INTERNATIONAL COURT OF JUSTICE

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Armed Activities on the Territory of the Congo
***(Democratic Republic of the Congo* v. *Uganda*)**

The Court to arrange for an expert opinion

THE HAGUE, 22 September 2020. The International Court of Justice (ICJ) decided, by an Order dated 8 September 2020, to arrange for an expert opinion, in accordance with Article 67, paragraph 1, of its Rules, in the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda).*

It is recalled that, in its Judgment on the merits of the case delivered on 19 December 2005, the Court found that Uganda had violated the principle of non-use of force in international relations and the principle of non-intervention and that it had violated human rights and humanitarian law as an occupying Power in the Congolese province of Ituri. The Court found at the same time that the Democratic Republic of the Congo (DRC) had for its part violated obligations owed to Uganda under the 1961 Vienna Convention on Diplomatic Relations. The Court concluded that the Parties were under an obligation to one another to make reparation for the injury caused. It also decided that, failing agreement between the Parties, the question of reparation due to each of them would be settled by the Court, in a subsequent procedure in the case.

Having received a request from the DRC on 13 May 2015 to determine the amount of reparations owed by Uganda, the Court, taking into account that the Parties had been unable to reach an agreement in that respect, decided, by an Order of 1 July 2015, to resume proceedings in the case with regard to the question of reparations. In September 2016 and February 2018, the Parties filed their Memorials and Counter-Memorials on the question of reparations. Following the filing of these pleadings, the DRC and Uganda also submitted their responses to the questions addressed to them by the Court as well as comments on the responses of the other Party.

In its Order of 8 September 2020, the Court decides, *inter alia*, that

"(1) An expert opinion shall be obtained, which will be entrusted to four independent experts appointed by Order of the Court after hearing the Parties.

(2) For the purposes of determining the reparation owed to the Democratic Republic of the Congo by Uganda for the injury caused as a result of the breach by Uganda of its international obligations, as determined by the Court in its 2005 Judgement, the Court continues to examine the full range of claims and defences to the heads of

damage claimed by the Applicant. However, with respect to some of these heads of damage, namely loss of human life, loss of natural resources and property damage, the Court considers it necessary to arrange for an expert opinion, in accordance with Article 67, paragraph 1, of its Rules . . .”

The Order provides the terms of reference for the experts and further states that experts will prepare and file with the Registry a written report on their findings and that this report will be communicated to the Parties, which will be given the opportunity of commenting on it, pursuant to Article 67, paragraph 2, of the Rules of Court.

In its Order, the Court emphasizes that the decision to arrange for an expert opinion in no way prejudges the amount of the reparation due by either party to the other, nor any other question relating to the dispute brought before the Court, and leaves intact the parties’ right to adduce evidence and submit their arguments on those subjects, in accordance with the Statute and the Rules of Court.

Composition of the Court

The Court was composed as follows: *President* Yusuf; *Vice-President* Xue; *Judges* Tomka, Abraham, Bennouna, Cançado Trindade, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Crawford, Gevorgian, Salam, Iwasawa; *Judge* ad hoc Daudet; *Registrar* Gautier.

Judges Cançado Trindade and Sebutinde appended separate opinions to the Order of the Court.

Summaries of the separate opinions are annexed to this press release.

The full text of the Order is available on the Court’s website.

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History of the proceedings

The history of the proceedings can be found in press releases Nos. 1999/34 of 23 June 1999, 2000/24 of 1 July 2000, 2005/11 of 29 April 2005, 2005/26 of 19 December 2005, 2015/18 of 9 July 2015, 2019/11 of 1 March 2019 and 2019/48 of 13 November 2019, which are available on the Court’s website (www.icj-cij.org).

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Note: The Court’s press releases are prepared by its Registry for information purposes only and do not constitute official documents.

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The International Court of Justice (ICJ) is the principal judicial organ of the United Nations. It was established by the United Nations Charter in June 1945 and began its activities in April 1946. The Court is composed of 15 judges elected for a nine-year term by the General Assembly and the Security Council of the United Nations. The seat of the Court is at the Peace Palace in The Hague (Netherlands). The Court has a twofold role: first, to settle, in accordance with international law, through judgments which have binding force and are without appeal for the parties concerned, legal disputes submitted to it by States; and, second, to give advisory opinions on legal questions referred to it by duly authorized United Nations organs and agencies of the system.

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Separate opinion of Judge Cançado Trindade

1. In his Separate Opinion, Judge Cançado Trindade deems it fit to lay on the records the concerns he has been having along the years with the handling of proceedings on reparations in the present case of *Armed Activities on the Territory of the Congo* (D.R. Congo *versus* Uganda). Along 29 paragraphs, he addresses three interrelated points, namely: first, the relevance of due compliance with the right to reparations; second, the need of prompt compliance with the right to reparations; and third, the relevance of prompt reparations for grave breaches of international law of human rights and international humanitarian law.

2. In the case of *Armed Activities on the Territory of the Congo* (reparations, D.R. Congo *versus* Uganda), Judge Cançado Trindade has always opposed postponing again the hearings on reparations in the present case, and his own position has remained a solitary dissenting one; the ICJ's majority rescheduled the oral hearings on reparations on several occasions. Judge Cançado Trindade recalls that already in his Declaration presented in the ICJ's Order of 11.04.2016, in the present case, he expressed his concern with the undue prolongation of time of proceedings (since 2005) as to the due reparations in the *cas d'espèce*. He has remained very critical of the ICJ. He has always been of the understanding that attention to the prolonged suffering of numerous victims stands well above attention to susceptibilities of contending States.

3. Judge Cançado Trindade recalls that he has been insisting within the ICJ upon the need to proceed promptly to the determination of reparations for the grave breaches of the International Law of Human Rights and International Humanitarian Law for a long time. The delays by the ICJ so far are unacceptable to him (para. 1). In his own understanding,

> "there is need to move beyond the unsatisfactory inter-State outlook, if one is to foster the progressive development of international law in the domain of reparations, in particular collective reparations. Prolonged delays are most regrettable, particularly from the perspective of the victims. Already the 'founding fathers' of international law went well beyond the strict inter-State outlook, and were particularly attentive to the duty of prompt reparation for damages" (para. 2).

4. Judge Cançado Trindade considers that the ICJ is not conditioned or limited by what the parties request or want, not even in the fixing of time-limits. As he has been pointing out within the ICJ time and time again, the Court is not an arbitral tribunal. The ICJ is the master of its own procedure, also in the fixing of time-limits, in the path towards the realization of justice, avoiding the undue prolongation of time (para. 20).

5. The ICJ's present Order of 08.09.2020 finally designates four independent experts to assist the Court in the determination of the reparations, as necessary. Judge Cançado Trindade considers that this could and should have been made a long time ago.

6. He proceeds that it is in jusnaturalist thinking — as from the XVIth century — that the goal of prompt reparation was properly pursued. Legal positivist thinking — as from the late XIXth century — unduly placed the "will" of States above *recta ratio*.

7. Judge Cançado Trindade proceeds that, in this respect, there are relevant passages in the significant references of classic works[1]. Such a duty of reparation for injuries was in his view "clearly seen as a response to an *international need*"[2], in conformity with the *recta ratio*, — whether the beneficiaries were (emerging) States, peoples, groups or individuals. The *recta ratio* provided the basis for the regulation of human relations with the due respect for each other's rights.

8. In the handling by the ICJ of the present case concerning *Armed Activities on the Territory of the Congo* (reparations), it has already been 15 years since the ICJ delivered its Judgment (of 19.12.2005) on the merits, wherein grave breaches were established by the Court. Judge Cançado Trindade reiterates that

> "yet, the numerous victims still wait for reparations. And this is the third time, in the ongoing proceedings on reparations, that I have deemed it fit to leave on the records my concerns as to the continuing and undue prolongation of time, to the detriment of the victims themselves[3]. *Tempus fugit*" (para. 5, *in* para. 14).

9. Judge Cançado Trindade adds that, in its aforementioned Judgment of 2005, the ICJ was particularly attentive to those grave breaches of massacres of civilians, incitement of ethnic conflicts among groups, forced displacement of persons, among others, having drawn attention to the need of reparation, though unfortunately without setting up a reasonable time-limit for that.

10. In the present case, the ultimate beneficiaries of reparations for damages resulting from grave breaches of the International Law of Human Rights and International Humanitarian Law (as determined by the ICJ itself) are the human beings victimized. They are the *titulaires* of the right to reparations, as subjects of the law of nations, as conceived and sustained, in historical perspective, by the "founding fathers" of international law. This is deeply-rooted in the historical trajectory of international law. He considers that as *titulaires* of that right, they have, in the *cas d'espèce*, been waiting for reparations for a far too long time; many of them have already passed away. *Justitia longa, vita brevis* (para. 7).

11. It is critical to Judge Cançado Trindade that, to start with, there has been a focus unduly on compensation only, while the Court should address reparations in all their forms; moreover, one

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[1] Of, e.g., Francisco de Vitoria (Second *Relectio* — *De Indis*, 1538-1539); Hugo Grotius (*De Jure Belli ac Pacis*, 1625, book II, ch. 17); Samuel Pufendorf (*Elementorum Jurisprudentiae Universalis — Libri Duo*, 1672; and *On the Duty of Man and Citizen According to Natural Law*, 1673); Christian Wolff (*Jus Gentium Methodo Scientifica Pertractatum*, 1764; and *Principes du droit de la nature et des gens*, 1758); among others, such as the pertinent considerations also of Alberico Gentili (*De Jure Belli*, 1598); Francisco Suárez (*De Legibus ac Deo Legislatore*, 1612); Cornelius van Bynkershoek (*De Foro Legatorum*, 1721; and *Questiones Juris Publici — Libri Duo*, 1737) (paras. 16-17). There is nothing new under the sun. The more we do research on the classics of international law (largely forgotten in our hectic days), the more we find reflections on the victims' right to reparations for injuries, — also present in the writings of, e.g., Juan de la Peña I then (*De Bello contra Insulanos*, 1545); Bartolomé de Las Casas (*De Regia Potestate*, 1571); Juan Roa Dávila (*De Regnorum Justitia*, 1591); Juan Zapata y Sandoval (*De Justitia Distributiva et Acceptione Personarum ei Opposita Disceptatio*, 1609) (paras. 16-17).

[2] J. Brown Scott, *The Spanish Origin of International Law — Francisco de Vitoria and His Law of Nations*, Oxford/London, Clarendon Press/H. Milford, 1934, pp. 140, 150, 163, 165, 172, 210-211 and 282-283; and cf. also, Association Internationale Vitoria-Suarez, *Vitoria et Suarez: Contribution des théologiens au Droit international moderne*, Paris, Pédone, 1939, pp. 73-74, and cf. pp. 169-170; A.A. Cançado Trindade, "Prefacio", *in Escuela Ibérica de la Paz (1511-1694) — La Conciencia Crítica de la Conquista y Colonización de América* (eds. P. Calafate and R.E. Mandado Gutiérrez), Santander, Ed. Universidad de Cantabria, 2014, pp. 40-109.

[3] Cf., earlier on, ICJ, case of *Armed Activities on the Territory of the Congo* (D.R. Congo *versus* Uganda, Order of 01.07.2015), Declaration of Judge Cançado Trindade, paras. 1-7; ICJ, case of *Armed Activities on the Territory of the Congo* (D.R. Congo *versus* Uganda, Order of 11.04.2016), Declaration of Judge Cançado Trindade, paras. 1-20.

cannot refer unduly and only to calculation of the number of individual victims, but it should bear in mind the complexity of the present case of mass murder, of a considerable high number of victims, and the impossibility of identifying them all. In his opinion, focus should be given to collective rather than individual reparations.

12. In this regard, Judge Cançado Trindade adds that lessons should be drawn from the relevant international case-law on collective reparations in cases of massacres, in particular of the Inter-American Court of Human Rights (IACtHR)[4], the European Court of Human Rights (ECtHR), and of the International Criminal Court (ICC).

13. In effect, Judge Cançado Trindade recalls in his Opinion that breach of rights and the reparation due form an indissoluble whole. He reiterates that the duty of reparation is deeply and firmly-rooted in the history of the law of nations (*droit des gens*), going back to its origins, when it marked presence in the writings of the "founding fathers" of our discipline, who expressly referred to it in the light of the principle *neminem laedere*. It is relevant to face new challenges in the international legal order "from an essentially humanist approach", moving "beyond the unsatisfactory inter-State outlook", thus fostering "the progressive development of international law in the domain of reparations, in particular collective reparations".

14. The *reparatio* seeks to avoid the aggravation of the extreme harm already done to the human victims, with a careful attention to *fundamental human values*. In Judge Cançado Trindade's understanding, contrary to what legal positivism assumes, law and ethics are ineluctably interrelated, and this is to be taken into account for a faithful realization of justice (para. 22).

15. This vision has historically marked presence since the very origins of the law of nations (*droit des gens*), and has never been minimized by the more lucid international legal doctrine, untouched by the misleading distortions of legal positivism. Judge Cançado Trindade adds that the fundamental principle of humanity upholding human dignity, of utmost importance, has been asserted in the jurisprudential construction of contemporary international tribunals[5].

16. The consolidation of the international legal personality (active as well as passive) of individuals, as subjects of international law, — adds Judge Cançado Trindade, — enhances accountability at international level for grave violations of the rights of the human person. Individuals are, — he adds, —

> "also bearers of duties under international law, and this further reflects the consolidation of their international legal personality. Developments in international legal personality and international accountability go hand in hand, giving expression to the formation of the *opinio juris communis* to the effect that the gravity of

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[4] Cf., e.g., A.A. Cançado Trindade, *La Responsabilidad del Estado en Casos de Masacres — Dificultades y Avances Contemporáneos en la Justicia Internacional*, Mexico, Edit. Porrúa/Escuela Libre de Derecho, 2018, pp. 1-104; A.A. Cançado Trindade, *Los Tribunales Internacionales Contemporáneos y la Humanización del Derecho Internacional*, Buenos Aires, Edit. Ad-Hoc, 2013, pp. 7-185; A.A. Cançado Trindade, *El Acceso Directo del Individuo a los Tribunales Internacionales de Derechos Humanos*, Bilbao, Universidad de Deusto, 2001, pp. 9-104.

[5] He more recently addressed this criticism in his recent study "Reflections on the International Adjudication of Cases of Grave Violations of Rights of the Human Person", originally published at the 9 *Journal of International Humanitarian Legal Studies* (2018) pp. 98-136, — recently presented by him, in French, as a *magna* lecture at the Law Faculty of the Université Aix-Marseille, in Aix-en-Provence, France, on 30.10.2018, followed by the second lecture, in English, ministered at the Peace Palace of the International Court of Justice, at The Hague, on 17.01.2019.

violations of fundamental rights of the human person affects directly basic values of the international community as a whole" (para. 25).

17. *Justitia longa, vita brevis*; the time of human justice is not the time of human beings. Judge Cançado Trindade states that the lessons of the "founding fathers" of the law of nations (*droit des gens*) remain as contemporary as ever, and forward-looking in our days. The duty of prompt reparation forms part of their perennial legacy. That legacy is to keep being cultivated[6], so as to face new challenges that contemporary international tribunals face in our days, from an essentially humanist approach (para. 27).

18. In Judge Cançado Trindade's own understanding, one is to move beyond the unsatisfactory inter-State outlook, if one is to foster the progressive development of international law in the domain of reparations, in particular collective reparations. Prolonged delays are most regrettable, particularly from the perspective of the victims, and therefore, from the perspective of *justice*.

Separate opinion of Judge Sebutinde

Judge Sebutinde is of the opinion that this is not a proper case for the Court to appoint experts under Article 50 of the Statute of the Court and Article 67 of the Rules of Court as it is not a case involving "complex issues" that require technical, scientific or specialized knowledge or expertise that is outside the realm of normal judicial expertise. Judge Sebutinde recalls that in accordance with the well-settled principle of *onus probandi incumbit actori*, it is the duty of the party that asserts certain facts to establish the existence of such facts. Since 13 May 2015, when the Democratic Republic of the Congo filed its "New Application" requesting the Court to reopen proceedings in order to determine the amount of reparations due to it from the Republic of Uganda, both Parties have had ample opportunity over the last five years to tender whatever evidence they deem necessary or sufficient (including facts, data and methodology) to prove their respective claims. What remains is not for the Court to seek further evidence outside that already submitted by the Parties, but rather to perform its judicial function by examining the evidence already on record and determining the reparations due.

The proposed terms of reference of the experts contained in the Order have the effect of unfairly interfering with the allocation of the burden of proof and tilting the balance in favour of one Party to the detriment of the other, contrary to the principles of a fair hearing and equality of arms. Alternatively, the terms of reference have the effect of inappropriately delegating the judicial function to the experts.

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[6] On that legacy, cf., recently, A.A. Cançado Trindade, *A Humanização do Direito Internacional*, 2nd. rev. ed., Belo Horizonte/Brazil, Edit. Del Rey, 2015, ch. XXIX ("The Perennity of the Teachings of the 'Founding Fathers' of International Law"), 2015, pp. 647-676.