongful act . . . and the injury suffered by the Applicant, consisting of all damage of any type, material or moral" (*ibid.*, pp. 233-234, para. 462). The Court applied this same criterion in two other cases in which the question of reparation arose (*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. 32; *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012 (I)*, p. 332, para. 14). However, it should be noted that the causal nexus required may vary depending on the primary rule violated and the nature and extent of the injury.

94. In particular, in the case of damage resulting from war, the question of the causal nexus can raise certain difficulties. In a situation of a long-standing and large-scale armed conflict, as in this case, the causal nexus between the wrongful conduct and certain injuries for which an applicant seeks reparation may be readily established. For some other injuries, the link between the internationally wrongful act and the alleged injury may be insufficiently direct and certain to call for reparation. It may be that the damage is attributable to several concurrent causes, including the actions or omissions of the respondent. It is also possible that several internationally wrongful acts of the same nature, but attributable to different actors, may result in a single injury or in several distinct injuries. The Court will consider these questions as they arise, in light of the facts of this case and the evidence available. Ultimately, it is for the Court to decide if there is a sufficiently direct and certain causal nexus between Uganda's internationally wrongful acts and the various forms of damage allegedly suffered by the DRC (see Part II, Section A above).

95. The Court is of the opinion that, in analysing the causal nexus, it must make a distinction between the alleged actions and omissions that took place in Ituri, which was under the occupation and effective control of Uganda, and those that occurred in other areas of the DRC, where Uganda did not necessarily have effective control, notwithstanding the support it provided to several rebel groups whose actions gave rise to damage. The Court recalls that Uganda is under an obligation to make reparation for all damage resulting from the conflict in Ituri, even that resulting from the conduct of third parties, unless it has established, with respect to a particular injury, that it was not caused by Uganda's failure to meet its obligations as an occupying Power (see paragraph 78 above).

96. Lastly, the Court cannot accept the Respondent's argument based on an analogy with the 2007 Judgment in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), I.C.J. Reports 2007 (I)*, p. 234, para. 462, in which the Court expressly "confine[d] itself to determining the specific scope of the duty to prevent in the Genocide Convention" and did not "purport to establish a general jurisprudence applicable to all cases where a treaty instrument, or other binding legal norm, includes an obligation for States to prevent certain acts" (*ibid.*, pp. 220-221, para. 429). The Court considers that the legal régimes and factual circumstances in question are not comparable, given that, unlike the above-mentioned *Genocide* case, the present case concerns a situation of occupation.

97. As regards the injury suffered outside Ituri, the Court must take account of the fact that some of this damage occurred as a result of a combination of actions and omissions attributable to other States and to rebel groups operating on Congolese territory. The Court cannot accept the Applicant's assessment that Uganda is obliged to make reparation for 45 per cent of all the damage that occurred during the armed conflict on Congolese territory. This assessment, which purports to correspond to the proportion of Congolese territory under Ugandan influence, has no basis in law or in fact. However, the fact that the damage was the result of concurrent causes is not sufficient to exempt the Respondent from any obligation to make reparation.

98. The Parties have also addressed the applicable law in situations in which multiple actors engage in conduct that gives rise to injury, which has particular relevance to the events in Kisangani, where the damage alleged by the DRC arose out of conflict between the forces of Uganda and those of Rwanda. The Court recalls that, in certain situations in which multiple causes attributable to two or more actors have resulted in injury, a single actor may be required to make full reparation for the damage suffered (*Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, pp. 22-23; see commentary to Article 31 of the ILC Articles on State Responsibility,

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Yearbook of the International Law Commission, 2001, Vol. II, Part Two, p. 91, and particularly pp. 93-94, paras. 12-13, as well as the commentary to Article 47, *ibid.*, pp. 124-125, paras. 1-8). In other situations, in which the conduct of multiple actors has given rise to injury, responsibility for part of such injury should instead be allocated among those actors (see commentary to Article 31, *ibid.*, p. 93, para. 13, and to Article 47, *ibid.*, p. 125, para. 5). The Court will return to this issue in assessing the DRC's claims for compensation in relation to Kisangani (see paragraphs 177, 221 and 253 below).

3. The nature, form and amount of reparation

99. The Court will recall certain international legal principles that inform the determination of the nature, form and amount of reparation under the law on the international responsibility of States in general and in situations of mass violations in the context of armed conflict in particular.

100. It is well established in international law that "the breach of an engagement involves an obligation to make reparation in an adequate form" (*Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9*, p. 21). This is an obligation to make full reparation for the damage caused by an internationally wrongful act (*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. 30; *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010 (II)*, p. 691, para. 161; *Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004 (I)*, p. 59, para. 119; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 80, para. 150).

101. As stated in Article 34 of the ILC Articles on State Responsibility, "[f]ull reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination". Thus, compensation may be an appropriate form of reparation, particularly in those cases where restitution is materially impossible (*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. 31; *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, pp. 103-104, para. 273).

102. In view of the circumstances of the present case, the Court emphasizes that it is well established in international law that reparation due to a State is compensatory in nature and should not have a punitive character (*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. 31). The Court observes, moreover, that any reparation is intended, as far as possible, to benefit all those who suffered injury resulting from internationally wrongful acts (see *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012 (I)*, p. 344, para. 57).

103. The Court notes that the Parties do not agree on the principles and methodologies applicable to the assessment of damage resulting from an armed conflict or to the quantification of compensation due.

* *

104. The DRC contends that it reached an estimate, in good faith, of the damage caused, by applying a well-defined method and taking account of the circumstances of the case, where the damage suffered was on a massive scale. Thus, in such circumstances, according to the DRC, the Court's jurisprudence does not require a precise assessment of the damage caused. The Applicant contests the Respondent's claim that every injury suffered by every victim has to be specifically demonstrated in order to calculate the quantum. The DRC relies on the standard of proof applicable to mass claims. According to the Applicant, consistent international jurisprudence supports the proposition that international law does not require the specific injuries caused to each victim or group of victims to be established in order to calculate compensation in the context of mass claims. The Applicant also draws attention to the difficulties involved in gathering evidence. The DRC thus argues that it will be necessary to mitigate the effects of the general rule that it is for the party that alleges a fact to prove its existence, in order to take account of situations where the respondent is in a better position to provide evidence of the facts at issue. The Applicant contends that international jurisprudence, particularly in the context of mass injury, has introduced a certain amount of flexibility

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as regards the establishment of detailed and precise evidence. The DRC relies in this regard on the practice of the European Court of Human Rights, the Eritrea-Ethiopia Claims Commission (hereinafter the "EECC") and the ICC.

105. Uganda, for its part, contends that the Court must demand a high degree of certainty to establish the damage caused. The Respondent thus argues that the DRC must prove the damage, by stating precisely which persons or property, in specific places and at specific times, incurred loss, damage or injury. In addition, Uganda claims that the fact that Ituri was occupied does not relieve the DRC of the obligation to submit some evidence.

* *

106. The Court recalls that "reparation must, as far as possible, wipe out all the consequences of the illegal act" (*Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 47). The Court has recognized in other cases that the absence of adequate evidence of the extent of material damage will not, in all situations, preclude an award of compensation for that damage (*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. 35). While the Court recognizes that there is some uncertainty about the exact extent of the damage caused, this does not preclude it from determining the amount of compensation. The Court 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 may be called for where the evidence leaves no doubt that an internationally wrongful act has caused a substantiated injury, but does not allow a precise evaluation of the extent or scale of such injury (see *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. 334, para. 21, pp. 334-335, para. 24, and p. 337, para. 33).

107. The Court observes that, in most instances, when compensation has been granted in cases involving a large group of victims who have suffered serious injury in situations of armed conflict, the judicial or other bodies concerned have awarded a global sum, for certain categories of injury, on the basis of the evidence at their disposal. The EECC, for example, noted the intrinsic difficulties faced by judicial bodies in such situations. It acknowledged that the compensation it awarded reflected "the damage that could be established with sufficient certainty through the available evidence" (*Final Award, Eritrea's Damages Claims, Decision of 17 August 2009*, United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. XXVI, p. 516, para. 2), even though the awards "probably d[id] not reflect the totality of damage that either Party suffered in violation of international law" *(ibid.)*. It also recognized that, in the context of proceedings aimed at providing compensation for injuries affecting large numbers of victims, the relevant institutions have adopted less rigorous standards of proof. They have accordingly reduced the levels of compensation awarded in order to account for the uncertainties that flow from applying a lower standard of proof (*ibid.*, pp. 528-529, para. 38).

108. The Court is convinced that it should proceed in this manner in the present case. It will take due account of the above-mentioned conclusions regarding the nature, form and amount of reparation when considering the different forms of damage claimed by the DRC.

109. Uganda submits that the relevant principles of international law concerning compensation preclude requiring a responsible State to pay compensation that exceeds its financial capacity. The DRC, however, considers that "the amounts awarded should not be influenced by . . . the situation of the perpetrator of the wrongful act" and that they should depend on the injury alone.

110. The Court recalls in this regard that the EECC raised the question whether, in determining the amount of compensation, account should be taken of the financial burden imposed on the responsible State, given its economic condition, in particular if there is any doubt about the State's capacity to pay without compromising its ability to meet its people's basic needs (*Final Award, Eritrea's Damages Claims, Decision of 17 August 2009*, *RIAA*, Vol. XXVI, pp. 522-524, paras. 19-22). The Court will further address the question of the respondent State's financial capacity below (see paragraph 407).

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C. QUESTIONS OF PROOF

111. Having established the principles and rules applicable to the assessment of reparations in the present case, the Court will examine questions of proof in order to determine who bears the burden of proving a fact, the standard of proof, and the weight to be given to certain kinds of evidence.

* *

112. The DRC maintains that it is not required, as Uganda claims, to prove each injury sustained in the armed conflict. According to the Applicant, Uganda is seeking to impose a more exacting standard of proof than is required at the reparations stage. It adds that, at this stage, the circumstances of the case and the difficulties encountered by the Parties in gathering evidence in a situation of armed conflict should also be taken into account. The DRC recalls the Court's jurisprudence, according to which, in some situations, the respondent is in a better position to establish certain facts. It therefore asks the Court to adopt an approach to the valuation of harm that is neither mechanical nor rigid.

113. Uganda, for its part, draws the attention of the Court to the DRC's obligation to prove the loss, damage or injury suffered by specific persons or property, in specific places and at specific times. According to the Respondent, it follows from the 2005 Judgment, in particular paragraph 260 thereof (see paragraph 71 above), that the DRC must demonstrate that the injury suffered was the consequence of the internationally wrongful acts for which Uganda was found responsible, by providing evidence that the injury was a result of specific actions attributable to Uganda. According to the Respondent, it falls to the DRC to provide proof of the exact injury, the causal nexus, and that each specific action that gave rise to injury is attributable to Uganda.

* *

114. The Court does not accept Uganda's contention that the DRC must prove the exact injury suffered by a specific person or property in a given location and at a given time for it to award reparation. In cases of mass injuries like the present one, the Court may form an appreciation of the extent of damage on which compensation should be based without necessarily having to identify the names of all victims or specific information about each building or other property destroyed in the conflict.

1. The burden of proof

115. The Court will begin by recalling the rules governing the burden of proof. In accordance with its well-established jurisprudence on the matter, "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" (*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), Merits, Judgment, I.C.J. Reports 2010 (II)*, p. 660, para. 54). In principle, therefore, it falls to the party alleging a fact to "submit the relevant evidence to substantiate its claims" (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 71, para. 163).

116. However, the Court considers that this is not an absolute rule applicable in all circumstances. There are situations where "this general rule would have to be applied flexibly . . . and, in particular, [where] the Respondent may be in a better position to establish certain facts" (*Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012 (I)*, p. 332, para. 15). The Court "cannot however apply a presumption that evidence which is unavailable would, if produced, have supported a particular party's case; still less a presumption of the existence of evidence which has not been produced" (*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992*, p. 399, para. 63).

117. The Court has thus underlined that "[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" (*Ahmadou Sadio Diallo (Republic of Guinea*

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v. *Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010 (II)*, p. 660, para. 54). It is for the Court to evaluate all the evidence produced by the parties and which has been duly subjected to their scrutiny, with a view to forming its conclusions. Depending on the circumstances of the case, it may be that "neither party is alone in bearing the burden of proof" (*ibid.*, p. 661, para. 56).

118. As regards the damage that occurred in the district of Ituri, which was under Ugandan occupation, the Court recalls the conclusion it reached in paragraph 78 above. In this phase of the proceedings, it is for Uganda to establish that a particular injury suffered by the DRC in Ituri was not caused by its failure to meet its obligations as an occupying Power.

119. However, as regards damage that occurred on Congolese territory outside Ituri, and although the existence of armed conflict may make it more difficult to establish the facts, the Court is of the view that "[u]ltimately . . . it is the litigant seeking to establish a fact who bears the burden of proving it; and in cases where evidence may not be forthcoming, a submission may in the judgment be rejected as unproved" (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 319, para. 101; see also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 437, para. 101).

2. The standard of proof and degree of certainty

120. In practice, the Court has applied various criteria to assess evidence (see *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 (I)*, pp. 129-130, paras. 209-210; *Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 17). The Court considers that the standard of proof may vary from case to case and may depend on the gravity of the acts alleged (*I.C.J. Reports 2007 (I)*, p. 130, para. 210). The Court has also recognized that a State that is not in a position to provide direct proof of certain facts "should 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).

121. The Court has previously addressed the question of the weight to be given to certain kinds of evidence. The Court recalls, as noted in its 2005 Judgment, that it

> "will treat with caution evidentiary materials specially prepared for this case and also materials emanating from a single source. It will prefer contemporaneous evidence from persons with direct knowledge. It will give particular attention to reliable evidence acknowledging facts or conduct unfavourable to the State represented by the person making them (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 41. para. 64). The Court will also give weight to evidence that has not, even before this litigation, been challenged by impartial persons for the correctness of what it contains." (2005 Judgment, *I.C.J. Reports 2005*, p. 201, para. 61; see also *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 (I)*, pp. 130-131, para. 213).

122. The Court stated that the value of reports from official or independent bodies

> "depends, among other things, on (1) the source of the item of evidence (for instance partisan, or neutral), (2) the process by which it has been generated (for instance an anonymous press report or the product of a careful court or court-like process), and (3) the quality or character of the item (such as statements against interest, and agreed or uncontested facts)" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015 (I)*, p. 76, para. 190).

123. The Court considers it helpful to refer to the practice of other international bodies that have addressed the determination of reparation concerning mass violations in the context of armed conflict. The EECC recognized the difficulties associated with questions of proof in its examination of compensation claims for violations of obligations

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under the *jus in bello* and *jus ad bellum* committed in the context of an international armed conflict. While it required "clear and convincing evidence to establish that damage occurred", the EECC noted that if the same high standard were required for quantification of the damage, it would thwart any reparation. It therefore required "less rigorous proof" for the purposes of quantification (*Final Award, Eritrea's Damages Claims, Decision of 17 August 2009, RIAA*, Vol. XXVI, p. 528, para. 36). Moreover, in its Order for Reparations in the *Katanga* case, which concerns acts that took place in the course of the same armed conflict as in the present case, the ICC was mindful of the fact that "the Applicants were not always in a position to furnish documentary evidence in support of all of the harm alleged, given the circumstances in the DRC" (*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, p. 38, para. 84).

124. In light of the foregoing and given that a large amount of evidence has been destroyed or rendered inaccessible over the years since the armed conflict, the Court is of the view that the standard of proof required to establish responsibility is higher than in the present phase on reparation, which calls for some flexibility.

125. The Court notes that 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. However, given the context of armed conflict in this case, the Court must take account of other evidence, such as the various investigative reports in the case file, in particular those from United Nations organs. The Court already examined much of this evidence in its 2005 Judgment and took the view that some of the United Nations reports, as well as the final report of the Judicial Commission of Inquiry into Allegations into Illegal Exploitation of Natural Resources and Other Forms of Wealth in the DRC established in 2001 (hereinafter the "Porter Commission Report"), had probative value when corroborated by other reliable sources (*I.C.J. Reports 2005*, p. 249, para. 237). Although the Court noted in 2005 that it was not necessary for it to make findings of fact for each individual incident, these documents nevertheless record a considerable number of incidents on which the Court can now rely in evaluating the damage and the amount of compensation due. The Court will also take more recent evidence into account, notably the "Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003", which was published in 2010 by the Office of the High Commissioner for Human Rights (hereinafter the "Mapping Report"). The Court will also take account of the reports by the Court-appointed experts, where it considers them to be relevant.

126. In the circumstances of the case and given the context and the time that has elapsed since the facts in question occurred, the Court considers that it must assess the existence and extent of the damage within the range of possibilities indicated by the evidence. This may be evidence included in the case file by the Parties, in the reports submitted by the Court-appointed experts or in reports of the United Nations and other national or international bodies. Finally, the Court considers that, in such circumstances, an assessment of the existence and extent of the damage must be based on reasonable estimates, taking into account whether a particular finding of fact is supported by more than one source of evidence ("a number of concordant indications") (see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 83, para. 152).

D. THE FORMS OF DAMAGE SUBJECT TO REPARATION

127. The Parties disagree about which forms of damage fall within the scope of the 2005 Judgment and thus must be taken into account by the Court during this phase of the proceedings.

* *

128. The DRC argues that the internationally wrongful acts attributable to Uganda and the existence of the resulting injuries have already been established by the Court in its 2005 Judgment and that the present phase of the proceedings concerns only the extent of those injuries, with a view to evaluating the amount of the reparation.

129. The DRC asserts that it is not reasonable to interpret the 2005 Judgment as excluding from this reparation phase the forms of damage not expressly mentioned therein. Thus, in the Applicant's view, incidents of rape and sexual violence, which are not referred to as such in the 2005 Judgment, fall within the framework of that Judgment,

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as do other forms of damage, such as macroeconomic damage and the plundering of certain minerals not expressly mentioned therein.

130. While Uganda admits its responsibility for the internationally wrongful acts established by the Court, it contends that the 2005 Judgment contains certain temporal, geographic and subject-matter limitations. It considers that its obligation to make reparation concerns only the forms of damage expressly set out in the 2005 Judgment. In the Respondent's view, the DRC cannot, at this late stage, introduce into the general framework of the 2005 Judgment acts such as rape or sexual violence. Uganda thus asks the Court to limit the scope of the present Judgment to only those forms of damage expressly mentioned in the 2005 Judgment.

* *

131. The Court has already determined, in its 2005 Judgment, that Uganda is under an obligation to make reparation for the injury caused to the DRC by several actions and omissions attributable to it. The Court is of the opinion that its task, at this stage of the proceedings, is to rule on the nature and amount of reparation owed to the DRC by Uganda for the forms of damage established in 2005 that are attributable to it. Indeed, the Court's objective in its 2005 Judgment was not to determine the precise injuries suffered by the DRC. It is sufficient for an injury claimed by the Applicant to fall within the categories established in 2005 (*I.C.J. Reports 2005*, p. 241, para. 211, p. 245, para. 220, pp. 252-253, paras. 246-250, p. 257, para. 259, and pp. 280-281, para. 345, subparas. (3) and (4) of the operative part). As the Court has done in previous cases on reparation, it will determine whether each of the claims for reparation falls within the scope of its prior findings on liability (cf. *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012 (I)*, pp. 332-333, para. 17, and p. 343, para. 53).

III. COMPENSATION CLAIMED BY THE DRC

132. The DRC claims compensation for damage to persons (Section A), damage to property (Section B), damage to natural resources (Section C) and for macroeconomic damage (Section D). The Court will examine these claims on the basis of the general considerations described above.

A. DAMAGE TO PERSONS

133. In the operative part of its 2005 Judgment, the Court found that Uganda

> "by the conduct of its armed forces, which committed acts of killing, torture and other forms of inhumane treatment of the Congolese civilian population, destroyed villages and civilian buildings, failed to distinguish between civilian and military targets and to protect the civilian population in fighting with other combatants, trained child soldiers, incited ethnic conflict and failed to take measures to put an end to such conflict; as well as by its failure, as an occupying Power, to take measures to respect and ensure respect for human rights and international humanitarian law in Ituri district, violated its obligations under international human rights law and international humanitarian law" (*I.C.J. Reports 2005*, p. 280, para. 345, subpara. (3) of the operative part);

and

> "that the Republic of Uganda, by engaging in military activities against the Democratic Republic of the Congo on the latter's territory, by occupying Ituri and by actively extending military, logistic, economic and financial support to irregular forces having operated on the territory of the DRC, violated the principle of non-use of force in international relations and the principle of non-intervention" (*ibid.*, p. 280, para. 345, subpara. (1) of the operative part).

* *

134. The DRC claims a total of at least US$4,350,421,800 in.compensation for damage to persons caused by the internationally wrongful acts of Uganda. The DRC divides this claim by reference to five forms of damage: loss of

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life (US$4,045,646,000), injuries and mutilations (US$54,464,000), rape and sexual violence (US$33,458,000), recruitment and deployment of child soldiers (US$30,000,000), as well as displacement of populations (US dollar;186,853,800).

1. Loss of life

135. The DRC claims compensation for the loss of 180,000 civilian lives. To this, the DRC adds a claim for the loss of the lives of 2,000 members of the Congolese armed forces who were allegedly killed in fighting with the Ugandan army or Ugandan-backed armed groups. To substantiate the number of 180,000 civilian lives lost, the DRC relies on mortality surveys and other estimates produced by non-governmental organizations, in particular a report by the International Rescue Committee (hereinafter the "IRC") and a study conducted by the Association pour le développement de la recherche appliquée en sciences sociales (hereinafter "ADRASS"). These studies aim to quantify "excess mortality" by comparing the overall observed or calculated deaths during the conflict period with the mortality rate of previous years. While the IRC report estimates that 3.9 million "excess deaths" occurred during the relevant period, between 1998 and 2003, the ADRASS study arrives at a number of 200,000 "excess deaths".

136. The DRC proceeds from the estimate of the IRC, which it rounds up to 4 million lives lost. It then divides this number by ten, "[g]iven the caution which should be observed within judicial proceedings", to arrive at a "minimum estimate" of 400,000 civilian victims. Recognizing that Uganda should not be held responsible for every civilian death caused by the armed conflict, the DRC subsequently applies a multiplier of 0.45 to reflect the share of responsibility it attributes to Uganda. The DRC thereby arrives at a number of 180,000 civilian lives lost attributable to Uganda. The DRC considers that this approach finds support in the report of the Court-appointed expert Ms Guha-Sapir, who, based on data from 38 mortality surveys in the public domain, estimates the "excess civilian deaths" due to the conflict in the DRC between 1998 and 2003 to be 4,958,775. Dividing this number by ten and applying the 0.45 multiplier put forward by the DRC, Ms Guha-Sapir arrives at an estimate of 224,449 "excess civilian deaths".

137. The DRC submits that 60,000 of those deaths occurred in Ituri, that 920 resulted from the fighting in Kisangani, and that 119,080 occurred in other parts of the country. The DRC further divides the number of civilian lives lost into those resulting from violence that was deliberately targeted at the civilian population (40,000 in.Ituri), and those which resulted from other breaches of Uganda's international obligations in the context of the invasion and occupation of parts of the DRC (20,000 collateral civilian deaths in Ituri; 920 in.Kisangani; and 119,080 civilian deaths in other areas of the DRC).

138. In response to a question posed by the Court under Article 62 of the Rules of Court, the DRC submitted "victim identification form[s]", which had been collected by an expert commission established by the Government of the DRC (hereinafter the "Congolese Commission of Inquiry"). These forms record 5,440 individual lives allegedly lost due to Uganda's unlawful conduct.

139. The DRC proposes that the Court use fixed sums to determine the compensation for each life lost. With respect to lives lost as a result of acts of violence deliberately targeted at the civilian population, the DRC requests US$34,000 in.compensation per person. This figure allegedly corresponds to the average amount awarded by Congolese courts to the families of victims of war crimes. Regarding civilian deaths not resulting from direct violence against the civilian population and deaths among members of the Congolese armed forces, the DRC proposes that the Court use fixed amounts based on an estimation of the average age of the victims, average life expectancy and average anticipated yearly income, resulting in a figure of US$18,913 per person. With respect to the first category, the DRC notes that one of the Court-appointed experts, Mr. Senogles, did not analyse the prevailing practice of Congolese courts, as stipulated in the Court's terms of reference, and considers that his proposal to award US$30,000 per person is unsubstantiated and too low. The DRC is of the view that the expert failed to explain why the Court should have recourse to the practice of the United Nations Compensation Commission (hereinafter the "UNCC") instead of the case law of international courts and tribunals, especially those operating on the African continent.

140. In total, the DRC requests the Court to award US$4,045,646,000 in.compensation for the loss of life which, it alleges, was caused by Uganda.

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141. Uganda submits that demographic studies estimating excess mortality do not prove "the exact injury that was suffered as a result of specific actions of Uganda", as required by the Court in its 2005 Judgment (*I.C.J Reports 2005*, p. 257, para. 260). Uganda also maintains that the IRC study, as well as the report by the Court-appointed expert Ms Guha-Sapir, is unreliable and methodologically flawed. In particular, Uganda argues that both studies are based on outdated data. It asserts that if Ms Guha-Sapir's methodology were to be applied to the more recent data for the period 1998-2003 published by the United Nations Population Division, no significant "excess deaths" would have been detected. Uganda also notes that the authors of the ADRASS study considered that their figure of 200,000 lives lost is probably significantly overstated. Uganda further claims that the DRC's use of a multiplier of 0.45 to determine Uganda's share of responsibility is arbitrary and does not adequately take the role of other actors into account.

142. Uganda also refers to other independent sources, including the Uppsala Conflict Data Program (hereinafter the "UCDP") housed at Uppsala University and used by the Court-appointed expert Mr. Urdal, the Armed Conflict Location & Event Data Project (hereinafter the "ACLED") housed at the University of Sussex, and the Mapping Report. Uganda points out that these "neutral sources" arrive at figures which are far lower than those put forward by the DRC. It also maintains that, under the Court's jurisprudence and for various reasons, the reports by third parties on which the DRC relies, including United Nations reports and reports by non-governmental organizations, must be treated with caution. Finally, Uganda argues that the practice of international courts and tribunals requires an applicant to provide evidence that proves the identity of persons who were allegedly killed, including the person's name and the date, location and cause of death. Uganda asserts that the DRC has thus failed to meet its burden of proof as to the exact injury that was suffered as a result of specific actions of Uganda. The DRC's request for compensation should therefore be rejected.

143. Regarding the claim concerning the deaths of Congolese soldiers, Uganda contends that the Court made no finding in the 2005 Judgment that Uganda was responsible for such deaths and that, even if the DRC were entitled to seek reparation for these alleged deaths, the claim is unsupported by evidence.

144. Concerning the valuation of lives lost as a result of deliberate violence against the civilian population, Uganda disputes that the appropriate average amount of compensation should be determined by reference to decisions of the DRC's domestic courts. It also asserts that the figure put forward by the DRC in this regard is not corroborated by the documents the DRC has submitted. Moreover, Uganda maintains that in recent reparation decisions relating to the same conflict, the ICC has awarded amounts that are substantially lower than those allegedly awarded by Congolese courts. Uganda also considers that the variables used by the DRC to determine the average amount of compensation for civilian deaths that were not the result of deliberate violence are not supported by evidence. In particular, Uganda notes that, in calculating the average annual income of the deceased victims, the actual average income in the DRC should be used instead of gross domestic product per capita. Concerning the report of the Court-appointed expert Mr. Senogles, Uganda argues that the valuation practice of the UNCC cannot be transposed to inter-State judicial proceedings. Moreover, Uganda maintains that Mr. Senogles applied the UNCC's methodology incorrectly by recommending fixed amounts based on the Commission's Category C claims, which required more detailed evidence of individual losses than is available in the present proceedings.

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145. The Court recalls that, in its 2005 Judgment, it found, *inter alia*, that Uganda had committed acts of killing among the civilian population, had failed to distinguish between civilian and military targets, had not protected the civilian population in fighting with other combatants and, as an occupying Power, had failed to take measures to respect and ensure respect for human rights and international humanitarian law in Ituri (*I.C.J. Reports 2005*, p. 241, para. 211, and p. 280, para. 345, subpara. (3) of the operative part). Furthermore, the Court found that Uganda, through its unlawful military intervention in the DRC, had violated the prohibition of the use of force as expressed in Article 2, paragraph 4, of the United Nations Charter (*ibid.*, p. 227, para. 165). The Court reaffirms that, as a matter of principle, the loss of life caused by these internationally wrongful acts gives rise to the obligation of Uganda to make full reparation. To award compensation, the Court must determine the existence and extent of the

injury suffered by the Applicant and satisfy itself that there exists a sufficiently direct and certain causal nexus between the Respondent's internationally wrongful act and the injury suffered.

146. The victim identification forms submitted by the DRC (see paragraph 138 above) are few in number in comparison to the number of lives lost claimed by the DRC, and thus do not support the claim that Uganda owes reparation for 180,000 civilian deaths.

147. Moreover, a large majority of the victim identification forms do not indicate the name of the deceased. Although, given the extraordinary circumstances of the present case, the Court is not persuaded by Uganda's contention that the identity of the persons allegedly killed must be established for these forms to have any evidentiary value (see paragraph 114 above), the victim identification forms also suffer from other defects, in particular the fact that they are not accompanied by corroborating documentation. Furthermore, many of the forms do not show a sufficient causal nexus between any internationally wrongful conduct by Uganda and the alleged harm, but rather refer to other actors as the presumed perpetrators of such harm, including Rwanda or armed groups operating outside Ituri, for whose actions Uganda was not responsible. The Court has observed in previous cases that witness statements which are collected many years after the relevant events, especially when not supported by corroborating documentation, must be treated with caution (*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. 78-79, paras. 197 and 199; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 731, para. 244). Consequently, the victim identification forms submitted by the DRC can be accorded only very limited probative value in arriving at an appreciation of the number of deaths for which Uganda owes reparation.

148. The scientific studies relied on by the DRC to calculate the number of "excess deaths", namely the IRC report and the ADRASS study, do not substantiate the existence of a sufficiently direct and certain causal nexus. The Court considers that, irrespective of the scientific and methodological quality of the surveys, they were not intended to, and do not, identify the number of deaths that have a sufficiently direct and certain causal nexus to the unlawful acts of Uganda. In her report, Ms Guha-Sapir estimates "with 95% confidence that a minimum of 3.2 million excess deaths may have resulted in this period due to armed conflict", but the Court was not convinced by her explanation for this estimate. During the hearing, Ms Guha-Sapir acknowledged that it was impossible to attribute the "excess deaths" identified in her report to a single cause. Even if the number of 3.2 million lives lost were accepted as an indication of the number of lives lost during the armed conflict, the Court would be left without any plausible basis to determine for which of these lives lost "there is a sufficiently direct and certain causal nexus between the wrongful act . . . and the injury suffered by the Applicant" (*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. 32; *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012 (I)*, p. 332, para. 14, citing *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 (I)*, pp. 232-233, para. 462). Some of the lives lost during the conflict (the number of which cannot be determined) may be regarded as having a cause that is too remote from the internationally wrongful acts of Uganda to be a basis for a claim of reparation against it (see commentary to Article 31 of the ILC Articles on State Responsibility, *Yearbook of the International Law Commission*, 2001, Vol. II, Part Two, p. 93, para. 10). Consequently, the Court considers that the mortality surveys presented cannot contribute to the determination of the number of lives lost that are attributable to Uganda.

149. The Court also takes note of the report on "conflict deaths", that is "lives lost as a direct result of the armed conflict", prepared by the Court-appointed expert Mr. Urdal. Mr. Urdal's report is based on the UCDP database, an academic database which he uses to identify "direct conflict deaths" based on individual incidents. Using the UCDP database, Mr. Urdal arrives at an estimate of 14,663 direct civilian deaths that occurred in the entire DRC during the relevant period, between August 1998 and June 2003, including 5,769 in.Ituri. This number includes civilians who "were killed as a result of deliberately targeted violence", as well as "civilian collateral victims". Mr. Urdal notes in his report that only 32 civilian deaths are coded in the UCDP database as having occurred in the DRC in clashes involving Ugandan troops. However, the Court recalls that, in its 2005 Judgment, it also held Uganda responsible

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for failing to comply with its obligations as an occupying Power in Ituri in respect of violations of international human rights law and international humanitarian law in the occupied territory (*I.C.J. Reports 2005*, p. 245, para. 220). On this basis, and unless Uganda establishes that particular deaths alleged by the DRC in Ituri were not caused by Uganda's failure to meet its obligations as an occupying Power, Uganda owes reparation for the loss of life resulting from the conflict in Ituri, irrespective of whether those deaths resulted from clashes involving Ugandan troops (see paragraph 78 above). With respect to lives lost outside Ituri, the UCDP database is less helpful, since, according to the expert, it is "not designed to determine the legal attribution of deaths".

150. Moreover, the Court notes the inherent limitations of the UCDP database as evidence in a judicial proceeding. The UCDP database is based mainly on press reports and reports by non-governmental organizations. The Court accords to such documents, if they are submitted directly in its proceedings, only limited probative value when they are not corroborated by other forms of evidence (2005 Judgment, *I.C.J. Reports 2005*, p. 204, para. 68; *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment, I.C.J. Reports 2003*, p. 190, para. 60; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, pp. 40-41, paras. 62-63; *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Judgment, I.C.J. Reports 1980*, pp. 9-10, paras. 12-13). Moreover, the numbers resulting from the UCDP database represent very conservative estimates and, in all likelihood, undercount the overall number of direct civilian deaths. This was confirmed by Mr. Urdal at the hearing, when he stated that the figure of 14,663 civilian deaths (that occurred in the entire DRC from August 1998 until June 2003 based on the UCDP database, including 5,769 in.Ituri) was "almost certainly an underestimate" and that it would be impossible to determine the "margin of error". His assessment regarding an undercount is to a certain extent substantiated by indications on the ACLED database for an overall number of 23,791 (civilian and military) deaths resulting from the conflict.

151. Although the information supplied by Mr. Urdal may provide an indication of an approximate number of direct civilian victims, the Court cannot base its assessment of the number of lives lost solely on the report of Mr. Urdal and the UCDP database. It is thus necessary to consider additional forms of evidence.

152. The Court has considered reports produced under the auspices of the United Nations and other documents prepared by independent third parties. In its 2005 Judgment, the Court relied on United Nations reports as "sufficient evidence of a reliable quality", but only "to the extent that they [were] of probative value and [were] corroborated, if necessary, by other credible sources" (*I.C.J. Reports 2005*, pp. 239-240, paras. 205-208, and p. 249, para. 237). The precise evidentiary value accorded to any report, including those produced by United Nations entities, also depends on the methodology and amount of research underlying its preparation (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015 (I)*, p. 76, paras. 189-190; *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 (I)*, pp. 135-137, paras. 227-230). For that reason, the Court attaches particular credibility to the Mapping Report (see paragraph 125 above). Notably, all the information contained in the Mapping Report is corroborated by at least two independent sources, including witness interviews, and thus constitutes reliable evidence (Mapping Report, para. 10). However, even the Mapping Report

> "did not provide for in-depth investigations or gathering of evidence admissible in court, but rather [aims at giving] 'the basis for the formulation of initial hypotheses of investigation by giving a sense of the scale of violations, detecting patterns and identifying potential leads or sources of evidence'" (*ibid.*, para. 5).

153. The Court has also taken into account other United Nations documents, such as the Secretary-General's reports on the United Nations Organization Mission in the Democratic Republic of the Congo (hereinafter "MONUC"), bearing in mind that those reports do not always provide sufficient information as to the methodology adopted and are for the most part less rigorously verified than the Mapping Report.

154. The Court is of the view that the various reports of United Nations bodies, including the Mapping Report, provide a certain amount of information about specific incidents during the conflict, but do not provide a sufficient basis for the Court to arrive at an overall estimate of the number of deaths attributable to Uganda. The individual

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instances of persons killed that are listed in the Mapping Report are often described in imprecise terms (e.g. "several" or "numerous"). In other cases, the Mapping Report at least provides a range of the number of possible casualties. This is exemplified by the situation in Kisangani, which is documented comparatively well. The Mapping Report states that the fighting between Ugandan and Rwandan troops in Kisangani resulted in the death of "over 30" civilians in August 1999, "over 24 civilians" in May 2000, and "between 244 and 760" civilians in June 2000 (Mapping Report, paras. 361-363). While these numbers may suffice to cast doubt on the number of 920 civilian casualties claimed by the DRC in relation to these events, they provide the Court with certain ranges that inform its overall appreciation of the scale of loss of life. Moreover, since the Mapping Report was not designed to assign responsibility to particular actors, the numbers provided therein do not necessarily enable the Court to conclude that there was a sufficiently direct and certain causal nexus between the internationally wrongful acts of Uganda and the instances of loss of life reported (see paragraphs 93 and 148 above).

155. The Court takes note of Uganda's estimate that the Mapping Report identifies a total number of 2,291 lives lost with respect to which there can be a "reasonable suspicion" that they resulted from conduct that is attributable to Uganda. However, this assessment does not take into account the number of lives that were lost as a result of Uganda's failure to comply with its obligations as an occupying Power in Ituri, nor does it recognize that Uganda may owe reparation for certain deaths outside Ituri, even if the Mapping Report does not make specific reference to Uganda's role in a particular incident.

156. The Court further considers that, even when adding together the civilian lives lost that were recorded by the Mapping Report as having occurred in Ituri and the lives lost in other parts of the DRC in which Uganda is implicated, the total number will probably not reflect the full extent of loss of life for which Uganda is responsible. The Mapping Report aims solely to document serious violations of international humanitarian and human rights law. The United Nations Secretary- General's Second special report on MONUC dated 27 May 2003, for example, estimates that "more than 60,000" deaths occurred between 1999 and 2003 in.Ituri alone (United Nations, doc. S/2003/566 of 27 May 2003, para. 10). While the Court cannot simply adopt a figure that appears, without supporting analysis, in a single report, the MONUC report nevertheless suggests that reliance solely on the Mapping Report would lead to an undercount of the number of lives lost.

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157. In considering the deficiencies in the evidence presented by the DRC, the Court takes into account the extraordinary circumstances of the present case, which have restricted the ability of the DRC to produce evidence with greater probative value (see paragraphs 125-126 above). The Court recalls that from 1998 to 2003, the DRC did not exercise effective control over Ituri, due to belligerent occupation by Uganda. In the *Corfu Channel* case, the Court found that the exclusive territorial control that is normally exercised by a State within its frontiers has a bearing upon the methods of proof available to other States, which may be allowed to have 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, see paragraph 120 above). This general principle also applies to situations in which 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.

158. Moreover, the DRC rightly emphasizes that the kind of evidence that is usually provided in cases concerning damage to persons, such as death certificates and hospital records, is often not available in remote areas lacking basic civilian infrastructure, and that this reality has also been recognized by the ICC. The Court recalls the finding of the ICC according to which victims of the same conflict were not always in a position to furnish documentary evidence (see paragraph 123 above). In those proceedings, however, many such victims did in fact provide death certificates and medical reports (*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, paras. 111-112). While it would not have been impossible for the DRC to produce such documentation for a certain number of persons in the present case, the Court recognizes the difficulties in obtaining such documentation for tens of thousands of alleged victims.

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159. The Court 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. At the same time, the Court considers 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 (see paragraph 66 above).

160. The Court observes that the evidence before it, notably the Mapping Report, demonstrates that a large number of civilian casualties occurred in the DRC between 1998 and 2003 and that a significant part of these casualties can be linked to internationally wrongful acts of Uganda. However, there is insufficient evidence to support the DRC's claim of 180,000 civilian deaths for which Uganda owes reparation. Nor can the Court base its conclusions on reparation on the 32 deaths that are coded in the UCDP database as having occurred in clashes involving Ugandan forces, if only because that figure does not cover deaths caused by armed groups in Ituri (see paragraph 78 above).

161. The Court considers that the analysis by Mr. Urdal, taken together with reports of various United Nations bodies, provides a more substantiated basis for assessing the number of lives lost for which Uganda owes reparation. According to Mr. Urdal, the UCDP database arrives at an estimate of 14,663 direct civilian deaths in the entire DRC, of which 5,769 occurred in Ituri and 8,894 occurred in areas outside of Ituri. In respect of deaths in Ituri, the Court has not been presented with evidence suggesting that those civilian deaths were due to a cause other than Uganda's failure to meet its obligations as an occupying Power. Moreover, Mr. Urdal has indicated that the UCDP database likely undercounted the total number of civilian deaths in Ituri. It follows that the number of civilian deaths in Ituri for which Uganda owes reparation likely exceeds the figure of 5,769 that Mr. Urdal derived from the UCDP database. Outside Ituri, the Court may not simply assume that the number of civilian deaths for which Uganda owes reparation corresponds to the 8,894 conflict-related deaths calculated by Mr. Urdal as having occurred in that area. On the one hand, given the involvement of many actors in the armed conflict outside Ituri, it cannot be presumed that all such deaths were caused by Uganda's wrongful conduct. On the other hand, Mr. Urdal has observed that the UCDP database likely also undercounted civilian deaths outside Ituri.

162. Neither the materials presented by the DRC, nor the reports provided by the Court-appointed experts or prepared by United Nations bodies contain sufficient evidence to determine a precise or even an approximate number of civilian deaths for which Uganda owes reparation. Bearing these limitations in mind, the Court considers that the evidence presented to it suggests that the number of deaths for which Uganda owes reparation falls in the range of 10,000 to 15,000 persons.

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163. Turning to valuation, the Court considers that the DRC has not presented convincing evidence for its claim that the average amount awarded by Congolese courts to the families of victims of war crimes amounts to US$34,000. Expert reports submitted in the context of cases before the ICC that are related to the situation in the DRC suggest that this figure is too high (*The Prosecutor* v. *Bosco Ntaganda*, ICC-01/04-02/06, Trial Chamber VI, Reparations Order, 8 March 2021, para. 237; *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. 230). Therefore, the Court will not rely on the average amount proposed by the DRC for the loss of a life as a result of deliberate acts of violence against the civilian population, irrespective of whether judgments of domestic courts may generally serve as an appropriate guide in a case such as the present one. The Court also does not consider that the alternative fixed-sum rates suggested by the Court-appointed expert Mr. Senogles are suitable for the present proceedings. The expert derives these rates from the practice of the UNCC but does not provide a satisfactory rationale for applying those rates in the present case. The rate he suggests for loss of life is based on the UNCC's Category C claims, which allowed individuals to claim actual losses up to US$100,000 on condition that they were documented by appropriate evidence of the circumstances and of the valuation of the claimed loss. The Court notes that, under the UNCC's Category B claims, claimants could seek fixed amounts, ranging from US$2,500 per individual who suffered serious personal injury or whose spouse, child or parent died, to US$10,000 per family of a victim, in an expedited process where the standard of proof was lower.

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164. The methodology that the DRC proposes for the valuation of deaths that did not result from direct attacks on the civilian population is similar to that based on expected future life-time earnings. The Court notes that claims in respect of loss of life are usually based on an evaluation of the losses of the surviving heirs or successors, in addition to administrative expenses such as medical and burial costs (see *Corfu Channel (United Kingdom* v. *Albania), Assessment of Amount of Compensation, Judgment, I.C.J. Reports 1949*, pp. 249-250; *Opinion in the* Lusitania *Cases, 1 November 1923, RIAA*, Vol. VII, p. 35). This approach was considered by the EECC to be "a useful reference for assessing compensation in inter-State claims, if properly applied in appropriate cases", which "may provide a rough measure of a State's injury where a group of its nationals of known size has suffered similar injuries" (*Final Award, Ethiopia's Damages Claims, Decision of 17 August 2009, RIAA*, Vol. XXVI, p. 669, para. 83). In addition to this material element of injury, the Court may award compensation for non-material ("moral" or "non-pecuniary") elements of the injury caused to individuals and their surviving relatives as a result of the psychological harm they have suffered (*Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012 (I)*, p. 333, para. 18). In the *Diallo* case, the Court found that non-material injury can be established without specific evidence and that any quantification of compensation for such injury necessarily rests on equitable considerations (*ibid.*, pp. 334-335, paras. 21 and 24). However, for the purposes of the present proceedings, the Court does not consider that it would be appropriate to assign a higher value to lives lost in a deliberate attack on civilians, as the DRC proposes. It notes in this regard that the EECC considered that, in the situation before it, 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 (*Final Award, Ethiopia's Damages Claims, Decision of 17 August 2009, RIAA*, Vol. XXVI, pp. 664-665, paras. 61 and 64).

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165. Concerning the DRC's request for compensation for 2,000 lives allegedly lost among members of its armed forces, the Court notes that the DRC has provided very little evidence in support of this claim. The Mapping Report gives a very limited indication in this regard, referring generally to losses suffered by the Congolese armed forces in 1999 and noting one incident in August 2000 (Mapping Report, paras. 385 and 392). The Court does not consider that other material submitted by the DRC, including the memoir of MLC leader Jean-Pierre Bemba, constitutes reliable evidence. The Court emphasizes that the more lenient evidentiary standard employed in view of the difficulty of obtaining documentary evidence in the DRC (see paragraphs 123-126 above) does not apply with equal force to the loss of life of military personnel, since a State can be expected to possess at least minimal records regarding its own armed forces, including those killed in action. The Court dismisses this claim of the DRC for lack of evidence, and therefore does not address any other question in relation to it.

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166. The Court recalls that it may, under the exceptional circumstances of the present case, award compensation in the form of a global sum, within the range of possibilities indicated by the evidence and taking into account equitable considerations (see paragraph 106 above). The Court notes that, while the available evidence is not sufficient to determine a reasonably precise or even an approximate number of civilian lives lost that are attributable to Uganda, it is nevertheless possible to identify a range of possibilities with respect to the number of such civilian lives lost (see paragraph 162 above). Taking into account all the available evidence (see paragraphs 135-156 above), the various methodologies proposed to determine the amount of compensation for a human life lost (see paragraphs 163-164 above), as well as its jurisprudence and the pronouncements of other international bodies (see paragraphs 69-126, 157-158 and 163-164 above), the Court will award compensation for the loss of civilian lives as part of a global sum for all damage to persons (see paragraph 226 below).

2. Injuries to persons

167. The DRC also requests the Court to award US$54,464,000 in.compensation for injuries and mutilations among the civilian population.

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168. This claim includes injuries due to deliberate attacks on the civilian population, such as direct targeting, mutilation or torture, as well as injuries suffered as collateral damage resulting from military operations. The DRC submits that Uganda is responsible for 30,000 injured or mutilated civilians in Ituri. The DRC arrives at this number by dividing the 60,000 deaths which it claims to have occurred in Ituri by two. It claims that, of the 30,000 individuals injured in Ituri, 20,000 were harmed as a result of deliberate violence against civilians, while the remaining 10,000 were injured as a result of "other circumstances related to the conflicts". The DRC further states that the alleged 20,000 individuals injured as a result of deliberate violence against civilians include 15,000 who were seriously injured or mutilated and 5,000 who suffered minor injuries. In other areas, the DRC maintains that 1,937 civilians were injured as a consequence of the fighting between Uganda and Rwanda in Kisangani, in addition to 203 civilians injured as a result of Uganda's internationally wrongful acts in Beni, Butembo and Gemena. Thus, the overall number of injured victims put forward by the DRC is 32,140. To support this claim, the DRC invokes United Nations reports, particularly the Mapping Report, the Secretary-General's Second special report on MONUC, the MONUC special report on the events in Ituri, as well as the victim identification forms submitted by the DRC. However, the DRC also notes the "absence of more precise data on this point".

169. In terms of valuation, the DRC submits that a distinction must be made between injuries resulting from deliberate attacks on civilians and those suffered "as collateral damage" resulting from military operations. The DRC requests the Court to award compensation to victims in the first category on the basis of the average sums allegedly awarded by Congolese courts to victims injured or mutilated in the context of the perpetration of serious international crimes, namely US$3,500 for serious injuries or mutilations and US$150 for minor injuries. With regard to "collateral" injuries, the DRC argues that the Court should award a minimum of US$100 per person.

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170. Uganda asserts that the DRC has not produced adequate evidence to sustain its claim for compensation for injuries and mutilations among the civilian population.

171. Uganda argues that the DRC has derived the number of 30,000 injured persons in Ituri by arbitrarily dividing by two an uncorroborated mortality estimate included in a single United Nations report. Moreover, Uganda notes that the DRC has not established the identity of the persons alleged to have been injured and has failed to provide details such as the location, date or nature of the injury. In addition, Uganda maintains that the DRC has not demonstrated a sufficiently direct causal nexus between the personal injuries claimed and Uganda's unlawful acts. In this regard, Uganda reiterates its criticism of the victim identification forms submitted by the DRC and notes that, in proceedings before the ICC, victims of the same conflict submitted corroborative documentation such as hospital records and forensic reports.

172. Uganda further submits that the DRC's proposed valuation of damage for personal injuries is unsupported by evidence. Uganda argues that the DRC has provided only a handful of domestic judgments, mostly relating to rape and sexual violence, which do not corroborate the figures allegedly awarded by Congolese courts in relation to other injuries or mutilations.

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173. In its 2005 Judgment, the Court found Uganda responsible for torture and other forms of inhuman treatment of the civilian population, as well as for failing to distinguish between civilian and military targets and to protect the civilian population in fighting with other combatants, as well as for failing, as an occupying Power, to take measures to respect and ensure respect for human rights and international humanitarian law in Ituri district (*I.C.J. Reports 2005*, p. 280, para. 345, subpara. (3) of the operative part). Therefore, injuries among the civilian population which arise from these acts, as well as from the violation of the prohibition of the use of force and the principle of non-intervention (*ibid.*, p. 280, para. 345, subpara. (1) of the operative part), fall within the scope of the 2005 Judgment and are, as a matter of principle, subject to the obligation to make reparation.

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174. With regard to Ituri, the DRC puts forward a figure of 30,000 injured civilians. Taking its claim of 60,000 civilian lives lost in Ituri as a point of departure, the DRC estimates that the number of persons injured must amount to at least half that number. The Court notes that, during an armed conflict, the number of persons injured normally surpasses the number of lives lost and, on that basis, it is not excessive to estimate the number of injured persons as half of the number of deaths. However, the DRC has not presented sufficient evidence to establish that the number of lives lost in Ituri does in fact amount to 60,000 (see paragraphs 156 and 160 above). Therefore, the Court has no basis for using the number of 60,000 lives allegedly lost in Ituri as a reference even for an approximation of the number of civilians injured. The DRC acknowledges that its approach is due to the "absence of more precise data on this point".

175. The Court has already noted that the victim identification forms submitted by the DRC cannot be considered reliable evidence and do not demonstrate the full extent of injuries claimed (see paragraphs 146-147 above). By the DRC's own count, no more than 1,353 of those forms record alleged injuries, including sexual violence. Apart from their minimal evidentiary value, the forms thus represent only a fraction of the injuries claimed by the DRC.

176. Furthermore, the Court observes that none of the relevant United Nations reports includes an overall estimate of the number of injured civilians. The United Nations Secretary-General's Second special report on MONUC gives a broad estimate of lives lost and persons displaced in Ituri but notes in relation to other personal injuries only that "countless others have been left maimed or severely mutilated" (United Nations, doc. S/2003/566 of 27 May 2003, para. 10). Similarly, the MONUC special report on the events in Ituri contains some examples of instances where civilians were left injured, but does not provide a basis for the Court to reach an overall estimate (United Nations, doc. S/2004/573 of 16 July 2004, paras. 74-75 and 93). The Mapping Report also contains examples of incidents involving injuries resulting from deliberate attacks on the civilian population, including through torture and mutilation (Mapping Report, paras. 369, 407-408, 413-414 and 422). However, the Mapping Report acknowledges that "most effort had to be focused on incidents involving the deaths of a large number of victims" (*ibid.*, para. 535). The sum of the instances identified in the Mapping Report amounts to hundreds of injured civilians, a number which the Court finds implausibly low, particularly given the protracted and pervasive violence in Ituri.

177. More reliable estimates exist with regard to the magnitude of injuries resulting from the fighting between Ugandan and Rwandan troops in Kisangani. The Mapping Report states that the fighting between UPDF and Rwandan troops in Kisangani in August 1999 resulted in over 100 wounded civilians (*ibid.*, para. 361). The report of the United Nations inter-agency assessment mission to Kisangani (hereinafter the "Inter-Agency Report") notes that an estimated 1,700 people were injured in clashes between Ugandan and Rwandan troops in the period from 5 to 10 June 2000 (United Nations, doc. S/2000/1153 of 4 December 2000, para. 57). This figure is broadly corroborated by the Mapping Report, which states that "over 1,000" civilians were wounded in Kisangani during this encounter (Mapping Report, para. 363). The Court can therefore conclude that the number of 1,937 injured civilians put forward by the DRC in relation to Kisangani falls within a plausible range. The Court is not in a position to apportion to Uganda a specific share of the total damage related to persons injured in Kisangani.

178. The Mapping Report also refers to relevant events in other areas of the DRC. For example, the Mapping Report indicates that Ugandan troops in Beni were "arbitrarily detain[ing] large numbers of people and subject[ing] them to torture and various other cruel, inhuman or degrading treatments" (*ibid.*, para. 349). In addition, the Report mentions the torture of civilians and a human rights activist in the town of Buta (*ibid.*, para. 402). However, while these examples indicate that deliberate attacks against and mistreatment of civilians by Ugandan forces, sometimes amounting to torture, were not confined to Ituri or Kisangani, the Mapping Report cannot serve as a reliable basis to determine the extent of such acts in other locations for the purpose of awarding compensation.

179. On the basis of the evidence reviewed, the Court is unable to determine, with a sufficient level of certainty, even an approximate estimate of the number of civilians injured by internationally wrongful acts of Uganda. The Court notes that the DRC has failed to produce appropriate evidence to corroborate its claim that 30,000 civilians were injured in Ituri. However, the Court reiterates its conclusions with regard to the difficult circumstances prevailing in the DRC and their effect on the ability of the Applicant to furnish the kind of evidence normally expected in

claims relating to personal injuries (see paragraphs 120-126 above). The Court considers that the available evidence at least confirms the occurrence of a significant number of injuries in many localities.

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180. Regarding valuation, the Court notes that the DRC claims fixed amounts of US$3,500 per person for injuries resulting from deliberate attacks on civilians, and US$150 for minor deliberate injuries. With regard to "collateral" injuries, the DRC seeks a minimum of US$100 per person. The DRC does not provide convincing evidence that these figures are derived from the average amounts awarded by Congolese courts in the context of the perpetration of serious international crimes. The Court is mindful of the fact that the proposed sum for "collateral" injuries is intended to cover medical costs and loss of income and only to a lesser extent compensation for non-material harm, whereas injuries and mutilation from direct attacks on civilians would justify higher awards because of the associated trauma and psychological harm. However, large awards for non-material harm may be inappropriate in situations involving significant numbers of unidentified and hypothetical victims (see paragraph 164 above). Furthermore, the Court notes that it is difficult to draw any distinction between serious and minor injuries since there is no basis to determine their respective proportions.

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181. The Court recalls that it may, under the exceptional circumstances of the present case, award compensation in the form of a global sum, within the range of possibilities indicated by the evidence and taking into account equitable considerations (see paragraph 106 above). The Court notes that the available evidence for personal injuries is less substantial than that for loss of life, and that it is impossible to determine, even approximately, the number of persons injured as to whom Uganda owes reparation. The Court can only find that a significant number of such injuries occurred and that local patterns can be detected (see paragraph 179 above). Taking into account all the available evidence (see paragraphs 168-178 above), the methodologies proposed to assign a value to personal injuries (see paragraph 180 above), as well as its jurisprudence and the pronouncements of other international bodies (see paragraphs 69-126 above), the Court will award compensation for personal injuries as part of a global sum for all damage to persons (see paragraph 226 below).

3. Rape and sexual violence

182. The DRC seeks US$33,458,000 in.compensation for 1,710 victims of rape and sexual violence in Ituri and for 30 victims of such acts in other parts of the DRC, including Kisangani.

183. The DRC acknowledges that the Congolese Commission of Inquiry was able to identify no more than 342 cases of rape in Ituri, as recorded by the victim identification forms. The DRC categorizes these cases into 122 cases of rape (which the DRC refers to as "viol simple") and 220 cases of "aggravated rape". The DRC then multiplies the number of 342 by five and arrives at 1,710 victims (610 cases of rape and 1,100 cases of "aggravated rape"). The DRC justifies this method of calculation by arguing that sexual violence was a widespread weapon of war in Ituri and that it is commonly underreported because of the social stigma attached to it. To this figure, the DRC adds 18 cases of rape in Kisangani, 10 in.Butembo, and two in Beni, as reported by the Congolese Commission of Inquiry.

184. With respect to valuation, the DRC claims that, in the context of serious international crimes, Congolese courts have on average awarded sums of US$12,600 in.cases of rape and US$23,200 in.cases of "aggravated rape". The DRC further submits that the non-material injury suffered by the victims of sexual violence is particularly significant and that it is aggravated by the frequent ostracization of the victims by their family members or society in general.

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185. Uganda argues that instances of rape and sexual violence are not mentioned in the 2005 Judgment, and that, therefore, the DRC should be precluded from claiming compensation for such acts.

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186. Uganda also maintains that the DRC has failed to produce evidence to support the number of rapes alleged to have occurred in Ituri or elsewhere. In this regard, Uganda reiterates its criticism of the victim identification forms and the use of multipliers.

187. Uganda states that the DRC provides no authority for the proposition that compensation for sexual violence should be determined by reference to decisions rendered by Congolese courts. Moreover, Uganda is of the view that the decisions of those courts do not support the average figures put forward by the DRC.

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188. The Court notes that, in its 2005 Judgment, Uganda was found to be responsible for violations of its obligations under international humanitarian law and international human rights law, including by acts of torture and other forms of inhuman treatment (*I.C.J. Reports 2005*, p. 241, para. 211). International criminal tribunals as well as human rights courts and bodies have recognized that rape and other acts of sexual violence committed in the context of armed conflict may amount to grave breaches of the Geneva Conventions or violations of the laws and customs of war, and that they may also constitute a form of torture and inhuman treatment (*The Prosecutor* v. *Kunarac et al.*, IT-96-23 & IT-966-23/1-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgement of 12 June 2002, pp. 46-47, paras. 149-151; *Mrs. A.* v. *Bosnia and Herzegovina* (United Nations, Committee against Torture, Communication No. 854/2017, decision of 2 August 2019, UN doc. CAT/C/67/D/854/2017), para. 7.3; as to regional practice, see e.g. African Commission on Human and Peoples' Rights, General Comment No. 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5), pp. 17-18, paras. 57-58). The Court therefore considers that Uganda can be required to pay compensation for acts of rape and sexual violence, to the extent substantiated by the relevant evidence, even though such acts were not mentioned specifically in the 2005 Judgment (see paragraph 131 above).

189. Concerning the evidentiary basis of the DRC's claim, the Court reiterates that the victim identification forms provided by the DRC are of little probative value (see paragraphs 146-147 above). The Court is mindful that victims of sexual violence often experience psychological trauma and social stigma, and that, therefore, such violence is frequently underreported and notoriously difficult to document (see EECC, *Final Award, Ethiopia's Damages Claims, Decision of 17 August 2009, RIAA*, Vol. XXVI, pp. 675-676, paras. 104-105). However, the Court does not find it appropriate to overcome such evidentiary challenges by using unsubstantiated multipliers. Therefore, even if the 342 cases of sexual violence which are, according to the DRC, supported by the victim identification forms were deemed to be adequately substantiated, the Court could not accept the number of 1,740 such cases claimed by the DRC as being sufficiently proven.

190. The Court considers 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. This absence of adequate documentation has also been recognized by various United Nations reports. The MONUC special report on the events in Ituri, for example, notes that "[t]he exact number of female victims of rape or sexual slavery is impossible to estimate at this time" (United Nations, doc. S/2004/573 of 16 July 2004, para. 1). Similarly, the Mapping Report acknowledges its own shortcomings with regard to sexual violence:

> "Aware that such a methodology prevents full justice from being done to the numerous victims of sexual violence and fails to reflect appropriately the widespread use of this form of violence by all armed groups involved in the different conflicts in the DRC, it was decided from the outset to seek information and documents supporting the perpetration of sexual violence in certain contexts rather than seeking to confirm each individual case, the victims being unfortunately too numerous and dispersed across the whole country." (Mapping Report, para. 535.)

191. However, the Court finds that it is beyond doubt that rape and other forms of sexual violence were committed in the DRC on a large and widespread scale. The Mapping Report notes the "widespread use of this form of violence by all armed groups" and reiterates that the victims were "numerous" (Mapping Report, see also paras. 35 and 530). It provides various examples of rape in Ituri during the period of occupation involving

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members of the UPDF and other armed groups (*ibid.*, paras. 405, 408, 409, 416, 419) and outside Ituri by members of the UPDF (*ibid.*, paras. 330, 443). The MONUC special report on the events in Ituri observes that in that area "[c]ountless women were abducted and became 'war wives', while others were raped or sexually abused before being released" (United Nations, doc. S/2004/573 of 16 July 2004, para. 1). The ICC has found that rape and sexual violence occurred in Ituri during the period in which the district was occupied by Uganda, and that they amounted to a "common practice" (*The Prosecutor* v. *Bosco Ntaganda*, ICC-01/04-02/06, Trial Chamber VI, Judgment of 8 July 2019, paras. 293, 940-948, 1196 and 1199).

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192. Regarding the valuation of the harm suffered by victims of rape and sexual violence, the Court finds that the DRC has not provided sufficient evidence that would corroborate the alleged average amounts awarded by Congolese courts of US$23,200 per victim for "aggravated rape" and US$12,600 for rape. The Court takes note of an expert report submitted to the ICC relating to the situation in the DRC, which indicates that there is an emerging standard in Congolese courts of US$5,000 per victim being awarded in cases of rape (*The Prosecutor* v. *Bosco Ntaganda*, ICC-01/04-02/06, Trial Chamber VI, Reparations Order, 8 March 2021, para. 238).

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193. The Court recalls that it may, under the exceptional circumstances of the present case, award compensation in the form of a global sum, within the range of possibilities indicated by the evidence and taking into account equitable considerations (see paragraph 106 above). The Court notes that the available evidence for rape and sexual violence is less substantial than that for loss of life, and that it is not possible to determine even an approximate number of cases of rape and sexual violence attributable to Uganda. The Court can only find that a significant number of such injuries occurred (see paragraphs 190-191 above). Taking into account all the available evidence (see paragraphs 183-189 above), the methodologies proposed to assign a value to rape and sexual violence (see paragraph 192 above), as well as its jurisprudence and the pronouncements of other international bodies (see paragraphs 69-126 above), the Court will award compensation for rape and sexual violence as part of a global sum for all damage to persons (see paragraph 226 below).

4. Recruitment and deployment of child soldiers

194. The DRC claims US$30,000,000 as compensation for the recruitment of 2,500 child soldiers by Uganda and by armed groups supported by Uganda.

195. The DRC's claim is based on two specific instances of alleged recruitment of child soldiers, which it supports with three distinct pieces of evidence. First, the DRC refers to the United Nations Secretary-General's Sixth report on MONUC which indicates that, in 2000, "a considerable number" of children had been taken for military training to Uganda, about 600 of whom were about to be transferred to the custody of UNICEF or non-governmental organizations (United Nations, doc. S/2001/128 of 12 February 2001, para. 66). Second, the DRC relies on witness testimony before the ICC in the *Lubanga* case, allegedly referring to the same incident and putting the number of transferred children at 700. Third, the DRC invokes the Mapping Report, which notes that the MLC was engaged in the recruitment of child soldiers with "the backing of the Ugandan army", that the MLC "admitted to having 1,800 [child soldiers] within its ranks" (Mapping Report, para. 697) and that "all the armed groups in Ituri (UPC, FNI, FRPI, FAPC and PUSIC) are alleged to have recruited thousands of children along ethnic lines" (*ibid.*, para. 429).

196. The DRC requests a fixed sum of US$12,000 per child soldier, deriving this figure from the alleged practice of Congolese courts.

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197. Uganda asserts that the number of 600 children indicated in the Secretary-General's Sixth report on MONUC is contradicted by the Mapping Report. Moreover, Uganda argues that the same witness in the *Lubanga*

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case on whom the DRC relies indicated that a significant percentage of the children involved in this incident were over the age of 15 and could therefore not be classified as child soldiers.

198. Uganda also submits that the Mapping Report refers only to the recruitment of child soldiers by the MLC and that there is no evidence either in the Mapping Report or otherwise presented by the DRC demonstrating that the child soldiers in question were recruited by Uganda or trained in UPDF training camps. According to Uganda, the DRC claims compensation for the recruitment of child soldiers only with respect to Ituri. Uganda points out that the MLC had almost no presence in Ituri. In addition, Uganda maintains that it cannot be held responsible for acts of the MLC outside occupied Ituri and that the Court, in its 2005 Judgment, held that the MLC was neither created nor controlled by Uganda. Moreover, Uganda highlights that the DRC did not list the MLC among the armed groups for whose acts it claims reparation. With regard to valuation, Uganda objects to the DRC's method of assessing the injury suffered by child soldiers by reference to the amount awarded by Congolese courts for acts that the DRC considers have caused similar harm.

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199. In its 2005 Judgment, the Court found that "there [was] convincing evidence of the training in UPDF training camps of child soldiers and of the UPDF's failure to prevent the recruitment of child soldiers in areas under its control" (*I.C.J. Reports 2005*, p. 241, para. 210). The DRC's claim is thus encompassed by the 2005 Judgment.

200. The Court finds that there is limited evidence supporting the DRC's claims regarding the number of child soldiers recruited or deployed. The Court notes that the Secretary-General's Sixth report on MONUC found that, in the year 2000, 600 children who had apparently been transferred for military training to Uganda were soon to be repatriated by humanitarian organizations. In particular, the report recalls:

> "As indicated in my 6 December 2000 report, a considerable number of Congolese children were taken from the Bunia, Beni and Butembo region, apparently for military training in Uganda (para. 75). Concern has been expressed at the possibility that these children will be deployed back to the Democratic Republic of the Congo as soldiers. As the present report was being finalized, information was received that 600 children would be transferred to the custody of humanitarian organizations next week." (United Nations, doc. S/2001/128 of 12 February 2001, para. 66).

Furthermore, the Court takes note of the MONUC special report on the events in Ituri, according to which "[t]housands of children aged from 7 to 17 were drawn forcibly or voluntarily into armed groups" (United Nations, doc. S/2004/573 of 16 July 2004, para. 1). This report contains various indications which confirm that a significant number of children were recruited or deployed as child soldiers in Ituri (*ibid.*, paras. 39, 147 and 148). The Mapping Report also indicates that "[a]ccording to child protection agencies working in the disarmament, demobilisation and reintegration (DDR) of children, at least 30,000 children were recruited or used by the armed forces or groups during the conflict" (Mapping Report, para. 673).

201. The Court takes note of Uganda's reliance on the Mapping Report, according to which, ultimately, only 163 children were repatriated (*ibid.*, para. 429). However, the relevant section of the Mapping Report notes that in 2000 "at least 163 of these children were sent to Uganda to undergo military training at a UPDF camp in Kyankwanzi before finally being repatriated to Ituri by UNICEF in February 2001" *(ibid.)*. The Court reads the Mapping Report to mean that 163 out of a larger number of children were ultimately repatriated by UNICEF to Ituri in 2001.

202. This reading of the Mapping Report is supported by witness testimony concerning the same events in the *Lubanga* trial at the ICC. In this case, witness P-0116 recalled that, in 2000, the accused had sent children to Uganda:

> "P-0116, who was based in Bunia during the period shortly before the timeframe of the charges, testified he was told that the accused had sent children to Uganda during the summer of 2000, and that Mr Lubanga was with them at the camp . . . Some of those who witnessed this transfer of about 700 youths to Uganda told P-0116 they had been taken on Ugandan cargo planes, and it appeared that the accused was in contact with the Ugandan military authorities who gave him the

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necessary military support." (*The Prosecutor* v. *Thomas Lubanga Dyilo*, ICC-01/04-01/06, Trial Chamber I, Judgment pursuant to Article 74 of the Statute, 14 March 2012, paras. 1031 and 1033.)

203. The Court notes Uganda's point that P-0116 was not an eyewitness and recalls that it affords limited evidentiary weight to hearsay testimony (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 42, para. 68; *Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, pp. 16-17). However, the Court is also mindful of the fact that the witness was assessed as credible by an ICC Trial Chamber and that his or her description of the events matches the one set out in the Mapping Report.

204. Regarding the alleged support provided by Uganda for the recruitment and deployment of child soldiers by the MLC, the Mapping Report notes that "[t]he MLC's army, the ALC, with the backing of the Ugandan Army, the UPDF, allegedly also recruited children, primarily in Mbandaka, Equateur Province" (Mapping Report, para. 697). This report also mentions that, in 2001, the MLC admitted to having 1,800 child soldiers within its ranks *(ibid.)*. The Court is not convinced by Uganda's argument that the DRC has limited its claim geographically to Ituri. While it is true that some parts of the DRC's Memorial give the impression that all 2,500 instances of the recruitment of child soldiers are claimed to have occurred in Ituri, other sections note that "such practices were also reported in other regions, including the province of Equateur".

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205. Concerning the valuation of the harm caused with respect to child soldiers, the Court observes that the DRC did not provide evidence for the sums allegedly awarded by Congolese courts. The Court further notes that the Court-appointed expert suggested basing the valuation of the injury suffered by child soldiers on an analogy with the UNCC Category E claims. However, this category pertained to individuals who had been taken as hostages or were illegally detained, and did not, therefore, reflect the material injury and psychological trauma sustained by child soldiers in the DRC. The Court further observes that, in the *Lubanga* case, the ICC Trial Chamber set the amount of compensation for such a victim *ex aequo et bono* at US$8,000, taking into account, *inter alia*, decisions of Congolese courts (*The Prosecutor* v. *Thomas Lubanga Dyilo*, ICC-01/04-01/06, Trial Chamber II, Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable, 21 December 2017, para. 259). In the framework of the present reparation proceedings, these methodologies do not provide a sufficient basis for assigning a specific valuation of damage in respect of a child soldier.

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206. The Court recalls that it may, under the exceptional circumstances of the present case, award compensation in the form of a global sum, within the range of possibilities indicated by the evidence and taking into account equitable considerations (see paragraph 106 above). The Court notes that the available evidence for the recruitment and deployment of child soldiers provides a range of the possible number of victims in relation to whom Uganda owes reparation (see paragraphs 200-204 above). Taking into account all the available evidence (see paragraphs 195-204 above), the methodologies proposed to assign a value to the damage caused by the recruitment and deployment of child soldiers (see paragraph 205 above), as well as its jurisprudence and the pronouncements of other international bodies (see paragraphs 69-126 above), the Court will award compensation for the recruitment and deployment of child soldiers as part of a global sum for all damage to persons (see paragraph 226 below).

5. Displacement of populations

207. The DRC claims US$186,853,800 in.compensation for the flight and displacement of parts of the population in Ituri and elsewhere in the DRC.

208. The DRC estimates that 600,000 persons were forced to flee their town or village as a consequence of Uganda's failure to comply with its obligations as an occupying Power in Ituri between 1998 and 2003. To

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substantiate its claim, the DRC refers, in particular, to the Secretary- General's Second special report on MONUC, the MONUC special report on the events in Ituri, and the Mapping Report.

209. The DRC further submits that many people were forced to flee in order to escape the impact of the war in other parts of the DRC. However, the DRC also asserts that since it would "not [be] possible to derive any exact figures from" the records, it has limited its claim to 433 cases of displacement in Beni, 93 in.Butembo and 12 in.Gemena. These instances are allegedly identified and recorded in the victim identification forms collected by the Congolese Commission of Inquiry. In addition, relying on the Inter-Agency Report, the DRC asserts that 68,000 persons were internally displaced as a result of the confrontations between Ugandan and Rwandan troops in Kisangani. The DRC thus claims compensation for a total of 668,538 displaced persons.

210. Regarding the valuation of these cases of flight and displacement, the DRC submits that a distinction must be made between the situation of persons who fled their homes in order to escape deliberate acts of violence against civilian populations and the situation of those who were driven from their homes by the fighting. According to the DRC, the first of these scenarios mainly occurred in Ituri and should be compensated by a sum of US$300 per person, amounting to a total of US$180,000,000. The second scenario allegedly applies to those who fled their homes for shorter periods in areas outside Ituri, mainly in Kisangani, and the ensuing damage should be valued at US$100 per person, amounting to a total of US$6,853,800. The DRC explains that these sums are meant to reflect the material harm ([days of displacement]×[daily cost of living]) combined with a lump sum for moral injury suffered.

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211. Uganda criticizes the DRC's claim for being based on broad estimates and not on a case-by-case analysis relating to specific groups of persons displaced in identifiable locations on specific dates. Uganda asserts that the DRC derives the number of allegedly displaced persons in Ituri from an unsubstantiated estimate in a single United Nations report. Furthermore, Uganda submits that there is no evidence indicating that such displacements occurred as a result of deliberate efforts by Uganda to make civilians flee or were a direct result of Uganda's violation of the *jus ad bellum*. According to Uganda, with respect to Ituri, the DRC has also failed to show that Uganda's exercise of due diligence obligations would have sufficed to prevent the alleged displacement.

212. Regarding the situation in Kisangani, Uganda highlights that the Mapping Report did not adopt the estimate of 68,000 displaced persons contained in the Inter-Agency Report, stating merely that "thousands of people" had been displaced. With respect to displacement in other parts of the DRC, Uganda reiterates that the victim identification forms are not credible evidence.

213. With regard to the valuation of the injury resulting from the displacement of persons, Uganda submits that the DRC has not explained, other than by asserting that they are reasonable, why the amounts of US$300 and US$100 should, respectively, be the measure of damage for persons displaced as a result of deliberate violence and for other displaced persons.

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214. The Court reiterates that, in its 2005 Judgment, it held Uganda responsible for indiscriminate and deliberate attacks on the civilian population and for its failure to protect the civilian population in the course of fighting against other troops (*I.C.J. Reports 2005*, p. 241, para. 211). In addition, the Court found that Uganda did not comply with its obligations as an occupying Power and incited ethnic conflict in Ituri *(ibid.)*. Uganda is under an obligation to make reparation for any displacement of civilians that was caused in a sufficiently direct and certain way by these acts (see paragraphs 78 and 93 above). This includes cases of displacement that have a sufficiently direct and certain causal nexus to Uganda's violation of the *jus ad bellum*, even if they were not accompanied by violations of international humanitarian law or human rights obligations (EECC, *Final Award, Ethiopia's Damages Claims, Decision of 17 August 2009, RIAA*, Vol. XXVI, p. 731, para. 322).

215. The Court recognizes that a large majority of cases of displacement for which the DRC seeks compensation occurred in Ituri. In this regard, the Court takes note of the Secretary-General's Second special report on MONUC

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which states that, "[a]ccording to the Office for the Coordination of Humanitarian Affairs, between 500,000 and 600,000 internally displaced persons" were dispersed throughout Ituri as at May 2003 (United Nations, doc. S/2003/566 of 27 May 2003, para. 10). While this number appears plausible given the magnitude of the conflict and its impact on Ituri, the Court recalls that, in its 2005 Judgment, it decided not to take into account elements of United Nations reports which rely only on second-hand sources (*I.C.J. Reports 2005*, p. 225, para. 159). Moreover, the Court cannot confirm such a large number based on an estimate from a single report. The Court reiterates that, in the present context, it considers United Nations reports as reliable evidence only "to the extent that they are of probative value and are corroborated, if necessary, by other credible sources" (2005 Judgment, *I.C.J. Reports 2005*, p. 239, para. 205).

216. The Court observes that the number of displaced persons claimed by the DRC finds support in the MONUC special report on the events in Ituri, which notes that "[m]ore than 600,000 [were] forced to flee from their homes" between January 2002 and December 2003 (United Nations, doc. S/2004/573 of 16 July 2004, para. 40). However, the MONUC special report does not indicate the source for its estimate. In addition, the Court points out that the period covered by the report extends to December 2003 and thus a few months beyond the temporal scope of Uganda's occupation of Ituri and the 2005 Judgment. An earlier report prepared by the Special Rapporteur on the human rights situation in the DRC, to which the Court also referred in its 2005 Judgment (*I.C.J. Reports 2005*, p. 240, para. 209), notes that ethnic tensions fuelled by Uganda had displaced 50,000 persons by August 2000 (United Nations, docs. A/55/403 of 20 September 2000, para. 26, and E/CN.4/2001/40 of 1 February 2001, para. 31). While this report gives a useful indication of how the situation in Ituri evolved during the early stages of the conflict, it does not provide data for subsequent years and can, as such, neither corroborate nor disprove the figure claimed by the DRC.

217. A report prepared in July 2003 by the non-governmental organization Human Rights Watch (hereinafter "HRW"), which the Court referred to in its 2005 Judgment, also adopts the figure of 500,000 displaced civilians (HRW, "Ituri: Covered in Blood. Ethnically Targeted Violence in Northeastern DR Congo", p. 50). However, the Court notes that the source used for this figure is cited as "Estimates of the UN Office for the Co-ordination of Humanitarian Affairs (OCHA), January 2003" and is thus likely the same as the one relied on by the Secretary-General's Second special report on MONUC. Consequently, the Court cannot rule out the possibility that all three reports indicating a number of more than 500,000 displaced persons were based on the same source, whose methodology, accuracy and probative value the Court is unable to ascertain.

218. The Court acknowledges, however, that additional evidence has been presented with regard to specific instances of large-scale displacement in Ituri. The MONUC special report on the events in Ituri describes, in detail, large-scale operations against Lendu villages by UPDF soldiers and allied militias from February to April 2002 in.the Irumu region, resulting in 40,000 displaced persons (United Nations, doc. S/2004/573 of 16 July 2004, para. 42). Moreover, the special report recalls how 2,000 individuals were displaced as a result of UPDF troops failing to stop an attack on the town of Mabanga by local Hema and Gegere militias in August 2002 (*ibid.*, para. 45). According to the same report, the subsequent fighting in Bunia, in which the UPDF was involved, and particularly the massacres conducted by the Union des patriotes congolais (hereinafter the "UPC"), resulted in the displacement of 10,000 families (*ibid.*, para. 49). Finally, the special report describes the large-scale "Chikana Namukono" military operation that was conducted by the UPC between January and May 2003 in.the Lipri, Bambu and Kobu area, and which forced 60,000 civilians to flee into the surrounding bush (*ibid.*, para. 70). The Court notes that the description of these events is not based on third-party estimates but on eyewitness testimony collected by MONUC human rights investigators. In addition, the Court observes that the Mapping Report mentions a further instance in the Irumu region in September 2002, where the killing of Hema by troops of the Forces de résistance patriotique en Ituri (hereinafter the "FRPI") resulted in "several thousand" displaced persons (Mapping Report, para. 413).

219. More specific evidence is also available concerning the displacement of persons in locations outside Ituri, particularly from the city of Kisangani. In its 2005 Judgment, the Court recognized that

> "[a]ccording to the report of the inter-agency assessment mission to Kisangani (established pursuant to paragraph 14 of Security Council resolution 1304 (2000) (doc. S/2000/1153 of 4 December 2000,

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> paras. 15-16)), the armed conflict between Ugandan and Rwandan forces in Kisangani led to 'fighting spreading into residential areas and indiscriminate shelling occurring for 6 days . . . 65,000 residents were forced to flee the fighting and seek refuge in nearby forests'" (*I.C.J. Reports 2005*, p. 240, para. 208).

220. The Court referred to this section of the Inter-Agency Report to establish that Uganda had breached various obligations under international law, and not to establish the precise extent of the damage caused by these violations. In this regard, notwithstanding the Court's earlier observations regarding the Inter-Agency Report, it cannot ignore new evidence that has since emerged. The Mapping Report adopts a more rigorous methodology than the Inter-Agency Report (see paragraph 152 above). In particular, the Mapping Report did not adopt the number of 68,000 displaced persons in relation to the "Six-Day War" of June 2000 in.Kisangani but more cautiously noted that the encounter caused "thousands of people to be displaced" (Mapping Report, para. 363). In the absence of further evidence, the Court cannot therefore adopt the number of 68,000 persons displaced in Kisangani, as claimed by the DRC.

221. The Court recalls that the displacements in Kisangani were the result of the fighting between Ugandan and Rwandan troops. Having considered the available evidence, the Court attaches particular weight to the conclusion in the Mapping Report that "thousands" of persons were displaced from Kisangani as a result of these confrontations. In the view of the DRC, Uganda owes reparation for all the damage in Kisangani, because that damage had both cumulative and complementary causes. Uganda, on the other hand, maintains that the two States separately committed internationally wrongful acts and that each is responsible only for the damage caused by its own action. The Court considers that each State is responsible for damage in Kisangani that was caused by its own armed forces acting independently. However, based on the very limited evidence available to it, the Court can form only a general appreciation of the total number of persons displaced by the conflict in Kisangani. Under these circumstances, the Court is not in a position to apportion to Uganda a specific share of the total number of displaced persons. It has taken into account the available evidence on the displacement of persons from Kisangani in arriving at the global sum awarded for all injuries to persons (see paragraph 106 above and paragraph 226 below).

222. Regarding displacements that have allegedly occurred in other parts of the DRC, the Court notes that the only evidence submitted by the DRC consists of the victim identification forms. These forms can be accorded only very limited probative value (see paragraphs 146-147 above).

223. In conclusion, the Court finds that the evidence presented by the DRC does not establish a sufficiently certain number of displaced persons for whom compensation could be awarded separately. The evidence does, however, indicate a range of possibilities resulting from substantiated estimates. The Court is convinced that Uganda owes reparation in relation to a significant number of displaced persons, taking into account that displacements in Ituri alone appear to have been in the range of 100,000 to 500,000 persons (see paragraphs 215-218 above).

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224. Regarding the valuation of loss resulting from displacement, the Court sees no basis to draw a distinction between two types of displacement, as suggested by the DRC, based on whether the victims fled their homes in order to escape deliberate acts of violence against civilian populations or were driven from their homes by the fighting. Considerations more relevant to the valuation of damage caused by displacement would include the length of time that an individual was displaced and the difficulty of the circumstances endured during displacement. These are matters as to which the DRC did not offer evidence. The Court also notes that the DRC does not sufficiently explain the basis for the figures of US$300 and US$100 sought for the two types of displacement that it identifies.

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225. The Court recalls that it may, under the exceptional circumstances of the present case, award compensation in the form of a global sum, within the range of possibilities indicated by the evidence and taking into account

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equitable considerations (see paragraph 106 above). The Court notes that the available evidence for the displacement of persons provides a range of the possible number of victims attributable to Uganda (see paragraph 223 above). Taking into account all the available evidence (see paragraphs 208-222 above), possible methodologies to assign a value to the displacement of a person (see paragraph 224 above), as well as its jurisprudence and the pronouncements of other international bodies (see paragraphs 69-126 above), the Court will award compensation for the displacement of persons as part of a global sum for all damage to persons (see paragraph 226 below).

6. Conclusion

226. On the basis of all the preceding considerations (see paragraphs 133-225 above, specifically 166, 181, 193, 206 and 225), and given that Uganda has not established that particular injuries alleged by the DRC in Ituri were not caused by its failure to meet its obligations as an occupying Power, the Court finds it appropriate to award a single global sum of US$225,000,000 for the loss of life and other damage to persons.

B. DAMAGE TO PROPERTY

227. The DRC also maintains that Uganda must make reparation in the form of compensation for damage to property.

228. In the operative part of its 2005 Judgment, the Court found that

> "the Republic of Uganda, by the conduct of its armed forces, which . . . destroyed villages and civilian buildings, failed to distinguish between civilian and military targets and to protect the civilian population in fighting with other combatants . . . incited ethnic conflict and failed to take measures to put an end to such conflict; as well as by its failure, as an occupying Power, to take measures to respect and ensure respect for human rights and international humanitarian law in Ituri district, violated its obligations under international human rights law and international humanitarian law" (*I.C.J. Reports 2005*, p. 280, para. 345, subpara. (3) of the operative part);

and

> "that the Republic of Uganda, by engaging in military activities against the Democratic Republic of the Congo on the latter's territory, by occupying Ituri and by actively extending military, logistic, economic and financial support to irregular forces having operated on the territory of the DRC, violated the principle of non-use of force in international relations and the principle of non-intervention" (*ibid.*, p. 280, para. 345, subpara. (1) of the operative part).

* *

229. The DRC asks that Uganda pay US$239,971,970 for damage to property. This claim consists of several elements, which are detailed below.

230. With respect to damage in Ituri, the DRC claims US$12,956,200 for damage to private dwellings, US$21,250,000 for damage to civilian infrastructure, in particular schools, health facilities and administrative buildings, and US$7,318,413 for damage due to looting. Together these elements of the claim amount to US$41,524,613.

231. The DRC alleges that 8,693 private dwellings, 200 schools, 50 health facilities and 50 administrative buildings were destroyed in Ituri.

232. Regarding damage to property outside Ituri, the DRC claims US$25,628,075 for damage to private dwellings and civilian infrastructure in places where the UPDF operated (Kisangani, Beni, Butembo and Gemena). After initially revising this figure downward in response to questions asked by the Court, in its final submissions the DRC ultimately reverted to claiming the original amount. In addition, the DRC claims US$97,412,090 for damage to its electric company, Société nationale d'électricité (hereinafter "SNEL"), and US$69,417,192 for damage to certain property of its armed forces. Together, these elements of the claim amount, according to the DRC, to US$198,447,357.

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233. To particularize its claims concerning private dwellings and looting, the DRC relies on aggregate tables allegedly prepared on the basis of data contained in its victim identification forms. The DRC's claims for damage to infrastructure are based on United Nations reports, while those concerning SNEL and the property of the Congolese armed forces rely on summary reports prepared by these entities. The DRC also proposes that the Court, in determining its claim regarding damage to property, use an "approach based on approximate number and cost".

234. The DRC estimates the value of a "basic" private dwelling at US$300, dwellings of "medium" quality at US$5,000, and "luxury" dwellings at US$10,000. It considers that 80 per cent of the private houses destroyed were "basic". The DRC submits that the value of each school and health facility should be set at US$75,000 and the value of each administrative building at US$50,000. Regarding looting, the DRC bases both its claim for the extent of the damage suffered and its valuation on records of its investigators, as reflected in the above-mentioned aggregate tables.

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235. Uganda submits that the DRC has failed "to sustain its burden of proving these property claims with convincing evidence that shows, with a high degree of certainty, the exact injury suffered as a result of specific internationally wrongful acts of Uganda, or the valuation of the alleged injury". Uganda stresses that this standard also pertains to damage to property in Ituri, where its status as an occupying Power "does not relieve the DRC of its burden . . . to prove specific harms inflicted by other actors in Ituri, prove specific measures that Uganda failed to take as an occupying Power, and prove the causal nexus between such omissions and the harms". Uganda alleges that the DRC has not provided sufficient documentation or information as evidence to prove its claims or to show a causal nexus with Uganda's internationally wrongful acts. It also argues that the credibility of the numbers in the summary tables submitted by the DRC is undermined by arithmetic errors and contradictory information.

236. Uganda considers that the DRC's claim relating to the property of the Congolese armed forces was not raised at any time during the merits phase and therefore cannot serve as a basis for an award of damages in this phase, adding that the claim would, in any case, fail for lack of proof.

237. Responding to the DRC's argument that the Court would need to take the "specific circumstances and characteristics" of the case into account, Uganda points out that victims at the ICC produced residence certificates, habitation certificates and other documents of a similar kind. Uganda also emphasizes that the EECC "was furnished with engineering studies, building-by-building assessment of damaged structures, aerial and ground-level photography and affidavits by public works officials and residents" and that the DRC has not produced similar evidence.

238. Concerning the valuation of dwellings in Ituri, Uganda notes that the Court-appointed expert Mr. Senogles confirmed that the values asserted by the DRC are "not evidenced and not explained". Uganda maintains that the DRC would have been in a position to submit at least some supporting materials in the form of bills, receipts or other documents that might corroborate the alleged costs. It voices similar concerns with regard to the alleged value of administrative buildings, as well as property damage outside Ituri. Moreover, Uganda asserts that the "evidentiary discount factors" applied by Mr. Senogles (see paragraph 239 below) cannot be used to remedy this alleged lack of evidence. Finally, Uganda submits that values asserted for allegedly looted individual property are too high and not based on corroborating information.

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239. The Court-appointed expert Mr. Senogles was asked under the terms of reference to respond to the following question:

> "Based on the evidence available in the case file and documents publicly available, particularly the United Nations Reports mentioned in the 2005 Judgment, what is the approximate number and type of properties damaged or destroyed by Ugandan armed forces in the relevant period in the district of Ituri and in June 2000 in.Kisangani?"

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The expert bases his factual assessments exclusively on the claims and allegations made in the Memorial of the DRC, without considering additional sources of information, such as United Nations reports. For private dwellings in Ituri, the expert simply adopts the number of luxury, medium-quality and basic dwellings set out in one of the aggregate tables presented by the DRC (26, 199 and 13,384 respectively), and multiplies those figures by the unitary values put forward by the DRC itself. For other claims, the expert applies "evidentiary discount factors" to certain aspects of the claim in order "to take account of the inherent uncertainty in the way [the] claim has been put forward". As a general matter, the expert notes "the absence of granular detail or evidence in respect of each individual property" but also finds it "understandable . . . for the damages claim in respect of thousands of individual properties to have been formulated in such a way".

1. General aspects

240. The Court recalls that, in its 2005 Judgment, it found that Uganda was responsible for damage to property, both inside and outside Ituri. The Court concluded that UPDF troops "destroyed villages and civilian buildings" and "failed to distinguish between civilian and military targets" (*I.C.J. Reports 2005*, p. 241, para. 211).

241. In the same Judgment, the Court also determined that Uganda "fail[ed], as an occupying Power, to take measures to respect and ensure respect for human rights and international humanitarian law in Ituri district" (*ibid.*, p. 280, para. 345, subpara. (3) of the operative part). The Court recalls that, in this phase of the proceedings, it is for Uganda to establish that the damage to particular property in Ituri alleged by the DRC was not caused by its 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 damage (see paragraph 78 above).

242. The Court emphasizes that, given the extraordinary character of the conflict and the ensuing difficulty of gathering detailed evidence for most forms of property damage, the DRC cannot be expected to provide specific documentation for each individual building destroyed or seriously damaged during the five years of Uganda's unlawful military involvement in the DRC (see paragraph 114 above). At the same time, the Court considers 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, particularly in relation to assets and infrastructure owned by the DRC itself and of which it was in possession and control. The Court will bear these considerations in mind when assessing the evidence tendered by the DRC.

2. Ituri

243. In the Court's view, the DRC offers no convincing evidence for the number of 8,693 private dwellings that it claims have been destroyed in Ituri. Some of the victim identification forms provide a certain impression of the different types of property lost by individuals. These forms do not, however, contain information to substantiate the alleged extent of the damage and the nature and value of the property affected (see paragraphs 146-147 above). Therefore, the victim identification forms submitted — and the aggregate tables allegedly prepared on the basis of such forms — do not contribute to identifying the scale of damage even within a possible range. There are also substantial inconsistencies with respect to the claim for damage to private dwellings in Ituri. For instance, in its Memorial, the DRC states that 80 per cent of the private dwellings destroyed were "basic" *(habitations légères)*. However, the aggregate table presented by the DRC for Ituri indicates that 98 per cent of them were "basic".

244. The DRC has based its claim that 200 schools were destroyed in Ituri on an unsubstantiated estimate in the Secretary-General's Second special report on MONUC which is not corroborated by the Mapping Report. Uganda has pointed out that the document in which the DRC lists lost properties only refers to 18 schools and 12 kindergartens.

245. Nor does the DRC substantiate the number of 50 administrative buildings and 50 health facilities that it alleges have been destroyed in Ituri. The DRC merely considers it "reasonable to assume" that 50 clinics and hospitals and 50 administrative buildings were destroyed as a consequence of Uganda's failure to comply with its obligations as an occupying Power in Ituri, without providing any further evidence. The DRC's claim with respect to looting of property in Ituri is based on general references in international reports and on victim identification forms whose probative value is limited and which often do not identify the specific property that was looted.

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Finally, the DRC does not substantiate its assessment regarding the average valuations of the buildings and other forms of property destroyed or looted in Ituri.

246. The evidence presented by the DRC does not permit the Court to even approximate the extent of the damage, and the report of the Court-appointed expert does not provide any relevant additional information. The Court must therefore base its own assessment on United Nations reports, particularly on the Mapping Report. The Court considers that this report contains several credible findings on the destruction of "dwellings", "buildings", "villages", "hospitals" and "schools" in Ituri. For example, it states with respect to Ituri that, on 31 August 2002, elements of the UPC, which had received logistical support from the UPDF, set "1,000 houses" on fire in Walendu Bindi in the Irumu region (Mapping Report, para. 413). The Mapping Report also states that, on 15 October 2002, UPC militiamen destroyed "more than 500 buildings" in Zumbe in the Walendu Tasi community (*ibid.*, para. 414) and that, on 6 March 2003, elements of the UPDF, the Front national intégrationiste and the FRPI, in the course of a joint military operation, "destroyed numerous buildings, private homes and premises used by local and international NGOs" (*ibid.*, para. 421). Furthermore, the Mapping Report identifies at least ten occasions where entire villages were set on fire by the UPDF or armed groups operating in Ituri (*ibid.*, paras. 366, 370, 414 and 422), and other incidents where hundreds of buildings were burned or destroyed during attacks (*ibid.*, paras. 409 and 413-414). The Court also takes into consideration that the MONUC special report on the events in Ituri contains various descriptions of entire villages and buildings that were burned down or otherwise destroyed by armed groups in Ituri (United Nations, doc. S/2004/573 of 16 July 2004, paras. 47 and 63).

247. The Court further notes that the Mapping Report and other United Nations reports establish a convincing record of large-scale pillaging in Ituri, both by Uganda's armed forces and by other actors (Mapping Report, paras. 366, 369-370, 405, 407-408, 413-414, 416, 419-421 and 428; MONUC special report on the events in Ituri, United Nations, doc. S/2004/573 of 16 July 2004, paras. 42, 49, 51, 73-74, 100 and 114).

248. With regard to the valuation of the property lost, the Court considers that the DRC has not provided convincing evidence supporting the alleged average value of private dwellings, public buildings and property looted. This is acknowledged in the report of the Court-appointed expert Mr. Senogles. The expert nevertheless recommends that the Court adopt the figures proposed by the DRC with regard to private dwellings, based on their "reasonableness". With regard to different forms of property damage, the expert applies unexplained "evidentiary discount factor [s]", i.e. 25 per cent for public buildings and 50 per cent for looting in Ituri. The Court does not consider that the expert has sufficiently substantiated the variable "evidentiary discount factors" he proposes to apply.

249. The Court considers that proceedings before the ICC relating to the same conflict are relevant for the purposes of valuation. In the *Katanga* case, Trial Chamber II assessed the harm connected to the destruction of each house in the village of Bogoro (Ituri) in February 2003, at US$600 (*The Prosecutor* v. *Germain Katanga*, No. ICC-01/04/01/07, Trial Chamber II, Order for Reparations pursuant to Article 75 of the Statute, 24 March 2017, para. 195). As to the valuation of schools and health care centres, the ICC's Trust Fund for Victims has provided an estimate, not addressed by the Trial Chamber, that it would cost US$50,000 to rebuild a school or health care centre in Ituri as at February 2020 (*The Prosecutor* v. *Bosco Ntaganda*, No. ICC-01/04-02/06, Trial Chamber VI, Reparations Order, 8 March 2021, para. 236 (iv); *The Prosecutor* v. *Bosco Ntaganda*, No. ICC-01/04-02/06, Trial Chamber VI, Trust Fund for Victims' observations relevant to reparations, 28 February 2020, para. 130 (d)).

3. Outside Ituri

250. As to damage outside Ituri (see in general paragraphs 82-84 above), the DRC relies primarily on aggregate tables allegedly prepared on the basis of victim identification forms and on the Inter-Agency Report, which provides a list of incidents that resulted in damage to private dwellings, schools and administrative buildings in Kisangani during June 2000. The DRC has not satisfactorily responded to the Court's request to explain its methodology for the calculation of property damage claimed in Kisangani, Beni and Butembo, locations where the UPDF is known to have operated. The Court also notes that, by extending the claim to all damage to property that would not have occurred "but for" the unlawful use of force by Uganda, the DRC disregards the fact that the Court decided, in its 2005 Judgment, that armed groups operating outside Ituri were not under the control of Uganda (*I.C.J. Reports 2005*, p. 226, para. 160, pp. 230-231, para. 177, and p. 253, para. 247). Therefore, even if the

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Court were able to determine the extent of damage to property outside Ituri, it has not been provided with sufficient evidence regarding the question of which property damage was caused by Uganda. Concerning the operations of the UPDF in Beni and Butembo, the Mapping Report confirms several incidents that resulted in substantial destruction of property without, however, indicating the extent of such destruction (Mapping Report, paras. 330, 347, 348, 349, 361 and 443).

251. The evidence presented by the DRC does not permit the Court to assess the extent of the damage even approximately, and the report of the Court-appointed expert does not provide any relevant additional information. Mr. Senogles simply applies unexplained "discount factors" of 25 per cent to the DRC's claims with respect to Beni, Butembo and Gemena, and 40 per cent to the claim relating to Kisangani.

252. The Court notes that, with respect to Kisangani, the Mapping Report refers to the destruction of "over 400 private homes and . . . serious damage to public and commercial properties, places of worship . . . educational institutions and healthcare facilities, including hospitals" during indiscriminate attacks with heavy weapons between the Ugandan and Rwandan armed forces from 5 to 10 June 2000 (Mapping Report, para. 363). The Mapping Report thus corroborates the findings of the Inter-Agency Report (United Nations, doc. S/2000/1153 of 4 December 2000, paras. 15-16, 57 and tables 1 and 2), which the Court considered to be a reliable source in its 2005 Judgment (*I.C.J. Reports 2005*, p. 240, para. 208).

253. The Court considers that the Mapping Report and the Inter-Agency Report contain sufficient evidence to conclude that Uganda caused extensive property damage in Kisangani. In the view of the DRC, Uganda owes reparation for all the damage in Kisangani, because that damage had both cumulative and complementary causes. Uganda, on the other hand, maintains that the two States, Uganda and Rwanda, separately committed internationally wrongful acts and that each is responsible only for the damage caused by its own wrongful actions. The Court considers that each State is responsible for damage in Kisangani that was caused by its own armed forces acting independently. However, based on the very limited evidence available to it, the Court is not in a position to apportion a specific share of the damage to Uganda. It has taken into account the available evidence on damage to property in Kisangani in arriving at the global sum awarded for all damage to property (see paragraph 258 below).

4. Société nationale d'électricité (SNEL)

254. The claim of the DRC for damage caused to SNEL forms a large part (US$97,412,090) of the overall claim for damage to property (US$239,971,970). It is possible that, given the character of the conflict and the scale of the hostilities, the company suffered at least some damage (Inter-Agency Report, para. 57). However, the brief and rudimentary report on which the DRC relies was prepared by SNEL in 2016, shortly before the filing of the Memorial on the question of reparation. In this connection, the Court recalls that it "will treat with caution evidentiary materials specially prepared for this case" (2005 Judgment, *I.C.J. Reports 2005*, p. 201, para. 61). The report by SNEL does not contain evidence that would substantiate the extent and valuation of damage claimed, or the responsibility of Uganda for any damage, nor is it corroborated by other evidence before the Court. The report of the Court-appointed expert is unhelpful in this respect, as his recommendation is based on the amounts claimed by the DRC and merely applies an unexplained 40 per cent "discount factor".

255. The Court notes that SNEL is a public entity which, as a national service provider, is subject to specific supervision by the Government of the DRC. Given the Government's close relationship with SNEL, in particular the fact that it likely has relevant documents in its possession, the DRC could have been expected to provide some evidence substantiating its claim to the Court. Under these circumstances, the Court considers that the DRC has not discharged its burden of proof regarding its claim for damage to SNEL.

5. Military property

256. Similar considerations apply to the DRC's claim for damage to certain property of its armed forces (US$69,417,192). The DRC substantiates this claim only by way of a brief and rudimentary report that was prepared by DRC officials shortly before the filing of its Memorial on the question of reparation. This report does not provide a sufficient basis for the Court to determine the existence of the damage claimed, the responsibility of Uganda for such damage or its valuation. Given the direct authority of the Government over its armed forces, the DRC could have

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been expected to substantiate its claims more fully, which it has not done. The Court dismisses this claim of the DRC for lack of evidence, and therefore does not address any other question in relation to this claim.

6. Conclusion

257. The Court finds that the evidence presented by the DRC regarding damage to property is particularly limited. The Court is nevertheless persuaded that a significant amount of damage to property was caused by Uganda's unlawful conduct, as the Court found in its 2005 Judgment (*I.C.J. Reports 2005*, p. 241, para. 211). The Mapping Report, in particular, provides reliable and corroborated information about many instances of damage to property caused by Uganda, and also by other actors in Ituri (see paragraphs 246, 247, 252 and 253 above). The Court also concludes that Uganda has not established that the particular damage to property alleged by the DRC in Ituri was not caused by Uganda's failure to meet its obligations as an occupying Power.

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258. The Court recalls that it may, under the exceptional circumstances of the present case, award compensation in the form of a global sum, within the range of possibilities indicated by the evidence and taking into account equitable considerations (see paragraph 106 above). The Court notes that the available evidence in relation to damage to property caused by Uganda is limited, but the Mapping Report at least substantiates many instances of damage to property caused by Uganda. Taking into account all the available evidence (see paragraphs 230-253 above), the proposals regarding the assignment of value to damage to property (see paragraphs 234-235 and 239 above), as well as its jurisprudence and the pronouncements of other international bodies (see paragraphs 69-126 above), the Court will award compensation for damage to property as a global sum of US$40,000,000 (see paragraph 106 above).

C. Damage related to natural resources

259. In its 2005 Judgment, the Court found that

> "the Republic of Uganda, by acts of looting, plundering and exploitation of Congolese natural resources committed by members of the Ugandan armed forces in the territory of the Democratic Republic of the Congo and by its failure to comply with its obligations as an occupying Power in Ituri district to prevent acts of looting, plundering and exploitation of Congolese natural resources, violated obligations owed to the Democratic Republic of the Congo under international law" (*I.C.J. Reports 2005*, pp. 280-281, para. 345, subpara. (4) of the operative part).

The Court recalls that both the DRC and Uganda are parties to the African Charter on Human and Peoples' Rights of 27 June 1981, Article 21, paragraph 2, of which states that "[i]n case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation".

* *

260. In its final submissions presented at the oral proceedings, the DRC asked the Court to adjudge and declare that Uganda is required to pay US$1,043,563,809 as compensation for damage to Congolese natural resources caused by acts of looting, plundering and exploitation. This sum comprises claims for the loss of minerals, including gold, diamonds, coltan, tin and tungsten, for the loss of coffee and timber, for damage to flora through deforestation, and damage to fauna.

261. The DRC relies on the 2005 Judgment, in which the Court found that there was persuasive and credible evidence to establish that Uganda had violated its international obligations by exploiting natural resources, notably as an occupying Power. In this regard, the DRC invokes the principle of *res judicata*. It argues that, in order to demonstrate the "exact injury", it is not necessary to prove that the injury in question is linked to a specific internationally wrongful act with absolute certainty. It further argues that a lower evidentiary standard applies to natural resources, as laid down by the Court in the case concerning *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,

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paras. 33-35). The DRC considers this standard to be adequate in light of the special circumstances which "stem from five years of looting, plundering and exploitation of natural resources across a territory and by persons not under the DRC's control".

262. To substantiate the extent and amount of its claim, the DRC uses different methodologies depending on the type of natural resource in question. It applies a surplus methodology for its claims regarding gold, diamonds and coltan (see paragraph 283 below). According to this approach, the difference between the production of minerals in Uganda and the export of those minerals from Uganda between 1998 and 2003 is used as a proxy for assessing the injury allegedly suffered by the DRC as a result of the illegal exploitation. With respect to timber, the DRC calculates the damage based on the commercial value of exports and taxes of a specific timber company, DARA-Forest, from 1998 to 2003. The DRC's claims relating to damage to fauna are mainly based on an assessment prepared by the Congolese Institute for Nature Conservation (hereinafter the "ICCN"), the public body in the DRC responsible for managing national parks. The DRC further refers to the reports of the United Nations Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo (hereinafter "UNPE"), the Porter Commission Report, the Mapping Report and reports by non-governmental organizations to establish the causal nexus between the damage and internationally wrongful acts attributable to Uganda and to prove the alleged extent of the damage.

263. Regarding its claims for exploitation of coffee, tin and tungsten, the DRC adopts the figures set out in the report by the Court-appointed expert Mr. Nest. With respect to the methodology adopted by the expert to determine the extent of exploitation, notably of gold, diamonds and coltan, however, the DRC expresses doubts about the "proxy tax rate" approach adopted by the expert to calculate the damage in question. As for the valuation of the exploited resources, the DRC considers it inappropriate for the expert to apply a discount of 35 per cent (see paragraph 271 below) systematically without any regard for the specific value of each resource. The DRC also contends that the expert relied on the market conditions in the DRC as a "spoliation economy" caused by Uganda's breach of international obligations, and concludes that the Court should not adopt these very low base prices. In addition, the DRC maintains that the expert excluded the exploitation of natural resources by civilians in Ituri and thus inappropriately limited the scope of his analysis. Finally, the DRC argues that the expert should have included damage to fauna and flora through deforestation in the scope of his analysis.

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264. Uganda submits that the Court should reject the DRC's claims for compensation for the looting, plundering and exploitation of its natural resources. Uganda argues that certain kinds of natural resources for which the DRC claims compensation, notably timber and fauna, fall outside the scope of the 2005 Judgment. Uganda further maintains that the DRC's claims regarding tin, tungsten and coffee are *ultra petita*, since the DRC only raised them during the first round of the oral proceedings.

265. Uganda further argues that the evidence that the DRC presents is insufficient, and that the DRC has not discharged its burden of proof. In response to the DRC's reliance on the standard set out in the *Certain Activities* case (see paragraph 261 above), Uganda maintains that in that case the Court was not "approximating from zero [since] Costa Rica presented evidence linking specific injury to specific wrongful acts occurring in a specific area and at a specific point in time". Uganda claims that the DRC must provide "evidence regarding the locations, ownership, average production, and concessions or licenses for each mine and forest for which the DRC claims compensation for illegal exploitation by Uganda".

266. According to Uganda, the methodologies applied by the DRC suffer from considerable flaws. With regard to the DRC's contention that the difference between the purported production of minerals in Uganda and export of those minerals from Uganda between 1998 and 2003 can be used as a proxy for assessing the injury allegedly suffered by the DRC as a result of the illegal exploitation of those minerals, Uganda argues that this effectively contradicts the Court's finding in 2005 that there was no "governmental policy of Uganda directed at the exploitation of natural resources of the DRC [n]or that Uganda's military intervention was carried out in order to obtain access to Congolese resources" (2005 Judgment, *I.C.J. Reports 2005*, p. 251, para. 242). Regarding the exploitation

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of timber, Uganda observes that the DRC's claim is founded entirely on a "case study" concerning DARA-Forest, which the Porter Commission refuted as wholly unfounded and which the UNPE itself retracted. Uganda thus argues that the evidence adduced by the DRC fails to prove the exact extent of damage to the different kinds of natural resources and does not demonstrate that such damage can be attributed to Uganda.

267. In response to the findings of the Court-appointed expert Mr. Nest, Uganda argues that under the terms of reference the expert was not instructed to assess the exploitation of tin, tungsten and coffee and that his findings in this regard were therefore beyond the scope of his mandate. With respect to the methodology applied to assess the quantity of resources exploited, Uganda contends that the expert relies on an "exports — domestic production" model that is methodologically flawed. Furthermore, Uganda maintains that the expert's methodology contradicts what it describes as the express findings in the 2005 Judgment that Uganda had no governmental policy directed at the exploitation of the DRC's natural resources and that Uganda's military intervention in the DRC was not carried out in order to obtain access to these resources. Regarding valuation, Uganda argues that the expert's determination of the base prices by reference to the market price was inapposite and that their adjustment was based on arbitrary factors.

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268. The Court-appointed expert Mr. Nest estimates that the total value of exploitation activities by personnel in what he refers to as the "Ugandan area of influence" amounts to US$58,855,466.40 (US$41,332,950.80 for resources extracted in Ituri; US$17,522,515.60 for resources extracted outside Ituri). The expert uses the term "Ugandan area of influence" to describe non-government-held areas in the northern part of the DRC where UPDF personnel were present, covering approximately one third of the territory of the DRC, both inside and outside of Ituri.

269. In the terms of reference, the Court asked the expert to evaluate the "approximate quantity" and value of unlawfully exploited "natural resources, such as gold, diamond, coltan and timber" within Ituri during the occupation by Ugandan armed forces of that district and of "natural resources, such as gold, diamond, coltan and timber" plundered and exploited by Ugandan armed forces in the DRC, except for Ituri, "[b]ased on the evidence available in the case file and documents publicly available, particularly the United Nations Reports mentioned in the 2005 Judgment" (see paragraph 25 above).

270. Concerning the scope of his report, the expert understands the formulation "natural resources, such as gold, diamond, coltan and timber" to be a non-exhaustive list. On this basis, he also examined the exploitation of tin, tungsten and coffee. Regarding the methodology adopted, the expert report notes that complete evidence for the purposes of a precise valuation was missing "in virtually all cases". Therefore,

> "other sources of information had to be relied on to inform estimates about resource distribution and quantities, including maps of deposits, anecdotal descriptions of resource distribution from field observations in the DRC, or production data had to be combined from several sources".

Furthermore, the expert report points to the effect of "tumultuous conditions" on the availability, reliability, and commensurability of data, to the interruptive impact of the conflict on industrial production during the period from 1998 to 2003, and to significant but often unrecorded artisanal production and smuggling of all seven resources addressed in the expert report.

271. The expert proceeded in "eight basic steps". He first assessed the quantity of resources produced in what he called the Ugandan area of influence, based on national production data combined with information about the location of resources (for gold and diamonds). Alternatively, "[w]here national data for resources were not available or appeared too unreliable", the expert used "export and/or import data for countries trading in the DRC resources" as a proxy for DRC production (as for coltan, coffee, timber, tin and tungsten). He then estimated the distribution of the pertinent resources within the Ugandan area of influence, notably between Ituri and non-Ituri. The expert next calculated the average price for each resource and for each year of the conflict by taking the base annual average prices for 1998-2003 and applying a discount of 35 per cent to reflect the approximate prices in the relevant areas based on

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information obtained from a wide range of sources, including databases, reports by the United Nations and other international organizations, and academic publications. He then adjusted the resulting price into 2020 United States dollars by "inflating" them by reference to a standard rate. The expert then obtained the base value of each resource by multiplying the estimated amount of each resource produced in the Ugandan area of influence, Ituri and outside Ituri, by its price during the relevant period. Finally, on the basis of a variety of sources, the expert indicated, for each resource, "proxy taxes", i.e. estimated rates reflecting the value extracted by personnel through each method of exploitation (theft, payments of fees and licences, and taxation) as a percentage of the estimated total value of production for each resource in the relevant period. The expert set such specific "proxy taxes" for Ituri, where he took into account the value extracted by "any and all armed forces and any affiliated administrative personnel, including both UPDF and Congolese", and for the remainder of the Ugandan area of influence, where he only took into account exploitation undertaken by UPDF personnel. He then calculated the value exploited by the above-referenced personnel from each resource in Ituri and outside Ituri by multiplying the base value of each natural resource by the "proxy taxes" previously estimated.

272. In its observations on the expert's report, the DRC pointed out that Mr. Nest had not taken account of the unlawful exploitation of natural resources in Ituri by civilians which, it alleges, was brought about by Uganda's violation of its international obligations as the occupying Power. In response, Mr. Nest explained that, for Ituri, he had estimated the value extracted by military and administrative personnel only, excluding the value retained by civilians. This exclusion was based on his assumption that "civilians were voluntarily involved in the production, trade and export of the seven resources from 1998 to 2003, and that profits retained by them, after theft and taxes, remained in their control". The expert then supplemented his original report by estimating the additional value extracted by civilians from those resources in Ituri. He also indicated that the question whether the civilian-retained portion of this value should be regarded as part of the damage suffered by the DRC is a matter for the Court to determine.

1. General aspects

273. In its 2005 Judgment, the Court stated that "[i]n reaching its decision on the DRC's claim [regarding natural resources], it was not necessary for the Court to make findings of fact with regard to each individual incident alleged" (*I.C.J. Reports 2005*, p. 249, para. 237). The Court then found that "it d[id] not have at its disposal credible evidence to prove that there [had been] a governmental policy of Uganda directed at the exploitation of natural resources of the DRC or that Uganda's military intervention [had been] carried out in order to obtain access to Congolese resources" (*ibid.*, p. 251, para. 242). However, it "consider[ed] that it ha[d] ample credible and persuasive evidence to conclude that officers and soldiers of the UPDF, including the most high-ranking officers, [had been] involved in the looting, plundering and exploitation of the DRC's natural resources and that the military authorities [had] not take[n] any measures to put an end to these acts" *(ibid.)*.

274. With respect to the natural resources located outside Ituri, the Court established that Uganda bears responsibility for looting, plundering and exploitation of natural resources "whenever" members of the UPDF were involved (*ibid.*, p. 252, para. 245), but not for any such acts committed by members of "rebel groups" that were not under Uganda's control (*ibid.*, p. 253, para. 247). The 2005 Judgment did not specify which acts of looting, plundering and exploitation of natural resources the Court considered to be attributable to Uganda. That decision was left to the reparations phase, in which the DRC would have to provide evidence regarding the extent of damage to natural resources outside Ituri, as well as its attribution to Uganda.

275. With respect to natural resources located in Ituri, the Court found "sufficient credible evidence" to establish that Uganda had violated "its obligations under Article 43 of the Hague Regulations of 1907 as an occupying Power in Ituri in respect of all acts of looting, plundering and exploitation of natural resources in the occupied territory" (2005 Judgment, *I.C.J. Reports 2005*, p. 253, para. 250). This means Uganda is liable to make reparation for all acts of looting, plundering or exploitation of natural resources in Ituri, even if the persons who engaged in such acts were members of armed groups or other third parties (*ibid.*, p. 253, para. 248). It remains for the Court in the reparations phase to satisfy itself that the available evidence establishes the existence of the alleged injury from looting, plundering and exploitation of natural resources and, in the exceptional circumstances of this case, to identify at least a range of possibilities regarding its extent.

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276. The Court recalls that it is limited to deciding on the amount of compensation due for the injuries resulting from the internationally wrongful acts that the Court identified in its 2005 Judgment (*ibid.*, p. 257, para. 260), in which it specifically addressed reports regarding the exploitation of gold (*ibid.*, pp. 249-250, para. 238, and pp. 250-251, paras. 240-242), diamonds (*ibid.*, p. 250, para. 240, p. 251, para. 242, and p. 253, para. 248), and coffee (*ibid.*, p. 250, para. 240). The Court did not mention coltan, tin, tungsten, timber or damage to fauna and flora. Coltan, tin, tungsten and timber are nonetheless raw materials which are encompassed by the generic term "natural resources". Furthermore, the Court is of the view that claims relating to fauna are covered by the scope of the 2005 Judgment, in which the "hunting and plundering of protected species" was referred to as part of the DRC's allegations regarding natural resources (*ibid.*, p. 246, para. 223). To the extent that damage to flora represents a direct consequence of the plundering of timber through deforestation, the Court considers that such damage falls within the scope of the 2005 Judgment. The Court must nevertheless satisfy itself in the present reparations phase that the alleged exploitation of resources which were not mentioned explicitly in the 2005 Judgment actually occurred and that Uganda is liable to make reparation for the ensuing damage.

277. The Court is of the view that the methodological approach taken by the expert report is convincing overall. The Court notes that the methodology adopted by the expert appropriately differs slightly depending on the resource in question and on the respective degree of reliability of the data on which he bases his estimates. The expert report is also transparent about its own limitations, acknowledging that

> "[t]he incompleteness of data meant other sources of information had to be relied on to inform estimates about resource distribution and quantities, including maps of deposits, anecdotal descriptions of resource distribution from field observations in the DRC, or production data had to be combined from several sources".

Despite these limitations, Mr. Nest's methodology informs the Court's conclusions on the extent of damage for which Uganda owes reparation. Given the nature of the unlawful exploitation of natural resources, including the conflict situation and the lack of documentation in the relevant sector of the economy that is predominantly informal, the Court is of the view that the "proxy tax" (see paragraph 271 above) methodology used by Mr. Nest is appropriate, in the circumstances of the present case, to estimate the loss with a suitable degree of approximation. The Court is not convinced by the standard suggested by Uganda, according to which the DRC has to prove the specific time, place, and damage relating to each incident of exploitation (see paragraph 114 above). Given the pattern of widespread exploitation and the evidentiary challenges in this case, the approach suggested by Uganda does not appear appropriate. Instead, the Court considers that the approach taken in the expert's report, which is based on estimates derived from reliable economic data, scientific publications and the case file, produces a more persuasive assessment and valuation of the damage. The expert has also taken into account other explanations for the respective surpluses of Congolese production and Ugandan exports. As to valuation, the expert report applies a plausible discount to the international market price.

278. As previously noted (see paragraph 272 above), the expert did not include the value extracted by civilians from natural resources in Ituri in the amount of compensation estimated in his original report, based on his assumption that, during the period of occupation, civilians were voluntarily involved in the production, trade and export of those resources and that profits retained by them remained in their control (see paragraph 272 above). In the circumstances assumed by the expert, it can be concluded that an operator's continued retention of its own profits does not amount to an act of "looting, plundering and exploitation" in respect of which the Court found that Uganda had failed to comply with its obligations as an occupying Power under Article 43 of the Regulations Respecting the Laws and Customs of War on Land annexed to the Fourth Hague Convention of 18 October 1907 (2005 Judgment, *I.C.J. Reports 2005*, p. 253, para. 250) and thus, would not call for any reparation by Uganda. However, the 2005 Judgment also refers to instances in which UPDF members facilitated illegal trafficking in natural resources by commercial entities (*ibid.*, para. 248). The evidence available to the Court does not permit an appreciation of the extent to which the scenario assumed by Mr. Nest prevailed in Ituri, as compared to situations in which other private persons deprived the operator of profits through acts of looting, plundering or exploitation of natural resources. In considering the compensation owed with respect to all acts of looting, plundering and exploitation of natural resources, the Court therefore places emphasis on the calculations made by Mr. Nest using the "proxy tax" methodology.

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279. The Court notes that the terms of reference provided to the expert by the Court did not include damage to fauna and damage to flora through deforestation and that the expert therefore made no findings with respect to those forms of damage to natural resources (beyond commercial trade in timber).

280. The Court observes that the DRC refers, in support of its claim for damage related to natural resources, to the UNPE reports, the Porter Commission Report, the Mapping Report, reports by non-governmental organizations and reports prepared by domestic institutions. In its 2005 Judgment, the Court expressed its general view that the Porter Commission Report and the United Nations reports furnished sufficient and convincing evidence to determine whether Uganda engaged in acts of looting, plundering and exploitation of the DRC's natural resources (*ibid.*, p. 201, para. 61, and p. 249, para. 237). The Court attributes probative value to the findings of these reports, particularly if they are corroborated by the Mapping Report and the expert report by Mr. Nest.

281. Taking these general considerations into account, the Court will draw its conclusions on the basis of the evidence that it finds reliable in order to determine the damage caused by Uganda to Congolese natural resources and the compensation to be awarded.

2. Minerals

(a) Gold

282. In its Memorial the DRC claimed US$675,541,972 for the loss of gold. At the end of the oral proceedings the DRC stated that its claim for gold was "at least US$249,881,000".

283. To calculate the extent of damage, the DRC uses a surplus exports methodology to ascertain the amount of gold that was exploited. This methodology is based on the assumption that domestic production by Uganda was virtually non-existent between 1998 and 2003, that Uganda nonetheless exported large amounts of gold during the relevant period, and that the surplus of exports corresponds to the amount of gold Uganda exploited in the DRC.

284. The DRC bases its calculations on data for the years 1998 to 2000 from the Ugandan Ministry of Energy and Mineral Development, taken from the first UNPE report (United Nations, doc. S/2001/357 of 12 April 2001, pp. 19-20), and from the annual reports of Uganda's Ministry of Energy and Mineral Development for the period from 2001 to 2003. The DRC claims that the surplus of gold exports from Uganda amounts to 45,143 tonnes for the period between 1998 and 2003. Responding to the contention by Uganda that only statistics from the Ugandan Bureau of Statistics (hereinafter the "UBOS") were accurate, the DRC stated that the export surplus would still amount to 28,923 tonnes even if it were calculated using the UBOS figures.

285. The DRC refers to various reports to illustrate the extent of Uganda's role in the exploitation of gold, in terms of geography, the quantity of resources involved, and the range of practices employed. To substantiate its claim, the DRC refers to the presence of Uganda as an occupying Power in the Adidi and Mabanga gold mines in the Ituri district. It also refers to the presence of Uganda in the Watsa (Haut-Uélé district) and Bondo gold mines (Bas-Uélé district). Depending on the location, the DRC argues that UPDF soldiers requisitioned or exploited gold, or levied "taxes" on the exploitation of gold. The DRC recognizes that the various incidents it refers to are not, in themselves, sufficient to quantify its injury, but argues that they do establish the extent of Uganda's role in the looting, plundering and illegal exploitation of gold.

286. With respect to valuation, the DRC stated during the oral proceedings that it agrees with the approach taken by Mr. Nest which consisted in using the World Gold Council's data, and that the resulting price should therefore be discounted to reflect the part of the value chain that remains, if any, in the DRC. The DRC suggests applying a discount percentage of 95 per cent.

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287. Uganda maintains that the Court, in its 2005 Judgment, made no finding that Uganda was responsible for gold smuggling or that Uganda derived any benefit from illegally exploited gold. It is of the view that the DRC has offered no legal basis for an award of monetary compensation for the exploitation of gold.

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288. Uganda submits that the DRC's methodology to assess the extent of the injury the DRC allegedly suffered contradicts the Court's finding in its 2005 Judgment that there was no "governmental policy of Uganda directed at the exploitation of natural resources of the DRC [n]or that Uganda's military intervention was carried out in order to obtain access to Congolese resources" (*I.C.J. Reports 2005*, p. 251, para. 242). Uganda also argues that the surplus methodology adopted by the DRC is flawed because the DRC does not demonstrate any link between the export of natural resources from Uganda and their illegal exploitation. Uganda emphasizes that the Porter Commission did not make any finding concerning the illegal character of gold exports by Uganda. Uganda further argues that the DRC's approach disregards statistical and regulatory factors that explain the apparent gap between Uganda's purported production and export of gold. According to Uganda, the "economic data" on which the DRC relied came from the first UNPE report, which was widely criticized. Furthermore, these data merely indicate the amount of gold for which permit-seekers sought authorization for export from Uganda, and not what they actually exported.

289. Uganda further maintains that virtually none of the examples of injury alleged by the DRC contains proof of specific acts of exploitation of gold attributable to Uganda. While Uganda recognizes that the DRC provides evidence, primarily from the Porter Commission Report, "of specific acts attributable to Uganda resulting in unlawful exploitation of mineral resources", it argues that the DRC fails to prove the existence and the extent of injury with respect to these acts. Regarding its responsibility as an occupying Power in Ituri, Uganda claims that the DRC did not offer any evidence to prove that the injury would have been averted if Uganda had acted in compliance with its legal obligations. Uganda also argues that, even if it had taken all measures in its power and discharged its obligations as an occupying Power, it could not possibly have prevented all exploitative acts by private persons in Ituri.

290. Uganda also contests the method of valuation adopted by the DRC during the oral proceedings according to which the valuation price of gold should correspond to 95 per cent of the world price. Uganda points out that this discount is based on field studies that had nothing to do with Uganda or the UPDF, since they concern transactions of Congolese local dealers from 2007 to 2011.

291. Uganda argues that the Court should not rely on the expert report by Mr. Nest. According to Uganda, Mr. Nest conceded when questions were put to him at the hearing that the methodology he had adopted did not prove that the surplus of Ugandan exports had originated in unlawful exploitation of gold in the DRC that was attributable to Uganda. It further claims that Mr. Nest relied on uncorroborated estimates and applied "proxy taxes" based on inflationary figures and inadequate data.

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292. The Court-appointed expert Mr. Nest combines two methods to assess the amount of illegally exploited gold. First, he compares the data relating to the DRC's total national production data with DRC exports ("DRC production surplus"). To the extent that this gold production exceeded formal exports in what he refers to as the Ugandan area of influence, he assumed that this surplus reflected the total quantity of gold smuggled from that area. Secondly, the expert compares the data from the UBOS regarding gold exports with Ugandan production data as a basis for estimating the quantities of gold illegally exploited in the Ugandan area of influence ("Ugandan export surplus"). The expert then takes the higher figure between the DRC production surplus and the Ugandan export surplus as the estimated quantity of gold exploited in the Ugandan area of influence for each year. Based on eight documents that contain eye-witness reports and statements by gold producers, he estimates that around 45 per cent of the gold production in the Ugandan area of influence came from Ituri, and around 55 per cent from outside Ituri. The expert then estimates the value exploited by relevant personnel from gold by reference to "proxy taxes" (see paragraph 271 above). According to Mr. Nest, "[w]ithin Ituri all armed forces are likely to have stolen limited quantities of gold from producers and traders" and, "[o]utside Ituri, it is probable [that] some UPDF personnel engaged in limited theft of gold". With respect to fees and licences, the applicable "proxy taxes" were calculated by reference to United Nations reports and other reports. As to "taxes" levied on gold, he indicates that, for various reasons, outside Ituri "the funds extracted through a tax on value imposed by UPDF personnel is estimated to be low". Mr. Nest estimates the value of gold

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exploited by relevant personnel in the Ugandan area of influence at US$45,892,790.2 (US$35,359,097.3 for gold exploitation in Ituri and US$10,533,692.9 for gold exploitation outside Ituri).

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293. In its 2005 Judgment, the Court referred to the Porter Commission's findings on the exploitation of gold when establishing Uganda's responsibility for the looting, plundering and exploitation of natural resources (*I.C.J. Reports 2005*, pp. 249-251, paras. 238 and 240-242). Yet the Court did not attribute specific acts of exploitation of gold outside Ituri to Uganda.

294. The Court is not convinced by the methodology and the figures on which the DRC bases its assessment of the amount and value of gold looted, plundered and exploited for which Uganda owes reparation. In particular, the DRC's methodology does not exclude the value of gold production and trade that commercial entities continued to receive during the period of Ugandan occupation and control, nor does it take into account informal gold production in Uganda.

295. However, the Court considers that there is sufficient evidence of the involvement of Ugandan forces in gold exploitation throughout the DRC (see e.g. Porter Commission Report, pp. 19-20, 64-72, 81-82, 177, 197; see also 2005 Judgment, *I.C.J. Reports 2005*, pp. 249-250, para. 238, and pp. 250-251, paras. 240-241). Referring to widespread individual incidents of exploitation over a period of five years, the evidence establishes a pattern of plundering, looting and exploitation of gold in the DRC which involved Ugandan forces. The Court considers Mr. Nest's methodology and assessment to be a helpful basis for its appreciation of the damage attributable to Uganda's unlawful conduct (see paragraph 292 above).

296. Specifically with respect to Ituri, the evidence before the Court establishes a pattern of exploitation of gold (see e.g. Porter Commission Report, p. 69; Mapping Report, paras. 753-757, 761; First UNPE report, United Nations, doc. S/2001/357 of 12 April 2001, para. 59; see also 2005 Judgment, *I.C.J. Reports 2005*, p. 250, para. 240, and p. 253, para. 248) also reflected by the expert in his report. According to the findings made in paragraphs 249 and 250 of the 2005 Judgment, Uganda failed to comply with its obligations as an occupying Power and is responsible for "all acts" of exploitation in Ituri. As the Court has noted, this implies that Uganda is liable to make reparation for all acts of looting, plundering or exploitation of natural resources in Ituri, even if the persons who engaged in such acts were members of armed groups or other third parties (see paragraphs 79, 275 and 278 above).

297. The Court further considers that the evidence before it shows a pattern of exploitation of gold outside Ituri (First UNPE report, United Nations, doc. S/2001/357 of 12 April 2001, paras. 56 and 57 as confirmed by the Porter Commission Report, pp. 21-23, 64-72). In calculating "proxy taxes" (see paragraph 271 above) outside Ituri, Mr. Nest uses information regarding the locations of gold and of Ugandan forces to estimate exploitation by Ugandan troops as opposed to other forces, so that the Court does not need to reduce this figure to take account of the fact that the conduct of other forces outside Ituri is not attributable to Uganda.

298. The Court is of the view that there is sufficient evidence to conclude that Uganda is responsible for a substantial amount of damage resulting from looting, plundering and exploitation of gold within the range of the assessment of the expert report. On this basis, the Court will award compensation for this form of damage as part of a global sum for all damage to natural resources (see paragraph 366 below).

(b) Diamonds

299. The DRC claims US$7,055,885 for the looting, plundering and illegal exploitation of diamonds.

300. The DRC argues that the extent of Uganda's role in the illegal exploitation and exportation of the DRC's diamond resources is clear from various perspectives: first, from Uganda's occupation of the DRC's diamond mining areas; secondly, from the involvement of certain members of the Ugandan army in the provision of security services to companies exploiting diamonds and the collection of "taxes" by rebel groups allied to Uganda; thirdly, from the

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involvement of the most senior Ugandan military officials in the exploitation of the DRC's diamond reserves; and fourthly, from the role that Ugandan military transport played in the exporting of diamonds.

301. The DRC submits that the exponential increase that was seen in Ugandan diamond exports from 1998, despite Uganda not producing diamonds, provides further confirmation of Uganda's role in the illegal exploitation and exportation of the DRC's diamond resources, and enables it to assess the extent of the injury suffered. On the basis of export statistics stemming from a 2002 report by the British All-Party Parliamentary Group on the Great Lakes and Genocide Prevention, based largely on data from the Diamond High Council (now the Antwerp World Diamond Centre), the DRC estimates that the injury it suffered in the period from 1998 to 2001 amounted to US$7,055,885, i.e. the total value of Ugandan diamond exports during the period in question. The DRC adds that that amount needs to be supplemented by Ugandan diamond exports in 2002 and 2003. Although the DRC made enquiries to the Diamond High Council to that effect, it has not provided a figure to the Court.

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302. Uganda maintains that the DRC's claim that Uganda illegally exploited Congolese diamonds in the amount of US$7,055,885 lacks foundation. Accordingly, in Uganda's view, the DRC has offered no legal basis upon which compensation can be awarded for this claim.

303. Uganda observes that the methodology used by the DRC to assess the extent of damage based on Uganda's purported export of minerals effectively contradicts the Court's finding in 2005 that there was no "governmental policy of Uganda directed at the exploitation of natural resources of the DRC [n]or that Uganda's military intervention was carried out in order to obtain access to Congolese resources" (2005 Judgment, *I.C.J. Reports 2005*, p. 251, para. 242). Uganda further highlights that the DRC bases its claim entirely on the widely criticised first report of the UNPE.

304. Uganda contests the DRC's valuation of its injury, noting that the export statistics provided by the DRC emanate from a single source, the Diamond High Council, and are uncorroborated. Uganda emphasizes that neither the British all-party parliamentary group nor the UNPE independently verified the data from the Diamond High Council before relying on them. Uganda refers to the Porter Commission, which concluded that the first UNPE report based on these statistics was unreliable since the data did not reflect the legal export of diamonds from Uganda but rather the declared origin of imports after arriving in Belgium. Uganda has submitted its own statistical data from the UBOS which indicate that Uganda exported only miniscule quantities of diamonds between 1998 and 2003 (worth approximately US$4,393 in.total).

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305. In his report, the Court-appointed expert Mr. Nest applies to diamonds a methodology comparable to the one he uses for gold. He states, however, that the dataset on which he relies makes the resulting estimates less complete than those for gold. To compensate for this, Mr. Nest extrapolates in certain respects from the data on gold. On the basis of his findings, Mr. Nest estimates that the value extracted by relevant personnel through the exploitation of diamonds is US$6,039,299, of which US$1,013,897 is in Ituri and US$5,025,402 outside Ituri.

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306. In its 2005 Judgment, the Court referred to the Porter Commission's findings on the exploitation of diamonds when establishing Uganda's liability for the looting, plundering and exploitation of natural resources (*I.C.J. Reports 2005*, pp. 250-251, paras. 240 and 242, p. 253, para. 248). Notably, the Court found with respect to Ituri that "[i]t is apparent from various findings of the Porter Commission that rather than preventing the illegal traffic in natural resources, including diamonds, high-ranking members of the UPDF facilitated such activities by commercial entities" (*ibid.*, p. 253, para. 248). However, the Court did not identify specific acts regarding the

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exploitation of diamonds for which Uganda is responsible, nor did it specify the quantity or value of the exploited diamonds.

307. The Court considers that the figures put forward by the DRC with respect to the quantity and value of exploited diamonds for which Uganda owes reparation are not based on a convincing methodological approach, in particular because the DRC relies on insufficient and uncorroborated data.

308. However, the Court is of the view that there is sufficient evidence of involvement by Ugandan forces in a pattern of plundering, looting and exploitation of diamonds throughout the DRC. The Court notes that the Porter Commission Report contains descriptions of multiple incidents involving the exploitation of diamonds attributable to Uganda (Porter Commission Report, pp. 51, 82, 88-89, 117, 121-123, 162). Furthermore, United Nations reports published after the Porter Commission Report substantiated the existence of such patterns of diamond exploitation in Ituri (see e.g. the MONUC special report on the events in Ituri, United Nations, doc. S/2004/573 of 16 July 2004, para. 133; Mapping Report, para. 768) and outside Ituri (see e.g. Mapping Report, para. 748).

309. In these circumstances, the Court considers Mr. Nest's methodology, which, in essence, corresponds to the one he adopted for gold, and his assessment to be a persuasive reference for the Court's determination of the extent and valuation of damage for which Uganda owes reparation.

310. The Court considers that there is sufficient evidence to conclude that Uganda is responsible for damage resulting from the looting, plundering and exploitation of diamonds within the range of the assessment of the expert report. On this basis, the Court will award compensation for this form of damage as part of a global sum for all damage to natural resources (see paragraph 366 below).

(c) Coltan

311. The DRC claims US$2,915,880 for damage resulting from the plundering, looting, and illegal exploitation of coltan and niobium, one of the minerals extracted from coltan.

312. The DRC refers to various reports indicating that Uganda controlled coltan mines in Bafwasende and Mambasa in order to substantiate its claim that coltan was one of the natural resources unlawfully exploited either in Ituri or by Ugandan forces outside Ituri. The DRC also relies on the final UNPE report, according to which UPDF soldiers operated coltan mines, charged diggers a daily fee to exploit an area, and had connections with a company called La Conmet that transported coltan from Orientale Province in the DRC to Uganda and then to Kazakhstan.

313. In order to substantiate the extent of coltan exploitation by Uganda, the DRC relies on a 2002 report by the British All-Party Parliamentary Group on the Great Lakes and Genocide Prevention, which is based, *inter alia*, on statistics provided by the Ugandan Government. The report contains Ugandan export statistics of coltan and niobium in the relevant period. The DRC submits that Uganda, while not producing coltan itself, exported a total of 90,640 kg of coltan between 1998 and 2000.

314. Relying on information from La Conmet, the DRC submits that the market price of coltan during the relevant period was US$17 per kilogram. The 90,640 kg allegedly exploited by Uganda thus had a value of US$1,540,880. The DRC asserts that the evidence also shows that Ugandan exports of niobium had a total value of US$1,375,000 during the relevant period. Combining the figures for coltan and niobium, the DRC argues that the damage it suffered amounts to at least US$2,915,880.

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315. Uganda maintains that the DRC has offered no legal basis for an award of monetary compensation for the exploitation of coltan/niobium.

316. Uganda contends that the "economic data" on the basis of which the DRC attempts to demonstrate the extent of unlawful coltan/niobium exploitation by Uganda do not support the DRC's claim. According to Uganda, the data taken from the 2002 report by the British All-Party Parliamentary Group on the Great Lakes

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and Genocide Prevention reproduce the data originally presented in the first UNPE report, which in turn is based on export statistics apparently received from Uganda's Ministry of Energy and Mineral Development. Uganda claims that these statistics do not even refer to coltan, but only to niobium and tantalum. Uganda further maintains that these statistics show that the value of niobium exports during the period of the conflict was nearly five times less than that claimed by the DRC and, even with the addition of the export value of tantalum, still nearly three times lower than the DRC's assessment.

317. Uganda further considers that, to the extent that coltan from the DRC may have transited through Uganda, it did so in the normal course of trade. It argues that the DRC had to present convincing evidence that specific amounts of coltan transited through Uganda as a result of specific internationally wrongful acts attributable to Uganda, which it has failed to do. Uganda maintains that the Porter Commission refuted the claim that Uganda's exports of niobium were connected to the illegal exploitation of Congolese resources.

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318. Mr. Nest notes that the "overwhelming majority" of informal coltan production in the DRC was in what he called the "Rwandan area of influence". However, he finds that, outside Ituri, "it is reasonable to assume some UPDF personnel stole minor quantities of [coltan]". Mr. Nest estimates that the value of coltan unlawfully exploited by Uganda amounts to US$375,487, of which US$63,038 in.Ituri and US$312,449 outside Ituri.

* *

319. The evidence furnished by the DRC does not provide a convincing basis for its claim of US$2,915,880 for coltan. The Porter Commission found that the allegations contained in the La Conmet "case study" and in the UNPE reports, on which the DRC relies, were not supported by credible evidence. The Court further notes that various incidents involving Rwandan exploitation of coltan can be identified from the available evidence, thus giving credence to Mr. Nest's observation that most of the informal coltan production was in what Mr. Nest calls the "Rwandan area of influence".

320. At the same time, there are certain indications of coltan exploitation by UPDF personnel in Ituri, as well as outside Ituri. In its final report, the UNPE observed that various armed groups exploited coltan in Ituri under the protection of the UPDF (Final UNPE report, United Nations doc. S/2002/1146 of 16 October 2002, p. 21, para. 108). The United Nations experts also described several clashes between the UPDF and other forces, and even within the UPDF itself, for control of coltan-rich areas outside Ituri (*ibid.*, p. 20, para. 101). The cross-border transportation of coltan in vehicles belonging to the Chief of Staff of the UPDF is also documented. For example, the Mapping Report details measures taken by the UPDF in retaliation for an attack on one of their coltan convoys on the road to Butembo (Mapping Report, para. 743). A 2001 HRW report describes how Mai-Mai fighters ambushed UPDF soldiers in order to intercept a truck transporting a supply of coltan with a value of around US$70,000 (HRW, "Uganda in Eastern DRC. Fueling Political and Ethnic Strife", p. 5).

321. In light of these circumstances, the Court considers Mr. Nest's methodology and assessment to be a persuasive basis for the Court's determination of the extent and valuation of damage attributable to Uganda's internationally wrongful conduct.

322. The Court considers that there is sufficient evidence to conclude that Uganda is responsible for damage resulting from the looting, plundering and exploitation of coltan within the range of the assessment of the expert report. On this basis, the Court will award compensation for this form of damage as part of a global sum for all damage to natural resources (see paragraph 366 below).

(d) Tin and tungsten

323. The DRC claims US$257,667 for the exploitation of tin and US$82,147 for the exploitation of tungsten. These claims were not contained in the DRC's written submissions but were introduced after the submission of

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the expert report, which included both minerals in its study. Accordingly, the amounts claimed by the DRC and the underlying methodology are based on the expert report by Mr. Nest.

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324. Uganda submits that the DRC has not proven any damage or provided any valuation with respect to tin and tungsten. According to Uganda, Mr. Nest's estimates must be disregarded because they are contrary to the *non ultra petita* rule, which precludes the Court from awarding a party more than it requested.

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325. According to the report by Mr. Nest, tin ore extracted in the DRC is often found in the same ore body as coltan. Referring to the "3Ts" — tin, tantalite and tungsten — the expert notes in his report that, "[e]xcluding tin and tungsten given the attention paid to these resources would be an error [because of] intense interest in these minerals and their connection to conflict in [the] DRC". At the same time, Mr. Nest notes that probably only limited value was exploited from tin and tungsten by UPDF personnel or by other actors in Ituri. When explaining the inclusion of the two minerals in the expert report, he clarifies that "[t]his report estimates that limited value was exploited from tin and tungsten. However, given public interest in these resources they have been included to flag their relative insignificance as sources of value exploited by personnel in either Ituri or non-Ituri."

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326. The Court considers that the inclusion of tin and tungsten in the scope of the expert report was permissible under the terms of reference (see paragraph 276 above). The Court notes that Mr. Nest's expert report refers only to evidence of the transit of small quantities of tin and tungsten through Ituri, which in itself does not constitute looting, plundering or exploitation. In particular, he underlines that he included those two minerals only "in order to flag their relative insignificance as sources of value exploited by personnel in either Ituri or non-Ituri" (see paragraph 325 above).

327. Given that there is limited evidence relating to tin and tungsten and that the expert noted the relative insignificance of these resources, in terms of the quantities exploited and the corresponding value, the Court decides that it will not take these two minerals into account in determining the compensation due for damage to natural resources.

3. Flora

(a) Coffee

328. The DRC includes in its claim for reparation the damage resulting from the unlawful exploitation of coffee, and adopts the amounts given in Mr. Nest's expert report, namely US$2,046,568 (Ituri) and US$722,804 (outside Ituri), amounting to US$2,769,372 in.total.

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329. Uganda submits that the DRC has not proven any damage or provided any valuation with respect to its claim for coffee. Uganda contends that Mr. Nest's estimates should be disregarded by the Court since they were made contrary to the *non ultra petita* rule.

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330. The Court-appointed expert explains that he understood the terms of reference to be non-exhaustive. He maintains that, since he was explicitly asked to base his report on the UNPE reports, "[n]eglecting coffee, in [his]

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view, would be an error" as "UNPE (2001a; 2001b; 2002a; 2002b) and MONUC (2004) specifically include coffee in their reports". He estimates the damage resulting from the exploitation of coffee at US$2,046,568 (Ituri) and US$722,804 (outside Ituri), amounting to a total of US$2,769,372. According to Mr. Nest, "[w]ithin Ituri all armed forces probably stole limited quantities of coffee", and "[o]utside Ituri, any theft of coffee by UPDF personnel was probably minor".

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331. The Court considers that the inclusion of coffee in the scope of the expert report was permissible under the terms of reference (see paragraph 276 above). Mr. Nest's findings with respect to coffee are corroborated to a certain extent by other evidence. For instance, the Porter Commission confirmed allegations indicating the looting, plundering and exploitation of coffee attributable to Uganda outside Ituri (e.g. Porter Commission Report, pp. 18, 82-83 and 89) where, according to the expert, 70 per cent of the exploited coffee was produced. The findings of the Porter Commission regarding coffee were also cited by the Court in 2005 (*I.C.J. Reports 2005*, pp. 250-251, paras. 240 and 242, with reference to paragraph 13.1 of the Porter Commission Report). The exploitation of coffee in Ituri is further mentioned in a 2001 HRW report (HRW, "Uganda in Eastern DRC. Fueling Political and Ethnic Strife", p. 39). The Court therefore considers that there is sufficient evidence to conclude that Uganda is responsible for damage resulting from the looting, plundering and exploitation of coffee.

332. However, since these reports only contain anecdotal evidence, and since the expert could otherwise only rely on an uncorroborated report by a Congolese non-governmental organization, the Court considers that it is appropriate to award compensation at a level lower than that calculated by the Court-appointed expert. On this basis, the Court will award compensation for this form of damage as part of a global sum for all damage to natural resources (see paragraph 366 below).

(b) Timber

333. The DRC claims US$100 million for the unlawful exploitation of timber. During the oral proceedings, the DRC stated that it was claiming, "in respect of flora, primarily, US$100 million, and, in the alternative, the . . . minimum amount of US$85,483,758 [for damage within Ituri]". The DRC contends that the invasion and occupation of Congolese territory by Ugandan armed forces damaged the DRC's flora, particularly through deforestation for the purposes of timber exploitation, in the provinces of Orientale and North Kivu.

334. To substantiate the extent of the damage and its attribution to Uganda, the DRC mainly relies on the case study concerning the DARA-Forest company taken from the first UNPE report (United Nations, doc. S/2001/357 of 12 April 2001, paras. 47-54). The DRC states that the scale of the commercial damage is illustrated by the market value of the 48,000 cubic metres of timber that DARA-Forest exported annually and exclusively to Uganda between September 1998 and 2003 from the territory where the Ugandan army was operating. The DRC admits that the UNPE amended its analysis in relation to the DARA-Forest company and noted that it appeared that the Government of the DRC still recognized the companies operating in rebel-held areas. The DRC also acknowledges that the Porter Commission Report disputed many of the assertions made by the UNPE in its initial report, including the claim linking Ugandan authorities to the DARA-Forest company. The DRC maintains that the Commission's detailed analysis indicates various instances of exploitation for which Uganda was responsible, including timber smuggling in the provinces of Orientale and North Kivu, the UPDF's involvement in that trafficking, and the scale and volume of the activity of DARA- Forest. The DRC also highlights that the UNPE and the Porter Commission confirm that the harvested forests, except the one in Beni, are located in Ituri, where Uganda was the occupying Power (Porter Commission Report, pp. 54-55, 61-62).

335. The DRC mainly bases its claim on the alleged commercial value of exports by the DARA-Forest company. The DRC uses data on export prices from the International Tropical Timber Organization to calculate the total commercial value of the timber exported by DARA-Forest between 1998 and 2003. Based on these data for the relevant years, the DRC puts forward an average export price of US$439.30 per cubic metre for tropical sawn timber. It

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submits that DARA-Forest's illegal exports spanned a period of four and a half years. On that basis, the DRC calculates that those exports have a total commercial value of US$94,888,800.

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336. In Uganda's view, the DRC has submitted no evidence to justify the compensation claimed for deforestation.

337. As to the extent of the alleged damage, Uganda observes that the DRC's claim is founded entirely on the case study of DARA-Forest, which the Porter Commission refuted as "fundamentally flawed" and which the UNPE itself retracted. Uganda points to the findings of the Porter Commission according to which "Dara's operation . . . was not illegal exploitation" and "therefore should not have been . . . used as a basis for criticism" of Uganda. Moreover, Uganda highlights the Commission's conclusion that "[t]here is no evidence . . . that Uganda as a country or as a [g]overnment harvests timber in the Democratic Republic of Congo". Uganda maintains that with regard to the few instances in which the Porter Commission described the involvement of Ugandan soldiers in the exploitation of timber, the DRC offers no evidence specifying and proving the exact injury resulting from such exploitation.

338. Uganda also criticizes the DRC's method of valuation, in particular its use of market value to calculate the damage, arguing that any injury to the DRC would have been limited to lost concession payments and taxes. However, according to Uganda, in the present case no compensation is due since the DRC's own evidence showed that DARA-Forest adhered to all the regulations in force and paid its taxes. Uganda adds that, even if the price of timber exports were relevant to this analysis, the average price claimed by the DRC is unsupported by reliable evidence.

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339. Mr. Nest uses a "proxy tax" (see paragraph 271 above) to arrive at the conclusion that the DRC is owed compensation for the timber exploitation in the amount of US$3,438,704 (US$2,793,301 in.Ituri; US$645,402 outside Ituri).

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340. The Court is of the view that the evidence submitted by the DRC does not support the amount claimed as compensation for the unlawful exploitation of timber. The methodology applied by the DRC to substantiate its claim is not convincing. The Porter Commission concluded that the DARA-Forest case study "was fundamentally flawed" and that it was "unable to find support for any single allegation made in this so-called Case Study" (Porter Commission Report, p. 64). Furthermore, as to areas outside Ituri, the evidence on which the DRC relies does not prove Uganda's involvement in the exploitation of timber by the DARA-Forest company. According to the addendum to the report of the UNPE, the exploitation licence held by DARA-Forest was granted by the Congolese Government which continued to approve the company's operations in rebel-held areas. Moreover, according to the Porter Commission Report, during the occupation of Ituri DARA-Forest continued to pay taxes at the same bank as it had done before the area came under rebel control (*ibid.*, pp. 62-63).

341. In its questions put to the Parties under Article 62, paragraph 1, of the Rules of Court, the Court invited the DRC to provide it with evidence regarding the "locations, ownership, average production, and concessions or licenses for each . . . forest". However, the DRC failed to do so. Instead, the DRC continued to rely on the DARA Forest case study during the oral proceedings.

342. The Court further considers that the report by Mr. Nest provides little support for the amount claimed by the DRC. Notably, he gives lower average prices for timber than those put forward by the DRC.

343. However, the Court recognizes that the Porter Commission Report contains indications that Uganda was involved in timber exploitation (Porter Commission Report, p. 153). The Court also notes that there is additional

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evidence of exploitation of timber in Ituri (see e.g. Final UNPE report, United Nations doc. S/2002/1146 of 16 October 2002, p. 22, para. 116; Mapping Report, para. 751). Furthermore, the report by the Court-appointed expert estimates that a considerable amount of exploited timber stems from what he terms the "Ugandan area of influence".

344. The Court considers that there is sufficient evidence to conclude that Uganda owes reparation for damage resulting from the looting, plundering and exploitation of timber. The Court nevertheless notes that Mr. Nest's calculations in relation to timber are based on less precise information and rougher estimates than were available to him, for example, in relation to gold. The amount of compensation should therefore be considerably lower than his estimate. On this basis, the Court will award compensation for this form of damage as part of a global sum for all damage to natural resources (see paragraph 366 below).

(c) Environmental damage resulting from deforestation

345. In its written pleadings, the DRC did not raise a separate claim with respect to environmental damage and referred only once to "damage done to biodiversity and the habitats of animal species" as part of its claims for compensation for deforestation. However, the DRC reserved its right to supplement its claim concerning damage to flora, noting that "a scientific study ha[d] shown that the massive deforestation in the east of the country [was] most pronounced in those areas where the Ugandan armed forces [had been] operating". In its oral pleadings, the DRC stated that its claim of US$100,000,000 for damage to flora comprised damage caused by the commercial exploitation of timber and damage caused by deforestation, and thus environmental damage. Given that the DRC values the unlawful exploitation of timber in Ituri at between approximately US$85,500,000 and US$95,000,000, the remainder (between US$5 million and US$14.5 million) may be understood as covering environmental damage resulting from deforestation, in particular, a loss of biodiversity. However, the DRC offers no evidence for the extent of this damage, nor does it offer a methodology for its valuation.

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346. Uganda did not address the claim for compensation for environmental damage separately from that for the exploitation of timber.

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347. Mr. Nest clarified that he understood the DRC's claim for damage due to "deforestation" as referring to "timber production". Therefore, he did not address the assessment of environmental damage separately from the exploitation of timber.

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348. The Court has held that "it is consistent with the principles of international law governing the consequences of internationally wrongful acts, including the principle of full reparation, to hold that compensation is due for damage caused to the environment, in and of itself" (*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Compensation, Judgment, I.C.J. Reports 2018 (I)*, p. 28, para. 41) and that "damage to the environment, and the consequent impairment or loss of the ability of the environment to provide goods and services, is compensable under international law" (*ibid.*, p. 28, para. 42).

349. The Court also recalls that in *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Compensation, Judgment, I.C.J. Reports 2018 (I)* it found with respect to environmental damage that

> "[t]he damage may be due to several concurrent causes, or the state of science regarding the causal link between the wrongful act and the damage may be uncertain. These are difficulties that must be addressed as and when they arise in light of the facts of the case at hand and the evidence presented to the Court. Ultimately, it is for the Court to decide whether there is a sufficient causal nexus

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> between the wrongful act and the injury suffered." (*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. 34).

350. However, in the present case the DRC did not provide the Court with any basis for assessing damage to the environment, in particular to biodiversity, through deforestation. The Court is thus unable to determine the extent of the DRC's injury, even on an approximate basis, and therefore dismisses the claim for environmental damage resulting from deforestation.

4. Fauna

351. In its Memorial, the DRC claimed US$2,692,980,468 for alleged direct and indirect loss of wildlife in four national parks (Virunga National Park, Garamba National Park, the Okapi Wildlife Reserve and Maiko National Park). During the oral proceedings, the DRC stated that it was claiming "a minimum amount of US$680,902,068" for direct losses in two of its national parks, the Okapi Wildlife Reserve and Virunga National Park.

352. The DRC submits that it was difficult to assess the injury related to fauna given "the sheer scale of the damage inflicted, its duration, the diversity of forms it took [and] the difficulty of collecting data in areas which had been under Uganda's control for a long period". The DRC emphasizes that the Okapi Wildlife Reserve is largely located in Ituri, which was under Ugandan occupation during the relevant period. It also specifies that "a small part of Virunga Park lies within Ituri".

353. To substantiate its claim, the DRC mainly relies on a 2016 study titled "Evaluation of the damage caused to Congolese fauna by Uganda between 1998 and 2003", which was prepared by a team of experts from the University of Kinshasa using the estimates of the ICCN, the body responsible for managing national parks in the DRC. According to this study, 54,892 animals were killed as a result of Uganda's conduct. The DRC also makes reference to reports by UNESCO, to the UNPE reports and to a study by the ICCN based on aerial counts in 2003 with respect to Virunga National Park. In response to Uganda's criticism of this last ICCN study, the DRC submits that the ICCN "carried out aerial counts in 2003, in conjunction with the Zoological Societies of London and Frankfurt, the US Fish and Wildlife Service and the International Rhino Foundation" and "compared [its estimates] to those of UNESCO".

354. With respect to its method of valuation, the DRC contends that "the price fixed for each animal has been set on the basis of prices habitually applied in international markets, or in unlawful markets in the case of species listed in Appendix I to [the Convention on International Trade in Endangered Species of Wild Fauna and Flora]", and that these prices were adjusted to reflect only the share of the damage caused by Uganda.

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355. Uganda argues that the DRC's claim for loss of wildlife falls outside the scope of the 2005 Judgment. Further, even if the Court's findings on the merits permitted a claim for compensation relating to wildlife, the DRC's claims in this regard clearly exceed the scope of those findings, given that the DRC only presented to the Court certain limited acts concerning harm to wildlife at the merits phase.

356. Uganda maintains that the DRC must present convincing evidence with a high level of certainty of specific internationally wrongful acts attributable to Uganda that resulted in specific wildlife loss to the DRC, as well as the valuation of that loss. According to Uganda, the DRC does not satisfy this requirement. Uganda emphasizes that the DRC bases its claim for direct losses on a single source, the study by the ICCN, a Congolese governmental agency. According to Uganda, the DRC does not explain how and on what basis the ICCN collected and compiled that information. Uganda asserts that the DRC appears to have fabricated the numbers claimed for the purposes of this litigation. It points out that the UNESCO report cited by the DRC in fact contradicts the findings set out in the study by the ICCN and that the findings of the UNPE on which the DRC relies were refuted by the Porter Commission.

357. Uganda argues that the DRC assigns monetary values to killed and unborn animals based on "unreliable, inappropriate and arbitrary prices", including "black market" prices. Uganda also asserts that claiming compensation

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for unborn offspring leads to double counting because ordinarily the value of an animal captures its ability to produce offspring. Finally, Uganda points to flaws in the DRC's methodology for calculating the number of offspring that would have been born.

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358. The Court recalls that it found that the DRC's claims relating to damage to fauna are encompassed by the scope of its 2005 Judgment (see paragraph 276 above). However, the Court is of the view that the evidence submitted by the DRC does not support the amount of its claim. The 2016 study prepared by a team of experts of the University of Kinshasa (see paragraph 353 above) needs to be treated with caution, bearing in mind that the Court stated in its 2005 Judgment that it "w[ould] treat with caution evidentiary materials specially prepared for [a case before it] and also materials emanating from a single source" (2005 Judgment, *I.C.J. Reports 2005*, p. 201, para. 61). Furthermore, the Court notes that neither the studies that are based on information from the ICCN (see paragraph 353 above) nor the UNESCO report cited by the DRC sufficiently explains the way in which the respective estimates were reached. Furthermore, these reports are insufficient to establish a causal nexus between any damage in park areas outside Ituri and the wrongful acts of Uganda. The Court therefore limits its further examination to the claims of the DRC relating to the parts of the Okapi Wildlife Reserve and Virunga National Park which are located in Ituri.

359. The Court observes that some of the damage claimed by the DRC is alleged to have occurred in the Okapi Wildlife Reserve, 90 per cent of which is located in Ituri, and in the northern part of Virunga National Park, a small part of which is located in Ituri. The Court recalls that Uganda is internationally responsible for failing to comply with its obligations as an occupying Power in Ituri in respect of all acts of looting, plundering or exploitation of natural resources in the occupied territory, which includes damage to wildlife, and that it owes reparation for such damage (see paragraphs 79, 275 and 278 above).

360. The Court further recalls 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" (*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). It notes that wildlife is often subject to less social and technical monitoring than human beings or commercial goods. In this context, the Court ascribes particular weight to reports by international organizations specifically mandated to monitor the sites in question, to the extent that these reports are of probative value and are corroborated, if necessary, by other credible sources.

361. The Court notes that various reports from international organizations contain substantial indications that significant damage was inflicted upon wildlife in Ituri during the period of Ugandan occupation (UNESCO, *World Heritage in the Congo Basin*, 2004, p. 27; Mapping Report, para. 745; UNPE Interim report, United Nations, doc. S/2002/565 of 22 May 2002, para. 52). The Court also observes that Uganda itself has confirmed the existence of severe poaching in the occupied territory, when it pointed out that it had started an anti-poaching initiative ("Operation Tango") in the Okapi Wildlife Reserve and Virunga National Park as from late October 2000. In this context, Uganda cites an article, only parts of which Uganda included in an annex to its written pleadings, stating in particular that "[a]lthough poaching began in earnest in 1996, the heaviest slaughter of wildlife occurred between 1998 and 2000", and that "[a]ccording to reliable trade sources, much of the tooled ivory on the Ugandan market is being smuggled from Ituri". Since 90 per cent of the Okapi Wildlife Reserve is located in Ituri, Uganda had an obligation at the relevant time to fulfil its duties as an occupying Power (see paragraph 79 above).

362. Under these circumstances, the Court considers that the information given in the reports by international organizations is sufficient for it to conclude that significant damage to fauna occurred in the areas in which Uganda was an occupying Power. The Court therefore concludes that Uganda is liable to make reparation for damage occurring in those parts of the Okapi Wildlife Reserve and Virunga National Park located in Ituri, where Uganda was the occupying Power.

363. While the available evidence is not sufficient to determine a reasonably precise or even an approximate number of animal deaths for which Uganda owes reparation, the Court is nevertheless satisfied, on the basis of

the reports cited above (see paragraph 361), that Uganda is responsible for a significant amount of damage to fauna in the Okapi Wildlife Reserve and in the northern part of Virunga National Park, to the extent that these parks are located in Ituri. On this basis the Court will award compensation for this form of damage as part of a global sum for all damage to natural resources.

5. Conclusion

364. The Court observes that the evidence presented to it and the expert report by Mr. Nest demonstrate that a large quantity of natural resources was looted, plundered and exploited in the DRC between 1998 and 2003. In respect of Ituri, Uganda is liable to make reparation for all such acts. As to areas outside of Ituri, a significant amount of natural resources looted, plundered and exploited is attributable to Uganda. However, neither the report by the Court-appointed expert nor the evidence presented by the DRC or set out in reports by the Porter Commission, United Nations bodies and non-governmental organizations is sufficient to prove the precise extent of the looting, plundering and exploitation for which Uganda is liable. The expert report by Mr. Nest provides a methodologically solid and persuasive estimate on the basis of the available evidence. This expert report is particularly helpful regarding the valuation of the different natural resources it covers (minerals, coffee and timber). However, while the expert report by Mr. Nest, and, with respect to fauna, the reports by specialized United Nations bodies, may offer the best possible estimate of the scale of the exploitation of natural resources under the circumstances, they do not permit the Court to reach a sufficiently precise determination of the extent or the valuation of the damage.

365. As it did with respect to damage to persons and to property, the Court must take account of the extraordinary circumstances of the present case, which have restricted the ability of the DRC and of the expert to present evidence with greater probative value (see paragraphs 120-126 above). The Court recalls that it may, under the exceptional circumstances of the present case, award compensation in the form of a global sum, within the range of possibilities indicated by the evidence and taking into account equitable considerations (see paragraph 106 above).

366. Taking into account all the available evidence (see paragraphs 260-363 above, specifically 298, 310, 322, 332, 344, 363), in particular the findings and estimates contained in the report by the Court-appointed expert Mr. Nest, as well as its jurisprudence and the pronouncements of other international bodies (see paragraphs 69-126 above), the Court will award compensation for the looting, plundering and exploitation of natural resources in the form of global sum of US$60,000,000.

D. MACROECONOMIC DAMAGE

367. Finally, the DRC claims US$5,714,000,775 for macroeconomic damage.

368. In the operative part of its 2005 Judgment, the Court found that "Uganda, by engaging in military activities against the Democratic Republic of the Congo . . . violated the principle of non-use of force in international relations and the principle of non-intervention" and held "that the Republic of Uganda is under obligation to make reparation to the Democratic Republic of the Congo for the injury caused" (*I.C.J. Reports 2005*, pp. 280-282, para. 345, subparas. (1) and (5)). The Court did not, however, specifically mention macroeconomic damage.

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369. The DRC submits that the unlawful use of large-scale force by Uganda caused a considerable slowdown in the economic activity of the DRC, constituting a loss of revenue for which full compensation must be paid. The DRC invokes the principle that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed (*Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 47). The DRC also claims, referring to Articles 31 and 36 of the ILC Articles on State Responsibility, that compensation should cover any financially assessable damage including loss of profits in so far as it is established. Therefore, in the DRC's view, general economic consequences are not excluded from the compensable damage.

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370. The DRC submits that any past State practice or jurisprudence that rejected reparation for macroeconomic damage resulting from war or armed conflict was based on special provisions peculiar to each case in point and that all these cases were exceptions to the general rule of full reparation.

371. According to the DRC, Uganda caused compensable general economic injury, in addition to more specific harm. The DRC maintains that there is no risk of double recovery if compensation for macroeconomic damage is awarded together with compensation for loss suffered by individuals. In this regard, the DRC argues that, if a country suffers on both the macroeconomic and the microeconomic level, the former represents a loss of profits, whereas the latter represents damage to the existing assets of businesses or production units.

372. To substantiate its claim, the DRC commissioned two experts from the University of Kinshasa to estimate "the macroeconomic damage caused by the 1998-2003 war". This 2016 study (hereinafter the "Kinshasa study") is based on a model that was developed by two economists who specialize in modelling the impact of war on the economic performance of affected countries. The DRC maintains that there is nothing speculative about macroeconomic damage, since the effects of war on the macroeconomic balance of affected States, the progress of the economy and its performance in terms of growth, are measurable and have indeed been measured by the DRC using proven methods and reliable data. The DRC further submits that the data it provided show that although the Congolese economy was already declining in 1998, the downturn was precipitated by the war and the economy began to recover when the war ended, demonstrating that the war had caused specific and identifiable macroeconomic harm.

373. According to the Kinshasa study, the macroeconomic damage suffered by the DRC as a result of the 1998-2003 war amounts to US$12,697,779,493.27. Since, in the DRC's submission, the harm resulting from the war was not caused solely by Uganda's internationally wrongful conduct but was also the consequence of acts of other States, Uganda's share amounts to 45 per cent of the total. The sum claimed by the DRC under this head of damage is thus US$5,714,000,775.

*

374. Uganda disputes the DRC's claim for macroeconomic damage on several grounds.

375. Uganda submits that the DRC's claim is not covered by the 2005 Judgment. In Uganda's view, the DRC must show an "exact injury" resulting from "specific actions" that constitute violations of international law for which the Court has established Uganda's responsibility, which the DRC has not done with respect to macroeconomic damage.

376. Uganda also maintains that macroeconomic damage resulting from armed conflict is not compensable under international law. Uganda argues that this is confirmed by the uniform rejection of such claims in State practice and in jurisprudence. Regarding State practice, Uganda refers to the Treaty of Versailles and the unilateral or conventional reparation schemes after the Second World War, none of which included an obligation to pay reparation for the macroeconomic impact of the war. With regard to jurisprudence, Uganda cites the EECC final awards on Ethiopia's damage and on Eritrea's damage, respectively, for the propositions that international law imposes no responsibility to compensate for the "generalized economic and social consequences of war", and that past tribunals have not "found generalized conditions of war-related economic disruption and decline to constitute compensable elements of damage, even in the case of some types of injury bearing a relatively close connection to illegal conduct".

377. Uganda further considers that macroeconomic damage is not subject to compensation under international law because it is inherently speculative. More specifically, Uganda claims that the causal nexus between its violation of the prohibition of the use of force and any possible macroeconomic loss is not sufficiently direct and is too remote. Uganda asserts that the DRC's claim itself illustrates the speculative nature of this head of damage, as "no claim for compensation can be justified by recourse to probabilities, variables, statistical methods and cryptic formulas".

378. In addition, Uganda submits that the concept of lost profits does not encompass macroeconomic damage as claimed by the DRC. In this regard, Uganda argues that lost profits relate to income-producing assets. Uganda contends that the economy of a nation does not constitute an income-producing asset. According to Uganda, the DRC fails to identify any assets that were specifically designed to produce profits and were affected by Uganda's internationally wrongful acts.

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379. Uganda also argues that the macroeconomic damage for which the DRC seeks compensation includes damage that is also claimed elsewhere in its written pleadings and that the DRC thus effectively seeks double recovery under the guise of macroeconomic damage.

380. Finally, Uganda asserts that, from an economic science perspective, the methodology by which the DRC substantiates its claim is flawed. Noting that the Kinshasa study mainly relies on a model developed by two economists, Uganda commissioned the same two experts, Mr. Paul Collier and Ms Anke Hoeffler of the University of Oxford, to prepare an assessment (hereinafter the "Collier and Hoeffler assessment") in which they set out their critical views of the Kinshasa study. Apart from alleging several technical errors and raising issues with the data used in the Kinshasa study, the Collier and Hoeffler assessment points to an "overall flaw [that] is more fundamental" and consists in an implausible assumption of positive growth in gross domestic product in the DRC after 1998 and in disregarding the rise of global commodity prices from 2001 onwards.

* *

381. The Court does not need to decide, in the present proceedings, whether a claim for macroeconomic damage resulting from a violation of the prohibition of the use of force, or a claim for such damage more generally, is compensable under international law. It is enough for the Court to note that the DRC has not shown a sufficiently direct and certain causal nexus between the internationally wrongful act of Uganda and any alleged macroeconomic damage. In any event, the DRC has not provided a basis for arriving at even a rough estimate of any possible macroeconomic damage.

382. The Court considers that it is not sufficient, as the DRC claims, to show "an uninterrupted chain of events linking the damage to Uganda's wrongful conduct". Rather, the Court is required to determine "whether there is a sufficiently direct and certain causal nexus between the wrongful act . . . and the injury suffered by the Applicant" (see paragraph 93 above; *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. 32; *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012 (I)*, p. 332, para. 14; *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 (I)*, pp. 233-234, para. 462). Compensation can thus only be awarded for losses that are not too remote from the unlawful use of force (commentary to Article 31 of the ILC Articles on State Responsibility, *Yearbook of the International Law Commission*, 2001, Vol. II, Part Two, p. 93, para. 10). A violation of the prohibition of the use of force does not give rise to an obligation to make reparation for all that comes afterwards, and Uganda's conduct is not the only relevant cause of all that happened during the conflict (see EECC, *Final Award, Ethiopia's Damages Claims, Decision of 17 August 2009, RIAA*, Vol. XXVI, p. 719, para. 282).

383. Uganda's unlawful use of force may well have had a negative effect on the economy of the DRC. In these proceedings, however, the Court must determine whether any macroeconomic damage allegedly suffered by the DRC is supported by the evidence, and whether the DRC has established a sufficiently direct and certain causal nexus between the internationally wrongful conduct of Uganda identified by the Court in its 2005 Judgment and this head of damage. The Kinshasa study on which the DRC relies does not provide any certainty regarding the existence or extent of the negative effect on the economy alleged by the DRC. The countervailing Collier and Hoeffler assessment casts serious doubts on the Kinshasa study, at least regarding the extent of any possible damage and the potential effects of any independent causal factors. The Court also notes that the methodology used in the Kinshasa study is based on an econometric model that is designed to show general trends or verify certain hypotheses that may suffice for abstract scientific purposes or policy recommendations. The Court is not convinced that the methodology used in the study is sufficiently reliable for an award of reparation in a judicial proceeding.

384. The Court concludes that the DRC has not demonstrated that a sufficiently direct and certain causal nexus exists between the internationally wrongful acts of Uganda and any possible macroeconomic damage. The Court therefore cannot award compensation to the DRC for losses allegedly arising from the general disruption to the economy as a result of the conflict (see EECC, *Final Award, Ethiopia's Damages Claims, Decision of 17 August 2009, RIAA*, Vol. XXVI, p. 747, para. 395). The Court thus rejects the claim of the DRC for macroeconomic damage.

IV. SATISFACTION

385. The DRC argues that, regardless of the amount awarded by the Court, compensation as a form of reparation is not sufficient to remedy fully the damage caused to the DRC and its population. It therefore asks that Uganda be required to give satisfaction through: (i) the criminal investigation and prosecution of officers and soldiers of the UPDF; (ii) the payment of US$25 million for the creation of a fund to promote reconciliation between the Hema and the Lendu in Ituri; and (iii) the payment of US$100 million for the non-material harm suffered by the DRC as a result of the war.

386. Uganda, for its part, is of the view that the DRC's request for criminal investigations and prosecutions is a new liability claim which was not brought at the merits phase. Furthermore, it asserts that the claim for a payment of US$125 million concerns the same injury already covered by the DRC's other claims, and that, in any event, satisfaction should take the form of a purely symbolic payment.

* *

387. Before examining the three forms of satisfaction sought by the DRC, the Court recalls that, in general, a declaration of violation is, in itself, appropriate satisfaction in most cases (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 106, para. 282 (1); *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France), Judgment, I.C.J. Reports 2008*, p. 245, para. 204; *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 (I)*, p. 234, para. 463, and p. 239, para. 471 (9); *Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 35). However, satisfaction can take an entirely different form depending on the circumstances of the case, and in so far as compensation does not wipe out all the consequences of an internationally wrongful act.

388. As regards the first measure sought by the DRC, namely the conduct of criminal investigations and prosecutions, the Court recalls that under Article 37 of the ILC Articles on State Responsibility:

> "1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.
>
> 2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality."

389. The Court observes that the forms of satisfaction listed in the second paragraph of this provision are not exhaustive. In principle, satisfaction can include measures such as "disciplinary or penal action against the individuals whose conduct caused the internationally wrongful act" (commentary to Article 37 of the ILC Articles on State Responsibility, *Yearbook of the International Law Commission*, 2001, Vol. II, Part Two, p. 106, para. 5).

390. The Court recalls that, in its 2005 Judgment, it found that Ugandan troops had committed grave breaches of the Geneva Conventions. The Court observes that, pursuant to Article 146 of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 and to Article 85 of the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Uganda has a duty to investigate, prosecute and punish those responsible for the commission of such violations. There is no need for the Court to order any additional specific measure of satisfaction relating to the conduct of criminal investigations or prosecutions. The Respondent is required to investigate and prosecute by virtue of the obligations incumbent on it.

391. As regards the second measure of satisfaction sought by the DRC, namely the payment of US$25 million for the creation of a fund to promote reconciliation between the Hema and the Lendu in Ituri, the Court recalls that in its 2005 Judgment it considered that the UPDF had "incited ethnic conflicts and t[aken] no action to prevent such conflicts in Ituri district" (*I.C.J. Reports 2005*, p. 240, para. 209). In this case, however, the material damage caused by the ethnic conflicts in Ituri is already covered by the compensation awarded for damage to persons and to property. The Court nevertheless invites the Parties to co-operate in good faith to establish different methods

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and means of promoting reconciliation between the Hema and Lendu ethnic groups in Ituri and ensure lasting peace between them.

392. Lastly, the Court cannot uphold the third measure of satisfaction sought by the DRC, namely the payment of US$100 million for non-material harm. There is no basis for granting satisfaction for non-material harm to the DRC in such circumstances, given the subject-matter of reparation in international law and international practice in this regard. The EECC rejected Ethiopia's claim for moral damage suffered by Ethiopians and by the State itself on account of Eritrea's illegal use of force (*Final Award, Ethiopia's Damages Claims, Decision of 17 August 2009, RIAA*, Vol. XXVI, p. 662, paras. 54-55, and p. 664, para. 61). In the circumstances of the case, the Court considers that the non-material harm for which the DRC seeks satisfaction is included in the global sums awarded by the Court for various heads of damage.

V. OTHER REQUESTS

393. The Court now turns to the other requests made by the DRC in its final submissions, namely that the Court order Uganda to reimburse the DRC's costs incurred during the proceedings, that the Court grant pre-judgment and post-judgment interest, and that the Court remain seised of the case until Uganda has fully made the reparations and paid compensation as ordered by it.

A. COSTS

394. The DRC in its final submissions requests the Court to order that the costs it incurred in the present case be reimbursed by Uganda. It argues that there are special circumstances for doing so, referring in particular to the gravity of the violations of international law from which the DRC and its people suffered, as well as the catastrophic scale of the damage that resulted. The DRC submits that it has faced an enormous task in identifying and assessing that damage, which has placed an additional burden on already impoverished public finances, a burden that the DRC would not have had to bear if large areas of its territory had not been invaded and occupied by the Ugandan armed forces for a number of years. In the DRC's view, those circumstances fully justify making an exception, in the present case, to the general rule set forth in Article 64 of the Statute of the Court that each party bear its own costs.

395. Uganda, for its part, argues that granting the DRC's request for costs would run counter to the presumption set forth in Article 64 of the Court's Statute, and that it would be contrary to the practice of the Court and its predecessor, neither having ever ordered one party to pay the costs of the other. Uganda contends that only if the Court were faced with a serious abuse of process by a party might there be a possibility of departing from the principle; in its view, such circumstances are not met in the present case. Uganda submits that it was fully justified in resisting the DRC's claims and that there is therefore no basis for ordering it to pay the DRC's costs. In its final submissions, Uganda requests that the Court declare that each Party should bear its own costs.

* *

396. Article 64 of the Statute provides that "[u]nless otherwise decided by the Court, each party shall bear its own costs". Taking into account the circumstances of this case, including the fact that Uganda prevailed on one of its counter-claims against the DRC and subsequently waived its own claim for compensation, the Court sees no sufficient reason that would justify departing, in the present case, from the general rule set forth in Article 64 of the Statute. Accordingly, each Party shall bear its own costs.

B. PRE-JUDGMENT AND POST-JUDGMENT INTEREST

397. The DRC in its final submissions requests the Court to order Uganda to pay pre-judgment interest and post-judgment interest. With respect to pre-judgment interest, the DRC observes that, according to Article 38, paragraph 1, of the ILC Articles on State Responsibility, "[i]nterest on any principal sum due . . . shall be payable when necessary in order to ensure full reparation". The DRC contends that, in light of the principle of full reparation and taking into account the passage of time, pre-judgment interest is appropriate in the present case. The DRC in its written

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pleadings requested the Court to fix the rate of the pre-judgment interest at 6 per cent. At the hearings, it proposed a rate of 4 per cent, payable from the filing of the Memorial on Reparation, due on heads of claim other than those for which the amount of compensation awarded by the Court, based on an overall assessment, already takes into account the passage of time.

398. The DRC also requests that post-judgment interest, at a rate of 6 per cent, accrue on the principal sum awarded by the Court, should Uganda fail to pay it "on the date of the judgment".

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399. Uganda argues that ordering pre-judgment interest in the circumstances of the case would not be consistent with the practice of the Court or the rules applicable to inter-State compensation under international law. In this regard, it submits that pre-judgment interest would apply only in circumstances where the Court determines that a fixed sum was due to the applicant as of a specified date in the past, and to the extent that is necessary to ensure full reparation. Uganda argues, however, that no such circumstances exist in the present case. Rather, it asserts that the DRC generally seeks compensation based on a present-day valuation and that there is no basis for supplementing that valuation with compensatory interest.

400. Uganda considers that in the circumstances of the case, the DRC is only entitled to post-judgment interest. In this regard, it accepts that, should the Court order Uganda to pay compensation to the DRC, it could order that, if such compensation is not paid within a reasonable period of time, interest would accrue on the amount owed until the date of payment. However, Uganda argues that what constitutes a "reasonable period of time" for such payment must be assessed in light of the amount established by the Court. Given contemporary market conditions, it urges the Court to set such interest at an annual rate no higher than 3 per cent.

* *

401. With respect to the DRC's claim for pre-judgment interest, the Court observes that, in the practice of international courts and tribunals, while pre-judgment interest may be awarded if full reparation for injury caused by an internationally wrongful act so requires, interest is not an autonomous form of reparation, nor is it a necessary part of compensation in every case (see *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Compensation, Judgment, I.C.J. Reports 2018 (I)*, p. 58, para. 151). The Court notes that in determining the amount to be awarded for each head of damage, it has taken into account the passage of time (cf. *ibid.*, p. 58, para. 152). In this regard, the Court observes that the DRC itself has stated in its final submissions that it is not requesting pre-judgment interest in respect of damage for which "the amount of compensation awarded by the Court, based on an overall assessment, already takes account of the passage of time". The Court considers that there is thus no need to award pre-judgment interest in the circumstances of the case.

402. With regard to the DRC's claim for post-judgment interest, the Court recalls that it has granted such interest in past cases in which it has awarded compensation, having observed that "the award of post-judgment interest is consistent with the practice of other international courts and tribunals" (*Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012 (I)*, p. 343, para. 56; see also *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Compensation, Judgment, ICJ Reports 2018 (I)*, p. 58, paras. 154-155). The Court expects timely payment and has no reason to assume that Uganda will not act accordingly. Nevertheless, consistent with its practice, the Court decides that, should payment be delayed, post-judgment interest shall be paid. It will accrue at an annual rate of 6 per cent on any overdue amount (see paragraph 406 below).

C. REQUEST THAT THE COURT REMAIN SEISED OF THE CASE

403. In its final submissions, the DRC also requests that the Court "declare that the present dispute will not be fully and finally resolved until Uganda has actually paid the reparations and compensation ordered by the Court" and that "[u]ntil that time, the Court will remain seised of the present case".

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404. The Court observes that the DRC, by its request, is essentially asking the Court to supervise the implementation of its Judgment. In this regard, the Court notes that in none of its previous judgments on compensation has it considered it necessary to remain seised of the case until a final payment was received. The Court moreover considers that the award of post-judgment interest addresses the DRC's concerns regarding timely compliance by the Respondent with the payment obligations set out in the present Judgment. In light of the above, there is no reason for the Court to remain seised of the case and the request of the DRC must therefore be rejected.

VI. TOTAL SUM AWARDED

405. The total amount of compensation awarded to the DRC is US$325,000,000. This global sum includes US$225,000,000 for damage to persons, US$40,000,000 for damage to property, and US$60,000,000 for damage related to natural resources.

406. The total sum is to be paid in annual instalments of US$65,000,000, due on 1 September of each year, from 2022 to 2026. The Court decides that, should payment be delayed, post-judgment interest at an annual rate of 6 per cent on each instalment will accrue on any overdue amount from the day which follows the day on which the instalment was due.

407. The Court is satisfied that the total sum awarded, and the terms of payment, remain within the capacity of Uganda to pay. Therefore, the Court does not need to consider the question whether, in determining the amount of compensation, account should be taken of the financial burden imposed on the responsible State, given its economic condition (see paragraph 110 above).

408. The Court notes that the reparation awarded to the DRC for damage to persons and to property reflects the harm suffered by individuals and communities as a result of Uganda's breach of its international obligations. In this regard, the Court takes full cognizance of, and welcomes, the undertaking given by the Agent of the DRC during the oral proceedings regarding the fund that has been established by the Government of the DRC, according to which the compensation to be paid by Uganda will be fairly and effectively distributed to victims of the harm, under the supervision of organs whose members include representatives of victims and civil society and whose operation is supported by international experts. In distributing the sums awarded, the fund is encouraged to consider also the possibility of adopting measures for the benefit of the affected communities as a whole.

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409. For these reasons,

THE COURT,

(1) *Fixes* the following amounts for the compensation due from the Republic of Uganda to the Democratic Republic of the Congo for the damage caused by the violations of international obligations by the Republic of Uganda, as found by the Court in its Judgment of 19 December 2005:

(a) By twelve votes to two,

US$225,000,000 for damage to persons;

IN FAVOUR: *President* Donoghue; *Vice-President* Gevorgian; *Judges* Tomka, Abraham, Bennouna, Yusuf, Xue, Sebutinde, Bhandari, Robinson, Iwasawa, Nolte;

AGAINST: *Judge* Salam; *Judge* ad hoc Daudet;

(b) By twelve votes to two,

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US$40,000,000 for damage to property;

IN FAVOUR: *President* Donoghue; *Vice-President* Gevorgian; *Judges* Tomka, Abraham, Bennouna, Yusuf, Xue, Sebutinde, Bhandari, Robinson, Iwasawa, Nolte;

AGAINST: *Judge* Salam; *Judge* ad hoc Daudet;

(c) Unanimously,

US$60,000,000 for damage related to natural resources;

(2) By twelve votes to two,

Decides that the total amount due under point 1 above shall be paid in five annual instalments of US$65,000,000 starting on 1 September 2022;

IN FAVOUR: *President* Donoghue; *Vice-President* Gevorgian; *Judges* Abraham, Bennouna, Yusuf, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte;

AGAINST: *Judge* Tomka; *Judge* ad hoc Daudet;

(3) Unanimously,

Decides that, should payment be delayed, post-judgment interest of 6 per cent will accrue on any overdue amount as from the day which follows the day on which the instalment was due;

(4) By twelve votes to two,

Rejects the request of the Democratic Republic of the Congo that the costs it incurred in the present case be borne by the Republic of Uganda;

IN FAVOUR: *President* Donoghue; *Vice-President* Gevorgian; *Judges* Abraham, Bennouna, Yusuf, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte;

AGAINST: *Judge* Tomka; *Judge* ad hoc Daudet;

(5) Unanimously,

Rejects all other submissions made by the Democratic Republic of the Congo.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this ninth day of February, two thousand and twenty-two, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Democratic Republic of the Congo and the Government of the Republic of Uganda, respectively.

(Signed) Joan E. DONOGHUE,
President.

(Signed) Philippe GAUTIER,
Registrar.

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Judge TOMKA appends a declaration to the Judgment of the Court; Judge YUSUF appends a separate opinion to the Judgment of the Court; Judge ROBINSON appends a separate opinion to the Judgment of the Court; Judge SALAM appends a declaration to the Judgment of the Court; Judge IWASAWA appends a separate opinion to the Judgment of the Court; Judge *ad hoc* DAUDET appends a dissenting opinion to the Judgment of the Court.

(Initialled) J.E.D.

(Initialled) Ph.G.

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DECLARATION OF JUDGE TOMKA

The Court and armed conflicts — Task of the Court in the present phase of the proceedings — Compensation awarded not commensurate with extent of damage suffered by the DRC as a result of Uganda's serious violations of international law.

Article 56 of the Statute of the Court — Insufficiency of reasons provided by the Court for the amounts awarded.

Payment of compensation by instalments over five-year period — Post-judgment interest — Date from which post-judgment interest accrues — Failure to protect value of compensation awarded.

Costs — Article 64 of the Statute of the Court — Uganda found to have breached important international law obligations — Violation by Uganda of the Order on provisional measures of 1 July 2000 — Necessity for the DRC to vindicate its rights before the Court — Long period of active litigation — Whether the Court should have exercised its discretion to order Uganda to pay the DRC's reasonable costs of legal representation.

1. In one of my opinions I expressed the view that "[t]he courts are usually powerless to stop wars" and that they "usually can only sort out *ex post* the legal consequences of the wars provided they have jurisdiction over the particular case" (*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 (I)*, separate opinion of Judge Tomka, p. 312, para. 3).

2. The Court was not able to stop the involvement of Uganda in the armed conflict in the territory of the DRC despite its Order of 1 July 2000 unanimously indicating certain provisional measures. In particular, the Court ordered that

> "[b]oth Parties must, forthwith, prevent and refrain from any action, and in particular any armed action, which might prejudice the rights of the other Party in respect of whatever judgment the Court may render in the case, or which might aggravate or extend the dispute before the Court or make it more difficult to resolve" (*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Provisional Measures, Order of 1 July 2000, I.C.J. Reports 2000*, p. 129, para. 47 (1)).

The Court further ordered that

> "[b]oth Parties must, forthwith, take all measures necessary to ensure full respect within the zone of conflict for fundamental human rights and for the applicable provisions of humanitarian law" (*ibid.*, p. 129, para. 47 (3)).

3. Even before the Court authoritatively determined that its "orders on provisional measures under Article 41 [of the Statute] have binding effect" (*LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 506, para. 109), it stated that

> "[w]hen the Court finds that the situation requires that measures of this kind should be taken, it is incumbent on each party to take the Court's indications seriously into account, and not to direct its conduct solely by reference to what it believes to be its rights" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 144, para. 289).

And the Court emphasized:

> "Particularly is this so in a situation of armed conflict where no reparation can efface the results of conduct which the Court may rule to have been contrary to international law." *(Ibid.)*

4. In its Judgment on the merits, rendered on 19 December 2005, the Court found that Uganda

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> "(1) . . . by engaging in military activities against the Democratic Republic of the Congo on the latter's territory, by occupying Ituri and by actively extending military, logistic, economic and financial support to irregular forces having operated on the territory of the DRC, violated the principle of non-use of force in international relations and the principle of non-intervention;
>
> . . . . . .
>
> (3) . . . by the conduct of its armed forces, which committed acts of killing, torture and other forms of inhumane treatment of the Congolese civilian population, destroyed villages and civilian buildings, failed to distinguish between civilian and military targets and to protect the civilian population in fighting with other combatants, trained child soldiers, incited ethnic conflict and failed to take measures to put an end to such conflict; as well as by its failure, as an occupying Power, to take measures to respect and ensure respect for human rights and international humanitarian law in Ituri district, violated its obligations under international human rights law and international humanitarian law;
>
> (4) . . . by acts of looting, plundering and exploitation of Congolese natural resources committed by members of the Ugandan armed forces in the territory of the Democratic Republic of the Congo and by its failure to comply with its obligations as an occupying Power in Ituri district to prevent acts of looting, plundering and exploitation of Congolese natural resources, violated obligations owed to the Democratic Republic of the Congo under international law" (*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, pp. 280-281, para. 345 (1), (3) and (4)).

5. The Court also found that "Uganda did not comply with the Order of the Court on provisional measures of 1 July 2000" (*ibid.*, p. 281, para. 345 (7)).

6. The failure of Uganda to comply with the Order on provisional measures led to significant losses of human life, serious personal injuries, displacement of populations, serious material damage and looting, plundering and unlawful exploitation of the natural resources of the DRC.

7. It was the task of the Court, in the present phase of the case, to "sort out *ex post* the legal consequences" of the unlawful use of force by Uganda and its unlawful intervention in the DRC, as well as of the other serious violations of its obligations under international law mentioned above. I doubt that the Court fully succeeded in this task. The amount of compensation awarded, in particular for personal injury (damage to persons) and damage to property, in my view, does not reflect the scale of the damage Uganda inflicted on the DRC and its people during the almost five years of its unlawful military activities. The amount of compensation awarded is not commensurate with the extent of the suffering and losses caused by Uganda's breach of the fundamental rule of international law prohibiting the use of force in international relations and the serious violations of its obligations under international humanitarian law and international human rights law.

8. As a Member of the Court, I was faced with a dilemma. Not being convinced that the amounts of compensation fixed by the Court will, as far as possible, wipe out all the consequences of Uganda's illegal acts, should I vote against point (1) of the *dispositif*? But as these amounts of compensation are part of the much larger overall amount to which the DRC, in order to be made whole, is certainly entitled, I decided in the end not to vote against this point.

9. Article 56, paragraph 1, of the Statute requires that the judgment shall state the reasons on which it is based. The reasons should allow the reader to understand how the Court reached its conclusions. I doubt that the reader will be able to understand how the Court arrived at the particular amounts of compensation for various heads of damages. While the Court does not spare the reports of the Secretary-General of the United Nations on the UN Mission in the Democratic Republic of the Congo and the report of the Court-appointed experts from criticism, taking issue in particular with their methodologies, in the end the Court itself does not indicate any precise methodology by which it has arrived at the amount of compensation it has awarded. Instead, the Court is content to repeat that

> "it may, under the exceptional circumstances of the present case, award compensation in the form of a global sum, within the range of possibilities indicated by the evidence and taking into account equitable considerations" (Judgment, paragraphs 166, 181, 193, 206, 225, 258 and 365).

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This incantation hardly satisfies the requirement of providing the reasons for the Court's Judgment.

10. I have voted against the Court's decision that the compensation due by Uganda to the DRC shall be paid in five instalments over a period of five years. The Court fixed the amount of compensation at the moment of rendering its Judgment, asserting that "in determining the amount to be awarded for each head of damage, it has taken into account the passage of time" (Judgment, paragraph 401). For that reason, it considered that there was no need to award pre-judgment interest. When determining post-judgment interest at 6 per cent, it decided that such interest shall accrue from the day following the day on which the instalment was due (Judgment, paragraph 406). This decision, however, does not take into account that, with the passage of time, the real value of the compensation awarded and still remaining to be paid in instalments, will diminish due to inflation and the decrease in the purchasing power of the US dollar. Assuming that inflation in this five-year period will be at around 6 per cent (the interest determined by the Court), the real value of the compensation awarded will significantly decrease (by up to US$39,000,000). While the DRC and Uganda would have been free to agree on the conditions for a possible payment of the compensation in instalments, the Court's decision — without protecting the value of the compensation awarded — is not, in my view, fair to the Applicant.

11. I cannot agree with the decision of the majority to reject the DRC's claim to be reimbursed by Uganda for the costs it incurred in the context of the present case. It is true that Article 64 of the Statute of the Court provides that "[u]nless otherwise decided by the Court, each party shall bear its own costs". The Statute thus gives a power to the Court to award costs "when it is called upon to do so, [and] after careful consideration of the particular circumstances of the case" (*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Judgment, I.C.J. Reports 2015 (II)*, joint declaration of Judges Tomka, Greenwood, Sebutinde and Judge *ad hoc* Dugard, p. 754, para. 2). As the victim of an unlawful use of force, with part of its territory occupied for an extended period and whose population suffered, the DRC had to seek protection and to vindicate its rights in this Court. The Respondent was found in breach of important international law obligations. Moreover, the Court found in its 2005 Judgment that Uganda did not comply with its Order on provisional measures of 1 July 2000. During the negotiations on reparations, Uganda offered a mere US$25,500,000, later increasing its offer to US$37,028,368. The DRC had no choice but to return to the Court. The long period of active litigation of the case before the Court between 1999 and 2005 and again between 2015 and 2021 no doubt entailed substantial costs for the DRC. These costs were certainly several times higher than the value of Uganda's counter-claim, worth less than US$1 million, which the DRC in its Counter-Memorial on Reparations accepted (p. 5, para. 2.03), and the waiver of which by Uganda is given by the Court as a reason for not "departing . . . from the general rule" (Judgment, paragraph 396). All these circumstances militate in favour of granting the request. However, to my regret, the Court did not even wish to receive the DRC's statement of costs following the closure of the oral proceedings.

12. This was not an ordinary case concerning a maritime delimitation dispute or the interpretation of a treaty in which the Court provides a service to both parties. This was a case about Uganda unlawfully engaging in military activities against the DRC on the latter's territory, occupying one of its districts and actively extending military, logistic, economic and financial support to irregular forces which operated on the territory of the DRC, as found in point (1) of the *dispositif* of the 2005 Judgment. Significant damage was caused to the DRC and its people. If any case calls for the reimbursement of the reasonable amount of the Applicant's costs of legal representation, it is this one. Unfortunately, the opening phrase in Article 64 of the Statute "[u]nless otherwise decided" remains a dead letter.

(Signed) Peter TOMKA.

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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,

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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 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

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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 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.

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

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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:

> "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.
>
> 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.

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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 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. 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

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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:

> "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

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the latter two categories 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 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.

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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 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

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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 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.

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.

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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.

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.

NOTES

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.]*

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

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).

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).

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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").

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.

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.

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.

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.

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.

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.

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*

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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.

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.

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.

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SEPARATE OPINION OF JUDGE ROBINSON

The Court's award of US$225 million for damage to persons — Questions raised about the Court's reasoning in arriving at that figure — The Court's reliance on the EECC Award — The Court's approach to and the application of the principle of equitable considerations.

Standard of proof at the reparations phase — The Court's failure to apply the lower standard applicable at the reparations phase.

1. Although I voted in favour of the award by the Court of US$225 million as compensation for damage to persons, I wish to make some observations about the reasoning employed by the Court to arrive at that sum, its treatment of the standard of proof at the reparations phase and the compensability of macroeconomic damage.

The Court's approach to the award of compensation

2. The Court's basic approach to the award of compensation is set out in paragraph 106 as follows:

> "[t]he Court 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 may be called for where the evidence leaves no doubt that an internationally wrongful act has caused a substantiated injury, but does not allow a precise evaluation of the extent or scale of such injury."

3. The head of damage, damages to persons, has five categories of injuries, namely, loss of life, injuries to persons, rape and sexual violence, recruitment and deployment of child soldiers, and displacement of populations. In respect of each category, after analysing the extent and valuation of the damage or injury, the Court decided to award compensation for each category of injury as part of a global sum. The Court did not fix compensation for each category of injury, and ultimately awarded what it described as a global sum of US$225 million for damage to persons. In this opinion in relation to this case, the term "heads of damages" is taken as applying to damage to persons, damage to property, damage to natural resources and macroeconomic damage. However, damage to persons has the five categories of injuries stated above.

4. The use by the Court of the concept of a global sum is unprecedented in its work. In the *Corfu Channel* case, the Court awarded a total sum as compensation reflecting the aggregation of specific awards that it had made in respect of each of the three heads of damage. In *Ahmadou Sadio Diallo*, the Court awarded a total sum that reflected the aggregation of awards that it had made in respect of each of the three heads of damage. In *Certain Activities*, the Court also awarded a total sum of compensation that reflected the aggregation of specific awards that it had made in respect of each of the two heads of damages. In this case, therefore, the Court is in a "brave new world" in the approach that it has adopted of making a final award in respect of the five categories of injuries, without previously making specific awards for those five categories.

5. In 2009, the Eritrea-Ethiopia Claims Commission ("EECC" or "the Commission") determined the reparations to be awarded in the dispute between the two countries arising out of an armed conflict that lasted about two years. At the outset it must be clarified that the reliance placed by the Court on the EECC's Award is wholly misplaced. The Court states that in respect of cases of mass casualties resulting from an armed conflict, "the judicial or other bodies concerned have awarded a global sum, for certain categories of injury, on the basis of the evidence at their disposal" (paragraph 107). It then refers to the EECC's Final Award on *Eritrea's Damages Claims* (2009)[1]. Although the language in that paragraph does not mean that the Court was implying that the EECC used the term "global sum", it must be clarified that that term is not used by the Commission in any part of its Award. An examination of that Award shows that the EECC did not do anything that was remotely similar to what the Court has done in this case. The EECC awarded compensation in the form of a specific sum for each category of injury and then made a final award that reflected an aggregation of those specific sums, which it simply described as the "total monetary compensation". For example, in respect of rape, the Commission awarded a specific sum of US$2 million, which it

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added to the other sums awarded for the other categories of injuries making a grand total of US$161,455,000. It is inappropriate to describe the award of US$2 million as a global sum, thereby suggesting that the EECC's approach to compensation was similar to that of the Court. It is nothing of the sort, because, unlike the EECC, the Court does not award a specific sum for any of the five categories of injuries in respect of damage to persons; it awards what it describes as a global sum.

6. In relation to cases of mass injuries, the Court found that it may "form an appreciation of the extent of damage on which compensation should be based without necessarily having to identify the names of all victims or specific information about each building destroyed in the conflict" (paragraph 114). The thrust of this opinion is that the Court should have implemented this important finding by making a specific award of compensation in respect of each category of injury. Such a course would have rendered the Court's ultimate award of compensation more comprehensible. Had the Court followed that approach, an award for a specific category of injury, such as rape, made on the basis of its appreciation of the extent of injury should not be treated as part of a global sum, because it is inevitable that in cases of mass casualties an approach is taken reflecting the totality of the wrongfulness relating to a specific category of injury rather than the specificity of individual acts constituting that totality. In that regard, it may be recalled that the Court categorically rejected Uganda's submission that it was necessary for the Democratic Republic of Congo (DRC) to adduce evidence showing specific injuries to specific persons or specific damage to specific property at a particular time or place. In this case the Court has correctly shunned the particularization of injuries.

The concept of an award of compensation in the form of a global sum "within the range of possibilities indicated by the evidence"

7. The Court's use of the concept of an award of compensation within the range of possibilities indicated by the evidence appears to have been inspired by the EECC's *Eritrea Damages Award*, in which the phrase is used twice. Page 508 of the Award reads,

> "The Commission required clear and convincing evidence that damage occurred, but less rigorous proof for purposes of the quantification of damages which requires exercises of judgment and approximation. In commercial arbitration, lack of evidence may warrant dismissal of a damages claim for failure of proof. In contrast, when serious violations of international law, causing harm to many individuals, have been determined, it would be inappropriate to dismiss the claim outright. The Commission recognized its obligation to determine appropriate compensation, even if the process involves estimation or guesswork within the range of possibilities indicated by the evidence. The Commission further took into account a trade-off fundamental to recent international efforts to address injuries affecting large number of victims. Compensation levels were thus reduced, balancing uncertainties flowing from the lower standard of proof"[2].

Paragraphs 37 and 38 of the Award also explain the Commission's understanding of the concept. The language in these paragraphs is essentially the same as that on page 508. Considering that the Award on *Eritrea's Damages Claims* is cited favourably seven times in the Judgment, it is surprising that the Court has not followed the Commission's approach to determining compensation.

8. Four points may be made about the manner in which the Commission uses the term "within the range of possibilities indicated by the evidence", which distinguishes it from the Court's approach. The first point is that, as indicated below, the Commission is careful to set the context in which recourse may be had to the concept of an award of compensation within the range of possibilities indicated by the evidence:

(i) the quantification of damages for serious violations of international law resulting in harm to individuals calls for the exercise of judgment and approximation, particularly in relation to mass conflicts, which inevitably lead to uncertainties with regard to the extent and valuation of damage;

(ii) in light of this particular context, there is a lower standard of proof at the reparations phase;

(iii) in applying that lower standard of proof, a court or tribunal has an "obligation to determine appropriate compensation, even if the process involves estimation or guesswork within the

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(iv) range of possibilities indicated by the evidence"[3]; and

(v) the trade-off for a court or tribunal relying on estimation or guesswork of compensation due in a case of mass casualties such as a war is that compensation may be reduced.

The Court's use of the concept does not reveal any sensitivity to that context which the Commission was careful to identify for its use. In particular, no sensitivity is shown by the Court to the linkage between the use of the concept and the lower standard of proof at the reparations phase. In the vast majority of instances where the Court finds that the evidence does not allow it to even approximate the extent of the damage, the evidence is such that had the Court been sensitive to the lower standard of proof, it would have been in a position either by estimation or guesswork to determine the extent and valuation of the damage; nor does the Court's approach reveal any sensitivity to reducing the compensation sum as a trade-off for "uncertainties flowing from the lower standard of proof"[4]. This trade-off is described by the Commission as "fundamental to recent international efforts to address injuries reflecting large numbers of victims"[5]. The opinion will later address issues relating to the standard of proof.

9. The second point is that it is within that special context and against that special background that the phrase "within the range of possibilities indicated by the evidence" must be interpreted. The Commission is not at large in the estimation or guesswork that it is allowed to engage in; rather, it must discharge its functions having regard to the evidence, but in doing so it considers possible assessments of the evidence and exercises its judgment in adopting an appreciation of the evidence that allows it to estimate the extent and value of the injury. This is very much like applying the principle of equitable considerations. Thus, there is no inconsistency between the Commission's reference to estimation or guesswork and the finding in *Story Parchment* that "the damages may not be determined by mere speculation or guess[work]"[6], because the Commission's approach is that the estimation or guesswork is to be carried out within the range of possibilities indicated by the evidence; in other words, the range of possibilities indicated by the evidence functions as a restraint or rein on the circumstances in which recourse may be had to estimation or guesswork, the latter being nothing more than a method of approximating compensation.

10. The third point is that the purpose for which the Commission uses the concept of "within the range of possibilities indicated by the evidence" would seem to be wholly different from the purpose for which it is used by the Court. The Commission sets out its understanding of the concept at the beginning of the Award. Although it does not make any explicit reference to that concept in its analysis of any of the categories of injuries, it is safe to presume that its analysis on compensation is informed by that concept as outlined at the beginning of the Award. In that regard, the Commission determines a specific sum for each category of injury within the range of possibilities indicated by the evidence. On the other hand, the Court, although purporting to use the concept of "within the range of possibilities indicated by the evidence", refrains from determining a specific sum as compensation for each category of injury. The Court has therefore not applied the concept in the way that it was used by the Commission. This difference is, of course, explained by the Court's use of a global sum, a concept which does not appear to admit of specific determinations of compensation for a category of injury. To the extent that the Court's concept of a global sum does not involve estimating compensation for each category of injury, it is inconsistent with the Commission's concept of compensation involving estimation or guesswork within the range of possibilities indicated by the evidence.

11. The fourth point is that, unlike the Commission, it appears that the Court does not see itself as having an obligation to determine appropriate compensation even if it has to use estimation or guesswork within the range of possibilities indicated by the evidence. It is odd that the Court seizes on the last part of the Commission's dictum — within the range of possibilities indicated by the evidence — but ignores the first part which refers to the obligation to determine appropriate compensation by estimation or even by guesswork. The Commission's approach calls for action by the tribunal to determine appropriate compensation even by estimation or guesswork, but places a restraint on that action. By ignoring that obligation, the Court has not followed the Commission's approach on the nine occasions that the Judgment uses the phrase "within the range of possibilities indicated by the evidence". It would seem that the Court is still searching for a precision in the evidence that the law does not require. The Court does not appear to acknowledge that the quantification of damages in situations of mass casualties resulting from a war requires what the Commission calls "exercises of judgment and approximation". Regrettably,

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the Court appears to approach the reliability of the evidence for the purpose of determining the extent and valuation of the damage or injury with the rigour of an insurer examining a claim for damages arising from an accident between two motor vehicles.

Comprehending the Court's concept of a global sum

12. The Court determined that on the basis of the evidence, the number of lives lost was in a range from 10,000 to 15,000 (paragraph 162); the number of displaced populations was in a range from 100,000 to 500,000 (paragraph 223); the number of children recruited and deployed fell within a range (paragraph 206); however, the Court did not identify that range. In relation to injuries to persons, the Court determined that the evidence only allowed it to find that a "significant number of such injuries occurred" (paragraph 181); in relation to rape and sexual violence, the Court determined that the evidence only allowed it to find that "a significant number of such injuries occurred" (paragraph 193).

13. Compensation is based on a determination of the extent of damage or injury and its valuation. If the determination of the extent of damage or injury is wrong, compensation based on the valuation will also be wrong. Since the Court awards compensation for each category of injury as part of a global sum, it is reasonable to expect that when added together, the aggregation of those five parts would comprise the global sum of US$225 million.

14. In effect, the Court's approach calls for the addition of a specific number of persons from the range that is identified for loss of life and displacement of populations to what is described as a "significant number" in respect of rape and sexual violence and injuries to persons. However, it is not possible to add the certain and precise number that may be identified within those two ranges to something that is as uncertain and imprecise as a "significant number" and arrive at the global sum of US$225 million. The matter is rendered more complicated by the fact that, in respect of the recruitment and deployment of child soldiers, the Court states that there is a range but does not identify the range. Although two numbers, 1,800 and 2,500, are indicated in paragraph 204 on the recruitment of child soldiers, there is nothing to show how these numbers could constitute a range. The Court's approach would have been more comprehensible if it had identified a range in respect of all five categories of injuries. Regrettably, since the Court's assessment of the extent of the damage is open to criticism, its global award of compensation of US$225 million is also open to question.

15. It is regrettable that the Court does not explain the concept of the global sum. Although the concept, as developed by the Court, suggests that the addition of the five parts in respect of the categories of injuries constitutes the global sum, the analysis above shows that the five parts are not susceptible to addition. In any event, as noted before, the Court's use of the concept of the global sum does not appear to allow a specific determination of compensation for each category of injury; if it did, the final award would not be global. However, the dilemma is that, absent an award for each category of injury, the global sum is difficult to comprehend and appears to be snatched from thin air. Thus, the global sum is incompatible with a specific determination of compensation for each category of injury but is incomprehensible without such a determination. Another difficulty is that, since compensation is awarded for each of the five categories of injuries as *part* of the global sum, it is evident that the global sum may be partitioned, thereby implying that it is capable of disaggregation, with the result that the sum loses its global character.

16. By stating that it may exceptionally award compensation in the form of a global sum, the Court acknowledges that the more usual practice is for a final award of compensation to reflect the aggregation of specific awards for each category of injury. In my view, *DRC* v. *Uganda* was not an appropriate case to depart from the more usual practice. This is a case in which the Court has found that one Party has committed breaches not only of international humanitarian law but also of international human rights law, giving rise to claims for compensation for loss of life, injuries to persons, rape and sexual violence, the recruitment and deployment of child soldiers, and displacement of populations. Each category of injury is unique, having its own peculiar characteristics, warranting individual treatment by the Court in its award of compensation. The uniqueness and peculiarity of each category of injury are lost in the award of a global sum for all five categories. For example, given the significance that international human rights law attaches to the right to life — it is a predicate to the enjoyment and exercise of all other human rights, and is the first article of the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights — it is inappropriate to award a sum as compensation not only for

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the loss of life but also for another category of injury such as displacement of populations. There is no justification for commingling an award of compensation for loss of life with an award of compensation for any other category of injury.

17. The concept of the global sum has been used in investment arbitration — see for example, *Blount Brothers Corporation* v. *Iran*[7] and *Adam Joseph Resources* v. *CNA Metals*[8] in which each Tribunal awarded a global sum for all costs claimed by the claimant; however, in that field, which is largely concerned with commercial and investment activities, it does not present the substantive and presentational problems that arise in a case relating to the loss of life, injuries to persons and the other categories of injuries in this case. In light of all the difficulties presented by the concept of the global sum, it has to be questioned whether it is an appropriate tool for the discharge by the Court of its judicial function.

The principle of equitable considerations

18. In relation to loss of life, injuries to persons, and rape and sexual violence, the Court determined that the evidence at its disposal did not allow it to determine even an approximate number of lives lost (paragraph 162), or of injuries to persons (paragraph 181), or of rapes and other acts of sexual violence (paragraph 193). It is submitted that it would only be in the rarest of cases that the Court would not be in a position to approximate the numbers of lives lost, injuries to persons, and rapes, had it determined compensation on the basis of equitable considerations. The opinion now proceeds to an examination of the principle of equitable considerations as it has been developed by the Court and other tribunals.

19. The Court's case law is that recourse may be had to equitable considerations as the basis for an award of compensation in situations where the evidence provides certainty as to damage caused by the wrongful conduct of a respondent, but no certainty as to the extent of that damage. In that regard, in *Certain Activities (Costa Rica* v. *Nicaragua)* the Court cited the following passage from *Story Parchment*, cited in *Trail Smelter*:

> "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"[9].

20. In *Al-Jedda*, the European Court of Human Rights relied on Article 41 of the European Convention, which allows it to "afford just satisfaction" to an injured party in circumstances where the domestic law only allows partial reparation. In *Diallo*, the Court cited the following passage from *Al-Jedda* v. *United Kingdom*: "[i]ts guiding principle is equity, which above all involves flexibility and an objective consideration of what is just, fair and reasonable in all the circumstances of the case, including not only the position of the applicant but the overall context in which the breach occurred"[10]. Although *Al-Jedda* was a case involving non-material harm, the elements of the principle of equity that are identified — flexibility, fairness and reasonableness in all the circumstances of the case — are equally applicable to a claim for material harm. It is significant that the European Court highlights the element of flexibility, which, while it does not allow for wild approximations, does allow the Court to make a reasonable approximation of the extent and valuation of the damage.

21. That the Court's jurisprudence is consistent with the use of the principle of equitable considerations to arrive at approximate determinations of the extent of the damage is evident from its finding in *Certain Activities* that "the absence of certainty as to the extent of damage did not necessarily preclude it from awarding an amount that it considered approximately to reflect the value of the impairment or loss of environmental goods or services"[11]. The principle of equitable considerations, therefore, allows the Court to approximate the valuation of the damage suffered in cases where there is certainty that there was some damage, but none as to its extent. It is in such circumstances that an award of compensation is made on the basis of equitable considerations. The Court, if it applies the principle of equitable considerations, is not required to be precise in its determination of either the number of victims or its valuation of the damage suffered.

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22. In *Diallo*, Guinea submitted claims of US$250,000 for non-material injury and US$550,000 for other material damage[12]. The Court awarded US$85,000 for non-material injury[13] and US$10,000 for material injury[14] on the basis of equitable considerations. In respect of the award of US$10,000 for loss of personal property, the Court found credible an inventory prepared by Guinea but concluded that "Guinea has failed to prove the extent of the loss of Mr. Diallo's personal property listed on the inventory and the extent to which any such loss was caused by the DRC's unlawful conduct"[15]. The Court reasoned that Mr. Diallo did suffer some material injury in relation to his personal property but indicated that it could not accept the large sum claimed by Guinea. In those circumstances, the Court "consider[ed] it appropriate to award an amount of compensation based on equitable considerations"[16]. Despite Guinea's failure to prove the extent of Mr. Diallo's loss in relation to his personal property, the Court awarded US$10,000 as compensation. The Court had no valuation of any of the property listed on the inventory, but that did not deter it from approximating the damage suffered by Mr. Diallo.

23. It is noteworthy that, against the background of a total lack of evidence as to the value of the property listed on the inventory, the Court offered no specific explanation either for its decision to award compensation on the basis of equitable considerations or for the sum it awarded. The Court did nothing more than outline the facts of the case and then announce its decision to award compensation on the basis of equitable considerations. That, of course, does not mean that the Court's decision was unreasoned, because it was within the Court's power to award compensation in the particular circumstances of a case, applying the elements of flexibility, fairness and reasonableness.

24. It is acknowledged that, in contradistinction to *Diallo*, which addresses compensation for a single individual, the present case relates to mass casualties in an armed conflict. However, *Diallo* establishes a principle whereby the Court can arrive at an approximation of the damage and correspondingly make an award of compensation. This principle is as applicable to mass casualties as it is to a single individual, although, concededly, its application will be more difficult in relation to the former. Indeed, its application is particularly appropriate in the context of a mass casualty, such as the armed conflict between Uganda and the DRC, because of the inevitable uncertainties that will arise in determining quantities, e.g. the number of persons who lost their lives.

25. In *Chaparro Álvarez and Lapo Íñiguez* v. *Ecuador* (cited by the Court in *Diallo*[17]), the applicants sought compensation for pecuniary damage resulting from their unlawful detention and the Ecuadorian Government's unlawful seizure of their factory that produced ice chests. With regard to pecuniary damage arising from the seizure of the applicants' property, the Inter-American Court of Human Rights noted that the only evidence presented was an expert appraisal that "made general references, without defining the amount they are requesting as compensation for this concept and without developing a logical reasoning that would allow the Court to assess the damage effectively caused"[18]. The Inter-American Court expressly acknowledged "the complexity of determining the commercial value" of the applicant's company, but nonetheless it awarded the sum of US$150,000 "based on the equity principle"[19].The Inter-American Court took into consideration the fact that the "factory had been in operation for several years and that, at the time of the facts, had received some loans to improve its productivity"[20]. Like the Court in *Diallo*, the Inter-American Court did not have any specific evidence on the basis of which it could arrive at an approximate valuation of the loss suffered by the company, but that did not deter it from arriving at a sum on the basis of equitable considerations that, in its view, approximated to the value of the loss suffered by the company. Again, like the Court in *Diallo*, it is noteworthy that, in the face of a total lack of any evidence as to the valuation of the loss suffered by the company, the Inter-American Court did not offer any specific reason either for awarding compensation on the basis of equitable considerations or for the sum it awarded.

26. In *Diallo*, the Court specifically cited paragraphs 240 and 242 of *Chaparro* which read:

> "240. The representatives did not present any supporting documentation that would allow the Court to establish the value of Mr. Lapo's house. Consequently, the Court decides, in equity, to establish the sum of US$20,000.00, (twenty thousand United States dollars). The State must pay this amount to Mr. Lapo within one year of notification of this judgment.
>
> . . . . . .
>
> 242. The amount requested for [Chaparro's apartment] is US$135,729.07 (one hundred and thirty-five thousand seven hundred and twenty-nine United States dollars and seven cents). From the

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> evidence provided, the Court is unable to establish clearly the basis used by the expert to establish that the apartment was worth this amount, since no additional evidence or arguments have been submitted by the representatives in this regard. Therefore, it decides to establish, in equity, the amount of US$40,000.00 (forty thousand United States dollars), which the State must deliver to Mr. Chaparro to compensate him for the loss of his apartment. The State must pay this amount to Mr. Chaparro within one year of notification of this judgment."[21]

27. *Chaparro* provides a very strong precedent for the Court to arrive at an approximate sum as compensation for injuries suffered by the DRC, because in relation to Mr. Lapo's house there was no supporting documentation that allowed the Inter-American Court to establish its value. Nonetheless, that court awarded the sum of US$20,000. Further, although the Inter-American Court found the expert evidence in relation to the value of Mr. Chaparro's apartment to be wholly unhelpful, it "establish[ed], in equity, the amount of US$40,000" as compensation. It is quite likely that the Court cited this case because it felt that the principle of equity, on the basis of which the Inter-American Court acted, had elements that were similar to the principle of equitable considerations it applied in *Diallo.*

28. As in *Diallo*, the Inter-American Court did not offer any specific reason either for awarding compensation on the basis of equity or for the sum it awarded. It outlined the facts and thereafter awarded compensation on the basis of equity, although it had no supporting evidence whatsoever in relation to the value of the house and the apartment, the principle of equity allowed it to make a reasonable estimate of the compensation.

29. Here again, although this case does not relate to mass casualties in an armed conflict, the principle of equity, on which it relies, is as applicable to such casualties as it is to a single individual.

30. In its Final Award on *Eritrea's Damages Claims*, the EECC acknowledged that there were significant weaknesses in the evidence relating to the extent of injury or valuation. Nonetheless, since the violations of harm to individuals were many, the Commission, "in the circumstances[, has] sought to develop a reasonable estimate of the losses resulting from the injuries it found, taking account of the likely population of the affected areas and estimates of the frequency and extent of loss. This process was unavoidably imprecise and uncertain, but it was necessary given the limitations of the record"[22]. The element of reasonableness on which the Commission relied is a significant component of the principle of equitable considerations; it is equally clear that this element allows a court or tribunal to navigate areas of uncertainty and imprecision in the evidence with a view to fixing a sum for compensation.

Conclusions on the principle of equitable considerations

31. When the Court applies the principle of equitable considerations, it is applying equity *intra legem*, equity within the law; in particular, it is applying equity in the manner that Professor Francesco Francioni has described it: "as a method for infusing elements of reasonableness and 'individualized' justice whenever the applicable law leaves a margin of discretion to the court or tribunal which has to make the decision"[23]. It is not applying equity *contra legem,* an example of which is the power given to the Court under Article 38, paragraph 2, of the Statute of the Court to determine a case *ex aequo et bono* if it has the consent of the parties to do so. In sum, therefore, the elements of the principle of equitable considerations are reasonableness, flexibility, judgment, approximation and fairness. Consequently, the Court's finding that it may form an appreciation of the extent of damage is nothing but an illustration of the principle of equitable considerations, which allows for reasonableness and judgment, as indicated by the EECC, and flexibility, as indicated by the European Court of Human Rights in *Al-Jedda*. Another important feature of the principle of equitable considerations is that the court or tribunal, in applying that principle, becomes actively engaged with the evidence so as to estimate a sum for compensation, or, in the language of the EECC, "to determine appropriate compensation". The EECC sees this activity as obligatory, even if it calls for estimation or guesswork, albeit an estimation that is restrained by the range of possibilities indicated by the evidence. It does not appear that the Court was prepared to become sufficiently engaged with the evidence so as to estimate a sum for compensation.

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Application of the principle of equitable considerations to the facts of the case

32. Had the Court applied the principle of equitable considerations, it would have been able to determine a specific sum for compensation in practically every case in which the DRC made a claim for compensation. In those cases, the Court had before it, evidence from the DRC as to the extent of damage or injury and the valuation of the damage or injury. It also had before it, evidence from its own experts as well as from United Nations bodies and non-governmental organizations. Whenever the Court has evidence of that kind before it, it is always in a position to weigh the varying proposals from the parties and others and determine a sum for compensation on the basis of equitable considerations. Even if the Court only has evidence from the applicant and the respondent, or from one party alone, by becoming actively engaged with the evidence, it is in a position to determine a sum for compensation on the basis of equitable considerations. It is not the case, as the Court asserts in relation to loss of life, injuries to persons, and rape, that the evidence did not allow it to even approximate the number of persons or injuries involved. Eritrea and Ethiopia, like the DRC and Uganda, are poor, developing countries with relatively limited infrastructural facilities, and it is therefore not surprising that, except in relation to evidence for damage to buildings, the evidence before the EECC was of the same quality as the evidence before the Court. Nonetheless, the EECC found it possible in respect of all the claims, except for those dismissed for lack of evidence, to fix a sum as compensation on the basis of a reasonable estimate.

33. For example, Eritrea sought compensation for injury resulting from rape[24]. It provided very little evidence as to the extent of the damage (i.e. number of women raped) or the valuation of the injury. Rather, Eritrea proposed that each party set aside an estimated US$500,000 to US$1,000,000 to fund locally administered programs for women's health care and support services for rape victims[25].

34. In light of the lack of evidence, the Commission faced similar challenges to the Court in assessing the DRC's claims for damage to persons resulting from rape. Like the Court, the Commission noted "the cultural sensitivities surrounding rape in both countries and the unwillingness of victims to come forward"[26]. As such, the Commission "ha[d] no illusion that the record before it reveals the full scope of rape during the extended armed conflict"[27]. The Commission was, therefore, "acutely aware that the full number of victims and the full magnitude of the harm they suffered cannot and will not ever be known"[28]. The parties similarly failed to "provide the Commission with an agreed or useful methodology for assessing compensation"[29].

35. However, the Commission's award of compensation for rape reflected a reliance on the elements of judgment and flexibility that is missing in the Court's determination of compensation for the same category of injury. The Commission found that it was "predictable that each Party failed to prove its damages claim for rape, either as to a reasonable number of victims or as to a reasonable measure of economic harm"[30]. The Commission did not find it strange that the parties failed to identify a sum to reflect the extent or valuation of the harm caused by rape, because it was willing to accept the responsibility to determine appropriate compensation. It rejected Eritrea's proposal because it was "presented . . . without explanation"[31], and found that such amounts did not provide sufficient support for rape victims[32]. Importantly, the Commission "consider[ed] that this serious violation of international humanitarian law demand[ed] serious relief"[33]. In order to adequately compensate for the acute harm of rape, the Commission became so actively engaged with the evidence that it awarded US$2 million to Eritrea, for Ethiopia's failure to prevent the rape of known and unknown victims in Eritrea; this sum was in excess of Eritrea's own proposal (see paragraph 35 of this opinion)[34]. In making this award, the Commission obviously took into account that "the record before it" did not reveal "the full scope of rape during the extended armed conflict".

36. The evidence relating to rape provides an illustration of a case in which the Court could certainly have fixed a sum as compensation on the basis of equitable considerations. The DRC relied on the finding by Congolese investigators of 342 cases of rape. However, it correctly concluded that that sum was an undercount for a variety of reasons, including the common practice of rape during the war and the well-known cultural tendency among victims not to report rape. Consequently, in order to take account of those factors the DRC multiplied the number of 342 by five and claimed compensation for 1,740 cases of rape and sexual violence. It must be acknowledged that this was not a satisfactory approach. However, there was evidence before the Court that would have allowed it to award compensation for the rape of an identified number of victims on the basis of equitable considerations.

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Instead, the Court found that there was a significant number of victims of rape and sexual violence. While it was correct for the Court not to accept the number of 1,740 cases of rape as submitted by the DRC, it was certainly in a position to accept that there were more than 342 such cases and identify a number that would form the basis for the valuation of the injury, for the following reasons. First, the Court had the uncontradicted statement by the DRC that for cultural reasons cases of rape and sexual violence are under-reported. Second, the DRC's submission that rape and sexual violence were widespread weapons of war in Ituri is supported by the ICC's confirmation that it was a "common practice" in that district (*The Prosecutor* v. *Bosco Ntaganda*, ICC-01-04-02). Third, it had the statement of the MONUC special report on the events in Ituri that "[c]ountless women were abducted and became 'war wives', while others were raped or sexually abused before being released". Fourth, proof in this phase of the proceedings does not require the same degree of certainty as the merits phase, addressing responsibility for wrongful conduct. The Court can be satisfied by proof on a balance of probabilities. These four factors provide a sound basis for a conclusion that there were more than 342 cases of sexual violence. The Court was in a position to identify a number higher than 342 and award a sum for compensation on the basis of equitable considerations.

37. Noticeably, the Commission played a more active role in its assessment of compensation than the Court, which was relatively passive in determining compensation. The Commission did not conclude that the evidence was of such poor quality that it was unable to even approximate the extent of the injury. Instead, it became actively engaged in the whole process of determining compensation by showing sensitivity to the inadequacy of the sum claimed by Eritrea as compensation and the fact that a serious violation of international humanitarian law had been committed.

38. A general comment that may be made is that the Court should have become more active and more engaged in fixing compensation by introducing its own determination of the extent and valuation of the damage or injury. The Court appears to see itself as performing a passive role as the recipient of the Parties' submissions and the evidence as a whole. Unlike the Commission, it does not see itself as being under an "obligation to determine appropriate compensation, even if the process involves estimation or guesswork within the range of possibilities indicated by the evidence"[35]. *Certain Activities* provides a precedent for the Court becoming very engaged in the determination of compensation. In that case, the Court rejected the methodologies proposed by both parties for determining compensation for environmental damage and advanced its own methodology, albeit in some respects borrowing from the parties' methodologies. It was on the basis of its own methodology that the Court awarded compensation to Costa Rica on the basis of equitable considerations.

39. In *Diallo* and *Certain Activities*, the Court awarded compensation on the basis of equitable considerations. In this case, in respect of the five categories of injuries relating to damage to persons, rather than determining compensation on the basis of equitable considerations, the Court awarded compensation taking into account equitable considerations. No explanation is offered for the Court not following its approach in *Diallo* and *Certain Activities*. It is certain, however, that the approach adopted by the Court of awarding compensation taking into account equitable considerations means that it would not have had the full benefit of the principle. An award of compensation that only takes into account equitable considerations merely treats equitable considerations as an element in the determination of that award whereas an award of compensation based on equitable considerations is one that is governed by the principle of equitable considerations.

40. Thus, had the Court determined compensation on the basis of equitable considerations, it would have been in a position to award a specific sum as compensation for each category of injury.

Standard of proof

41. The Court rightly concluded that the standard of proof at the merits phase is higher than it is at the reparations phase. However, it does not explicitly identify the lower standard applicable to the reparations phase. That omission may be overlooked if the findings of the Court on questions of compensation are consistent with the use of a lower standard of proof. As noted before, where the Court has found that the evidence was not sufficient to determine a reasonably precise or even an approximate number of lives lost or persons injured, a finding could have been made that the evidence was sufficient for that purpose on the basis of the lower standard of proof. For example, in relation to loss of life, the Court concludes that the evidence was not sufficient to determine a reasonably

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precise or even an approximate number of lives lost. The Court identifies a range of lives lost from 10,000 to 15,000. There can be no doubt that on the basis of the lower standard of proof the Court would have been in a position to estimate the number of lives lost. Thus, if the Court determined that 12,000 lives were lost on a lower standard of proof such as a balance of probabilities its decision would be correct, because the evidence supports the conclusion that it was more probable than not that 12,000 lives were lost. One could arrive at the same conclusion on every occasion when the Court concluded that there was not sufficient evidence to even approximate the extent of the injury.

42. Moreover, there are instances in which the Court has used a standard of proof that is questionable because a lower standard should have been used in relation to the extent or valuation of damage or injury. Paragraph 163 states: "Turning to valuation, the Court considers that the DRC has not presented convincing evidence for its claim that the average amount awarded by Congolese courts to the families of victims of war crimes amounts to US$34,000." Paragraph 180 states: "The DRC does not provide convincing evidence that these figures are derived from the average amounts awarded by Congolese courts in the context of the perpetration of serious international crimes." Paragraph 205 states: "In the framework of the present reparation proceedings, these methodologies do not provide a sufficient basis for assigning a specific valuation of damage in respect of a child soldier." Paragraph 243 reads: "In the Court's view, the DRC offers no convincing evidence for the number of 8,693 private dwellings that it claims have been destroyed in Ituri." Paragraph 248 states: "With regard to the valuation of the property lost, the Court considers that the DRC has not provided convincing evidence supporting the alleged average value of private dwellings, public buildings and property looted." Paragraph 307 states: "The Court considers that the figures put forward by the DRC with respect to the quantity and value of exploited diamonds for which Uganda owes reparation are not based on a convincing methodological approach, in particular because the DRC relies on insufficient and uncorroborated data." Paragraph 319 states: "The evidence furnished by the DRC does not provide a convincing basis for its claim of US$2,915,880 for coltan." Finally, paragraph 340 states: "The methodology applied by the DRC to substantiate its claim is not convincing."

43. These are instances in which the Court has rejected claims on the basis that the evidence was not convincing. This is too high a standard for the reparations phase. Notably, at the merits phase the Court used the standard of convincing evidence in relation to questions of responsibility. For example, paragraph 72 of the 2005 Judgment states that "[t]he Court must first establish which relevant facts it regards as having been convincingly established by the evidence, and which thus fall for scrutiny by reference to the applicable rules of international law"[36]; paragraph 210 states: "The Court finds that there is convincing evidence of the training in UPDF training camps of child soldiers and of the UPDF's failure to prevent the recruitment of child soldiers in areas under its control."[37] There are other instances in which the Court uses the standard of convincing evidence at the merits phase. It follows that if convincing evidence is the correct standard of proof for the merits phase, it cannot be the correct standard for the reparations phase where the standard is lower.

Macroeconomic damage

44. Notably, the Court did not rule on the question whether macroeconomic damage was compensable under international law; it found that the DRC had not established the required causal nexus between Uganda's wrongful conduct and the alleged macroeconomic damage.

45. In my view, macroeconomic damage is compensable. In the first place, recourse may be had to the general principle of full compensation that was reflected in the *Factory at Chorzów* case as well as Articles 31 and 36 of the ILC Draft Articles[38]. In *Chorzów*, the Court held that "reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed"[39]. This is the classical statement of the principle of full reparation which would certainly include damage at the macroeconomic level resulting from an internationally wrongful act. Second, the principle of full reparation is also reflected in Article 31 (1) of the ILC Draft Articles which provides that "[t]he responsible State is under an obligation to make full reparation for the injury caused by an internationally wrongful act". It is difficult to understand why, in principle, the kind of damage to the economy of a country that could be caused by a war, in which thousands died and were injured and which lasted five years, would not be compensable under

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international law. A war can so shock the economic foundations of a State that damage at the macroeconomic level, for example, in relation to the value of its currency, is bound to ensue. Third, under Article 36 of the ILC's Draft Articles the responsible State has a duty to provide compensation, which covers any financially assessable damage including loss of profits in so far as it is established. Paragraph 5 of the commentary on Article 36 states that financially assessable damage is "any damage which is capable of being evaluated in financial terms". There is no reason why macroeconomic damage caused by a war should not be capable of being evaluated in financial terms. Criticisms were levelled by economists on behalf of Uganda at the Kinshasa study that was presented on behalf of the DRC to establish the macroeconomic damage that it claimed. Notwithstanding these criticisms, it is certainly possible that economic studies could be presented to a court or tribunal substantiating macroeconomic damage caused by a war. As a matter of law, such damage is compensable.

46. The Court dismissed the DRC's claim for macroeconomic damage on the ground that the DRC had not established a sufficiently direct and certain causal nexus between the internationally wrongful act of Uganda and any alleged macroeconomic damage. It is not clear whether in this finding the Court applied the lower standard of proof at the reparations phase. For example, if the standard of proof on the balance of probabilities were applied, it would be reasonable to conclude that, on the basis of the evidence in this case, the DRC established that there was a causal nexus between the macroeconomic damage that the DRC alleged it had suffered and the war. Using that standard, the DRC would have succeeded in establishing this nexus by showing that it was more probable than not that there was a sufficiently direct and certain causal nexus between the internationally wrongful conduct of Uganda and the macroeconomic damage it claimed.

47. In conclusion, questions may be raised about the reasoning employed by the Court to arrive at a global sum of US$225 million as compensation for damage to persons and also about its treatment of the standard of proof at the reparations phase.

(Signed) Judge Patrick L. ROBINSON.

NOTES

1 Eritrea-Ethiopia Claims Commission, *Final Award – Eritrea's Damages Claims, Decision of 17 August 2009*, United Nations, *Reports of International Arbitral Awards (RIAA),* Vol. XXVI, pp. 505-630.

2 EECC, *Final Award – Eritrea's Damages Claims, Decision of 17 August 2009*, p. 508.

3 *Ibid*.

4 *Ibid*.

5 *Ibid*.

6 Supreme Court of the United States, *Story Parchment Company* v. *Paterson Parchment Paper Company*, *United States Reports*, 1931, Vol. 282, p. 563.

7 Iran-US Claims Tribunal, Case No. 52, *Blount Brothers Corporation* v. *The Government of the Islamic Republic of Iran, Iran Housing Company*, Award No. 215-52-1 of 27 February 1986, para. 101.

8 Kuala Lumpur Regional Centre for Arbitration, *Adam Joseph Resources (M) SDN BHD* v. *CNA Metals Limited,* KLRCA Case No. INT/ADM-29-2011, Final Award on Costs, 15 April 2016, para. 4.11.

9 *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 (United States, Canada), 16 April 1938 and 11 March 1941*, *RIAA*, Vol. III, p. 1920; see also *Story Parchment Company* v. *Paterson Parchment Paper Company, U.S. Reports*, 1931, Vol. 282, p. 563.

10 *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012 (I)*, p. 335, para. 24, citing *Al-Jedda* v. *United Kingdom* [GC]*, No. 27021/08, Judgment of 7 July 2011, ECHR Reports*, 2011*,* para. 114.

11 *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Compensation, Judgment, I.C.J. Reports 2018 (I)*, pp. 38-39, para. 86.

12 *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012 (I)*, p. 330, para. 10.

13 *Ibid.*, p. 335, para. 25.

14 *Ibid.*, p. 338, para. 36.

15 *Ibid.*, p. 337, para. 31.

16 *Ibid.*, p. 337, para. 33.

17 *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012 (I)*, p. 337, para. 33.

18 *Chaparro Álvarez and Lapo Íñiguez* v. *Ecuador, Judgment of 21 November 2007* (preliminary objections, merits, reparations and costs), IACHR, Series C, No. 170, para. 230.

19 *Ibid.*, para. 232.

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20 *Ibid.*

21 *Chaparro Álvarez and Lapo Íñiguez* v. *Ecuador, Judgment of 21 November 2007* (preliminary objections, merits, reparations and costs), IACHR, Series C, No. 170, paras. 240 and 242.

22 EECC, *Final Award – Eritrea's Damages Claims, Decision of 17 August 2009*, para. 72.

23 Francesco Francioni, *Equity in International Law*, Max Planck Encyclopedia of International Law, November 2020.

24 EECC, *Final Award – Eritrea's Damages Claims, Decision of 17 August 2009*, para. 236.

25 *Ibid*.

26 *Ibid.*, para. 234.

27 *Ibid*.

28 EECC, *Final Award – Eritrea's Damages Claims, Decision of 17 August 2009,* para. 234.

29 *Ibid.*, para. 235.

30 *Ibid*.

31 *Ibid.*, para. 237.

32 *Ibid.*, para. 237.

33 *Ibid.*, para. 238.

34 *Ibid.*, para. 239.

35 EECC, *Eritrea's Damages Claims, Final Award, Decision of 17 August 2009*, p. 508.

36 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 205, para. 72.

37 *Ibid.*, p. 241, para. 210.

38 *Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Yearbook of the International Law Commission*, 2001, Vol. II, Part Two, pp. 92 and 98.

39 *Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 47.

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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].

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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:

> "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).

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

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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"

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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.

ENDNOTES

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.

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

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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 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

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

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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 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 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*.

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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.

ENDNOTES

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).

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.

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.

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,

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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 . . . II 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.

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.

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.

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OPINION DISSIDENTE DE M. LE JUGE *AD HOC* DAUDET

1. Cette affaire est exceptionnelle par le déchaînement de violences, d'inhumanité, parfois même de barbarie qui ont accompagné cette guerre, l'une des plus violentes en Afrique. Elle est également exceptionnelle par l'ampleur des dommages causés et le montant considérable d'environ 11 milliards et demi de dollars des Etats-Unis de la demande en réparation formulée à l'audience lors de l'énoncé des conclusions de la République démocratique du Congo (RDC) (arrêt, par. 46) envers l'Ouganda, jugé responsable de leur commission par l'arrêt de la Cour du 19 décembre 2005 (affaire des *Activités armées sur le territoire du Congo (République démocratique du Congo c. Ouganda), arrêt, C.I.J. Recueil 2005*, p. 168) (ci-après l'«arrêt de 2005»).

2. Les négociations entre les deux Etats en vue de déterminer le montant des réparations n'ayant pu aboutir, c'est à la Cour qu'il est revenu de l'établir en application du dispositif de l'arrêt de 2005 (par. 345, point 6). Le montant total dû par l'Ouganda a ainsi été fixé par la Cour dans l'arrêt rendu aujourd'hui à 325 millions de dollars des Etats-Unis, ce qui équivaut à moins de 3 % du montant de la demande de la RDC, dont on est ainsi fort éloigné.

3. A mon très grand regret, il m'a été impossible de partager l'opinion de la majorité, tant sur les conditions dans lesquelles le calcul des indemnités a été effectué, que sur les montants attribués au titre des dommages causés aux personnes humaines, qu'il s'agisse de leur vie et leur intégrité physique ou de leurs biens. Ce sont en effet les violations des droits les plus fondamentaux de la personne humaine, entraînant des dommages parfois de caractère insoutenable (tortures, viols, massacres à grande échelle) qui ont frappé des milliers de Congolais sans être, de mon point de vue, ni adéquatement pris en compte ni suffisamment indemnisés.

4. En revanche, j'ai pu partager la position de la majorité pour ce qui concerne les ressources naturelles. Bien que très inférieur à la demande de la RDC, le montant alloué m'est apparu justifié. Je ne suis au demeurant pas convaincu que ce type de dommages ait affecté profondément la vie quotidienne du peuple congolais dans la mesure où l'économie minière est peu distributive et les profits bénéficient en grande partie à des Etats ou groupes étrangers. Ces ressources minières dont le Congo est riche ont d'ailleurs largement fait le malheur de sa population, d'abord au temps de la colonisation; ensuite, au moment de l'indépendance, avec la sécession du Katanga par Moïse Tshombé, soutenu par des intérêts étrangers, qui plongea le pays dans le chaos et nécessitera l'intervention des Nations Unies, pour ne pas parler des désordres endémiques et troubles politiques divers qui affecteront ensuite ce pays et son peuple.

5. Avec l'aide d'experts dont les prestations ont été d'un inégal secours, la Cour a réalisé un travail considérable, auquel il convient de rendre hommage, pour accomplir ce qui lui a paru être le mieux possible pour fixer une indemnisation au titre des divers chefs qu'elle a estimée être la plus juste possible. Ce n'est donc certainement pas de ma part mettre un instant en doute ni la qualité des efforts de la Cour, ni sa conscience aiguë du poids des enjeux que d'émettre des critiques sur le résultat auquel elle est parvenue, avec tout le respect qui lui est dû et que je lui porte. Pour expliquer ma position à cet égard, il convient d'examiner le contexte général dans lequel se présentent les demandes d'indemnisation de la RDC et tout d'abord de remonter à la source, c'est-à-dire à l'arrêt de 2005.

6. En 2005, la Cour déclare l'Ouganda responsable des dommages causés à la RDC à divers titres. Elle le fait dans des termes clairs et sans équivoque, que l'on peut lire au fil du jugement. La Cour note «l'ampleur des activités militaires menées et des souffrances qui en ont résulté» (par. 150) et en relève le caractère «illicite» (par. 152). Elle dit que «[l]'intervention militaire illicite de l'Ouganda a été d'une ampleur et d'une durée telles [qu'elle] la considère comme une violation grave de l'interdiction de l'emploi de la force énoncée au paragraphe 4 de l'article 2 de la Charte des Nations Unies» (par. 165). La Cour évoque encore les «meurtres . . . actes de torture . . . traitement inhumain à l'encontre de la population civile» (par. 211), attestés par «des éléments de preuve crédibles suffisants» *(ibid.)*. Elle parle des «immenses souffrances» et des «nombreuses atrocités . . . commises» (par. 221). Elle note que les UPDF, qui «n'ont rien fait pour protéger la population civile» (par. 208) ont «incité à des conflits ethniques» en Ituri (par. 209) et «n'ont pris aucune mesure pour faire cesser la violence» *(ibid.)*. Nombre de ces extraits sont rappelés dans le présent arrêt (voir par. 51-57).

7. L'exigence de cohérence du présent arrêt avec celui de 2005, qui me semble être une nécessité, rend étrange à mes yeux que, après avoir établi les responsabilités d'une manière aussi marquée en 2005, la Cour n'ait pas

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aujourd'hui accordé une indemnisation en meilleure harmonie avec la force de cette décision. Or, de mon point de vue, la démarche suivie par la Cour pèche précisément par un défaut de cohérence avec l'arrêt de 2005 en accordant, quoi qu'elle en dise (voir par. 68), trop de crédit au formalisme pointilleux des avocats de l'Ouganda quant aux preuves des dommages et en faisant montre d'une rigueur qui me paraît parfois excessive compte tenu du contexte de cette affaire. Ainsi l'arrêt rendu aujourd'hui se situe-t-il en retrait de la dynamique de celui de 2005.

8. A mon avis, un très net défaut de cohérence, interne cette fois, apparaît également entre la partie II (par. 60-131) et la partie III (par. 132-384) de l'arrêt. La partie II traite de «considérations générales» auxquelles je souscris volontiers. Je la comprends comme signifiant que, certes, les exigences de la preuve et du lien de causalité présentent un caractère fondamental, et la Cour doit veiller à leur respect, mais que, en même temps, des assouplissements ne sont pas à exclure pour certains chefs de la demande, compte tenu de la situation particulière de la RDC, victime d'une guerre particulièrement cruelle et dévastatrice (voir par. 66-68).

9. Vient ensuite la partie III, dont j'attendais qu'elle soit une sorte d'application pratique, se situant donc dans la ligne exacte des principes définis dans la partie II, et que j'ai ressentie plutôt comme étant une fois encore en retrait, dans une forme de décalage avec eux, faute d'appliquer les éléments de souplesse qu'ils contenaient. Ce qui a ensuite conduit à retenir des montants d'indemnisation particulièrement bas, surtout s'agissant des dommages aux personnes.

10. Certes, dans une affaire comme celle-ci qui, à bien des égards, présente un caractère exceptionnel, il convient d'avancer avec prudence et sans doute faut-il tenir compte du fait que, si l'arrêt ne produit d'effet qu'entre les Parties, il n'en reste pas moins que les positions prises par la Cour risquent toujours d'être ensuite invoquées dans d'autres affaires, parfois en extrapolant, pour justifier une position. En sorte que la Cour se doit d'être attentive à ne pas ouvrir de brèche, dans laquelle, à une autre occasion, la possibilité de s'infiltrer de manière biaisée ne serait pas manquée. Et, toujours en considération du caractère exceptionnel de l'affaire, on ne peut faire reproche à la Cour de veiller avec grand soin et de manière stricte à l'intégrité des principes du droit international, en l'occurrence du droit de la responsabilité. Néanmoins, cette attitude de conformité au droit n'interdit pas la contextualisation des règles, ce qui n'a guère été fait ici. La difficile question étant, il est vrai, de savoir jusqu'où ne pas aller trop loin.

11. L'arrêt de 2005 n'était pas entré dans le détail de dommages précisément individualisés. Pas plus d'ailleurs que ne l'avait alors fait la RDC dans ses demandes à un stade de l'affaire qui portait sur l'établissement de la responsabilité et non sur les modalités et le montant des indemnités. A la phase actuelle de détermination du *quantum* il est évidemment nécessaire d'être plus précis dans la ventilation de ce qui est indemnisable — et à quelle hauteur — et ce qui ne l'est pas, ce qui présente des difficultés de preuves et de niveau requis pour l'établissement de celles-ci.

12. La RDC a plaidé avec insistance la situation particulière de violences et de désordres dans laquelle se trouvait ce pays pendant la période considérée, entraînant une impossibilité pratique de collecter des preuves avec le degré de précision requis. Il est inutile de reprendre ici les illustrations de cette difficulté qui ont été abondamment évoquées par la RDC dans ses pièces écrites et au cours des plaidoiries. Cependant, entre les deux extrêmes consistant soit à considérer ces difficultés particulières comme une dispense d'avoir à fournir des preuves, soit à ne les évoquer que de manière formelle à la manière de clauses de style sans leur prêter suffisamment attention, il y a place pour une voie moyenne que la Cour aurait, à mon sens, dû adopter.

13. Dans le contexte profondément troublé que, déjà, l'arrêt de 2005 avait relevé avec insistance, la désorganisation des services publics et de toutes les structures, ainsi que le faible niveau d'instruction des victimes sont des obstacles insurmontables que signale la RDC dans la présente instance (par. 62). Il est bien évident que, lorsque l'on fuit dans la forêt congolaise, on ne trouve ni médecin pour constater un viol ou des blessures, ni agent de l'état civil pour enregistrer un décès, ni notaire pour délivrer les titres de propriété qui serviront de preuves pour fonder d'ultérieures demandes en indemnisation. La Cour, qui en a parfaitement convenu en adoptant une position marquée de nuance et de compréhension (par. 158), n'a certes pas manqué de porter attention à ces éléments mais, à mon sens, sans en tirer ensuite logiquement toutes les conséquences pratiques dans son évaluation chiffrée des dommages, qui n'est pas marquée par la même flexibilité.

14. Cela étant posé, il convient de s'interroger sur la nature des actes commis et sur son effet sur le régime de la preuve. Il a été établi par l'arrêt de 2005 que des crimes de masse avaient été perpétrés : au paragraphe 207, la Cour

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s'estime convaincue que «des violations massives des droits de l'homme . . . ont été commis[es] par les UPDF» et, au paragraphe 205, elle déclare : «Afin de statuer sur la demande de la RDC, point n'est besoin pour la Cour de parvenir à un prononcé sur les faits s'agissant de *chacun* des incidents allégués.» (Les italiques sont de moi.) Au paragraphe 211, elle «considère qu'il existe des éléments de preuve crédibles suffisants pour conclure que les troupes des UPDF ont commis des meurtres, des actes de torture et d'autres formes de traitement inhumain à l'encontre de la population civile».

15. La RDC dans ses écritures et lors des plaidoiries a rappelé que, de manière générale (et pas seulement dans le cas des crimes de masse), les circonstances propres à chaque cas d'espèce peuvent conduire à ce que les exigences en matière de preuve soient assouplies en fonction desdites circonstances. Ainsi, dans l'affaire relative à *Certaines activités menées par le Nicaragua dans la région frontalière (Costa Rica c. Nicaragua)* (*indemnisation, arrêt, C.I.J. Recueil 2018 (I)*, p. 15), la Cour, au paragraphe 35, faisant référence à l'affaire *Diallo*, «rappelle que l'absence d'éléments de preuve suffisants quant à l'étendue des dommages matériels n'exclut pas dans tous les cas l'octroi d'une indemnisation pour ces derniers» et fait référence aux «considérations d'équité» qui l'ont guidée dans l'affaire *Diallo*. Au même paragraphe, la Cour cite un passage célèbre de l'arbitrage de la *Fonderie de Trail* allant dans le même sens :

> «Ce serait pervertir les principes fondamentaux de la justice que de refuser tout secours à la victime — et par là même libérer l'auteur du préjudice de l'obligation de réparation — sous prétexte que l'acte illicite est de nature à empêcher que le montant de l'indemnité puisse être déterminé avec certitude : en pareil cas, si le montant de l'indemnité ne doit pas être établi par simple spéculation ou conjecture, il suffit néanmoins que l'ampleur des dommages soit démontrée par une déduction juste et raisonnable, quand bien même le résultat n'en serait qu'approximatif.»[1]

16. Flexibilité encore dans le cas de la Commission des réclamations Erythrée/Ethiopie (ci- après la «CREE»)[2] ou à la CPI, dans les affaires *Lubanga*[3] et *Ntaganda*[4].

17. Assurément, dans le cas présent, les circonstances rappelées ci-dessus rendent particulièrement difficile la réunion de preuves précises au sujet de faits qui se sont produits il y a plus de vingt ans dans un pays où, l'espérance de vie étant de 63 ans (chiffre de la Banque mondiale : https://donnees.banquemondiale.org/indicator), de nombreux protagonistes sont décédés depuis cette époque et leur témoignage ne peut plus être recueilli. Or, la remarque que j'ai formulée ci-dessus (*supra* par. 13) vaut ici aussi pour les paragraphes 66 à 68 de l'arrêt, dans lesquels la Cour souligne les effets du temps passé et la difficulté qui en résulte pour «retrouver le cours des événements et . . . les qualifier juridiquement» (par. 66). Mais par la suite, un peu curieusement, la Cour observe que «la RDC aurait pu, depuis le prononcé de l'arrêt de 2005, recueillir davantage d'éléments concernant les vies perdues» (par. 159). Autrement dit, ce temps passé est considéré comme un avantage que la RDC n'a pas su saisir. De mon point de vue, tout au contraire, le temps qui passe est un facteur d'effacement des preuves soit matérielles (en Afrique, les conditions climatiques sont une cause supplémentaire de perte ou destruction de documents ou d'objets) soit testimoniales en raison des défaillances de la mémoire ou, comme je viens de le dire, des décès survenus. L'une des raisons invoquées dans les systèmes juridiques qui retiennent la prescription est précisément la fragilité des preuves relatives à des événements lointains dans le temps. J'estime donc que, tout au contraire, ces considérations aussi auraient justifié souplesse et flexibilité de la part de la Cour dans la partie III de l'arrêt relative à l'indemnisation.

18. En dépit d'éléments tendant à la nuance et à la meilleure adaptation possible à une situation complexe, la Cour s'en est tenue à une analyse très littérale du paragraphe 260 de l'arrêt de 2005. Ce paragraphe 260 est au centre de l'argumentation de l'Ouganda, qui se fonde expressément sur lui dans ses demandes finales. Il convient donc de s'y arrêter. Dans ce paragraphe, qui vise l'hypothèse d'échec des négociations conduisant à une phase contentieuse ultérieure pour déterminer l'indemnisation de la RDC, la Cour indique que «[l]a RDC aurait ainsi l'occasion de démontrer, *en en apportant la preuve, le préjudice exact qu'elle a subi du fait des actions spécifiques de l'Ouganda* constituant des faits internationalement illicites dont il est responsable» (les italiques sont de moi). Par cette phrase, la Cour ne fait que rappeler les règles de base selon lesquelles, pour être indemnisable, un préjudice doit être prouvé et rattaché par un lien de causalité à un fait internationalement illicite.

19. De mon point de vue, en parlant au paragraphe 260 de l'arrêt de 2005 du «préjudice exact» subi par la RDC et des «actions spécifiques» de l'Ouganda, la Cour n'a pas entendu assortir de conditions plus rigoureuses le principe de

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la réparation intégrale du préjudice causé par le fait internationalement illicite (article 31 des Articles de la CDI sur la responsabilité de l'Etat). Plus précisément, je doute que, en s'exprimant ainsi, la Cour ait entendu imposer des conditions particulières à la présentation des demandes de la RDC et s'imposer à elle-même pour l'avenir un cadre plus strict aux conditions requises pour le succès des demandes futures de la RDC, victime du «préjudice ... causé ... par l'Ouganda» (par. 259). Pour un certain nombre de chefs de responsabilité de l'Ouganda invoqués par la RDC, l'arrêt de 2005 avait reconnu l'existence de violations attestées par des «preuve[s] dignes de foi» (par. 208) des «preuve[s] crédibles» (par. 209 et 211), des «éléments de preuve convaincants» (par. 210). Mais encore reste-t-il à «préciser» combien de morts, combien de blessés, combien d'enfants-soldats enlevés, etc. Dans le paragraphe 260, la Cour rappelait les exigences habituelles en la matière, ni plus ni moins. A partir de là, je pense que, dans le présent arrêt, la Cour aurait pu, davantage qu'elle ne l'a fait, user de la faculté dont elle disposait d'appliquer cette règle générale en tenant mieux compte des circonstances de l'espèce et se situer ainsi dans la ligne décrite ci-dessus (*supra* par. 15).

20. Autrement dit, je n'attribue pas aux termes du paragraphe 260 une signification aussi rigide que celle qu'y a vu l'Ouganda et qui est finalement assez largement partagée par la Cour dans la troisième partie de son arrêt. Certes, la Cour n'a pas exigé la production d'un certificat médical pour prouver un viol ni un titre notarié pour prouver une perte d'habitation (voir *supra* par. 13) mais son degré d'exigence forte a néanmoins réduit les perspectives d'aménagement en fonction des situations, des circonstances ou des habitudes ou coutumes locales. On sait, par exemple, l'importance de la parole par rapport à l'écrit en Afrique, pouvant avoir pour effet que, pour justifier une réclamation, on ne produise pas un écrit qui existerait tout naturellement ailleurs mais qu'un témoignage oral en tienne lieu. Or, à ma connaissance, les experts n'ont interrogé personne et sont restés dans leurs bureaux. On doit enfin constamment garder à l'esprit le contexte particulier de violence et de désordre dans lequel les dommages ont été causés à cette époque en RDC.

21. Assurément, plus les actes sont graves et la demande de réparation élevée, plus les exigences en matière de preuves sont fortes. Ce point est important à souligner. Il était déjà peu concevable que la RDC reçoive l'indemnité à la hauteur véritablement démesurée et totalement hors de portée pour l'Ouganda qu'elle réclamait. Il était en tout cas totalement impossible qu'elle reçoive satisfaction sans produire des preuves tout particulièrement sérieuses. Or, il faut reconnaître que celles qui ont été apportées par la RDC ne présentaient pas cette caractéristique. Il n'y avait donc rien que de très normal à ce que la Cour réduise le montant de la demande. Pour autant, le chiffre arrêté par la Cour est à mon avis infiniment trop bas, principalement s'agissant des dommages aux personnes tels qu'ils ont été calculés.

22. Pour fixer le montant de la réparation pour dommages aux personnes, la Cour (et les experts) disposaient de deux paramètres : le nombre de victimes d'une part et le montant de l'indemnisation par personne d'autre part. La multiplication du premier par le second établissant, après d'éventuels aménagements, la somme à payer au titre de l'indemnisation. L'établissement du premier chiffrage dépendant des preuves apportées et celui du second, du modèle retenu. Dès l'abord, on pressent des marges d'incertitudes.

23. Il ne s'agit pas ici d'analyser le détail des évaluations faites par la Cour. L'exemple des pertes en vies humaines (par. 135-166) est à mon avis emblématique de l'extrême difficulté à laquelle a été confrontée la Cour et aussi de la méticulosité du travail qu'elle a accompli, pour cependant parvenir à un résultat à mon avis contestable. Cet exemple est souvent transposable à d'autres chefs de dommages. Ici, la détermination du nombre des victimes a fait apparaître de très importantes différences selon les sources (du chiffre de 180 000 morts avancé par la RDC à celui de 14 663 morts proposé par l'expert, lequel admet néanmoins qu'il est peut-être sous-estimé). Se pose ici un problème de preuves apportées par la RDC, que la Cour estime insuffisantes. Il est vrai que les fiches établies pour certaines victimes, concernant d'ailleurs une partie seulement des décès, étaient remplies de manière approximative (mais pouvait-il en être autrement ?) et se trouvaient donc difficilement exploitables. D'autres sources ne permettaient pas, aux yeux de la Cour, d'établir un lien de causalité assez solide. En sorte que l'addition d'éléments insuffisants n'a pas permis d'établir une preuve certaine. Après l'avoir croisée avec d'autres sources de renseignement jugées fiables, la Cour retient finalement une fourchette peu précise de 10 000 à 15 000 morts (proche du chiffre de 14 663 morts donné par l'expert, lequel, comme je viens de le dire, considère qu'il est probablement sous-estimé), faute d'éléments de preuve suffisants à ses yeux qui confirmeraient le chiffre avancé par la RDC de 180 000 morts (par. 161-162).

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24. Je n'ai pas été convaincu par cette conclusion et ne vois pas la raison pour laquelle la Cour a choisi le chiffre le plus bas, alors même qu'il est reconnu comme peut-être sous-estimé, dans une fourchette considérablement ouverte. En présence d'évidentes incertitudes sur les nombres pour les raisons que l'on a dites, après avoir écarté le niveau le plus haut, adopter une position sur une base de départ qui ne serait pas la plus basse de la fourchette, corrigée ensuite en tant que de besoin pour aboutir à une indemnisation de caractère intermédiaire, m'aurait semblé être plus justifié au regard des circonstances et des spécificités de l'affaire. Ne serait-ce qu'en prenant en compte la longue durée du conflit, la Cour aurait pu estimer que ce nombre de 14 663 pertes de vies humaines était manifestement sous-estimé car incompatible avec les caractéristiques d'ampleur et de durée de l'intervention militaire de l'Ouganda telles que les décrit la Cour au paragraphe 165 de l'arrêt de 2005. Et, si elle ne souhaitait pas s'appuyer sur cette considération d'élémentaire logique, elle pouvait s'aider dans sa décision par des considérations d'équité auxquelles il était approprié d'avoir recours afin de tenter de mieux affiner les bases de l'indemnisation.

25. L'examen de la question des viols et violences sexuelles a donné lieu aux mêmes approximations et incertitudes. La Cour a jugé que le nombre de 1740 cas invoqué par la RDC n'était pas suffisamment établi (par. 189) et qu'il était «impossible de déduire des rapports et des autres données . . . une estimation, même générale, du nombre de victimes de viols et d'autres formes de violence sexuelle» (par. 190). Elle a dit cependant «qu'il ne fait aucun doute que des viols et d'autres formes de violence sexuelle ont été perpétrés en RDC à grande échelle et de manière généralisée» (par. 191) et rappelé que, selon la CPI, il s'agissait d'une «pratique courante». Elle a également précisé «garde[r] à l'esprit que les victimes de violences sexuelles subissent fréquemment un traumatisme psychologique et une stigmatisation sociale, et que de telles violences sont donc souvent passées sous silence et notoirement difficiles à prouver», ainsi que l'avait souligné la CREE (par. 189). On pourrait y ajouter la stigmatisation familiale et le drame des enfants issus de viols. On pourrait aussi écouter sur ces points la parole du prix Nobel de la paix 2018, le Dr Mukwege, qui, mieux que tout autre, connaît ces douloureuses questions.

26. Dans ce cas comme dans celui des pertes en vies humaines une utilisation plus précise de l'équité que celle qu'en a fait la Cour (qui l'a seulement mentionnée sans indiquer le détail de son utilisation) aurait été souhaitable. Un recours aux considérations d'équité qui auraient été affirmées et précisées dans leur niveau d'importance aurait été parfaitement justifié, sans manquer au respect des principes et règles du droit international. Il faut en effet rappeler que l'équité sous cette forme ne va pas à l'encontre du droit international mais qu'elle vise seulement à permettre une meilleure adaptation de celui-ci aux circonstances. Certes, dans son arrêt, la Cour mentionne l'équité à maintes reprises mais seulement comme par révérence, sans autre précision et sans dire quelles conséquences elle en tire pour déterminer de justes montants de l'indemnisation des dommages aux personnes et aux biens (par. 166, 181, 193, 206, 225, 258). La Cour, en attribuant une somme globale ne détaillant pas les divers éléments qui la constituent, rend une décision qui pourra sembler approximative ou de caractère flou.

27. Je regrette à ce sujet qu'ait été retenue la formule d'une somme globale couvrant, de manière indifférenciée, un ensemble aussi large que les pertes en vies humaines (par. 135-166), les atteintes aux personnes (par. 167-181), les viols et violences sexuelles (par. 182-193), le recrutement et déploiement d'enfants-soldats (par. 194-206) et les déplacements de population (par. 207-225). Tel que l'arrêt est rédigé, il n'est pas possible d'apprécier la part d'indemnisation affectée à chaque dommage, ce qui à certains égards rend difficile d'appliquer le principe exprimé par la Cour au paragraphe 102 de son arrêt selon lequel «toute réparation doit, autant que possible, bénéficier à tous ceux qui ont souffert de préjudices résultant des faits internationalement illicites (voir *Ahmadou Sadio Diallo (République de Guinée c. République démocratique du Congo), indemnisation, arrêt, C.I.J. Recueil 2012 (I)*, p. 344, par. 57)».

28. Il faut toutefois rappeler ici que, à l'ouverture de l'audience, dans la suite du mémoire de la RDC (par. 7.50-7.51) indiquant l'intention de celle-ci de créer un organisme ayant pour objet de permettre l'indemnisation individualisée des dommages, l'agent de la RDC a signalé à la Cour qu'un décret en ce sens avait été adopté le 13 décembre 2019 et engageait la RDC. Est ainsi mise en place une structure comportant «des représentants des victimes . . . d[es] experts internationaux, [y compris] un délégué du système des Nations Unies» (CR 2021/5, p. 22-23). Cet engagement a été réitéré par l'agent à la clôture des audiences (CR 2021/11, p. 76).

29. On peut déduire de cette mesure qu'elle corrige l'inconvénient de la somme globale n'identifiant pas les sommes allouées au titre de chaque préjudice distinct et atténue fortement la critique émise ci-dessus puisqu'il

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appartiendra à la structure établie par la RDC de répartir les sommes globales entre les victimes des diverses catégories. Sa tâche ne sera pas facile au vu de la faiblesse des montants attribués par la Cour et, à mon avis, de leur caractère flou.

30. En conclusion, cette affaire démontre de manière éclatante que l'échec des négociations entre les deux pays est extrêmement regrettable. Seule une négociation de bonne foi, si elle avait pu se tenir, aurait permis de mettre en avant des fondements moraux, humanistes, économiques, sociaux, en un mot politiques, qui auraient pu constituer la trame nécessaire sur laquelle asseoir les demandes de l'un et les réponses possibles de l'autre. Ces fondements auraient pu conduire à de meilleures et plus justes indemnisations mais ils ne peuvent servir à asseoir une décision de la Cour.

31. La Cour, elle, ne peut se contenter de mettre en avant son intime conviction, des probabilités, ou des éléments rapportés par des sources vraisemblablement bien informées mais sans qu'elles présentent un caractère de certitude, qui tiendraient lieu de preuves ou de lien de causalité. Une lecture attentive de l'arrêt fait bien apparaître les difficultés auxquelles la Cour a été confrontée à cet égard.

32. Peut-être que dans le cadre d'une négociation aurait été mieux mis en lumière que dans l'arrêt un point qui, en effet, n'y apparaît pas. Dans sa décision, la Cour tient compte du fait que l'Ouganda, pays en développement, a des capacités de paiement limitées et, sans soulever frontalement la question, la Cour l'évoque à trois reprises : au paragraphe 109, où elle mentionne la position de l'Ouganda qui, à tort, prétend que «les principes pertinents de droit international» interdisent d'exiger un versement excédant les capacités de paiement du débiteur, alors qu'il n'existe pas véritablement de règle du droit international en la matière; au paragraphe 110, où elle mentionne que cette question a été soulevée par la CREE et indique qu'elle «se penchera plus loin sur la question de la capacité financière de l'Etat défendeur (voir le paragraphe 407 ci-dessous)»; au paragraphe 407, où la Cour dit peu de chose en se déclarant convaincue de la capacité de paiement de l'Ouganda, en sorte que la question du «fardeau financier imposé à l'Etat responsable» ne se pose pas. Ce qui, en revanche, n'apparaît pas est la «situation miroir» de la RDC qui, tout comme l'Ouganda, est un pays en développement dont les moyens financiers sont, comme ceux de l'Ouganda, limités. La question n'est pas posée dans l'arrêt, ne serait-ce «qu'en passant», de savoir si la RDC a la capacité d'assumer la part non indemnisée qui reste à sa charge car, à l'évidence, la RDC ne bénéficie pas de la réparation intégrale du préjudice subi, qu'elle a cependant eu très certainement le tort de surévaluer, ce qui aurait conduit à des indemnités punitives, impossibles à assumer en tout état de cause ainsi que je l'ai dit plus haut. Or, la Cour a rappelé «qu'il est bien établi ... que la réparation due à un Etat est de nature compensatoire et qu'elle ne doit pas revêtir un caractère punitif» (par. 102). Il reste cependant que, à mes yeux, la RDC subit une double peine : elle a été victime et elle percevra une indemnité insuffisante. On peut imaginer que, si une négociation de bonne foi avait pu se tenir, cet aspect de la question aurait été pris en compte, aboutissant à un résultat équilibré. Les faits n'ont pas été ceux-là. Il reste à espérer que la RDC saura surmonter sa profonde déconvenue, dont je ne doute pas et que je comprends. Je souhaite que les deux Etats retrouvent au plus tôt les relations pacifiques auxquelles leurs peuples aspirent.

(Signé) Yves DAUDET.

ENDNOTES

1 *Trail Smelter case (United States, Canada), sentences des 16 avril 1938 et 11 mars 1941*, Nations Unies, *Recueil des sentences arbitrales (RSA)*, vol. III, p. 1920 *[traduction du Greffe]*.

2 *Sentence finale, Réclamations de dommages de l'Erythrée, décision du 17 août 2009, RSA*, vol. XXVI, p. 528, par. 36.

3 *Le Procureur c. Thomas Lubanga Dyilo*, affaire ICC-01/04-01/06, chambre d'appel, ordonnance de réparation modifiée, annexe A de l'arrêt relatif aux appels interjetés contre la «décision fixant les principes et procédures applicables en matière de réparations» rendue le 7 août 2012, 3 mars 2015 (ICC-01/04-01/06-3129-AnxA), par. 11 et 22.

4 *Le Procureur c. Bosco Ntaganda,* affaire ICC-01/04-20/06-2659, chambre de première instance IV, ordonnance de réparation, 8 mars 2021, par. 76-77.

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