SEPARATE OPINION OF JUDGE CANÇADO TRINDADE

1. In the course of the handling of proceedings on reparations in the present case of *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, I have been having concerns, — as already expressed on the occasion of two previous Orders (of 1 July 2015 and 11 April 2016), — which I deem it fit again to lay on the records in today's Order (of 6 December 2016), in the present separate opinion in the *cas d'espèce*.

2. This time, I shall summarize my concerns in four interrelated points, namely: *(a)* the undue prolongation of time in the adjudication of cases of grave violations of international law; *(b)* breach and reparation conforming an indissoluble whole; *(c)* the fundamental duty of prompt reparation; and *(d)* reparations in distinct forms. May I turn to each of them in sequence; the path will then be paved for the presentation of my concluding observations.

I. Undue Prolongation of Time in the Adjudication of Cases of Grave Violations of International Law

3. It is most regrettable to find that, the graver the breaches of international law appear to be, the more time-consuming and difficult it becomes to impart justice. Last year, in its Judgment of 3 February 2015 in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia)*, the ICJ rejected the claim (and counter-claim) after a virtually unprecedented prolongation of sixteen years of the process, despite the *vita brevis* of victimized human beings. In my extensive dissenting opinion appended thereto, I devoted a whole section of it to the "regrettable delays in the adjudication" of the case (*I.C.J. Reports 2015 (I)*, pp. 15-17, paras. 6-18). And this is not the only example to this effect.

4. It was preceded by the Court's Judgment (of 26 February 2007) of the *Bosnian Genocide* case *(Bosnia and Herzegovina* v. *Serbia and Montenegro)*, after fourteen years of process. In another case, the one concerning the *Obligation to Prosecute or Extradite (Belgium* v. *Senegal)*, the numerous victims of the occurrences at issue had to wait a long time until finding justice in the ICJ Judgment on the merits (of 20 July 2012). Yet, the surviving victims of the occurrences at issue in the case of *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening)*, lost

all hope in human justice after the delivery of the ICJ Judgment of 3 February 2012, upholding the prevalence of State immunities over the right of access to justice *lato sensu*, in particular in face of international crimes.

5. In the handling by the ICJ of the present case concerning *Armed Activities on the Territory of the Congo* (reparations), it has been 11 years since the ICJ delivered its Judgment (of 19 December 2005) on the merits, wherein grave breaches were established by the Court; yet, the numerous victims still wait for reparations. And this is the third time, in the ongoing proceedings on reparations, that I deem it fit to leave on the records my concerns as to the continuing and undue prolongation of time, to the detriment of the victims themselves[1]. *Tempus fugit*.

6. In its aforementioned Judgment of 2005, the ICJ was particularly attentive to those grave breaches (massacres of civilians, incitement of ethnic conflicts among groups, forced displacement of persons, among others), having drawn attention to the need of reparation, though unfortunately without setting up a reasonable time-limit for that. In the current written phase of proceedings on reparations in the *cas d'espèce*, special attention has again been devoted to those grave breaches (e.g., in the region of Ituri and the city of Kisangani)[2], including an express cross-reference to a resolution of the Security Council (on the occurrences in Kisangani) in that respect[3], and references to recent proceedings on reparations before the International Criminal Court (ICC) in the case of *The Prosecutor* v. *Thomas Lubanga Dyilo*[4].

7. The Security Council resolution just mentioned, Security Council resolution 1304 (of 16 June 2000), upheld, over one and a half decades ago, *inter alia*, the duty to "make reparations" for damages (loss of life and others) "inflicted on the civilian population in Kisangani", and requested the Secretary-General to "submit an assessment of the damage[s] as a basis for such reparations" (para. 14). A report to that effect was forwarded to the President of the Security

[1] Cf., earlier on, case of *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Order of 1 July 2015, I.C.J. Reports 2015 (II)*, declaration of Judge Cançado Trindade, pp. 585-587, paras. 1-7; and *ibid.*, *Order of 11 April 2016, I.C.J. Reports 2016 (I)*, declaration of Judge Cançado Trindade, pp. 224-229, paras. 1-20.

[2] Cf. Memorial of the Democratic Republic of the Congo, Chaps. 3-4, pp. 72-133, paras. 3.01-4.76.

[3] Cf. *ibid.*, p. 109, para. 4.04.

[4] Cf. *ibid.*, pp. 77 and 96, paras. 3.10 and 3.37, respectively.

Council, appended to a letter from the Secretary-General of 4 December 2000[5].

8. That report (resulting from an assessment mission to Kisangani), which did not have the pretension to address at length or to exhaust the issue of reparations (para. 1), nonetheless singled out programmes of rehabilitation of victims (paras. 33-34). The report pointed out that the "recent war" in the Democratic Republic of Congo "involved seven neighbouring countries", creating a situation that "resulted in a major humanitarian crisis": the war-affected people rose "by around 7 to 20 million", including "1.8 million internally displaced people and over 400 thousand refugees", with "serious repercussions on the stability of the entire central African region" (paras. 13 and 44)[6].

9. So, in view of the virtual impossibility to provide *restitutio in integrum* in cases of mass crimes, reparations were seen, already one and a half decades ago, in 2000, to include not only compensation and satisfaction, but also rehabilitation of the victims (medical and social services), apologies (as satisfaction), guarantees of non-repetition of the grave breaches (occurred in the armed conflicts of the Great Lakes), among other forms of reparation. Half a decade later, the ICJ delivered its Judgment on the merits in the case of *Armed Activities on the Territory of the Congo* (2005), and now, over a decade later, we are still in the written phase of the proceedings on reparations for damages. *Justitia longa, vita brevis*.

II. Breach and Reparation Conforming an Indissoluble Whole

10. May I recall that the duty of reparation is deeply and firmly-rooted in the history of the law of nations, going back to its origins, when it marked presence in the writings of the "founding fathers" of our discipline, who expressly referred to it in the light of the principle *neminem laedere*. I had the occasion to review their writings in my extensive separate opinion in the case of *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012 (I)*, p. 324. May I herein single out and stress an important point.

11. Thus, already in the first half of the sixteenth century, Francisco de Vitoria held, in his celebrated second *Relectio — De Indis*

[5] Cf. UN Security Council doc. S/2000/1153, of 4 December 2000, pp. 1-12.

[6] As I pointed out in my declaration (para. 11, note 5) appended to the Court's Order of 11 April 2016, the great proportions and complexity of the armed conflicts in the Great Lakes are gradually being written in historical bibliography.

(1538-1539), that "the enemy who has done the wrong is bound to give all this redress"[7]; there is a duty, even amidst armed hostilities, to make restitution (of losses) and to provide reparation for "all damages"[8]. De Vitoria found inspiration in the much earlier writings of Thomas Aquinas (from the thirteenth century), and pursued an anthropocentric outlook in his lectures at the University of Salamanca[9].

12. The new humanist thinking came thus to mark presence in the emerging law of nations. In the second half of the sixteenth century, Bartolomé de las Casas, in his *De Regia Potestate* (1571), after invoking the lessons of Thomas Aquinas, also asserted the duty of *restitutio* and reparation for damages[10]. In one of his best-known works, *Brevísima Relación de la Destrucción de las Indias* (1552), de las Casas not only denounced the numerous massacres of native people, but also asserted the duty of reparations for damages[11]. Still in the sixteenth century, the duty of *restitutio* and reparation for damages was Juan Roa Dávila, in his *De Regnorum Iusticia* (1591), also referring to Thomas Aquinas[12].

13. Later on, in the seventeenth century, Hugo Grotius, in his well-known *De Jure Belli ac Pacis* (1625), dedicated a whole chapter to the obligation of reparation for damages (Book II, Chapter XVII)[13]. He kept in mind the dictates of *recta ratio*. To him, the "injured party" was not necessarily a State; he referred to distinct kinds of damage caused by breaches of "rights resulting to us", or from "losses suffered by negligence"; such damages or losses created an obligation of reparation[14].

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[7] Francisco de Vitoria, *Second Relectio — On the Indians [De Indis]* [1538-1539], Oxford/London, Clarendon Press/H. Milford, 1934 [reed.], p. LV.

[8] *Ibid.*, p. LV; in *Obras de Francisco de Vitoria — Relecciones Teológicas* (ed. T. Urdañoz), Madrid, BAC, 1955, p. 827.

[9] As from his first lecture; cf. Francisco de Vitoria, *Sobre el Poder Civil* [*Relectio de Potestate Civili*, 1528] (ed. J. Cordero Pando), Salamanca, Edit. San Estéban, 2009 [reed.], pp. 22 and 44.

[10] Bartolomé de las Casas, *De Regia Potestate o Derecho de Autodeterminación* [1571] (eds. L. Pereña, J. M. Pérez-Prendes, V. Abril and J. Azcárraga), CSIC, Madrid, 1969, p. 72.

[11] Bartolomé de las Casas, *Brevísima Relación de la Destrucción de las Indias* [1552], Barcelona, Ediciones 29, 2004 [reed.], pp. 14, 17, 23, 27, 31, 45, 50, 72-73, 87 and 89-90 (massacres), Bartolomé de las Casas, *Brevísima Relación de la Destruición de las Indias* [1552], Barcelona, Ed. Galaxia Gutenberg/Universidad de Alicante, 2009, pp. 91-92 and 116-117.

[12] Juan Roa Dávila, *De Regnorum Iusticia o El Control Democrático* [1591] (eds. L. Pereña, J. M. Pérez-Prendes and V. Abril), Madrid, CSIC/Instituto Francisco de Vitoria, 1970, pp. 59 and 63.

[13] Hugonis Grotius, *De Jure Belli ac Pacis* [1625], Book II, Chap. XVII, The Hague, Martinus Nijhoff, 1948, pp. 79-82.

[14] *Ibid.*, pp. 79-80, paras. I and VIII-IX; and cf. H. Grotius, *Le droit de la guerre et de la paix* [1625], (eds. D. Alland and S. Goyard-Fabre), Paris, PUF, 2005 [reed.], pp. 415-416 and 418, paras. I and VIII-IX.

14. Also in the seventeenth century, Samuel Pufendorf, in his thoughtful book *On the Duty of Man and Citizen According to Natural Law* (1673), stressed the need to provide reparation for damages at the same time that condemned by natural law vengeance, so as to secure peace. He warned that, without providing *restitutio*,

> "men in their wickedness will not refrain from harming each other; and the one who has suffered loss will not readily bring himself to make peace with the other as long as he has not obtained compensation . . . The obligation to make restitution for loss arises not only from harm done with intentional malice but also from harm done by negligence or by easily avoidable fault, without direct intention."[15]

15. Subsequently, in the eighteenth century, also in the line of jusnaturalist thinking, Christian Wolff, in his book *Principes du droit de la nature et des gens* (1758), also asserted the duty of appropriate reparation for damages[16]. Other examples could be added, but the aforementioned suffice for the purpose of the present separate opinion. It is not surprising to find that the "founding fathers" of international law were particularly attentive to the duty of reparation for damages. They addressed reparations in respect of distinct sorts of disputes, concerning distinct subjects — States as well as nations, peoples, groups and individuals.

16. Already in the sixteenth century, de Vitoria viewed the international community of emerging States as "co-extensive with humanity", and the provision of redress corresponded to "an international need"[17] in conformity with *recta ratio*. The emerging *jus naturae* et *gentium* was universalist, directed to all peoples; law and ethics went together, in the search for justice[18]. Reminiscent of Cicero's ideal of *societas hominum*[19], the "founding fathers" of international law conceived a "universal society

[15] Samuel Pufendorf, *On the Duty of Man and Citizen According to Natural Law* [1673], (eds. J. Tully and M. Silverthorne), Cambridge University Press, 2003 [reprint], pp. 57-58, and cf. pp. 59-60.

[16] Christian Wolff, *Principes du droit de la nature et des gens* [1758], Vol. III, Ed. Université de Caen, 2011 [reed.], Chap. VI, pp. 293-294, 296-297 and 306.

[17] Cf. Association internationale Vitoria-Suarez, *Vitoria et Suarez: Contribution des théologiens au droit international moderne*, Paris, Pedone, 1939, pp. 73-74, and cf. pp. 169-170; J. Brown Scott, *The Spanish Origin of International Law — Francisco de Vitoria and His Law of Nations*, Oxford/London, Clarendon Press/H. Milford, 1934, pp. 282-283.

[18] [Various authors], *Alberico Gentili — Giustizia, Guerra, Imperio* (Atti del Convegno di San Ginesio, 2010), Milan, Giuffrè Edit., 2014, pp. 275 and 320, and cf. pp. 299-300 and 327.

[19] Cf., *inter alia*, e.g., M. Luque Frías, *Vigencia del Pensamiento Ciceroniano en las Relecciones Jurídico-Teológicas del Maestro Francisco de Vitoria*, Granada, Edit. Comares,

of the humankind" *(commune humani generis societas)* encompassing all the aforementioned subjects of the law of nations *(droit des gens)*.

17. The reductionist outlook of the international legal order, which came to prevail in the nineteenth and early twentieth centuries, beholding only absolute State sovereignties and subsuming human beings thereunder, led reparations into a standstill and blocked their conceptual development. This latter has been retaken in current times, contributing to the historical process of humanization of contemporary international law.

18. The legacy of the "founding fathers" of international law has been preserved in the most lucid international legal doctrine, from the sixteenth-seventeenth centuries to date. It marks its presence in the universality of the law of nations, in the acknowledgment of the importance of general principles of law, in the relevance attributed to *recta ratio*. It also marks its presence in the acknowledgment of the indissoluble whole conformed by the breach and prompt reparation.

19. Reparations — in particular collective reparations — are at last attracting the growing attention of international legal doctrine in our days, as well as in case law. This should not pass unnoticed; to recall just one example, the ICC (Appeals Chamber), e.g., in its recent Judgment on reparations (of 3 March 2015) in the case of *The Prosecutor* v. *Thomas Lubanga Dyilo*, has drawn particular attention to *collective* reparations, in the factual context of the case[20].

III. The Fundamental Duty of Prompt Reparation

20. When damages ensuing from grave violations of the international law of human rights and international humanitarian law have occurred, — as some of those found by the ICJ (2005 Judgment) in the present case concerning *Armed Activities on the Territory of the Congo*, the ultimate beneficiaries of the reparations due are the victims, human beings as subjects of international law. The duty of reparation is not only a "secondary obligation" (as conventional wisdom tries to make one believe in current times). Not at all: it is, in my perception, a truly fundamental obligation. Such breaches entail the duty of prompt reparation, conforming an indissoluble whole.

2012, pp. 70, 95, 164, 272-273, 275, 278-279, 284, 398-399 and 418-419; A. A. Cançado Trindade and V. F. D. Cançado Trindade, "A Pré-História do Princípio de Humanidade Consagrado no Direito das Gentes: O Legado Perene do Pensamento Estóico", *O Princípio de Humanidade e a Salvaguarda da Pessoa Humana* (eds. A. A. Cançado Trindade and C. Barros Leal), Fortaleza/Brazil, IBDH/IIDH, 2016, pp. 49-84.

[20] Paragraphs 7, 52-53, 126, 133, 147, 152-153, 155-156, 165-166, 177, 180, 207 and 212.

21. Breach and reparation, in my understanding, cannot be separated in time, as the latter is to cease promptly all the effects of the former. The harmful effects of wrongdoing cannot be allowed to prolong indefinitely in time, without reparations to the victims. The duty of reparation does not come, as a "secondary obligation", after the breach, to be complied when the States concerned deem feasible. The duty of reparation, a fundamental obligation, arises immediately with the breach, to be promptly complied with, so as to avoid the aggravation of the harm already done, and restore the integrity of the legal order.

22. Hence its fundamental importance, especially if we approach it from the perspective of the centrality of the victims, which is my own. The indissoluble whole conformed by breach and reparation admits no disruption by means of undue and indefinite prolongation of time. In the *cas d'espèce*, the present Order discloses that the Contending Parties are aware of the passing of time without reparation and its negative impact upon the victims individually or in groups.

23. And the Court, reassuringly, for the first time, expresses in the present Order, just before its resolutory points, its own consciousness of the need, at this stage, "to rule on the question of reparations without undue delay", so as to avoid further undue prolongation of time. After all, only with reparation (from the Latin *reparare*, "to dispose again") will the effects of the breaches be made to cease: an international tribunal should keep in mind that it is unreasonable and unjust to spend years and years to determine reparations. Only the prompt compliance with the fundamental duty of full reparation will cease the consequences ensuing from the breaches, thus restoring the integrity of the international legal order.

IV. Reparations in Distinct Forms

24. There is a remaining point to be made here. In the course of the current proceedings on reparations in the present case concerning *Armed Activities on the Territory of the Congo*, reparations in distinct forms are to be kept in mind. The Contending Parties, the Democratic Republic of the Congo and Uganda, have shown awareness also of that, in their respective Memorials on reparations. Each of them refers to reparations, in the forms, in particular, of *compensation* and *satisfaction*, — even though, as already pointed out, there are still other forms of reparations[21], so as to alleviate human suffering and also to foster reconciliation.

[21] Cf. paragraph 9, *supra*, of the present separate opinion.

25. For example, in its Memorial, dated 26 September 2016, the Democratic Republic of Congo refers to reparation in its distinct forms[22]. Under the heading of *compensation*, the Democratic Republic of Congo claims reparation for damage caused to people, to property, to natural resources, as well as macro-economic damage[23]. Under the heading of *satisfaction*, the Democratic Republic of Congo claims reparation in the form of the initiation of criminal investigations and prosecutions of officers and soldiers of Uganda's People's Defence Force, the creation of a fund to promote reconciliation between the Hema and Lendu peoples in Ituri, and the payment of a lump sum to repair non-material damage suffered by the Congolese State and population[24].

26. For its part, in its Memorial, dated 28 September 2016, Uganda likewise refers to reparation in its distinct forms[25]. Under the heading of *compensation*, Uganda claims reparation for damage caused to its Chancery buildings. Under the heading of *satisfaction*, Uganda refers to damage caused to Ugandan diplomats and other persons, and to diplomatic premises and property; it expresses its understanding that the responsibility findings in the ICJ 2005 Judgment constitute an "appropriate form of satisfaction", providing reparation for the damages suffered[26].

27. The attention of the Contending Parties to reparations in its distinct forms may help to avoid further undue prolongations of time in the current proceedings in the *cas d'espèce*. In my dissenting opinion in the ICJ Order of 28 May 2009 in the case concerning the *Obligation to Prosecute or Extradite*, I devoted special attention to the need to bridge or reduce the *décalage* between the time of human beings and the time of human justice (*I.C.J. Reports 2009*, pp. 182-188, paras. 46-64), pondering that it is "indeed imperative" to do so (*ibid.*, p. 183, para. 49).

V. Concluding Observations

28. In my understanding, the Court is not conditioned or limited by what the parties request or want, not even in the fixing of time-limits. As I have been pointing out within the ICJ time and time again, and I reiter-

[22] Memorial of the Democratic Republic of the Congo, reparations, Chap. 7, Section 1, pp. 224-247, paras. 7.02-7.64 (compensation); and Chap. 7, Section 2, pp. 248-255, paras. 7.65-7.84 (satisfaction).

[23] *Ibid.*, Chap. 7, Section I, pp. 226-244.

[24] *Ibid.*, Section 2, pp. 249-255.

[25] Memorial of Uganda, Reparation, Chap. 2, Section III, pp. 31-53, paras. 2.23-2.69 (compensation); and Chap. 2, Section II, pp. 24-31, paras. 2.7-2.22 (satisfaction).

[26] Cf. *ibid.*, Chap. 3, Section II, p. 62, para. 3.11; Chap. 3, Section III, p. 65, para. 3.21; and Chap. 3, Section IV, p. 70, para. 3.33.

ate it herein, the Court is not an arbitral tribunal[27]. The Court is master of its own procedure, also in the fixing of time-limits, in the path towards the realization of justice, avoiding the undue prolongation of time.

29. *Justitia longa, vita brevis*; the time of human justice is not the time of human beings. If we care to seek new and forward-looking ideas to endeavour to overcome this *décalage*, we are likely to find them in the lessons of the "founding fathers" of international law. Although the world has entirely changed from the times of the "founding fathers" of the law of nations *(droit des gens)* to our own, the fulfilment of human aspirations and the search for the realization of justice are atemporal, remain always present, as imperatives of the human condition itself.

30. The lessons of the "founding fathers" of the law of nations *(droit des gens)* remain thus as contemporary as ever, and forward-looking in our days. The duty of prompt reparation forms part of their perennial legacy. That legacy is to keep being cultivated[28], so as to face new challenges that contemporary international tribunals face in our days, from an essentially humanist approach.

31. One is to move beyond the unsatisfactory inter-State outlook, if one is to foster the progressive development of international law in the domain of reparations, in particular collective reparations. Prolonged delays are most regrettable, particularly from the perspective of the victims. As already seen, the "founding fathers" of international law went well beyond the strict inter-State outlook, and were particularly attentive to the duty of prompt reparation for damages (cf. *supra*).

32. It is in jusnaturalist thinking — as from the sixteenth century — that the goal of prompt reparation was properly pursued. Legal positivist thinking — as from the late nineteenth century — unduly placed the "will" of States above *recta ratio*. It is in jusnaturalist thinking— revived

[27] Cf., e.g., to this effect, case of the *Obligation to Prosecute or Extradite (Belgium* v. *Senegal)* (Order of 28 May 2009), dissenting opinion of Judge Cançado Trindade, para. 88; case of the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination [CERD] (Georgia* v. *Russian Federation)* (Judgment of 1 April 2011), dissenting opinion of Judge Cançado Trindade, paras. 205-206; [merged] cases of *Certain Activities Carried Out by Nicaragua in the Border Area/Construction of a Road in Costa Rica along the San Juan River* (Judgment of 16 December 2015), separate opinion of Judge Cançado Trindade, paras. 39-41; case of *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia)*, Judgment of 17 March 2016, separate opinion of Judge Cançado Trindade, para. 25.

[28] On that legacy, cf., recently, A. A. Cançado Trindade, *A Humanização do Direito Internacional*, 2nd rev. ed., Belo Horizonte/Brazil, Edit. Del Rey, 2015, Chap. XXIX ("A Perenidade dos Ensinamentos dos 'Pais Fundadores' do Direito Internacional" ["The Perennity of the Teachings of the 'Founding Fathers' of International Law"], 2015, pp. 647-676.

as it is nowadays[29] — that the notion of *justice* has always occupied a central position, orienting *law* as a whole; *justice*, in sum, is at the beginning of all *law*, being, moreover, its ultimate end.

(Signed) Antônio Augusto CANÇADO TRINDADE.

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[29] Cf., in the last decades, e.g., *inter alia*, A. A. Cançado Trindade, *O Direito Internacional em um Mundo em Transformação*, Rio de Janeiro, Edit. Renovar, 2002, pp. 1028-1029, 1051-1052 and 1075-1094 (universal values underlying the new *jus gentium*, common to the whole of humankind, to all human beings — *civitas maxima gentium*); J. Maritain, *Los Derechos del Hombre y la Ley Natural*, Buenos Aires, Ed. Leviatán, 1982 [reimpr.], pp. 79-80, and cf. p. 104 (the human person transcending the State, and having a destiny superior to time). Cf. also, e.g., [Various authors], *Droit naturel et droits de l'homme — Actes des journées internationales de la société d'histoire du droit* (Grenoble-Vizille, May 2009 — ed. M. Mathieu), Presses universitaires de Grenoble, 2011, pp. 40-43, 52-53, 336-337 and 342.