# SEPARATE OPINION OF JUDGE ELARABY

*Agreement with the findings of the Court — Treatment by the Court of the prohibition of the use of force — Failure to address the Democratic Republic of the Congo's claim of aggression — Centrality of this claim to the Democratic Republic of the Congo's case — Prohibition of aggression in international law — General Assembly resolution 3314 (XXIX) — Authority of the Court to determine whether there has been a violation of the prohibition of aggression — Clear instance of aggression in the facts found to be established by the Court — Relevance of the Court's dicta in* Nicaragua *— Importance of consistency in the Court's jurisprudence.*

1. My vote in favour of the Judgment reflects my support for its conclusions. I do however deem it appropriate to place on record certain considerations which I find absent in the Judgment. While I fully concur with the Court's findings that there were grave violations of the principle of the non-use of force in international relations, I believe the Court should have explicitly upheld the Democratic Republic of the Congo's claim that such unlawful use of force amounted to aggression.

2. The issues arising in this case are manifold and complex, touching upon some of the most sensitive questions of international law. The Democratic Republic of the Congo has alleged that Uganda violated Article 2, paragraph 4, of the Charter of the United Nations. It claims that armed activities of Uganda constitute a breach of this general prohibition of the use of force. It alleges furthermore that these armed activities constitute aggression.

3. At each stage of the current proceedings, the Democratic Republic of the Congo has emphasized the gravity of the use of force exercised by Uganda in breach of its obligations under international law. In its Application initiating proceedings in the instant case, the Democratic Republic of the Congo alleges that:

> "this Application instituting proceedings against the Government of the Republic of Uganda, on account of acts of *armed aggression* perpetrated by Uganda on the territory of the Democratic Republic of the Congo, [is] in flagrant violation of the United Nations Charter and of the Charter of the Organization of African Unity.
>
> Such armed aggression by Ugandan troops on Congolese territory has involved *inter alia* violation of sovereignty and territorial integrity of the Democratic Republic of the Congo, violations of international humanitarian law and massive human rights violations.

> By the present Application the Democratic Republic of the Congo seeks to secure the cessation of the acts of aggression directed against it, which constitute a serious threat to peace and security in central Africa in general and in the Great Lakes Region in particular." (Application of the DRC, p. 5.)

4. Furthermore, in its Memorial, the Democratic Republic of the Congo declares:

> "Because all direct means of settling the dispute have failed, the Democratic Republic of the Congo is asking the Court to fulfil its role as guarantor of law, justice and peace and to condemn Uganda for the policy of aggression it has conducted against the Democratic Republic of the Congo since 2 August 1998." (Memorial of the Democratic Republic of the Congo (MDRC), p. 6, para. 0.10.)

In its Memorial, the Applicant elaborates upon this, declaring that "the gravity of the violation of the prohibition of the use of force" is such as to make it "characterizable as aggression" (MDRC, pp. 176-179, paras. 4.40-4.50). In its submissions, the Democratic Republic of the Congo asks the Court to find "the principle of non-use of force in international relations, including the prohibition of aggression" (MDRC, p. 273, para. 1) amongst the principles of international law violated by Uganda.

5. In its Reply to the Counter-Memorial of Uganda, the Democratic Republic of the Congo once again emphasizes its claim of Ugandan aggression:

> "[t]he wording [of the Democratic Republic of Congo's Application] shows very clearly what the essential subject-matter of the Application is: the principle of Ugandan aggression. The details of that aggression, including the looting of natural resources and associated atrocities, are not considered in isolation, as separate acts." (Reply of the Democratic Republic of the Congo (RDRC), p. 11, para. 1.16.)

In its presentation of the military intervention of Uganda, the Democratic Republic of the Congo states:

> "[g]iven the gravity of the Ugandan military intervention, the DRC concluded that it was faced with real aggression within the meaning of the definition given to this term by the General Assembly of the United Nations" (RDRC, p. 60, para. 2.01).

6. In the course of the oral pleadings, the Democratic Republic of the Congo reiterated its claim and referred to Ugandan military activities towards the Democratic Republic of the Congo and cited General Assembly resolution 3314 (XXIX) on the definition of aggression.

7. The activities alleged of Uganda generally — and especially the

form and nature of its use of force — are extremely serious in nature. The Court holds that:

> "The unlawful military intervention by Uganda was of such a magnitude and duration that the Court considers it to be a grave violation of the prohibition on the use of force expressed in Article 2, paragraph 4, of the Charter." (Judgment, para. 165.)

8. Thus while the Court uses exceptionally strong language to emphasize the gravity of the use of force in this case, it fails to consider the additional claim of the Democratic Republic of the Congo that such acts, on account of their very seriousness as well as their specific characteristics, constitute aggression. Aggression is the core and the very essence of the use of force prohibited under Article 2, paragraph 4, of the Charter. As the Preamble of the Definition of Aggression states, "aggression is the most serious and dangerous form of the illegal use of force".

9. In view of the submissions of the Applicant, and the gravity of the violations recognized by the Court, I feel it is incumbent upon the Court to respond to the serious allegation put forward by the Democratic Republic of the Congo that the activities of Uganda also constitute aggression as prohibited under international law.

10. Aggression is not a novel concept in international law. In the aftermath of the Second World War, the Nuremberg Tribunal stated that "to initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole" (Judgment of 1 October 1946, *Trial of the Major War Criminals before the International Military Tribunal*, Nuremberg, 14 November-1 October 1946, Vol. 1, p. 186). The founding of the United Nations was a landmark and a turning point in the outlawing of the use of force. The Charter of the United Nations lays down, in Article 2, paragraph 4, a general prohibition on "the threat and use of force" in States' international relations. Article 39 confers upon the Security Council the authority to make a determination of the "existence of any threat to the peace, breach of the peace, or act of aggression" in order to make recommendations and take action under other provisions of Chapter VII for the maintenance of international peace and security.

11. It does not follow however that the identification of aggression is solely within the purview of the Security Council. The Court has confirmed the principle that the Security Council's responsibilities relating to the maintenance of international peace and security are "'primary' not exclusive" (*Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962,* p. 163), it is clear that aggression — as a legal as well as a political concept — can be of equal concern to other competent organs of the United Nations,

including the Court as "the principal judicial organ of the United Nations" (Art. 92, Charter of the United Nations). Although the term's use in political and popular discourse is often highly charged, it nevertheless remains that aggression is a legal concept with legal connotations and legal consequences, matters which fall clearly within the remit of the Court, particularly when the circumstances of a case coming before the Court call for a decision thereon. There is now general recognition that, as Judge Lachs wrote in the *Lockerbie* cases,

> "the dividing line between political and legal disputes is blurred, as law becomes ever more frequently an integral part of international controversies" (*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992,* p. 27; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992*, p. 139).

12. The General Assembly and its subsidiary organs worked for many years to achieve an appropriate and effective definition of what constitutes aggression. The culmination of such efforts came with the adoption of the General Assembly Declaration on the Definition of Aggression (resolution 3314 (XXIX)). This resolution sets out a general definition of the term in Article 1, while also citing a non-exhaustive list of situations which amount to aggression in Article 3. Although this definition is not without its problems and at the time certain Member States had reservations about certain aspects thereof, it was nonetheless adopted without a vote by the General Assembly of the United Nations and marks a noteworthy success in achieving by consensus a definition of aggression.

13. The definition does not claim to be either completely exhaustive or authoritative. Yet it does offer an invaluable guide to the scope of aggression and an elucidation of the meaning of this term in international relations. As the Preamble of the Declaration emphasizes,

> "the adoption of a definition of aggression ought to have the effect of deterring a potential aggressor, would simplify the determination of acts of aggression and the implementation of measures to suppress them and would also facilitate the protection of the rights and lawful interests of, and the rendering of assistance to, the victim".

14. The Preamble to the Definition of Aggression in resolution 3314 (XXIX) also aptly clarifies that aggression "must be considered in the

light of all the circumstances of each particular case". It is to this consideration that I now turn. Examining the activities by Uganda against the Democratic Republic of the Congo found to have taken place in the current case, it is, in my view, clear that such activities amount to aggression. They fall clearly within the scope of Article 1 of the definition:

> "[a]ggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition".

15. In the *Nicaragua* case, aggression was considered by the Court in the context of an armed attack possibly giving rise to self-defence under customary international law. Although the Court found in that case that no such armed attack had been proven, the Court held that

> "[t]his description contained in Article 3, paragraph *(g)*, of the Definition of Aggression annexed to General Assembly resolution 3314 (XXIX), may be taken to reflect customary international law" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits*, *Judgment, I.C.J. Reports 1986,* p. 103, para. 195).

16. The gravity of the factual circumstances and context of the present case dwarfs that of the *Nicaragua* case. The acknowledgment by the Court of the customary international law status of the definition of aggression is of considerable importance to the instant case and in particular to the Democratic Republic of the Congo's claim that Uganda has violated the prohibition of aggression in international law. Indeed the definition of aggression applies *a fortiori* to the situation at hand: the full force of the Charter provisions are applicable; the nature and form of the activities under consideration fall far more clearly within the scope of the definition; the evidence before the Court is more complete and both Parties have been present at all stages of the proceedings.

17. These factors, allied with the central position of this claim within the Application and the pleadings of the Democratic Republic of the Congo, require the Court to adhere to its judicial responsibility to adjudicate on a normative basis. The Court's dicta on this point are of a broader significance as they establish a normative test which should be operational across the board. The same yardstick should be used in every case to gauge the unlawful use of force by any State. Article 38 *(b)* of the Statute mandates the Court to apply "international custom, as evidence of a general practice accepted as law". By dint of its dicta in the *Nicaragua* case, the Court should, in my view, have embarked on a determination as to whether the egregious use of force by Uganda falls within the

customary rule of international law as embodied in General Assembly resolution 3314 (XXIX).

18. Thus it was my expectation that the Court's dicta in the *Nicaragua* case, even if construed as *obiter* would be followed in the instant case by qualifying the grave use of force by Uganda as amounting to aggression. Rarely if ever has the Court been asked to pronounce upon a situation where such grave violations of the prohibition of the use of force have been committed. This makes it all the more important for the Court to consider the question carefully and — in the light of its dicta in the *Nicaragua* case — to respond positively to the Democratic Republic of the Congo's allegation that Ugandan armed activities against and on its territory amount to aggression and constitute a breach of its obligations under international law.

19. The consistency of the Court's dicta and holdings should be observed and maintained. It is appropriate to point out that the consistency of the case law practice and jurisprudence of the Court is not confined to the *dispositif* of the judgments. Shabtai Rosenne noted that there is "general desire for consistency and stability in the Court's case-law when the Court is dealing with legal issues which have been before it in previous cases" (*The Law and Practice of the International Court, 1920-1996*, Vol. III, *Procedure*, 1997, p. 1610).

The Court has emphasized this point in the case concerning the *Continental Shelf* by noting that

> "the justice of which equity is an emanation, is not abstract justice but justice according to the rule of law; which is to say that its application should display consistency and a degree of predictability; even though it looks with particularity to the peculiar circumstances of an instant case, it also looks beyond it to principles of more general application" (*Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 39, para. 45).

As a general rule, such consistency has hitherto been maintained. On this point, Judge Shahabuddeen remarked, the Court's "jurisprudence has developed in the direction of a strong tendency to adhere closely to previous holdings" (*Precedent in the World Court*, 1996, p. 238).

20. As remarked at the outset, I concur with the Court's findings in the present case, including its finding relating to the use of force. I am unable, however, to appreciate any compelling reason for the Court to refrain from finding that Uganda's actions did indeed amount to aggression. The International Court of Justice has not been conceived as a penal court, yet its dicta have wide-ranging effects in the international

community's quest to deter potential aggressors and to overcome the culture of impunity. Given the centrality of the claim of aggression to the Democratic Republic of the Congo's Application as well as the seriousness of the violation of the use of force in the present case and the broader importance of repressing aggression in international relations, I have appended this separate opinion to respond fully to the Democratic Republic of the Congo's submission on this point.

*(Signed)* Nabil ELARABY.