CR 2005/9 (traduction)

CR 2005/9 (translation)

Mercredi 20 avril 2005 à 10 heures

Wednesday 20 April 2005 at 10 a.m.

8 Le PRESIDENT : Veuillez vous asseoir.

La séance est ouverte. Avant de passer la parole à l'Ouganda, je voudrais vous informer que le juge Higgins, pour des raisons dont elle m'a dûment fait part, ne pourra aujourd'hui être présente sur le siège.

M. Suy, vous avez la parole.

Mr. SUY:

THE QUESTION OF THE "ILLEGAL" EXPLOITATION OF NATURAL RESOURCES

1. Mr. President, honourable Members of the Court, it is both a great honour and a privilege to appear again before your distinguished Court, on this occasion to present to you this morning, on behalf of Uganda, arguments on the question of the exploitation of the natural resources of the Democratic Republic of the Congo (DRC).

Over the coming two hours you will be able to see that there are numerous points of disagreement between the arguments that I shall seek to present to you on behalf of Uganda and what was said last week by Professor Sands on behalf of the DRC. However, there is at least one thing on which we all agree: this is the first time ever that a State has asked this Court to hold another State internationally responsible on account of "illegal exploitation" of its natural resources and of violation of the "principle of permanent sovereignty" of its people over its resources[1].

9 2. This very serious charge, which is accompanied by a number of references to the celebrated resolution 1803 of the United Nations General Assembly, and which seeks to resurrect the ghosts of colonialism in Africa, is not levelled at a great power or at some former colonial power, seized with a sudden nostalgia for its past. It is directed at a neighbour country itself the product of the process of decolonization, to which the Applicant ascribes the basest of intentions and most odious of motives. Thus the Democratic Republic of the Congo considers that the exploitation of its national resources was the true *objective* of the "crime", the initial cause, which explains "everything". In the words to you last week of Maître Tshibangu Kalala: "The *aim* of the war waged by Uganda in the Democratic Republic of the Congo was to topple

[1]See Professor Sands' presentation in CR 2005/5, p. 15, para. 1.

President Laurent-Désiré Kabila's régime and *to exploit illegally the natural wealth of the Congo*."[2]

3. Mr. President, Members of the Court, I hope that the detailed presentations of the colleagues who preceded me have convinced you that the aim of Uganda's military operations was not to overthrow President Laurent Kabila, but to respond to ongoing grave threats to her security. For my part, I shall now seek to show you that the DRC's accusations that Uganda engaged in "the illegal exploitation of Congolese natural resources . . . by pillaging its assets and wealth"[3] are unfounded, and that Uganda has not violated the "principle of permanent sovereignty of the Congolese people over its natural resources".

4. In order to do so, I shall proceed in two stages. First, I shall examine the methods employed by the DRC, both in its written pleadings and in oral argument, in order to *establish the facts*, and set out a certain number of objections to them (I). Then I shall address the fundamental question of the DRC's *legal characterization of the facts* in order to demonstrate to the Court the weaknesses in the Congo's legal argument (II).

I. Objections to the manner in which the DRC has sought to establish the facts

5. Establishing the truth of the facts means providing proof that the allegations made correspond to the reality. To cite a definition from an authoritative dictionary, "proof" means: "an operation resulting in a clear and convincing perception (at least in terms of law) of the truth of a proposition initially regarded as doubtful"[4].

6. Thus the issue in this case is at what point *and in respect of which precise facts* it may be said that the Congo has established in a "clear and convincing" manner the truth of allegations "initially regarded as doubtful". According to this Court's established jurisprudence, the answer is

10 that the facts must be established in such a way as to leave no room for "reasonable doubt"[5]. Both Parties seem to be in agreement on this jurisprudence, which thus requires that the facts be established "beyond all reasonable doubt". However, the manner in which the Congo has sought to

[2]CR 2005/2, p. 40, para. 72; emphasis added by Uganda.

[3]RDRC, p. 398.

[4]A. Lalande, (ed.), *Vocabulaire technique et critique de la philosophie*, Paris, *PUF*, 3rd ed., 1993.

[5]See, for example, Judgment of 9 April 1949, *Corfu Channel* case, *Merits, I.C.J. Reports 1949*, p. 18.

establish the facts involves a lack of rigour in relation to its interpretation of this principle, on which I should like briefly to address to you (A), before examining the sources relied on by the DRC in its argument, namely the report of the Porter Commission, extensively cited in its oral argument (C), and the reports of the United Nations Panels, extensively cited in its written pleadings (B).

A. The lack of rigour in the manner in which the DRC has sought to establish the facts

7. There is a substantial lack of rigour in the way in which the Congo has sought to establish the facts.

8. Thus the Congo has a number of times asked the Court to render a judgment "declaratory in character", at the present phase of the proceedings and to reserve for a later phase the question of the "form" and "amount" of any reparation[6]. It is only at a subsequent stage, according to the DRC, that it "must specify the nature of the injury and establish the causal link with the initial wrongful act"[7]. However, in so arguing the Democratic Republic of the Congo completely excludes from the current debate the issue of the *injury*, which, however, is the *condition* sine qua non *for the engagement of a State's international responsibility.* As Messrs. Combacau and Sur have made clear in their manual of Public International Law:

> "A State cannot invoke another State's responsibility, even where the requirements in regard to the originating act are met, *unless it has suffered some 'injury'*. That will normally represent the measure of the reparation due to the victim . . . [I]t is also *an element in the absence of which a State's responsibility simply cannot be engaged*."[8]

Similarly, in a general course taught by him a few years ago on premises next door to these, at the Academy of International Law, Professor Prosper Weil emphasized that the classic doctrine

11 of international law takes a clear position: "No injury, no international responsibility."[9] Professor Weil explained that this position was based on

> "the numerous judgments and arbitral awards which grant reparation to a State only after finding that the latter has suffered injury as a result of the wrongful act (or fault)

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[6]See speeches of Professors Sands, CR 2005/3, p. 20, para. 8, and Salmon, CR 2005/5, p. 56, para. 20.

[7]*Ibid.*, Salmon, para. 20.

[8]J. Combacau et S. Sur, *Droit international public*, Paris, Montchrestien, 6th ed., 2004, p. 525; emphasis added by Uganda.

[9]P. Weil, *Le droit international en quête de son identité, RCADI*, 1992-VI, Vol. 237, 1996, p. 340.

> of another State, but which *refuse any form of reparation to a State which has been unable to establish that it has suffered injury as a result of a wrongful act* (or fault) of another State"[10].

9. Even if the Court were thus to accede to the DRC's request that the "form" and precise "amount" of the reparation should be determined in a subsequent phase, that would not excuse the Congo from its obligation at the present stage to demonstrate the precise injuries suffered and to prove that they were suffered *directly* by the State itself, given that any *mediate injury* suffered by private individuals could be taken into account by this Court only after local remedies have been exhausted, in accordance with the procedures for diplomatic protection.

10. I have a second observation, linked to the preceding one, regarding what appears to be our opponents' covert strategy. Relying on its argument for a phased procedure, the DRC does not appear to regard itself as being under *an obligation precisely to establish all the facts* at this stage. It seems rather to be seeking to raise a Kafkaesque presumption of guilt against Uganda, whereby, if a single fact is proved, that must necessarily mean that *all* of the facts are proved. Uganda certainly does not seek to attribute to its opponent intentions which it does not have. It confines itself here to recording its view that the sound administration of justice requires that, as of now, the DRC must exhaustively establish the facts and that it must be able to show that *each one of those facts* is an "internationally wrongful act" attributable to Uganda — an issue to which I shall return in the second part of my presentation.

11. A final remark concerns a dubious technique of equation employed by our opponents. In particular, they sought to equate the findings of the Porter Commission report with those contained in the reports of the United Nations Panel of Experts on "the illegal exploitation of the natural resources" of the DRC, and hence with the written pleadings filed by the DRC with this Court. To cite just a few assertions from what Professor Sands told you last week:

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> — "the Porter Commission confirmed the conclusions of the reports of the United Nations expert panel"[11];
>
> — "The Final Report of the Porter Commission unambiguously confirms the DRC's allegations"[12];

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[10] *Ibid.*; emphasis added by Uganda.

[11] CR 2005/5, p. 17, par. 4.

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

— "The United Nations reports, the Security Council resolutions, the Final Report of the Porter Commission, the evidence before the Porter enquiry and all the other material before the Court *lead inevitably and inexorably to a 'single conclusion'*."[13].

12. This wholesale equation of the findings of the Porter Commission with those of the United Nations Expert Panel, abundantly quoted and reproduced in the DRC's written pleadings, does not however correspond to the reality. That is a fundamental issue in this case which will require exhaustive analysis. But first I should like briefly to remind the Court of the controversial nature of a number of the findings in these reports of the United Nations Expert Panel.

B. The controversial nature of a number of the findings in the reports of the "Panel of Experts"

13. Reading the DRC's reply, it is clear that the various allegations against Uganda on account of the "illegal" exploitation of the Congo's natural resources are very largely founded on the reports prepared by a "Panel of Experts" set up by the Security Council for purposes of conflict management, and in particular on the Panel's first report, presented in 2001, which, however, aroused a storm of protest in New York.

14. I would begin by reminding you, Mr. President, Members of the Court, that, as the Security Council itself stressed, this Panel was not set up in order to establish responsibility or to ascertain the truth. According to the statement by the President of the Security Council of 2 June 2000 defining the Panel's mandate[14], its mission was to "collect information" — "information" possibly contradictory, possibly true, possibly false, but the purpose of which was to enable the Council to co-ordinate its action in connection with the management, whether preventive or reactive, of the overall conflict. It is thus clear that the Panel was established with a quite precise aim in view: contributing to political action by the Council. Thus the aim of its reports was

13 not to produce "evidence", but, to quote the words of the Russian delegate to the Security Council, to provide "food for thought that requires further study"[15].

15. The "flexible" nature of the Panel's mission explains, moreover, its self-proclaimed aim of approaching the question of "information gathering" with great "flexibility", the word used in its

[13] *Ibid*., p. 31, par. 9; emphasis added by Uganda.

[14] S/PRST/2000/20.

[15] S/PV.4642 of 5 November 2002, p. 27.

first report[16] — even if the initial Panel should certainly be criticized for having frequently transformed flexibility into laxity, by failing even to respect the methodology which it claimed to be seeking to apply and, in its first report, betraying a degree of bias which provoked criticism from a number of States.

16. Thus, reading the reports, it is clear that the methods used do not permit the information which they contain to be regarded as "facts established beyond all reasonable doubt". The constant recourse to unidentified "sources", to unreferenced "documents", to hearsay, or even to "rumour"[17], the use of approximations, or expressions such as: "there are indications that . . .", "it would seem that . . .", "the Panel is inclined to believe that . . .", demonstrate the unreliability of many of the allegations contained in these reports. However, in this complex matter before us today, it is essential that the veracity of these sources be checked, in order that we may distinguish between deliberate falsehood, war propaganda, political intrigue and, above all, wholesale "denunciations" by individuals or entities having possessed — and still possessing — massive interests in the exploitation of natural resources in the DRC, who might well wish to eliminate the competition. In a situation of conflict like this one, the criteria adopted to prove and corroborate information, whether provided by "walk-ins", motivated "volunteers", "disinterested" businessmen, or traditional enemies, should have been far stricter than those apparently applied by the Panel, particularly in its first report.

14 17. The Panel can, moreover, be criticized for having failed to interview key witnesses or to consult readily accessible public documents, which could, however, have enabled it to avoid certain blunders. Thus, for example, the "DARA-Forest" case, presented in the first report as a "case study" representing an excellent example of "how a company used illicit business practices and complicity with occupying forces and the government", proved in reality to be an example of methodological error on the part of the Panel (as indeed was demonstrated by the Porter Commission and by Uganda's Rejoinder[18]).

[16] S/2001/357, para. 9.

[17] See S/2002/1146, para. 117.

[18] Rejoinder, paras. 390-395.

18. Reading the Security Council minutes, we can see that a number of countries, although not directly involved in the conflict, challenged the legal validity of the information in the reports, and indeed the reliability and veracity of certain of that information. Confining ourselves to the reactions to the October 2002 report, although this was not the most controversial of them, we would cite, for example, observations by delegates of:

— *South Africa* first of all, which states that it is "disappointed with the content of the . . . report . . . in the methodology the Panel used in gathering its information and in the conclusions and recommendations". It urges that "the Security Council require the Panel to further investigate and substantiate the allegations and recommendations made in the report", believing that "it is important for the Council to act on facts, rather than on incomplete or even false information"[19];

— next, the statement of *Oman* to the Security Council, which expresses its "strong concerns at the wrongful allegations, factual errors, hearsay and uncorroborated information"[20];

— *Russia* points out to the Security Council that "not all agree with the conclusions and recommendations of the report, including the Russian Federation"[21];

15 — *Mauritius* considers that the Panel "makes assumptions and bases itself on perceptions . . . [which] are not legally valid"; it fears that the Panel's report on occasion "aims at sensationalism"[22];

— finally, *Syria* stresses the "failure to secure irrefutable evidence" and notes that "the report was based on information provided by informers, be they companies or competing traders", [which] "affects the accuracy of the report and the credibility of the Panel of Experts"[23];

19. But, over and above States, the Security Council itself has clearly indicated these reports' lack of probative force. In resolution 1457 of 24 January 2003, the first Security Council resolution entirely devoted to the issue of natural resources, the Council

"*Stresses* that the new mandate of the Panel should include:

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[19] S/PV.4642, pp. 9 and 11.

[20] *Ibid.*, p. 18.

[21] *Ibid.*, p. 28.

[22] S/PV.4642 (resumption 1), p. 2.

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

— Further review of relevant data and analysis of information previously gathered by the Panel, as well as any new information . . . in order to verify, reinforce and, where necessary, update the Panel's findings, *and/or clear parties named in the Panel's previous reports . . .*" (Para. 9; emphasis added by Uganda.)

Still more clearly, in paragraph 15 of this same resolution 1457, the Security Council:

"*Urges* all States, especially those in the region, to conduct their own investigations, including as appropriate through judicial means, in order to clarify credibly the findings of the Panel, *taking into account the fact that the Panel, which is not a judicial body, does not have the resources to carry out an investigation whereby these findings can be considered as established facts.*"[24]

20. The Panel of Experts itself seems to have drawn the necessary conclusions from these reactions and to have admitted its reports' lack of probative force. The reconstituted Panel was not only honest enough to withdraw or revise many of the accusations against a number of individuals or entities, including — as we shall see — against Uganda, but it also emphasized in its final report to the Council of 15 October 2003, that

"[t]he nature of the Panel and the various mandates that it has been given precluded it from determining the guilt or innocence of parties that have business dealings linked to the Democratic Republic of the Congo. Accordingly, the Panel has restricted itself to the narrower issue of identifying parties where it has information indicating a prima facie case to answer."[25]

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21. After this brief reminder, I will now begin examining the fundamental differences between the findings in the reports of the "Panel of Experts" and those of the celebrated Porter Commission.

C. The fundamental differences between the findings in the reports of the "Panel of Experts" and those of the Porter Commission

22. Honourable Members of the Court, in making this comparison between the Porter Commission report and those of the Panel of Experts, I certainly do not seek to annoy you with a tiresome exercise in comparing and contrasting. Nor is it my intention to deny the existence of certain points of agreement between the investigations in question as far as the individual conduct of certain soldiers and officers is concerned. My objective is to show you that there is a very significant quantitative and qualitative difference, which will be decisive later on when a legal

[24]Emphasis added by Uganda.

[25]S/2003/1027 of 23 October 2003, paras. 15 and 16.

characterization is given to the facts, between the Porter Commission's findings and those in the reports (particularly the first one) of the United Nations Panel of Experts.

23. It is primarily in its initial report that the United Nations Panel levelled very serious accusations against Uganda, accusations repeated by the Congo, without taking account of the fact that the reports subsequently submitted by the reconstituted Panel abandoned or revised a great many of these accusations and that the Porter Commission also rejected them. While the following are not all of these points of divergence between the Porter Commission's report and the United Nations Panels' reports, here is a series, moreover not exhaustive, of 15 of these points, to which Uganda would like to draw your attention:

I. The Porter Commission found that the initial Panel's accusations that Uganda was exploiting the DRC's forest resources were without merit. The Commission studied in detail the case of the company DARA-Forest, discussed at length in the report by the Panel, which had tried to show "collusion" between timber companies in the DRC and the

17 Ugandan Government; the Commission concluded that the Panel's allegations were "fundamentally flawed"[26].

II. The Porter Commission concluded that the initial Panel's allegations that Ugandan soldiers had looted stockpiles of timber belonging to the forest products company AMEX-BOIS, located in Bagboka, were unfounded[27].

III. It concluded that another allegation concerning the looting of timber, this time in respect of the company *La Forestière*, was not proven either[28].

IV. The Porter Commission found that the initial Panel's allegations concerning the confiscation and looting of stockpiles of coffee in Equateur province were not proven[29].

V. The Porter Commission found that the initial Panel's allegations that "key officials in the Government … of … Uganda were aware of … the looting of stocks from a number of factories" were not proven[30].

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[26]See "Report of the Judicial Commission of Inquiry into allegations of illegal exploitation of natural resources and other forms of wealth in the DRC" in *I.C.J., Submission by the Republic of Uganda of new documents in accordance with Article 43 of the Statute and Article 56 of the Rules of Court*, 20 October 2003, pp. 53 *et seq.*, para. 16.

[27]*Id.*, p. 48, para. 15.1.

[28]*Id.*, p. 49, para. 15.2.

[29]*Id.*, p. 13, para. 11.3.3 and p. 49, para. 15.3.

VI. The Porter Commission found that the initial Panel's allegations that Uganda had made off with a number of cars in the DRC were without basis[31].

VII. The Porter Commission concluded that the initial Panel's allegations that the leaders of Uganda "directly and indirectly appointed regional governors or local authorities" in the Congo were unfounded. It did, however, note that the only attempted interference by a Ugandan officer in local government was immediately denounced by the Ugandan authorities. And the evidence clearly shows that "the UPDF tended to accept whoever was the local authority in place, so as to be able to concentrate on providing security in the relevant area"[32].

18 VIII. Moreover, the Porter Commission pointed out a number of times that Uganda exercised no jurisdiction over Congolese nationals and the rebel movements. It observed in this connection that President Museveni of Uganda "has publicly declared on many occasions that the internal administration of the Democratic Republic of Congo is for Congolese themselves, so long as the security concerns of Uganda are addressed"[33].

IX. The Porter Commission concluded that the initial Panel's allegations that Uganda had exerted "pressure" to facilitate trafficking in three tons of elephant tusks were unproven[34].

X. The Commission found that the initial Panel's accusations that Ugandan forces had engaged in monopolistic and price-fixing practices to control the economy in the eastern Congo were unfounded[35].

XI. It further concluded that the allegation that the RCD-ML and MLC rebels remitted to Kampala a share of the taxes collected was also devoid of any basis[36].

XII. The Commission stated that the initial Panel's assertion that "the political establishment in Kampala" knew of the "illegal" activities of certain "individuals" did not appear true[37].

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[30] *Id*., p. 53, para. 15.8.2.

[31] *Id*., p. 50, para. 15.4.

[32] *Id*., pp. 78-79, para. 18.1.

[33] *Ibid*., p. 144, para. 22.6.1.

[34] *Ibid*., p. 72, para. 16.3.4.

[35] *Ibid*., pp. 75 *et seq*.

[36] *Ibid*., pp. 76-77, para. 17.3.

[37] *Ibid*., pp. 85-86, para. 19.

XIII. It points out the falsity of the allegation that Uganda financed its war effort in the DRC through a system of re-exportation[38] or in any other way connected with events in the DRC[39].

XIV. The Commission showed that certain accusations made by the initial Panel against President Museveni were completely false[40].

19 XV. Finally, on the basis of all of the evidence examined, the Commission expressed its agreement with the position of the reconstituted Panel, which dropped the accusations against Uganda. While noting, as Professor Philippe Sands recalled last week, that "[t]here is agreement that officers to a very senior level, and men of the UPDF have conducted themselves in the Democratic Republic of Congo in a manner unbecoming", the Porter Commission added in the same sentence — but Professor Sands left this out — that: "There is agreement that the original Panel's allegations against Uganda as a State, and against President Museveni *were wrong*."[41]

24. The Commission later added:

> "The Government of Uganda has been acquitted of any wrong doing by the reconstituted Panel and *no state institution has been found by it to be involved* in exploiting the natural resources and other forms of wealth in the Democratic Republic of Congo."[42]

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25. By way of conclusion to this part of my statement concerning the DRC's proof of the facts, I would like to recall a sentence uttered before the Court last week by Professor Sands on

[38] *Ibid.*, pp. 129 *et seq.* (especially, p. 137).

[39] *Ibid.*, p. 170, para. 34.

[40] *Ibid.*, pp. 144 *et seq.*

[41] *Ibid.*, p. 196, para. 40.8; emphasis added. *Compare* statement by Mr. Sands in CR 2005/5, p. 33, para. 12.

[42] *Op. cit.*, p. 170, para. 34; emphasis added.

behalf of the DRC: "[T]he matters upon which there may be differences [between the Porter Report and the United Nations reports] are not material to the DRC's case in the proceedings."[43]

26. Uganda hopes that this means that the Parties are now in agreement on the following points:

— the various accusations made against the Government of Uganda, notably in the initial report by the United Nations Panel, and taken up in the DRC's written pleadings do not reflect the reality;

20 — no "order" or "incentive" was ever given to any soldier by the Government of Uganda to exploit any natural resources in the DRC; on the contrary, it has been shown that clear orders had been given in order to prevent things from getting out of hand;

— the various soldiers or officers who, according to the conclusions reached by the Porter Commission, "have conducted themselves in the Democratic Republic of Congo in a manner unbecoming" — whatever that term may mean legally — acted in their private capacity, in clear breach of the orders given by the highest State authorities and then tried to conceal their conduct from those authorities — as, moreover, the Porter Commission showed repeatedly;

— at no time did Uganda thus have any intention to exploit the natural resources of the DRC and it did not do so;

— the accusation that Uganda used those resources to "finance the war" is completely unfounded; and

— it follows "beyond all reasonable doubt" from the foregoing that Uganda's military operations in the DRC in no way aimed at "illegally exploiting the natural resources" of the Congo.

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27. With your permission, Mr. President, I would now like to move on to the second part of my statement, which concerns the major problem of the DRC's characterization of the facts.

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[43] CR 2005/5, pp. 32-33, para. 12.

II. Objections to the DRC's legal characterization of the facts

28. There are certain major weaknesses in the DRC's legal characterization of the facts, and Uganda wishes to draw the Court's attention to at least some of these. A number of them arise from the use of the term "illegality", which appears in the "Reports" of the Panels of Experts and in the Congo's written pleadings. I propose to address this issue first (A). In the light of those observations, I will then show that not only did Uganda not violate the principle of sovereignty over natural resources (B), but, on the contrary, it exercised a high degree of surveillance, within the means at its disposal, to prevent any violation of the rights of the Congolese people over their natural resources, and that that surveillance went as far as the unprecedented creation of the celebrated "Porter Commission" (C).

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A. The confusion arising from the use of the notion of "illegality" and the actual conditions required to engage the international responsibility of a State

29. It is well known that the legal characterization of the facts is the stage in the judicial argument when an established fact is classified "in a legal category with a view to attributing thereto the legal régime corresponding to that category"[44]. However, apparently "putting the cart before the horse", the Security Council created a "Panel of Experts on the *Illegal* Exploitation of the Natural Resources of the Congo". This suggests that the facts had been characterized as "*illegal*" even before it was known whether they actually existed!

30. Admittedly, it could be replied — and with good reason — that the Security Council is simply a political organ and that the use of the adjective "illegal" did not represent a precise legal characterization. However, we are bound to note that this term, replete with ambiguity and open to all kinds of misinterpretation, has acquired a certain force, even in this Court, having been used in the reports of the Security Council's "Panel of Experts", as well as in the Memorial, Reply and oral argument of the DRC, in which Uganda is accused of "*illegal*" exploitation of the DRC's natural resources.

31. Uganda can only react with perplexity to the use of the term "illegal" and to the definition of "illegality" given by the Panels of Experts and reiterated by the Congo. That definition, which appears in the very first report of the "Panel", contains elements which do not

[44] *Dictionnaire Basdevant*, Paris, Sirey, 1960, p. 493. *[Translation by the Registry.]*

permit the responsibility of a State to be engaged before an international court. Among the elements of that definition given in the Panel's first report, one finds, for example, "respect by actors of the existing regulatory framework within the country or territory where they operate or carry out their activities", *"the discrepancy between widely accepted practices in trade and business and the way business is conducted in the Democratic Republic of the Congo"* or even the

22 *violation of "'soft' law"*(!)[45]. Thus even the term *"soft law"* is brought into play to characterize the facts as "illegal", and the Panel of Experts was unable to refrain from congratulating itself, in its final report, on having "breathed life into the OECD [Organization for Economic Co-operation and Development in Europe] Guidelines for Multinational Enterprises"[46]! Admittedly, the fact that the "Panel", on its own admission, opted for a "broad interpretation of the concept of illegality"[47], and the reasons for that choice, are of little interest to this Court. However, the fact that the DRC is now requesting your Court to engage the international responsibility of a State on the basis of dubious terminology, and so questionable a definition, must certainly be of interest to this Court.

32. Mr. President, honourable Members of the Court, the judicious distinction in the French language between the term *"illégalité"* [illegality] (a term with little relevance in an international society without a legislative organ and hence without any "laws") and that of *"«illicéité»*[48] [unlawfulness/wrongfulness] (characteristic of something not compliant with an international obligation) can provide us with great assistance in this matter: among the nebulous set of allegedly "illegal" acts enumerated in the reports of the Panels of Experts and cited by the Congo, the Court can only properly consider the *"unlawful/wrongful"* acts, that is to say violations of rules of international law that are binding on Uganda.

33. That point is of fundamental importance, because the Reply of the DRC maintains constant confusion between what is "illegal" and "unlawful" or "wrongful" and, at the same time, between two different legal orders: the internal legal order and the international legal order. For the DRC, any violation whatsoever of one of its laws or administrative acts by a Ugandan national

[45]S/2001/357, para. 15. Emphasis added.

[46]S/2003/1027, para. 70.

[47]S/2001/357, para. 15.

[48][Note to translators: please leave in original French.]

must immediately be characterized as a violation of international law by Uganda and therefore engage its responsibility! It is not necessary here to stress the fallacious nature of that argument.

23 For it is well known that the originating act giving rise to international responsibility is not an act characterized as "illegal" by the domestic law of the State but an "internationally wrongful act" imputable to a State.

34. This, then, is the real criterion on which the legal characterization of the alleged facts in our case should be founded. There may have been "illegal acts", that is to say violations of the domestic law of Uganda, or of the DRC, or of both those countries at once — but such acts would only normally be the concern of the domestic legal orders of those countries, where appropriate proceedings could be brought. By contrast, what is of concern to this Court is whether one can point to an "*internationally wrongful* act", that is to say whether Uganda breached "an international legal obligation in force for that State" — to cite the commentary on Article 2 of the International Law Commission draft Articles on the Responsibility of States for internationally wrongful acts, adopted in 2001[49].

35. Mr. President, Members of the Court, Uganda does not deny the finding of the Porter Commission that certain soldiers and officers, acting on a strictly personal basis and in clear breach of the orders given by the State authorities, conducted themselves, to cite the Commission again, "in a manner unbecoming". This does not mean, however, that *all* acts of those soldiers described by the Porter Commission should necessarily be regarded as "*internationally wrongful*" acts. The fact that those soldiers, in beach of orders, engaged in "commercial activities" — and were, as Professor Sands stated, "conducting business"[50] — in the Congo, or even the fact that some of them "were planning to do business"[51], as Professor Sands also said, does not automatically make this conduct an "*internationally wrongful* act". The fact that certain soldiers and officers did everything they could to conceal their conduct from their superiors, in some cases going as far, to quote the Porter Commission, as a "conspiracy of silence", is no doubt a very important element in the debate on Uganda's compliance with the obligation of vigilance, but it is certainly not an

[49]Report of the International Law Commission to the General Assembly of the United Nations, *Official Records* (A/56/10), 2001, pp. 70 *et seq.*

[50]CR 2005/5, p. 33, para. 13.

[51]*Ibid.*

"*internationally wrongful* act". Possible violations of "soft law" or the OECD Guidelines are not necessarily "*internationally wrongful* acts".

24 36. Last week, Professor Sands told us that, in the DRC's view, "Uganda's responsibility is engaged in respect of *'all' acts* committed by its armed forces *whether they were lawful* or not"[52]. Uganda considers that it is impossible to attribute to it acts which do not constitute "*internationally wrongful* acts", that it is impossible to speak of responsibility in the absence of any violation by Uganda of an "international obligation in force for that State".

37. What then were the "international obligations" which Uganda could be said to have breached? The Reply of the DRC essentially identifies two: first, the principle of sovereignty over natural resources[53], and secondly, the obligation of vigilance[54]. I will now seek to show you that Uganda has not breached either of those obligations. Unless, Mr. President, it would be appropriate to take a break at this point.

The PRESIDENT: Yes, Professor Suy, I think it is time to have a break of 15 minutes, after which you will continue your statement.

Mr. SUY: Thank you very much.

The Court adjourned from 11.05 to 11.20 a.m.

The PRESIDENT: Please be seated.

Professor Suy, please continue.

Mr. SUY: Merci, Monsieur le Président. Mr President, as I was saying at the end of the first part of this sitting, Uganda bears no responsibility unless it has breached an international obligation in force for that State. And it was the Congo, in its Reply, that essentially identified two international obligations: one is the principle of Congolese sovereignty over natural resources, the other is the obligation of vigilance. I will now endeavour to show you that Uganda has breached neither of those obligations.

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[52] *Ibid.*, p. 25, para. 24. Emphasis added.

[53] RDRC, pp. 302 *et. seq.*

[54] *Id.*, pp. 306 *et seq.*

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B. Uganda has not violated the principle of the permanent sovereignty of the Congolese people over its natural resources

38. Uganda obviously does not deny, and has never denied, the principle of the Congolese people's sovereignty over its natural resources. As early as 1960, the "Declaration on the granting of independence to colonial countries and peoples" had affirmed that:

> "peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law . . ." (A/RES 1514 (XV) of 14 December 1960).

Two years later, United Nations General Assembly resolution 1803, entitled "Permanent Sovereignty over Natural Resources", reaffirmed this right of peoples, declaring that: "The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned." (A/RES 1803 (XVII) of 14 December 1962.) This formula was taken up in Article 1 common to the two international human rights covenants of 1966, which provides that "all peoples may . . . freely dispose of their natural wealth and resources . . .". Uganda fully endorses this right of peoples to dispose of their natural resources. On the other hand, it categorically denies the allegation that it violated that right in the instant case.

39. In its Reply, the Democratic Republic of the Congo contends that "[t]he Ugandan authorities and officers and men of the UPDF . . . have taken advantage of the occupation of Congolese territory by Ugandan troops to loot and illegally exploit the natural resources and other forms of wealth of the DRC"[55]. And the DRC goes on to say: "In reality, all the indications are that the illegal exploitation of Congolese resources is the result of *orders* given by the Ugandan authorities"[56]. The purpose of these allegations is clear: to substantiate the remainder of the Congolese argument, giving your Court the impression that Uganda invaded Congolese territory in order to appropriate the resources of its people.

40. Obviously, this is utterly false. As my colleagues have already shown, the stationing of a small number of Ugandan troops in eastern Congo was motivated solely by Uganda's legitimate

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security concerns. This quite specific objective and the nature of the Ugandan actions are totally

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[55]RDRC, para. 4.01.

[56]*Ibid.*, para. 4.66; emphasis added.

inconsistent with the theory of a plot and of exploitation put forward by the DRC. The Ugandan forces, who did not even number 10,000 men at the height of their deployment, did no more than maintain a presence in border regions from which the rebels were launching attacks against Uganda, and in certain other localities where there were strategic airfields. This fact is totally at variance with the scenario of "occupation" and "exploitation" of a region as big as Germany. It is significant, moreover, that the Security Council Panel itself recognized that security concerns accounted for Uganda's actions. In one of its reports, which the Reply of the DRC — otherwise so rich in references to that source — omits to cite, the Panel emphasizes that Uganda "has some legitimate security threats, which prompted its military intervention in the Democratic Republic of the Congo"[57].

41. Contrary to what is claimed by the DRC, therefore, Uganda had no intention of exploiting the resources of the Congolese people and did not do so. Contrary to the DRC's claim, Uganda did not seek to take — and did not take — "control of economic activities in the occupied Congolese territories"[58]. Nor was Uganda a power "administering" Congolese territory. It was the rebels of the Congo Liberation Movement (MLC) and of the Congolese Rally for Democracy (RDC) which controlled and administered these territories, exercising *de facto* authority. I have already mentioned that the only attempt at interference in this local administration by a Ugandan officer, albeit motivated by the desire to restore order in the region of Ituri in the interests of the population, was immediately opposed and disavowed by the Ugandan authorities, who instituted disciplinary proceedings against the officer in question.

42. The assertion that "the illegal exploitation of Congolese resources is the result of orders given by the Ugandan authorities"[59] is therefore not only false, but is at variance with the final report of the Security Council Panel. The Panel makes a clear distinction between the parties allegedly "guilty" of "illegal" exploitation, pointing on the one hand to "the *governments* of Rwanda and Zimbabwe", and on the other to "powerful *individuals* in Uganda"[60].

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[57]"Addendum to the report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo", S/2001/1072, 13 November 2001, para. 95.

[58]RDRC, p. 301.

[59]RDRC, para. 4.66.

[60]For example, S/2002/1146, para. 13.

43. It should also be noted in this connection that the Congo itself now seems to have abandoned its accusations on this score. While on the first day of the DRC's oral presentation, Mr. Kalala announced, as I have said, that the "aim of the war waged by Uganda" was to exploit the resources of the Congo, in that part of its argument specifically devoted to the issue of resources, the DRC appeared reluctant to press this charge, or to provide any evidence in this regard. On the contrary, last Wednesday's speeches by Mr. Kalala and Professor Sands were almost exclusively devoted to the individual actions of certain soldiers and officers who disobeyed orders.

44. It is true that the DRC, being aware of the fact that the conduct in question clearly contravened the instructions and orders given by the Ugandan authorities, devoted much of its argument to issues of attributability under international law. But such issues, whatever we make of them, can in no sense be used as a basis for accusing Uganda of violating the "principle of the permanent sovereignty of the Congolese people over its natural resources". Attributability is not a philosopher's stone, serving to transform any act by an individual into a wrongful act of the State. Nor is it a magic wand that can be used to change the way in which we characterize an internationally wrongful act, miraculously transforming an individual act of looting, committed in violation of orders and instructions, into a heinous crime of the State, on account of the "violation of the principle of the permanent sovereignty of the Congolese people over its natural resources".

45. Mr. President, distinguished Members of the Court, if the logic proposed by the DRC were to be applied, a soldier — a Belgian soldier, for example — who, in clear violation of army regulations and orders, participated in a private capacity in a smuggling operation on the territory of a foreign country, would immediately engage the international responsibility of Belgium for violating the principle of the permanent sovereignty of the people of that country over its natural resources. The United Nations would also be guilty of many crimes involving violation of the "principle of the permanent sovereignty of peoples over their natural resources", as a result of acts of theft or looting committed by individual soldiers participating in peacekeeping missions virtually all over the world.

46. Uganda does not see how it is possible to apply such a novel reinterpretation of this principle, which was shaped in a precise historical context (that of decolonization) and has a very

precise purpose. It respectfully requests the Court to reject this deeply offensive charge levelled at Uganda by the Democratic Republic of the Congo.

47. With your permission, I should now like to turn to the last part of my presentation, in which I shall seek to demonstrate that Uganda complied with the obligation of means incumbent on it under international law with regard to the conduct of its nationals.

C. Uganda complied with the obligation of means with regard to the conduct of its nationals

48. Uganda formally rejects the arguments concerning the duty of vigilance contained in the Reply of the DRC[61] and the conclusions it draws therefrom. The assertion that Uganda had a duty of diligence with regard to the Congolese rebel groups is manifestly erroneous, for a number of reasons, including the fact that Uganda did not control those groups and had no power over the administrative acts of those *de facto* authorities. That said, Uganda considers that, within the limits of its capabilities, it exercised a high degree of vigilance to ensure that its nationals did not, through their actions, infringe the Congolese people's right to control their natural resources. In order to deal with this issue, and answer the DRC's allegations, we must first look at the fundamental question of Uganda's failure to prohibit trade in basic products with the territories controlled by the rebels *(a)*, before examining what positive measures were adopted by Uganda *(b)*.

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(a) ***The fundamental question of the failure to prohibit trade in basic products with the territories controlled by the rebels***

49. This is a major point of disagreement between Uganda and the DRC. Thus it is clear from the DRC's Reply that the accusation that Uganda breached its "duty of vigilance" is essentially founded on Uganda's failure to prohibit trade — although such trade was going on well before the conflict started — between its nationals and the territories controlled by the rebels in eastern Congo. For example, the fact that the United Nations Panel "noted that consumer goods and other merchandise found in Gbadolite and Bunia originated mostly in Uganda", the fact that "[d]uring its field visit to Bunia, the Panel members witnessed the unloading of beer crates from an aircraft coming from Uganda", or the fact that "[i]n Gbadolite, most cigarettes, beverages, toilet

[61] RDRC, paras 4.71-4.81.

paper etc. are imported from Uganda"[62]; all this is adduced by the DRC to show that there was a "flagrant violation"[63] of the Congolese people's sovereignty over their resources and to "prove", again according to the Congo, that "Uganda has taken no proper steps to end the illegal exploitation of the natural resources of the DRC by Ugandan companies or nationals and by the Congolese rebel movements that it controls and supports"[64]. This characterization of the facts, which suggests that the export of merchandise from Uganda *to* the Congo proves the "*illegal*" exploitation of the Congo's natural resources, is paradoxical to say the least. However, matters become clearer when we examine the DRC's proposed definition of the expression "illegal exploitation of natural resources". Thus, in its Reply, the DRC states the following:

> "By 'illegal exploitation' of natural resources the DRC means all commercial or investment activities on its territory which are in contravention of the Congolese laws and regulations which govern those activities . . ."[65]

30 50. Thus, in the opinion of the DRC, any commercial transaction whatever between a Ugandan and a Congolese from the eastern Congo carried out — and again I cite the Reply[66] — *"without the consent of the lawful government of the DRC"* constitutes "*illegal* exploitation of natural resources". The DRC supplies a long list of the "laws" and "regulations" that have been violated by these commercial transactions[67]. So the position is becoming still clearer: if Uganda "has not taken proper steps to put an end" to these commercial activities, it is in breach of its duty of vigilance and the principle of sovereignty of the Congolese people over their natural resources.

51. Uganda cannot accept this characterization of the facts, which ignores the actual situation on the ground and treats the rules of international law with contempt. The inhabitants of the eastern Congo and of Uganda have been trading since time immemorial. These commercial relations have always existed, and are readily explained both by the geography of the region and by the needs of the populations on both sides of the frontier, who often share the same culture and language. In Uganda's view, the *de facto* authority established in eastern Congo as a result of the

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[62]RDRC, para. 4.25.

[63]*Ibid.*

[64]*Ibid*., para. 4.73.

[65]*Ibid*., para. 4.73.

[66]*Ibid*., para. 4.77.

[67]*Ibid*., para. 4.77.

fact that it was rebel movements that controlled this territory, not the Kinshasa Government, could not affect these commercial relations essential to the populations' survival, and therefore did not impose an obligation to apply commercial sanctions.

52. It should be stressed that a large body of case law, both national and international, confirms that third States cannot ignore *de facto* situations created on the territory of a neighbouring State due to war or insurrection and are bound to recognize certain acts by the *de facto* authorities, without this being regarded as a violation of international law. It is noteworthy that this case law has often been developed in cases far more difficult than the present one, in that the acts of the *de facto* entities were directly subject to a presumption of invalidity, in light of the illegal nature (contrary, even, to *jus cogens*) of the authority exercised by them. However, this has not prevented the courts from stressing that the duty of non-recognition does not apply to everyday actions and transactions.

31 53. Without citing all this case law here, we should nevertheless recall the famous *dictum* of the Court in its 1971 Advisory Opinion on Namibia, in which it stated:

> "In general, the non-recognition of South Africa's administration of the Territory *should not result in depriving the people of Namibia of any advantages derived from international co-operation*. In particular, while official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, *the effects of which can be ignored only to the detriment of the inhabitants of the Territory*."[68]

54. This decision in fact "internationalized" the solution reached a century previously by the United States Supreme Court concerning the validity of numerous acts by the Confederacy during the Civil War. For example, the Supreme Court had no hesitation in recognizing the validity of all commercial transactions during the war with Confederacy money, stating: "It would have been a cruel and oppressive judgment if all the transactions of the many millions of people composing the inhabitants of the insurrectionary states, for the several years of the war, had been held tainted with illegality because of the use of this forced currency . . ."[69]

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[68] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, Advisory Opinion* of 21 June 1971, *I.C.J. Reports 1971*, p. 56, para. 124; emphasis added.

[69] *Hanauer* v. *Woodruff*, 15 Wallace 439, 82 U.S. (1872), p. 448. See also, for example, *Horn* v. *Lockhart et al*., Wallace 570, 84 U.S. (1873), p. 575.

55. Much more recently another international court faced with the issue of acts by *de facto* entities adopted the same approach. In its judgment of 10 May 2001 in the *Case of Cyprus* v. *Turkey* concerning the situation in North Cyprus, the European Court of Human Rights stated:

> "Life goes on in the territory concerned for its inhabitants. That life must be made tolerable and be protected by the *de facto* authorities, including their courts; and, *in the very interest of the inhabitants, the acts of these authorities related thereto cannot be simply ignored by third States or by international institutions*, especially courts, including this one."[70]

56. Thus even the manifest illegality of the situation created in Namibia and in North Cyprus has not prevented international courts from considering that certain acts connected with the continuity of daily life could not be ignored by third States. This should be the case *a fortiori* with

32 regard to the effective authority exercised by rebel groups in the eastern Congo, which was not only not illegal from the international law viewpoint, but in addition was recognized by the Lusaka Agreements. In any event, this is not the place to formulate a general theory of acts by *de facto* authorities and their acceptance or rejection by international law. Mr. President, what I seek to do here is quite simply to stress that the fact that a State has failed to impose economic sanctions, abruptly blocking commercial relations that have always existed between its nationals and the nationals of a neighbouring State, can certainly not be regarded as a "violation of the principle of sovereignty over natural resources", nor as a violation of the duty of diligence.

57. Moreover, this was stressed by several States in the Security Council itself during discussion of the "reports" by the Panel of Experts on the situation in Congo. For example, the representative of China stated that:

> "the Security Council should make a distinction between illegal exploitation and current commercial and economic exchanges, in order to avoid any adverse effect on the economic development of the Democratic Republic of Congo and its population's means of subsistence"[71].

58. And this is also in perfect conformity with the principle codified by the first Article common to the two international covenants of 1996, whereby "all peoples may deal freely with their wealth and their natural resources . . ." Thus commercial relations between the eastern Congo, Uganda and several other States are maintained in *the interests of the local population*, in

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[70]ECHR, judgment of 10 May 2001, *Case of Cyprus* v. *Turkey*, para. 96; emphasis added.

[71]S/PV.4642 (Resumption 1), 5 November 2002, p. 21.

accordance with the criterion set by international jurisprudence. Staple commodities cannot wait in storage until the central government has managed to re-establish its authority. Coffee, for example, is planted, grows, is picked by the farmers, dried and stored, but it certainly cannot wait for 20 or 30 years until governments have been able to settle their dispute. A market and a buyer must be found before the crop is spoilt. If that market is in a neighbouring country, it is there that it will be sold, whatever a central government thousands of kilometres away which no longer exercises any *de facto* authority over the region where the coffee is grown may say. At a higher level of trade, in

33 minerals, it is clear that where there are mines there are miners. These must be able to live and feed their families. Closing the mines because the central government itself wishes to collect the taxes on their operations, instead of the local authorities (which are also Congolese) that exercise *de facto* control, is to condemn these people to certain death.

59. It is moreover significant that the DRC authorities themselves adopted and applied this principle when they were still mere rebel movements fighting the Mobutu régime. The Alliance of Democratic Forces for the Liberation of Congo-Zaire (AFDL), the rebel movement led by Laurent-Désiré Kabila, awarded several mining concession contracts to foreign firms. The "finance minister" of this movement stated with regard to one of these contracts:

> "[The AFDL] exercises effective control over the territory in question. This agreement, concluded transparently, is perfectly legal, even if the current authorities are not yet in power in Kinshasa. With regard to those who wish to sign an agreement today in Kinshasa, I only ask how they will enforce it here in the Shaba."[72]

60. It is also interesting in this connection to emphasize the way the "Panel of Experts" itself ultimately acknowledged in its last report to the Council on 15 October 2003 that a large number of companies at which an accusing finger had been pointed in its previous reports for "illegal exploitation" of natural resources in the DRC were in reality contributing by their activities to the "well-being" of local populations. In this last report the Panel states that, because certain companies had been working for several years "in areas that until recently had been controlled by rebels or opposition groups, their activities may have appeared to be illegal or illicit". But then the report "corrects" its initial approach by stating:

[72] See Rejoinder, para. 455.

> "As a result of their dialogue with the Panel, however, it became apparent that their business practices could be viewed as acceptable in that they make positive contributions to their communities in providing goods and services, as well as jobs for local people!"[73]

61. Lastly, it is very important to note that the Applicant also seems to be coming round to this view. In his pleadings last Wednesday, Professor Philippe Sands admitted that: "Some trade

34 between the two countries may indeed have been legitimate"[74] and he even admitted "the fact that some diamond trading activity may have been legitimate"[75] — while adding (I would not wish to misrepresent his argument!) that General Kazini's dealings in diamonds were not "legitimate".

62. To summarize, Mr. President, Uganda considers that one should be wary of any conclusion that might give the impression that not only Uganda but also numerous other States whose companies continued to develop commercial relations with the inhabitants of rebel-controlled regions have violated "the duty of vigilance". When all is said and done, a line has to be drawn. Uganda's refusal to yield to pressure from the DRC, which was asking it to do what even the United Nations Security Council had refused to do, namely to impose a trading embargo against the inhabitants of the eastern Congo, clearly fell on the lawful side of the line. That decision was thus both lawful and essential, having regard to the fact that during the period in question trade between these regions and the west of the country (and above all Kinshasa) was almost completely cut. Here an embargo by Uganda would have imperilled the survival of the population of eastern Congo. Based on concern to avoid damaging the interests of the local population, the decision was associated with a large number of precautionary measures, showing that Uganda exercised a high degree of surveillance aimed at preventing any abuse. I will now deal briefly with these positive measures taken by Uganda.

The positive measures taken by Uganda

63. From the outset, Uganda did a great deal to ensure that no abuses prejudicial to the interests of the population could result from the action of its forces or of Ugandan individuals.

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[73] S/2003.1027, para. 28; emphasis added.

[74] CR 2005/5, p. 40, para. 27; emphasis added.

[75] *Ibid*., p. 41, para. 27; emphasis added.

64. As early as December 1998, the Ugandan President, His Excellency Mr. Yoweri Museveni, gave a broadcast message making it clear that no involvement of the members of the Ugandan armed forces in commercial activities in eastern Congo would be
35 tolerated[76]. The purpose of this message was to avoid any risk of abuse by the armed forces, reserving commercial activities for the traditional private operators. Thus it is clear that, while the action concerned, i.e. the involvement of a soldier in commercial activities, could not automatically be considered "unlawful", Uganda went even further than its international obligations in seeking to prevent any risk of abuse.

65. Uganda also ensured that its troops refrained from all interference in the local administration, which was run by the Congolese themselves. And I repeat, when the commander of the Ugandan forces in eastern Congo attempted to appoint a temporary administrator in Ituri Province, his action, whereby he was merely seeking to restore public order in that region, produced a firm reprimand by his superiors, who instituted disciplinary measures against him[77].

66. When the Security Council set up a "Panel of Experts on the illegal exploitation of natural resources", Uganda endorsed that decision and has always co-operated fully with that Panel, giving it all the necessary assistance. Unfortunately the converse was not always true: barring a few exceptions, the Panel refused to communicate to Uganda (and to the other States involved), the information on which it based its allegations, regrettably further hampering Uganda's efforts to investigate the alleged facts so it could take the necessary action.

67. Be this as it may, when the first allegations of the "illegal" exploitation of natural resources surfaced, with the first report of this Panel of Experts, Uganda *immediately* responded by setting up an independent Judicial Commission of Inquiry presided over by the British judge David Porter — the celebrated "Porter Commission". Uganda thus became the first country in the region to set up such a thorough commission of enquiry and to pledge to follow its recommendations, a move welcomed by the Security Council, which "note[d] with satisfaction . . .
36 the decision by the Government of Uganda to establish a Judicial Commission of Inquiry", at the

[76]Message annexed to the "Letter dated 4 May 2001 addressed to the Security Council by the representative of Uganda", S/2001/458, p. 59.

[77]See Rejoinder, para. 496.

same time "urg[ing]" the other governments concerned to investigate further the various accusations[78].

A measure unheard of for a country supposedly with something to hide, Uganda gave this Commission quite extraordinary powers: for example, the "Porter Commission" had the power to order the production of documents held by anyone, including the President, the Minister of Defence and the Ugandan People's Defence Forces, and also to commission audits. In other words, the Porter Commission operated in optimum conditions of transparency and effectiveness.

68. This Commission heard scores of witnesses in various countries, consulted thousands of documents, conducted a number of enquiries *in situ*, always with the full co-operation of the Ugandan Government. The scale of the work carried out is shown by its final report which runs to no less than 250 pages, 1,850 tightly-packed pages containing transcripts of testimonies gathered by this Commission and thousands of pages of annexes. The fact that the DRC's lawyers quoted heavily from this Report and its annexes in their pleadings before your Court provides further proof of the Commission's impartiality and of Uganda's transparency.

69. Last week, Professor Sands pointed out, on the DRC's behalf, that "Uganda is entitled to the fullest respect for having set up the enquiry"[79]. Uganda accepts these rather telling compliments, but deeply regrets the concomitant falsehoods. For the DRC claimed — and again I am quoting Professor Sands — that "Uganda would rather the Court had not had access to the report of the enquiry"[80]. It stated that Uganda was now seeking to "escape the consequences" of that Report[81]. And it seemingly even sought to give the impression that Uganda had tried to conceal the Report from the Court since, to quote Professor Sands again:

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> "What is striking is that Uganda felt no need to share with the Court the final Report of the Porter Commission, which was sent to the Ugandan Government in January 2003, and to the Secretary-General of the United Nations shortly thereafter. Notwithstanding Article 50 of the Court's Rules — which requires parties to annex 'any relevant documents adduced in support' of a party's contentions — it was the DRC and not Uganda which filed the Porter Report with the Court."[82]

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[78]S/RES 1457 of 24 January 2003, para. 17.

[79]CR 2005/3, p. 16, para. 12.

[80]*Ibid.*

[81]*Ibid.*

[82]*Ibid.*, p. 11, para. 4.

I would refer you, Mr. President, honourable Members of the Court, to the document Submission by the Republic of Uganda of new documents in accordance with Article 42 of the Statute and Article 56 of the Rules of the Court: (1) Report of the Judicial Commission of Inquiry into all allegations of illegal exploitation of natural resources and other forms of wealth in the Democratic Republic of the Congo and (2) the Government White Paper on the said Report. We filed this with the Court as an official document.

70. Honourable Members of the Court, let me first respond with an observation. It is hard to understand how the DRC can logically claim that Uganda wished to conceal the Commission's Report both from the Court and from the truth, yet at the same time admit that it not only immediately communicated the Report to the United Nations Secretary-General, but that it also immediately, on the DRC's own admission, "*made it available on the worldwide web*"[83]. But let us not dwell on this inconsistency and move on to an actual falsehood. As I was saying a moment ago, Members of the Court have only to consult the official documents of the Court in this case to see that *it is Uganda* which filed the Report with the Court and also, indeed, the White Paper[84].

71. Thus it is clear that Uganda did not try to "hide" this Report from anyone, just as it is that at no time did Uganda seek to "escape [its] consequences". On the contrary, in line with its original assurances, the Ugandan Government, on receipt of the Report, published the White Paper in question, in which it pledged to follow the recommendations of the Porter Commission and to take all necessary action, disciplinary, judicial or any other, in order to investigate and punish those responsible. A further token of the seriousness with which Uganda looked into this matter is the

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fact that in some cases it went further than the Porter Commission's recommendations. For example, it is noteworthy that, following the publication of this Report, it relieved General Kazini of his command, even though the Porter Commission did not directly recommend this measure, merely calling for further investigation of his case.

72. This commitment remains total, and my distinguished colleague Philippe Sands dutifully referred last week to President Museveni's recent BBC interview, in which he stated that Uganda

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[83]CR 2005/3, p. 21, para. 10.

[84]See "Report of the Judicial Commission of Inquiry into allegations of illegal exploitation of natural resources and other forms of wealth in the DRC", in ICJ, Submission by the Republic of Uganda of new documents in accordance with Article 43 of the Statute and Article 56 of the Rules of the Court, 20 October 2003.

had scrupulously looked into all the Porter Commission's recommendations, was indeed still doing so, and was determined to prosecute all individuals found guilty of any breach of the law whatsoever.

73. Here, then, is a presentation of certain steps taken by Uganda as part of its duty of "vigilance". In a separate opinion appended by Judge Alvarez to the Judgment of your Court in the *Corfu Channel* case, he was at pains to explain that: "[t]his obligation of vigilance varies with the geographical conditions of the countries and with other circumstances . . . Moreover, *this vigilance depends on the means available to a given State*."[85]

74. Uganda, a developing country, undergoing a serious security crisis owing to the attacks it has suffered, has been dragged into a conflict it did not want. Seeking only to defend itself, Uganda wished to avoid any abuses by its armed forces. Within the limits of the means available to it, Uganda sought to prevent, to investigate, to react. It sought to introduce absolute transparency in this area by setting up an independent Judicial Commission of Inquiry, endowed — I would remind you — with extraordinary powers, a commission which few countries historically have had the courage to set up in similar conditions. Neither the existence of the war, nor the risks to its security, nor "official secrecy" have been invoked in any way to censor or obstruct the work of this Commission. Uganda has done its utmost to seek the truth. It is for all these reasons that it asks your Court to adjudge and declare that it has not failed in its duty of prudence and obligation as to means laid down by international law.

39 Mr. President, Members of the Court, this concludes my oral presentation of this morning on the illegal exploitation of natural resources. I thank you for your kind attention.

Le PRESIDENT : Merci, Monsieur le professeur Suy.

Ceci clôt l'audience de ce matin. Les audiences reprendront cet après-midi à 15 heures.

La séance est levée à 12 h 30.

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[85] *I.C.J. Reports 1949*, p. 44; emphasis added.