DECLARATION OF JUDGE TOMKA

[English Original Text]

Duty of vigilance — Toleration by Zaire on its territory of activities of rebel groups against Uganda in 1994-1997 period — Duty of Uganda to prosecute those who have committed grave breaches of international humanitarian law — Self-defence and the prohibition of the use of force: order of their consideration.

Having voted in favour of the *dispositif*, with the exception of its paragraph 9, I wish to clarify my position on several issues in relation to the Judgment.

I. Duty of Vigilance — Failure to Take Action

1. The Court rejected the first counter-claim of the Republic of Uganda (paragraph 9 of the *dispositif*). When voting on this paragraph, I was faced with a dilemma. I concur with the views of the Court concerning the counter-claim relating to the second period, from May 1997 until 2 August 1998, and to the third period, following 2 August 1998 (see paragraphs 302-304 of the Judgment). However, my position regarding the first period, from 1994 until May 1997, is — in respect of one of its aspects — different from that of the majority. I agree with the majority, that "Uganda has not produced sufficient evidence to show that the Zairean authorities were involved in providing political and military support for specific attacks against Ugandan territory" (para. 298). But, to my regret, I cannot subscribe to the reasoning and conclusion of the majority that the Democratic Republic of Congo (DRC) has not breached its duty of vigilance during the period 1994-1997 by tolerating Ugandan rebel movements' use of the DRC's territory to launch attacks on Uganda (paras. 300-301). As the Court observes, "[t]he DRC recognized that anti-Ugandan groups operated on the territory of the DRC from at least 1986" (para. 300). It is not disputed that in the period relevant for this part of Uganda's claim (1994-May 1997), the anti-Ugandan rebel movements used the territory of the then Zaire to launch attacks against Uganda and its population who were victims of these attacks. Zaire was well aware of the situation.

2. Sovereignty of a State does not involve only rights but also obligations of a territorial State. The State has an obligation not only to protect its own people, but also to avoid harming its neighbours. This Court, in the *Corfu Channel* case, confirmed the "general and well-recognized prin-

ciple" according to which every State has the "obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States" (*Merits, Judgment, I.C.J. Reports 1949*, p. 22).

3. In accordance with the provisions of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, provisions which are declaratory of customary rules, "every State has the duty to refrain from . . . acquiescing in organised activities within its territory directed towards the commission of such acts [i.e. acts of civil strife or terrorist acts] when the acts involve a threat or use of force"; and, "no State shall . . . tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State" (A/RES/2625 (XXV)).

4. The duty of vigilance required Zaire to exert all good efforts in order to prevent its territory from being used to the detriment of Uganda. Whether Zaire complied with such a duty should be determined on the basis of Zaire's conduct. The geomorphological features or size of the territory does not relieve a State of its duty of vigilance nor render it less strict. Nor does the absence of central governmental presence in certain areas of a State's territory set aside the duty of vigilance for a State in relation to those areas. Otherwise such absence, coupled with the attacks originating in that territory would have justified the neighbouring State, victim of attack, to step in and to put an end to the attacks.

The duty of vigilance is an obligation of conduct, not an obligation of result. It may happen that despite all good efforts of a State, which has a duty of vigilance, the neighbouring State will nevertheless suffer harm. The occurrence of harm does not necessarily prove that the duty of vigilance was breached. But its occurrence creates the presumption that the obligation of vigilance has not been complied with. In such a case it would be for the State which has the duty of vigilance (i.e., the DRC in the present case) to demonstrate that it exerted all good efforts to prevent its territory from being misused for launching attacks against its neighbour in order to rebut such a presumption.

5. The DRC has not provided the Court with credible information on any such bona fide effort. Therefore, I am unable to concur with the view of the majority that the absence of action by Zaire's Government against the rebel groups in the border area is not tantamount to "tolerating" or "acquiescing" in their activities (para. 301). I am convinced that justice would have been done if the DRC were found responsible for Zaire's toleration of the activities of (anti-Ugandan) rebel groups from its territory against Uganda, in the first period up to May 1997, that is, for its own failure to comply with its obligation of vigilance.

6. The Court's finding in paragraph 9 of the *dispositif* concerns Uganda's first counter-claim *in toto*. Although I concur with the majority

with respect to the major part of the first counter-claim, nevertheless I cannot agree with its finding with respect to one of the elements of the counter-claim. That is sufficient, in my view, for upholding the counter-claim. So, at the end, I felt to be left with no other choice than to vote against paragraph 9 of the *dispositif*. Needless to say that what I consider to be a breach by the Democratic Republic of the Congo of its duty of vigilance cannot be compared to the magnitude of Uganda's breach of the prohibition of the use of force.

II. Grave Breaches of International Humanitarian Law — Obligation to Prosecute

7. The Court has found that Uganda has breached its obligations under international humanitarian law (paragraph 3 of the *dispositif*). When considering the allegation of breaches of international humanitarian law obligations by the Uganda Peoples' Defence Forces (UPDF), the Court, being convinced that they were committed, qualifies these breaches as grave (see paragraphs 207 and 208).

8. The Court has also determined the legal consequences of Uganda's breaches of its international legal obligations, including the obligations under international humanitarian law (see the *dispositif*, paragraph 6, and also paragraphs 251-261). In doing that, the Court took as a point of departure the fourth final submission of the DRC (see paragraphs 25 and 252) and determined these consequences under the general rules of international law on responsibility of States for internationally wrongful acts.

9. Nevertheless, since grave breaches of international humanitarian law were committed, there is another legal consequence which has not been raised by the DRC and on which the Court remains silent. That consequence is provided for in international humanitarian law. There should be no doubt that Uganda, as party to both the Geneva Conventions of 1949 and the Additional Protocol I of 1977 remains under the obligation to bring those persons who have committed these grave breaches before its own courts (Article 146 of the Fourth Geneva Convention, and Article 85 of the Protocol I Additional to the Geneva Conventions).

III. Self-Defence and the Non-Use of Force

10. The order in which the Court, in the present case, has dealt with legal issues relating to self-defence and the prohibition of the use of force is worthy of note.

The Court having first made its findings on the facts concerning Uganda's use of force (paras. 55 *et seq.*), then moves to the analysis of relevant legal norms. In this analysis, leaving aside the issue of the alleged

consent by the DRC to Uganda's military presence on the former's territory, the consideration of self-defence precedes that of the prohibition of the use of force. One may consider that order understandable since if, according to Article 51 of the Charter,

> "[n]othing in the present 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",

then a lawful exercise of the right to self-defence cannot constitute a breach of any relevant article of the United Nations Charter (*in concreto*, Art. 2, para. 4), and there would be no point in analysing the latter. Only once the Court concludes that "the legal and factual circumstances for the exercise of a right of self-defence by Uganda . . . were not present" (para. 147), is it incumbent upon it to consider, and to make findings on, the prohibition of the use of force (paras. 148 *et seq.*).

11. The prohibition on the use of force cannot be read without having regard to the Charter provisions on self-defence. The provisions on self-defence, in fact, delineate the scope of rules prohibiting the use of force. If a measure in question constitutes a lawful measure of self-defence, it necessarily falls outside the ambit of the prohibition. In other words, the prohibition of the use of force is not applicable to the use of force in lawfully exercised self-defence.

12. The order in which the Court considers self-defence and the prohibition of the use of force in the present case is thus different from that in which it considered them in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* (*Merits, Judgment, I.C.J. Reports 1986*, pp. 98-106, paras. 187-201; and pp. 118-123, paras. 227-238), although it does not lead to different conclusions.

(Signed) Peter TOMKA.