INTERNATIONAL COURT OF JUSTICE

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Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)

Fixing of the time-limit for the filing of the Parties' Counter-Memorials on reparations

THE HAGUE, 13 December 2016. The International Court of Justice (ICJ), the principal judicial organ of the United Nations, has fixed the time-limit for the filing of the Parties' Counter-Memorials on the question of reparations in the case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda).

By an Order dated 6 December 2016, the Court fixed 6 February 2018 as the time-limit for the filing, by each Party, of a Counter-Memorial responding to the claims presented by the other Party in its Memorial.

The Court made the Order taking account of the views of the Parties, and conscious of the need to rule on the question of reparations without undue delay. The subsequent procedure has been reserved for further decision.

In its Order, the Court states that during a meeting held by the President of the Court on 22 November 2016 with the Agents of the Parties, the Co-Agent of the Democratic Republic of the Congo suggested that a maximum time-limit of 12 months be fixed for the preparation of the Parties' Counter-Memorials, whereas the Agent of the Republic of Uganda, referring to the period of 14 months which the Democratic Republic of the Congo had at its disposal for the preparation of its Memorial, and to the need for his country to translate that extremely voluminous pleading, requested a time-limit of 16 months for the preparation of his Government's Counter-Memorial. The Court adds that the Co-Agent of the Democratic Republic of the Congo, whilst recalling that almost 11 years had passed since the delivery of the Judgment of 19 December 2005 and that the victims had since been waiting, indicated that he deferred to the decision of the Court.

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Composition of the Court

The Court was composed as follows: President Abraham; Vice-President Yusuf; Judges Owada, Bennouna, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Crawford, Gevorgian; Registrar Couvreur.

Judge Cançado Trindade appended a separate opinion to the Order.

A summary of Judge Cançado Trindade's separate opinion is annexed to this press release.

History of the proceedings

For the history of the proceedings, please see paragraphs 121-134 of the Court's 2005-2006 Annual Report and Press Releases Nos. 2015/18 of 9 July 2015, 2015/31 of 14 December 2015 and 2016/13 of 21 April 2016, which are available on the Court's website (www.icj-cij.org).

The full text of the Order of 6 December 2016 can be found in the case documents on the Court's website (under "Cases/Contentious Cases").

Note: The Court's press releases do not constitute official documents.

The International Court of Justice (ICJ) is the principal judicial organ of the United Nations. It was established by the United Nations Charter in June 1945 and began its activities in April 1946. The seat of the Court is at the Peace Palace in The Hague (Netherlands). Of the six principal organs of the United Nations, it is the only one not located in New York. The Court has a twofold role: first, to settle, in accordance with international law, legal disputes submitted to it by States (its judgments have binding force and are without appeal for the parties concerned); and, second, to give advisory opinions on legal questions referred to it by duly authorized United Nations organs and agencies of the system. The Court is composed of 15 judges elected for a nine-year term by the General Assembly and the Security Council of the United Nations. Independent of the United Nations Secretariat, it is assisted by a Registry, its own international secretariat, whose activities are both judicial and diplomatic, as well as administrative. The official languages of the Court are French and English. Also known as the "World Court", it is the only court of a universal character with general jurisdiction.

The ICJ, a court open only to States for contentious proceedings, and to certain organs and institutions of the United Nations system for advisory proceedings, should not be confused with the other — mostly criminal — judicial institutions based in The Hague and adjacent areas, such as the International Criminal Tribunal for the former Yugoslavia (ICTY, an ad hoc court created by the

Security Council), the International Criminal Court (ICC, the first permanent international criminal court, established by treaty, which does not belong to the United Nations system), the Special Tribunal for Lebanon (STL, an international judicial body with an independent legal personality, established by the United Nations Security Council upon the request of the Lebanese Government and composed of Lebanese and international judges), or the Permanent Court of Arbitration (PCA, an independent institution which assists in the establishment of arbitral tribunals and facilitates their work, in accordance with the Hague Convention of 1899).

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Summary of the separate opinion of Judge Cançado Trindade

1. In his Separate Opinion, Judge Cançado Trindade deems fit to lay on the records the concerns he has been having with the handling of proceedings on reparations in the present case of Armed Activities on the Territory of the Congo (D.R. Congo versus Uganda). He addresses 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.

2. He finds "most regrettable" that, "the graver the breaches of international law appear to be, the more time-consuming and difficult it becomes to impart justice" (para. 3). He recalls previous cases wherein he has made the same point within the ICJ. In the cas d'espèce, he recalls that 11 years have passed since the ICJ delivered its Judgment (of 19.12.2005) on the merits, wherein grave breaches were established by the Court; yet, the numerous victims still wait for reparations. Tempus fugit.

3. 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), including an express cross-reference to a resolution of the Security Council (on the occurrences in Kisangani) in that respect, and references to recent proceedings on reparations before the International Criminal Court (ICC) in the case of Th. Lubanga Dyilo.

4. In effect, SC resolution 1304 (of 16.06.2000), — upheld, over one and a half decades ago, inter alia, the duty to "make reparations" for damages (loss of life and others) on a wide scale, and requested the Secretary-General to submit an assessment of damages as a basis for such reparations (para. 14); this was done by the Secretary General on 04.12.2000, in a report calling the attention also to "programmes of rehabilitation" of victims. Judge Cançado Trindade then ponders that, given

> "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" (para. 9).

5. Moving to his next point, Judge Cançado Trindade recalls that breach and reparation form an indissoluble whole: the duty of reparation is deeply and firmly-rooted in the history of the law of nations (droit des gens), 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. He made this point in his early and extensive Separate Opinion in the case of A.S. Diallo (reparations, Guinea versus D.R. Congo, Judgment of 19.06.2012).

6. References can be found, — he proceeds, — in Francisco de Vitoria's celebrated Second Relectio — De Indis (1538-1539), as well as in Bartolomé de Las Casas's De Regia Potestate (1571), as well as Brevísima Relación de la Destrucción de las Indias (1552), and also in Juan Roa Dávila's De Regnorum Iusticia (1591). They all found inspiration, already in the XVIth century, in the much earlier writings of Thomas Aquinas (from the XIIIth century), and pursued an anthropocentric outlook.

7. Later on, in the XVIIth century, Hugo Grotius, in his De Jure Belli ac Pacis (1625), dedicated a whole chapter to the obligation of reparation for damages, keeping in mind the dictates of recta ratio. The same was done in Samuel Pufendorf's book On the Duty of Man and Citizen According to Natural Law (1673). Subsequently, in the XVIIIth 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. Other examples could be recalled. In Judge Cançado Trindade's perception,

> "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" (para. 15).

8. He adds that "[t]he emerging jus naturae et gentium was universalist, directed to all peoples; law and ethics went together, in the search for justice. Reminiscent of Cicero's ideal of societas hominum, the 'founding fathers' of international law conceived a 'universal society of the human kind' (commune humani generis societas) encompassing all the aforementioned subjects of the law of nations (droit des gens)" (para. 16).

9. The reductionist outlook of the international legal order, which came to prevail in the XIXth and early XXth 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" (para. 17).

10. The legacy of the "founding fathers" of international law remains present in the most lucid international legal doctrine nowadays, in acknowledgment of the universality of the law of nations, the importance of general principles of law, the relevance of recta ratio, the indissoluble whole conformed by breach and prompt reparation. Judge Cançado Trindade adds that collective reparations are at last attracting growing attention of international legal doctrine in our days, as well as in case-law, e.g., the ICC/Appeals Chamber's 2015 Judgment on reparations in the case of Th. Lubanga Dyilo (paras. 18-19).

11. 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, — Judge Cançado Trindade proceeds, —

> "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" (para. 20).

12. Reparation ceases promptly all the harmful effects of the breaches, which cannot be allowed to prolong indefinitely in time, without reparations to the victims. The duty of reparation, in Judge Cançado Trindade's understanding,

> "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" (para. 21).

13. Its fundamental importance is properly acknowledged from the perspective of the centrality of the victims, which is his own (para. 22). In the present Order**,** just before its resolutory points, the Court reassuringly expresses, for the first time, 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" (para. 22).

14. As to the remaining point, — Judge Cançado Trindade goes on, — 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, and the contending parties (D.R. 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, there are still other forms of reparations, so as to alleviate human suffering and also to foster reconciliation (paras. 24-26).

15. 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. Judge Cançado Trindade recalls that, in his earlier Dissenting Opinion in the ICJ Order of 28.05.2009 in the case concerning the Obligation to Prosecute or Extradite, he devoted special attention to the need to bridge or reduce the décalage between the time of human beings and the time of human justice, pondering that it is "indeed imperative" to do so (para. 27).

16. In his understanding, the Court is not conditioned or limited by what the parties request or want, not even in the fixing of time-limits. As he has been pointing out within the ICJ time and time again, — and reiterates it herein, — "the Court is not an arbitral tribunal"[1]; 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" (para. 28).

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[1]Cf., e,g., to this effect, ICJ, case of the Obligation to Prosecute or Extradite (Order of 28.05.2009), Dissenting Opinion of Judge Cançado Trindade, para. 88; ICJ, case of the Application of the International Convention on the Elimination of All Forms of Racial Discrimination [CERD] (Judgment of 01.04.2011), Dissenting Opinion of Judge Cançado Trindade, paras. 205-206; ICJ, [merged] cases of the Certain Activities Carried out by Nicaragua in the Border Area / Construction of a Road in Costa Rica along the San Juan River (Judgment of 16.12.2015), Separate Opinion of Judge Cançado Trindade, paras.39-41; ICJ, case of Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea, Judgment of 17.03.2016, Separate Opinion of Judge Cançado Trindade, para. 25.

17. The concern to avoid undue delays in the compliance with the duty of prompt reparations for damages marks presence in the perennial lessons of the "founding fathers" of international law, which remain thus as contemporary as ever, and "forward-looking in our days" (para. 30).

> "[a]lthough 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 a-temporal, remain always present, as imperatives of the human condition itself" (para. 29).

18. We can thus face new challenges in the international legal order "from an essentially humanist approach" (para. 30), moving "beyond the unsatisfactory inter-State outlook", thus fostering "the progressive development of international law in the domain of reparations, in particular collective reparations" (para. 31). And Judge Cançado Trindade concludes that

> "It is in jusnaturalist thinking — as from the XVIth century — that the goal of prompt reparation was properly pursued. Legal positivist thinking — as from the late XIXth century — unduly placed the "will" of States above recta ratio. It is in jusnaturalist thinking — revived as it is nowadays — 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" (para. 32).
