SEPARATE OPINION OF JUDGE PARRA-ARANGUREN

Time-limits on Uganda's violation of international law by its military actions in DRC territory — Sudan's role — Uganda's assistance to former irregular forces — Uganda not an occupying Power in Kibali-Ituri district — Articles 42 and 43 of the Hague Regulations of 1907 not applicable to Uganda's military presence in Kibali-Ituri district.

1. My vote in favour of the Judgment does not mean that I agree with all the findings of its operative part nor that I concur with each and every part of the reasoning followed by the majority of the Court in reaching its conclusions.

I

2. In paragraph 345 (1) of the operative part of the Judgment, the Court

> "*Finds* that the Republic of Uganda, by engaging in military activities against the Democratic Republic of the Congo . . . violated the principle of non-use of force in international relations and the principle of non-intervention."

3. I agree that the Republic of Uganda (hereinafter referred to as "Uganda") violated the principle of non-use of force in international relations and the principle of non-intervention by engaging in military activities against the Democratic Republic of the Congo (hereinafter referred to as the "DRC") between 7 and 8 August 1998 and 10 July 1999, for the reasons explained in the Judgment; but I disagree with the finding that the violation continued from 10 July 1999 until 2 June 2003, when Ugandan troops withdrew from the DRC territory, because in my opinion the DRC consented during this period to their presence in its territory, not retroactively but under the terms and conditions prescribed in the Lusaka Ceasefire Agreement of 10 July 1999, the Kampala Disengagement Plan of 8 April 2000, the Harare Disengagement Plan of 6 December 2000 and the Luanda Agreement of 6 September 2002, as amended in the Dar es Salaam Agreement of 10 February 2003.

4. The Judgment states that the Lusaka Ceasefire Agreement does not refer to "consent" (para. 95) and that it goes beyond the mere ordering of the Parties to cease hostilities, providing a framework to facilitate the orderly withdrawal of all foreign forces to a stable and secure envi-

ronment, but carrying no implication as to the Ugandan military presence having been accepted as lawful (para. 97). It also explains:

> "The Agreement took as its starting point the realities on the ground. Among those realities were the major Ugandan military deployment across vast areas of the DRC and the massive loss of life over the preceding months. The arrangements made at Lusaka, to progress towards withdrawal of foreign forces and an eventual peace, with security for all concerned, were directed at these factors on the ground and at the realities of the unstable political and security situation. The provisions of the Lusaka Agreement thus represented an agreed *modus operandi* for the parties. They stipulated how the parties should move forward. They did not purport to qualify the Ugandan military presence in legal terms. In accepting this *modus operandi* the DRC did not 'consent' to the presence of Ugandan troops. It simply concurred that there should be a process to end that reality in an orderly fashion. The DRC was willing to proceed from the situation on the ground as it existed and in the manner agreed as most likely to secure the result of a withdrawal of foreign troops in a stable environment. But it did not thereby recognize the situation on the ground as legal, either before the Lusaka Agreement or in the period that would pass until the fulfilment of its terms." (Judgment, para. 99.)

5. The Judgment adds in paragraph 101:

> "This conclusion as to the effect of the Lusaka Agreement upon the legality of the presence of Ugandan troops on Congolese territory did not change with the revisions to the timetable that became necessary. The Kampala Disengagement Plan of 8 April 2000 and the Harare Disengagement Plan of 6 December 2000 provided for new schedules for withdrawal, it having become apparent that the original schedule in the Annex to the Lusaka Agreement was unrealistic. While the status of Ugandan troops remained unchanged, the delay in relation to the D-Day plus 180 days envisaged in the Lusaka Agreement likewise did not change the legal status of the presence of Uganda, all parties having agreed to these delays to the withdrawal calendar."

6. In respect to the Luanda Agreement the Judgment states that none of its elements

> "purport generally to determine that Ugandan forces had been legally present on the territory of the DRC. The Luanda Agreement revised the *modus operandi* for achieving the withdrawal of Ugandan forces in a stable security situation. It was now agreed — without

reference to whether or not Ugandan forces had been present in the area when the agreement was signed, and to whether any such presence was lawful — that their presence on Mount Ruwenzori should be authorized, if need be, after the withdrawal elsewhere had been completed until appropriate security mechanisms had been put in place. The Court observes that this reflects the acknowledgment by both Parties of Uganda's security needs in the area, without pronouncing upon the legality of prior Ugandan military actions there or elsewhere." (Para. 104.)

7. Therefore, the majority of the Court understands that the Lusaka Ceasefire Agreement did not change the legal status of the presence of Uganda, i.e., in violation of international law, but at the same time it considers that Uganda was under an obligation to respect the timetable agreed upon, as revised in the Kampala Disengagement Plan of 8 April 2000, the Harare Disengagement Plan of 6 December 2000 and the Luanda Agreement of 6 September 2002.

8. This interpretation of the Lusaka Ceasefire Agreement, the Kampala Disengagement Plan, the Harare Disengagement Plan and the Luanda Agreement creates an impossible legal situation for Uganda. On the one hand, if Uganda complied with its treaty obligations and remained in the territory of the DRC until the expiration of the timetables agreed upon, Uganda would be in violation of international law because the legal status of its presence had not been changed, the status of its military forces in the DRC being a violation of international law. On the other hand, if Uganda chose not to violate international law as a consequence of its military presence in the DRC, and therefore withdrew its troops from the territory of the DRC otherwise than in accordance with the timetables agreed upon, Uganda would have violated its treaty obligations, thereby also being in violation of international law.

9. This reasoning is, in my opinion, persuasive enough not to accept the very peculiar interpretation advanced in the Judgment of the Lusaka Ceasefire Agreement, the Kampala Disengagement Plan, the Harare Disengagement Plan and the Luanda Agreement. Moreover, an examination of the terms of these instruments leads to a different conclusion.

10. The Lusaka Ceasefire Agreement was signed on 10 July 1999 among the Republic of Angola, the Democratic Republic of the Congo, the Republic of Namibia, the Republic of Rwanda, the Republic of Uganda, the Republic of Zimbabwe, the Congolese Rally for Democracy (RCD) and the Movement for the Liberation of the Congo (MLC).

11. In my opinion, the DRC consented in the Lusaka Ceasefire Agreement to the presence in its territory not only of Ugandan troops but of all foreign forces, as evidenced in the following provisions:

(a) Article III, paragraph 12, prescribes that "[t]he final withdrawal of

all foreign forces from the national territory of the DRC shall be carried out in accordance with the Calendar in Annex 'B' of this Agreement and a withdrawal schedule to be prepared by the UN, the OAU and the JMC", i.e., the Joint Military Commission to be created as stipulated in Chapter 7 of Annex "A";

(b) Chapter 4 of Annex "A", number 4.1, reiterates that "[t]he final orderly withdrawal of all foreign forces from the national territory of the Democratic Republic of Congo shall be in accordance with Annex 'B' of this Agreement", and number 4.2 indicates that "[t]he Joint Military Commission/OAU and UN shall draw up a definitive schedule for the orderly withdrawal of all foreign forces from the Democratic Republic of Congo";

(c) Chapter 8, Article 8.1, contemplates that a force should be constituted, facilitated and deployed in the DRC by the United Nations in collaboration with the Organization of African Unity with the mandate, among others, to schedule and supervise the withdrawal of all foreign forces (Art. 8.2.1); and

(d) Chapter 11, Article 11.4, stipulates:

"All forces shall be restricted to the declared and recorded locations and all movements shall be authorised by the JMC, OAU and UN mechanisms. All forces shall remain in the declared and recorded locations until:

(a) in the case of foreign forces, withdrawal has started in accordance with JMC/OAU, UN withdrawal schedule;

. . . . . ."

(e) Annex "B", number 17 indicates "180 days from the formal signing of the Ceasefire" as the deadline for the withdrawal of all foreign forces.

12. The Kampala Disengagement Plan ("Plan for the Disengagement and Redeployment of Forces in Democratic Republic of Congo (DRC) in Accordance with the Lusaka Agreement") was agreed on 8 April 2000 by all the parties to the Lusaka Ceasefire Agreement. It included stipulations providing that

"During the process of Disengagement and Redeployment of the forces, in order to establish a cessation of hostilities, no Party shall threaten or use force against another Party, and under no circumstances shall any armed forces of any Party enter into or stay within the territory controlled by any other Party without the authorization of the JMC and MONUC." (Art. 1, para. 2 *(a)*.)

"The Parties shall comply with the cessation of hostilities in accord-

ance with Articles 1 and 3 of the Lusaka Cease Fire Agreement. Each Party shall ensure that all personnel and organizations with military capability under its control or within territory under its control, including armed civilian groups (illegally armed), Armed Groups controlled by or in the pay of one or other Party comply with this Plan." (Art. 1, para. 2 *(d)*.)

"Whilst reserving the right to self-defence, within defended positions, the Parties shall strictly avoid committing any reprisals, counter-attacks, or any unilateral actions, in response to violations of this Plan by another Party. The Parties are to report all alleged violations of the provisions of this Plan to HQ MONUC and the JMC." (Art. 2, para. 5.)

13. This last provision is remarkable in reserving the right of self-defence not only to the signatory States (the DRC, Namibia, Rwanda, Uganda, Zimbabwe) but also to the rebel movements Congolese Rally for Democracy (RCD) and the Movement for the Liberation of the Congo (NLC). Therefore it is not possible to accept the explanation given by the DRC in its letter of 6 May 2005 to the Court that the sole effect of the Lusaka Ceasefire Agreement was to suspend "the Congo's power to exercise its right of self-defence by repelling the armies of the occupying States by force"; the right of self-defence being also expressly admitted in Article 2, paragraph 5, of the Harare Disengagement Plan.

14. Moreover, the Kampala Disengagement Plan stipulated that the Disengagement obligation assumed by the parties was based on the assumption that a ceasefire existed, in order to facilitate the immediate deployment of MONUC, Phase 2 (Art. 3, para. 7); that "[a] total Cessation of Hostilities by all Parties" was included among the prerequisites to be met before an effective disengagement could take place (Art. 3, para. 8 *(a)*); and that the Ceasefire Zone was divided in four areas, as detailed in the map attached as Appendix 2 (Art. 14).

15. Some time later, on 6 December 2000, the Harare Disengagement Plan laid down the Sub Plans for Disengagement and Redeployment specifying the obligations in respect to Area A where the MCL, UPDF and FAC and their allies had declared to be present.

16. Therefore, in my opinion the presence of Ugandan troops in Congolese territory was consented to by the DRC in the terms stipulated in the Kampala and Harare Disengagement Plans.

17. The Luanda Agreement came into force upon its signing, on 6 September 2002, and was entitled "Agreement between the Governments of the Democratic Republic of The Congo and the Republic of Uganda on withdrawal of Ugandan Troops from the Democratic Republic of The

Congo, Cooperation and Normalisation of Relations between the Two Countries".

18. Article 1, paragraph 4, of the Luanda Agreement stipulates: "The Parties agree that the Ugandan troops shall remain on the slopes of Mt. Ruwenzori until the Parties put in place security . . . including training and coordinated patrol of the common border."

19. The DRC therefore expressly consented in Article 1, paragraph 4, of the Luanda Agreement to the presence of Ugandan troops on the slopes of Mt. Ruwenzori. In my opinion, the DRC also consented to their presence in the places from which they were to be withdrawn in accordance with the detailed plan stipulated in Annex A, Article 8, of the Luanda Agreement, with special reference to Beni and Gbadolite (D-5 days), Bunia (the withdrawal of troops to begin on D-70 days, and to be completed by D-100 days). Moreover this consent is expressed again in the Amendment signed at Dar es Salaam on 10 February 2003 extending the withdrawal from Bunia, D-38, to 20 March 2003, this date ultimately being extended to the end of May 2003. Consequently, the presence of Ugandan troops in Congolese territory as provided in the Luanda Agreement and in its Amendment of Dar es Salaam cannot be considered a violation of conventional and customary international law.

20. For the reasons set out above, it is my opinion that the DRC consented to the presence of Ugandan troops in its territory from 10 July 1999 until 2 June 2003, under the terms and conditions prescribed in the Lusaka Ceasefire Agreement of 10 July 1999, the Kampala Disengagement Plan of 8 April 2000, the Harare Disengagement Plan of 6 December 2000, and the Luanda Agreement of 6 September 2002, as amended in the Dar es Salaam Amendment of 10 February 2003. Therefore, Uganda's military presence in the DRC during this period did not violate the principle of non-use of force in international relations and the principle of non-intervention.

II

21. Paragraph 130 of the Judgment states

> "that it has not been presented with evidence that can safely be relied on in a court of law to prove that there was an agreement between the DRC and the Sudan to participate in or support military action against Uganda; or that any action by the Sudan (of itself factually uncertain) was of such a character as to justify Uganda's claim that it was acting in self-defence".

22. In this respect I wish to make reference to the statement by the Chief Prosecutor on the Uganda arrest warrants, dated 14 October 2005,

because it is in the public domain and the Court may ascertain its terms. The statement announces that the pre-trial Chamber II of the International Criminal Court has unsealed five warrants of arrest in the Uganda situation, because it considered there to be sufficient evidence that the concerned persons have committed crimes against humanity and war crimes; it is recalled therein that the Lord's Resistance Army (LRA) has killed, abducted, enslaved and raped the people of northern Uganda for 19 years, that more than 50 missions were made to Uganda, in small groups of two or three, to investigate the situation, and that among other facts, it was established that Joseph Kony is the absolute leader of the LRA and that he directs all of the LRA operations from his bases in the Sudan.

III

23. In paragraph 345 (1) of the operative part of the Judgment the Court

> "*Finds* that the Republic of Uganda . . . by actively extending military, logistic, economic and financial support to irregular forces having operated on the territory of the DRC, violated the principle of non-use of force in international relations and the principle of non-intervention."

24. It is to be observed that the Lusaka Ceasefire Agreement stipulated the importance of the solution of the internal conflict in the DRC by inter-Congolese dialogue. The Government of the DRC, the Rally for the Congolese Democracy (RCD), the Movement for the Liberation of the Congo (MLC), the political opposition, the civil society, the Congolese Rally for Democracy/Movement of Liberation (RCD-NL), the Congolese Rally for Democratic/National (RDC/N) and the Mai Mai decided, on 16 December 2002 in Pretoria, to put in place a government of national unity, aiming at national reconciliation. A calendar was set forth but it was not complied with, political reconciliation only being implemented through the installation of a new national government, including leaders of the three armed rebel organizations and Congolese society; the military forces of these three rebel groups were fully integrated into the national army and democratic elections were to be held within two years.

25. While I accept the principles of international law enunciated in General Assembly resolution 2625 (XXV) (24 October 1970) mentioned in paragraph 162 of the Judgment, they do not, in my view, apply to the present case. As a consequence of the dialogue among the parties, a new

national government was installed on 1 July 2003 in the DRC with participation of the leaders of the rebel forces, which were integrated into the Congolese army; this reconciliation, in my opinion, exonerates Uganda from any possible international responsibility arising out of the assistance it gave in the past to the Rally for the Congolese Democracy (RCD) and to the Movement for the Liberation of the Congo (MLC).

26. A similar situation took place in the Congo not very long ago, when in May 1997 the Alliance of Democratic Forces for the Liberation of the Congo (AFGL), with the support of Uganda and Rwanda, overthrew the legal Head of State of the former Zaire, Marshal Mobutu Ssese Seko, taking control of the country under the direction of Laurent-Désiré Kabila. I wonder whether Uganda would have been condemned for this assistance had the Court been requested by the DRC to make such a declaration after Laurent-Désiré Kabila legally assumed the Presidency of the country.

IV

27. In paragraph 345 (1) of the operative part of the Judgment the Court

> "*Finds* that the Republic of Uganda . . . by occupying Ituri . . . violated the principle of non-use of force in international relations and the principle of non-intervention."

28. The majority of the Court maintains that customary international law is reflected in the Regulations Respecting the Laws and Customs of War on Land annexed to the Fourth Hague Convention of 18 October 1907 (hereinafter "the Hague Regulations of 1907") (Judgment, paras. 172 and 217). This statement is noteworthy because occupying Powers have not always complied with the Hague Regulations of 1907.

29. The Judgment considers applicable Article 42 of the Hague Regulations of 1907 providing that

> "A territory is considered as being occupied when it is actually under the authority of the hostile army.
>
> The occupation extends only to the regions where this authority is established and capable of being asserted."

30. The Court therefore examines whether the requirements of Article 42 are met in the present case, stressing that it must satisfy itself that Ugandan armed forces in the DRC were not only stationed in particular locations but that they had substituted their own authority for that of the Congolese Government (Judgment, para. 173).

31. In this respect paragraph 175 of the Judgment states:

> "It is not disputed between the Parties that General Kazini, commander of the Ugandan forces in the DRC, created the new

'province of Kibali-Ituri' in June 1999 and appointed Ms Adèle Lotsove as its Governor. Various sources of evidence attest to this fact, in particular a letter from General Kazini dated 18 June 1999, in which he appoints Ms Adèle Lotsove as 'provisional Governor' and gives suggestions with regard to questions of administration of the new province. This is also supported by material from the Porter Commission. The Court further notes that the Sixth Report of the Secretary-General on MONUC (S/2001/128 of 12 February 2001) states that, according to MONUC military observers, the UPDF was in effective control in Bunia (capital of Ituri district)."

32. These facts are not disputed by Uganda and the majority of the Court concludes from them that the conduct of General Kazini "is clear evidence of the fact that Uganda established and exercised authority in Ituri as an occupying Power" (Judgment, para. 176).

33. In my opinion, this conclusion is not acceptable. It is true that General Kazini, Commander of the Ugandan forces in the DRC, appointed Ms Adèle Lotsove as "provisional Governor" in charge of the newly created province of Kibali-Ituri in June 1999, giving her suggestions with regard to questions of the administration of the province. However, this fact does not prove that either General Kazini or the appointed Governor were in a position to exercise, and in fact did exercise, actual authority in the whole province of Kibali-Ituri. It is also true that the UPDF was in control in Bunia (capital of Kibali-Ituri district), but control over Bunia does not imply effective control over the whole province of Kibali-Ituri, just as control over the capital (Kinsasha) by the Government of the DRC does not inevitably mean that it actually controls the whole territory of the country.

34. Therefore, in my opinion, the elements advanced in the Judgment do not prove that Uganda established and exercised actual authority in the whole province of Kibali-Ituri, as required in Article 42 of the Hague Regulations of 1907.

35. In addition, it may be observed that the elements advanced by the DRC to prove Uganda's actual control of the whole of Kibali-Ituri province are not conclusive, for the following reasons:

(a) The DRC's Application instituting proceedings against Rwanda, filed in the Registry on 28 May 2002, which is a document in the public domain, states in paragraph 5 of the section entitled Statement of Facts, under the heading "Armed Aggression":

"5. Since 2 August 1995, Rwandan troops have occupied a significant part of the eastern Democratic Republic of the Congo, notably in the provinces of Nord-Kivu, Sud-Kivu, Katanga, Kasai Oriental, Kasai Occidental, and Maniema and in Orientale Province, committing atrocities of all kinds there with total

impunity." (*Armed Activities on the Territory of the Congo (New Application: 2002),* Application I. Statement of Facts; A. Armed Aggression, p. 7.)

36. Consequently, in this statement "against interest" the DRC maintains that Rwanda occupied Orientale province from August 1995 until the end of May 2002, the date of its new Application to the Court, and Orientale province included the territories of what was to become Kibali-Ituri province in 1999. Therefore, the DRC considered Rwanda as the occupying Power of those territories, including the territories of Kibali-Ituri, and gave no indication in its Application that the occupation by Rwanda came to an end after the creation of Kibali-Ituri province.

(b) The special report on the events in Ituri, January 2002 to December 2003, prepared by the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC), and distributed on 16 July 2004 (hereinafter the "2004 MONUC report") dedicates the following special paragraph to the role of Rwanda:

"On 6 January 2003, RCD-Goma, a Congolese rebel movement supported by Rwanda, announced an alliance with UPC. Rwanda had become involved in the Ituri crisis much earlier, however. The Chief of Staff of the Rwandan army, James Kabarebe Kagunda, was reportedly the biggest advocate of Rwandan support to Hema militia and was in contact with Chief Kawa, who negotiated the arms supplies in June 2002. Rwanda reportedly supplied arms by airdrop to the UPC camps located in Mandro, Tchomia, Bule, Bulukwa and Dhego and sent military experts to train Hema militias, including child soldiers. Moreover, some UPC elements (estimated at 150) went for training in Rwanda from September to December 2002. On 31 December 2002, Thomas Lubanga visited Kigali for the first time. Kigali also facilitated the transport to Ituri of PRA elements, earlier trained in Rwanda, and used some Kinyarwanda-speaking Congolese to organize this support. One ex-UPDF sector Commander of Ituri, Colonel Muzora, who had left the Ugandan army to join the Rwandan forces, was seen by several witnesses in the UPC camps, mainly to orient the newcomers from Rwanda. Practically all witnesses interviewed by MONUC believe that Rwandan nationals occupied posts in UPC military commands. MONUC obtained testimonies about adults and children being trained in Rwanda and being sent through Goma, in 2002 and 2003, to fight in Ituri with UPC. It also appears that, when Thomas Lubanga and other high-ranking UPC officers fled from Ituri in March 2003, they were evacuated by air to Rwanda. Arms and ammunition were then supplied from Rwanda to UPC by air before UPC retook Bunia in May 2003. On 11 and 12 May 2003, two aircraft landed at Dhego — not far from Mongbwalu — from Rwanda, with grenades, rocket-propelled grenades, mortars and ammunition.

> The first of the aircraft was also carrying back Lubanga and Bosco from Kigali." (Special report on the events in Ituri, January 2002-December 2003 prepared by the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC), 16 July 2004, para. 29.)

37. The 2004 MONUC report describes the role of the pre-transitional Government of Kinshasa in the following terms:

> "Until 2002, the pre-transition Government in Kinshasa was hardly involved in Ituri. Its first delegation arrived in Bunia in August 2002, after a visit to Kampala. During a second visit, on 29 August 2002, the Minister for Human Rights, Ntumba Lwaba, was abducted by Hema militia and freed only after three days in exchange for the release of Lubanga and several UPC members who had been arrested in Kampala and transferred to Kinshasa. Early in 2002, the involvement of the Kinshasa Government centred on military assistance that it provided to RCD-ML in Beni. Kinshasa sent trainers, weapons and also some military elements, allegedly amounting to four battalions, in support of APC, which reportedly was sending weapon supplies from Beni to Lendu militia. FAC and APC were also named by eyewitnesses and victims as parties in some attacks on Hema villages. It is alleged that, in the last three months of 2002, some military supplies may also have been sent directly to the Lendu militia, notably to Rethy, in Djugu territory." (Special report on the events in Ituri, January 2002-December 2003 prepared by the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC), 16 July 2004, para. 30.)

38. In respect to the Transitional Government of Kinshasa, the 2004 MONUC report informs:

> "The political initiative of the Transitional Government to calm the tension in Ituri has focused on the deployment of some judicial and police personnel and sending official delegations. There have also been a number of press statements. Apart from the delivery of a humanitarian aid shipment early in 2004, humanitarian aid from the Government to the Ituri victims has been negligible. More concrete actions and active engagement would be needed to find a solution to the ongoing crisis. It was planned that the first brigade of the new national army would be deployed in Ituri before June 2004. How-

ever, there are no guarantees that these troops will receive regular payments and supplies." (Special report on the events in Ituri, January 2002-December 2003 prepared by the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC), 16 July 2004, para. 31.)

39. Additionally, the 2004 MONUC report states that other rebel groups were acting in Kibali-Ituri province from 1998 to 2003. Annex I lists the following as armed and political groups involved in the Ituri conflict: *(a)* Ituri armed groups: Union des patriotes congolais (UPC); Parti pour l'unité et la sauvegarde de l'intégrité du Congo (PUSIC); Forces populaires pour la démocratie au Congo (FPDC); Forces armées du peuple congolais (FAPC); Front nationaliste intégrationniste (FNI); Front de résistance patriotique de I'lturi (FRPI); Front pour l'intégration et la paix en Ituri (FIPI); *(b)* Regional Political Groups: Mouvement de libération du Congo (MLC); Rassemblement congolais pour la démocratie (RCD); RCD–Kisangani/Mouvement de libération (RCD-K/ML); RCD-Nationale (RCD-N).

40. The 2004 MONUC report also describes the activities of Ugandan troops in the province of Kibali-Ituri but does not state that Ugandan forces actually controlled or were capable to exercise actual authority in the totality of its territory.

41. Consequently, as the reliability of the 2004 MONUC report is "unchallenged" by the DRC, it does not support the conclusion that Uganda's authority was actually exercised in the whole territory of Kibali-Ituri province, as would be required by the 1907 Hague Regulations in order for Uganda to be considered its occupying Power. On the contrary, the 2004 MONUC report acknowledges that Rwanda as well as many rebel groups played an important role in the tragedy experienced in Kibali-Ituri province.

(c) As evidence of the occupation by Uganda of Kibali-Ituri province, the DRC has also cited Article 2, paragraph 3, of the 2002 Luanda Agreement, stating that the parties agree "[t]o work closely together in order to expedite the pacification of the DRC territories *currently under . . . Uganda[n] control* and the normalization of the situation along the common border". However, the sentence quoted by the DRC does not indicate that Uganda controlled the whole of Kibali-Ituri province but rather some Congolese territories, and for this reason it does not demonstrate that Uganda was the occupying Power in Kibali-Ituri province.

42. The above considerations, in my opinion, demonstrate that Uganda was not an occupying Power of the whole of Kibali-Ituri province but of some parts of it and at different times, as Uganda itself acknowledges. Therefore, it is for the DRC in the second phase of the present proceedings to demonstrate in respect of each one of the illegal acts violating

human rights and humanitarian law, and each one of the illegal acts of looting, plundering and exploitation of Congolese natural resources it complains of, that it was committed by Uganda or in an area under Uganda's occupation at the time.

43. Additionally it is to be observed that rebel groups existed in the province of Kibali-Ituri before May 1997, when Marshal Mobutu Ssese Seko governed the former Zaire; they continued to exist after President Larent-Désiré Kabila came to power and for this reason the DRC expressly consented to the presence of Ugandan troops in its territory. The Court itself acknowledges the inability of the DRC to control events along its border (Judgment, paras. 135, 301). Rebel groups were also present during Uganda's military actions in the region and continue to be present even after the withdrawal of Ugandan troops from the territory of the DRC on 2 June 2003, notwithstanding the intensive efforts of the Government of the DRC, with strong help from the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC), employing more that 15,000 soldiers, as is a matter of public knowledge.

V

44. As indicated above, the majority of the Court concluded that Uganda was an occupying Power of Kibali-Ituri province and that for this reason it

> "was under an obligation, according to Article 43 of the Hague Regulations of 1907, to take all the measures in its power to restore, and ensure, as far as possible, public order and safety in the occupied area, while respecting, unless absolutely prevented, the laws in force in the DRC. This obligation comprised the duty to secure respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third party." (Judgment, para. 178.)

45. Article 43 of the Hague Regulations of 1907 states:

> "When the legally constituted authority has actually passed into the hands of the occupant, the latter shall take all measures within his power to restore and, as far as possible, to insure public order and life, respecting the laws in force in the country unless absolutely prevented."

46. Consequently, application of Article 43 is conditional on the fact

that "legally constituted authority actually passed into the hands of the occupant". It is not clear to me how the majority of the Court came to the conclusion that this requirement was met, because no explanation in this respect is given in the Judgment.

47. Moreover, the obligation imposed upon the occupying Power by Article 43 is not an obligation of result. An occupying Power is not in violation of Article 43 for failing to effectively restore public order and life in the occupied territory, since it is only under the obligation to "take all measures within his power to restore and as far as possible, to insure public order and life". It is an open question whether the nature of this obligation has been duly taken into account in the Judgment.

48. Furthermore, when dealing with the occupation of the province of Kibali-Ituri by Uganda, the majority of the Court rarely takes into account the province's geographical characteristics in order to determine whether Uganda complied with its obligation of due diligence under Article 43 of the Hague Regulations of 1907; but they were considered to exonerate the DRC for its failure to prevent cross-border actions of anti-Ugandan rebel forces, as may be observed in the examination of Uganda's first counter-claim.

(Signed) Gonzalo PARRA-ARANGUREN.