DECLARATION OF JUDGE *AD HOC* VERHOEVEN

[Translation]

"Declaratory" judgment: legality, limits — "Declaratory" judgment: Order indicating provisional measures, obligation of cessation, assurances and guarantees of non-repetition — Illegal use of force: consequences.

1. As witnessed by my votes on the various elements of the *dispositif* of the Judgment, I essentially concur in the conclusions reached by the Court. Nevertheless, it is easily understandable in a complex case, where the facts are sometimes difficult to ascertain, that some misgiving might be felt as to certain grounds for decision, or at least that markedly different reasoning might have been preferred on certain points. There is no need to dwell on this. It is enough that agreement prevails on the *dispositif* and the essential grounds underlying it. This notwithstanding, I think it useful to raise a few points concerning several questions which, while not addressed very explicitly in the Judgment, are not so removed from it as to render them inappropriate for discussion, even briefly, in this declaration.

2. The first question concerns the so-called "declaratory" nature of a decision; this was underscored more than once by the Applicant, which elsewhere characterized the decision as being one "of principle". These qualifiers are not very illuminating in themselves, given the multitude of meanings ascribed to the words used in them. The gist of the principal claim can nevertheless be readily grasped. It aims at holding the Respondent responsible for the instances of wrongful use of force attributable to it, but the claim separates the finding of a violation of law from reparation for the ensuing injury. Thus, it is only in a subsequent phase of the proceedings, once there has been a finding of unlawful conduct, that the Court is called upon to decide the form and extent of the reparation, failing agreement thereon between the parties. It is not certain that the term "declaratory" — which appears nowhere in the Judgment — adequately reflects this separation. In essence, there is however no doubt as to the latter's legality. This is clearly shown by, for example, the Court's Judgment 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*, p. 149, para. 292 (15)), even though, for reasons otherwise left unexplained, the Court did not grant the interim award which had been sought in that case (*ibid.*, p. 143, para. 285). In the present proceedings, the Respondent is moreover hardly in a position to attack the propriety of severing the two elements, since its counter-claims

are presented in like fashion.

In an international community, where, more than elsewhere, negotiated solutions are to be preferred to those imposed by third parties, even independent and impartial ones, it is understandable that the Court should not be disinclined to rule initially solely on the "principle" of the lawfulness of the acts or conduct complained of. This does not however mean that the parties are free to make selective use of the Court as they please. True, they are not required to have recourse to the Court; but, if they do submit to it, they cannot disregard its fundamental characteristics. In this regard the present case offers a glimpse of the constraints — or at least some of them — by which the Parties are bound when they thus seek to sever the finding of responsibility *per se* from its concrete implications. The fact that the Court does not rule on this point does not mean that its Judgment is devoid of significance in this regard.

(a) The first constraint stems from the existence of facts — given legal characterization — without which there is no cause of action on the claim and beyond the scope of which a judicial decision is not vested with the authority of *res judicata*. In the case concerning *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland)*, the Court declined to make "a declaration of principle that Iceland is under an obligation to make compensation to the Federal Republic [of Germany] in respect of all unlawful acts of interference with fishing vessels of the Federal Republic" (*I.C.J. Reports 1974,* p. 204, para. 74) alleged to have been harassed by Icelandic coastal patrol boats seeking to prevent them from conducting their fishing activities in a maritime area which had been declared exclusive. The reason for the Court's refusal is not entirely clear. In a case primarily involving a disputed delimitation, the main ground for decision appears however to have been that the Court had no knowledge of the injurious acts, in the absence of which a decision ordering reparation, even one in principle, would be meaningless. Thus, the Court needed only to hold that the disputed extension of a zone from which the Icelandic authorities sought to bar foreign vessels was not enforceable against the Applicant, implicitly referring the question of reparation for the alleged damage to a fresh Application — not to a subsequent phase of the proceedings initiated by the original Application.

In the present case the existence of the injuries is beyond doubt. What is distinctive here however is that the Court has treated them by category, as it were, without ruling on each injurious "incident". It is difficult to see how the Court could have proceeded otherwise, given the multiplicity of injuries and the circumstances in which they arose. The authority of its decision as *res judicata* is not, in principle, affected by this, nor is that authority more circumscribed than that of a traditional interim judgment deferring the final determination of reparation owed to a later time. In reality, the form and

amount of reparation will not be the only questions to be decided by the Court if the Parties fail to agree on them; it will also be for the Court to establish, in regard to those "incidents" falling within the category on which the Court has ruled, the causal nexus between an injury suffered and an act by the Respondent engaging its responsibility.

(b) It is also my view that a request to defer the decision on reparation should not be granted in the absence of persuasive reasons. It would be out of keeping with the dignity and true interest of the Court for it to allow proceedings to be severed when there is no objective justification for it. There is no difficulty with the Congo's principal claim and Uganda's first counter-claim in this respect. It is easy to see why the Applicant, owing to the long conflict between the Parties and its consequences, should seek a finding of responsibility on the part of the Respondent, which it accuses of serious violation of the prohibition on the use of force, without waiting to gather all the evidence needed for a decision on reparation. Uganda's second counter-claim is however much more questionable from this perspective. Given that the violations of law alleged therein are specific and limited, it is difficult to discern what could have prevented the Respondent from furnishing to the Court, without further delay, the information required for a decision on reparation. Admittedly, however, there are no real drawbacks to deferring that decision in the present case and the seeming discrimination in the treatment of the Parties could have been deemed undesirable. This is why I thought it unnecessary to part company with the other Members of the Court on this point.

That said, in my view the oral proceedings confirmed that the second counter-claim bore only a very weak connection with the object and purpose of the principal claim. Thus, when the Court turned to ruling on the admissibility of that counter-claim, I was of the opinion that it failed to satisfy the connection requirement laid down in Article 80 of the Rules of Court. The Court held the claim admissible however and it appears undeniable that the acts of which the Applicant is accused, as described in the Judgment, were breaches of international law.

3. Whether or not a claim confined to seeking a judgment on the legality of conduct or of an act can be admitted is another question. In my opinion, it cannot be. In a dispute over the respective rights of an applicant and respondent, the effectiveness of the judgment would be largely vitiated and the role of the Court distorted if it were to be forbidden to pronounce, with a view to effectively resolving the dispute between the parties, upon the juridical consequences of the legal violation it has found.

The present case raises no difficulty on this point since the Applicant is essentially seeking reparation for injuries which it sees as the result of legal violations for which it holds the Respondent responsible. Yet it is true that the Applicant asserts no claim in respect of what it deems to be the consequences of the violation of the Order imposing provisional measures on the Parties. Should the Court therefore have confined itself to holding that this part of the Application was inadmissible? That undoubtedly is going too far. The essential raison d'être of provisional measures being less to protect the rights of the parties than to safeguard the "effectiveness" of the decision to be rendered by the Court in their regard, non-compliance with those measures is in effect a challenge to the authority of the Court. It is therefore understandable that the Court should condemn, even *proprio motu* where appropriate, violations of ordered measures evidenced by acts within its cognizance, without thereby calling into question the general rule referred to above.

For the same reason, I do not believe admissible an application confined to seeking, in addition to a finding of illegality, a ruling that there is an obligation to cease and desist from it. Such a ruling would be independent of the finding of illegality only if there existed a right to persist in a violation, and that would seem preposterous. It does not matter whether or not the State concerned undertakes to put an end to the violation, because it obviously cannot unilaterally renounce its obligations. This is most certainly not the same as seeking guarantees to this end; that is beyond the scope of a "declaratory" judgment strictly speaking. But a court cannot order such guarantees unless they have been requested, which is not the case here; further, they can only be ordered if they are in keeping with the intrinsic limits on a judicial function which is fundamentally that of "stating" the law and which accordingly does not include the power to order future measures deemed helpful in maintaining the security or protecting the interests of the prevailing party.

4. The Court refers in point 3 of the *dispositif* to the obligation to "respect and ensure respect for human rights and international humanitarian law" in Ituri district, occupied by the Respondent. This obligation cannot be denied, even though some uncertainty might endure as to the exact meaning of the expression "ensure respect for". The scope of the obligation nevertheless extends well beyond the needs of the "occupation" in the technical sense of the term. This goes without saying for the obligation to "respect" international humanitarian law and human rights, but it is also true of the obligation to "ensure respect" for them, as is clear from, for example, the four Geneva Conventions (1949) and the first Additional Protocol to them (1977). Thus, point 3 of the *dispositif* cannot be interpreted as relieving the Respondent of any duty of vigilance in areas where its troops are present but which are not "occupied" by them within the meaning of the *jus in bello*. This is so even where the use of force is in accordance with the *jus ad bellum*, because the lawfulness or unlawfulness of the use of arms is extraneous to the fundamental requirements of protection of persons from which international humani-

tarian law and human rights draw their inspiration. But this holds particularly true when a State uses force in violation of the *jus ad bellum*, because it must assume responsibility for the consequences of the unrest and chaos unleashed, as in the present case, by its military intervention.

5. In point 5 of the *dispositif* the Court "finds" that Uganda is under an obligation to make reparation to the Congo for the injury caused, referring to the damage resulting from the violations of law found in points 1, 3 and 4 of the *dispositif*. There is nothing out of the ordinary about this *per se*. And it is clearly elementary that unilateral use of force, when illegal, engages the responsibility of the author. At the time when there were essentially no restrictions on the use of force, it was understandable that war reparations should by nature escape the rules of responsibility. However, ever since the Charter of the United Nations clearly banned the use of force, it is difficult to see how a State having used armed force otherwise than in self-defence can elude its obligation to make reparation for the injury it has caused. It must be stressed that this injury comprises all the damage deriving from the violation of the prohibition on the use of force, regardless of whether it stems from acts or practices which in themselves comply with the rules of the law of war. It may be that breach of these rules augments the responsibility deriving from the violation of the *jus ad bellum*; be that as it may, compliance with the *jus in bello* is never sufficient to release a party from the obligation to make good all consequences of its violation of the *jus ad bellum*. Where occupation is unlawful because it results from the use of force otherwise than in self-defence, the occupying State bears an obligation, for example, to make reparation for all ensuing damage, even if it has acted in accordance with the Fourth Geneva Convention (1949) and with the Regulations annexed to the Fourth Hague Convention (1907). Contrary to the suggestion by the Respondent, an occupant enjoys no right or prerogative under those Regulations by which it can avoid responsibility in respect of an occupation established in violation of the *jus ad bellum*. This is one of the basic consequences of the contemporary prohibition on the use of force. It does not follow that a State legally using force may breach the *jus in bello*; the only point is that a State unlawfully using force cannot plead compliance with the *jus in bello* to avoid having to make reparation for the injury resulting from its military actions.

As basic as it is, this application of the law of responsibility can on occasion give rise to difficulties. Some are technical. For example, in the context of an armed conflict the causal connection between the injury and the violation of the law will often be difficult to prove, at least under the standards traditionally applied for this purpose. Others are more fundamental. There can, for instance, be some injustice in requiring a people, particularly a (very) poor one, to pay a debt, possibly a (very) heavy one, born of the errant conduct of leaders over whom it had little,

or no, hold. The concern is one of long standing and is justified. It will no doubt require international law one day to establish the conditions and limits governing payment of State debts. Alone, it offers no basis for calling into question the principle that a State having unlawfully used force must make reparation for all the consequences of its "wrongdoing".

(Signed) Joe VERHOEVEN.