

## DECLARATION OF JUDGE TOMKA

[Original English Text]

*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” (*I.C.J. Reports 2000*, 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

“(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, paras. 166, 181, 193, 206, 225, 258 and 365).

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” (*ibid.*, para. 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 (*ibid.*, para. 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, para. 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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