DECLARATION OF JUDGE CANÇADO TRINDADE

1. In concurring with the adoption of the present Order (of 11 April 2016) of the International Court of Justice (ICJ) in the case of *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, in which the Court discloses its prudence as to the length of the requested extension of time, I feel obliged, at the same time, to lay on the records, in this declaration, my concern at the continuing prolongation of the proceedings as to reparations in the *cas d'espèce*.

2. Looking back in time, it took almost a decade, since the Court's Judgment of 19 December 2005 (on the merits) in the present case, for the Contending Parties to come to the conclusion, in their inter-ministerial meeting held in Pretoria, on 17-19 March 2015, that they had not succeeded to reach a consensus in their negotiations. The aforementioned Judgment of 19 December 2005 — over a decade ago — set forth the duty of the Contending Parties to provide reparations for damages.

3. In effect, the Democratic Republic of the Congo and Uganda have both shown their awareness that the proceedings in the present case have consumed far too long a time. The Democratic Republic of the Congo did so, when asking the Court (Application of 8 May 2015) "to reopen proceedings" for determination of the reparations due. In its Order of 1 July 2015, the ICJ decided to resume the proceedings on reparations.

4. In my declaration appended to that Order, I pondered that the lesson to be learned was that "the Court should not have left the question of reparations, as it did in its Judgment of 19 December 2005, open to negotiations between the parties without a time-limit, without a reasonable time" (*I.C.J. Reports 2015 (II)*, p. 586, para. 4). After all, I added, the members of the segments of the population victimized in the present case have kept on waiting, for more than one decade, for "the reparations due to them for the damages they suffered" *(ibid.)*.

5. Yet, shortly afterwards, upon a new request of the Democratic Republic of the Congo (not objected to by Uganda), the ICJ issued a new Order in the *cas d'espèce*, of 10 December 2015, this time granting a further extension of the time-limit for the filing of the Memorials (on reparations) of the two Contending Parties[1]. And now, once again, in the more recent correspondence presented to the Court, the Democratic Republic

[1] The time-limit was extended by the Court from 6 January 2016 to 28 April 2016. The Democratic Republic of the Congo had asked for an extension until "late April or mid-May 2016".

of the Congo requests (letter of 31 March 2016) another extension of time[2], given the large scale of the damages and the complexity of the fact-finding.

6. In its letter of response (of 6 April 2016), Uganda, for its part, states that it is prepared to agree with a much shorter extension of time[3]. The Court, in the Order it has just adopted today, has found an intermediary solution, in between the time-extension requested by the Democratic Republic of the Congo and the one agreed upon by Uganda. In the resolutory point of the present Order of the ICJ, it extends to 28 September 2016 the time-limit for the filing by the two Parties of their respective Memorials on reparations.

7. It is understandable that both Contending Parties seek to prepare and substantiate their arguments as to reparations, and this is commendable, but this should not entail further prorogations or delays in the proceedings. *Tempus fugit*. In their more recent correspondence addressed to the Court, the Contending Parties have shown their awareness of this. Thus, in its letter of 31 March 2016, the Democratic Republic of the Congo stated that it felt obliged to request this new extension of time-limit "with reluctance" (p. 1), given the "unprecedented complexity" of this dispute (a five-year conflict), in which "for the first time in its history the Court will be faced with the question of reparation for war damages on such an unusual scale" (p. 1).

8. Yet, other contemporary international tribunals have for some time been constructing their case law on this matter[4]; a study of it could prove useful to the Contending Parties in the *cas d'espèce*, as well as to the ICJ

[2] Now an additional extension of ten months.

[3] Namely, an extension of three months.

[4] Cf. A. A. Cançado Trindade, *The Access of Individuals to International Justice*, Oxford University Press, 2011, pp. 151-191; A. A. Cançado Trindade, *Evolution du droit international au droit des gens — L'accès des particuliers à la justice internationale: le regard d'un juge*, Paris, Pedone, 2008, pp. 132-146 and 151-184; A. A. Cançado Trindade, *El Ejercicio de la Función Judicial Internacional — Memorias de la Corte Interamericana de Derechos Humanos*, 3rd ed., Belo Horizonte/Brazil, Edit. Del Rey, 2013, pp. 59-74 and 336-342; A. A. Cançado Trindade, *El Derecho de Acceso a la Justicia en Su Amplia Dimensión*, 2nd ed., Santiago de Chile, Ed. Librotecnia, 2012, pp. 367-396 and 423-559; A. A. Cançado Trindade, *Los Tribunales Internacionales Contemporáneos y la Humanización del Derecho Internacional*, Buenos Aires, Ed. Ad-Hoc, 2013, pp. 113-129; A. A. Cançado Trindade, *State Responsibility in Cases of Massacres: Contemporary Advances in International Justice*, Utrecht, Universiteit Utrecht, 2011, pp. 1-71. And cf. also: [Various Authors], *Réparer les violations graves et massives des droits de l'homme: La Cour Interaméricaine, pionnière et modèle?* (eds. E. Lambert Abdelgawad and K. Martin-Chenut), Paris, Ed. Société de législation comparée, 2010, pp. 17-334; I. Bottigliero, *Redress for Victims of Crimes under International Law*, Leiden, Nijhoff, 2004, pp. 1-253; [Various Authors], *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity* (eds. C. Ferstman, M. Goetz and A. Stephens), Leiden, Nijhoff, 2009, pp. 7-566; L. Moffett, *Justice for Victims before the International Criminal Court*, London/N.Y., Routledge, 2014, pp. 1-289; J.-B. Jeangène Vilmer, *Réparer l'irréparable — Les réparations aux victimes devant la Cour pénale internationale*, Paris, PUF, 2009, pp. 1-182.

itself. In any case, as to the time-length, in their latest arguments before the ICJ, the Contending Parties disclosed their awareness of the need to avoid further delays in the present proceedings on reparations. Thus, still in its letter of 31 March 2016, the Democratic Republic of the Congo announced that "this request for postponement will be the last of the kind" (p. 2).

9. For its part, in its letter of 6 April 2016, Uganda considered the time-extension requested "excessive" and "disproportionate" (pp. 1-2): as considerable time has already lapsed (since the 2005 Judgment on the merits), this case being "the second oldest on the Court's docket", it proceeded, the applicant State "has already had considerable time to collect evidence relating to its reparations claim" (p. 1). Uganda added that this matter should be now "resolved on a timely basis" (p. 2).

10. Over a decade ago, in delivering its Judgment of 19 December 2005 on the merits in the present case, the ICJ was aware that the particularization of the damages inflicted by the Parties was, at that stage, of course not sufficient: such account of damages had been addressed by the Democratic Republic of the Congo mainly in its Reply of 29 May 2002, and by Uganda in its Counter-Memorial of 21 April 2001, but in rather general terms, and not set out in great detail. In its 2005 Judgment, the Court made it clear that, in order to decide on reparations, though it was not necessary to embark on findings of fact with regard to each individual incident (paras. 205 and 237), the whole matter had to be addressed in greater detail at the following stage of reparations (para. 345 (6) and (14)), when it would need to be particularized.

11. The complexity of the case is widely known. Yet, as years go by, the history of the conflict at issue is gradually being written[5]. The needed particularization of the damages is possible, in particular for the purpose of collective reparations to the victims, and it should not entail further delays in the proceedings. After more than a decade, the time has now come for a prompt determination of the reparations for damages inflicted upon the numerous victims.

12. According to a *célèbre* maxim, *justice delayed is justice denied*. This point was the object of meditation already in Seneca's *Moral Letters to Lucilius* (circa 62-64 AD). In the search for the realization of justice, undue delays are indeed to be avoided. The victims (in armed conflicts) of grave

[5] Cf., *inter alia*, e.g., N. Nzereka Mughendi, *Guerres récurrentes en République démocratique du Congo — Entre fatalité et responsabilité*, Paris, L'Harmattan, 2010, pp. 15-199; P. Mbeko and H. Ngbanda-Nzambo, *Stratégie du chaos et du mensonge — Poker menteur en Afrique des Grands Lacs*, Québec, Edit. de l'Erablière, 2014, pp. 9-643; Lwamba Katansi, *Crimes et châtiments dans la région des Grands Lacs*, Paris, L'Harmattan, 2007, Chap. 7, pp. 41-72; G. Prunier, *Africa's World War — Congo, the Rwandan Genocide, and the Making of a Continental Catastrophe*, Oxford University Press, 2010, pp. 113-368 and 396-468; Th. Turner, *The Congo Wars: Conflict, Myth and Reality*, London/N.Y., Zed Books, 2008 (reimpr.), pp. 1-233.

breaches of the international law of human rights and of international humanitarian law have a *right to reparations* — most likely collective reparations, and in their distinct forms — within a reasonable time.

13. The more time passes, the more difficult fact-finding and investigations *in loco* become. I have addressed this point, among others, in my recent and extensive dissenting opinion (paras. 149-179, 195, 287, 321, 497-499, 533-535 and 538-539 in the case of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia)*, Judgment of 3 February 2015). Furthermore, as a life time is rather brief, and passes fast, many victims of those grave violations cross the final threshold of their lives without finding justice, or else having lost any hope in it.

14. Ancient Stoic thinking was already conscious of the perennial mystery surrounding human existence, that of the passing of time. Stoicism, in its perennial wisdom, recommended (as in, e.g., Seneca's *De Brevitate Vitae*, circa 40 AD) to keep always in mind all times — past, present and future — jointly: time past, by means of remembrance; time present, so as to make the best use of it (in search of justice); and time future, so as to anticipate and prevent all one can, thus seeking to make life longer.

15. The duty of reparation is firmly-rooted in the history of the law of nations. The acknowledgment of such duty goes back to its origins, to the perennial lessons of the "founding fathers" of international law. In this connection, four years ago, in my lengthy separate opinion in the case of *Ahmadou Sadio Diallo ((Republic of Guinea* v. *Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012 (I))*, I deemed it fit to recall the lessons and writings of the "founding fathers" that expressly referred to it (*ibid.*, pp. 351-352, para. 12 and pp. 353-354, paras. 15-19), in the light of the principle *neminem laedere*.

16. I thus recalled the relevant passages in the classic works of, e.g., Francisco de Vitoria (*Second Relectio de Indis*, 1538-1539); Hugo Grotius (*De Jure Belli ac Pacis*, 1625, Book II, Chap. 17); Samuel Pufendorf (*Elementorum Jurisprudentiae Universalis — Libri Duo*, 1672; and *On the Duty of Man and Citizen According to Natural Law*, 1673); Christian Wolff (*Jus Gentium Methodo Scientifica Pertractatum*, 1764; and *Principes du droit de la nature et des gens*, 1758); among others, such as the pertinent considerations also of Alberico Gentili (*De Jure Belli*, 1598); Francisco Suárez (*De Legibus ac Deo Legislatore*, 1612); Cornelius van Bynkershoek (*De Foro Legatorum*, 1721; and *Quaestiones Juris Publici — Libri Duo*, 1737).

17. There is nothing new under the sun. The more we do research on the classics of international law (largely forgotten in our hectic days), the more we find reflections on the victims' right to reparations for injuries — also present in the writings of, e.g., Juan de la Peña (*De Bello contra Insu-*

lanos, 1545); Bartolomé de Las Casas (*De Regia Potestate*, 1571); Juan Roa Dávila (*De Regnorum Justitia*, 1591); Juan Zapata y Sandoval (*De Justitia Distributiva et Acceptione Personarum ei Opposita Disceptatio*, 1609).

18. In sum, since the origins of the law of nations, there was acknowledgment of the duty to provide redress to those who suffered damages caused by wrongful acts, in distinct circumstances. The realm of the evolving *jus gentium*, the law of nations, was conceived as encompassing the international community of (emerging) States, as well as all peoples, groups and individuals: *jus gentium* was regarded as co-extensive with humanity.

19. The duty of reparation for injuries was clearly seen as a response to an *international need*[6], in conformity with the *recta ratio* — whether the beneficiaries were (emerging) States, peoples, groups or individuals. The *recta ratio* provided the basis for the regulation of human relations with the due respect for each other's rights[7]. As I have pondered in my earlier declaration appended to the Court's previous Order of 1 July 2015 in the present case and I here reiterate in the ICJ's new Order just adopted today (11 April 2016),

> "Reparations, in cases involving grave breaches of the international law of human rights and of international humanitarian law (. . .) are to be resolved by the Court itself, within a reasonable time, bearing in mind not State susceptibilities, but rather the suffering of human beings, — the surviving victims, and their close relatives, — prolonged in time, and the need to alleviate it. The aforementioned breaches and prompt compliance with the duty of reparation for damages, are not be separated in time: they form an indissoluble whole." (*I.C.J. Reports 2015 (II)*, p. 587, para. 7.)

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[6] J. Brown Scott, *The Spanish Origin of International Law — Francisco de Vitoria and His Law of Nations*, Oxford/London, Clarendon Press/H. Milford, 1934, pp. 140, 150, 163, 165, 172, 210-211 and 282-283; and cf. also, Association Internationale Vitoria-Suarez, *Vitoria et Suarez: Contribution des théologiens au droit international moderne*, Paris, Pedone, 1939, pp. 73-74, and cf. pp. 169-170; A. A. Cançado Trindade, "Prefacio", in *Escuela Ibérica de la Paz (1511-1694) — La Conciencia Crítica de la Conquista y Colonización de América* (eds. P. Calafate and R. E. Mandado Gutiérrez), Santander, Ed. Universidad de Cantabria, 2014, pp. 40-109.

[7] The *right reason* lies at the basis of the law of nations, being the spirit of justice in the line of natural law thinking; this trend of international legal thinking has always much valued the *realization of justice*, pursuant to a "superior value of justice". P. Foriers, *L'organisation de la paix chez Grotius et l'école de droit naturel* [1961], Paris, J. Vrin, 1987, pp. 293, 333, 373 and 375 [reed. of study originally published in: *Recueil de la Société Jean Bodin pour l'histoire comparative des institutions*, Vol. 15-Part II, Brussels, Libr. Encyclopédique, 1961].

20. In the present case, the ultimate beneficiaries of reparations for damages resulting from grave breaches of the international law of human rights and international humanitarian law (as determined by the ICJ) are the human beings victimized. They are the *titulaires* of the right to reparations, as subjects of the law of nations, as conceived and sustained, in historical perspective, by the "founding fathers" of international law. This is deeply-rooted in the historical trajectory of our discipline. As *titulaires* of that right, they have, in the *cas d'espèce*, been waiting for reparations for far too long a time; many of them have already passed away. *Justitia longa, vita brevis*.

(Signed) Antônio Augusto CANÇADO TRINDADE.