

The *Congo/Uganda* case: A comment on the main legal issues

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Summary

This article comments upon the judgment handed down by the International Court of Justice on 19 December 2005, in the Case Concerning Armed Activities on the Territory of the Congo: DRC v Uganda. The author uncovers the main legal issues pertaining to this case, namely, those associated with the legality of the use of force under international law, the rights and obligations of the occupying power in occupied territories, and the issue of diplomatic protection.

1 Introduction

The purpose of this comment is to highlight some of the most salient aspects of the judgment handed down by the International Court of Justice (ICJ or Court) in the *Case Concerning Armed Activities on the Territory of the Congo: Democratic Republic of the Congo v Uganda* (*Congo/Uganda* case),¹ and to analyse and comment upon them in light of applicable rules and principles of international law.

The ICJ judgment of 19 December 2005 on the *Congo/Uganda* case addresses a number of international law issues, including the legality of the use of force under the Charter of the United Nations (UN),² the issue of belligerent occupation and its corresponding international human rights and humanitarian obligations as contained in a multitude of international law instruments, the issue of the illegal exploitation of natural resources by an occupying power, and that of diplomatic pro-

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¹ Judgment of 19 December 2005 General List No 116 (*Congo/Uganda* case).

² 59 Stat 1031 TS 993 3 Bevans 1153.

tection under the 1961 Vienna Convention on Diplomatic Relations (Vienna Convention).³

In order to uncover the legal issues pertaining to the case, it is valuable to review the substance of the petition, the factual and legal bases of the Democratic Republic of the Congo (Congo or DRC)'s claims and of Uganda's counterclaims, the legal findings of the ICJ, as well as its reasoning and its final decisions. The assessment of the Court's decision on the legal issues raised in this case will take into consideration, when necessary, new developments that occurred in international law since the passing of the judgment. A conclusion will specify the implications of the Court's judgment in the case at hand for the progressive development of international law.

2 Factual and legal bases of the DRC's petition

2.1 Background to the petition

In 1997, Mr Laurent-Désiré Kabila⁴ assumed power in Zaire and renamed the country the Democratic Republic of the Congo. Kabila's ascension to power was made possible by Uganda and Rwanda, two neighbouring countries which provided him with military, logistic and economic support. On accession to power, the new President rewarded his two allies by granting them substantial benefits within the Congo, both military and economic. Such benefits included, for example, the appointment of a Rwandan national as the Chief of Staff of the *Forces Armées Congolaises*, the newly-created Congolese defence forces.⁵

Soon after Rwandan and Ugandan troops started operating in the DRC, the atmosphere between President Kabila and his two allies deteriorated as a result of the latter's increasing influence over the Congo's political, military and economic spheres. Faced with this uncomfortable situation, Mr Kabila sought to reaffirm and preserve the independence of the Congo from Rwanda and Uganda. It was within this context that, in July 1998, Mr Kabila learned of a planned *coup d'état* against him by the Rwandan Chief of Staff of the Congolese Defence Forces. On 28 July 1998, a reaction from the Congolese government came in the form of an official statement made by Mr Kabila, which called for the withdrawal of all foreign military forces from the DRC.⁶ This reaction helped to avert the completion of the planned *coup*. Immediately after the failure of the *coup* attempt, some Rwandan soldiers still present on the territory

³ Adopted on 14 April 1961 by the UN Conference on Diplomatic Intercourse and Immunities, Official Records Vols I & II UN *Treaty Series* vol 500 95.

⁴ Leader of the *Alliance des Forces Démocratiques pour la Libération du Congo*, one of the multiple Congolese rebel groups that proliferated in former Zaire shortly before the fall of Mobutu Sesse Seko, the then President of Zaire.

⁵ *Congo/Uganda* case (n 1 above) paras 29-30.

⁶ n 1 above, para 49.

of the Congo joined forces with the Congolese Tutsi soldiers which rebelled against their central government in an attempt to overthrow President Kabila. At the beginning of August of the same year, Uganda launched its own military attacks against the DRC.⁷

The military intervention led by the Ugandan People's Defence Forces started in the eastern part of the DRC. They advanced and occupied various regions in the north-eastern part of the country. During their progression, they provided military support to a substantial number of Congolese armed groups⁸ which had rebelled against the Kabila government. Such support involved, *inter alia*, the recruitment, education, military training and the supply of equipment to rebel groups.⁹

In order to contain and repel the Rwandan/Ugandan military attacks, the Congolese government turned to neighbouring countries (Angola, Namibia, Sudan and Zimbabwe) for military assistance, which was provided.

In an attempt to resolve the armed conflict that ensued between the DRC (together with its allies), on the one hand, and Rwanda and Uganda on the other, a series of meetings were held, at the regional level, between the belligerents and the representatives of various African states within the framework of what was officially known as 'the Lusaka process'. On 18 April 1999, this regional peace initiative gave birth to a cease-fire agreement concluded between the Congo and Uganda. As a follow up to the Lusaka peace process, Uganda adopted the Kampala Plan and the Harare Plan,¹⁰ which established the legal framework of its troops' disengagement and withdrawal from the DRC.¹¹

Meanwhile, on the international plane, the Security Council of the UN adopted a series of resolutions aimed at re-establishing peace within the DRC.¹² Thus, Resolution 1234 of 1999¹³ called upon states to bring to an end the presence of uninvited foreign forces in the Congo. Paragraph 8 of this resolution condemned all form of support to the Congolese armed groups, whereas paragraph 7 condemned massacres carried out on the territory of the DRC. In a decisive move to back the Lusaka peace agreement, the Security Council authorised the deployment of a UN liaison force to the Congo¹⁴ with the mission,

⁷ n 1 above, paras 30-31.

⁸ Such groups included the *Mouvement de Libération du Congo*, the *Rassemblement Congolais pour la Démocratie* and the *Armée de Libération du Congo*.

⁹ n 1 above, paras 31-32.

¹⁰ Signed on 8 April and 6 December 2000 respectively.

¹¹ n 1 above, para 33.

¹² Between 1999 and 2005, the Security Council adopted at least 34 resolutions concerning the situation in the DRC.

¹³ See S/RES/1234 (1999) adopted by the Security Council at its 3993 meeting held on 9 April 1999, para 2.

¹⁴ See S/RES/1258 (1999) adopted by the Security Council at its 4032 meeting held on 6 August 1999, para 8.

inter alia, to establish contact and maintain liaison with the Joint Military Commission (JMC) created by the signatories of the ceasefire agreement to monitor the implementation of the agreement; and to provide technical assistance to the JMC. Later on, Resolution 1279 of 1999¹⁵ transformed the UN military liaison forces into the UN Mission in the Democratic Republic of the Congo (MONUC). Under Resolution 1291 of 2000,¹⁶ the MONUC mandate was extended to include, among others, the monitoring of the ceasefire and the supervision and verification of the disengagement arrangements. Moreover, this resolution, in its paragraph 1, called for the withdrawal of all foreign troops from the Congolese territory in accordance with the Lusaka ceasefire agreement. This call was later reiterated by Resolution 1304 of 2000¹⁷ in which the Security Council, acting under chapter VII of the UN Charter, demanded that Uganda and Rwanda withdraw all their forces from the Congo without delay, in conformity with the timetable of the ceasefire agreement and the Kampala Disengagement Plan of 8 April 2000.¹⁸ This resolution further demanded that all other foreign military presence and activities in the territory of the DRC be brought to an end.¹⁹

On 23 June 1999, the DRC filed an application before the ICJ instituting proceedings against the Republic of Uganda; and in June 2003, Ugandan troops finally withdrew from the DRC.

2.2 Substance of the main contentions

In its memorial, the DRC submitted a number of claims in which it requested the ICJ to declare Uganda in violation of certain obligations it owes to the Congo under international law, and to determine the legal consequences which such violation involves. Similarly, Uganda presented a number of counterclaims in response to the DRC's submissions. The specifics of the contentions contained in both the main claims and main counterclaims are given below.

2.2.1 The DRC's main claims

The DRC presented at least four submissions, which are the main focus of the present comment. In the first submission, it requested the Court to declare that by invading, occupying and engaging in military and paramilitary activities on the eastern part of its territory, Uganda has violated various principles of conventional and customary international

¹⁵ S/RES/1279 (1999) adopted by the Security Council at its 4076 meeting held on 30 November 1999.

¹⁶ S/RES/1291 (2000) adopted by the Security Council at its 4104 meeting held on 24 February 2000.

¹⁷ S/RES/1304 (2000) adopted by the Security Council at its 4159 meeting held on 16 June 2000.

¹⁸ n 17 above, para 4(a).

¹⁹ n 17 above, para 4(c).

law (including article 2(4) of the UN Charter), which prohibit the use of force in international relations as well as foreign intervention in matters within the domestic jurisdiction of states; and impose respect for the sovereignty of states as well as for the principle of peaceful settlement of international disputes.²⁰

In its second submission, the Congo accused Uganda of resorting to acts of violence against its nationals, for killing and injuring them or despoiling them of their property, for failing to take adequate measures to prevent violations of human rights in the occupied regions and for failing to punish persons having engaged in the above-mentioned acts. It claimed that Ugandan armed forces perpetrated wide-scale massacres of civilians, resorted to torture and other forms of inhumane and degrading treatment, carried out acts of reprisal against civilians presumed to have harboured anti-Ugandan fighters, plundered civilian property, engaged in the deliberate destruction of villages and civilian private property, and abducted children and forcibly enlisted them in their armed forces. It further contended that such conduct was engaged in the violation of the following principles of international law: those principles of conventional and customary law imposing an obligation to respect and ensure respect for fundamental human rights law and international humanitarian law; those imposing an obligation to make a distinction in an armed conflict between civilian and military objectives; and those preserving the right of the Congolese people to enjoy the most basic civil, political, economic, social and cultural rights.²¹ Accordingly, the DRC requested the Court to declare Uganda responsible for violating the relevant provisions of the following instruments: the Hague Regulations of 1907;²² the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (GC IV);²³ Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts of 8 June 1977 (AP I);²⁴ the International Covenant on Civil and Political Rights of 1966 (CCPR);²⁵ the African Charter on Human and Peoples' Rights of 1981 (African Charter);²⁶ the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 (CAT);²⁷ and the African Charter on

²⁰ n 1 above, paras 23-4 & 28.

²¹ n 1 above, paras 25, 181, 183 & 184.

²² Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land of 18 October 1907, especially arts 42 & 43 relating to the duties of an occupying power.

²³ 6 UST 3516 TIAS No 3365 75 UNTS 287.

²⁴ Adopted at the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts.

²⁵ GA Res 2200A (XXI) UN Doc A/6316 (1966) 21 UN GAOR Supp No 16 52.

²⁶ OAU Doc CAB/LEG/67/3 rev 5 (1982) 21 *International Legal Materials* 58.

²⁷ GA Res 39/46 UN Doc A/39/51 (1984).

the Rights and Welfare of the Child of 1990 (African Children's Charter).²⁸

In submission three, Uganda was accused of engaging in the illegal exploitation of Congolese natural resources, pillaging and looting its assets and wealth, and of failing, as an occupying power, to take adequate measures to prevent such acts and to punish persons having committed them. The DRC argued that such conduct was in breach of conventional and customary international law principles imposing, *inter alia*, respect for the sovereignty of states, including sovereignty over their natural resources as proclaimed by international instruments such as General Assembly Resolution 1803 (XVII) on Permanent Sovereignty over Natural Resources.²⁹

In its fourth submission the DRC claimed to have sustained injury as a result of the illegal conduct of Uganda. Consequently, it requested the Court to declare Uganda under the legal obligation to cease forthwith all continuing internationally wrongful acts, provide guarantees and assurances of non-repetition, and make reparation for all injuries sustained by the DRC as a result of Ugandan occupation. It further requested the Court to determine the nature, form and amount of the reparation failing an agreement thereon between the two parties.³⁰

2.2.2 Uganda's main counterclaims

Before examining the details of Uganda's main counterclaim, it is worth indicating that Uganda has, of course, opposed all the allegations presented against it by the DRC. As regards the DRC's submission one, Uganda claimed to have acted in self-defence. With respect to submission two, Uganda denied to have been an occupying power where its troops were stationed. As for submission three, Uganda maintained that the DRC did not provide reliable evidence in support of its allegations regarding the looting and the illegal exploitation and plundering of its natural resources. The non-probative character of the DRC's evidence was also raised by Uganda against the DRC's first and second submissions.

As far as Uganda's main contentions are concerned, it has submitted three counterclaims in which it accused the DRC of the violation of the principle of non-use of force under article 2(4) of the UN Charter; the violation of specific provisions of the Lusaka Agreement; and for attacks on Ugandan diplomatic premises and personnel as well as on Ugandan

²⁸ OAU Doc CAB/LEG/24 9/49 (1990).

²⁹ Adopted on 14 December 1962; the DRC also relied on the following instruments: GA Res 3201 (S.VI) of 1 May 1974 on the Declaration on the Establishment of the New International Economic Order and GA Res 3281 of 12 December 1974, which established a Charter of Economic Rights and Duties of States; n 1 above, paras 222 & 226.

³⁰ See paras 4 & 252 of the *Congo/Uganda* case (n 1 above) for more details on this submission.

nationals. Only the latter counterclaim is of legal value for the purpose of this comment, in that it was the only successful counterclaim presented by the Republic of Uganda.

In this counterclaim, therefore, Uganda accused the DRC's armed forces for, *inter alia*, carrying out attacks on the Ugandan embassy in Kinshasa, confiscating property and archives belonging to the government of Uganda, Ugandan diplomats and Ugandan nationals; and mistreating diplomats and other Ugandan nationals present on the premises of the mission.³¹ Such actions constitute, according to Uganda, breaches of international diplomatic and consular law, in particular the following provisions of the 1961 Vienna Convention; article 22 on the inviolability of the premises of the mission, article 29 on the inviolability of the person of diplomatic agents, article 30 on the inviolability of the private residence of a diplomatic agent, and article 24 on the inviolability of archives and documents of the mission.³²

In essence, the principal claims and counterclaims of both the DRC and Uganda raised at least five fundamental issues of international law. They are: the legality of the use of force under international law; the issue of belligerent occupation and its corresponding human rights and humanitarian obligations as contained in a multitude of international law instruments; the issue of the illegal exploitation of natural resources; that of diplomatic protection under the Vienna Convention; and finally the issue of the legal consequences that flow from the violation of international obligations by a particular state.

3 Legal determination of the ICJ on each contention

3.1 The prohibition against the use of force in international law

The prohibition against the threat or use of force is the cornerstone of the UN Charter, article 2(4) of which stipulates that:

All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.

The provision of article 2(4) of the Charter was further reiterated and elaborated as a principle of international law in General Assembly Resolution 2625 (XXV) on the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the UN Charter.³³ This instrument clearly specifies the implications of the prohibition against the use of force. Firstly, it means that wars of aggression constitute a crime against peace giving

³¹ n 1 above, paras 306-12.

³² n 1 above, para 313.

³³ Adopted by the General Assembly of the UN at its 25th session held on 24 October 1970.

rise to state responsibility under international law. Secondly, states must not threaten or use force in violation of internationally recognised frontiers, or to solve international disputes. Thirdly, states are precluded from resorting to acts of reprisal involving the use of force. Fourthly, force must not be used by states to deprive peoples of their right to self-determination and independence. Fifthly, states must refrain from organising, instigating, assisting or participating in acts of civil strife or terrorist acts in another state and must not organise, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed against another state.³⁴ Although the Declaration on Friendly Relations is not a binding legal document, it nevertheless constitutes an important interpretative tool of the UN Charter's provisions.³⁵

On occasion, the ICJ has made pronouncements on the content of the principle of non-intervention as proclaimed by the UN Charter. Thus, in the *Nicaragua* case,³⁶ for example, the Court considered that if states were granted a general right to intervene, directly or indirectly, with or without armed forces, in support of an internal opposition in another state, such a right would lead to a fundamental modification of the customary law principle of non-intervention.³⁷ This would mean that this principle, to the extent that it has not yet been changed, prohibits any form of foreign intervention within the domestic matters of other states. The Court further concluded that acts committed in breach of the customary principle of non-intervention may also amount to a breach of the principle of non-use of force in international relations, if they directly or indirectly involve the use of force.³⁸ Article 2(4) can therefore be considered as declaratory of customary international law and as such, is binding upon all states.³⁹

The Court accordingly found that Uganda's military actions against the DRC were in contradiction with the requirements of article 2(4) of the UN Charter. It then turned to examine whether such actions could be justified under the self-defence clause of the UN Charter as Uganda has contended.⁴⁰

³⁴ MN Shaw *International law* (2003) 1018.

³⁵ As above.

³⁶ *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States of America)* Judgment of 27 June 1986 *ICJ Reports* (1986).

³⁷ *ICJ Reports* (1986) 108 para 206.

³⁸ *ICJ Reports* (1986) 109-110 para 209; see also the *Congo/Uganda* case (n 1 above) para 164.

³⁹ Shaw (n 34 above) 1018.

⁴⁰ Uganda asserted that from 11 September 1998 to 10 July 1999, its military forces within the Congo were acting in self-defence. In support of its assertion, it argued that its conduct was justified in that the Congo had entered into an alliance with Sudan to launch military action against it, had provided covert support to anti-Ugandan rebel groups and had incorporated such groups as well as Interahamwe *génocidaires* militia into its regular army; n 1 above, paras 122-6, 134-5 & 138-9.

3.2 Exceptions to the prohibition on the use of force

The prohibition against the use of force under article 2(4) of the UN Charter is tempered by only two other provisions of the Charter, which establish the only legal framework within which force may be legally used in international law; namely, chapter VII and article 51. Whereas chapter VII provides for the use of force in the context of collective measures decided by the Security Council of the UN, article 51 grants states the right to use force individually or collectively in the exercise of their inherent right to self-defence. Uganda's counterclaim against the DRC's first submission was based on the latter provision.

Before elaborating on article 51 of the UN Charter, it is perhaps important to indicate that new trends have recently emerged in the debate concerning the use of force under chapter VII of the Charter in cases of threats of an internal character. In effect, the more controversial doctrine of the 'right to humanitarian intervention'⁴¹ in man-made atrocities is giving way to the emerging norm of a 'collective international responsibility to protect'. For the proponents of this new approach, the Security Council may authorise military intervention under chapter VII of the Charter, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign governments have proved powerless or unwilling to prevent.⁴²

With respect to Uganda's counterclaim under the Charter, article 51 provides in effect that:

Nothing in the ... Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the ... Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Under article 51, self-defence can be invoked only when an armed attack has begun. There exists no consensus yet as to the definition of the term 'armed attack', which is a key notion for the exercise of the right to self-defence pursuant to article 51 of the UN Charter. However, attempts have been made to identify certain acts which can be qualified as constituting armed attacks.⁴³ Thus, article 3 of the Defini-

⁴¹ For the contours of this right, see eg A Roberts 'The so-called "right" to humanitarian intervention' (2002) 3 *Yearbook of International Humanitarian Law* 3-51; R Mahalingam 'The compatibility of the principle of non-intervention with the right of humanitarian intervention' (1996) 1 *UCLA Journal of International Law and Foreign Affairs* 221-263.

⁴² See 'A more secure world: Our shared responsibility' Report of the High-Level Panel on Threat, Challenges and Change UN Doc A/59/565 (2 December 2004) 56-7 paras 199-203.

⁴³ See principally art 3 of the Definition of Aggression, annexed to General Assembly Res (XXIX) of 14 December 1974.

tion of Aggression, annexed to General Assembly Resolution (XXIX) of 14 December 1974, provides a list of such acts, which include: (a) invasion, bombardment and cross-border shooting;⁴⁴ (b) blockade;⁴⁵ (c) attack on state positions abroad;⁴⁶ (d) breach of stationing agreements;⁴⁷ and (e) participation in the use of force by militarily organised unofficial groups.⁴⁸ The illegal acts allegedly committed by Rwanda on the territory of the DRC involve at least those acts referred to in (a) and (e). The basic requirement for acts of attack, bombardment and cross-border shooting to constitute an 'armed attack' pursuant to article 51 of the UN Charter is that their commission reaches a certain intensity or scale, which is different from mere frontier incidents.⁴⁹ On the other hand, a state's support to armed groups would amount to 'armed attack' under article 51 of the Charter if it consists of sending armed bands, groups, irregulars or mercenaries, which carry out acts of armed forces against another state of such gravity as to amount to (*inter alia*) an actual armed attack conducted by regular forces, or its substantial involvement therein.⁵⁰

Article 51 of the Charter allows both individual and collective self-defence. The right to collective self-defence permits a third state to lend its assistance to a state victim of an attack.⁵¹ The resort to individual or collective self-defence will be lawful only when it occurs in response to an actual armed attack;⁵² but not in anticipation, or in prevention of it. Thus, article 51 does not allow the use of force by a state to protect perceived security interests beyond the parameters set by it. An anticipatory use of the right to self-defence would therefore be in contradiction with the wording of article 51, as well as with its object and purpose, which are to reduce as far as possible the unilateral use of force in international relations.⁵³

3.3 Limits on the right of self-defence

Pursuant to article 51 of the Charter, self-defence has to be used only until the Security Council of the UN has stepped in to take the necessary measures to restore or maintain international peace and security. Therefore, provisional defensive measures taken pursuant to article 51 are to be discontinued with the intervention of the Security Council.

⁴⁴ n 43 above, arts 3(a) & (b).

⁴⁵ n 43 above, art 3(c).

⁴⁶ n 43 above, art 3(d).

⁴⁷ n 43 above, art 3(e).

⁴⁸ n 43 above, art 3(g).

⁴⁹ B Simma (ed) *The Charter of the United Nations: A commentary* (2002) 796.

⁵⁰ The *Nicaragua case*, *ICJ Reports* (n 36 above) 103 para 195; also art 3(g) of the Definition of Aggression (n 43 above).

⁵¹ Simma (n 49 above) 802.

⁵² *Nicaragua case*, *ICJ Reports* (n 36 above) 103 para 194.

⁵³ Simma (n 49 above) 803.

The right to self-defence under international law is also limited by the principles of proportionality and necessity. These principles embody the idea that a lawful self-defence must only aim at halting and repelling the armed attack and must not entail retaliatory or punitive actions. In addition, they require that the extent of the defence must not be disproportionate to the gravity of the attack sustained; and that the means employed for the defence must be strictly necessary for repelling the attack.⁵⁴ Though not expressly mentioned in the Charter, the principles of proportionality and necessity nevertheless do apply to the concept of self-defence as a rule of customary international law.⁵⁵ This view was adopted by the ICJ in its Advisory Opinion in the *Nuclear Weapon* case, in which it emphasised that the submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law.⁵⁶

In 2004 a report was published by the United Nations High-Level Panel on Threats, Challenges and Change,⁵⁷ which further highlighted the importance of the test of proportionality and necessity as a fundamental element in the assessment of the legality of the use of force in the exercise of the right of self-defence. This report states that, in considering whether to authorise or endorse the use of military force, the Security Council should always address at least the following five basic criteria of legitimacy:⁵⁸

Seriousness of threat: Is the threatened harm to state or human security of a kind, and sufficiently clear and serious, to justify *prima facie* the use of military force? In the case of internal threats, does it involve genocide and other large-scale killings, ethnic cleansing or serious violations of international humanitarian law, actual or imminently apprehended?

Proper purpose: Is it clear that the primary purpose of the proposed military action is to halt or avert the threat in question, whatever other purposes or motives may be involved?

Last resort: Has every non-military option for meeting the threat in question been explored, with reasonable grounds for believing that other measures will not succeed?

Proportional means: Are the scale, duration and intensity of the proposed military action the minimum necessary to meet the threat in question?

Balance of consequences: Is there a reasonable chance of the military action being successful in meeting the threat in question, with the consequences of action not likely to be worse than the consequences of inaction?

In line with the argument developed above, the Court observed that Ugandan forces were not engaged in military operations along the common border against rebels who carried out cross-border raids. They were rather engaged in military assaults that resulted in the taking

⁵⁴ Simma (n 49 above) 805.

⁵⁵ *Nicaragua* case, *ICJ Reports* (n 36 above) 94 para 176.

⁵⁶ General List No 95 *ICJ Reports* (1996) 226 & 245.

⁵⁷ n 42 above.

⁵⁸ n 42 above, 57-58 para 207.

of many Congolese towns.⁵⁹ Moreover, the use of force by Uganda was not subsequent to an imminent or prior armed attack by the Congolese forces.⁶⁰ What is interesting to observe at this point is the fact that Uganda justified its conduct by raising the necessity to secure its legitimate security interests, which would be threatened by the presence within the Congo of genocidal elements and the Sudanese forces.⁶¹ Such an argument renders Uganda's actions against the DRC fundamentally preventive and anticipatory, thus contradicting the letter of article 51 of the Charter.

The Court finally found that the legal and factual circumstances for the exercise of the right of self-defence by Uganda against the DRC were not met.⁶² It further observed that Uganda's actions violated not only the sovereignty and the territorial integrity of the DRC, but it also constituted an interference in the internal affairs of the DRC and in the civil war raging there. Accordingly, it held that the unlawful military intervention by Uganda constituted a grave violation of the prohibition on the use of force as expressed in article 2(4) of the UN Charter.⁶³

4 The question of belligerent occupation

This aspect of the claim relates to the legality of the presence of Ugandan forces on Congolese territory. In fact, in its claim the DRC contended that Uganda was an occupying power in the areas where its troops were present.⁶⁴ Although this issue did not form part of the main submissions presented by the DRC, its determination became central in that the outcome of the DRC's second and third submissions heavily depended on the findings of the Court thereon.

The whole legal debate on this issue aimed at determining whether the DRC consented to the presence of Ugandan troops on its territory. Uganda argued in its counterclaim that its presence in the Congo until 11 September 1998 was consented to by the Congolese government; that from 11 September 1998 until 10 July 1999 it was acting in self-defence and that thereafter, the Lusaka Agreement legalised the presence of its troops in the Congo.⁶⁵

The traditional view in international law as regards the legal context of occupation is that when a state government has given its consent to the use of foreign forces within its territory, there exists no international

⁵⁹ See paras 110-111 of the *Congo/Uganda* case (n 1 above).

⁶⁰ n 1 above, para 143.

⁶¹ As above.

⁶² n 1 above, para 147.

⁶³ n 1 above, para 165.

⁶⁴ n 1 above, para 169.

⁶⁵ n 1 above, para 92.

armed conflict⁶⁶ and, consequently, one cannot conclude to the existence of belligerent occupation. In addition, consent must be freely and properly given, it must be explicit, and clearly ascertainable. However, in the absence of such consent, any military action engaged in by the intervening forces within the territory of a foreign state would be in contradiction of the rules and principles prohibiting the use of force.

Thus, as to the period prior to 11 September 1998, the Court confirmed the existence of a valid consent by the DRC on the presence on its territory of Ugandan forces; at least until 8 August 1998 at the closing of the Victoria Falls Summit, during which the DRC accused Rwanda and Uganda of invading its territory.⁶⁷ Even in the absence of any written agreement between the parties, the existence of a valid consent for the period prior to September 11 can easily be ascertained from the political, economic, military and other advantages granted by the Congolese government to Rwandan and Ugandan troops present in the Congo during this period.

However, the Court rejected Uganda's claim covering the second period (from 11 September 1998 to 10 July 1999) following its earlier arguments according to which Uganda could not rely on self-defence as a justification for its breach of article 2(4) of the UN Charter.

With regard to the period after 10 July 1999, the Court, after considering the evidence before it, remarked that the Lusaka Agreement which in fact set out the conditions of, and provided a schedule for, an orderly withdrawal of foreign troops from the DRC, did not contain any provision that could be interpreted as constituting consent by the DRC to the presence of Ugandan troops on its territory after July 1999.⁶⁸ Therefore, the presence of Uganda in the DRC during this period was unlawful. The Court then moved to determine whether such an unlawful presence amounted to belligerent occupation.

The international rules and principles relating to belligerent occupation can be found in articles 42 to 56 of the Hague Regulations of 1907,⁶⁹ articles 27 to 34 and 47 to 78 of GC IV of 12 August 1949,⁷⁰ and in general principles of international and customary law. The notion of occupation in international law is specified by article 42 of the Hague Regulations of 1907, which states that:

Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.

This provision spells out the prerequisite for the application of the international law of belligerent occupation; namely that the occupying

⁶⁶ I Detter *The law of war* (2000) 88.

⁶⁷ n 1 above, para 53.

⁶⁸ n 1 above, para 105.

⁶⁹ n 22 above.

⁷⁰ n 23 above.

forces must be in a position to exercise control and to enforce their own authority in the occupied territory. The ability of the occupying power to assert its authority in the occupied territory is therefore a central criterion in the law of belligerent occupation. This includes the ability to issue directives to the inhabitants of the conquered territory and to enforce them.⁷¹ In addition, the law of occupation is applicable only to those areas of the foreign territory which are under the control of the occupying power.⁷²

The rules and principles of belligerent occupation as formulated above have been recognised by the ICJ as part and parcel of customary international law. Thus, in its Advisory Opinion on the Construction of a Wall Case, the Court observed that:⁷³

[I]n the words of the Convention (Convention (IV) Respecting the Laws and Customs of War on Land), those Regulations were prepared 'to revise the general laws and customs of war' existing at that time. Since then, however, the International Military Tribunal of Nuremberg has found that the 'rules laid down in the Convention were recognised by all civilised nations, and were regarded as being declaratory of the laws and customs of war' (Judgment of the International Military Tribunal of Nuremberg, 30 September and 1 October 1946, p 65). The Court itself reached the same conclusion when examining the rights and duties of belligerents in their conduct of military operations (Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996 (I), p 256 para 75). The Court considers that the provisions of the Hague Regulations have become part of customary law, as is in fact recognised by all the participants in the proceedings before the Court.

Consequently, the Court noted that not only were Ugandan troops stationed in the Ituri district in the north-eastern part of the DRC, but their Commander-in-Chief also created a new province within the occupied area, appointed a governor to administer it, made suggestions concerning its administration, and supervised local elections in the controlled province.⁷⁴ The Court considered such conduct as clear evidence of the exercise of effective control and authority in Ituri by Uganda pursuant to article 42 of the Hague Regulations of 1907.

Ultimately, the Court held that Uganda was an occupying power only in the Ituri district at the relevant time. Therefore, it was under the legal obligation, in terms of article 43 of the Hague Regulations of 1907, to take all the measures in its power to restore and ensure public order and safety in Ituri, in conformity with the laws in force in the DRC.⁷⁵ Moreover, it found that Uganda's responsibility could be engaged for any

⁷¹ D Fleck *The handbook of humanitarian law in armed conflicts* (1995) 243.

⁷² This approach is confirmed by the ICJ in its *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Authority* (2004) General List No 131 para 78.

⁷³ ICJ Advisory Opinion of 9 July 2004 (n 72 above) para 89.

⁷⁴ n 1 above, para 168.

⁷⁵ n 1 above, paras 177-178.

acts of its military that violated its international obligations and for any lack of vigilance in preventing violations of international human rights law and international humanitarian law by other actors present in the occupied Ituri.⁷⁶

5 Violations of international human rights law and international humanitarian law

The task of the Court in this submission was twofold: firstly, to establish whether the acts allegedly committed by Ugandan officers and soldiers were attributable to Uganda; secondly, whether such conduct constituted a breach of Ugandan obligations under international human rights law and international humanitarian law.

5.1 Could the conduct of Ugandan officers and soldiers be attributable to Uganda?

In making its findings on this issue, the ICJ followed a line of reasoning it has adopted in one of its previous jurisprudences. In effect, in its Advisory Opinion of 29 April 1999, it observed that:⁷⁷

According to a well-established rule of international law, the conduct of any organ of a state must be regarded as an act of that state. This rule, which is of a customary character, is reflected in article 6 of the Draft Articles on State Responsibility adopted provisionally by the International Law Commission on first reading, which provides:

'The conduct of an organ of the state shall be considered as an act of that state under international law, whether that organ belongs to the constituent, legislative, executive, judicial or other power, whether its functions are of an international or an internal character, and whether it holds a superior or a subordinated position in the organisation of the state.'

There is no doubt that the status and functions of the Ugandan forces present in the DRC were determined by the Ugandan government on behalf of which they operated. Accordingly, the Court rightly held that the conduct of individual members of the Ugandan armed forces present in the occupied territory was attributable to the state of Uganda.⁷⁸

What would be interesting to inquire at this point is what the decision of the Court would be if a Ugandan member of the armed forces had personally committed illegal acts contrary to the instructions received, or in excess of his authority.

In this regard, and according to a well-established rule of customary international law, as reflected in article 3 of the Hague Convention (IV) Respecting the Laws and Customs of War on Land of 1907, as well as in

⁷⁶ n 1 above, para 179.

⁷⁷ Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights Advisory Opinion of 29 April 1999 para 62.

⁷⁸ n 1 above, para 213.

article 91 of AP I of 1977, the individual conduct of a Ugandan soldier will still be attributed to Uganda. The relevant provisions of these two instruments make it clear that a party to a conflict 'shall be responsible for all acts committed by persons forming part of its armed forces'. What is even more interesting in this respect is that a single illegal act committed by an individual member of the occupying forces may engage the international responsibility of the occupying state simultaneously with the individual criminal responsibility of the author of the illegal act.⁷⁹

5.2 Was the conduct complained of in conformity with the applicable principles of international human rights law and international humanitarian law?

Humanitarian law designs a set of rules that protect certain groups of people (eg the wounded, sick, prisoners of war, civilians and other non-combatants) in times of armed conflicts. As already mentioned above, the Hague Regulations of 1907 and GC IV of 12 August 1949 specify the essential protections accorded to persons in occupied territories. Thus, article 46 of the Hague Regulations requires the occupying power to ensure respect for their lives, honour, religious beliefs and private property;⁸⁰ whereas article 31 of GC IV outlaws the use of any method of coercion against the inhabitants of the occupied territory. Moreover, protected persons must not be subjected to murder, torture, corporal punishment, mutilation, medical experiment⁸¹ or forced labour.⁸²

On the other hand, a wide range of international human rights instruments⁸³ provides for the protection and safeguard of certain basic rights which all persons must enjoy. Such rights include the right to life, freedom from torture and from slavery, the right to liberty and security of the person, the right to privacy, freedom of movement and association, and the like. Whereas the respect and protection of some rights are absolute at all time,⁸⁴ states may derogate from their obligations in respect of other rights in time of war, public danger or

⁷⁹ Art 25(4) of the Statute of the International Criminal Court states in this sense that '[n]o provision in this Statute relating to individual criminal responsibility shall affect the responsibility of states under international law'.

⁸⁰ See also art 27 of GC IV.

⁸¹ Art 32 of GC IV.

⁸² Art 52 of the Hague Regulations of 1907 and art 51 of GC IV.

⁸³ The Universal Declaration of Human Rights, CCPR, the European Convention on Human Rights and Fundamental Freedoms, the American Convention on Human Rights, the African Charter, the Convention on the Rights of the Child, CAT, etc.

⁸⁴ Eg the right to life, the obligation to refrain from torture, inhuman or degrading treatment, and slavery may not be derogated from under CCPR (arts 6, 7 & 8), the European Convention (arts 2, 3 & 4(1)), and the American Convention (arts 4, 5 & 6) respectively; art 75 of AP I as well as art 4 of Additional Protocol II also provide absolute guarantees for certain human rights.

public emergency which threatens their life, independence or security.⁸⁵ However, the African Charter makes no mention of derogation, and the African Commission has held that states may not derogate from the rights in the Charter.⁸⁶

The African Charter, unlike other human rights instruments, does not allow for state parties to derogate from their treaty obligations during emergency situations. Thus, even a civil war in Chad cannot be used as an excuse by the state violating or permitting violations of rights in the African Charter.

Human rights law and humanitarian law are interrelated as to their fundamental objects: They both prescribe a certain quality of behaviour towards individuals, and are both concerned with the rights and protection of individuals.⁸⁷ In times of armed conflict, the protection of civilians under the Hague Regulations of 1907 and under GC IV of 1949 is extended by various provisions of human rights instruments to the extent that their application is not suspended.⁸⁸ Such an extension does not in any way modify the legal regime of *jus in bello*, which already regulates the conduct of armed conflict. Instead, it reinforces and strengthens the protection already provided to the victims of war by international humanitarian law.

On the basis of various reports and other credible sources⁸⁹ presented to it, the Court found Ugandan troops responsible for the following acts and omissions committed in violation of international human rights law and international humanitarian law: commission of acts of killing, torture and other forms of inhumane treatment of the civilian population; destruction of villages and civilian buildings; failure to distinguish between civilian and military targets and to protect the civilian population in fighting with other combatants; incitement to ethnic conflict; involvement in the training of child soldiers; and failure to take measures to ensure respect for human rights and international humanitarian law in Ituri.⁹⁰

Being aware of the fact that the conduct above falls within the ambit of both international human rights law and international humanitarian law, the Court first observed that there is a converging point between these two branches of international law; and further that under certain conditions international human rights law may well be applicable outside a state's territory. In support of this argument, it recalled the

⁸⁵ Art 4 of CCPR, art 15 of the European Convention and art 27(1) of the American Convention.

⁸⁶ *Commission Nationale des Droits de l'Homme et des Libertés v Chad* (2000) AHRLR 66 (ACHPR 1995) para 21.

⁸⁷ Detter (n 66 above) 161.

⁸⁸ Detter (n 66 above) 317.

⁸⁹ For more details on these evidentiary documents, see the *Congo/Uganda* case (n 1 above) paras 206-210.

⁹⁰ n 1 above, para 211.

approach it adopted in its Advisory Opinion on the *Construction of a Wall* case, according to which:⁹¹

the protection offered by the human rights convention does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.

Having thus highlighted the interrelation between the two branches of international law, the Court rightly concluded to their simultaneous applicability in cases of occupation. Moreover, it emphasised that international human rights instruments are applicable in respect of acts done by a state in the exercise of its jurisdiction outside its own territory, particularly in occupied territories.⁹²

As regards the lawfulness of the conduct of Ugandan troops in the DRC, the Court found that their acts (as enumerated above) were committed in violation of Uganda's obligations under articles 25, 27, 28, 43, 46 and 47 of the Hague Regulations of 1907, which are binding on the parties under customary international law. Uganda was also found to have ignored its conventional obligations under the following instruments to which it is party: articles 27, 32 and 53 of GC IV; articles 48, 51, 52, 57, 58 and 75(1) and (2) of AP I; articles 6(1) and (7) of CCPR; articles 4 and 5 of the African Charter; articles 38(2) and (3) of CRC; and articles 1, 2, 3 (3-6) of the Optional Protocol to the Convention on the Rights of the Child.⁹³

In conclusion, the Court declared Uganda internationally responsible for the violations of international human rights law and international humanitarian law committed by its armed forces and their members in the DRC, and for failing to comply with its obligations as an occupying power in Ituri in respect of violations of international human rights law and international humanitarian law in the occupied territory.⁹⁴

6 Illegal exploitation of natural resources

To reach its decision on this contention, the Court relied heavily on the UN Panel reports as well as on the report of the Porter Commission,

⁹¹ n 1 above, para 216.

⁹² n 1 above, para 216; also the ICJ *Advisory Opinion on the Construction of a Wall Case* (n 72 above) paras 107-113.

⁹³ n 1 above, para 219.

⁹⁴ n 1 above, para 220.

which it both considered to be of higher and persuasive probative value.⁹⁵ On the basis of the Porter Commission's report, it found that despite the lack of a clear governmental policy directed at the exploitation of Congolese natural resources, Ugandan high-ranking officers, as well as soldiers, were involved in the looting, plundering, exploitation and trade of the DRC's natural resources, and that the military high command failed to take the necessary measures to put an end to such acts.⁹⁶ Such conduct, according to the Court, constitutes a clear violation of the *jus in bello*, as reflected in article 47 of the Hague Regulations of 1907 and article 33 of GC IV of 1949, which prohibit pillage.⁹⁷ It also amounts to a violation by Uganda of its duty of vigilance as an occupying power. In addition to this finding, the Court referred to article 21(2) of the African Charter, which proclaims the rights of spoliated and dispossessed people to the lawful recovery of its property as well as to an adequate compensation.

However, as regards the contention that Uganda violated the principle of the DRC's sovereignty over its natural resources, the Court observed that the customary international law principle of permanent sovereignty over national resources did not apply to the situation prevailing in the DRC. In the opinion of the Court, nothing in General Assembly Resolution 1803 (XVII) of 14 December 1962 on the Permanent Sovereignty over Natural Resources, as well as in subsequent resolutions,⁹⁸ suggests that such a principle is applicable to acts of looting, pillage and exploitation of certain natural resources by members of the occupying armed forces.⁹⁹

True to its position as adopted in paragraph 213 of the judgment,¹⁰⁰ the Court correctly found Uganda internationally responsible for acts of looting, plundering and exploitation of the DRC's natural resources committed by its military personnel; for violating its obligation of vigilance in regard to these acts and for failing to comply with its obligation under article 43 of the Hague Regulations of 1907 as an occupying power in Ituri in respect of all acts of looting, plundering and exploitation of natural resources in the occupied part of the Congolese territory.¹⁰¹

⁹⁵ n 1 above, para 237. The probative value of the Porter Commission Report stems from the fact that neither the DRC nor Uganda has challenged the credibility of the information contained therein (para 61).

⁹⁶ n 1 above, para 242.

⁹⁷ n 1 above, para 245.

⁹⁸ Namely, General Assembly Res 3201 (S VI) of 1 May 1974 on the Declaration on the Establishment of a New International Economic Order and General Assembly Res 3281 (XXIX) of 12 December 1974 on the Charter of Economic Rights and Duties of States.

⁹⁹ n 1 above, para 244.

¹⁰⁰ In which it attributes all acts and omissions of the Ugandan military personnel to the state of Uganda.

¹⁰¹ n 1 above, para 250.

7 The issue of diplomatic protection

The Court started its comments on this issue by recalling the timeless character of the 1961 Vienna Convention, which applies irrespective of the state of peace or that of armed conflict. In so doing, it set out the basic principles of diplomatic immunity as formulated in articles 44 and 45 of this document.

Article 44:

The receiving state must, even in case of armed conflict, grant facilities in order to enable persons enjoying privileges and immunities, other than nationals of the receiving state, and members of the families of such persons irrespective of their nationality, to leave at the earliest possible moment. It must, in particular, in case of need, place at their disposal the necessary means of transport for themselves and their property.

Article 45:

If diplomatic relations are broken off between two states, or if a mission is permanently or temporarily recalled: (a) the receiving state must, even in case of armed conflict, respect and protect the premises of the mission, together with its property and archives; (b) the sending state may entrust the custody of the premises of the mission, together with its property and archives, to a third state acceptable to the receiving state; (c) the sending state may entrust the protection of its interests and those of its nationals to a third state acceptable to the receiving state.

In terms of article 22(1) of the 1961 Vienna Convention, the premises of the mission are inviolable and agents of the receiving state are not to enter them without the consent of the mission. This rule is absolute.¹⁰²

The prohibition extends to the furnishings and other property on the premises, the means of transport, which are all immune from search, requisition, attachment or execution.¹⁰³ Thus, in the *Case Concerning United States Diplomatic and Consular Staff in Tehran: United States of America v Iran*,¹⁰⁴ the ICJ strongly reaffirmed the fundamental character of this rule of general international law when it stated that:¹⁰⁵

Iran was placed under the most categorical obligations, as a receiving state, to take appropriate steps to ensure the protection of the United States embassy and consulates, their staffs, their archives, their means of communication and the free movement of the members of their staffs.

The Court insisted that such obligations concerning the inviolability of the members of a diplomatic mission and of the premises, property and archives of the mission continued even in cases of armed conflict or breach of diplomatic relations.¹⁰⁶

¹⁰² Shaw (n 34 above) 671.

¹⁰³ Art 22(3) Vienna Convention.

¹⁰⁴ Judgment of 24 May 1980 General List No 64 (*Iranian Hostages case*).

¹⁰⁵ The *Iranian Hostages case* (n 104 above) para 61.

¹⁰⁶ n 104 above, para 86.

Article 24 of the Vienna Convention makes the archives and documents of the mission inviolable at any time and wherever they may be. Although the Vienna Convention is silent about the meaning of 'archives and documents', article 1(1)(k) of the 1963 Vienna Convention on Consular Relations defines the term 'consular archives' to include all the papers, documents, correspondence, books, films, tapes and registers of the consular post, together with the ciphers and codes, the card indexes and any article of furniture intended for their protection or safekeeping.

Moreover, article 29 of the Vienna Convention contains one of the most fundamental and oldest established rules of diplomatic law; namely the rule that the person of a diplomatic agent is inviolable. He may not be arrested, detained or assaulted. The receiving state has to take all appropriate measures to prevent any attack on the person, freedom or dignity of diplomatic agents. This prohibition is reiterated and consolidated by the 1973 UN Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, which enjoins state parties to make attacks upon protected persons a crime under domestic law with appropriate penalties and to take such measures as may be necessary to establish jurisdiction over these crimes.¹⁰⁷ In addition, article 8 obliges state parties to extradite or prosecute alleged offenders.

Finally, article 30(1) of the 1961 Vienna Convention, which reflects the accepted rule in customary law, protects the private residence of diplomatic agents from any forms of violation, whereas article 30(2) provides for the inviolability of his papers, correspondence and property.

The Court in the *Congo/Uganda* case found that attacks on Uganda's diplomatic premises in Kinshasa indeed occurred, and that Ugandan diplomats were maltreated by members of the Congolese armed forces on embassy premises and at Ndjili International Airport. In accordance with the arguments developed above, it held that the DRC, through its conduct, has breached its obligations under articles 22 and 29 of the Vienna Convention.¹⁰⁸

Concerning the issue of the confiscation or removal of Uganda's property and archives, the Court relied on its reasoning in the *Iranian Hostages* case, according to which the Vienna Convention does not only protect foreign missions from violation by the receiving state, but also obliges the receiving state to prevent any other person or entity from doing so. On this premise, the Court considered that it had sufficient evidence indicating that Uganda's property, archives and working files have been removed. Accordingly, it found the DRC responsible for

¹⁰⁷ Arts 2, 3, 6 & 7 of this document.

¹⁰⁸ n 1 above, paras 337-340.

acting in violation of its obligations under article 24 of the Vienna Convention.¹⁰⁹

However, with respect to Uganda's contention based on the maltreatment of its nationals not enjoying diplomatic immunity, the Court rightly observed that this issue falls within the scope of the right to diplomatic protection, the exercise of which is subjected to the fulfilment of certain conditions. In fact, under general international law, at least two requirements must be met before a state can exercise its right to diplomatic protection: firstly, there must be a nationality connection between the victim of an illegal act and the state seeking to exercise diplomatic protection on his behalf. Secondly, the victim of an illegal act must have exhausted all local remedies available in the state where the illegal act took place. Relying on these general principles, the Court observed that no evidentiary documents existed which identified the alleged victims as Ugandan nationals. This condition not having been met, the Court declared this part of the counterclaim inadmissible.¹¹⁰

8 Legal consequences flowing from the findings of the Court

After establishing the international responsibility of Uganda,¹¹¹ the Court moved to the DRC's submission, in which it was required to set out the legal consequences attached to the violations by Uganda of its international legal obligations. The Court started its discussion on this submission by recalling the basic principle of reparation as established in international law.

8.1 Basic principle

According to an established rule of general international law, any violation by a state of its international obligation generates state responsibility and, consequently, a duty to make reparation. This general rule is repeated in article 1 of the 2001 International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts,¹¹² which stipulates that '[e]very internationally wrongful act of a state entails the international responsibility of that state'. Article 2 of this instrument further defines an internationally wrongful act as conduct consisting of an action or omission, attributable to the state under international law, and constituting a breach of the international law

¹⁰⁹ n 1 above, paras 342-343.

¹¹⁰ n 1 above, para 333.

¹¹¹ n 1 above, paras 165, 220 & 250 respectively.

¹¹² GA Official Records 56th session Suppl No 10 (A/56/10) Annex to GA Res 56/83 of 12 December 2001 (ILC Articles on Responsibility of States).

obligation of that state. Furthermore, what constitutes a breach of an international obligation is specified by article 12, pursuant to which such a breach exists when an act of a state is not in conformity with what is required of it by that obligation, regardless of its origin or character.

Nonetheless, the legal consequences that flow from the violation by a state of its international obligations towards another state are spelled out in the 2001 ILC Articles on Responsibility of States. They are cessation and non-repetition,¹¹³ and reparation.¹¹⁴

8.2 Cessation and non-repetition

In terms of article 30 of the 2001 ILC Articles on Responsibility of States, the state found responsible for a wrongful act under international law is under the obligation to cease that act if it is continuing, and to offer appropriate assurances and guarantees of non-repetition if circumstances so require. In the *Rainbow Warrior* case, the arbitral tribunal held that in order for cessation to arise, the wrongful act has to have a continuing character and the violated rule must still be in force at the date the order is given.¹¹⁵ However, a commitment given to ensure the implementation of specific measures may suffice to meet the obligation to offer a general assurance of non-repetition.¹¹⁶

Accordingly, in response to the DRC's request that Uganda be declared under the obligation to cease forthwith all continuing illegal acts and provide guarantees and assurances of non-repetition, the Court observed that the commission of internationally wrongful acts by Uganda had ceased.¹¹⁷ It further held that Uganda had given sufficient guarantees and assurances of non-repetition in the form of the Tripartite Agreement on Regional Security in the Great Lakes Region, signed by Uganda, Rwanda and the DRC. This document provided, *inter alia*, for the need to ensure respect for the principles of good neighbourliness, sovereignty, territorial integrity and non-interference in the internal affairs of sovereign states in the region.¹¹⁸

8.3 Reparation

According to article 31 of the 2001 ILC Articles on Responsibility of States, the responsible state is under an obligation to make full reparation for the injury caused by the internationally wrongful act. Reparation is therefore a central concept in the enforcement of the state's

¹¹³ Art 30.

¹¹⁴ Art 31.

¹¹⁵ *France v New Zealand* 82 ILR 499, 673; 74 ILR 241, 274.

¹¹⁶ *LaGrand case (Germany v United States of America)* Judgment of 27 June 2001 General List No 104 para 124.

¹¹⁷ n 1 above, para 254.

¹¹⁸ n 1 above, paras 256-7.

responsibility. This argument, which is confirmed by state practice and case law,¹¹⁹ was emphasised by the Permanent Court of International Justice (PCIJ) in the *Chorzów Factory* case, when it stated that it is a principle of international law, and even a greater conception of law, that any breach of an engagement involves an obligation to make reparation.¹²⁰ In the final phase of this case, the PCIJ laid down the fundamentals of reparation in international law as follows:¹²¹

The essential principle contained in the actual notion of an illegal act is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation that would, in all probability, have existed if that act had not been committed.

In light of the applicable rules on reparation as explained above, the Court responded positively to the DRC's request for reparation by concluding that Uganda was under an obligation to make full reparation for the injury sustained by the DRC and its citizens as a result of Uganda's wrongful conduct.¹²²

On the other hand, following the finding of the responsibility of the DRC under the Vienna Convention,¹²³ the Court similarly decided that the DRC was under the obligation to make reparation for the injury it has caused to Uganda.¹²⁴

Finally, the Court enjoined the DRC and Uganda to decide on the nature, amount and form of the reparation, while reserving its right, failing an agreement between them, to make a determination thereupon in a subsequent procedure.¹²⁵

In anticipation of the nature and form of reparation that can be agreed upon by the DRC and Uganda, the basic principle is that the breach of an international engagement involves an obligation to make reparation in an adequate form.¹²⁶ In this regard, article 34 of the ILC 2001 Articles on Responsibility of States provides the DRC and Uganda with at least three methods of reparation from which they can choose. These are restitution,¹²⁷ compensation¹²⁸ and satisfaction,¹²⁹ either singly or in combination. These methods of reparation may be chosen by both parties when enforcing the Court's ruling on the submissions

¹¹⁹ Eg the *Chorzów Factory* case (n 126 below); the *Rainbow Warrior Arbitration* case (n 115 above); the *Gabèikovo-Nagymaros Project* case, *ICJ Reports* (1997) and the *Iranian Hostages* case (n 104 above) para 95 (5).

¹²⁰ PCIJ Series A No 17 (1928) 9.

¹²¹ n 120 above 47-48.

¹²² n 1 above, paras 259 & 345(5).

¹²³ n 1 above, para 344.

¹²⁴ n 1 above, para 345(11).

¹²⁵ n 1 above, paras 260 & 345(6) & 345(14).

¹²⁶ First phase of the *Chorzów Factory* case PCIJ Series A No 9 (1927) 21.

¹²⁷ Art 35.

¹²⁸ Art 36.

¹²⁹ Art 37.

relating to the violation of article 2(4) of the UN Charter, the illegal exploitation of natural resources and the violation of the incriminated provisions of the 1961 Vienna Convention. As far as the enforcement of the Court's decision on alleged violations of international human rights law and international humanitarian law is concerned, the parties may well be guided by a recent General Assembly resolution adopted on 21 March 2006, which provides for remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law.¹³⁰ In addition to the methods of reparation provided for in article 34 above, Principle IX, paragraphs 21 and 23 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross violations of International Human Rights Law and Serious Violations of International Humanitarian Law¹³¹ establish two other methods, which the DRC and Uganda may opt for. They are rehabilitation and guarantees of non-repetition.

8.3.1 Restitution

Reparation by restitution in kind (or *restitutio in integrum*) would usually re-establish the situation which existed before the wrongful act was committed (*status quo ante*). This will happen only to the extent that it is not materially impossible and does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.¹³² Restitution may take the form of material restoration or return of territory, persons or property, or the reversal of some judicial act, or some combination of them. Examples of material restitution include the release of detainees, the handing over to a state of an individual arrested in its territory, and the restitution of ships or other types of property.¹³³

In the context of gross violations of international human rights law and serious violations of international humanitarian law, restitution as a remedy to, and reparation for, the violations should, whenever possible, restore the victim to the original situation in which he was before the violations occurred. Restitution in this context includes, as appropriate, restoration of liberty, the enjoyment of human rights, identity, family

¹³⁰ Res 60/147 (A/RES/60/147) of 21 March 2006 entitled Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law; Principle VII of this document provides that remedies include victims' right to equal and effective access to justice; adequate, effective and prompt reparation for harm suffered; and access to relevant information concerning violations and reparation mechanisms.

¹³¹ n 130 above (Basic Principles and Guidelines on the Right to a Remedy and Reparation).

¹³² ILC Commentary of the Articles on Responsibility of States (2001) 237-238.

¹³³ n 132 above, 240.

life and citizenship, return to one's place of residence, restoration of employment and return of property.¹³⁴

8.3.2 Compensation

This is a form of reparation intended to replace the value of an asset, the integral restitution of which is materially impossible.¹³⁵ Article 36(2) of the ILC 2001 Articles on Responsibility of States directs in this respect that the compensation to be provided shall cover any financially assessable damage, including loss of profits in so far as this can be established. Monetary compensation can be paid for both material and non-material (moral) injuries suffered by the victim of an internationally wrongful act.¹³⁶ Compensation for material injuries, such as loss of property, is generally assessed on the basis of the 'fair market value' of the property lost.¹³⁷

Compensation as a result of gross violations of international human rights law and serious violations of international humanitarian law shall be proportional to the gravity of the violation and the circumstances of each case.¹³⁸ Like compensation in the context of the 2001 ILC Articles on Responsibility of States, compensation for the victims of gross human rights violations and serious violations of international humanitarian law would encompass both material damages (such as loss of earnings, pensions, and such) and moral damages (such as pain and suffering, mental anguish, humiliation, loss of enjoyment of life and loss of companionship or consortium).¹³⁹ Other damages for which the DRC may claim compensation on behalf of its nationals may include physical or mental harm; lost opportunities, including employment, education and social benefits; and costs required for legal or expert assistance, medicine and medical services, and psychological and social services.¹⁴⁰

8.3.3 Satisfaction

The third option within the hands of the parties is satisfaction, which is a remedy of exceptional character arising only when restitution and compensation are not capable of providing full reparation to the injured party.¹⁴¹ This form of remedy covers injuries which are not financially

¹³⁴ Principle IX para 19 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation (n 130 above).

¹³⁵ n 132 above, 243-244.

¹³⁶ *Rainbow Warrior Arbitration* case (n 114 above) 82 *ILR* 499 575.

¹³⁷ n 132 above, 255.

¹³⁸ Principle IX para 20 of Basic Principles and Guidelines on the Right to a Remedy and Reparation (n 130 above).

¹³⁹ n 132 above, 254.

¹⁴⁰ n 132 above, Principle IX, para 20.

¹⁴¹ n 132 above, 263.

assessable, and which amount to an affront to the injured state. The injuries suffered here are frequently of a symbolic character, arising from the very fact of the breach of the obligation, irrespective of its material consequences for the state concerned.¹⁴² Satisfaction may consist of an acknowledgment of the breach, an expression of regret, a formal apology or another appropriate modality.¹⁴³ Such a modality may take the form of, for example, a declaration of the wrongfulness of the incriminated act by the competent court or tribunal of the guilty state.¹⁴⁴

In the *Rainbow Warrior* case, for example, the arbitral tribunal emphasised the long-established practice of states and international courts of using satisfaction as a remedy for the breach of an international obligation, particularly where moral or legal damage has been done to the state. Accordingly, the tribunal concluded that its public condemnation of France for its breaches of treaty obligations towards New Zealand constituted appropriate satisfaction.¹⁴⁵ Therefore, in negotiating an agreement on the appropriate formula of reparation, the DRC and Uganda will certainly keep in mind the possibility of making use of restitution, compensation and/or satisfaction as a method of reparation. Any disagreement arising on the amount of reparation will be decided upon by the Court.

Satisfaction as regards the violation by Uganda of the Congolese people's rights under international human rights law and international humanitarian law may take various forms, including any of the following:¹⁴⁶

- the search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities;
- an official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim;
- judicial and administrative sanctions against persons liable for the violations;
- commemorations and tributes to the victims; and
- inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels.

¹⁴² n 132 above, 264.

¹⁴³ ILC Articles on State Responsibility, art 37.

¹⁴⁴ n 132 above, 266.

¹⁴⁵ n 115 above, 82 *ILR* 577.

¹⁴⁶ n 130 above, Principle IX para 22.

8.3.4 Rehabilitation

Reparation for international human rights law and international humanitarian law violations suffered by the DRC nationals may also occur in the form of rehabilitation. Rehabilitation would include medical and psychological care as well as legal and social services.¹⁴⁷

8.3.5 Guarantees of non-repetition

As it has been mentioned earlier, the Court found that Uganda had already given sufficient guarantees and assurances of non-repetition in the form of the Tripartite Agreement on Regional Security in the Great Lakes signed by Uganda, Rwanda and the DRC.¹⁴⁸ However, this finding should not in any way constitute a bar for Uganda to reiterate its guarantees of non-repetition towards the DRC as a form of reparation for the offences of international human rights and international humanitarian character committed by her against the DRC's nationals. In this respect, such guarantees may include all or any of the following measures:¹⁴⁹

- ensuring effective civilian control of military and security forces;
- providing international human rights and international humanitarian law education and training for law enforcement officials as well as military and security forces; and
- reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law.

The Court may be prompted to give assurances and guarantees of non-repetition at least in two ways; either on the basis of a binding decision to that effect reached by the Court on request from another party, or, in the absence of a request to that effect, as a result of a free agreement by the litigants as part of the implementation of the Court's final judgment according full reparation to the injured party. In the latter case, the giving of guarantees of non-repetition by the guilty party would be considered sufficient to wipe out all the consequences of the illegal acts.

9 Conclusion

Whereas the author fully agrees with the decision reached by the ICJ on each of the main issues of this case, which in fact conforms to international law, it is unfortunate to observe that at certain points, one is left with the feeling that the Court does not undertake an exhaustive ana-

¹⁴⁷ n 130 above, Principle IX, para 21.

¹⁴⁸ Sub-section 8.2 above.

¹⁴⁹ n 130 above, Principle IX, para 23.

lysis of the applicable law. This is particularly true with respect to the violation of international human rights law and international humanitarian law by Uganda, where the Court merely listed the incriminated provisions, without making any elaborate comment on their actual content, meaning, extent and implications.