DECLARATION OF JUDGE KOROMA

The Court has found Uganda in violation of a wide range of legal instruments to which it is a party — Rejection of claim of self-defence — Article 3 (g) *of the Definition of Aggression of 1974 (XXIX) — Non-attributability of attacks by rebel groups reaffirms the Court's earlier jurisprudence and is consistent with Article 51 of the Charter — Customary law character of General Assembly resolution 1803 (XVII) of 14 December 1962 — Article 21 of the African Charter on Human and Peoples' Rights of 1981 — Findings of the Court are in general accordance with determinations made by the Security Council in its resolutions on this dispute — Principle of* pacta sunt servanda.

1. The circumstances and consequences of this case involving the loss of between three and four million human lives and other suffering have made it one of the most tragic and compelling to come before this Court.

2. Uganda stands accused by the Democratic Republic of the Congo (DRC) of an act of aggression within the meaning of Article I of the Definition of Aggression set out in General Assembly resolution 3314 (XXIX) of 14 December 1974, and in contravention of Article 2, paragraph 4, of the United Nations Charter. Uganda is further accused of committing repeated violations of the Geneva Conventions of 1949 and their Additional Protocols of 1977 in flagrant disregard of the elementary rules of international humanitarian law and of committing massive violation of human rights in the conflict zones in breach of international human rights law.

3. The Court has found that the Republic of Uganda:

— by engaging in military activities against the DRC and by actively extending military, logistic, economic and financial support to irregular forces having operated on the territory of the Congo, violated the principle of non-use of force in international relations and the principle of non-intervention;

— by the conduct of its armed forces, which committed acts of killing, torture and other forms of inhumane treatment of the Congolese civilian population, destroyed villages and civilian buildings, failed to distinguish between civilian and military targets and to protect the civilian population in fighting with other combatants, trained child soldiers, incited ethnic conflict and failed to take measures to put an end to such conflict, as well as by its failure to take measures to respect and ensure respect for human rights and international humani-

tarian law in the Congo, violated its obligations under international human rights law and international humanitarian law; and

— by acts of looting, plundering and exploitation of Congolese natural resources committed by members of Ugandan armed forces in the territory of the DRC, and by its failure to comply with its obligations as an occupying Power in Ituri District to prevent acts of looting, plundering and exploitation of Congolese natural resources, violated obligations owed to the DRC under international law.

4. These violations found by the Court are very serious breaches of international law and are compounded by the gravity of this case and the human tragedy underlying it. In effect, the Court's findings confirm that Uganda has been in violation of its obligations under the following international legal instruments: Article 2, paragraph 4 , of the United Nations Charter, prohibiting the use of force by States in their international relations; the Charter of the Organization of African Unity (OAU), which obliges all States to respect the sovereignty and territorial integrity of one another, to resolve disputes between them by peaceful means, and to refrain from interfering in each other's internal affairs; the Regulations respecting the Laws and Customs of War on Land annexed to the Fourth Hague Convention of 18 October 1907; the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949; Protocol I Additional to the Geneva Conventions of 12 August 1949; the International Covenant on Civil and Political Rights of 19 December 1966; the African Charter on Human and Peoples' Rights of 27 June 1981; the Convention on the Rights of the Child of 20 November 1989; and the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, all of which are binding on Uganda.

5. More specifically, the Court found that acts committed by the Uganda Peoples' Defence Forces (UPDF) itself and by officers and soldiers in it were in clear violation of the provisions of international humanitarian law and human rights instruments to which both Uganda and the Congo are parties, as well as of international customary law, in particular:

— the Hague Regulations, Articles 25, 27, 28, 43, 46 and 47, with regard to the obligations of an occupying Power;
— the Fourth Geneva Convention, Articles 27, 32 and 53, also with regard to the obligations of an occupying Power;

— the International Covenant on Civil and Political Rights, Articles 6, paragraph 1, and 7;
— the First Protocol Additional to the Geneva Conventions of 12 August 1949, Articles 48, 51, 52, 57, 58 and 75, paragraphs 1 and 2;

— the African Charter on Human and Peoples' Rights, Articles 4 and 5;

— the Convention on the Rights of the Child, Article 38, paragraphs 2 and 3;
— the Optional Protocol to the Convention on the Rights of the Child, Articles 1, 2, 3, paragraph 3, 4, 5 and 6.

In a nutshell, Uganda has been found responsible for illegal use of force, violation of sovereignty and territorial integrity, military intervention, violation of human rights and international humanitarian law, looting, plunder and exploitation of the Congo's natural resources, causing injury to the Congo as well as to Congolese citizens. Thus Uganda has been found in breach of a wide range of legal instruments to which it is a party and, according to the evidence before the Court, the violations gave rise to the most egregious of consequences. The non-fulfilment of obligations by a State entails international responsibility.

6. Not only are the international Conventions violated by Uganda binding on it, but they are intended to uphold the rule of law between neighbouring States and constitute the foundation on which the existing international legal order is constructed. They oblige States to conduct their relations in accordance with civilized behaviour and modern values — to refrain from the use of military force, to respect territorial integrity, to solve international disputes by peaceful means, and to respect human rights, human dignity, and international humanitarian law. Under the international humanitarian law and international human rights instruments mentioned above, Uganda was obliged to refrain from carrying out attacks against civilians, to ensure humane treatment of them and even of combatants caught up in military conflict, and to respect the most basic of their rights, the right to life. In this regard, Article 1 of the Fourth Geneva Convention stipulates that: "The High Contracting Parties undertake to respect and to ensure respect for the present Convention *in all circumstances*." (Emphasis added.) Article 2 of the Convention provides that:

> "In addition to the provisions which shall be implemented in peace-time, the present Convention shall apply to *all cases* of declared war or *of any other armed conflict* which may arise between *two* or more of the High Contracting Parties, even if the state of war is not recognized by one of them." (Emphasis added.)

Article 27 states:

> "Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights . . . They shall at all times be humanely treated, and shall be protected . . . against all acts of violence . . .
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> Women shall be especially protected against any attack on their honour, in particular against rape . . . or any form of indecent assault."

According to Article 51 of Additional Protocol I to the 1949 Geneva Conventions:

> "1. The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations . . .
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> 2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.
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> . . . . . .
>
> 4. Indiscriminate attacks [against civilians] are prohibited . . ."

In other words, in the course of a military conflict, civilians should be spared unnecessary violence, including massacres and other atrocities such as those allegedly perpetrated by the UPDF. Furthermore, according to Article 3 of the 1989 Convention on the Rights of the Child, to which Uganda is also a party, in all actions concerning children, the primary *consideration* must be the *best interests* of the child. Article 19 provides that States parties agree to take all appropriate measures to protect the child from all forms of physical and mental violence, while Article 38 of the Convention provides that States parties undertake to respect and to ensure respect for the rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child. States parties to the Convention must take all feasible measures to ensure that persons who have not attained the age of 15 years do not take part in direct hostilities. Yet, according to the evidence before the Court, these obligations were wantonly flouted during the UPDF's military campaign in the Congo, as children were recruited as child soldiers to take part in the fighting.

7. The Court thus reached the justifiable conclusion that Uganda repeatedly and egregiously transgressed both the *jus ad bellum* and *jus in bello*, illegally used force and violated the rules of international humanitarian law.

8. Crucially and for very cogent reasons, the Court has rejected, under both Article 51 of the United Nations Charter and customary international law, Uganda's contention that it acted in self-defence in using mili-

tary force in the Congo. Uganda argued, *inter alia*, that the Congo was responsible for the armed attacks by various rebel groups and was therefore guilty of aggression under the conditions set forth in the Definition of Aggression of 1974 (XXIX) in Article 3, paragraph *(g)*, which provides that:

> "Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression:
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> . . . . . .
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> *(g)* The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein."

The Court rejected the contention, observing that: Uganda never claimed that it had been the victim of an armed attack by the armed forces of the DRC; the "armed attacks" to which reference was made came rather from the ADF; there was no satisfactory proof of the involvement in these attacks, direct or indirect, of the Government of the DRC; and the attacks did not emanate from armed bands or irregulars sent by the DRC, or on behalf of the DRC, within the meaning of Article 3 *(g)* of General Assembly resolution 3314 (XXIX) of 1974 on the Definition of Aggression. The Court concluded that, on the basis of the evidence before it, even if the series of deplorable attacks could be regarded as cumulative in character, they still remained non-attributable to the DRC.

9. This finding is also consistent with the jurisprudence of the Court. In the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, the Court stressed the need to recognize a distinction between cases of armed attack and "other less grave forms" of the use of force (*Merits, Judgment, I.C.J. Reports 1986*, p. 101, para. 191). This distinction was reaffirmed by the Court in 2003 in the case concerning *Oil Platforms (Islamic Republic of Iran* v. *United States of America)*. According to the Court, it is necessary to distinguish between a State's massive support for armed groups, including *deliberately* allowing them access to its territory, and a State's enabling groups of this type to act against another State. Only the first hypothesis could be characterized as an "armed attack" within the meaning of Article 51 of the Charter, thus justifying a unilateral response. Although the second would engage the international responsibility of the State concerned, it constitutes no more than a "breach of the peace", enabling the Security Council to take action pursuant to Chapter VII of the Charter, without, however, creating an entitlement to unilateral response based on self-defence. In other words, if a State is powerless

to put an end to the armed activities of rebel groups despite the fact that it opposes them, that is not tantamount to use of armed force by that State, but a threat to the peace which calls for action by the Security Council. In my opinion, this interpretation is consistent with Article 51 of the Charter and represents the existing law.

10. However, according to the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV)):

> "no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the régime of another State, or interfere in civil strife in another State".

Uganda, in the course of the proceedings, acknowledged that it had supported one of the Congolese rebel movements, explaining, *inter alia*, that it gave "just enough" military support to the movement to help Uganda achieve its objectives of driving out Sudanese and Chadian forces from the Congo and of taking over the airfields between Gbadolite and the Ugandan border and that its support was not directed at the overthrow of the President of the Congo. The Court notes that even if Uganda's activities were in support of its perceived security needs, it necessarily still violated the principles of international law.

11. Another issue that was pleaded before the Court relates to permanent sovereignty over natural resources. The Court's acknowledgment of the *customary law* character of General Assembly resolution 1803 (XVII) of 14 December 1962, on permanent sovereignty over natural resources, is not without significance, for, although the Court has decided that it is the Hague Regulations of 1907 as well as the Fourth Geneva Convention of 1949 which lay down the rules according to which Uganda's conduct must be judged, resolution 1803 (XVII), it should be recalled, confirmed the "right of peoples and nations to permanent sovereignty over their natural wealth and resources". It makes clear that such resources should be exploited "in the interest of . . . the well-being of the people of the State concerned". These rights and interests remain in effect at all times, including *during armed conflict and during occupation*. The Security Council in resolution 1291 (2000) reaffirmed the sovereignty of the DRC over its natural resources, and noted with concern reports of the illegal exploitation of the country's assets and the potential consequences of these actions on the security conditions and continuation of hostilities. Accordingly, in my view, the exploitation of the natural resources of a State by the forces of occupation contravenes the principle of permanent sovereignty over natural resources, as well as the Hague Regulations of 1907 and the Fourth Geneva Convention of 1949. Moreover, both the

DRC and Uganda are parties to the African Charter on Human and Peoples' Rights of 1981, which stipulates that:

> "All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In *no case* shall a people be deprived of it." (Art. 21, para. 1; emphasis added.)

12. It is noteworthy that the findings of the Court, a judicial organ, are in the main in tandem with determinations made earlier by the Security Council in its resolutions on this dispute. In its resolution 1234 (1999) the Council implicitly considered the Congo, not Uganda, to be in a situation of self-defence. In that resolution, the Council not only recalled the inherent right of individual or collective self-defence under Article 51 of the United Nations Charter, but also deplored the continuing fighting and the presence of forces of foreign States in the DRC in a manner inconsistent with the principles of the United Nations Charter, and called upon those States to bring to an end the presence of uninvited forces. In its resolution 1291 (2000) the Council called for the orderly withdrawal of all foreign forces from the Congo in accordance with the Lusaka Ceasefire Agreement (1999). The Council also called on all parties to the conflict in the DRC to protect human rights and respect international humanitarian law and the Convention on the Prevention and Punishment of the Crime of Genocide of 1948. Acting under Chapter VII of the Charter the Council, in resolution 1304 (2000), confirmed that Uganda and Rwanda had violated the sovereignty and territorial integrity of the DRC and demanded that they withdraw all their forces from the DRC without further delay, and called on all parties to the conflict to protect human rights and respect international humanitarian law.

13. On the other hand, the Court has found the DRC to have been in breach of its obligations to Uganda under the Vienna Convention on Diplomatic Relations of 1961 because of its maltreatment of Ugandan diplomats and other individuals. In other words, the Congo, even when acting in self-defence,

> "is not relieved from fulfilling its obligations:
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> . . . . . .
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> *(b)* To respect the inviolability of diplomatic or consular agents, premises, archives and documents." (Responsibility of States for Internationally Wrongful Acts, United Nations, *Official Records of the General Assembly, Fifty-sixth Session, Supple-*

ment No. 10, United Nations doc. A/56/10 (2001), Draft Art. 50, para. 2 *(b)* and Commentary.)

Thus the findings of the Court have been carefully considered and reasoned. Had Uganda respected its obligations under the United Nations Charter not to resort to force in its disputes — political or otherwise — with the DRC, its obligations under the OAU Charter to settle its disputes by peaceful means, its obligations under international human rights instruments and international humanitarian law to respect the human rights and dignity of Congolese citizens and not to treat the civilian population inhumanely during its military incursion, and had the UPDF respected its obligation not to exploit the natural wealth and resources of the territory under occupation, the ensuing human tragedy could have been prevented or at least not aggravated.

14. If Uganda, above all, had respected the fundamental and customary law principle of *pacta sunt servanda* — requiring a State to comply with its obligations under a treaty — the tragedy so vividly put before the Court would not, at least, have been compounded. Observance of treaty obligations is not only moral, but serves an important role in maintaining peace and security between neighbouring States and in preventing military conflicts between them. Respect for this Judgment should contribute to putting an end to this tragedy.

15. It is, *inter alia*, against this background that I have voted in favour of the Judgment.

(Signed) Abdul G. KOROMA.