

## DISSENTING OPINION OF JUDGE *AD HOC* DAUDET

[Translation]

1. This case is exceptional on account of the explosion of violent, inhuman and sometimes barbarous acts that accompanied this war, one of Africa's most brutal. It is also exceptional in terms of the scale of the damage caused and the fact that the Democratic Republic of the Congo (DRC), in presenting its submissions during the oral proceedings (Judgment, paragraph 46), sought the considerable sum of US\$11.5 in reparation from Uganda, found responsible for the commission of that damage by the Court's Judgment of 19 December 2005 (case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, *I.C.J. Reports 2005*, p. 168; hereinafter the "2005 Judgment").

2. Following the failure of negotiations between the two States to determine the amount of reparation, it fell to the Court to establish that sum, in accordance with the operative part of the 2005 Judgment (para. 345 (6)). The total amount owed by Uganda has thus been fixed by the Court in today's Judgment at US\$325 million, which equates to less than 3 per cent of the amount sought by the DRC, of which it falls far short.

3. To my very great regret, I was unable to support the majority opinion as regards both the way in which the compensation was calculated and the amounts awarded for the human damage caused, be it loss of life, bodily harm or damage to personal property. Indeed, these are violations of the most basic human rights, resulting in sometimes indefensible harm (torture, rape, large-scale massacres) to thousands of Congolese, which, in my view, has been neither adequately taken into account nor sufficiently compensated.

4. I was, however, able to support the majority position with regard to natural resources. Although well below the sum claimed by the DRC, the amount awarded was in my view justified. In any event, I am not convinced that this form of damage greatly affected the day-to-day lives of the Congolese people, since the mining economy is not particularly distributive and profits are predominantly enjoyed by foreign States and groups. Moreover, these mineral resources, which the DRC has in abundance, have largely been a source of misery for its people: first, during colonization; then, at the time of independence, when Moïse Tshombé's secession of Katanga, backed by foreign interests, plunged the country into chaos and required the intervention of the United Nations; not to mention the endemic unrest and various political upheavals that subsequently afflicted the country and its people.

5. With the help of experts whose services were of varying assistance, the Court made a considerable — and commendable — effort to do its very best to fix what it considered to be the fairest possible compensation for the various heads of damage. I am therefore certainly not for one moment questioning either the quality of the Court's work or its acute awareness of the seriousness of the issues at stake; I am simply expressing, with all due respect to the Court, my disagreement with the result that it reached. To explain my position in this regard, it is necessary to examine the overall context of the DRC's claims for compensation and to return first to the source, i.e. the 2005 Judgment.

6. In 2005, the Court declared Uganda responsible for various categories of damage caused to the DRC. It did so in clear and unequivocal terms, which can be found throughout the Judgment. The Court notes "the magnitude of the military events and the attendant suffering" (para. 150), as well as

the “unlawful” nature of those actions (para. 152). It finds that “[t]he unlawful military intervention by Uganda was of such a magnitude and duration that the Court considers it to be a grave violation of the prohibition on the use of force expressed in Article 2, paragraph 4, of the Charter” (para. 165). The Court also speaks of “acts of killing, torture and other forms of inhumane treatment of the civilian population” (para. 211), confirmed by “sufficient” “credible evidence” (*ibid.*). It refers to the “immense suffering” and the “many atrocities . . . committed” (para. 221). It finds that the UPDF, which “failed to protect the civilian population” (para. 208), “incited ethnic conflicts” in Ituri (para. 209) and “failed to take action to put an end to the violence” (*ibid.*). Several of these excerpts were recalled in the present Judgment (see paragraphs 51-57).

7. Given the need for consistency between the present Judgment and that delivered in 2005 — which I consider essential — I find it strange that, having so clearly established responsibilities in 2005, the Court has not today awarded compensation more in keeping with the resoluteness of that decision. In my view, the approach taken by the Court is flawed precisely because it is not consistent with the 2005 Judgment; in spite of the Court’s assertions (see paragraph 68), it gives too much credence to the punctilious formalism of Uganda’s lawyers with regard to evidence of damage and shows what I consider to be sometimes undue rigour given the context of this case. As a result, the present Judgment lacks the momentum of the 2005 decision.

8. In my opinion, there is also an obvious inconsistency — this time an internal one — between Parts II (paragraphs 60-131) and III (paragraphs 132-384) of the Judgment. Part II sets out “general considerations”, with which I readily agree. I understand this part of the Judgment to mean that while the requirements of proof and a causal nexus are fundamental, and the Court must ensure that they are respected, some flexibility is nonetheless permissible for certain heads of damage, given the specific situation of the DRC, the victim of an especially cruel and devastating war (paragraphs 66-68).

9. This is followed by Part III, which I had expected to be some kind of practical application of, and thus to be entirely in line with, the principles identified in Part II, but which seems instead to be once more at a remove from and in some way out of step with those principles, in so far as it fails to apply the flexibility they encompass. This led to the adoption of particularly conservative levels of compensation, especially for damage to persons.

10. In a case such as this, which in many respects is exceptional, there is clearly a need to proceed with caution and, of course, to keep in mind that while the Judgment is binding only on the Parties, the Court’s positions may nevertheless subsequently be relied on in other cases, sometimes by extrapolation, to justify a stance. The Court must therefore take care not to create an opening which, on another occasion, would surely be exploited. And, still in view of the exceptional nature of this case, the Court cannot be criticized for carefully and strictly upholding the integrity of the principles of international law, in this instance the law of responsibility. Nevertheless, compliance with the law does not preclude a contextualization of the rules, which was absent here. The difficulty being, it is true, knowing where to stop.

11. The 2005 Judgment did not go into the details of specifically individualized damage, any more than the DRC did, for that matter, in the claims it made at a stage of the case concerning the establishment of responsibility rather than the forms and amount of reparation. In the current phase of determination of the quantum, greater precision is obviously needed for the breakdown of what is eligible for compensation — and in what amount — and what is not, which poses difficulties in relation to evidence and the standard required for evidence to be established.

12. The DRC argued strongly that the specific situation of violence and disorder faced by the country during the period under consideration made it impossible, in practical terms, to gather evidence with the requisite degree of precision. There is no point returning to the numerous examples of those difficulties mentioned by the DRC in its written pleadings and during the oral argument. However, between the two extremes which consist in either regarding these particular difficulties as an exemption from the need to provide proof or referring to them only as a matter of form, paying them lip service but not giving them due attention, there is room for a middle path, which, in my view, the Court should have taken.

13. Against the deeply troubling backdrop already clearly recorded in the 2005 Judgment, the disruption of public services and of all infrastructure, as well as the victims' low level of education, are presented in the present proceedings as insurmountable obstacles by the DRC (paragraph 62). It is evident that when one flees into the Congolese forest, one finds neither a doctor to record rape or injuries, nor an official from the civil registry to record deaths, nor a notary to issue the titles to property that will serve as evidence to found subsequent claims for compensation. The Court, which fully acknowledged this in adopting a nuanced and understanding position (paragraph 158), certainly did not fail to draw attention to these facts, but, in my opinion, it did not take the next logical step and draw the practical consequences in its quantification of the damage, which is not marked by the same flexibility.

14. With this in mind, it is important to examine the nature of the acts committed and the effect it has on the standard of proof. The 2005 Judgment established that mass crimes had been perpetrated: in paragraph 207, the Court declares itself convinced that "massive human rights violations . . . were committed by the UPDF" and, in paragraph 205, it states: "In order to rule on the DRC's claim, it is not necessary for the Court to make findings of fact with regard to *each* individual incident alleged." (Emphasis added.) In paragraph 211, it "considers that it has credible evidence sufficient to conclude that the UPDF troops committed acts of killing, torture and other forms of inhumane treatment of the civilian population".

15. In its written pleadings and oral argument, the DRC recalled that, as a general rule (not just in the case of mass crimes), the circumstances specific to each case may lead to evidentiary requirements being relaxed in accordance with the said circumstances. For example, 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), p. 15)*, the Court, in paragraph 35, referring to the *Diallo* case, "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" and mentions the "equitable considerations" which guided it in the *Diallo* case. In the same paragraph, the Court quotes a well-known passage from the Arbitral Award in the *Trail Smelter* case, which makes a similar point:

"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, though the result be only approximate."<sup>1</sup>

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<sup>1</sup> *Trail Smelter (United States, Canada), Awards of 16 April 1938 and 11 March 1941*, United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. III, p. 1920.

16. Flexibility was also shown by the Eritrea-Ethiopia Claims Commission (EECC)<sup>2</sup> and by the ICC in the *Lubanga*<sup>3</sup> and *Ntanganda*<sup>4</sup> cases.

17. There is no doubt that, in the present case, the circumstances recalled above make it particularly difficult to gather precise evidence relating to events that took place more than 20 years ago in a country in which, since life expectancy is just 63 years (World Bank figure: <https://data.worldbank.org/indicator>), many of those involved have died in the meantime and their testimony can no longer be gathered. Yet the observation I made earlier (see paragraph 13) is equally applicable to paragraphs 66 to 68 of the Judgment, in which the Court emphasizes the effects of the time that has elapsed and the resulting difficulty in “establishing the course of events and their legal characterization” (paragraph 66). Somewhat surprisingly, however, the Court then observes that “more evidence relating to loss of life could be expected to have been collected [by the DRC] since the Court delivered its 2005 Judgment” (paragraph 159). In other words, the time that has passed is regarded as an opportunity of which the DRC has failed to take advantage. From my perspective, it is quite the opposite: the passing of time is a factor in the loss of both material evidence (in Africa, the weather conditions may also contribute to the loss or destruction of documents and objects) and testimony, either on account of failing memory or, as I have just mentioned, because deaths occur. In fact, one of the reasons invoked in legal systems with a statute of limitations is the fragility of evidence relating to long-ago events. Hence my opposing view that these considerations would also have justified a show of leniency and flexibility on the part of the Court in Part III of the Judgment on reparations.

18. Despite there being factors that argue in favour of nuance and adapting as best as possible to a complex situation, the Court has confined itself to a very literal interpretation of paragraph 260 of the 2005 Judgment. Paragraph 260 lies at the heart of Uganda’s arguments and is expressly relied on in its final submissions. It is therefore worth spending some time on it. In this paragraph, which concerns the hypothetical failure of negotiations leading to a later contentious phase to determine compensation for the DRC, the Court states that “[t]he 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*” (emphasis added). With this sentence, the Court is merely recalling the basic rules according to which, to be eligible for compensation, an injury must be proven and connected by a causal nexus to an internationally wrongful act.

19. In my view, when referring in paragraph 260 of the 2005 Judgment to the “exact injury” suffered by the DRC and “specific actions” of Uganda, the Court did not intend to make the principle of full reparation for injury caused by the internationally wrongful act (Article 31 of the International Law Commission’s Articles on State Responsibility) subject to more rigorous conditions. More specifically, I am not sure that it was the Court’s intention, in expressing itself in this way, to impose particular conditions on the presentation of claims by the DRC, or to confine itself in the future to a more stringent framework of requirements for the success of the forthcoming claims of that State, the victim of the “injury . . . caused . . . by Uganda” (para. 259). For a number of the grounds of responsibility invoked by the DRC against Uganda, the 2005 Judgment recognizes the existence of violations borne out by evidence that is “of a reliable quality” (para. 208), “persuasive” (para. 209),

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<sup>2</sup> Eritrea-Ethiopia Claims Commission, *Eritrea’s Damages Claims, Final Award*, Decision of 17 August 2009, *RIAA*, Vol. XXVI, p. 528, para. 36.

<sup>3</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Appeals Chamber, Order for Reparations (amended), Annex A to the Judgment on the appeals against the “Decision establishing the principles and procedures to be applied to reparations” of 7 August 2012, 3 Mar. 2015 (ICC-01/04-01/06-3129-AnxA), paras. 11 and 22.

<sup>4</sup> *The Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-2659, Trial Chamber VI, Reparations Order, 8 Mar. 2021, paras. 76-77.

“credible” (para. 211) and “convincing” (para. 210). What remains to be “specified”, however, is the number of people who died or were injured, the number of child soldiers who were abducted, and so on. In paragraph 260, the Court is recalling the usual requirements in this regard, nothing more and nothing less. From there, I think that, in the present Judgment, the Court could have made better use of its power to apply this general rule taking greater account of the circumstances of the case and, in so doing, could have adopted a stance in line with the one described above (see paragraph 15).

20. In other words, I do not consider the terms of paragraph 260 to have as rigid a meaning as that which is attributed to them by Uganda, and which is ultimately broadly adopted by the Court in Part III of its Judgment. It is true that the Court did not require the production of a medical certificate to prove a rape, nor a notarized title to prove the loss of a dwelling (see above, paragraph 13), but its exacting standards nevertheless reduced the likelihood of adjustments being made for the situation, circumstances, or local habits or customs. For example, the importance of the spoken word compared to the written word in Africa is well known and is such that, to prove a claim, oral testimony might be given instead of producing the written documentation that would exist elsewhere as a matter of course. Yet, as far as I am aware, the experts stayed in their offices and questioned no one. Finally, one must always keep in mind the specific context of violence and disorder prevailing in the DRC at the time the damage was caused.

21. Certainly, the more serious the acts and the higher the reparations claim, the more stringent the requirements to be met by the evidence. This is an important point to note. It was already highly unlikely that the DRC would receive the level of compensation it claimed, which was clearly disproportionate and completely beyond Uganda’s means. There was, in any event, absolutely no possibility of it receiving satisfaction without producing particularly solid evidence. Yet it must be acknowledged that the evidence provided by the DRC could not be characterized as such. There was therefore absolutely nothing unusual in the Court awarding a lower amount than that claimed. Nevertheless, in my opinion, the figure fixed by the Court is far too low, primarily because of the way in which damage to persons was calculated.

22. To fix the amount of reparation for damage to persons, the Court (and the experts) used two parameters: the number of victims and the amount of compensation per person. The former is multiplied by the latter to determine, after any adjustments, the sum to be paid as compensation. The first figure depends on the evidence produced; the second, on the model applied. From the outset, there appears to be some room for uncertainty.

23. The point here is not to analyse the Court’s assessments in detail. In my view, the example of loss of life (paragraphs 135-166) illustrates both the extreme difficulty faced by the Court and the meticulous nature of the work it has carried out, albeit to reach a result which I consider questionable. It is an example which is often transposable to other heads of damage. In this instance, determining the number of victims reveals significant variations between the sources (ranging from the 180,000 deaths put forward by the DRC, to the 14,663 proposed by the expert, who nonetheless acknowledges that this figure may have been underestimated). There is a problem here with the evidence provided by the DRC, which the Court considers insufficient. It is true that some of the victim identification forms — which, moreover, concern only some of the deaths — were completed on an approximate basis (but how could it have been otherwise?) and were therefore not particularly helpful. Other sources did not, in the Court’s view, enable a sufficiently substantiated causal nexus to be established. This cumulation of insufficient evidence made it impossible to establish clear proof. After checking against other sources of information deemed to be reliable, the Court ultimately adopted the rather broad range of 10,000 to 15,000 deaths (close to the figure of 14,663 deaths given by the expert, who, as I have just mentioned, considers this likely to be an underestimation), having

concluded that there was insufficient evidence to confirm the 180,000 deaths put forward by the DRC (paragraphs 161-162).

24. I was unconvinced by that conclusion and fail to understand why the Court chose the lowest figure in a very broad range, despite the acknowledgment that it was potentially an underestimation. Given the obvious uncertainty which, for the reasons mentioned, surrounds the numbers in question, I believe that, having excluded the highest figure, it would have been more justified, in view of the circumstances and specific nature of the case, to start at a position above the lowest figure in the range and then correct that position as necessary to reach an intermediate level of compensation. Taking into account the length of the conflict alone, the Court could have found that the figure of 14,663 lives lost was clearly too low, since it was inconsistent with the scope and duration of Uganda's military intervention as set out in paragraph 165 of the 2005 Judgment. Had the Court preferred not to rely on that basic logic, it could have been guided in its decision-making by equitable considerations, reference to which was appropriate to try to refine the bases for compensation.

25. The examination of rape and sexual violence gave rise to the same approximations and uncertainties. The Court considered that the figure of 1,740 cases claimed by the DRC was not sufficiently proven (paragraph 189) and that it was "impossible to derive even a broad estimate of the number of victims of rape and other forms of sexual violence" (paragraph 190). It nonetheless found that "it is beyond doubt that rape and other forms of sexual violence were committed in the DRC on a large and widespread scale" (paragraph 191), and recalled that, according to the ICC, this was a "common practice". The Court also stated that it was "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", as noted by the EECC (paragraph 189). To this, one could add the stigma faced by and within families and the tragic lot of children born of rape. One could also listen to the 2018 Nobel Peace Prize lecture on this subject by Dr. Mukwege, who is more familiar than anyone with these painful issues.

26. In this instance, as in the case of loss of life, a more precise use of equity than that employed by the Court (which only mentioned equity without explaining how it was used) would have been desirable. Recourse to equitable considerations, whose importance has been affirmed and explained, would have been perfectly justified, and would not have infringed the rules and principles of international law. Indeed, it must be recalled that this form of equity is not contrary to international law but is merely intended to enable it to be better adapted to the circumstances. Although the Court refers to equity on several occasions in its Judgment, it does so as if only out of respect, without offering any further explanations or stating what action was taken to determine fair amounts of compensation for damage to persons and property (paragraphs 166, 181, 193, 206, 225, 258). By awarding a global sum whose various components are not specified, the Court has rendered a decision which may be seen as approximate or vague.

27. In this regard, I regret the choice of a global sum covering such a broad array of heads of damage without distinction, ranging from loss of life (paragraphs 134-168) to injuries to persons (paragraphs 167-181), rape and sexual violence (paragraphs 182-193), the recruitment and deployment of child soldiers (paragraphs 194-206) and the displacement of populations (paragraphs 207-225). The way the Judgment is drafted, it is impossible to assess the share of compensation allocated to each head, which in some respects makes it difficult to apply the principle expressed by the Court in paragraph 102 of its Judgment, according to which "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)".

28. It should nonetheless be recalled here that, at the opening of the hearings, following up on statements made in the Memorial (paras. 7.50-7.51) setting out the DRC's intention to establish a fund that would allow individualized damage to be compensated, the Agent of the DRC informed the Court that a decree to that effect, binding on the DRC, had been adopted on 13 December 2019. A body comprising "representatives of the victims and . . . international experts, including one delegate of the United Nations system" has thus been put in place (CR 2021/5, pp. 22-23). This commitment was reiterated by the Agent at the close of the hearings (CR 2021/11, p. 76).

29. It can be inferred that this measure offsets the disadvantage of a global sum that does not identify the amounts allocated to each particular head of damage, and considerably tempers the criticism levelled above, since it will be for the body established by the DRC to distribute the global sums among the various categories of victims. This will be no easy task given the conservative and, in my opinion, vague nature of the amounts awarded by the Court.

30. In conclusion, this case vividly shows that the failure of negotiations between the two countries is extremely regrettable. Only good faith negotiations, had they been able to take place, could have brought to the fore the moral, humanist, economic and social foundations, in short, the fundamental principles that might have formed the necessary groundwork on which to base the requests of one side and the possible responses of the other. These principles might have resulted in greater and fairer compensation, but cannot form the basis of a decision of the Court.

31. The Court itself cannot simply put forward its firm conviction, likelihoods, or evidence from sources that are probably well informed but do not provide certainty, in lieu of proof or a causal nexus. A careful reading of the Judgment clearly shows the difficulties faced by the Court in this regard.

32. It is possible that, in negotiations, one point would have been given greater emphasis than it received in the Judgment, from which it is in fact absent. In its decision, the Court takes into account that, as a developing country, Uganda has a limited capacity to pay and, without raising the question directly, alludes to it on three occasions: in paragraph 109, in which it refers to the position taken by Uganda, which wrongly claims that "the relevant principles of international law" preclude requiring a debtor to pay compensation that exceeds its financial capacity, despite the absence of a concrete rule to that effect in international law; in paragraph 110, in which the Court mentions that this question was raised by the EECC and states that it "will further address the question of the respondent State's financial capacity below (see paragraph 407)"; and in paragraph 407, in which the Court says little, declaring itself satisfied that Uganda has the capacity to pay, such that the question of "the financial burden imposed on the responsible State" is irrelevant. What is absent, however, is the "mirror image situation" in the DRC, which, like Uganda, is a developing country with, like Uganda, limited financial resources. The Judgment makes no mention, not even "in passing", of whether the DRC has the capacity to bear the uncompensated share for which it remains liable, since it is clear that the DRC is not receiving full reparation for the injury it suffered, despite its clearly erroneous overstating of that injury, which would have led to punitive damages that could not have been paid in any event, as I mentioned above. Indeed, the Court recalled that "it is well established . . . that reparation due to a State is compensatory in nature and should not have a punitive character" (paragraph 102). In my view, however, the DRC is being doubly punished: it was a victim and it will receive insufficient compensation. One can imagine that, had it been possible for good faith

negotiations to take place, this would have been taken into account, resulting in a balanced outcome. That is not what happened. It is to be hoped that the DRC will be able to overcome the understandably profound disappointment it is no doubt experiencing. May the two States resume the peaceful relations that their people desire as soon as possible.

*(Signed)*

Yves DAUDET.

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