SEPARATE OPINION OF JUDGE KOOIJMANS

General context of the dispute — Chronic instability in the region — Interconnection between bilateral dispute and overall crisis — Function of judicial dispute settlement — Importance of balanced appraisal of concerns and interests of litigants — Judgment insufficiently reflects complexity of situation.

Ugandan military actions after 7 August 1998 only justifiable under right of self-defence — No involvement of DRC Government in armed actions by Ugandan rebel groups — Actions thus not attributable to DRC — Right of self-defence not conditional upon armed attack by State — Uganda entitled to self-defence against armed irregulars — Standard of necessity and proportionality no longer met after 1 September 1998.

Belligerent occupation in invaded areas other than Ituri district — DRC rendered incapable of exercising authority by invasion — Uganda occupying Power in all invaded areas until Lusaka Agreement — Status of Congolese rebel movements after Lusaka — Effect on status of Uganda as occupying Power.

Occupation no violation of principle of non-use of force — Conceptual distinction between jus ad bellum *and* jus in bello.
Provisional measures addressed to both Parties — No evidence of violation by Uganda provided by DRC — Court's finding in operative part not appropriate.

First counter-claim — Duty of vigilance and burden of proof — No evidence of efforts by Zaire Government to control rebel groups in relevant period.

1. Although I have voted in favour of most of the findings of the Court as reflected in the *dispositif*, I nevertheless feel constrained to make the following remarks. My main difficulty with the present Judgment is a certain lack of balance in the description of the dispute and of the relevant facts even if the conclusions drawn are in my view in general legally correct. I will therefore start with a number of general remarks and subsequently deal with certain legal issues with regard to which I would have preferred a different approach.

A. General Remarks

2. In an article entitled "Explaining Ugandan Intervention in Congo: Evidence and Interpretations", the author writes:

> "[T]o explain the intervention of one State into the affairs of another is rarely simple or uncontroversial . . . To maintain objectivity in the face of confusing and contradictory evidence is particularly difficult . . . Moreover, the results are likely to be tentative, partial and complex, and therefore less than totally satisfying. One is more likely to end with a 'thick description' of a complex episode than a 'scientific' explanation of a discrete social event." [1]

3. These cautious words of a social scientist are of limited use for a court of justice which has to evaluate the legality of certain specific activities which have been put before it. The task of a judicial body does not allow it to conclude with a "thick description" of a complex episode but compels it to come to a clear and unequivocal determination of the legal consequences of acts committed during that "complex episode".

4. However, in order to make its legal assessments and conclusions comprehensible and thereby acceptable to litigant States whose leaders are no trained lawyers (even though they may be assisted by legal professionals), but are the main actors in the process of implementing the judgment, a court should make clear in its reasoning that it is fully aware of the wider context and the complexity of the issues involved. A judgment which is not seen as logical and fair in its historical, political and social dimensions runs the risk of being one compliance with which will be difficult for the parties.

5. The Parties to the present dispute share a hapless post-decolonization history. They have been in the grip of merciless dictatorships which elicited violent resistance and armed rebellions. The overthrow of these dictatorships (in Uganda in 1986 and the Congo in 1997) did not bring internal stability; armed groups, either loyal to the previous régime or pursuing goals of their own and operating from remote parts of their own territory or from abroad continued to threaten the new leadership. In this respect the Parties shared the plight which seems to have become endemic in much of the African continent: régimes under constant threat from armed movements often operating from the territory of neighbouring States, whose Governments sometimes support such movements but often merely tolerate them since they do not have the means to control or repel them. The latter case is one where a Government lacks power and consequently fails to exercise effectively its territorial authority; in short, there is a partial failure of State authority and such failure is badly concealed by the formal performance of State functions on the international level. Commitments entered into by Governments unable to implement them

[1] John P. Clark, Associate Professor of International Relations, *The Journal of Modern African Studies*, Vol. 39 (2001), p. 262.

are unworthy of reliance from the very start and hardly contribute to the creation of more stability.

6. Under such circumstances, the ruling powers may feel left to their own resources. In order to fight the armed movements operating from abroad, usually by carrying out hit and run tactics, they often engage in a kind of hot pursuit onto neighbouring territory since diplomatic démarches have no effect. They may, moreover, lack all confidence in the good intentions of the neighbour Government in spite of its commitments and this may, in turn, induce them to support opposition movements seeking to overthrow that "untrustworthy" Government.

7. And so the circle is closed and we find ourselves confronted with a pattern which is so typical for post-Cold War Africa: Governments, harassed by armed rebel movements often operating from foreign territory, trying to improve their security by meddling in the affairs of neighbouring States; Governments, moreover, which have sometimes come to power through external intervention themselves but which, once in power, turn against their former supporters in order to become master in their own house and to strengthen their grip on the internal situation.

8. Needless to say, such chronic instability and the ensuing incessant practice of unrestrained violence lead to immense human suffering. The human disaster in Rwanda in 1994 is an extreme example, genocidal in dimension, of a much more general pattern of gross violations of human rights by warring factions and authorities trying to remain in power.

9. The organized international community has thus far been unable to provide structural assistance, necessary to strengthen State institutions, and has thus failed to lay the basis for an improved security system in the region. It has mainly limited itself to monitoring the situation, providing a sometimes robust, but more often impotent, peace-keeping assistance in war-stricken areas, and to furnishing humanitarian assistance.

10. It is within this framework that the dispute before the Court must be placed. It is not necessary to describe in detail the crisis as it developed since the 1994 genocide in Rwanda nor to demonstrate how an increasing number of States, in the Great Lakes region and even beyond, became involved. These events have been well documented in various articles and in a great number of reports from United Nations agencies and non-governmental organizations[2]. Suffice it to say that the Congo's eastern

[2] See, *inter alia*, Mel McNulty, "The Collapse of Zaire: Implosion, Revolution or External Sabotage?", *The Journal of Modern African Studies*, Vol. 37 (1999), pp. 53-82;

border area, a "line of political instability on which the future of central Africa may well hinge" (as it was aptly called by David Shearer), occupied a central place in the crisis. The overall picture is moreover obfuscated by the fact that, apart from the Governments involved, an even greater number of insurgent movements, sometimes controlled by Governments but more often with shifting alliances, determined and determine the situation on the ground.

11. Is it possible to extract from this tangled web one element, to isolate it, to subject it to legal analysis and to arrive at a legal assessment as to its consequences for the relations between only two of the parties involved? A court mandated by its Statute to decide disputes between States whenever it has jurisdiction to do so cannot refrain from carrying out that mandate on the ground that its judgment would only cover one dispute which is indissolubly linked to the overall conflict. The system of international judicial dispute settlement is premised on the existence of a series of bilateral inter-State disputes, artificial as this sometimes may be, as became clear, for example, in the *Legality of the Use of Force* cases (the Federal Republic of Yugoslavia *versus* ten individual Member States of NATO).

12. In a slightly different context (different in that the dispute before the Court was said to represent "a marginal and secondary aspect of an overall problem" between the Parties) the Court stated that "no provision of the Statute or Rules contemplates that the Court should decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, however important". In the present case the latter part of the sentence could be paraphrased as "merely because that dispute is intricately linked to a much wider problem which involves other parties as well". The Court went on to say that

> "never has the view been put forward that, because a legal dispute submitted to the Court is only one aspect of a political dispute, the Court should decline to resolve for the parties the legal question at issue between them . . .; if the Court were, contrary to its settled jurisprudence, to adopt such a view, it would impose a far-reaching

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Gérard Prunier, "Rebel Movements and Proxy Warfare: Uganda, Sudan and the Congo (1986-1999)", *African Affairs*, Vol. 103/412, pp. 359-383; John P. Clark's article, cited in footnote 1; David Shearer, "Africa's Great War", *Survival*, Vol. 41 (1999), pp. 89-106. See also the following reports of the International Crisis Group: "North Kivu, into the Quagmire?" (15 August 1998); "Congo at War, a Briefing on the Internal and External Players in the Central African Conflict" (17 November 1998); "How Kabila Lost His Way" (21 May 1999); "Africa's Seven-Nation War" (21 May 1999); "The Agreement on a Cease-Fire in the Democratic Republic of Congo" (20 August 1999).

and unwarranted restriction upon the role of the Court in the *peaceful solution* of international disputes" (*United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 20, para. 37; emphasis added).

13. The last part of this quotation illustrates the important place assigned by the Charter to the Court in the context of the peaceful settlement of disputes, as is clear from Article 36, paragraph 3, in Chapter VI on the Pacific Settlement of Disputes. The concept of peaceful dispute settlement is premised on the condition that the parties to a dispute find their particular position and their specific concerns reflected in the settlement suggested to or imposed upon them. That settlement must acknowledge those concerns, even if it fails to satisfy the parties' demands or even censures their conduct.

14. I regret that the Judgment of the Court in my view falls short of meeting the standard just mentioned. It inadequately reflects the structural instability and insecurity in the region, the overall pattern of lawlessness and disorder and the reprehensible behaviour of all parties involved. A reading of the Judgment cannot fail to leave the impression that the dispute is first and foremost a dispute between two neighbouring States about the use of force and the ensuing excesses, perpetrated by one of them. A two-dimensional picture may correctly depict the object shown but it lacks depth and therefore does not reflect reality in full.

15. It is true that in paragraph 26 the Court states that it is aware of the complexity of the situation which has prevailed in the Great Lakes region and that the instability in the DRC has had negative security implications for Uganda and other neighbouring States.

It is also true that in paragraph 221 the Court observes that the actions of the various Parties in the complex conflict have contributed to the immense suffering faced by the Congolese population.

But in my view this awareness is insufficiently reflected in the Court's consideration of the various claims of the Parties. I will try to demonstrate this in the sections of this opinion dealing with the right of self-defence as claimed by Uganda (see B below), Uganda's first counter-claim (see E below) and Uganda's breach of its obligations under the Order on provisional measures (see D below).

B. Use of Force and Self-defence

16. I am in full agreement with the Court that, as from the beginning of August 1998, Uganda could, for the presence of its forces on Congo-

lese territory, no longer rely on the consent given by the DRC and that its military activities from that time on thus can only be considered in the light of the right of self-defence (Judgment, para. 106).

17. In the preceding months the initially warm relations between the Presidents of the DRC and Uganda had soured. In that same period the frequency and intensity of attacks by Ugandan rebel movements operating from Congolese territory had increased. In less than two months five attacks of a serious nature, in which a considerable number of civilians were killed or abducted, had taken place (Judgment, para. 132). A reoccurrence of the chronic instability of the pre-1997 period was, in particular after the outbreak of a rebellion against President Kabila on 2 August, certainly not beyond the realm of possibility.

18. Uganda chose to react by stepping up its military activities on the Congolese side of the border. During the month of August the UPDF successively took the towns and airports of Beni, Bunia and Watsa, "all in close proximity to the border". I fully agree with the Court when it states that these actions were of a different nature from previous operations along the common border under the informal bilateral agreement (Judgment, para. 110). They were military assaults which could only be justified under the law of self-defence.

19. Uganda has claimed that the Congolese authorities were actively supporting the Ugandan rebels in carrying out their attacks but the Court has not been able to find "satisfactory proof of the involvement in these attacks, direct or indirect, of the Government of the DRC". It thus found that these attacks could not be attributed to the DRC and I cannot fault this finding. (Judgment, para. 146.)

20. The Court consequently finds that "[f]or all these reasons . . . the legal and factual circumstances for the exercise of the right of self-defence by Uganda against the DRC were not present". Then follows, however, a sentence which is not altogether clear:

> "Accordingly, the Court has no need to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces." (Judgment, para. 147.)

21. Presumably, the Court refers here to the exchange of arguments between the Parties whether the threshold, which the Court had previously determined as appropriate in characterizing support of activities by irregular bands as an attack by the "supporting" State (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 104,

para. 195), was still in conformity with contemporary international law.

In the oral pleadings counsel for Uganda contended that

> "armed attacks by armed bands whose existence is tolerated by the territorial sovereign generate legal responsibility and therefore constitute armed attacks for the purpose of Article 51. And thus, there is a separate, a super-added standard of responsibility, according to which a failure to control the activities of armed bands, creates a susceptibility to action in self-defence by neighbouring States." (CR 2005/7, p. 30, para. 80.)

The DRC for its part denied that the mere acknowledgment that armed groups were present on its territory was tantamount to support.

> "To assimilate mere tolerance by the territorial sovereign of armed groups on its territory with an armed attack clearly runs counter to the most established principles in such matters. That position, which consists in considerably lowering the threshold required for the establishment of aggression, obviously finds no support in the *Nicaragua* Judgment." (CR 2005/12, p. 26, para. 6.)

22. The Court does not deem it necessary at this point to deal with these contentions since it has found that the attacks by the rebels "did not emanate from armed bands or irregulars sent by the DRC or *on behalf of* the DRC, within the sense of Article 3 *(g)* of General Assembly resolution 3314 (XXIX) on the definition of aggression adopted on 14 December 1974" (Judgment, para. 146; emphasis added). By drawing this conclusion, the Court, however, implicitly rejects Uganda's argument that mere tolerance of irregulars "creates a susceptibility to action in self-defence by neighbouring States".

23. It deserves mentioning, however, that the Court deals in more explicit detail with this issue when considering Uganda's first counter-claim with regard to the period 1994-1997. The Court there says that it "cannot conclude that the absence of action by Zaire's Government against the rebel groups in the border area is tantamount to 'tolerating' or 'acquiescing' in their activities" and that "[t]hus the part of Uganda's first counter-claim alleging Congolese responsibility for tolerating the rebel groups prior to May 1997 cannot be upheld." (Judgment, para. 301).

24. I agree that in general it cannot be said that a mere failure to control the activities of armed bands present on a State's territory is by itself tantamount to an act which can be attributed to that State, even though I do not share the Court's finding with regard to the first counter-claim.

But I fail to understand why the Court said explicitly there what it only said implicitly with regard to the DRC's first claim, notwithstanding that Uganda raised that very same argument when it contested that claim.

25. What is more important, however, is that the Court refrains from taking a position with regard to the question whether the threshold set out in the *Nicaragua* Judgment is still in conformity with contemporary international law in spite of the fact that that threshold has been subject to increasingly severe criticism ever since it was established in 1986. The Court thus has missed a chance to fine-tune the position it took 20 years ago in spite of the explicit invitation by one of the Parties to do so.

26. But the sentence quoted in paragraph 20 calls for another comment. Even if one assumes (as I am inclined to do) that mere failure to control the activities of armed bands cannot in itself be attributed to the territorial State as an unlawful act, that in my view does not necessarily mean that the victim State is under such circumstances not entitled to exercise the right of self-defence under Article 51. The Court only deals with the question whether Uganda was entitled to act in self-defence *against the DRC* and replies in the negative since the activities of the rebel movements could not be attributed to the DRC. By doing so, the Court does not answer the question as to the kind of action a victim State is entitled to take if the armed operation by irregulars, "because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 103, para. 195) but no involvement of the "host Government" can be proved.

27. The Court seems to take the view that Uganda would have only been entitled to self-defence *against the DRC* since the right of self-defence is conditional on an attack being attributable, either directly or indirectly, *to a State*. This would be in line with what the Court said in its Advisory Opinion of 9 July 2004: "Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack *by one State against another State*" (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *I.C.J. Reports 2004*, p. 194, para. 139; emphasis added).

28. By implicitly sticking to that position, the Court seems to ignore or even to deny the legal relevance of the question referred to at the end of paragraph 26.

But, as I already pointed out in my separate opinion to the 2004 Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Article 51 merely

> "conditions the exercise of the inherent right of self-defence on a previous armed attack without saying that this armed attack must come from another State even if this has been the generally accepted interpretation for more than 50 years" (*I.C.J. Reports 2004*, p. 230, para. 35).

I also observed that this interpretation no longer seems to be shared by the Security Council, since in resolutions 1368 (2001) and 1373 (2001) it recognizes the inherent right of individual or collective self-defence without making any reference to an armed attack by a State. In these resolutions the Council called acts of international terrorism, without any further qualification and without ascribing them to a particular State, a threat to international peace and security.

29. If the activities of armed bands present on a State's territory cannot be attributed to that State, the victim State is not the object of an armed attack by it. But if the attacks by the irregulars would, because of their scale and effects, have had to be classified as an armed attack had they been carried out by regular armed forces, there is nothing in the language of Article 51 of the Charter that prevents the victim State from exercising its *inherent* right of self-defence.

30. When dealing with the first counter-claim in paragraph 301 of the Judgment, the Court describes a phenomenon which in present-day international relations has unfortunately become as familiar as terrorism, viz. the almost complete absence of government authority in the whole or part of the territory of a State. If armed attacks are carried out by irregular bands from such territory against a neighbouring State, they are still armed attacks even if they cannot be attributed to the territorial State. It would be unreasonable to deny the attacked State the right to self-defence merely because there is no attacker State, and the Charter does not so require. "Just as Utopia is entitled to exercise self-defence against an armed attack by Arcadia, it is equally empowered to defend itself against armed bands or terrorists operating from within the Arcadian territory", as Professor Yoram Dinstein puts it [3].

31. Whether such reaction by the attacked State should be called self-defence or an act under the state of necessity [4] or be given a separate name, for example "extra-territorial law enforcement", as suggested by Dinstein himself, is a matter which is not relevant for the present purpose. The lawfulness of the conduct of the attacked State must be put to the same test as that applied in the case of a claim of self-defence against a State: does the armed action by the irregulars amount to an armed

[3] Yoram Dinstein, *War, Aggression and Self-Defence*, 3rd ed., 2001, p. 216.
[4] See Oscar Schachter, "The Use of Force against Terrorists in Another Country", *Israel Yearbook on Human Rights*, Vol. 19 (1989), pp. 225 ff.

attack and, if so, is the armed action by the attacked State in conformity with the requirements of necessity and proportionality.

32. As for the first question, I am of the view that the series of attacks which were carried out from June till the beginning of August 1998, and which are enumerated in paragraph 132 of the Judgment, can be said to have amounted to an armed attack in the sense of Article 51, thus entitling Uganda to the exercise of self-defence. Although Uganda, during the proceedings, persistently claimed that the DRC was directly or indirectly involved in these attacks, the finding that this allegation cannot be substantiated and that these attacks are therefore not attributable to the DRC has no direct legal relevance for the question whether Uganda is entitled to exercise its right of self-defence.

33. The next question therefore is: was this right of self-defence exercised in conformity with the rules of international law?

During the month of August 1998 Ugandan military forces seized a number of towns and airports in an area contiguous to the border-zone where Uganda had previously operated with the consent of and, according to the Protocol of April 1998, in co-operation with the DRC.

Taking into account the increased instability and the possibility of a return to the undesirable conditions of the late Mobutu period, I do not find these actions unnecessary or disproportionate to the purpose of repelling the persistent attacks of the Ugandan rebel movements.

34. It was only when Uganda acted upon the invitation of Rwanda and sent a battalion to occupy the airport of Kisangani — located at a considerable distance from the border area — on 1 September 1998 that it grossly overstepped the limits set by customary international law for the lawful exercise of the right of self-defence.

Not by any stretch of the imagination can this action or any of the subsequent attacks against a great number of Congolese towns and military bases be considered as having been necessitated by the protection of Uganda's security interests. These actions moreover were grossly disproportionate to the professed aim of securing Uganda's border from armed attacks by anti-Ugandan rebel movements.

35. I therefore fully share the Court's final conclusion that Uganda's military intervention was of such a magnitude and duration that it must be considered a grave violation of the prohibition on the use of force expressed in Article 2, paragraph 4, of the Charter (Judgment, para. 165).

I feel strongly, however, that the Court, on the basis of the facts and the arguments presented by the Parties and irrespective of the motives ascribed to them, should have gone further than merely finding that Uganda had failed to substantiate its claim that the DRC was directly or

indirectly involved in the attacks by the rebel movements and thus concluding that Uganda was not entitled to self-defence. In the circumstances of the case and in view of its complexity, a further legal analysis of Uganda's position, and the rights ensuing therefrom, would in my view have been appropriate.

Thus the Court has forgone a precious opportunity to provide clarification on a number of issues which are of great importance for present-day international society but still are largely obscure from a legal point of view.

C. Belligerent Occupation

36. The Court is of the view that Uganda must be considered as the occupying Power, in the sense of the *jus in bello*, in Ituri district. It further concludes that it has not been provided with evidence to show that authority as occupying Power was exercised by Ugandan armed forces in any areas other than in Ituri district (Judgment, paras. 176 and 177).

37. Although I have no difficulty with the Court's finding with regard to Ituri district, I have some doubts in respect of the Court's reasoning leading to the conclusion that Uganda was not in the position of an occupying Power in other areas invaded by the UDPF.

38. Article 42 of the 1907 Hague Regulations provides that:

> "territory is considered occupied when it is actually placed under the authority of the hostile army.
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> The occupation extends only to the territory where such authority has been established and can be exercised."

To all appearances this definition is based on factual criteria. However, as Professor Adam Roberts aptly remarks: "The core meaning of the term is obvious enough; but as usually happens with abstract concepts, its frontiers are less clear."[5]

39. The reasons for this lack of clarity may in the first place be of a factual nature. The situation on the ground is often confused and the parties involved may present conflicting pictures of this situation. In the present case, however, the Parties agree to a remarkably great extent on the localities taken by the UPDF in the relevant period. They differ, however, considerably on the question whether the places where Ugandan troops were present, were actually under the authority of Uganda. This is mainly a factual issue.

40. The lack of clarity may, however, also be due to non-factual con-

[5] Adam Roberts, "What Is Military Occupation?", *British Year Book of International Law,* Vol. 55 (1984), pp. 249-305, at p. 249.

siderations. As one author points out: "'[o]ccupation' has . . . acquired a pejorative connotation, and as a result, occupants would tend to prefer euphemistic titles to portray their position"[6]. This author further observes that at the time of the adoption of the Hague Regulations it was generally assumed that, upon gaining control, the occupant would *establish* its authority over the occupied territory by introducing some kind of direct and therefore easily identifiable administration. In a period when war or the use of force as such was not legally objectionable, the notion of occupation as a term of art was not held in disrepute either. And thus the establishment of an administrative system by the occupant was seen as quite normal.

41. Partly as a result of the outlawing of war, that practice has become the exception rather than the rule. Occupants feel more and more inclined to make use of arrangements where authority is said to be exercised by transitional governments or rebel movements or where the occupant simply refrains from establishing an administrative system.

> "In these cases, the occupants would tend not to acknowledge the applicability of the law of occupation to their own or their surrogate's activities, and when using surrogate institutions, would deny any international responsibility for the latter's actions."[7]

42. In the present case, the Court was confronted with both these factual and non-factual issues. Uganda denied its responsibility under the law of occupation firstly on the ground that its troops were too thinly spread to be able to exercise authority. It argued secondly that actual authority was vested in the Congolese rebel movements, which carried out virtually all administrative functions.

43. The Court has deemed it its task

> "to satisfy itself that the Ugandan armed forces in the DRC were not only stationed in particular locations but also that they had *substituted their own authority* for that of the Congolese Government" (Judgment, para. 173; emphasis added).

44. It is in particular this element of "substitution of the occupant's authority for that of the territorial power" which leads in my opinion to an unwarranted narrowing of the criteria of the law of belligerent occupation as these have been interpreted in customary law since 1907.

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[6] Eyal Benvenisti, *The International Law of Occupation*, 1993, p. 212. Roberts also refers to this phenomenon: "To many, 'occupation' is almost synonymous with aggression and oppression", *op. cit.*, p. 301.

[7] Eyal Benvenisti, *op. cit.*, p. 5.

45. Article 41 of the "Oxford Manual" adopted in 1880 by the Institut de droit international already stated:

> "Territory is regarded as occupied when, as the consequence of invasion by hostile forces, the State to which it belongs has *ceased, in fact*, to exercise its authority therein, and the invading State *is* alone *in a position to maintain order there*. The limits within which this state of affairs exists determine the extent and duration of the occupation." (Emphasis added.)

It is noteworthy that these criteria have remained virtually unaltered. In modern national manuals on the law of armed conflict these criteria are expressed in similar terms; they are, firstly, that

> "military occupation presupposes a hostile invasion, resisted or unresisted, as a result of which the invader has rendered the invaded government incapable of exercising its authority, and [secondly] that the invader is in a position to substitute its own authority for that of the former government"[8].

46. In the present case the first criterion is certainly met; even if the actual authority of the DRC Government in the north-eastern part of the country was already decidedly weak before the invasion by the UPDF, that Government indisputably was rendered incapable of exercising the authority it still had as a result of that invasion. By occupying the nerve centres of governmental authority — which in the specific geographical circumstances were the airports and military bases — the UPDF effectively barred the DRC from exercising its authority over the territories concerned.

47. The Court, without explicitly mentioning this criterion, nevertheless seems to assume that it has been met. It concentrates, however, on the second criterion, the actual exercise of authority by the Ugandan armed forces and concludes that it has not been provided with "any specific evidence . . . that authority was exercised by [them] in any areas other than in Ituri district". It seems to adopt the view that in these areas authority was exercised by the rebel movements which cannot be considered to have been controlled by Uganda. (Judgment, para. 177.)

48. The Court in my view did not give sufficient consideration to the fact that it was the Ugandan armed invasion which enabled the Congolese rebel movements to bring the north-eastern provinces under their control. Had there been no invasion, the central Government would have been in a far better position to resist these rebel movements. Uganda's invasion was therefore crucial for the situation as it developed after the outbreak of the civil war. As the decisive factor in the elimination of the

[8] *United States Manual on the Law of Land Warfare* (1956), FM 27-10. See also *United Kingdom Manual of the Law of Armed Conflict* (2004), p. 275, 11.3.

DRC's authority in the invaded area, Uganda actually replaced it with its own authority.

49. I am, therefore, of the opinion that it is irrelevant from a legal point of view whether it exercised this authority directly or left much of it to local forces or local authorities. As long as it effectively occupied the locations which the DRC Government would have needed to re-establish its authority, Uganda had *effective*, and thus factual, authority. Its argument that it cannot be considered to have been an effective occupying Power, in view of the limited number of its troops, cannot therefore be upheld[9].

50. As long as Uganda maintained its hold on these locations, it remained the effective authority and thus the occupying Power, until a new state of affairs developed. Such a new state of affairs was effected by the Lusaka Ceasefire Agreement of 10 July 1999. In normal circumstances, a ceasefire agreement as such does not change the legal situation, at least as long as the occupying Power remains in control. But the Lusaka Agreement is, as the Court states,

> "more than a mere ceasefire agreement, in that it lays down various 'principles' (Art. III) which cover both the internal situation within the DRC and its relations with its neighbours" (Judgment, para. 97).

51. The Lusaka Agreement laid the foundation for the re-establishment of an integrated Congolese State structure. For this purpose the status of the two most important rebel movements — the MLC and the RCD — now called the "armed opposition", was modified; they became formal participants in the open national dialogue (Art. III, para. 19). This new position was reflected in their signing of the agreement as separate parties per the attached list.

52. In my opinion the "upgraded" status of the two rebel movements directly affected Uganda's position as occupying Power. These move-

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[9] See also Oppenheim-Lauterpacht, *International Law*, 7th ed., 1962, p. 435:

> "When the legitimate sovereign is *prevented* from exercising his powers, and the occupant, *being able* to *assert* his authority, actually establishes an administration over a territory, it matters not with what means, and in what ways, his authority is exercised." (Emphasis added.)

See also H. P. Gasser in D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflict*, 1995, p. 243:

> "Even if the stated strategic goal of an invasion of foreign territory is not to gain control of the area or its inhabitants, but 'merely' to secure against attacks on the invader's own territory close to the border, the invading power still bears responsibility for the parts of the territory actually controlled. Similarly, neither the claimed short duration of the occupation nor the *absence of military administration* for the occupied territory makes any difference." (Emphasis added.)

ments had become — in the formulation of Chapter VI — the two parties who, together with the central Government, had primary responsibility for the re-establishment of an integrated State administration, as spelled out in paragraph 2 of Chapter VI.

53. The Lusaka Agreement certainly did not automatically bring to an end Uganda's status as occupying Power since that status is based on control in fact. The recognition of the formal status of the RCD and MLC cannot, however, be disregarded.

After Lusaka, territorial authority could no longer be seen as vested exclusively in the central Government but as being shared with "armed opposition" movements which had been recognized as part of the national authority.

54. Only in those places where it remained in full and effective control, like Ituri district, did Uganda retain its status as occupying Power and in this respect I share the Court's view that Uganda occupied Ituri district until the date its troops withdrew. As for the other areas where it had carried out its military activities, Uganda should, however, be considered as the occupying Power from the date when it seized the various locations until the signing of the Lusaka Agreement. Even if it retained its military grip on the airports and other strategic locations, it can, as a result of the arrangements made in the Lusaka Agreement, no longer be said to have substituted itself for or replaced the authority of the territorial government since under the terms of the Agreement that authority was also exercised by the rebel movements.

55. Whereas my disagreement with the way in which the Court interpreted the criteria for the applicability of the law of belligerent occupation is to a certain extent merely technical (although not without legal consequences), I have more substantive reservations as to the way in which the phenomenon of "occupation" is dealt with in the *dispositif*.

56. In the first paragraph of the operative part the Court finds that Uganda, by engaging in military activities against the DRC on the latter's territory, by occupying Ituri and by supporting the irregular forces having operated on the territory of the DRC, violated the principle of non-use of force and the principle of non-intervention. In my view, the occupation of Ituri should not have been characterized in a direct sense as a violation of the principle of the non-use of force.

57. The law on belligerent occupation was originally set up as a "balancing mechanism"[10] between the interests of the ousted sovereign and the occupying Power. The latter's obligation as temporary authority to restore and ensure public order while respecting the laws in force (Art. 43, Hague Regulations) and its powers with respect to property (Arts. 48 ff.) reflect this balancing mechanism. It was only in 1949 that

[10] Benvenisti, *op. cit.*, p. 30.

the rules on occupation were extended in the Fourth Geneva Convention by adding a number of provisions regarding the treatment of the population of occupied territory.

58. In their interrelationship the rules on occupation form an important part of the *jus in bello* or international humanitarian law. The main purpose of that law is to protect persons caught up in conflict, even if it does take into account the interests of the belligerent parties. It does not differentiate between belligerents. In particular, no distinction is made in the *jus in bello* between an occupation resulting from a lawful use of force and one which is the result of aggression. The latter issue is decided by application of the *jus ad bellum*, the law on the use of force, which attributes responsibility for the commission of the acts of which the occupation *is the result*.

59. In the present case, the Court has found that Uganda has violated its obligation under the principle of the non-use of force, since its military activities do not constitute self-defence. It thus has breached its obligations under the *jus ad bellum*. The Court has also found that Uganda has violated its obligations under the *jus in bello*, in particular in regard to the district of Ituri, the occupation of which was the outcome of its illegal use of force.

60. It goes without saying that the outcome of an unlawful act is tainted with illegality. The occupation resulting from an illegal use of force betrays its origin but the rules governing its régime do not characterize the origin of the result as lawful or unlawful.

61. In his report for the Centennial of the First Hague Peace Conference Professor Christopher Greenwood has dealt with the implications of the fact that nowadays the *jus in bello* exists "within a framework of international law which significantly restricts the right of States to resort to force". He continues by saying that the full implications of the relationship between the contemporary *jus ad bellum* and *jus in bello* have yet to be determined[11].

62. Earlier I drew attention to the fact that the reluctance of Governments to declare the law of belligerent occupation applicable may be due to the impression that "occupation" has become almost synonymous with aggression and oppression.

63. I am aware that this impression is lent credibility by Article 3 of General Assembly resolution 3314 (XXIX) on the Definition of Aggression, which under *(a)* qualifies as an act of aggression: "The invasion or attack by the armed forces of a State of the territory of another State, *or any military occupation*, however temporary, resulting from such invasion or attack . . ." (Emphasis added.)

[11] F. Kalshoven (ed.), *The Centennial of the First International Peace Conference, Reports and Conclusions*, 2000, p. 186.

This resolution, as important as it may be from a legal point of view, does not in all its terms reflect customary law. The reference to military occupation as an act of aggression is in my opinion less than felicitous[12].

64. Professor Greenwood says that "[t]he law of belligerent occupation has had a poor record of compliance for most of the 20th century". In his view the principal problem is not one of a deficiency in the law but rather the reluctance of States to admit that the law applies at all[13]. I regret that in the first paragraph of the *dispositif* the Court may have contributed to this reluctance on the part of belligerent parties to declare the law of occupation applicable.

D. Provisional Measures

66. In its fifth submission the DRC requested the Court to declare that Uganda had violated the Court's Order on provisional measures of 1 July 2000. In paragraph 7 of the *dispositif* the Court acceded to this request.

For a number of reasons I do not find the Court's reasoning in support of this ruling to be cogent.

67. The provisional measures indicated by the Court in its Order of 1 July 2000 were three in number and were addressed to both Parties. The Parties were first called upon to prevent and refrain from any action, in particular armed action, which might prejudice the rights of the other Party or might aggravate or extend the dispute. They were further ordered to take all measures to comply with their obligations under international law and with Security Council resolution 1304 (2000) of 16 June 2000. Finally, they were instructed to take all measures necessary to ensure full respect within the zone of conflict for human rights and for international humanitarian law.

68. It deserves mentioning that, whereas the Applicant requested the Court to indicate provisional measures addressed to Uganda, the Court decided *proprio motu* to indicate measures for both Parties, as there existed a serious risk of events occurring which might aggravate or extend the dispute or make it more difficult to resolve (*I.C.J. Reports 2000*, p. 21, para. 44).

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[12] See B. Broms, "The Definition of Aggression"; *Recueil des cours*, Vol. 154 (1977), p. 348:

> "[I]t could be argued in view of the way in which the paragraph has been construed that the military occupation or the annexation presupposes the existence of an act of aggression in the form of an invasion or attack and that it would therefore not have been necessary to include them separately in this paragraph."

[13] *Op. cit.*, pp. 218-219.

69. During the written and oral proceedings hardly any attention was paid by the Parties to the Order of 1 July 2000. The DRC's submissions in its Reply, dated 29 May 2002, made no reference to it. The request for a ruling that Uganda had violated the provisions of the Order appeared for the first time in the final submissions.

70. In paragraph 264 of the Judgment the Court notes "that the DRC put forward no specific evidence demonstrating that after July 2000 Uganda committed acts in violation of each of the three provisional measures indicated by the Court".

71. This observation would have sufficed to dismiss the DRC's submission, just as the Court did in respect of a similar submission in its Judgment in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening)*. There the Court stated that it was for Cameroon to show that Nigeria acted in violation of the provisional measures indicated in the Order of 15 March 1996 but that Cameroon had not established the facts which it bore the burden of proving (*I.C.J. Reports 2002*, p. 453, paras. 321-322). In this respect the Court relied on its earlier statement that it is

> "the litigant seeking to establish a fact who bears the burden of proving it; and in cases where evidence may not be forthcoming, a submission may in the judgment be rejected as unproved" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, *Jurisdiction and Admissibility, I.C.J. Reports 1984*, p. 437, para. 101).

72. In the present case, however, the Court does not do so because it has already found (in its consideration of the DRC's second claim) that Uganda is responsible for acts in violation of human rights and international humanitarian law throughout the period when Ugandan troops were present in the DRC, including the period subsequent to the issuance of the Order on provisional measures.

The Court therefore concludes that Uganda did not comply with that Order.

73. In paragraph 265 the Court notes that the provisional measures were addressed to both Parties and that its finding as to Uganda's non-compliance is "without prejudice to the question as to whether the DRC did not also fail to comply with the provisional measures indicated by the Court".

74. In view of the fact that the Court deemed it necessary to recall that the purpose of these provisional measures was to protect the rights of either of the Parties pending the determination of the merits (para. 263) the formulation chosen by the Court seems to indicate an awareness that this purpose has been respected neither by Uganda nor by

the DRC even though the latter question was not raised by Uganda and was thus not for the Court to decide.

75. In these circumstances it would in my view have been judicially sound not to include in the *dispositif* a finding that Uganda did not comply with the Order on provisional measures.

I have no doubt whatsoever that Uganda breached its obligations under the Order. This is sufficiently demonstrated in the part of the Judgment dealing with the DRC's second submission and the Court's finding on that submission. But the Court is also "painfully aware" that many atrocities have been committed by other parties as well (Judgment, para. 221).

76. In short, in view of the fact that the DRC has not provided any specific evidence of Uganda's violation of the Order and taking into account the purpose of provisional measures being the protection of the legal interests of *either party*, I sincerely regret that the Court has decided to include in the *dispositif* of the Judgment the finding that one of them has violated the Order of 1 July 2000, in particular since the Court in no way excludes that such violation has also been committed by the other Party.

77. There is no need for the Court to decide on each and every submission presented by the Parties. In the present case, for example, the *dispositif* does not deal with the Congolese requests for cessation and for guarantees and assurances, which only have been considered in the reasoning. Paragraphs 264 and 265 of the Judgment were sufficient to make clear the Court's position in respect of the DRC's submission on provisional measures.

78. The Court's decision to include a finding in the *dispositif* is in my view an illustration of the lack of balance I have referred to earlier. For these reasons — and not because I disagree with the finding itself — I felt constrained to vote against paragraph 7 of the *dispositif*.

E. The First Counter-Claim

79. I share the Court's view that it is useful to divide Uganda's first counter-claim into three periods. I agree with the Court that the counter-claim is without merit as regards the second and the third period. The following comments thus relate only to the period prior to May 1997 and only to the merits of that part of the counter-claim.

80. In paragraphs 298 and 299 of the Judgment the Court concludes that Uganda has not produced satisfactory evidence that Zaire (as the DRC was then called) actually supported the Ugandan rebel movements

which were active on Zairean territory. I have no difficulty with the Court's view on that matter.

81. In paragraph 300 of the Judgment the Court deals with the question whether Zaire had acted in conformity with its duty of vigilance, which in its words is "a different issue". In this respect the Court takes note of Uganda's argument that the rebel groups were able to operate "unimpeded" in the border area because of the almost complete absence of central government presence or authority in the region during President Mobutu's 32-year term in office. The Court continues by saying that neither Zaire nor Uganda was in a position to put an end to the activities of the anti-Ugandan and anti-Zairean rebel movements operating in the area. Then it finds that, *in the light of the evidence before it*, it cannot, however, conclude that the absence of action of Zaire's Government is tantamount to "tolerating" or "acquiescing" in their activities and that, consequently, this part of Uganda's counter-claim cannot be upheld.

82. But surely it is not Uganda that has to provide evidence that Zaire *was* in a position to exercise control over its borders and thus to take action. Nor was counsel for the DRC persuasive when he argued that Uganda itself recognized "the impossibility of effectively policing" the common border. It is for the State under a duty of vigilance to show what efforts it has made to fulfil that duty and what difficulties it has met. In my view the DRC has only been successful in sufficiently substantiating an "almost complete absence" of government presence or authority for the period from October 1996 to May 1997, the time of the first civil war. But I have found no evidence in the case file nor in relevant reports that the Government in Kinshasa was not in a position to exercise its authority in the eastern part of the country for the whole of the relevant period and thus was unable to discharge its duty of vigilance before October 1996; the DRC has not even tried to provide such evidence.

83. I therefore fail to understand the factual ground for the Court's conclusion that "the part of Uganda's first counter-claim alleging Congolese responsibility for tolerating the rebel groups prior to May 1997 cannot be upheld" (Judgment, para. 301). In my view the logical conclusion would have been that the DRC has failed to provide evidence that it took credible measures to prevent rebel movements from carrying out transborder attacks or was unable to do so and that the first part of the counter-claim thus must be upheld.

84. Let me add that factual circumstances, such as geographical con-

ditions (mountainous terrain) may explain a lack of result but can never justify inadequate efforts or the failure to make efforts.

(Signed) P. H. KOOIJMANS.