INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING
ARMED ACTIVITIES ON THE TERRITORY OF THE CONGO

DEMOCRATIC REPUBLIC OF THE CONGO
v.
UGANDA

MEMORIAL OF UGANDA ON REPARATION

VOLUME I

28 SEPTEMBER 2016

Table of Contents

CHAPTER 1

INTRODUCTION

1.1 At the request of the Democratic Republic of the Congo (the "DRC"), the Court by Order dated 1 July 2015 resumed proceedings in this case on the issue of reparation. In its Order, the Court set 6 January 2016 as the time-limit for the simultaneous filing of Memorials by the DRC and the Republic of Uganda with regard to the reparations each State considers are to be owed to it by the other.

1.2 At the request of the DRC, the original time limit was extended first to 28 April 2016 (by Order dated 10 December 2015) and later to 28 September 2016 (by Order dated 11 April 2016). Pursuant to the latter Order, Uganda respectfully submits this Memorial on the nature and amount of reparations owed to it by the DRC.

1.3 The Court will recall that the DRC originally instituted these proceedings by Application filed with the Court on 23 June 1999. In its Application, the DRC asserted a number of claims against Uganda relating to its alleged presence in and activities on the territory of the DRC.

1.4 In its Counter-Memorial dated 21 April 2001, Uganda responded to the DRC's claims on the merits and included a number of counter-claims relating, *inter alia*, to the DRC's mistreatment of Ugandan nationals and diplomats, and

the breach of international obligations it owed with respect to Uganda's diplomatic mission in Kinshasa.

1.5 After written pleadings, the Court held oral hearings on the merits of the DRC's claims and Uganda's counter-claims between 11 and 29 April 2005. The Court thereafter issued its Judgment on the Merits on 19 December 2005 (the "2005 Judgment"). In its 2005 Judgment, the Court determined that both Parties were obligated to make reparation to each other for the injury caused by their internationally wrongful acts.

1.6 Specifically, the Court found:

a. Uganda to be obligated to make reparation to the DRC for certain violations of international law;[1] and

b. the DRC to be obligated to make reparation to Uganda for the injury caused by (1) the conduct of the DRC's armed forces, which attacked the Ugandan diplomatic premises in Kinshasa, maltreated Ugandan diplomats and other individuals on the diplomatic premises, and maltreated Ugandan diplomats at Ndjili International Airport; and (2) the DRC's failure to provide the Ugandan diplomatic premises and Ugandan diplomats with effective protection, and its failure to prevent

[1] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005 (hereinafter "*Armed Activities* (2005)"), paras. 345(1)-(5).

archives and Ugandan property from being seized from the diplomatic premises.[2]

1.7 In its 2005 Judgment, the Court took note of the DRC's stated "intention to seek initially to resolve the issue of reparation by way of direct negotiations with Uganda".[3] It therefore instructed "the Parties [to] seek in good faith an agreed solution based on the findings of the present Judgment."[4] The Court further stated that "failing agreement between the Parties, the question of reparation due [by one party to another] shall be settled by the Court" and reserved for this purpose the subsequent procedure in the case.[5]

1.8 In accordance with the Court's direction, Uganda has sought in good faith over a number of years to reach an agreed solution with the DRC based on the Court's 2005 Judgment and the rules of international law applicable to reparation.

1.9 Uganda is approaching the negotiations with openness and a desire to promote peace, stability and friendly relations with its brothers and sisters in the DRC. Unfortunately, no agreement has yet been reached. Even so, as explained in paragraphs 1.48-1.51. Uganda considers that these negotiations on reparation have not been exhausted.

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[2] *Ibid.*, paras. 345(12)-(13).

[3] *Ibid.*, para. 261.

[4] *Ibid.*

[5] *Ibid.*, paras. 345(6)-(14).

1.10 Uganda in no way impugns the good faith of the DRC. Nevertheless, Uganda considered, as a matter of principle, that the DRC's position throughout the negotiations had no basis in law relating to questions of reparation on the international plane. As a matter of practice, Uganda considered the specific quantum sought by the DRC—more than US$ 23.5 *billion*—to be unfounded and excessive in the extreme.

I. The Structure of the Memorial

1.11 Uganda's Memorial consists of two volumes. Volume I contains the main text of the Memorial. Volume II contains additional supporting material.

1.12 The main text of the Memorial consists of three chapters, followed by Uganda's Submissions. This **Chapter 1** is an introduction, which sets out the structure of the Memorial as well as information with respect to the Parties' effort to negotiate a settlement on the issue of reparations.

1.13 **Chapter 2** sets out the rules of international law governing reparation for wrongful acts. These rules apply equally to Uganda's counter-claims and to the claims of the DRC.

1.14 **Chapter 3** presents the specifics of Uganda's counter-claims. For the reasons stated there, Uganda considers that satisfaction is the appropriate form of reparation for: (a) the mistreatment of its diplomats and other nationals on the

premises of Uganda's diplomatic mission in Kinshasa, and the mistreatment of its diplomats at Ndjili Airport; (b) the damage done to the former official residence of Uganda's Ambassador to the DRC; and (c) the seizure of all movable property located in and on Uganda's diplomatic premises. In light of the evidentiary record to be presented, Uganda also considers that compensation in the total amount of US$ 987,797.73 is the appropriate form and quantum of reparation for the damages done to its former Chancery building in Kinshasa.

1.15 This Memorial concludes with Uganda's Submissions in respect of its counter-claims.

II. The History of Negotiations

1.16 Recounting the full history of the Uganda-DRC negotiations is neither necessary nor relevant to the present proceedings. Uganda will therefore bring the Court's attention to the most notable events of those negotiations.

1.17 On 8 September 2007, Uganda and the DRC concluded the Ngurdoto-Tanzania Agreement on Bilateral Cooperation (the "Ngurdoto Agreement"), in which the Parties underscored their "determin[ation] to promote social, cultural, economic, and political cooperation in order to achieve peace, security and prosperity" between the two States.

1.18 As part of that process, the Parties agreed in Article 8 of the Ngurdoto Agreement to "constitute … an *ad hoc* committee to study the ICJ Judgment in the *Case concerning Armed Activities on the DRC Territory (DRC v. Uganda)* and recommend to the Joint Permanent Commission of Cooperation modalities of implementing its orders on the question of Reparation."[6] (The Joint Permanent Commission of Cooperation, or JPCC, was first created in 1986 but had been inactive for 10 years prior to the Ngurdoto Agreement.[7])

1.19 Uganda proceeded to constitute its own *ad hoc* committee promptly following the Ngurdoto Agreement and sent a follow-up communication to the DRC inquiring as to the status of the DRC's committee. It received no response.

1.20 Subsequently, on 25 May 2010, the Parties convened a ministerial level meeting in Kampala, Uganda, during which they formally constituted the joint *ad hoc* committee, consisting of seven members from each side, envisioned in the Ngurdoto Agreement.[8] The Agreed Minutes of the meeting provide that:

a. "The Joint Team will adopt a Workplan, rules of procedure and determine timeframes for completing work"; and

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[6] Ngurdoto-Tanzania Agreement between the Democratic Republic of the Congo and the Republic of Uganda on Bilateral Cooperation (8 Sept. 2007) (hereinafter "Ngurdoto-Tanzania Agreement"), Art. 8. Vol. II, Annex 1.

[7] *Ibid*., Art. 6.

[8] Government of Uganda and the Government of the Democratic Republic of Congo, *Agreed Minutes of the Ministerial Level Meeting between the Republic of Uganda and the Democratic Republic of Congo* (25 May 2010), p. 1. Vol. II, Annex 6.

b. "As per Article 8 of [the Ngurdoto Agreement] the Ad Hoc committee shall report to the JPC; including modalities for implementing the work plan".[9]

1.21 Also at the 25 May 2010 meeting, the DRC *for the first time* submitted to Uganda an evaluation of the damages it alleged it had suffered as a result of Uganda's internationally wrongful acts a decade earlier.[10]

1.22 Uganda considers that because it was submitted outside the litigation process in the context of an attempt to settle the Parties' dispute through negotiations, the DRC's 2010 evaluation of its alleged damages (like Uganda's response discussed below) is confidential. It would therefore be inappropriate to annex it to this pleading or otherwise discuss the details of the DRC's presentation. Uganda notes only that other documents in the non-confidential record of negotiations reflect that the quantum of compensation claimed by the DRC (from which it never moved) was more than US$ 23.5 billion.[11]

1.23 Uganda responded to the DRC's evaluation of its damages and presented the details of its own reparation claim at a ministerial meeting held in

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[9] *Ibid*.

[10] *Ibid*.

[11] Government of Uganda and the Government of the Democratic Republic of Congo, *The Joint Report of the Meeting of Experts of the Democratic Republic of Congo and the Republic of Uganda on the Implementation on the Judgment of the ICJ of 19th December 2005* (13-17 Mar. 2015), p. 12, Vol. II, Annex 10.

Johannesburg, South Africa, on 13-14 September 2012.[12] Uganda, at the time, proposed that the DRC pay it US$ 3.7 million as monetary compensation on its counter-claims.[13]

1.24 At the opening session of the meeting "Hon. Sam K. Kutesa, Minister of Foreign Affairs of Uganda thanked the Congolese delegation for accepting Uganda's proposed date for the Joint Ad hoc Committee meeting". [14] He also:

> "took note of positive developments in Uganda and the DRC bilateral relations. He also reiterated Uganda Government's commitment to further strengthen bilateral relations and to reach a fair and speedy settlement in the matter between the two parties as per the ruling of the International Court of Justice." [15]

1.25 For her part, "Her Excellency Mrs. Wivine Mumba Matipa, Minister of Justice and Human Rights of DRC, expressed the gratitude of the Congolese Government for the positive role played by Uganda in the stabilization of the Great Lakes region."[16] In this respect, Uganda observes that it has consistently endeavoured to be a positive force for the re-establishment of peace and security

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[12] Government of Uganda and the Government of the Democratic Republic of Congo, *Minutes of the Ministerial Meeting between the Republic of Uganda and the Democratic Republic of Congo* (13-14 Sept. 2012), p. 1. Vol. II, Annex 7.

[13] Government of Uganda and the Government of the Democratic Republic of Congo, *The Joint Report of the Meeting of Experts of the Democratic Republic of Congo and the Republic of Uganda on the Implementation on the Judgment of the ICJ of 19th December 2005* (13-17 Mar. 2015), p. 7, Vol. II, Annex 10.

[14] *Ibid.*, p. 2.

[15] *Ibid*.

[16] *Ibid*.

in the eastern DRC. Thus, for example, at the request of the DRC, Uganda helped mediate the dispute between the DRC government and the M23 rebel group in 2012-2013.[17] This resulted in the 12 December 2013 Nairobi accords ending the last major military conflict in the DRC.

1.26 At the September 2012 Johannesburg meeting, DRC Minister Matipa also "expressed the commitment of the DRC Government to resolve the dispute in order to respond to the legitimate aspirations of our people in order to focus on the matters of interest to both countries namely social and economic development, peace and stability in the region."[18]

1.27 With regards to the merits of the DRC's claim as reflected in its 2010 evaluation of damages, the minutes state that:

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[17] *See*, "Ban Welcomes Signing of Declaration between DR Congo-M23", *United Nations News Centre* (13 Dec. 2013), p. 1 (The Press release notes that: "Talks between the M23 – mostly composed of soldiers who mutinied from the DRC national army in April last year – and the Government have been held in Kampala, Uganda, under the auspices of the Chairperson of the International Conference for the Great Lakes Region (ICGLR), Ugandan President Yoweri Museveni, the Mediator, as well as Ugandan Defence Minister and Facilitator, Crispus Kiyonga."). Vol. II, Annex 18; "Eighth Preliminary Meeting Between the DR Congo Government and M23", *International Conference on the Great Lakes Region* (11 Jan. 2013) ("Since the return of the delegations to Kampala, the Facilitator has been consulting with the two teams with a view to finding a way forward. Consequently, the plenary sessions have resumed. The Facilitator has also been consulting with the leadership of the United Nations and USA with a view to ensuring that the recent sanctions slammed on M23 do not create negative implications for the dialogue. His understanding now is that these sanctions don't affect the dialogue. The dialogue is being facilitated by Dr. Crispus Kiyonga, Minister of Defence of the Republic of Uganda. The DRC government delegation is led by H.E Raymond Tshibanda, Minister of Foreign Affairs, International Cooperation and Francophonie of DRC. The delegation of M23 is led by Mr. François Rucogoza, Executive Secretary of M23."). Vol. II, Annex 33.

[18] Government of Uganda and the Government of the Democratic Republic of Congo, *Minutes of the Ministerial Meeting between the Republic of Uganda and the Democratic Republic of Congo* (13-14 Sept. 2012), p. 2. Vol. II, Annex 7.

> "1. Uganda, [i]n presenting the response to the DRC claim for damages, highlighted that the DRC claim for damages was excessive and exaggerated and does not observe the parameters of the International Court of Justice.
>
> 2. Uganda therefore requested the DRC to review its claim and present a more realistic figure that takes into account the parameters set by the International Court of Justice to determine reparations." [19]

1.28 With respect to Uganda's claim for compensation, the DRC expressed the view that "it is exaggerated, disproportionate and unfounded according to relevant and credible proofs. The DRC has instead proposed to pay an amount of USD 10,000 on the basis of the premises assessment report done by both parties in 2002."[20]

1.29 At the conclusion of the Johannesburg meeting, the two delegations agreed that they would "work together to present respective proofs to support any figures that will be ultimately agreed upon in respect of both claims in order to reach a negotiated settlement of the dispute." [21]

1.30 Representatives of the two States met again between 10 and 14 December 2012 in Kinshasa to begin the process of exchanging evidence supporting their respective claims. According to the minutes of that meeting, the DRC's Vice Minister of Foreign Affairs opened the first working session of the meeting with

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[19] *Ibid*.

[20] *Ibid*.

[21] *Ibid*.

remarks during which he "insisted on the fraternal and excellent relation[s] that does not only exist between the Uganda[n] and Congolese people but also between their Excellencies Presidents Yoweri K. Museveni and Joseph Kabila Kabange."[22]

1.31 During the meeting, the Parties exchanged documents relating to each other's claims but, given the quantity of information exchanged, agreed to meet again at a later date to continue their discussions.[23]

1.32 Between 24 and 27 November 2014, the two Parties met again at the ministerial level in Johannesburg. During this meeting, Uganda presented a detailed assessment of what it considered to be the flaws in the materials the DRC had made available to Uganda. Speaking on behalf of Uganda, Hon. Peter Nyombi, the then-Attorney General, offered an assessment of the DRC's evidence based on the relevant rules of international law. Rather than burden the Court with a recapitulation of Attorney General Nyombi's presentation here, Uganda invites the Court to review it at Annex 5 of this Memorial, should it be so interested.[24]

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[22] Government of Uganda and the Government of the Democratic Republic of Congo, *Minutes of the 3rd Meeting of Ugandan and Congolese Experts on the Implementation of the Ruling of the International Court of Justice of 19 December 2005* (14 Dec. 2012), p. 2. Vol. II, Annex 8.

[23] *Ibid*.

1.33 In any event, Attorney General Nyombi concluded his remarks with the following statement:

> "the above evaluation of the evidence provided by the DRC to support her claim should not in itself be the final conclusion of the matter but rather the evlaution [sic] should facilitate the arbitration and negotiation process towards reaching a final and amicable solution through the spirit of cooperation and brotherliness as was envisaged in the bilateral cooperation framework handed over to us by our two Presidents and expressed in the Ngurdoto Agreement."[25]

1.34 Because the Parties were unable to reconcile their positions at this meeting, the Ministers "directed that the two positions be harmonized as soon as possible. Thereafter the two parties shall meet before mid February 2015 in South Africa to conclude the negotiations."[26]

1.35 The meeting was delayed slightly to March 2015, when, between 13 and 17 March 2015, experts from both Parties met in advance of a ministerial meeting that followed immediately thereafter. At the meeting, the DRC insisted on its

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[24] Government of Uganda, *Response by Uganda on the Evaluation of the Evidence Submitted by the Democratic Republic of Congo in Support of Her Claim Arising out of the ICJ Judgment of December 2005* (24-29 Nov. 2014). Vol. II, Annex 5.

[25] *Ibid*., p. 24.

[26] Government of Uganda and the Government of the Democratic Republic of Congo, *Agreed Minutes of the 2nd Ministerial Meeting of the Ad Hoc Committee of Uganda/Democratic Republic of Congo on the Implementation of the Ruling of the ICJ (2005)*(24-27 Nov. 2014), p. 4. Vol. II, Annex 9.

original position of claiming more than US$ 23.5 billion in compensation.[27]

1.36 At the DRC's invitation, Uganda offered its observations on the methodological and legal aspects of the DRC's claim. Specifically:

a. Uganda reminded the DRC that "according to the ICJ 2005 judgment, the DRC bears the evidentiary burden to prove the exact injury that it suffered as a result of the specific actions of Uganda for which it is responsible under international law."[28] Uganda considered this burden not met in regard to the claimed amount.

b. Uganda pointed out that "while collecting data, the DRC did not follow the internationally acceptable standards of collection of data which include collection of primary evidential materials, verification, analysis and evaluation. The DRC relied on figures proposed by the claimants without any verification, analysis or evaluation."[29]

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[27] Government of Uganda and the Government of the Democratic Republic of Congo, *The Joint Report of the Meeting of Experts of the Democratic Republic of Congo and the Republic of Uganda on the Implementation on the Judgment of the ICJ of 19th December 2005* (13-17 Mar. 2015), p. 12, Vol. II, Annex 10.

[28] Government of Uganda and the Government of the Democratic Republic of Congo, *The Joint Report of the Meeting of Experts of the Democratic Republic of Congo and the Republic of Uganda on the Implementation on the Judgment of the ICJ of 19th December 2005* (13-17 Mar. 2015), p.6. Vol. II, Annex 10.

[29] *Ibid*., p. 5.

c. Uganda observed that the DRC offered "no specific proof to support the claims in three broad categories: macroeconomic damages, material and non-pecuniary damages; material and non-pecuniary damages suffered by the DRC; and material and non-pecuniary damages suffered by natural/legal entities."[30]

d. Uganda explained that "some of the claims contained in the DRC Claim are outside the scope of the ICJ judgment in terms of time, nature and geographical areas."[31]

e. Uganda also explained that it could not compensate some losses either because they were not verified (such as injury to wounded soldiers and damage to the environment) or are not compensable under international law (such as macro-economic damages, break-down of civil order and economic chaos, loss on the treasury).[32]

1.37 Nevertheless, to demonstrate good faith and reach an amicable agreement, Uganda proposed to pay the DRC US$ 25,500,000 in compensation based on

[30] *Ibid*., p. 6.

[31] *Ibid*., p. 5.

[32] *Ibid*., pp. 12-13.

criteria it considered to be appropriately grounded in the relevant rules of international law.[33]

1.38 The DRC offered no meaningful response to Uganda's substantive observations. It responded only that Uganda's "technical" approach "led to a bigger under estimation of the different damages inflicted to the Congolese populations as a result of armed activities exercised on the DRC territory, valued at less than 1% of the amount claimed."[34]

1.39 There being no agreement between the experts, they decided to refer the matter for further consideration to the ministerial level meeting which took place between the 17 and 19 of March 2015.

1.40 According to the Agreed Minutes of the Meeting of Ministers, Uganda took the view that "there [was] need for the parties to agree on the criteria which should be used as a basis for compensation payable to the DRC", and proposed that "both states should conduct joint verification and analysis of the 7400 documents provided by the DRC based on the agreed criteria."[35]

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[33] *Ibid*., p. 12.

[34] *Ibid*., p. 8.

[35] Government of Uganda and the Government of the Democratic Republic of Congo, *The Agreed Minutes of the 4th Meeting of Ministers of the Democratic Republic of Congo and the Republic of Uganda on the Implementation of the Judgment of the ICJ of 19th December 2005* (17-19 Mar. 2015), p. 2. Vol. II, Annex 11.

1.41 According to the records of the meeting, Uganda proposed that the Parties be guided by the following criteria:

> "1. We propose that we be guided by the ICJ Judgment of 19th December 2005; thus excluding claims outside the scope of the Judgment. These include;
> a) Rape
> b) Claims arising in the period outside 8th August 1998 to 2nd June 2003.
> c) Areas court said Uganda was not present; Zongo, Bomanga and Bongadanga
>
> 2. Follow principles of international law and exclude the following claims; Macro Economic damages, wounded soldiers, loss to the treasury, breakdown of civil order and economic chaos, disorganization of health and education system, delay of the economic and social development plan and other war related damages.
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> 3. We propose that in arriving at a mutually acceptable compensable amount for acts of killing and death, reliance should be made on judicial precedents/authorities.
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> 4. In the case of personal injury, the amount payable should take into consideration the level of injury and disability.
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> 5. In case of loss of property and other related claims, we propose that upon proof, the assessment should be based on equitable considerations and the fair market value of the property destroyed at the time.
>
> 6. Loss of business and profits: we propose that claims in this category should be based on the lost future profits of the income generating activity, assets of the business, anticipated profits and basic accounting principles.
>
> 7. Looting, plundering and exploitation of natural resources: we propose to rely on the DRC's submissions to the United Nations Security Council, reports of UN Agencies and other humanitarian organizations.

> 8. Violation of international Human Rights law and international Humanitarian law in Ituri province as an occupying power also referred to as moral prejudice: we propose an ex gratia payment that is mutually acceptable to both parties.
>
> 9. A joint verification and analysis of the 7400 documents provided by the DRC should be carried to isolate credible claims from unrealistic and exaggerated claims.
>
> We believe that if the two parties can agree on specific criteria on which to base the amount of compensation payable to the DRC we shall be able to resolve the matter amicably." [36]

1.42 The Agreed Minutes further reflect that Uganda "in spirit of brotherhood and good neighborliness and without prejudice" offered to "withdr[a]w its counter claim in respect of the damage on its Embassy property in Kinshasa."[37] It also offered to revise its previous offer of compensation upward to US$ 37 million[38]

1.43 In response, the DRC:

> "(a) *Object[ed] to using any criteria to assess her claim*."
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> …
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> "(c) … accept[ed] the withdrawal of Uganda's counter's claim [sic] of USD 3,760,000, which the DRC had admitted as due and owing but reject[ed] the offer by Uganda of the USD 37,028,368 as being insignificant"

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[36] *Ibid*., p. 4.

[37] *Ibid*., pp. 2-3.

[38] *Ibid*., p. 3.

> (d) … insist[ed] that since there is no agreement, the matter should be referred to the ICJ."[39]

1.44 Given the Parties' diverging positions, the Agreed Minutes conclude:

> "Since there is no consensus reached, the Parties resolved that there should be no further negotiations at technical and Ministerial level and that the matter should be referred to the Heads of State within the framework of the Ngurdoto Agreement on Bilateral Cooperation between Uganda and the DRC of 2007 for further guidance."[40]

1.45 Less than two months later, on 13 May 2015, the DRC submitted to the Court a "New Application to the International Court of Justice", in which it requested the Court "to reopen the proceedings that it suspended in the case, in order to determine the amount of reparation owed by Uganda to the Democratic Republic of the Congo, on the basis of the evidence already transmitted to Uganda and which will be made available to the Court."[41]

1.46 The Court's procedural Orders noted above in paragraphs 1.1-1.2 followed.

1.47 Uganda considers that negotiations on reparation have not yet been exhausted. Indeed, the DRC itself has recently expressly so agreed.

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[39] *Ibid*., DRC'S Specific Responses to New Criteria Proposed by the Ugandan Side, pp. 1-2 (emphasis added).

[40] *Ibid*., p. 3.

[41] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Order No. 166 (1 July 2015), I.C.J., para. 6.

1.48 Specifically, at the conclusion of an Official Visit to Uganda by the President of the DRC, H.E. Joseph Kabila Kabange, on 4 August 2016 the Parties entered into a "Joint Communiqué Issued by the Democratic Republic of the Congo and the Republic of Uganda Held on 4th August 2016, at Mweya Safari Lodge, Kasese District, Uganda" (the "Joint Communiqué").[42] The Joint Communiqué was signed by Uganda's Minister of Foreign Affairs, Hon. Sam Kutesa, and the DRC's Senior Minister/Minister in Charge of Decentralisation and Customary Affairs, Hon. Salomon Banamuhere.

1.49 Paragraph 4 of the Joint Communiqué provides:

> "The two Heads of State held fruitful discussions on a number of issues of common interest at bilateral, regional and international level. They expressed satisfaction at the cordial bilateral relations existing between the two countries and reaffirmed their commitment to further enhance these relations."

1.50 In that context, paragraph 6(v) of the Joint Communiqué further provides:

> "On the judgment of the International Court of Justice (ICJ) of 19th December 2009 [sic] related to the Uganda military activities in the DRC, it was agreed that President Joseph Kabila comes up with a new proposal on the implementation of the court judgment. The two Heads of State decided that in the interim, the filing of Memorials on reparation by DRC scheduled on 28th September 2016 be

[42] Joint Communiqué Issued by the Democratic Republic of the Congo and the Republic of Uganda Held on 4th August 2016, at Mweya Safari Lodge, Kasese District, Uganda (4 Aug. 2016), Vol. II, Annex 2.

> postponed pending consideration of the proposals to settle the question of reparations directly."

1.51 As Uganda explained to the Court in its letter dated 22 September 2016, Uganda understands the Joint Communiqué to constitute an international agreement binding on both Parties to resume negotiations, and not to submit their respective Memorials in light of the forthcoming proposals from the DRC to settle the question of reparations directly.[43]

1.52 However, given the prevailing state of uncertainty, and given that the Court has not modified its scheduling Order dated 11 April 2016, Uganda considers that it has no choice but to submit the present Memorial to protect its rights and interests, despite the clear provisions of the Joint Communiqué. Uganda expressly reserves all of its rights under the Joint Communiqué and otherwise.

[43] The Joint Communiqué was registered with the United Nations on 26 September 2016.

CHAPTER 2

RELEVANT RULES OF INTERNATIONAL LAW ON REPARATION

2.1 In this Chapter, Uganda discusses the relevant rules of international law applicable to reparation claims. These rules apply equally to Uganda's counter-claims and to the DRC's claims. This Chapter is presented in three sections. **Section I** addresses the purpose and scope of the obligation to make full reparation in international law. **Section II** discusses general legal principles relating to satisfaction as a form of reparation. Finally, **Section III** sets out the general legal principles governing compensation as a form of reparation.

I. The Function and Scope of the Obligation to Make Full Reparation

2.2 It is "well established in general international law that a State which bears responsibility for an internationally wrongful act is under an

obligation to make full reparation for the injury caused by that act."[44] "Injury" includes "any damage, whether material or moral."[45]

2.3 The function of reparation is, to the extent possible, to re-establish the situation that would have existed but for the internationally wrongful act. As the Court's predecessor, the PCIJ, explained in *Factory at Chorzów,* "reparation must, so far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed."[46] That said, reparation is due only for the injury actually caused by a wrongful act. This "make[s] clear that the subject matter of reparation is, globally, the injury resulting from and ascribable to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act."[47]

2.4 Reparation can "take the form of restitution, compensation and satisfaction, either singly or in combination."[48] The Court has observed

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[44] *Armed Activities* (2005), para. 259 (citing to *Factory at Chorzów, Claim for Indemnity, Jurisdiction,* Judgment, 1927, P.C.I.J., Series A, No. 9, p. 21; *Gabčíkovo-Nagymaros Project* (*Hungary/Slovakia*), Judgment, I.C.J. Reports 1997 ("*Gabčíkovo-Nagymaros Project*"), p. 81, para. 152; *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, I.C.J. Reports 2004 ("*Avena and Other Mexican Nationals*"), p. 59, para. 119.

[45] ARSIWA, Art. 31(2).

[46] *Factory at Chorzów, Claim for Indemnity,* Merits, Judgment, 1928, P.C.I.J., Series A, No. 17 ("*Chorzów Factory, Merits*"), p. 47.

[47] ARSIWA, Art. 31 cmt. 9.

[48] *Ibid*., Art. 34.

that the form and scope of reparation, "clearly varies depending upon the concrete circumstances surrounding each case and the precise nature and scope of the injury."[49] Given the nature of Uganda's counter-claims (and the DRC's claims), combined with the fact that neither Party is seeking restitution as such, the Parties' obligation to make reparation in the present case can be discharged either by satisfaction or compensation, or both.

2.5 Uganda observes further that the Parties have not requested the Court to decide their reparation claims *ex aequo et bono*. The Court must therefore adjudicate those claims "in accordance with international law" within the meaning of Article 38(1) of the Court's Statute.[50]

2.6 There is no treaty between the Parties that establishes rules governing reparation. The Court must therefore rely on customary rules of international law and general principles of law, as articulated in the Court's prior jurisprudence and that of other international courts and tribunals, together with the teachings of the most highly qualified publicists. These rules and general principles, which are equally

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[49] *Avena and Other Mexican Nationals*, para. 119; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, p. 14 ("*Pulp Mills*"), para. 274.

[50] Statute of the International Court of Justice, Art. 38(2) ("This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.").

applicable to the claims of both Parties, are discussed in the sections that follow.

II. The Obligation to Give Satisfaction for the Injury Caused by a Wrongful Act

2.7 Satisfaction is one of the forms of reparation that a State may be called upon to provide to discharge its obligation to make reparation for the injury caused by its internationally wrongful act.[51] Indeed, satisfaction is the most frequently awarded form of reparation in international practice, including in cases before the Court. Of the Court's 14 judgments on liability decided to date, it has awarded compensation only in two instances: the *Corfu Channel* and *Diallo* cases.[52] In seven cases, the Court has deemed satisfaction to be adequate reparation.[53]

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[51] ARSIWA, Art. 37(1) ("The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.").

[52] The Permanent Court of Justice only awarded compensation in one case: *S.S. "Wimbledon"*, Judgment, 1923, P.C.I.J., Series A, No. 1 ("*S.S. "Wimbledon"*").

[53] *Corfu Channel (U.K. v. Albania)*, Merits, Judgment, I.C.J. Reports 1949 ("*Corfu Channel*"), p. 36; *Arrest Warrant of 1 I April 2000 (Democratic Republic of the Congo* v. *Belgium)*, Judgment, I.C.J. Reports 2002 ("Arrest Warrant"), para.75; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007 ("*Bosnia and Herzegovina v. Serbia and Montenegro*" (2007)), paras. 463-464; *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, I.C.J. Reports 2008 ("*Djibouti v. France"* (2008)), para. 205(2)(a); *Pulp Mills*, para. 282; *Application of the Interim Accord of 13 September 1995 (The Former Yugoslav Republic of Macedonia v. Greece)*, Judgment, I.C.J. Reports 2011 ("*FYRM v. Greece*"), para. 169; *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa*

2.8 The practice of the Court and other international tribunals point to at least three circumstances in which satisfaction is the most appropriate form of reparation.

2.9 *First*, satisfaction constitutes adequate reparation whenever restitution is not possible and the quantum of compensation cannot be accurately assessed due to a lack of adequate evidence. The Eritrea-Ethiopia Claims Commission ("EECC" or "Commission"), which arbitrated claims between Ethiopia and Eritrea for losses resulting from violations of international law during the 1998-2000 conflict between those parties, provides a good example of this practice. The EECC determined that Ethiopia had violated international law by, *inter alia*, depriving certain persons who had dual Ethiopian and Eritrean nationality of their Ethiopian citizenship. Although the injury was material in nature, the Commission concluded that Eritrea had not presented sufficient evidence in support of the extent of any injury from this wrongful act. The EECC thus found reparation in the form of satisfaction alone was warranted.

2.10 Specifically, it stated:

Rica), Judgment, I.C.J. Reports 2015 *("Nicaragua v. Costa Rica"* (2015)), paras. 139, 224.

> "Taking into account the limitations of the record, and in particular the paucity of evidence regarding the practical consequences following from the loss of Ethiopian nationality, the Commission decides that satisfaction in the form of the Commission's earlier liability findings constitutes sufficient reparation for Eritrea's claims for compensation for unlawful deprivation of some dual nationals' Ethiopian nationality."[54]

2.11 Likewise, the Commission viewed Ethiopia's unlawful seizure of the Eritrean ambassador's papers, personal property and hand luggage as a material injury for which compensation was possible. It nevertheless found that because Eritrea had failed to provide evidence supporting its valuation of the property, satisfaction in the form of the Commission's finding on liability was the appropriate form of reparation.[55]

2.12 *Second*, satisfaction is the appropriate remedy when a State's failure to exercise due diligence to prevent other actors from causing injury is found not to have directly caused the injury in question. This rule is related to the need to show a direct and certain causal nexus between the wrongful act and the injury. In cases where it is uncertain whether the injury would have been avoided had the required due diligence been exercised, the Court has awarded satisfaction instead of compensation.

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[54] *Eritrea's Damages Claims, Final Award, Eritrea-Ethiopia Claims Commission, Decision of 17 August 2009*, reprinted in 26 U.N.R.I.A.A. 505 (2009) ("*Eritrea's Damages Claims*"), para. 288.

[55] *Ibid*., para. 387-88.

2.13 The Court explained in the *Bosnia and Herzegovina v. Serbia and Montenegro* that:

> "whether the genocide at Srebrenica would have taken place even if the Respondent had attempted to prevent it by employing all means in its possession, becomes directly relevant, for the definition of the extent of the obligation of reparation borne by the Respondent as a result of its wrongful conduct. The question is whether there is a sufficiently direct and certain causal nexus between the wrongful act, the Respondent's breach of the obligation to prevent genocide, and the injury suffered by the Applicant, consisting of all damage of any type, material or moral, caused by the acts of genocide. *Such a nexus could be considered established only if the Court were able to conclude from the case as a whole and with a sufficient degree of certainty that the genocide at Srebrenica would in fact have been averted if the Respondent had acted in compliance with its legal obligations.* However, the Court clearly cannot do so. As noted above, the Respondent did have significant means of influencing the Bosnian Serb military and political authorities which it could, and therefore should, have employed in an attempt to prevent the atrocities, but it has not been shown that, in the specific context of these events, those means would have sufficed to achieve the result which the Respondent should have sought. Since the Court cannot therefore regard as proven a causal nexus between the Respondent's violation of its obligation of prevention and the damage resulting from the genocide at Srebrenica, financial compensation is not the appropriate form of reparation for the breach of the obligation to prevent genocide."[56]

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[56] *Bosnia and Herzegovina v. Serbia and Montenegro* (2007), para. 462 (emphasis added).

2.14 Rather than award compensation, the Court stated that "[a]s in the *Corfu Channel* case, the Court considers that a declaration of [the wrongful act] is in itself appropriate satisfaction, and it will, as in that case, include such a declaration in the operative clause of the present Judgment."[57]

2.15 Finally, satisfaction is awarded in the context of non-material damage to a State. It is the appropriate remedy for "those injuries, not financially assessable, which amount to an affront to the State."[58] The arbitral tribunal in the *Rainbow Warrior* case explained:

> "There is a long established practice of States and international Courts and Tribunals of using satisfaction as a remedy or form of reparation (in the wide sense) for the breach of an international obligation. This practice relates particularly to the case of moral or legal damage done directly to the State, as opposed to the case of damage to persons."[59]

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[57] *Ibid*., para. 463.

[58] ARSIWA, Art. 37, cmt. 3.

[59] *Difference between New Zealand and France Concerning the Interpretation or Application of two Agreements, Concluded on 9 July 1986 between the two States and which Related to the Problems Arising from the Rainbow Warrior Affair*, Decision (30 Apr. 1990), reprinted in 20 U.N.R.I.A.A. 215 (2006), para. 122. In this case, which concerned with violations of sovereignty and territorial integrity, the tribunal held that "the condemnation of the French Republic for its breaches of its treaty obligations to New Zealand, made public by the decision of the Tribunal, constitutes…appropriate satisfaction for the legal and moral damage caused to New Zealand." *Ibid.*, para 123.

2.16 The circumstances in which satisfaction was held to be adequate reparation include the ill treatment of diplomatic or consular representatives and violations of the premises of embassies, consulates, or of the residents of members of the mission.[60]

2.17 The EECC found, for example, that Ethiopia's unlawful searches of Eritrean diplomatic personnel as they departed Ethiopia, and Eritrea's unlawful searches of Ethiopian diplomatic personnel as they departed Eritrea, as well as the unlawful arrest and temporary detention of the Ethiopian Chargé d'Affaires, constituted non-material injury for which satisfaction was appropriate. This took the form of the Commission's declaration of the wrongfulness of those acts.[61]

2.18 Many possibilities exist as to the form in which satisfaction may be given.[62] One of "the most common modalities of satisfaction" is "a declaration of the wrongfulness of the act by a competent court or tribunal."[63]

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[60] ARSIWA, Art. 37(2), cmt. 4.

[61] *Eritrea's Damages Claims*, para. 386 & IX(18); *Ethiopia's Damages Claims, Final Award, Eritrea-Ethiopia Claims Commission, Decision of 17 August 2009*, reprinted in 26 U.N.R.I.A.A. 631 (2009), paras. 387-88 & XII(C).

[62] ARSIWA, Art. 37(2), cmt. 5.

[63] *Ibid.*, Art. 37(2), cmt. 6.

2.19 The significance and utility of declaratory relief in such circumstances was affirmed by the Court in *Corfu Channel.* After finding a mine-sweeping operation carried out by the British Navy unlawful, the Court ruled:

> "To ensure respect for international law, of which it is the organ, the Court must declare that the action of the British Navy constituted a violation of Albanian sovereignty. This declaration is in accordance with the request made by Albania through her Counsel, and is in itself appropriate satisfaction."[64]

2.20 This same approach has been followed in many subsequent cases.[65]

2.21 The DRC itself has recognised the significance of satisfaction as a form of reparation. In its submissions to the Court during the compensation phase of the *Diallo* case, the DRC stated: "It is important not to lose sight of the fact that Guinea has already obtained satisfaction simply from the Court's judicial finding that the DRC had violated

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[64] *Corfu Channel*, p. 35 & *dispositif*, p. 36.

[65] *Bosnia and Herzegovina v. Serbia and Montenegro (2007)*, paras. 463-464; *Djibouti v. France (2008)*, para. 205(2)(a); *Pulp Mills*, p. 282; *FYRM v. Greece*, para. 169; *Nicaragua v. Costa Rica* (2015), paras. 139, 224; *See also Rainbow Warrior*, RIAA, vol. XX, p. 217 (1990), para. 123.

international law. Guinea will thus have received twofold satisfaction in this case" when seeking further reparation.[66]

2.22 The same is true here. Both Parties, by having received judicial declarations vindicating various aspects of their claims, have received clear and meaningful satisfaction from the principal judicial organ of the United Nations.

III. The Obligation to Pay Compensation for the Damage Caused by an Internationally Wrongful Act

2.23 In other circumstances, it is "a well-established rule of international law that an injured State is entitled to obtain compensation from the State that has committed an internationally wrongful act for the damage caused by it."[67] The amount of compensation an injured State may obtain will depend, however, on the extent to which a claim for compensation satisfies the rules and principles of international law governing such questions.

2.24 Those include, among others:

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[66] Counter-Memorial of the Democratic Republic of the Congo (Question of Compensation Owed to Guinea by the DRC) in *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* (21 Feb. 2012) ("Counter-Memorial on Compensation of the DRC in *Diallo Case* (2012)"), para. 1.48.

[67] *Gabčíkovo-Nagymaros Project*, para. 152. *See also* ARSIWA, Art. 36(1) ("The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby[.]").

a) Compensation is limited to damage actually caused by a specific internationally wrongful act; indirect, remote and speculative damages are excluded;

b) Compensation can cover only financially assessable damage in so far as it is proved by clear, credible and convincing evidence;

c) Compensation must be proportionate to actual injury;

d) Compensation cannot be punitive;

e) Compensation must not exceed the payment capacity of the responsible State or impair its ability to meet the basic needs of its people;

f) Compensation does not cover damages the injured State failed to mitigate; and

g) Compensation must exclude damages to which the injured State contributed.

2.25 Each of these rules and principles are discussed in the subsections that follow.

A. Compensation Is Limited to Damage Caused by Specific Wrongful Acts

2.26 Under international law, compensation may be payable only for the specific injury caused by a State's internationally wrongful act.[68] The requisite casual nexus must, moreover, be "direct and certain." The Court

[68] *Gabčíkovo-Nagymaros Project*, para. 152; *Bosnia and Herzegovina v. Serbia and Montenegro* (2007), para. 462; *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, I.C.J. Reports 2012 ("*Diallo (2012)*"), para. 14. *See* also ARSIWA, Art. 36(1) ("The State responsible for an internationally wrongful act is under an obligation to compensate for the damage *caused* thereby.") and Art. 31(1) ("The responsible State is under an obligation to make full reparation for the injury *caused by* the internationally wrongful act.").

itself has consistently emphasised this requirement. In the *Diallo* case, for instance, it ruled:

> "As to each head of damage, the Court will consider whether an injury is established. It will then ascertain whether, and to what extent, the injury asserted by the Applicant is the consequence of wrongful conduct by the Respondent, taking into account *whether there is a sufficiently direct and certain causal nexus between the wrongful act and the injury suffered by the Applicant*. If the existence of injury and causation is established, the Court will then determine the valuation."[69]

2.27 The "direct and certain causal nexus" requirement is central in determining the scope of compensation because "the subject matter of reparation is, globally, the injury resulting from and ascribable to the wrongful act."[70] As noted, it does *not* extend to "any and all consequences flowing from an internationally wrongful act."[71] Losses, damages or injuries that are "too indirect, remote, and uncertain"[72] are therefore excluded.

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[69] *Diallo (2012)*, para. 14; *Bosnia and Herzegovina v. Serbia and Montenegro* (2007), para. 462 (emphasis added).

[70] ARSIWA, Art. 31, cmt. 1.

[71] ARSIWA, Art. 31, cmt. 9.

[72] *Trail Smelter Case (United States, Canada)*, Award (16 Apr. 1938 and 11 Mar. 1941), reprinted in 3 U.N.R.I.A.A. 1905 (2006), p. 1931; *see also Alabama* arbitrations where "indirect" damages were excluded altogether. "*Alabama Claims", Protocol V, Record of the proceedings of the Tribunal of Arbitration at the fifth conference held at Geneva, in Switzerland, on the 19th of June, 1872*, reprinted in J. C. Bancroft Davis, *Report of the Agent of the United States Before the Tribunal of Arbitrations at Geneva* (1873) ("*Alabama Claims*"), pp. 21-22.

2.28 For those reasons, international tribunals have uniformly rejected claims for all damages relating to the outbreak of war.[73] The EECC, for example, ruled that "a significant range of possible damages related to armed conflict lie beyond the pale of State responsibility."[74] These include (but are not limited to) the following: generalised economic and social consequences of war;[75] business losses of either State or private entities that stem from generalised conditions of economic disruption in wartime;[76] the decline in international development assistance;[77] and the

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[73] *United States v. Germany, U.S.-Germany Mixed Claims Commission, Administrative Decision No. II*, Award (1 Nov. 1923), reprinted in 7 U.N.R.I.A.A. 1 (2006), pp. 23, 28; *Alabama Claims*, pp. 21-22; *Ethiopia's Damages Claims*, para. 289.

[74] *Eritrea-Ethiopia Claims Commission, Decision No. 7: Guidance Regarding Jus ad Bellum Liability* (27 July 2007) ("EECC, Decision No. 7"), para. 13.

[75] The EECC observed: "Since at least the Alabama arbitration, panels have rejected claims for damages to generalized economic interests of the victorious State or its nationals, or to its expenses in waging war. ... The United States-German Mixed Claims Commission…emphasized the need for a direct causal connection between a loss and the actions of the defendant State, and rejected claims for "all damage or loss in consequence of the war." The Commission also held that "international law does not impose liability for such generalized economic and social consequences of war." *Ethiopia's Damages Claims*, paras. 286, 395.

[76] The EECC regarded "business losses stemming from generalized conditions of economic disruption in wartime…as too remote from Eritrea's jus ad bellum violation, and as not compensable." *Ibid*., para. 402.

[77] As the EECC concluded: "The record was not sufficient to establish either the amount of the alleged loss, or a *sufficient causal connection between that loss and Eritrea's violation of the jus ad bellum. In this connection, any reduction of development assistance to Ethiopia resulted from decisions taken by international financial institutions and foreign governments for their own reasons.* Particularly where the immediate cause of the alleged injury was decisions made by third parties, *much more compelling evidence would be required to show that the loss was attributable to Eritrea's jus ad bellum violation*. The claim is dismissed." *Ibid*., para. 465.

loss of foreign and domestic investment.[78]

2.29 The Court's 2005 Judgment on the merits in this case itself underscores the importance of the "direct and certain causal nexus" requirement. After identifying the internationally wrongful acts for which Uganda was responsible and noting its obligation to make reparation, the Court stated that it would be incumbent on the DRC "to demonstrate and prove *the exact injury* that was suffered *as a result of specific actions of Uganda* constituting internationally wrongful acts *for which it is responsible*."[79] The same, of course, applies *mutatis mutandis* to Uganda's counter-claims.

2.30 The obligation of both Parties to pay compensation therefore turns on specific proof of specific injuries caused by specific acts for which they are responsible. Both Uganda and the DRC have the burden to prove: (1) "the exact injury" suffered as a consequence of (2) the "specific actions" (3) "for which [they have been found] responsible" under international law.

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[78] Ethiopia claimed more than US$ 2 billion for foreign and domestic investment in the Ethiopian economy that allegedly was not made during the war years. The EECC held: "given the huge amount claimed…there was insufficient evidence to show the amount of any compensable injury to the State of Ethiopia. *Of greater import, the evidence did not establish a sufficient causal connection between Eritrea's jus ad bellum delict and any injury to Ethiopia stemming from reductions in foreign and domestic investment during the war years*." *Ibid*., paras. 466, 469.

[79] *Armed Activities* (2005), para. 260 (emphasis added).

2.31 This exercise has to be carried out strictly within the limitations *ratione materiae, ratione loci* and *ratione temporis* of the Court's findings with respect to the responsibility of both Parties, which constitute *res judicata.* There were many aspects of the claims advanced by both Parties during the merits phase that the Court rejected, and only some aspects—limited by subject, location and time—that led to findings of State responsibility.

2.32 For example, with respect to responsibility *ratione materiae,* since the Court did not find the DRC responsible for acts of aggression against Uganda, Uganda is now precluded from claiming reparation for the loss, damage, or injury associated with that part of Uganda's counter-claim. Likewise, since the Court did not find Uganda internationally responsible for acts by rebel groups of looting, plundering, or exploitation of the DRC's natural resources (other than in Ituri district),[80] the DRC is now precluded from claiming reparation for such conduct.

2.33 With respect to responsibility *ratione loci,* the Court did not find the DRC responsible for alleged mistreatment of Ugandan nationals (other than diplomats) who were present at Ndjili International Airport as they attempted to leave the country. As such, Uganda is now precluded from

[80] *Ibid.*, para. 247.

claiming reparation for that alleged mistreatment of those nationals at the airport.[81] Likewise, the Court did not find Uganda responsible for actions at certain locations in the DRC.[82] The DRC is therefore precluded from seeking reparation for loss, damage or injury resulting from the attacks in those places.

2.34 As regards limitations *ratione temporis*, the Court found the DRC responsible for three separate attacks on the Ugandan diplomatic premises in Kinshasa in August, September and November 1998.[83] Consequently, Uganda's claim for reparation is limited to the loss, damage or injury resulting from those attacks and long-term occupation, and not incidents occurring after Uganda regained access to its diplomatic premises. Likewise, the DRC may only claim reparation for loss, damage or injury occurring within the time period indicated in the 2005 Judgment. Thus, with respect to the Court's finding that certain wrongful acts occurred during the course of Uganda's occupation in Ituri district in the DRC, the

[81] *Ibid*., paras. 332-333.

[82] *Ibid*., para. 71 (finding that "on the basis of the evidence before it, it has not been established to its satisfaction that Uganda participated in the attack on Kitona"); *ibid.*, p. 209, para. 91 (finding that the Court "has not received convincing evidence that Ugandan forces were present at Mobenzene, Bururu, Bomongo and Moboza").

[83] *Ibid*., paras. 306, 334-337.

Court appears to have regarded that occupation as commencing in June 1999[84] and ending in June 2003,[85] when Ugandan forces withdrew.

2.35 It follows that in order for the Court to determine the scope of the Parties' obligation to pay compensation, both Uganda and the DRC must demonstrate a sufficiently direct and certain causal nexus between the exact injury they suffered and specific internationally wrongful acts, limited by subject, location and time, for which they were found responsible in the 2005 Judgment.

B. Compensation Covers Only Financially Assessable Damage Insofar as It Is Established

2.36 The function of compensation is to address the actual losses resulting from an internationally wrongful act. Compensation covers only "financially assessable damage including loss of profits *insofar as it is established.*"[86] Even if a violation of international law has been proven, it is a separate matter to establish the extent of the damage that resulted from the violation in question. If the extent of damage is not proven, then no further reparation beyond the finding of a wrongful act is appropriate.

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[84] *Ibid*., para. 175.

[85] *Ibid*., para. 167.

[86] ARSIWA, Art. 36(2) (emphasis added).

2.37 Establishing compensable damage involves two interrelated issues: a burden of proof and a standard of proof.

2.38 As to the burden of proof, the Court has on several occasions noted the "general rule" that "it is for the party which alleges a particular fact in support of its claims to prove the existence of that fact."[87] This requirement is also reflected in the 2005 Judgment. Indeed, anticipating the possibility of the DRC returning to the Court to seek compensation in a separate phase, the Court stated: "The DRC would thus be given the opportunity to demonstrate and prove the exact injury that was suffered" as a result of Uganda's internationally wrongful acts.[88] The same is true, of course, with respect to demonstrating the exact damage suffered with respect to Uganda's counter-claim. The burden is on Uganda to prove the extent of such damage during this phase.[89]

2.39 As regards the standard of proof, the requirement that damage is compensable insofar as it is established means that no compensation "for speculative and uncertain damage can be awarded."[90] International courts

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[87] *Diallo (2010)*, para. 54; *FYRM v. Greece*, para. 72; *Pulp Mills*, para. 162.

[88] *Armed Activities* (2005), para. 260.

[89] *Ibid*., para. 344.

[90] *Amco Asia Corporation and Others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Award (20 Nov. 1984), reprinted in 1 ICSID Reports 413 (1993) ("*Amco v. Indonesia*"), para. 238; *Chorzów Factory, Merits*, p. 56.

and tribunals, including this Court, look for clear, credible and convincing evidence in support of a claim for compensation.[91]

2.40 Relevant practice in this regard can be found in the *Diallo* case, where the DRC itself advanced the standard of "credible and convincing" evidence in the context of compensation claims. The DRC acknowledged, for example, that it was incumbent upon the claimant in that case, Guinea, "to provide the Court with … *credible and convincing* evidence of the genuine, rather than imaginary, existence of Mr. Diallo's [property]," with "evidence of the real, rather than hypothetical, loss of [that property]," and with "*credible* and *irrefutable* proof of [the property's] financial value."[92]

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[91] For general discussion of the Court's evidentiary practice, *see* Jean-Flavien Lalive, "Quelques remarques sur la preuve devant la Cour permanente et la Cour internationale de Justice", 7 *Annuaire suisse de droit international* 77 (1950). Vol. II, Annex 21; Keith Highet, "Evidence, the Court, and the *Nicaragua* Case", 81 *American Journal of International Law* 1 (1987). Vol. II, Annex 24; Eduardo Valencia-Ospina, "Evidence before the International Court of Justice", 1 *International Law Forum* 202 (1999). Vol. II, Annex 25; Maurice Kamto, "Les moyens de preuve devant la Cour internationale de Justice à la lumière de quelques affaires récentes portées devant elle", 49 *German Yearbook of International Law* 259 (2006). Vol. II, Annex 27; Ruth Teitelbaum, "Recent Fact-finding Developments at the International Court of Justice", 6 *Law and Practice of International Courts and Tribunals* 119 (2007). Vol. II, Annex 29; P. Tomka & V.-J. Proulx, "The Evidentiary Practice of the World Court" in LIBER AMICORUM GUDMUNDUR EIRIKSSON (J. C. Sainz-Borgo ed., forthcoming 2016). Vol. II, Annex 32. For the evidentiary practice of other international courts and tribunals, *see, generally*, J.C. Witenberg, "La théorie des preuves devant les juridictions internationales", 56 *Recueil des Cours* 1 (1936-II). Vol. II, Annex 19; Durward Sandifer, *Evidence Before International Tribunals* (1975). Vol. II, Annex 23; Chittharanjan Amerasinghe, *Evidence in International Litigation* (2005). Vol. II, Annex 26.

[92] Counter-Memorial on Compensation of the DRC, in *Diallo (2012)*, para. 2.42 (emphasis added).

2.41 Likewise, the DRC contested Guinea's claim by stating "that Guinea has failed to show in a sufficient and *convincing* manner, *beyond all reasonable doubt*" the loss of Mr. Diallo's property,[93] and that Guinea's claim for loss of potential earnings "is neither *credible* nor *justified*."[94]

2.42 The requirement to provide objective proof applies with particular force to alleged lost profits, compensation for which tribunals have typically been reluctant to provide due to their inherently speculative nature.[95] By definition, calculations of lost profits are vulnerable to unquantifiable commercial and political risks, which only increase the further into the future projections are made. To be compensable, lost profits must therefore have "sufficient attributes to be considered a legally protected interest of sufficient certainty."[96] They must be direct and foreseeable, not merely possible.[97]

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[93] *Ibid*., para. 2.50 (emphasis added).

[94] *Ibid*., para. 2.55 (emphasis added).

[95] ARSIWA, Art. 36, cmt. 27.

[96] *Ibid*.

[97] In *Percy Shufeldt* the Arbitrator held that: "*[L]ucrum cessans* must be the direct fruit of the contract and not too remote or speculative. … The contract at the date of its cancellation or abrogation had been in existence for six years, and the extraction and exportation of chicle was carried on as a going business which was producing substantial profits, and there is nothing to show that these profits would not have been continued to the expiration of the contract." *Percy Shufeldt Claim (U.S.A./Guatemala)*, Award

2.43 In this regard, Uganda observes that the Court's approach to the award of compensation has been premised on proof of *actual* loss, damage or injury, and not on the techniques and evidentiary standards that operate before mass claims commissions.

2.44 It follows that the scope of the Parties' duty to compensation will depend on the extent to which they establish damage in accordance with the rules governing the burden and standard of proof.

C. Compensation Must Be Proportionate

2.45 Monetary compensation is intended to offset, in so far as possible, damage suffered by the injured State as a result of a breach of an international legal obligation.[98] It must be proportionate to actual injury.[99] This requirement can be met by taking into account the nature of the wrongful act, the concrete circumstances surrounding each case, and the

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(24 July 1930), reprinted in 2 U.N.R.I.A.A. 1079 (2006), p. 1099. *See also* Marjorie Whiteman, *Damages in International Law* (1943), pp. 1836-1837. Vol. II, Annex 20.

[98] ARSIWA, Art. 36, cmt. 4.

[99] As the US-German Claims Commission held: "The fundamental concept of 'damage' is…reparation for a loss suffered; a judicially ascertained compensation for wrong. *The remedy should be commensurate with the loss.*" *Opinion in the Lusitania Cases* (1 Nov. 1923), reprinted in 7 U.N.R.I.A.A. 32 (2006) ("*Opinion in the Lusitania Cases*"), p. 39 (emphasis added). *See also Avena and Other Mexican Nationals*, para. 119 (where the ICJ also stated that reparation must correspond to the injury).

precise nature and scope of the injury.[100] Two rulings of the EECC are particularly instructive in this regard.

2.46 *First*, the EECC held that there must be a measure of proportion between the character of a wrongful act and the compensation due.[101] For example, it concluded that even though "Eritrea's violation of the *jus ad bellum* … was serious, and had serious consequences," that violation nonetheless "was different in magnitude and character from the aggressive uses of force marking the onset of the Second World War, the invasion of South Korea in 1950, or Iraq's 1990 invasion and occupation of Kuwait."[102] The Commission thus held that the "determination of compensation must take such factors into account."[103] Similar factors should apply here.

2.47 *Second*, the EECC held that to avoid disproportionate compensation, injury must be assessed by reference to the actual social and economic conditions in the place of its occurrence. It explained:

> "[C]ompensation *must be assessed in light of the actual social and economic circumstances of the injured individuals* in respect of whom the State is

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[100] *Pulp Mills*, para. 274; *Avena and Other Mexican Nationals*, para. 119.

[101] *Ethiopia's Damages Claims*, paras. 311-312.

[102] *Ibid*., para. 312.

[103] *Ibid*., para. 312.

> claiming. The difficult economic conditions found in the affected areas of Eritrea and Ethiopia must be taken into account in assessing compensation there. *Compensation determined in accordance with international law cannot remedy the world's economic disparities*."[104]

2.48 It follows that compensation that may be due to Uganda and the DRC must be commensurate with the character of a wrongful act and the Parties' actual social and economic circumstances.

D. Compensation Must Not Be Punitive

2.49 The purpose of compensation is *not* to punish the responsible State. Nor does compensation have an exemplary character. Its function is purely compensatory.[105] There is "not a single case in contemporary practice in which an international court or tribunal has awarded punitive damages."[106] Even where "serious breaches of international obligations were involved, either due to the importance of the norm breached or

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[104] *Eritrea's Damages Claims*, p. 508, para. 26; *Ethiopia's Damages Claims*, para. 26 (emphasis added).

[105] ARSIWA, Art. 36, cmt. 4. In *Velásquez-Rodríguez v. Honduras*, the case concerned damages for disappearance of a person. The Inter-American Court of Human Rights held that international law did not recognise the concept of punitive damages. *Case of Velásquez-Rodríguez v. Honduras*, IACHR, Judgment of July 21, 1989, Series C, No. 7 (Compensation), para. 38. In *Re Letelier and Moffit*, claims concerned the assassination in Washington DC by Chilean agents of a former Chilean Minister; the *compromis* excluded any award of punitive damages, despite their availability under the United States law. *Dispute concerning responsibility for the deaths of Letelier and Moffitt (United States, Chile)*, Award (11 Jan. 1992), reprinted in 25 U.N.R.I.A.A. 1 (2006).

[106] Stephan Wittich, "Punitive Damages", in THE LAW OF INTERNATIONAL RESPONSIBILITY (J. Crawford et al. eds., 2010), pp. 669-671. Vol. II, Annex 31.

because of aggravating circumstances—or both—punitive damages were not an issue."[107]

2.50 As long ago as in 1923, the US-German Claims Commission flatly rejected a request for punitive damages in *the Lusitania Cases*, in which the Commission was called upon to assess the damages done to American nationals when a German submarine torpedoed the British liner Lusitania before America's entry into the First World War. The Commission held that the "remedy should be commensurate with the loss"[108] and "no exemplary, punitive, or vindictive damages can be assessed."[109]

2.51 And in the *Corfu Channel* case, this Court emphasised the "grave omissions" by Albania, yet treated the violation like any other wrongful act and awarded damages that were purely compensatory in character.[110]

2.52 The same point was more recently reaffirmed by the EECC, which stated that "compensation has a limited role which is remedial, not punitive."[111] According to the EECC, the award of damages in inter-State proceedings is aimed at "providing appropriate compensation within the

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[107] *Ibid*., p. 671.

[108] *Opinion in the Lusitania Cases*, p. 39.

[109] *Ibid*., p. 36.

[110] *Corfu Channel*, para 23; *see also* Stephan Wittich, "Punitive Damages", p. 671. Vol. II, Annex 31.

[111] *Eritrea's Damages Claims*, para. 26.

framework of the law of State responsibility."[112] In this regard, the Commission noted that "in situations involving unlawful use of force, States and the United Nations have created regimes or accepted outcomes involving compensation *for far less than the damage caused by the unlawful use of force."*[113] The Commission followed this example by dismissing various excessive compensation claims by the Parties where their purpose appeared to be punitive, not remedial.

2.53 The DRC itself has acknowledged that the purpose of compensation is not to punish but to provide for reparation that is reasonable and proportionate to injury. In the *Diallo* case, the DRC argued that it "contests and rejects this amount [sought by Guinea], which is manifestly excessive and disproportionate in relation to the injury actually suffered."[114] The DRC also asserted with respect to non-material damage that "the Respondent recalls that the purpose of compensation for the non-pecuniary damage suffered by Mr. Diallo is neither to enrich him, enabling him to invest in commercial activities in Guinea, nor to enrich

[112] *Ethiopia's Damages Claims*, para. 308.

[113] *Ibid*., para. 313 (emphasis added).

[114] Counter-Memorial on Compensation of the DRC in *Diallo (2012)*, para. 1.7.

Guinea. Rather, it is a form of financial relief, intended to compensate the said injury."[115]

2.54 It follows that neither Uganda nor the DRC can extract retribution through compensation. They may claim only the actual losses incurred as a result of the internationally wrongful acts.

E. Compensation Must Not Exceed the Payment Capacity of the Responsible State

2.55 International law limits compensation in another critical respect: it must not exceed the payment capacity of the responsible State; nor may it cause serious injury to the paying State's population.[116] To the contrary, compensation must be commensurate with a State's ability to pay. In no case may compensation have the effect of depriving the people of the responsible State of their means of subsistence.[117]

2.56 These principles were most recently reaffirmed by the EECC. Ethiopia claimed nearly US$ 14.3 billion for damages resulting from

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[115] Counter-Memorial on Compensation of the DRC in *Diallo (2012)*, para. 1.48.

[116] *Ethiopia's Damages Claims*, para. 22; *Eritrea's Damages Claims*, para. 22. *See also* William Bishop, "State Responsibility", 2 *Recueil des Cours* 384 (1965), p. 403. Vol. II, Annex 22; Richard Falk, "Reparations, International Law, and Global Justice", in THE HANDBOOK OF REPARATIONS (P. de Greiff ed., 2006), p. 492. Vol. II, Annex 28; Christian Tomuschat, "Reparations in Favour of Individual Victims of Gross Violations of Human Rights and International Humanitarian Law", in PROMOTING JUSTICE, HUMAN RIGHTS AND CONFLICT RESOLUTION THROUGH INTERNATIONAL LAW, LIBER AMICORUM LUCIUS CAFLISCH (M. Kohen ed., 2007), pp. 581 *et seq.* Vol. II, Annex 30.

[117] *Ethiopia's Damages Claims*, para. 19; *Eritrea's Damages Claims*, para. 19.

Eritrea's violations of both *jus ad bellum* and *jus in bello*. For its part, Eritrea claimed approximately US$ 6 billion from Ethiopia for damages resulting from breaches of *jus in bello*.[118]

2.57 The Commission expressed concern about the magnitude of these claims, calling them "huge, both absolutely and in relation to the economic capacity of the country against which they were directed."[119] It observed further that claims of such magnitude raise "serious questions involving the intersection of the law of State responsibility with fundamental human rights norms"[120] that required limiting compensation so as to avoid imposing crippling burdens upon the paying State.

2.58 The Commission explained:

> "Both Ethiopia and Eritrea are parties to the International Covenant on Economic, Social and Cultural Rights ("ICESCR") and the International Covenant on Civil and Political Rights. Both Covenants provide in Article I(2) that '*[i]n no case may a people be deprived of its own means of subsistence.*' During the hearings, it was noted that early drafts of the International Law Commission's ("ILC") Draft Articles on State Responsibility included this qualification, but that it was not retained in the Articles as adopted. *That does not alter the fundamental human rights law rule of*

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[118] *Ethiopia's Damages Claims*, paras. 18-19; *Eritrea's Damages Claims*, para. 18.

[119] *Ethiopia's Damages Claims*, paras. 18; *Eritrea's Damages Claims*, para. 18.

[120] *Ethiopia's Damages Claims*, para. 19; *Eritrea's Damages Claims*, para. 19.

> *common Article I(2) in the Covenants, which unquestionably applies to the Parties.*
>
> "Similarly, Article 2(1) of the ICESCR obliges both Parties to take steps to achieve the 'full realization' of rights recognized by that instrument. The Commission is mindful that in its General Comments, the Committee on Economic, Social and Cultural Rights has identified a range of steps to be taken by States where necessary, inter alia, to improve access to health care, education … and resources to improve the conditions of subsistence. These General Comments have been endorsed and taken as guides to action by many interested observers and the United Nations' development agencies.[121]
>
> "*Awards of compensation of the magnitude sought by each Party would impose crippling burdens upon the economies and populations of the other, notwithstanding the obligations both have accepted under the Covenants.*"[122]

2.59 Ethiopia argued that the Commission need not be concerned about these impacts because the obligation to pay would fall on the Government of Eritrea, not its people. The Commission rejected the argument, stating: "Huge awards of compensation by their nature would require large diversions of national resources from the paying country—and its citizens

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[121] U.N. Committee on Economic, Social and Cultural Rights, *Report on the Fifth Session (26 Nov. – 14 Dec. 1990), Annex III, General Comment No. 3 (1990): the Nature of States Parties' Obligations (art. 2, para. 1 of the Covenant),* U.N. Doc. E/1991/23 (1991), p. 86. Vol. II, Annex 17.

[122] *Ethiopia's Damages Claims*, paras. 19-21; *Eritrea's Damages Claims*, paras. 19-21 (emphasis added).

needing health care, education and other public services—to the recipient country."[123]

2.60 Even though Eritrea was found responsible for violating both *jus ad bellum* and *jus in bello*, the Commission nevertheless held that "an award of compensation should be limited" to ensure that the financial burden imposed on Eritrea "would not be so excessive, given its economic condition and its capacity to pay, as to compromise its ability to meet its people's basic needs."[124] In reaching this conclusion, the EECC gave significant weight Eritrea's ranking among countries in the world in terms of development in the U.N. Human Development Report.[125]

2.61 The Commission observed that its decision in this respect was based on the "prevailing practice of States in the years since the Treaty of Versailles [which] has been to give very significant weight to the needs of the affected population in determining amounts sought as post-war reparations."[126]

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[123] EECC, Decision No. 7, pp. 6-7.

[124] *Ethiopia's Damages Claims*, paras. 22, 313.

[125] *Ethiopia's Damages Claims*, para. 18.

[126] EECC, Decision No. 7, pp. 6-7.

2.62 Any Award of compensation either to Uganda or the DRC can neither exceed the payment capacity of the responsible State or cause serious injury to the paying State's population.

F. Compensation Does Not Cover Damages the Injured State Could Have Avoided

2.63 A further element affecting the scope of compensation is the duty to mitigate damage.[127] Even the wholly innocent victim of wrongful conduct is expected to act reasonably when confronted by the injury.[128] A failure to mitigate by the injured State may preclude recovery to that extent.[129]

2.64 This point was clearly articulated by the Court in *Gabcikovo-Nagymaros*:

> "It is a general principle of international law that a party injured by the non-performance of another contract party must seek to mitigate the damages he has sustained. It would follow from such a principle that an injured State which has failed to take the necessary measures to limit the damage sustained would not be entitled to claim compensation for that damage which could have been avoided."[130]

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[127] ARSIWA, Art. 31, cmt. 11.

[128] *Ibid*.

[129] *Ibid*.

[130] *Gabčíkovo-Nagymaros Project*, para. 80.

2.65 Neither Uganda nor the DRC can therefore claim full compensation for damage which could have been avoided had they fulfilled their duty to mitigate.

G. A State May Not Recover Full Compensation for Damages to Which It Contributed

2.66 In the determination of the extent of compensation, international law requires that account be taken of "the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity" in relation to which compensation is sought.[131] This is consonant with the principle that compensation is due for only the damage directly caused by an internationally wrongful act. It is also "consistent with fairness as between the responsible State and the victim of the breach."[132]

2.67 The relevance of contributory fault to determining the extent of compensation is widely recognised.[133] In *S.S. Wimbledon*, a question arose as to whether there had been any contribution to the injury suffered as a result of the ship harboring at Kiel for some time, following refusal of

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[131] ARSIWA, Art. 39.

[132] *Ibid*., Art. 39, cmt. 2.

[133] In *Delagoa Bay Railway*, the arbitrators noted that: "All the circumstances that can be adduced against the concessionaire company and for the Portuguese Government mitigate the latter's liability and warrant…a reduction in reparation." *Delagoa Bay Railway (Great Britain, USA/Portugal)*, Award (13 June 1891), *cited* in ARSIWA, Art. 39, cmt. 4.

passage through the Kiel Canal, before taking an alternative course. The PCIJ implicitly acknowledged that the captain's conduct could affect the amount of compensation payable, although it held that the captain had acted reasonably in the circumstances.[134]

2.68 In *LaGrand,* Germany delayed in asserting that there had been a breach and in instituting proceedings. The Court noted that "Germany may be criticized for the manner in which these proceedings were filed and for their timing," and stated that it would have taken this factor, among others, into account "had Germany's submission included a claim for indemnification."[135]

2.69 It follows that the amount of compensation to which either Party may be entitled has to reflect the contribution to the injury by the injured Party or any person or entity in relation to whom compensation is sought.

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[134] *S.S. "Wimbledon"*, p. 31.

[135] *LaGrand Case (Germany v. United States of America)*, Judgment, I.C.J. Reports 2001, paras. 57, 116.

CHAPTER 3

UGANDA'S REQUEST FOR REPARATION ON ITS COUNTER-CLAIMS

3.1 In this Chapter, Uganda presents its request for reparation relating to its counter-claims having regard to the relevant rules of international law elaborated in Chapter II. This Chapter consists of four sections. **Section I** discusses the Court's findings pertinent to Uganda's counter-claims. **Section II** sets forth Uganda's claim for reparation for the mistreatment of Ugandan diplomats and other nationals. **Section III** addresses reparation for physical damage caused to Uganda's diplomatic premises. Finally, **Section IV** deals with reparation for property seized from the diplomatic premises.

I. The Court's Findings with Respect to the DRC's Wrongful Acts

3.2 In its 2005 Judgment, the ICJ upheld Uganda's second counter-claim relating to the attacks on and seizure of the Ugandan diplomatic premises in Kinshasa, and the maltreatment of Ugandan diplomats and other nationals. In paragraph 12 of the *Dispositif*, the Court unanimously found that:

> "the Democratic Republic of the Congo, by the conduct of its armed forces, which attacked the Ugandan Embassy in Kinshasa, maltreated Ugandan diplomats and other individuals on the

> Embassy premises, maltreated Ugandan diplomats at Ndjili International Airport, as well as by its failure to provide the Ugandan Embassy and Ugandan diplomats with effective protection and by its failure to prevent archives and Ugandan property from being seized from the premises of the Ugandan Embassy, violated obligations owed to the Republic of Uganda under the Vienna Convention on Diplomatic Relations of 1961."

3.3 In paragraph 13 of the *Dispositif*, the Court accordingly determined "that the Democratic Republic of the Congo is under obligation to make reparation to the Republic of Uganda for the injury caused."[136]

3.4 As with the DRC's claims against Uganda, the Parties were first afforded an opportunity to attempt to reach agreement on the question of the reparation due. Failing such agreement, "the question of reparation due to the Republic of Uganda shall be settled by the Court[.]"[137] As explained in Chapter 1, the Parties failed to reach any agreement.

3.5 The nature and extent of the reparation the DRC owes to Uganda must, of course, be determined by reference to the findings of fact and conclusions of law reached by the Court in the 2005 Judgment. There, the Court expressly found that:

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[136] *Armed Activities* (2005), Dispositif, para. 13.

[137] *Ibid*., Dispositif, para. 14.

- "[T]here is sufficient evidence to prove that there were attacks against the Embassy and acts of maltreatment against Ugandan diplomats at Ndjili International Airport."[138]

- The Embassy of Uganda was the subject of a "long-term occupation … by Congolese forces."[139]

- "Acts of maltreatment by DRC forces of persons within the Ugandan Embassy were necessarily consequential upon a breach of the inviolability of the Embassy premises prohibited by Article 22 of the Vienna Convention on Diplomatic Relations. This is true regardless of whether the persons were or were not nationals of Uganda or Ugandan diplomats."[140]

- "[T]here is evidence that some Ugandan diplomats were maltreated at Ndjili International Airport when leaving the country." [141]

- "In summary, the Court concludes that, through the attacks by members of the Congolese armed forces on the premises of the Ugandan Embassy in Kinshasa, and their maltreatment of persons who found themselves at the Embassy at the time of the attacks, the DRC breached its obligations under Article 22 of the Vienna Convention on Diplomatic Relations. The Court further concludes that by the maltreatment by members of the

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[138] *Ibid*., para. 334.

[139] *Ibid*., para. 336.

[140] *Ibid*., para. 338.

[141] *Ibid*., para. 339.

Congolese armed forces of Ugandan diplomats on Embassy premises and at Ndjili International Airport, the DRC also breached its obligations under Article 29 of the Vienna Convention."[142]

- "[T]he Status Report on the Residence and Chancery, jointly prepared by the DRC and Uganda under the Luanda Agreement, provides sufficient evidence for the Court to conclude that Ugandan property was removed from the premises of the official residence and Chancery. It is not necessary for the Court to make a determination as to who might have removed the property reported missing. The Vienna Convention on Diplomatic Relations not only prohibits any infringements of the inviolability of the mission by the receiving State itself but also puts the receiving State under an obligation to prevent others—such as armed militia groups—from doing so."[143]

- "The Court notes that, at this stage of the proceedings, it suffices for it to state that the DRC bears responsibility for the breach of the inviolability of the diplomatic premises, the maltreatment of Ugandan diplomats at the Ugandan Embassy in Kinshasa, the maltreatment of Ugandan diplomats at Ndjili International Airport, and for attacks on and seizure of

[142] *Ibid*., para. 340.

[143] *Ibid*., para. 342.

property and archives from Ugandan diplomatic premises, in violation of international law on diplomatic relations." [144]

3.6 On the basis of these findings, all of which constitute *res judicata* binding upon the Parties, the DRC has an obligation to make reparation for categories of injury:

1. Loss, damage or injury arising from the maltreatment of persons, in particular:

    i. Ugandan diplomats and other nationals mistreated by Congolese forces on its diplomatic premises; and

    ii. Ugandan diplomats at Ndjili Airport.

2. Loss, damage or injury to the buildings located on the diplomatic premises as a result of their invasion, seizure and long-term occupation by Congolese forces. This includes renovation and repair costs.

3. The loss of public and personal property seized from the diplomatic premises.

3.7 Uganda's reparation claim in regard to each of these categories of injury is set forth in the sections that follow.

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[144] *Ibid*., para. 344.

II. Loss, Damage or Injury to Ugandan Diplomats and Other Persons Resulting from the DRC's Wrongful Acts

3.8 Uganda considers the mistreatment of its diplomats and other persons on its diplomatic premises in Kinshasa, as well as the maltreatment of its diplomats at Ndjili Airport, to be a matter of singular concern. The principle of the inviolability of the premises of diplomatic missions and the persons of diplomatic agents is of a "fundamental character."[145]

3.9 In the *Tehran Hostages* case, the Court made a point of stressing that "the obligations laid on States by [the Vienna Convention on Diplomatic Relations] are of cardinal importance for the maintenance of good relations between States in the interdependent world of today."[146] There is "no more fundamental prerequisite for the conduct of relations between States," the Court said, "than the inviolability of diplomatic envoys and embassies, so that throughout history nations of all creeds and cultures have observed reciprocal obligations for that purpose." [147]

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[145] *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment, I.C.J. Reports 1980 ("*United States Diplomatic and Consular Staff in Tehran*"), para. 86.

[146] *Ibid*., para. 91.

[147] *Ibid*.

3.10 "The institution of diplomacy," the Court continued, "has proved to be an instrument essential for effective co-operation in the international community, and for enabling States, irrespective of their differing constitutional and social systems, to achieve mutual understanding and to resolve their differences by peaceful means."[148]

3.11 Uganda considers that, because the injuries done to *the individual persons* who suffered mistreatment at the hands of Congolese forces are at least partially material in nature, they are potentially amendable to monetary compensation. Nevertheless, Uganda recognises the inherent difficulty in providing sufficiently clear and credible evidence, particularly evidence that is contemporary to the events in question, to quantify the extent of the damages with sufficient certainty. Under the circumstances, Uganda considers that the Court's formal findings of the DRC's international responsibility in the 2005 Judgment constitute an appropriate form of satisfaction, providing reparation for the consequent injury.

3.12 The injury suffered by *the Ugandan State* as a result of the DRC's mistreatment of its nationals on Uganda's diplomatic premises and its diplomats at Ndjili Airport is most appropriately viewed as non-material

[148] *Ibid*.

in nature. These injuries constitute an affront to Uganda's dignity and a deprivation of the rights accorded it by the Vienna Convention on Diplomatic Relations.

3.13 In this respect, they are comparable to those injuries inflicted by Ethiopia's unlawful searches of Eritrean diplomatic personnel as they departed Ethiopia, and Eritrea's unlawful searches of Ethiopian diplomatic personnel as they departed Eritrea at issue before the EECC.[149] Just as the Commission found satisfaction by way of a declaratory judgment the appropriate form of reparation there, so too Uganda considers it appropriate in this case.

3.14 Uganda observes further that its choice of satisfaction as an appropriate and sufficient form of reparation in respect of these elements of its counter-claim is also motivated by the desire to promote an atmosphere conducive to the further improvement of bilateral relations between the Parties, an important goal the Parties themselves repeatedly emphasised during the course of their negotiations and again very recently in the 4 August 2016 Joint Communiqué signed in Uganda.

[149] *Eritrea's Damages Claims*, para. 386 & IX(18); *Ethiopia's Damages Claims*, paras. 387-88 & XII(C).

III. Loss, Damage or Injury Relating to Uganda's Diplomatic Premises Resulting from the DRC's Wrongful Acts

3.15 This element of Uganda's counter-claims consists of the renovation and repair costs necessitated by the DRC's invasion and long-term occupation of the diplomatic premises.

3.16 When Congolese forces invaded, seized and occupied Uganda's diplomatic premises, it comprised two locations: (1) the Ambassador's Residence (at No. 12 Avenue de l'Ouganda) consisting of one two-story building; and (2) the Chancery (at No. 17 Tombalbaye Avenue de Travailure) consisting of a main, three-story building and two detached, two-story buildings).

3.17 By the time Uganda regained access to the Embassy buildings in April 2005, they were in a ruinous condition. Indeed, they were in that condition long before 2005. During the pleadings at the merits phase, the DRC did not object to Uganda's statement that as of September 2002 the Embassy buildings were already "in a state of total disrepair."[150] The subsequent three years of the Congolese occupation caused further serious structural and other damage of those buildings, as demonstrated by

[150] *Armed Activities (2005)*, para. 312.

contemporaneous photographs of the former Chancery included in Annex 4.[151]

1. Renovation and Repair Costs Incurred for the Rehabilitation of the Ambassador's Residence

3.18 The costs Uganda incurred to repair the damage done to the Ambassador's Residence total US$ 93,585. Nevertheless, Uganda is unable to present sufficiently clear, credible and convincing evidence necessary to meet the relevant evidentiary standards to prove that amount.

3.19 Uganda has, and respectfully submits herewith, two bills of quantities prepared by the construction company "GECODES" in the amount of US$ 43,475[152] and US$ 28,325,[153] respectively. It does not currently have two other bills of quantities that total another US$ 21,785.

3.20 Uganda also has a letter from GECODES to the Embassy of Uganda dated 29 July 2008 requesting payment from Uganda in the amount of US$ 93,585.[154] Although this is the amount that Uganda in fact

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[151] Photographs of Damages to Uganda's Chancery Located at No. 17 Tombalbaye Avenue de Travailure, Gombe, Kinshasa, Vol. II, Annex 4.

[152] GEOCODES sprl, *Travaux de Rehabilitation de la Residence de l'Ambassadeur de la Republique de l'Ouganda a Kinshasa* (July 2007). Vol. II, Annex 12.

[153] GEOCODES sprl, *Devis Supplémentaire des Travaux de la Réhabilitation de la Residence de l'Ambassadeur de l'Ouganda a Kinshasa - Gombe R.D.C.* (Jan. 2008). Vol. II, Annex 13.

[154] *Letter* from GEOCODES sprl to the Ambassador of Uganda to Democratic Republic of Congo (29 July 2008). Vol. II, Annex 14.

has paid, it has also been unable to locate wire transfer receipts to prove the fact of payment.

3.21 Because requisite evidence is lacking to conclusively establish the extent of the renovation and repair costs incurred and paid for the rehabilitation of the former Ambassador's residence, Uganda considers that the Court's formal findings of the DRC's international responsibility in the 2005 Judgment constitute an appropriate form of satisfaction, providing reparation for the injury suffered.

2. Renovation and Repair Costs Incurred for the Rehabilitation of the Chancery

3.22 The costs Uganda has incurred and paid to repair the three damaged Chancery buildings total US$ 1,198,532.94. This amount is evidenced by itemised invoices sent to Uganda by the construction company M/S SAFRICAS for the renovation and repair work it performed on the Chancery buildings, as well as wire transfer receipts confirming the payment of those invoices by Uganda. These materials are submitted herewith as Annex 15.

3.23 For the convenience of the Court, all itemised invoices and wire transfer receipts are summarised in Table 1 on the following page.

Table 1: *Summary of Payments by Uganda's Embassy in Respect of Renovation of the Ugandan Chancery Buildings located at No. 17 Tombalbaye Avenue de Travailure, Gombe, Kinshasa*

Payee	**Dates of Invoices**	**Payment No.**	**Dates of Payments**	**Payment Description**	**Amount (US Dollars)**	**Total Certificate Amount**
Safricas Congo S.A.R.L.	9/18/2013	PV-1503	9/26/2013	Certificate 1 for Advance Payment	107,988.00	247,988.00
Safricas Congo S.A.R.L.		PV-1504	9/27/2013	Certificate 2 for Advance Payment	140,000.00	
Safricas Congo S.A.R.L.	1/24/2014	PV-1980	2/6/2014	Certificate 2 for Work Done	80,809.98	80,809.98
Safricas Congo S.A.R.L	8/15/2014	PV-2712	9/2/2014	Certificate 3 for Work Done	100,000.00	196,291.70
Safricas Congo S.A.R.L.		PV-2771	9/30/2014	Certificate 3 for Work Done	96,291.70	
Safricas Congo S.A.R.L.	3/05/2015	PV-3174	4/21/2015	Certificate 4 for Work Done	130,000.00	291,740.28
Safricas Congo S.A.R.L.		PV-3184	4/27/2015	Certificate 4 for Work Done	161,740.28	
Safricas Congo S.A.R.L.	10/20/2015	PV-3492	10/30/2015	Certificate 5 for Work Done	76,581.00	267,861.88
Safricas Congo S.A.R.L.		PV-3539	12/5/2015	Certificate 5 for Work Done	95,000.00	
Safricas Congo S.A.R.L.		PV-3722	3/9/2016	Certificate 5 for Work Done	40,000.00	
Safricas Congo S.A.R.L.		PV-3819	4/26/2016	Certificate 5 for Work Done	56,280.88	
Safricas Congo S.A.R.L.	6/15/2016	PV-3955	6/26/2016	Certificate 6 for Work Done	101,253.07	113,841.98
Safricas Congo S.A.R.L.		PV-3956	6/30/2016	Certificate 6 for Work Done	12,588.91	
TOTAL					**1,198,533.82**	**1,198,533.82**

3.24 The evidence thus clearly and convincingly shows that Uganda's renovation and repair costs for the Chancery as of the time of the Submission of this Memorial is US$ 1,198,532.94.

3.25 That said, while undertaking repair work to the Chancery, Uganda expanded the available floor space beyond that of the original buildings. Specifically, it added additional spaces measuring 238 sq metres[155], or 18% of the current total area of the Chancery buildings. Because these additions were not necessitated by the DRC's wrongful acts, but rather reflects an independent decision on the part of Uganda, Uganda does not consider it legally appropriate to claim compensation for the costs related to the addition of these spaces.

3.26 Deducting 18% from the total renovation and repair costs, the actual amount Uganda incurred and paid to repair the three damaged Chancery buildings as a result of the DRC's wrongful acts totals US$ 982,797.73.

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[155] Ministry of Foreign Affairs of Uganda, *Letter to the Solicitor General, Ministry of Justice and Constitutional Affairs, in regard to measurements for the Uganda renovated building located at plot 17 avenue Tombalbaye, District of Gombe, City of Kinshasa, Democratic Republic of Congo* (26 Sep. 2016). Voll. II, Annex 5-A.

3.27 Finally, as described above, the DRC returned Uganda's Chancery and the Ambassador Official Residence in unusable condition.[156] They were unfit for any purpose. While they were being rehabilitated, Uganda was therefore required to rent properties to serve as the Chancery, and to house the Ambassador and other diplomats.

3.28 However, for the reasons explained in Chapter II, Uganda considers that there is no "direct and certain causal nexus", as required under international law, between the DRC's wrongful acts and the lease expenses Uganda incurred. Because "the subject matter of reparation is, globally, the injury resulting from and ascribable to the wrongful act,"[157] and *not* "any and all consequences flowing from an internationally wrongful act,"[158] Uganda does not claim any compensation for those consequential damages.

IV. Loss of Property Wrongfully Seized from Uganda's Diplomatic Premises

3.29 In its 2005 Judgment, the Court found that "Ugandan property was removed from the premises of the official residence and Chancery" and that the DRC bore international responsibility for "the seizure of property

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[156] See *supra* Chapter 3, para. 3.17.

[157] ARSIWA, Art. 31, cmt. 1.

[158] *Ibid*.

from Ugandan diplomatic premises."[159] The DRC is therefore obligated to make reparation to Uganda for the losses caused.

3.30 The property removed from the premises of the official residence and Chancery comprised both the state property of Uganda and the personal property of Ugandan diplomats residing in the diplomatic premises. Uganda previously prepared a detailed list that itemised all seized items and stated their values. This list was submitted as Annex 92 to Uganda's Counter-Memorial submitted to the Court in April 2001. For convenience, it is attached again to this Memorial as Annex 3.[160] The total value of the items indicated is US$ 1,085,660 (all values stated are as of 1998).

3.31 Uganda accepts that the list of property is, on its own, insufficient to prove the value of the listed property.[161] Sufficient proof would require the submission of invoices, receipts, insurance documents or other similar documents showing the value of the listed property.

3.32 Uganda is, however, unable to provide such evidence due in large measure to the circumstances surrounding the departure of Uganda's

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[159] *Armed Activities (2005)*, paras. 342, 344.

[160] Loss of Uganda Government Property at Uganda Embassy, Kinshasa. Vol. II, Annex 3.

[161] *Diallo (2012)*, paras. 28, 32.

diplomatic personnel from Kinshasa in 1998 and the DRC's removal of documents from the "archives and working files" of Uganda's diplomatic premises "in violation of its obligations under Article 24 of the Vienna Convention on Diplomatic relations."[162]

3.33 Because requisite evidence is lacking to conclusively establish the value of the property wrongfully seized by the DRC from Uganda's diplomatic premises, Uganda considers that the Court's formal findings of the DRC's international responsibility in the 2005 Judgment constitute an appropriate form of satisfaction, providing reparation for the injury suffered.

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3.34 For the foregoing reasons, Uganda respectfully submits that the clear, credible and convincing evidence demonstrates that the DRC is obligated to make monetary compensation to Uganda in the total amount of US$ 982,797.73.

[162] *Armed Activities* (2005), para. 343.

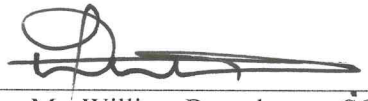
SUBMISSIONS

On the basis of the facts and law set forth in this Memorial, Uganda respectfully requests the Court to adjudge and declare that:

1) With respect to the loss, damage or injury arising from (a) the maltreatment of persons by Congolese forces on Uganda's diplomatic premises and of Ugandan diplomats at Ndjili Airport; (b) the invasion, seizure and long-term occupation of the residence of the Ambassador of Uganda in Kinshasa; and (c) the seizure of public and personal property from Uganda's diplomatic premises in Kinshasa, the Court's formal findings of the DRC's international responsibility in the 2005 Judgment constitute an appropriate form of satisfaction, providing reparation for the injury suffered.

2) With respect to the loss, damage or injury arising from the invasion, seizure and long-term occupation of Uganda's Chancery compound in Kinshasa, the DRC is obligated to make monetary compensation to the Republic of Uganda in the total amount of US$ 982,797.73.

Respectfully submitted,



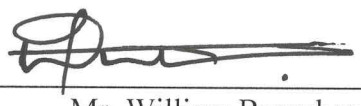
Mr. William Byaruhanga, SC
Attorney General of The Republic of Uganda

AGENT OF THE REPUBLIC OF UGANDA

28 September 2016

CERTIFICATION

I certify that the Annexes are true copies of the documents referred to.



Mr. William Byaruhanga, SC
Attorney General of The Republic of Uganda

AGENT OF THE REPUBLIC OF UGANDA

28 September 2016

LIST OF ANNEXES

VOLUME II

TREATIES & AGREEMENTS

UGANDA GOVERNMENT DOCUMENTS

JOINT UGANDA-DRC DOCUMENTS

Annex 7 Government of Uganda and the Government of the Democratic Republic of Congo, *Minutes of the Ministerial Meeting between the Republic of Uganda and the Democratic Republic of Congo* (13-14 Sept. 2012)

Annex 8 Government of Uganda and the Government of the Democratic Republic of Congo, *Minutes of the 3rd Meeting of Uganda and Congolese Experts on the Implementation of the Ruling of the International Court of Justice of 19 December 2005* (14 Dec. 2012)

Annex 9 Government of Uganda and the Government of the Democratic Republic of Congo, *Agreed Minutes of the 2nd Ministerial Meeting of the Ad Hoc Committee of Uganda/Democratic Republic of Congo on the Implementation of the Ruling of the ICJ (2005)* (24-27 Nov. 2014)

Annex 10 Government of Uganda and the Government of the Democratic Republic of Congo, *The Joint Report of the Meeting of Experts of the Democratic Republic of Congo and the Republic of Uganda on the Implementation on the Judgment of the ICJ of 19th December 2005* (13-17 Mar. 2015)

Annex 11 Government of Uganda and the Government of the Democratic Republic of Congo, *The Agreed Minutes of the 4th Meeting of Ministers of the Democratic Republic of Congo and the Republic of Uganda on the Implementation of the Judgment of the ICJ of 19th December 2005* (17-19 Mar. 2015)

THIRD PARTY DOCUMENTS, INCLUDING INVOICES AND WIRE TRANSFER RECEIPTS

Annex 12 GEOCODES sprl, *Travaux de Rehabilitation de la Residence de l'ambassadeur de la Republique de l'Ouganda a Kinshasa* (July 2007)

Annex 13 GEOCODES sprl, *Devis Supplementaire des Travaux de la Rehabilitation de la Residence de l'Ambassadeur de l'Ouganda a Kinshasa - Gombe R.D.C*. (Jan. 2008)

Annex 14 *Letter* from GEOCODES sprl to the Ambassador of Uganda to Democratic Republic of Congo (29 July 2008)

Annex 15 SAFRICAS Invoices and Wire Transfer Receipts of Payments by Uganda's Embassy in Respect of Renovation of the Ugandan Chancery Located at No. 17 Tombalbaye Avenue de Travailure, Gombe, Kinshasa (2013-2016)

Annex 16 Intentionally Omitted

UNITED NATIONS DOCUMENTS

Annex 17 U.N. Committee on Economic, Social and Cultural Rights, *Report on the Fifth Session (26 Nov. – 14 Dec. 1990), Annex III, General Comment No. 3 (1990): the nature of States parties' obligations (art. 2, para. 1 of the Covenant)*, U.N. Doc. E/1991/23 (1991)

Annex 18 "Ban Welcomes Signing of Declaration between DR Congo-M23", *United Nations News Centre* (13 Dec. 2013)

ACADEMIC ARTICLES & BOOKS

Annex 19 J.C. Witenberg, "La théorie des preuves devant les juridictions internationals", 56 *Recueil des Cours* 1 (1936-II)

Annex 20 Marjorie Whiteman, *Damages in International Law* (1943)

Annex 21 Jean-Flavien Lalive, "Quelques remarques sur la preuve devant la Cour permanente et la Cour internationale de Justice", 7 *Annuaire suisse de droit international* 77 (1950)

Annex 22 William Bishop, "State Responsibility", 2 *Recueil des Cours* 384 (1965)

Annex 23 Durward Sandifer, *Evidence before International Tribunals* (1975)

Annex 24 Keith Highet, "Evidence, the Court, and the Nicaragua Case", 81 *American Journal of International Law* 1 (1987)

Annex 25 Eduardo Valencia-Ospina, "Evidence before the International Court of Justice", 1 *International Law Forum* 202 (1999)

Annex 26 Chittharanjan Amerasinghe, *Evidence in International Litigation* (2005)

Annex 27 Maurice Kamto, "Les moyens de preuve devant la Cour internationale de Justice à la lumière de quelques affaires récentes portées devant elle", 49 *German Yearbook of International Law* 259 (2006)

Annex 28 Richard Falk, "Reparations, International Law, and Global Justice", in THE HANDBOOK OF REPARATIONS (P. de Greiff ed., 2006)

Annex 29 Ruth Teitelbaum, "Recent Fact-finding Developments at the International Court of Justice", 6 *Law and Practice of International Courts and Tribunals* 119 (2007)

Annex 30 Christian Tomuschat, "Reparations in Favour of Individual Victims of Gross Violations of Human Rights and International Humanitarian Law", in PROMOTING JUSTICE, HUMAN RIGHTS AND CONFLICT RESOLUTION THROUGH INTERNATIONAL LAW, LIBER AMICORUM LUCIUS CAFLISCH (M. Kohen ed., 2007)

Annex 31 Stephan Wittich, "Punitive Damages", in THE LAW OF INTERNATIONAL RESPONSIBILITY (J. Crawford et al. eds., 2010)

Annex 32 P. Tomka & V.-J. Proulx, "The Evidentiary Practice of the World Court" in LIBER AMICORUM GUDMUNDUR EIRIKSSON (J. C. Sainz-Borgo ed., forthcoming 2016)

NEWSPAPER REPORTS

Annex 33 "Eighth Pleinary Meeting Between the DR Congo Government and M23", *International Conference on the Great Lakes Region* (11 Jan. 2013)