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 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

[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.

> 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 range of possibilities indicated by the evidence"[3]; and

(iv) 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

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

[3] *Ibid*.

[4] *Ibid*.

[5] *Ibid*.

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, 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

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

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 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,

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[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.

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.

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

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[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.

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.
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> 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 evidence provided, the Court is unable to establish clearly

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[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.

[20] *Ibid.*

> 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

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[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.

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.

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

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

[25] *Ibid*.

[26] *Ibid.*, para. 234.

[27] *Ibid*.

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. 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

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[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.

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 precise or even an approximate number of lives lost. The Court identifies a range of lives

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

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.

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[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.

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 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.

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[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.