CR 2005/12 (traduction)

CR 2005/12 (translation)

Lundi 25 avril 2005 à 10 heures

Monday 25 April 2005 at 10 a.m.

8 Le PRESIDENT : Veuillez vous asseoir. L'audience est ouverte. La Cour se réunit aujourd'hui pour entendre le second tour de plaidoiries de la République démocratique du Congo. Le Congo prendra la parole ce matin jusqu'à 13 heures et cet après-midi, de 15 heures à 16 h 30, au sujet de ses propres demandes. Je donne donc la parole à M. Kalala.

Mr. KALALA:

General introduction

1. Mr. President, Members of the Court, as Co-Agent of the DRC in this case, I have listened attentively to the oral arguments of the representatives of the respondent State. In this connection, I note the statement by Professor Ian Brownlie, speaking on behalf of the Republic of Uganda, when he told us that the Congo: "has from the beginning deliberately adopted a pleading strategy divorced from the Rules of the Court, from legal logic, and from the sound administration of justice"[1]. In this second round of oral argument, the representatives of the DRC will seek to avoid such strong language. They will continue vigorously to defend the interests of the DRC, but courteously, and with respect for their opponent. They will be at pains to abide scrupulously by the provisions of Article 60 of the Rules of Court. Thus the Congo will not simply repeat, word for word, passages from its written pleadings, whether expressly or implicitly[2]. Nor will the DRC reiterate its arguments without seeking to answer the objections raised by Uganda. This approach will, I hope, enable the judicial debate to move forward.

2. Mr. President, Members of the Court, since the start of its presentation in the first round of oral argument, Uganda has stressed that this dispute must not be judged from a Manichaean viewpoint of good against evil, angels versus demons. Thus we were told that this was not a case of a demon, the invader, and an angel, the country invaded[3]. It was with this in mind that Uganda's
9 counsel told you that you must take account of the Rwandan genocide, the problem of the Interahamwe, the public statements by Mr. Yerodia and indeed — above all — the roles of the Sudan and Rwanda.

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[1]CR 2005/10, p. 8, para. 2.

[2]See, for example, Mr. Brownlie's speech in CR 2005/7, p. 14, para. 17; cf. CMU, Vol. 1, p. 40, para. 52.

[3]CR 2005/6, p. 17, para. 5.

3. Mr. President, as a Congolese, I have noted the lessons on the subtleties of the history of my country kindly dispensed by the Respondent's counsel. I would, however, say this to them: in these proceedings the DRC has brought before the Court its dispute with Uganda. That dispute results from Uganda's participation in the war which has ravaged the Congo since 2 August 1998 and which, according to numerous independent sources, has caused several million deaths. The roots and origins of this conflict are doubtless many-sided, and history will apportion responsibility among all those involved: Congolese, Africans, Europeans, others . . . However, what the Congo is asking of the Court is not to pass judgment in terms of history, morality or international politics, but to render a judgment in law. And in law there is clearly, as between Uganda and the Congo, on the one side an aggressor State and on the other an aggressed State. It is the Congo, and not Uganda, whose territory has been invaded, its population massacred and tortured, its wealth plundered. In that sense there is not a demon and an angel, but a State responsible under international law and another which has been gravely injured by those violations. It is solely on this specific point that the Court is being asked to rule.

4. Allow me, Mr. President, to add one more thing on this subject. Over the last few days, you have heard much talk of Rwanda, described as invader of the Congo, and still more of the Sudan, characterized as a terrorist State and Uganda's aggressor. Mr. President, Members of the Court, in the 1980s Nicaragua regarded itself as a victim of the use of force by the United States, but also by El Salvador, Honduras and Costa Rica. However, only the dispute between Nicaragua and the United States was brought before this Court, and then decided by it. Similarly, here, the DRC has brought to the Court only its dispute with Uganda, and it is solely on that dispute that the Court is being asked to rule. Mr. Reichler alluded in somewhat ironic terms to the DRC's "frustration" at having been unable to bring Rwanda before the Court[4]. Allow me officially, on behalf of the DRC, to reassure him. The Congo has also brought its dispute with Rwanda to the Court. Hearings in the preliminary phase of the proceedings are due to be held this coming July. Perhaps Uganda, too, has a certain sense of frustration, in that it appears to wish to bring to the Court its dispute with the Sudan. Mr. President, in the first round of oral argument, the Sudan was

[4]CR 2005/6, p. 41, para. 65.

cited by Uganda's counsel close to 250 times — we counted them! It is not for me to ascertain the reasons for this veritable "obsession" with the Sudan to which our opponents appear to have succumbed. For their part, in the remainder of these proceedings the DRC's counsel will continue to confine themselves to the dispute between the Congo and Uganda. They will have nothing to say about any responsibility of other States in other disputes, whether Rwanda, the Sudan, or others. Only the actions of Uganda will be evaluated and criticized in the light of existing positive international law. The Court will have no difficulty in ruling on this matter without raising the issue of the responsibility of third States, quite simply because there is absolutely no need to rule on the responsibility of third States in order to be able to determine the extent of Uganda's responsibility for the acts in question.

5. Mr. President, in his introductory speech last Friday, 15 April, Mr. Khiddu Makubuya, Agent of Uganda, stressed the improvement in political and diplomatic relations between our two countries. In that context he wondered why the DRC should have chosen unilaterally to reactivate this case[5], asking "whose interests it really serves".

6. Mr. President, Members of the Court, I am Congolese. I was in Kinshasa in August 1998 when the war began; I subsequently met large numbers of Congolese whose families have been affected by the war, in the north and east of the country. I also met many Congolese soldiers in connection with the special military commission created for purposes of these proceedings, who fought against the Ugandan Army and who have told me some terrible and moving stories. I can

11 assure you that no Congolese citizen would understand why our Government should drop all its claims against Uganda on account of its actions in the Congo. I can assure you that no Congolese citizen would understand why Uganda should be simply allowed to escape all responsibility after having occupied almost 900,000 sq km of Congolese territory and of having been responsible there for atrocities and pillage. I can assure you that no Congolese citizen would understand why our Government should abandon any prospect of compensating the victims out of reparations payable by Uganda on account of its wrongful acts, when the United Nations Security Council itself, moved and outraged by the Kisangani fighting in June 2000, demanded that Uganda make reparation for

[5]CR 2005/6, p. 10, para. 8.

the damage inflicted upon the civilian population of Kisangani. I hope this answers my honourable opponent's shocking question: "whose interests [does] it really serve"? He would doubtless reply that the pursuit of these proceedings is certainly not in the interest of Uganda. And he would be partly right. Partly, for it is in everyone's interest that the two States' respective responsibilities be determined on the basis of law, by a judicial forum as independent, impartial and prestigious as the International Court of Justice.

7. Mr. President, Members of the Court, the Congolese people cry out in their distress and appeal to your Court for justice. It is true that the Congolese and Ugandan peoples are obliged by history, geography, sociology, globalization and the fight against poverty to live together and to co-operate in all areas of life. There are, for example Lubaga living in both the DRC and Uganda, Kakwa in both the DRC and Uganda. In the DRC, over 80 per cent of the population are of Bantu origin. And in Uganda, the Baganda, who have given their name to the country, are also Bantu and constitute the ethnic majority. Thus, no political leader, Congolese or Ugandan, will ever be powerful enough to sunder completely the bonds of fraternity, solidarity and friendship which unite the Congolese and the Ugandan people.

8. That said, it is essential that the war damage caused to the DRC by Uganda be judicially assessed and effectively compensated, so as to enable our two countries finally to close this page of history and contemplate the future with fresh eyes. When you have burned someone's house and injured his children, reconciliation with the victims must necessarily be preceded by an admission of guilt and payment of compensation.

12 9. The DRC therefore hopes that its dispute with Uganda will serve as an example to all African States — and to the world — when tempted to have recourse to force in international relations, in violation of the United Nations Charter. The Congo was shocked to hear Uganda's Defence Minister tell us in his speech last Monday, 18 April, that the United Nations Security Council and the international community could not be counted on to settle Africa's problems[6]. In other words, the system of collective security established by the United Nations Charter as a guarantee of international peace and security is meaningless as far as Uganda is concerned, so that

[6]CR 2005/7, p. 38, para. 10, and p. 47, para. 33.

it is obliged to take the law into its own hands. Coming from an African State and Member of the United Nations, that statement is totally unacceptable and explains the policy of force pursued by Uganda against the DRC. That is the reason why, in a world which seeks to foster respect for the rule of law, and in a Great Lakes region where it is sought to bring criminal proceedings against individuals for violation of the rules of international humanitarian law, it would be wrong not to bring proceedings also against States which trample under foot the rules of international law.

10. Mr. President, Members of the Court, in invoking the international responsibility of Uganda before this Court, the DRC seeks to make its own contribution to the struggle, worldwide, to ensure respect for the rule of law in inter-State relations. In short, the Congolese people, their feet firmly grounded on earth, their gaze turned resolutely to the sky, hope that this Court, in which they have total confidence, will bring together sky and earth and give them the justice which they deserve in order to heal their wounds.

11. Mr. President, Members of the Court, whilst reserving the right to provide written replies in accordance with the schedule laid down by the Court, the Democratic Republic of the Congo will already seek, in the course of this oral presentation, to outline a reply to the questions put by some of you last Friday. In this regard, I can immediately give a preliminary answer to the question put by Judge Vereshchetin. The Congo's claim covers a period commencing at the start of Uganda's aggression on 2 August 1998 and terminating with the present proceedings.

13 12. And now, Mr. President, Members of the Court, I will outline for you the various stages in the DRC's presentation in this second round of oral argument:

— first, Professor Salmon will make a general critique of the Respondent's argument, highlighting certain particularly significant aspects of the present dispute;

— secondly, Professor Klein will criticize more specifically the arguments put forward by Uganda in support of its denial that it violated the principle of non-use of force in international relations;

— Professor Corten will then address the status of Uganda as occupying Power between the months of August 1990 and June 2003, with all the consequences which that entails;

— with your permission, I shall then return to the Bar in order to refute Uganda's objections regarding violations of human rights in the occupied territories;

— Professor Sands will then deal with Uganda's argument on the illegal exploitation of natural resources in occupied territory;

— finally, H.E. Mr. Jacques Masangu-a-Mwanza will, as agent of the DRC, officially present my country's submissions.

Mr. President, Members of the Court, I thank you for your kind attention and ask you kindly to give the floor to Professor Salmon.

Le PRESIDENT : Merci, Monsieur le professeur Kalala. Je donne maintenant la parole à Monsieur le professeur Salmon.

Mr. SALMON: Mr. President, Members of the Court.

Uganda's approach to evidence

Introduction

1. Uganda's first round of oral argument revealed new facets of its counsels' talent in the art of wielding rhetoric. The ode to truth sung by Paul Reichler was of stirring stuff; it had the ring of Verdi. We were far removed from the lessons given to the Congolese about the need for care and

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professionalism in respect of evidence[7]. Humility reigned. Bossuet's influence made itself felt.

The truth had to be told. *Veritas*, does it not have the same gracious appearance we can admire in this courtroom?

It had to be told.

We were going to see.

We saw.

We first saw the relativity of truth over time. Did Aulus Gellius, speaking in the second century, not write "truth is the daughter of time"[8]?

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[7]Uganda, which lectured the DRC at length on the question of evidence (burden of proof, standard of proof, authority and weight of the evidence). See the response by Philippe Sands, CR 2005/3, p. 24, para. 17.

[8]*Noctes atticae*, XII, II, 7 (middle of the second century).

I. Retraction

2. We first witnessed several instances of retraction. A number of points asserted as true in Uganda's written pleadings are no longer so.

— Before, there was no question of Uganda having supported the MLC[9]; now, Uganda makes a limited admission to having done so — that movement having been, it is said, a sort of *de facto* government. Assuming this latter assertion to be plausible — *quod non* — nobody explains to us how this could have been true *before* the Lusaka Agreements.

— Before, Ugandan troops had not been sent into the Democratic Republic of the Congo until 11 September 1998[10]; now, it is admitted that a minor turning point occurred on 13 August with the taking of Bunia[11]. This step in the right direction is nevertheless not enough, as we shall see.

— Before, there was no question of there having been any looting of natural resources[12] and General Kazini had nothing to feel guilty about[13]. It is now admitted that there was some misconduct, but our opponents hasten to add that it was prohibited by instructions issued by the highest Ugandan authorities.

15 — Before, the Ugandan Embassy and ambassador's residence in Kinshasa had been expropriated[14]; now, this is no longer the case[15], and for good reason, since it was never true.

3. On the other hand, a new claim is put forward: the alleged capture of Beni by the *Forces armées congolaise*s, barely alluded to in Uganda's written pleadings and now described as a major attack on 6, or 7, August 1998, but without the slightest evidence offered to substantiate it[16].

Truth's relativity over time is echoed by its relativity in space. Pirandello comes to mind. Right you are (if you think you are).

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[9]CMU, paras. 138-143.

[10]RU, para. 152.

[11]CR 2005/6, pp. 35-36, para. 55 (Mr. Reichler). The seizure of that airfield was already admitted in Uganda's Counter-Memorial, p. 37, para. 47.

[12]CMU, para. 152; RU, paras. 321 *et seq.*

[13]RU, para. 496.

[14]CMU, para. 408.

[15]CR 2005/10, p. 38, para. 42 (Mr. Suy).

[16]CR 2005/6, p. 35, para. 53 (Mr. Reichler), and CR 2005/7, p. 43, para. 24 (Mr. Mbabazi).

II. Contradictions between counsel or between positions taken in the written proceedings and those in the oral proceedings

4. We had long known that truth was relative. Blaise Pascal already said: "Truth on this side of the Pyrenees, error on the other."[17]

5. Uganda reduces the territorial dimension of this adage, applying it even within its own positions or between its own counsel, who are untroubled by numerous contradictions in respect of certain facts.

— Thus, they swear to us that Uganda did not help Kabila drive Mobutu from power in Kinshasa[18], while this is contradicted by the annexes to Uganda's Counter-Memorial[19].

— Thus, the Democratic Republic of the Congo is accused of a lack of vigilance in respect of Ugandan rebels or criticized on account of collaboration by the Congolese authorities with the rebels between May and July 1998[20], but elsewhere it is admitted that the Democratic Republic

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of the Congo was co-operating at that time with Uganda[21] and it is asserted that the first Congolese attack against Uganda did not take place until 6 August[22].

— Here we are told that the Sudanese were driven from the airfields[23], there that those airfields were conquered "before the Sudanese . . . could occupy them"[24] and even that the decision of 11 September 1998 was taken in order "to deny the Sudan opportunity to use the territory of the DRC to destabilize Uganda"[25]. Where does the truth lie?

— Thus, Uganda's written pleadings demand full reimbursement for the value of the embassy and the ambassador's residence for "expropriation", while Professor Suy swears that "Uganda has never claimed that there was seizure or expropriation of its property"[26]. Who can make any sense out of this?

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[17]Excerpt from *Pensées*, V, 294 (1670).

[18]CR 2005/6, p. 23, para. 24 (Mr. Reichler).

[19]CMU, Ann. 42, p. 14; for the details, see Mr. Klein, CR 2005/11, pp. 14-15, para. 10.

[20]CMU, paras. 334-339; CR 2005/7, paras. 5-6, 8-11, 38 and 77 (Mr. Brownlie).

[21]CR 2005/6, paras. 29-32 (Mr. Reichler).

[22]*Ibid.*, p. 35, para. 53. See the response in Corten, CR 2005/11, para. 17.

[23]CR 2005/7, p. 15, para. 18 (Mr. Reichler); CR 2005/7, p. 47, para. 32 (Mr. Mbabazi).

[24]CMU, p. 41, para. 52.

[25]*Ibid.*, Ann. 27, judges' folder of Uganda, tab 5.

[26]CR 2005/10, p. 38, para. 42 (Mr. Suy).

III. Unsupported assertions

6. *Our opponents, it would seem, enjoy the privilege of access to the revealed truth,* which enables them to proceed by way of assertions unsupported by the slightest evidence. This is to forget the discourse by the Marquis de Condorcet, who proclaimed: "The truth belongs to those who seek it, not to those who claim to possess it."[27] Thus, it is an unwise strategy to confine oneself to unsupported assertions, as our opponents do.

— There still is not the slightest evidence that the Democratic Republic of the Congo participated in the attacks referred to in Uganda's Counter-Memorial[28]. The incident involving the unfortunate adolescents who died in the flames in Kishwamba is assuredly appalling, but the documents relied on by the other Party do not demonstrate that the Congolese participated in any way whatsoever in this atrocity. Uganda only produces a single, non-probative, document concerning one of these incidents and nothing about the other four. This was already pointed out in the Congo's Reply, but our opponents have apparently given up trying to prove something which cannot be proved[29].

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— There still is not the slightest evidence that the DRC supported Ugandan rebel movements, as claimed[30].

The most egregious instance is, however, the myth of the Sudanese in the Congo. One could just as well have said the Martians in the Congo — that the Martians had used Congolese territory to attack Uganda — and repeated the words "Mars" or "Martians" *nearly 250 times*, as is the case for the words "Sudan" or "Sudanese" in our opponents' pleadings. It is not enough to repeat the same fable *ad nauseam* for it to become reality. The presence of the Sudanese in the Congo is a tale made up from start to finish[31]. While there may have been contacts with the Sudanese, what proof is there of a diabolical conspiracy? There is no evidence of an appeal for help; not the slightest indication of a prisoner taken or of weapons or *materiel* seized; not the slightest evidence of Sudanese at the airfields[32]. On the other hand, it was the Sudan which, in the Security Council

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[27] *Discours sur les conventions nationales,* April 1791.

[28] CMU, pp. 221-223.

[29] CR 2005/11, paras. 7 and 8 (Mr. Corten).

[30] CR 2005/11, p. 20, para. 39 (Mr. Brownlie) and CR 2005/11, para. 12-13 (Mr. Corten).

[31] CR 2005/11, paras. 20-26 (Mr. Corten).

[32] CR 2005/11, p. 31, para. 37 (Mr. Corten).

in October 1998, accused Uganda of aggression[33]. And what did Uganda's Minister for Foreign Affairs say in October 1998 on the subject of a claimed threat from the Sudan: "In my opinion, this threat is artificial; Sudan does not have the capability to carry it out."[34] He said this in October 1998.

— Nor is there any evidence in the least that rebel groups were incorporated into the *Forces armées congolaises*[35] or of a plot involving the DRC and the Sudan[36].

In respect of this, the Democratic Republic of the Congo wishes to convey to the Court its deep concern over this technique employed by our opponents. It is comparable to what might be called systematic conditioning. It is a well-known, classic strategy: "If you throw enough mud, some will stick."

18 7. Further, the Court will not be insensitive to the fact that it is extremely difficult for the Democratic Republic of the Congo, even with its duty to co-operate in bringing evidence before the Court, to adduce *negative* evidence that it did *not* appeal to the Sudanese, that the Sudanese were *not* there. It is a rare chance to come across the statement by the leader of the MLC, who, recounting the battles culminating in the fall of Gbadolite, says that he pursued the *Forces armées congolaises* and Hutus until reaching Gbadolite and he makes no mention of a single Sudanese soldier[37].

8. In another context in which the DRC is being asked to prove a negative, that of the alleged attack by its army on Ugandan forces stationed in Beni, the most one can do is invoke presumptions. During the hearings held by the Porter Commission, nobody ever reported an attack by the *Forces armées congolaises* in Beni[38].

IV. Evasions

9. A Chinese proverb holds: "The truths we least wish to learn are those we have the most interest in knowing." Thus, it is counter-productive to seek to avoid giving answers.

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[33]CR 2005/3, p. 43, para. 36 (Mr. Corten).

[34]RDRC, Ann. 108.

[35]CR 2005/11, p. 28, paras. 29-30 (Mr. Corten).

[36]CR 2005/11, p. 30, paras. 34 *et seq.* (Mr. Corten).

[37]Jean-Pierre Bemba, *Le choix de la liberté*, pp. 41-46.

[38]CR 2005/11, p. 29, para. 32 (Mr. Corten).

A. Repeating falsehoods as if the DRC had not already shown the opposite to be true in its written pleadings

10. Uganda excels in the art of reiterating unsubstantiated allegations despite the Democratic Republic of the Congo having refuted them in its written pleadings.

11. Thus, in respect of the alleged support provided to rebel groups by the Government under Mobutu's régime[39], or the claimed lack of participation by Uganda in the Kitona airborne operation[40], Uganda's counsel plead as if they were unaware of any of the arguments set out by the Democratic Republic of the Congo in its Additional Observations on the Ugandan counter-claims.

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B. Uganda systematically fails to respond to the questions it has been asked

12. Similarly, Uganda does not answer the questions put to it in the course of this current round of oral argument.

— What was the exact date of their intervention? Uganda now maintains that it was 13 August 1998, but Operation "Safe Haven" certainly began on 7, if not 6, August.

— What was the date on which all consent to Uganda's presence in the border zone was definitely withdrawn? According to our opponent's oral statements, it was never withdrawn. Yet, on 6 August 1998, the Democratic Republic of the Congo accused Uganda of aggression[41]; this fact was acknowledged by Uganda itself in a November 1998 document of the Ugandan Ministry of Foreign Affairs, which notes that this accusation had been made by the Democratic Republic of the Congo at the Victoria Falls Summit on 7 and 8 August 1998[42].

— The other side does not seek to explain how its arguments can be reconciled with Security Council resolutions 1234 and 1304[43].

— No reasoned response concerning its status as occupying Power, as recognized by the Secretary-General's Special Representative on 2 February 2002[44], or to the arguments

[39]AWODRC, paras. 1.11 *et seq.*

[40]*Ibid.*, para. 1.87.

[41]CR 2005/4, p. 13, para. 17 (Mr. Corten).

[42]CMU, Ann. 31, p. 14.

[43]CR 2005/4, p. 15, para. 2 (Mr. Corten).

[44]CR 2005/4, p. 27, para. 16 (Mr. Klein).

advanced by the Democratic Republic of the Congo on the irrelevance of the self-defence claim and of the supposedly "modest" presence of Ugandan troops[45].

— Why did Uganda not protest to the Congo in August in respect of the alleged aggression or refer the matter to the Security Council[46]? According to its written pleadings, it did not complain until October 1998, but without ever claiming either aggression or self-defence before filing the Counter-Memorial[47].

13. Many other examples could be cited concerning not only human rights violations but also instances of natural resources looting.

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C. Silence

14. Abbé Dinouart, a churchman — admittedly, little known — in a pamphlet entitled "The Art of Silence" wrote in 1771 in respect of certain silences: "It is a contemptuous silence not to condescend to respond to those who address us, or who await our views in regard to them, and to treat everything they say with disdainful arrogance."[48]

15. The first characteristic in this connection is our opponents' mastery of the technique of "hurdling", i.e. jumping over obstacles. Anything in the way is simply ignored in the argument. Particularly apparent: their love of silence, or the amnesia which strikes them in respect of their oral argument on consent. Various events are considered as so many instances of renewed consent: the Protocol of 27 April 1998, the Lusaka Agreement of 10 July 1999, and the Luanda Agreement of 6 September 2002. They choose to overlook the period when there was no consent, between 6 August 1998 and the Lusaka Ceasefire Agreement. The diversity of these consents, in terms of their nature and object, is obscured.

16. Silence also in respect of the continuation of the aggression after the Lusaka Agreement of 10 July 1999. According to Uganda's Rejoinder, there was no military engagement after that Agreement[49]. Then what about the UPDF's conquests of Gemena on 9 and 10 July, Zongo on

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[45]CR 2005/2, pp. 51-52, paras. 25 and 26 (Mr. Salmon) and CR 2005/4, p. 23, para. 9 (Mr. Klein).

[46]CR 2005/3, p. 43, para. 39 (Mr. Corten).

[47]RU, p. 112, paras. 256 and 258.

[48]Abbé Dinouart, *L'Art de se taire* [The Art of Silence], text presented by Jean-Jacques Courtine and Claudine Haroche, Petite collection Atopia, Jérôme Million, Grenoble 2002, p. 44.

[49]RU, p. 79, para. 176.

29 July, Libenge (1,356 km from the Ugandan border) on 22 July[50], Bongandanga and Basankusu on 30 November 1999 to the south of Lisala[51]? What about the fighting in Bomongo, Moboza, Dongo in February 2000, in Imese in April 2000, in Buburu in late April 2000, in Mobenzene in May-June 2000[52]? What about the bloody battles as from 5 June 2000 between Ugandan and Rwandan forces for control of Kisangani?

17. The other Party's silence is particularly telling in respect of Kisangani. UPDF troops arrived there by air on 1 September 1998; they fought the Rwandan army there first in 1999 and
21 then twice in 2000. This led the Security Council to issue the well-known condemnation set out in resolution 1304.

18. Uganda has said nothing about any of this, because these facts totally undermine its argument. The claim that the pivotal date was 11 September 1998 crumbles because Kisangani was taken on 1 September; what justification can be asserted for this conquest? Why battle Rwanda? What is the relationship between those battles and securing the border, subduing Ugandan rebels or an imaginary Sudanese enemy? Why did the fighting continue after the ceasefire of the Lusaka Agreements of 10 July 1999? We would very much like to see the silence broken on all of these points.

V. Outright denial of proven truths

19. Our opponents would have been well-advised to remember the words of St. Gregory the Great: "Never has straightforward truth done anything by duplicity."

A. Fabricated or ludicrous evidence

20. It is apparent that many of the documents produced by Uganda were written long after the fact, that they constitute fabricated, purpose-made evidence and are of a particularly dubious nature.

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[50]RDRC, p. 97, para. 2.75.

[51]*Ibid.*, p. 96, para. 2.73.

[52]*Ibid.*, p. 97, para. 2.75.

— For example, the sworn testimony of an official from the Ugandan Ministry of Foreign Affairs that the Protocol of 27 April 1998 was motivated by the Kichwamba attack, which occurred on 8 June 1998[53], in other words a month-and-a-half after the Protocol was signed.

— For example, the document from the UPDF High Command which is said to show that the decision to send troops into the DRC was taken on 11 September 1998[54]. This document only justifies the *maintenance* of the troops. But, it has now been established, by the documents of the Porter Commission, that Operation "Safe Haven" began on 7 August 1998 and that the objective was to support Congolese rebels. Moreover, General Kazini and President Museveni himself admitted before the Commission that Operation "Safe Haven" began on 7 August with the capture of Beni[55].

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— Another example, the statement by a witness arrested in May 2000 who described air-drops taking place in November 2000, even though he was in prison at the time[56].

There is not even one contemporary document until 11 December 1998 evidencing any war-like act by the Sudan or the Democratic Republic of the Congo; the documents filed by Uganda are later ones written specifically for the purpose.

— The testimony of the former Ugandan Ambassador to Kinshasa concerning documents implicating Mobutu in a plan to assassinate President Museveni are highly suspect — I spoke about them in my first statement here and will not repeat myself[57].

21. Uganda maintained in its written pleadings that the accusations against the UPDF as to the looting of natural resources were contradicted "by sworn testimony and documentary evidence"[58] and that there was no evidence that Uganda had failed to take action to prevent illegal activities[59]. We now know the truth about that.

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[53]RU, pp. 42-44, para. 91; see Mr. Corten, CR 2005/4, pp. 11-12, paras. 11-12.

[54]RU, p. 67, para. 155 (DRC judges' folder, tab 5).

[55]See the evidence drawn from the Porter Commission pointed out by Maître Kalala, CR 2005/2, pp. 30-31, paras. 40-41.

[56]See the details in CR 2005/3, p. 15, para. 16 (Mr. Salmon).

[57]*Ibid.*, p. 14, para. 16.

[58]RU, paras.456-494; CR 2005/5, p. 41, para. 30 (Mr. Sands).

[59]*Ibid.*, p. 42, para. 35.

B. Deliberate denial of truths now well established

22. It would be a never-ending task to compile a list of the truths which Uganda's written pleadings and oral argument have been devoted to hiding.

— Ugandan support for the pro-Kabila rebel, who ultimately seized power in Kinshasa and overthrew Marshal Mobutu.

— The UPDF's military intervention before mid-September.

— Support for Congolese rebel groups before the signing of the Lusaka Agreement, since General Kazini admits that Operation "Safe Haven" was organized jointly with the Congolese rebel movements beginning on 7 August 1998.

23 — UPDF participation in the illegal exploitation of the natural resources and other wealth of the Congo. In its written pleadings, Uganda called into question the reliability of the report by the United Nations Panel of Experts on the looting and illegal exploitation of the natural resources of the Congo. The Porter Commission's work has now proved the involvement of the UPDF and its top leaders in the unlawful activities affecting the natural resources of the Congo, out of motives either of personal gain or to cover up the illegal exploitation of those resources by private companies[60], notably the Victoria company[61]. On this point, the United Nations reports are confirmed by the Porter Commission.

— Finally, we can also cite Uganda's contention that, if exploitation did take place, it was on behalf of the local population[62].

23. That then is the truth — *Veritas* — which Uganda sought to show. It is to be feared that this is a misinterpretation of Quevedo's precept that "the truth should never be shown naked, but veiled in her chemise".

24. Mr. President, Members of the Court, this thought from the great Spanish playwright closes my presentation. I thank the Court for having kindly accorded me its attention.

Le PRESIDENT : Merci, Monsieur le professeur Salmon. Je donne maintenant la parole à Monsieur le professeur Klein.

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[60]CR 2005/5, p. 13, para.14 (Mr. Kalala); CR 2005/5, p. 25, para. 2, p. 28, para. 3 (Mr. Sands).

[61]CR 2005/5, p. 35, para. 15 and p. 37, para. 18.

[62]*Ibid.*, p. 41, para. 28.

Mr. KLEIN:

The use of force by Uganda against the Congo cannot be justified either by self-defence or by consent

1. Mr. President, Members of the Court, Uganda endeavoured, last week, to provide some legal justification for its military intervention on Congolese territory by relying on the principal argument that this action was justified by self-defence. At the same time, but without always drawing a clear distinction between the two arguments, the Respondent has also repeatedly invoked

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the consent of the Congolese authorities to justify the presence of its armed forces on Congolese territory. This morning I have to return to those two defences in order to show that neither is founded in law.

I. The use of force by Uganda against the Congo cannot be justified on the basis of self-defence

2. I will thus begin by showing that Uganda cannot validly invoke the right of self-defence in the present case, both because that State has not been the victim of an armed attack and because the conditions to be fulfilled under international law in order to invoke self-defence were certainly not met in the case of the invasion of Congolese territory by the Ugandan army. Before examining those two points in greater detail, I wish to point out that my task will be to show that Uganda's arguments on self-defence are devoid of any legal foundation. It will also be helpful to keep in mind the factual backdrop described in detail by my colleague Professor Olivier Corten last Friday, when he showed at length that the other Party's arguments are devoid of foundation in fact[63].

A. Uganda cannot validly invoke self-defence because it was not the victim of an armed attack

3. Concerning the first of those points, the existence of an armed attack, Uganda has presented arguments that, to say the least, cannot be described as particularly clear. Thus, whilst emphasizing the fact that the legal position of the Respondent is not based on the concept of preventive or pre-emptive self-defence[64], Mr. Brownlie at the same time has stated that "there are

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[63]CR 2005/11, pp. 20-27, paras. 4-26.

[64]CR 2005/7, p. 29, para. 72 (Mr. Brownlie).

situations in which it is unrealistic and practically impossible to insist on a distinction between a direct response to an armed attack and anticipatory or preventive action"[65].

25 4. It is thus not easy to comprehend precisely the scope of Uganda's legal argument on self-defence. In the first place, it would seem appropriate in any event to take Uganda at its word, and to exclude any argument based on preventive or pre-emptive self-defence[66]. But one must then be coherent and admit that any military action based on the need to prevent or anticipate forthcoming attacks *cannot be justified on the basis of self-defence*. It should be borne in mind, in this respect, that the Respondent's written pleadings, like the oral statement presented on its behalf over the past few days, are literally riddled with references to such concerns[67]. All the military actions carried out by the Ugandan army on Congolese territory and justified by the sole concern to prevent future attacks must thus, based on the criteria used by Uganda itself, be regarded as contrary to international law.

5. Only one hypothesis thus remains, that of self-defence in reaction to an attack that could be described as "consummated". Uganda seeks to establish the existence of such an attack, basing its argument on alleged connections between the Congolese Government and various Ugandan rebel groups operating from Congolese territory. The Respondent basically advances two criteria to found its conclusion that the Congo committed an armed attack. One is the direct participation of the State in the action of armed groups[68]. This calls for no particular comment, save for a reminder that such a factual situation has certainly not been established in the present case. The other criterion put forward by Uganda is that of the forbearance, or lack of control, of a State with respect to armed groups on its territory, which "renders the State harbouring such armed bands susceptible to action in accordance with Article 51 [of the Charter]"[69]. According to Mr. Brownlie, "this consequence is the result of the application of well recognized principles of State

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[65] *Ibid.*, p. 28, para. 71.

[66] *Ibid.*, pp. 29-30, para. 72.

[67] See, *inter alia, ibid.*, p. 14, para. 17, and the citation of the statement by the Ugandan Minister for Foreign Affairs, which can be found in that oral statement ("Against the *perceived threat* of increased destabilization of Uganda especially by the Sudan using Congolese territory as it had previously done, Uganda deployed additional forces *to counter this threat*", CMU, Ann. 42, p. 15; emphasis added). See also, in Mr. Brownlie's statement, para. 20 and the extracts from documents cited, p. 16.

[68] CR 2005/7, p. 33, para. 92 (Mr. Brownlie).

[69] *Ibid.*

26 responsibility and the existence of direction and control by the territorial sovereign is not necessary"[70].

6. That proposition is astonishing in more ways than one. First because Mr. Brownlie infers that the Democratic Republic of the Congo showed toleration of Ugandan rebel groups in the border zone simply from the fact that the Congo, in its written pleadings, recognizes the existence of such groups in that area[71]. But the mere acknowledgment that armed groups were present on its territory is not, however, tantamount to toleration. As Professor Corten very clearly explained last Friday, Uganda cannot admit that the Congo was engaged, up to the summer of 1998, in active collaboration with the UPDF in action against the Ugandan rebel groups present on Congolese territory and, at the same time, accuse the Congolese authorities of failing in their obligations of vigilance by tolerating the activities of those groups[72]. The argument clearly does not stand up in terms of fact. It is equally deficient in law. 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. However, neither can it find support in, for example, the *Tadic* judgment rendered by the ICTY Appeals Chamber, nor in the writings of Professor Dinstein, to which the other Party nevertheless attributes considerable authority. That author confines himself to indicating that a similar notion of toleration was enshrined in the Draft Code of Offences against the Peace and Security of Mankind, adopted by the International Law Commission in 1954, but he himself does not accept such a hypothesis among the acts capable of giving rise to a right of self-defence[73]. Uganda's argument on this point thus proves totally devoid of foundation, in fact as in law. It completely distorts the legal concept of aggression.

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[70] *Ibid.*

[71] *Ibid.*, p. 29, para. 76.

[72] CR 2005/11 (Mr. Corten).

[73] Yoram Dinstein, *War, Aggression and Self-Defence*, 3rd. ed., Cambridge, CUP, 2001, pp. 181-183.

27 As we will also see, Uganda has not been able to show that its military action, even assuming that it was justified by a prior armed attack, met the requirements of necessity and proportionality which must underpin any recourse to self-defence.

B. The use of force by Uganda does not meet the requirements of proportionality or necessity

7. Uganda, in its first round of oral argument, sought to combine the requirements of necessity and proportionality, claiming that the first was in some way included in the second. With the greatest respect, I would like to point out to our opponents that this is not the case, and that the various sources to which the Congo referred in its initial oral presentation clearly show the distinction between those two requirements, even if they are closely related[74]. In the present case, Uganda has not been able to show that those requirements were met.

8. With respect to the first of those requirements, necessity, Mr. Brownlie has said nothing at all about the condition that force may exclusively be used as a *necessary* measure of self-defence. He simply dismissed the emphasis placed by Roberto Ago on the condition of the exhaustion of peaceful means of settlement of disputes, on the ground that it is not a customary rule[75]. In reality, Uganda's position on this point has proved far too radical, since it fails to address the connections between the condition of necessity and the exhaustion of peaceful means of settlement. In this respect, it all depends on the circumstances of the case. In a case where a State is targeted by a blitzkrieg, being bombed and invaded by the armed forces of another State, obviously no one would expect the invaded State to seek to use peaceful means to settle each dispute with the invader before using armed force in order to repel the aggression. However, in the case of latent threats or small-scale attacks repeated over a certain period of time, as in the situation complained of by Uganda, necessity has to be assessed very differently. It clearly implies that other means of
28 action have proved totally unproductive, before the use of force is called for, as a last-resort solution.

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[74]See *inter alia* extracts from the Judgment on *Military and Paramilitary Activities in and against Nicaragua* and the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* cited during the first round of oral argument of the Democratic Republic of the Congo (Tuesday 12 April 2005, CR 2005/3, p. 47, para. 2).

[75]CR 2005/7, Monday 18 April 2005, p. 32, para. 89 (Mr. Brownlie).

9. It is obviously insufficient simply to make a few general comments, as Minister Mbabazi did, about the ineffectiveness of the Security Council, in order to justify a total failure to appeal to that organ at any time before using force[76]. The Security Council has admittedly been guilty of inaction in the past, particularly in connection with the Rwandan genocide. But can this really be used to justify a deliberate future policy of ignoring the obligation to seise that organ of situations which appear to constitute a threat for international peace and security, but rather opting for unilateral action in all circumstances? Need it be recalled that, in the present case, Uganda did not make even the slightest attempt to seise the Council of the alleged attack of which it subsequently claims to have been the victim? The full-blown apologia for unilateral armed action that the Court heard from Uganda last week, especially as it came from one of the most important members of the Government, can only arouse the strongest concerns for the future.

10. Lastly, I must again refer back to Mr. Brownlie's statement that "if the concept of necessity of self-defence is to be applied on the basis of effectiveness and common sense, it is surely the view of the victim State and its nationals which must prevail"[77]. Here, once again, the proposition is totally incorrect, both in fact and in law. In law, it seems that Uganda is determined not to accept the dictum of the Court in the *Oil Platforms* case which I mentioned during my first statement. I can thus only reiterate once again that "the requirement of international law that measures taken avowedly in self-defence must have been necessary for that purpose is strict and objective, leaving no room for any 'measure of discretion'"[78]. Uganda's argument is particularly

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unacceptable as, in terms of fact, the idea that this military action was a response to a real necessity was far from being shared by all, even in Uganda. A particularly striking illustration of this is the statement by the Democratic Party, dated 18 September 1998, expressing the disagreement of that political opposition group regarding the armed action initiated by Congo, observing that:

> "the objectives such as national security which President Museveni has given for what amounts to military aggression by Uganda cannot be achieved . . . through military adventure. On the contrary, it will be more difficult to achieve such objectives if we employ military means instead of peaceful ones such as diplomacy."[79]

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[76]CR 2005/8, Monday 18 April 2005, p. 38, para. 10; p. 47, para. 73 (Mr. Mbabazi).

[77]CR 2005/7, Monday 18 April 2005, p. 34, para. 92 (Mr. Brownlie).

[78]Judgment of 6 November 2003, p. 196, para. 73.

[79]RDRC, Ann. 66.

Thus the armed action was far from being perceived as being the only possible means of action.

11. In the same way that it failed to prove the requirement of necessity, Uganda, in its first round of oral argument, was unable to show that its armed action was proportionate to the prior attack it allegedly suffered. It is helpful, first of all, to return to the question of the graphic representation of the extent of Ugandan occupation and incursion on Congolese territory. The Respondent has repeatedly criticized the sketch-maps presented by the Congo, contending that they did not correspond to the actual Ugandan military presence on the ground. And in this respect Uganda has presented the map annexed to the Harare Disengagement Plan[80] which, it claims, reflects much better the reality of the situation[81]. However, those representations of the extent of the Ugandan military presence in the Congo are by no means incompatible, as the Respondent has sought to show.

Mr. President, Members of the Court, a simple comparison of those maps, paying careful attention to the border-line between the Democratic Republic of the Congo and Congo-Brazzaville, which is not very clear on the Harare map, will show that they basically reflect the same reality and identify in the same way the area under the control of the UPDF, although the Harare map refers to joint control by the UPDF and the MLC over the area in question. Professor Corten will return, later on, to the significance of that joint reference to the UPDF and the MLC. But for the purposes
30 of the present discussion, it thus appears clearly that, unfortunately for Uganda, the map on which it has sought to rely does not substantiate its position in any way.

12. In any event, that is not the main issue. The basic problem remains that, faced with the absence of any initial attack by the Congo, any countermeasure based on alleged self-defence can only be disproportionate. In this respect, the Respondent has once again become mired in contradictions. On the one hand, as we have already indicated, it maintains that it is not basing its legal argument on any concept of preventive or pre-emptive self-defence. On the other, however, it justifies the proportionality of its action by pointing to the danger for Uganda of the alliance allegedly formed between the DRC, Sudan and Ugandan rebel groups[82]. However, this danger is

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[80]CMU, Ann. 79.

[81]CR 2005/6, Friday 15 April 2005, paras. 101-102 (Mr. Reichler); CR 2005/7, Monday 18 April 2005, p. 31, para. 86 (Mr. Brownlie).

[82]CR 2005/7, Monday 18 April 2005, p. 22, para. 42, in particular points 3 and 4 (Mr. Brownlie).

once again presented as a threat for the future with respect to which, as the Congo has shown in its first round of oral argument, proportionality proves extremely difficult — if not totally impossible — to assess.

13. Lastly — and Professor Salmon has already referred to this earlier today — one cannot fail to note that Uganda only invoked self-defence to justify its military action up to the taking of Gbadolite, in early July 1999[83]. At no time has the Respondent mentioned the military actions by its troops on Congolese territory beyond Gbadolite after July 1999. Those military actions culminated with the capture, in the spring of 2000, of the town of Mobenzene, several hundred kilometres from Gbadolite in the direction of Kinshasa. The Congo clearly described these military actions in its written pleadings[84] and in oral argument[85]. One could also add mention of clashes between Ugandan and Rwandan troops in Kisangani in June 2000, as Professor Salmon also recalled just now. Uganda has remained silent on all this, because it knows full well that it could not justify any of its military actions on the ground of proportionate self-defence. It is particularly aware of this as, shortly after the Kisangani clashes, the Security Council adopted

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resolution 1304 (2000), whereby it stated very clearly that Uganda "violated the sovereignty and territorial integrity of the Democratic Republic of the Congo"; that finding obviously totally destroys Uganda's argument of self-defence[86].

14. In conclusion, it is thus clear that Uganda's military actions against the Congo, from the month of August 1998, cannot be justified on the ground of self-defence, first because the Respondent was not the victim of an armed attack within the meaning of international law. In any event, the requirements of necessity and proportionality for self-defence were certainly not met in the present case. Thus Uganda's military intervention in the Congo cannot be justified by any argument of self-defence, but nor can it be justified by any consent thereto by the Democratic Republic of the Congo, as I would now like to show in the second part of this statement.

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[83]CR 2005/8, Monday 18 April 2005, pp. 46-47, para. 32 (Mr. Mbabazi).

[84]RDRC, pp. 96-98.

[85]CR 2005/2, Monday 11 April 2005, p. 47, para. 16 (Mr. Salmon).

[86]Refer back to RDRC, pp. 36-38.

However, Mr. President, at this stage I will defer to your decision, either for me to continue this statement or to suspend it for a break, should you so wish.

The PRESIDENT: Thank you, Professor Klein. It is indeed time to have a break of ten minutes, after which you will continue.

The Court adjourned from 11.20 to 11.30 a.m.

The PRESIDENT: Please be seated. Professor Klein, please continue.

Mr. KLEIN: Thank you, Mr. President.

II. Uganda's use of force against the Congo cannot be justified on the basis of consent

15. Mr. President, Members of the Court, at this stage there are still two fundamental points of disagreement between the Parties regarding the possibility of justifying the military presence of Ugandan troops on Congolese territory on the basis of consent. In the first place, it is clear to the Congo that, contrary to what our opponents claim, the consent of the Congolese authorities to the presence of Ugandan troops had ceased to exist in August 1998. Secondly, it is equally clear that the scope of the Lusaka Agreement of 10 July 1999 is far from being as broad as Uganda claims, and that one cannot read into it any expression of consent by the Democratic Republic of the Congo to the maintenance of Ugandan armed forces on Congolese territory after the conclusion of that agreement. In explaining its position on this point, the Congo will now seek to provide elements of an answer to the question put to the Parties last Friday by Judge Elaraby. But before addressing these two points in detail, I should like first to consider an issue which the respondent has basically failed to address in its oral argument, namely the question of the scope of the consent given by the Congolese authorities, were that consent to be proven. I would therefore begin by recalling in this connection that, in any event, and even supposing it to be proven, the consent of the Democratic Republic of the Congo could only have covered a hypothetical peaceful presence of UPDF troops on Congolese territory.

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A. The consent of the Democratic Republic of the Congo, even supposing it proven, could only have covered a hypothetical peaceful presence of UPDF troops on Congolese territory

16. Professor Brownlie, in his presentation last Tuesday, most opportunely reminded us that, according to the work of the International Law Commission on State responsibility, consent can be effective only within the limits within which it was given[87]. However, having noted this point, Uganda's counsel failed to apply it in our case. They never made it clear as to what precisely the Congolese authorities' alleged consent related. *A fortiori*, at no time did they attempt to show that the conduct of the Ugandan troops in the Congo from the month of August 1998 remained within the limits of that purported consent. The question is, however, crucial, and the Democratic Republic of the Congo would be delighted to hear our opponents' views on this point in the second round of oral argument. The point is indeed crucial, for it highlights the essentially academic nature of Uganda's argument on consent, as Professor Corten already pointed out two weeks ago[88].

33 17. According to Uganda's own argument, in 1997-1998, as well as in 1999 in the Lusaka Agreement, the Congolese authorities gave their consent to the presence of UPDF troops for a quite specific purpose: the fight against rebel groups launching attacks on Ugandan territory from the Democratic Republic of the Congo. It is this factor which Uganda's counsel have constantly emphasized throughout their oral argument[89]. This was thus an essential limit, *ratione materiae*, on the consent purportedly given by the Congolese authorities to the presence of Ugandan troops in the Democratic Republic of the Congo. However, it is clearly not military action by UPDF troops on Congolese territory against Ugandan rebel groups which forms the subject of the Democratic Republic of the Congo's complaints before this Court today. What is at stake in this case — need I remind you? — is hostile actions by Ugandan troops against the Congolese Armed Forces, the capture of towns, the destruction of civil infrastructure, the very serious violence committed against Congolese civilian populations, and the plundering of the Congo's natural resources. Clearly, none of those acts is capable of being covered by any form of consent on the part of the Congolese authorities. Thus, the only practical effect of the consent relied on by Uganda — even supposing it proven — could be to provide legal justification for the peaceful presence of Ugandan troops on

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[87]CR 2005/8, p. 9, para. 7 (Mr. Brownlie).

[88]CR 2005/4, p. 9-10, para. 6 (Mr. Corten).

[89]See, *inter alia*, CR 2005/8, p. 10, para. 12 (Mr. Brownlie); *ibid.*, p. 23, para. 21 (Mr. Reichler).

Congolese territory, or, at most, the conduct by the UPDF of military action against any rebel groups still active. I would therefore urge the Court to keep this consideration in mind when the consent argument is again raised, whether today or in the days to come.

Having clarified this point, we can now return to the first period concerned by the consent argument. I will show that in this case the Congo's consent to the presence of Ugandan troops on Congolese territory no longer existed in August 1998.

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B. The Congo's consent to the presence of Ugandan troops on Congolese territory no longer existed in August 1998

18. In his presentation last Tuesday, Professor Brownlie devoted a good part of his argument in regard to the period 1997-1998 to revisiting facts which are not disputed by the Democratic Republic of the Congo. Thus he referred in particular to the Congolese authorities' informal consent to the presence of Ugandan troops on Congolese territory in the border zone with Uganda for the purpose of combating certain rebel groups[90]. Since the Congo has never disputed the fact of that consent, it seems to me pointless to return to it here. The only real point of disagreement between the Parties in relation to this initial period is over whether or not it was formalized in an official document: the Protocol signed between the two States on 27 April 1998. On this point, by contrast, Uganda was remarkably brief in its last presentation, confining itself to quoting the terms of the Protocol without seeking to conduct any real analysis[91]. We can well understand why, for there is absolutely nothing in the actual terms of this Protocol of April 1998 which would indicate that it expressed formal consent to the presence of foreign troops on Congolese territory. With the Court's permission, I will again remind you of the terms of the key provision in that agreement: "the two armies agreed to co-operate in order to insure security and peace along the common border"[92]. Where, in this, is there any record of a formal consent by the Congo to the presence of Ugandan troops on its territory? Taking the words in their ordinary meaning, agreeing "to co-operate in order to insure security and peace along the common border", is not to accept "the maintenance — or presence — of Ugandan troops on Congolese territory along the common

[90]CR 2005/8, pp. 9-12, paras. 9-20 (Mr. Brownlie).

[91]*Ibid*, p. 13, para. 22.

[92]CMU, Ann. 19.

border". Thus the actual text of the Protocol of April 1998 contains no evidence of any "formalization" of the consent previously given by the Congolese authorities to the presence of the Ugandan troops. That does not, however, mean that such informal consent had disappeared, but simply that it was never formalized.

19. The consent of the Congolese authorities having at all times remained informal, it could logically be withdrawn in an equally informal manner. And that is exactly what President Kabila
35 did in his statement of 27 July 1998. Here again our opponents appear to have some problems with the ordinary meaning of the words of that statement. Does the fact that only Rwanda is expressly referred to and that Congo is not expressly mentioned change anything at all in the sense of the statement's final sentence, which reads as follows: "This marks the end of the presence of all foreign military forces in the Congo"[93]? Were the Ugandan troops present in the Congo at that time in such a state of symbiosis with their new environment that they no longer identified themselves as "foreign [armed] forces"? Rather than seeking to emphasize supposed doubts in the wake of that statement, Uganda could have applied itself to explaining how its thesis that its troops remained in the Congo throughout the month of August 1998 with the consent of the Congolese authorities could be reconciled with various statements cited by Professor Corten in his presentation on Wednesday 13 April[94]. All of these have two points in common: they systematically accuse Uganda of aggression, and date from the month of August 1998. Mr. Reichler has sought to cast doubt on their scope in regard to Uganda, essentially on the basis that they allegedly merely emanated from press reports[95]. However, that allegation is as false as it is futile: false because the accusations of aggression in question originate from direct sources, in particular United Nations documents; futile because, in any event, a document prepared by the Ugandan Ministry of Foreign Affairs shows that the Respondent was perfectly well aware of the Congolese accusations from the beginning of August 1998. Professor Salmon referred to it this morning. Allow me now to cite the relevant extract from that document, which refers to "the

[93]MDRC, pp.60-61, para. 2.11.

[94]CR 2005/4, pp. 13-14, para. 17.

[95]CR 2005/8, p. 18, para. 5 (Mr. Reichler).

allegation made by the DRC [at the Victoria Falls Summit of 7 and 8 August 1998] that Uganda and Rwanda had committed aggression against the country"[96].

20. Our opponents appear to have great difficulty in reconciling themselves with the ordinary meaning of words. "Aggressors" and "invited" are however, in their current sense, words rarely
36 used as synonyms. The same observation could indeed be applied to the words "uninvited forces", used in several Security Council resolutions, on which Uganda has to date remained strangely silent. In any event, and let us once again remind ourselves, even supposing — *quod non* — that consent can still be established at that date, it could only have covered the peaceful presence of Ugandan troops in the Congo. In no way could it preclude the wrongfulness of the many hostile actions conducted by those troops against the Congolese Armed Forces during the months of August and September 1998.

As we shall now see in the final part of my presentation, Uganda's argument that the Lusaka Agreement of 10 July 1999 evidenced the Congo's consent to the presence of Ugandan troops on Congolese territory is equally unfounded.

C. The Lusaka Agreement of 10 July 1999 is not evidence of consent by Congo to military operations by Ugandan troops

21. According to the argument developed by Uganda, the Lusaka Agreement of 10 July 1999 entitles Ugandan troops in law to be present in Congolese territory with effect from that date. The explanation for this is said to be that the Lusaka Agreement is a "comprehensive system of public order"[97] closely linking the settlement of the inter-State conflict to the settlement of the civil war that had been tearing Congo apart since the summer of 1998. This argument, and the reading of the Lusaka Agreement on which it is based, are in reality quite untenable. So I wish to state at the outset, in reply to Judge Elaraby's question, that the Democratic Republic of Congo's view is that the Lusaka Agreement does not entitle Ugandan troops in law to be present in Congolese territory, even before the period of one hundred and eighty days initially prescribed for the withdrawal of those troops has expired. The aim of the Lusaka Agreement was not and could not be suddenly to

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[96]Document entitled *Uganda's position on issues of peace and security in the Great Lakes region*, November 1998, CMU, Ann. 31, p. 4.

[97]CR 2005/6, Friday 15 April 2005, p. 49, para. 85 and CR 2005/8, Tuesday 19 April 2005, p. 20, para. 11 (Mr. Reichler).

legitimise a military presence that was clearly unlawful up to that point. The argument that the Lusaka Agreement goes beyond a simple ceasefire agreement is certainly acceptable, but in no sense can this justify the view that this aspect of the agreement is thereby simply excluded from

37 any legal analysis of this document. In fact it is solely the internal part of this agreement that goes beyond the scope of a ceasefire. It is only in the context of this internal part, implementation of which is a matter for the Congolese protagonists alone even if the other parties are invited to give their support[98], that the process of national reconciliation is contemplated. This process includes, *inter alia*, setting up a national conference, adopting a new constitution and even the creation of a new army[99]. But according to the Ugandan argument, Congo allegedly agreed to the presence and maintenance of the foreign forces that had invaded its territory a year before until this process of national reconciliation had reached its end, or until the rebel groups still present in Congolese territory had been eliminated[100]. You will agree that this is a surprising proposition; in particular, it amounts to giving the clauses of the Lusaka Agreement a meaning completely foreign to them.

22. As regards the foreign troops in Congolese territory at the time, the expressly stated purpose of the Lusaka Agreement was to organize the modalities of withdrawal, of the departure of these troops, not of their continuing future presence in Congo by legalising that presence one way or another. Article III, Section 12, of the Agreement could not be clearer in this respect. It states: "The final withdrawal of all foreign forces from the national territory of the DRC shall be carried out in accordance with the calendar in Annex 'B' and a withdrawal schedule to be prepared by the United Nations, the OAU and the JMC."[101] This is clearly about the withdrawal of foreign armed forces, even if this is pursuant to a certain timetable, not about keeping them in Congolese territory. And Uganda seeks in vain to use another provision of Annex A of the Agreement as an argument: "All forces shall remain in the declared and recorded locations until *(a)* in the case of foreign forces withdrawal has started in accordance with JMC/OAU, United Nations withdrawal scheme."[102] Here, the Respondent stresses the words "remain in place" in order once more to infer consent to

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[98]Art. III, Sec. 19 of the Agreement and Art. 5.1 of Ann. A.

[99]Art. 5.1 of Ann. A.

[100]Oral argument by Mr. Reichler, Tuesday 19 April 2005, CR 2005/8, p. 24, para. 23.

[101]CMU, Ann. 45.

[102]Art. 11.4, Ann. A.

38 the presence and maintenance of its troops in Congolese territory[103], but again this is a very incomplete reading of this provision, intentionally divorced from its context. The purpose of the chapter in which it appears is to organize the redeployment of the various protagonists' forces to defensive positions in zones where those forces are in contact[104]. This is quite simply from the viewpoint of a ceasefire, not of a "comprehensive system of public order" — of avoiding a resumption of hostilities between the various opposing armed forces. It is clearly with this end in view, and this end only, that these forces are *required* — Article 11.4 of the Annex states "all forces shall be *restricted* to the declared and recorded locations"[105] — not *authorized*, to stay in certain fixed positions pending their final withdrawal. Once again the reading of the Lusaka Agreement proposed by Uganda is very difficult to reconcile with the ordinary meaning of the words in this instrument, as well as with its overall scheme.

23. By way of confirmation, a comparison of the Lusaka Agreement with the Luanda Agreement of 2002 clearly shows that Uganda is attempting to give the first of these instruments a scope that is completely foreign to it. This comparison is all the more striking because the Luanda Agreement contains both clauses relating to the withdrawal of UPDF troops according to a given timetable, exactly like the Lusaka Agreement, and a clause expressing Congo's consent to a limited Ugandan military presence in the Ruwenzori mountains which has no equivalent in the Lusaka Agreement. The first of these clauses is expressed in terms very similar to the clause in the Lusaka Agreement on the withdrawal of foreign forces from Congolese territory: "The G[overnment] O[f] U[ganda] commits itself to the continued withdrawal of its forces from the DRC in accordance with the Implementation Plan . . . attached thereto."[106] The contrast between this provision on the withdrawal of foreign forces and the provision, still in the Luanda Agreement, that expresses Congo's consent to the maintenance of Ugandan army units in part of its territory is particularly striking: "The Parties agree that the Ugandan troops shall remain on the slopes of
39 Mount Ruwenzori until the Parties put in place security mechanisms guaranteeing Uganda's

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[103]CR 2005/8, Tuesday 19 April 2005, p. 24, para. 23 (Mr. Reichler).

[104]"Chapter 11. Redeployment of forces of the parties to defensive positions in conflict zones."

[105]Emphasis added.

[106]Art. 1, para. 1.

security, including training and coordinated patrol of the common border."[107] Thus it is very clear that the provisions on the withdrawal of armed forces from Congolese territory, even if this withdrawal is spread over time, can in no way be presented as having the same meaning and the same scope as a provision whereby Congo unambiguously consents to the presence of these troops in its territory. Obviously these two provisions have fundamentally different aims. While, I repeat, the Lusaka Agreement does contain a provision on the withdrawal of foreign troops similar to that found in the Luanda Agreement, we search in vain in the 1999 Lusaka Agreement for a provision of the same type as that just cited and which clearly expresses consent to the presence and maintenance of Ugandan troops in Congolese territory. Thus the meaning attributed by Uganda to the Lusaka Agreement is obviously contradicted by the Luanda Agreement.

24. But over and above these textual arguments, there are more fundamental reasons why the Ugandan position on this point is unacceptable. If instruments such as the agreement concluded in Lusaka on 10 July 1999 were to be given the interpretation suggested by Uganda, there are very good reasons for thinking that the governments in place in States affected by a conflict with both internal and external dimensions would in future be wary of signing any ceasefire and national reconciliation agreement. In agreeing to become parties to such agreements they would risk being burdened for an indefinite period with very intrusive foreign "guests", who would have succeeded in giving the outward signs of an accepted presence to what would be none other than an intrusion into the territory and into the internal affairs of the State concerned. There would be the inevitable risk of consent being invalidated by constraint, and it is for all these reasons that the Ugandan argument that the Congolese authorities had consented to the presence of UPDF troops in Congo by becoming parties to the 1999 Lusaka Agreement is unacceptable. The disengagement plans
40 adopted subsequently to implement and adapt the Lusaka Agreement are part and parcel of the latter, and therefore the Congo's adhesion to these instruments is clearly not the expression of any consent whatever to the maintenance of Ugandan troops in Congolese territory which the Respondent is seeking to infer from these agreements.

[107] Art. 1, para. 4.

25. Even assuming that consent could be inferred from the Lusaka Agreement — which, I repeat, the Congo refuses to consider — it should be stressed once again that in any event such consent would only justify the stationing of Ugandan troops in Congolese territory in their positions at that time. In no way would it justify the various hostile actions by the Ugandan army in Congolese territory after July 1999, particularly against the Congolese Armed Forces. I stressed earlier this morning how numerous these hostile armed actions had been after that date. Once again, it is revealing in this connection that the other Party says nothing about the limits of the consent allegedly given by the Congolese authorities in the Lusaka Agreement and that it does not show in any way that action by its troops in Congolese territory after 10 July 1999 stayed within these limits. It is perhaps worth stating at this stage that Uganda could not seek to justify that military action on some other basis, such as alleged prior violations by the DRC of the Lusaka Agreement. The Court clearly dismissed the counter-claim submitted by Uganda on this point for lack of connection with the principal claims of Congo. I will return to this shortly. Thus the result of that decision is clear. Issues relating to compliance or non-compliance with the Lusaka Agreement are not part of the present dispute, and Uganda would seek in vain to use alleged violations of that Agreement as an argument to justify its military actions in Congolese territory after 10 July 1999.

26. But I still have one final issue to tackle this morning. Uganda also claims that, in addition to expressing consent by Congo to the presence of UPDF troops, the Lusaka Agreement confirms the legitimacy of military action by Uganda as from August 1998. By their adhesion to it, the parties to the Agreement, with the Democratic Republic of Congo in the first rank, allegedly

41 recognized that it was necessary for Uganda to conduct this military operation in Congolese territory in self-defence[108]. This was claimed to be the case because the Agreement expressly recognizes the security concerns of the Democratic Republic of the Congo and of neighbouring States, and because it refers to the necessity for putting an end to the activities of armed groups present in the territory of the Congo, the activities of most of these groups being directed against Uganda. Here again the argument is completely without foundation. The Lusaka Agreement

[108]CR 2005/8, Tuesday 19 April 2005, p. 24, para. 23 (Mr. Reichler).

certainly does not rule on the legal validity or the legitimacy of the claims of the various parties, whether these be the signatory States or the two Congolese rebel movements concerned. It does not do so expressly, or by implication as the other Party seems to imply. In the Order by which it dismissed Uganda's counter-claim seeking a finding that the Democratic Republic of Congo was responsible for alleged violations of the Lusaka Agreement, the Court stated very clearly that the issues dealt with in the Lusaka Agreement, "which relate to *methods for solving the conflict* in the region agreed at multilateral level in a ceasefire accord having received the 'strong support' of the United Nations Security Council (resolutions 1291 (2000) and 1304 (2000)), concern facts of a different nature from those relied on in the Congo's claims, which relate to acts for which Uganda was allegedly responsible *during that conflict*"[109]. Since, according to the Court's own analysis, the Lusaka Agreement focuses on issues different in nature from those relating to the establishment of international responsibility, it is clear that it certainly cannot be regarded as recognizing the validity of a legal argument developed by Uganda precisely in order to escape its international responsibility.

Hence, just as the Lusaka Agreement cannot be used to support the Ugandan argument of alleged consent, neither does it demonstrate any purported recognition by Congo that the armed activities of the UPDF in Congolese territory since August 1998 were justified on the ground of self-defence.

27. As a general conclusion, therefore, it is clear that Uganda's attempts to justify its armed action against the Congo do not stand up to scrutiny. Professor Corten showed last Friday that the facts of the case did not support the argument of self-defence at all. We have just seen that the same was true in law, because the conditions imposed upon the exercise of self-defence in

42 international law were in no way satisfied in the present case, either in regard to the existence of an initial act of aggression or as to fulfilment of the requirements of necessity and proportionality. The position is the same with regard to the existence of alleged consent by the Congolese authorities to the presence of Ugandan troops. This consent is not established at all for the relevant periods, and even assuming that it could be, Uganda has never set out the limits of this consent or

[109] Order of 29 November 2001, *I.C.J. Reports 2001*, p. 680, para. 42.

shown that the action by its armed forces remained within those limits. In any event, this is an argument whose practical effect would be extremely limited. All of these elements thus clearly establish Uganda's international responsibility on account of the act of aggression of which Uganda was guilty in invading the Congo from August 1998 and maintaining a military presence there until the beginning of June 2003.

I thank the Court for its patience and its attention, and now request that it give the floor to my colleague, Professor Olivier Corten, who will show that the status of Uganda throughout this period was certainly that of an occupying State.

Le PRESIDENT : Merci, Monsieur le professeur Klein. Je donne maintenant la parole à Monsieur le professeur Corten.

Mr. CORTEN: Thank you, Mr. President.

Uganda's status as occupying Power under international humanitarian law

1. Mr. President, Members of the Court, since the beginning of this case, the Democratic Republic of the Congo has always stressed Uganda's status as occupying Power[110]. The occupation means that Uganda may be held responsible for any violation of the rules of international humanitarian law applicable to the occupied territories, be this the protection of the Congolese people or of its property and resources. It is also important to remember that this status does not depend on the lawfulness or unlawfulness of the presence of the Ugandan troops in the occupied Congolese territory. Uganda continued to be an occupying Power in Congo between

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August 1998 and June 2003 and did so irrespective of the validity of the legal title it may have invoked to justify its presence[111].

2. The decisive consequences attaching to the status of occupying Power doubtless explain why the Respondent has sought to challenge this status[112]. In this connection, two arguments were reiterated in the first round. According to one, the limited number of Ugandan soldiers or agents in

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[110]Application of 23 June 1999, para. IV *(b)* of the submissions; MDRC, p. 47, para. 157; p. 169, para. 4.20; p. 273, para. 1, of the submissions; RDRC, pp. 98-100; see also para. 5.05.

[111]Oral argument of Mr. Salmon, 11 April 2005, CR 2005/2, pp. 50-55, paras. 21-30.

[112]Oral argument of Mr. Suy, 20 April 2005, CR 2005/9, pp. 22-25, paras. 40-41; oral argument of Mr. Brownlie, 20 April 2005, CR 2005/10, p. 17, para. 48; see also RU, pp. 245-246, para. 525.

the Congo, together with their strictly localized presence, would not warrant the characterization of Uganda as occupying Power. According to the other, it is not Uganda but Congolese rebel movements which, *de facto*, administered northern and eastern Congo. So it is they, not Uganda, who should be termed occupiers.

3. Mr. President, Members of the Court, neither of these arguments can be accepted, as I shall show you in this oral argument. Moreover, and this will be the object of the third part of my oral argument, one wonders whether Uganda did not finally acquiesce in its status as occupying Power.

I. The relatively limited and localized Ugandan presence in the Congo does not affect its status as occupying Power

4. But to begin with, Uganda stresses the limited number of its troops in the Congo during this period of occupation. At the most, this number was supposedly 7,200, according to the version found in the Counter-Memorial[113], or "around 10,000", according to the version put forward in the oral proceedings[114]. Uganda adds that its presence was limited to designated strategic locations, such as the airfields in northern Congo[115].

5. Mr. President, Members of the Court, let me first remind you of a few facts. In their oral
44 arguments, the representatives of Uganda pointed out that the Ugandan troops had seized control of towns far removed from the common border[116]. By consulting the map being projected behind me, and which you will find as tab 18 in your judges' folder, you will be able to appreciate the scale of the Ugandan occupation in view of all the towns occupied, from Bunia and Beni, close to the eastern border, to Bururu or Mobenzene, in the far western part of Congo. The southern boundary of the occupied area runs north of the towns of Mbandaka westwards, then extends east to Kinsangani, rejoining the Ugandan border between Goma and Butembo.

6. To fully understand the effect of the occupation of all these towns, it is perhaps interesting to recall the topography of this part of the Congo. This other map is tab 36 in your judges' folder.

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[113]CMU, p. 50, para. 63; emphasis added.

[114]Oral argument of Mr. Reichler, 19 April 2005, CR 2005/8, p. 31, para. 40, and p. 25, para. 26; p. 36, para. 50; in a slightly different vein, see the oral argument of Mr. Reichler on 15 April 2005, CR 2005/6, p. 48, para. 82; see also RU, p. 75, para. 170.

[115]Oral argument of Mr. Reichler, 15 April 2005, CR 2005/6, p. 37, para. 58; see also RU, pp. 75-76, para. 170.

[116]Oral argument of Mr. Reichler, 15 April 2005, CR 2005/6, p. 47, para. 80.

Please excuse its very inferior quality, but it does show one thing well. Excluding the extreme east on the one hand and the region of Gbadolite on the other, all the area is covered in dense, lush and sometimes impenetrable forest. Indeed, counsel for Uganda stressed this aspect:

> "It was critical to the success of the plan that Ugandan forces take control of all airfields between the Ugandan border and Gbadolite . . . there were no highways or even roads in this part of the DRC. Travel was by foot, through dense forest and jungle, or by air. Supplies could only be brought in by air. Control of airfields was a *sine qua non* for resupplying or reinforcing troops marching across this terrain. It was also essential in order to prevent enemy forces from resupplying or reinforcing their own troops . . ."[117]

On Uganda's own admission, controlling the airfields in an area such as this is all it takes to prevent "enemy forces", i.e. mainly the official authorities of the Democratic Republic of the Congo, from administering it.

7. It is hard not to conclude from all this that Uganda occupied the area before you, which you will find as tab 3 in your judges' folder. Here too, the occupation of Congo extends throughout its whole width, from east to west, running down as far as a line situated north of the

45 Mbadanka-Kisangani-Goma axis. Given the characteristics of the region and Uganda's strategy as explained to you by its representatives, there is no doubt that this entire region was indeed placed "under the authority of [a] hostile army", to quote the words of the Hague Regulations defining occupation[118].

8. So much so, Mr. President, that the Ugandan authorities did not rest content with controlling the occupied territories militarily, by seizing all the strategic points in northern and north-western Congo. They also performed acts of administration in the occupied territories. Uganda literally created Ituri Province, in eastern Congo, appointing administrators and even governors there[119]. Uganda also supervised elections throughout the territories it occupied[120]. The Court is quite familiar with these events, which have been set out in the Reply[121]. But I wish to bring them to the attention of Uganda, which remains obstinately silent on the subject of them in its oral arguments.

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[117]Oral argument of Mr. Reichler, 15 April 2005, CR 2005/6, p. 37, para. 58.

[118]Oral argument of Mr. Salmon, 11 April 2005, CR 2005/2, p. 50, para. 22.

[119]Oral argument of Mr. Klein, 13 April 2005, CR 2005/4, pp. 24-25, paras. 10-11.

[120]See the review in the pro-government Ugandan newspaper *New Vision*, 28 January 2000; RDRC, Ann. 12.

[121]*Ibid*., pp. 99-101, paras. 2.81-2.85.

9. Mr. President, Members of the Court, in these circumstances the exact number of UPDF soldiers in Congo, whether 7,000 or 10,000, or probably even more, is not a decisive criterion.

10. In this connection, I should like to recall a few episodes from contemporary Congolese history, with which I am familiar.

— Between 1887 and 1908, King Leopold II created, then administered the "independent State of the Congo" with an iron fist. However, according to estimates, control of the whole territory was in the hands of 648 officers and 1,612 NCOs, in other words, a total of 2,260 men in all[122].

— The Congo then became a Belgian colony. In 1948, the colony's ordinary budget earmarked funds for 15,702 officers and soldiers then in the Congo.[123]

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11. How can it be explained that this vast territory — i.e. the entire territory of the Congo, not just its northern and north-eastern parts — could have been controlled and administered with such limited numbers? First, owing to the topographical peculiarities of the region, which I have already described. Then, thanks to the co-operation of Congolese officers and soldiers recruited by the colonial Power, in the same way as Uganda was able to count on local auxiliary forces, as I shall show you in the second part of this presentation.

II. The presence of local administrations subordinated to it does not affect Uganda's status as occupying Power

12. Mr. President, Members of the Court, Uganda admits providing assistance to the Congo Liberation Movement, the *Rassemblement pour le Congo démocratique*, and other rebel movements, of a political as well as a military kind, through the training of soldiers, supplies of weapons and even by joint engagement in the battles of the UPDF and the Congo Liberation Army, the armed branch of the MLC[124]. On the other hand, our opponents stress the fact that this was only "limited assistance" — their words — to anti-government forces[125]. Assistance limited in time to begin with, since it did not start, in military terms at least, until March 1999[126]. Then

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[122]De Boeck, G., *Les révoltes de la force publique sous Leopold II, Congo 1895-1908*, Anvers, ed. EPO, 1987, p. 52, and Ann., p. 505.

[123]Jolimont, P., "Naissance de la Force Publique 1888", *Bulletin militaire*, No. 32, état-major de la force publique, November 1948, p. 635.

[124]Oral argument of Mr. Reichler, 15 April 2005, CR 2005/6, p. 54, para. 98; RU, p. 80, para. 180.

[125]Oral argument of Mr. Reichler, 15 April 2005, CR 2005/6, p. 54, para. 98; RU, p. 82, para. 185.

[126]*Ibid*., p. 83, paras. 187 and 189, and oral argument of Mr. Reichler, 15 April 2005, CR 2005/6, para. 98.

assistance limited qualitatively, since this support was only provided on an *ad hoc* basis, solely to defend Uganda[127].

13. As for the first aspect of this Ugandan argument, it is necessary at this point to quote again the words of General Kazini, according to which, on 7 August 1998, "we [in other words the Ugandan armed forces] decided to launch an offensive together with the rebels, a special operation
47 we code-named Safe Haven"[128]. It was thus on 7 August 1998 that a "joint offensive" was led by the UPDF and the Congolese rebel forces. It was from this moment that Uganda exercised control over the DRC, even though, in fact, it was only later that it decided to create a new entity, the MLC, in circumstances related by the leader of this movement in a book published in 2001[129].

14. Moreover, a careful reading of this work is enough to give a fair idea of the extent of Ugandan modesty in this particular aspect of the case. In reality, it would seem that the MLC could only be created, be supported by an army (the Congolese Liberation Army (ALC)), conquer towns and administer territories, thanks to Uganda's support[130]. Only when the Ugandan instructors had finished training an army of several tens of thousands of men did the UPDF consider reducing its troops on the ground. Yet this did not prevent these troops from reserving the possibility of returning, and above all of continuing to issue their orders through the local auxiliary forces[131]. Moreover, this control of the rebel movements by the Ugandan authorities was not limited to the military arena. It also extended to the economic sphere, a point to which Professor Sands will revert this afternoon[132]. In any event, it is clear that the situation fully corresponds with the requirements of international law; for there to be occupation — I am quoting a reference source already referred to by Professor Salmon in the first round — "it is sufficient that the occupying

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[127]*Ibid.*

[128]"Lead Counsel: So you can briefly explain to the commission what 'Operation Safe Haven' was about. Brigadier J. Kazini: "Safe Haven". This was now an operation . . . The operation was code-named "Safe Haven" because there was a need to change in the operational plan. Remember, the earliest plan was to jointly — both governments — to jointly deal with the rebels along the border; that was now the UPDF and the FAC. But now there was a mutiny, the rebels were taking control of those areas. So we decided to launch an offensive together with the rebels, a special operation we code-named Safe Haven"; CW/01/03 24/07/01, p. 129.

[129]Jean-Pierre Bemba, *Le choix de la liberté*, pp. 41-46. See RDRC, pp. 115-124, paras. 2.109-2.128..

[130]Oral argument of Mr. Tshibangu Kalala, 11 April 2005, CR 2005/2, pp. 35-36, paras. 56-57; pp. 37-40, paras. 60-72.

[131]See the remarks by Jean-Pierre Bemba reproduced in the Reply of the Democratic Republic of the Congo, p. 118, para. 2.114.

[132]See also RDRC, pp. 100-101, para. 2.84, and in particular, the quotations from the above-mentioned work by Jean-Pierre Bemba.

force can, within a reasonable time, send detachments of troops to make its authority felt within the occupied district"[133].

48 15. Mr. President, Members of the Court, to escape the consequences of its acts, Uganda dwelt at length on the conclusion of the Lusaka ceasefire and successive agreements. According to the Respondent, these agreements legitimized the rebel movements as *de facto* administrators and recognized their control over the occupied territories. Our opponents have dwelt at length on a map which presents northern and north-eastern Congo as "area 1"[134]. You can see this map being projected behind me. This map, as well as the whole Agreement from which it is taken, is reproduced as tab 41 in your judges' folder. And I invite you to directly consult the text reproduced on the pages indicated in this document as pages 3 and 4. According to Uganda, since the MLC is designated as administrator of this area, area 1, Uganda could not itself be considered as occupying Power. However, as you see now, according to the text of this Agreement, area 1, which reflects the situation of the forces on the ground on 18 November 2000, is indeed that of the "MLC and UPDF"[135]; not, therefore, of the MLC alone, as counsel of Uganda implied[136]. This means that the UPDF may be regarded as having controlled all of area 1 as far as the extreme west of the Democratic Republic of the Congo. It is noteworthy that the geographical positions of the MLC and the UPDF are thus treated jointly by this Agreement. In short, this plan confirms the fact that the UPDF was an occupying Power of the area — of all the area — even if this was partly through the medium of the MLC. As for the rebel movements' purported legitimacy under the terms of the ceasefire agreements, it is hard to see what its significance could be for the question which concerns us. For the only question that is important at this stage is whether Uganda actually controlled northern and north-eastern Congo. Whether this control was exercised directly or through the medium of subordinate forces is of no decisive legal consequence.

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[133] *United States Army Field Manual* in Whiteman, *Digest of International Law*, Vol. 10, p. 541; Mr. Salmon, 11 April 2005, CR 2005/2, pp. 50-53, paras. 22-26.

[134] CMU, Ann. 79; see oral argument of Mr. Reichler, 19 April 2005, CR 2005/8, p. 30, para. 37.

[135] *Ibid.*

[136] Oral argument of Mr. Reichler, 19 April 2005, CR 2005/8, p. 30, paras. 37 and 38.

49 16. Mr. President, Members of the Court, among the various categories of occupation scholarly writers mention is occupation through a local government[137]. Numerous precedents are cited:

— the occupation of Cambodia by Vietnam through a local Cambodian government[138];

— the occupation of southern Lebanon by Israel through a local Lebanese force[139];

— the occupation of northern Cyprus by Turkey through a local Cypriot administration, or an older example[140]:

— the occupation of a number of European countries by Nazi Germany, during the Second World War, with often very limited numbers — a few hundred officials for the whole of Belgium and northern France for example[141].

17. Certainly, Uganda cannot simply hide behind the fact that the occupied territories were partly administered by groups under its control. In the particular circumstances, there is no doubt that Uganda can be described as an occupying Power in the light of current international humanitarian law. This is probably what explains — and I now come to the third and last part of my oral argument — the fact that Uganda ultimately seems to have acquiesced in the status of occupying Power.

III. Uganda's conduct shows that it acquiesced in its characterization as occupying Power

18. Mr. President, Members of the Court, since the adoption of resolution 1234, on 9 April 1999, the Security Council has called upon "all parties . . . in the Democratic Republic of the Congo" to respect "the [provisions of the] Geneva Conventions of 1949"[142]. In its

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[137] Adam Roberts, "What is military occupation?", *BYBIL*, 1984, p. 284; emphasis added.

[138] See, *inter alia*, United Nations General Assembly resolutions 35/6 of 22 October 1980, 36/5 of 21 October 1981 and 37/6 of 28 October 1982.

[139] See *inter alia* United Nations General Assembly resolution 35/122A of 11 December 1980.

[140] See *inter alia* United Nations General Assembly resolutions 33/15 of 9 November 1978, 34/40 of 20 November 1979 and 37/253 of 13 May 1983.

[141] J. Gerard-Libois and J. Gotovitch, *L'an 40. La Belgique occupée*, CRISP, Bruxelles, 1971, pp. 132-140; Louveaux, C.L., "La magistrature dans la tourmente des années 1940-1944", *Revue de droit pénal et de criminologie*, 1981, Vol. II, p. 663.

[142] S/RES/1234, 9 April 1999, para. 6.

50 resolution 1341 of 22 February 2001, the Security Council, after demanding that the Ugandan forces withdraw from the territory of the Democratic Republic of the Congo[143],

> "Reminds *all parties* of their obligations with respect to the security of civilian populations under the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 and stresses that *occupying forces should be held responsible for human rights violations in the territory under their control*."[144]

19. It is clear from this resolution that Uganda, as a party to the conflict, was considered by the Security Council as occupying Power within the meaning of international humanitarian law. To Congo's knowledge, Uganda has never made the slightest objection or reservation with respect to this resolution.

20. For example, Uganda has never claimed that it could not be characterized as occupying Power within the meaning of resolution 1342/2001, because its army, as it now says, only occupied a few locations or airfields yet did not control any area. On the contrary, Uganda concluded various agreements confirming that it did not dispute its status as occupying Power:

— the Sirte Agreement of 18 April 199 refers to the withdrawal of the UPDF from the "areas where there are troops of Uganda . . ."[145];

— in the Lusaka Ceasefire Agreement, the States parties declare that they are "determined to ensure the respect for . . . the Geneva Conventions of 1949"[146]. The same parties later refer to the "territory under their control"[147];

— in the Harare Disengagement Plan, we have seen that there was an "area 1", controlled by the UPDF and its ally, the MLC;

— lastly, the Luanda Agreement of 6 September 2002 contains a reference, in Article 2, paragraph 3, to the "territories currently under the Uganda[n] control"[148].

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[143]S/RES/1341, 22 February 2001, para. 2.

[144]S/RES/1341, 22 February 2001, para. 14; emphasis added.

[145]MDRC, Ann. 65.

[146]Preamble, fifth preambular paragraph; text in MDRC, Ann. 31.

[147]Paragraph 22 of the Agreement; text in MDRC, Ann. 31.

[148]Art. 2, para. 3, of the Agreement, RU, Ann. 84.

51 21. As you see, these agreements do indeed refer to areas or territories under Ugandan control, not just to localities or still less airfields. Uganda cannot, having accepted these texts, now claim never to have controlled part of Congolese territory.

22. Similarly, it should be recalled that, in the first round of oral argument, my colleague Professor Klein quoted a letter sent by the special representative of the United Nations Secretary-General, on 2 February 2002, to the Ugandan Minister of Defence. In that letter, which you will find at tab 29 in your judges' folder, the UPDF troops were specifically referred to as "occupying force"[149], which justified their taking all necessary steps "to ensure security in the North East DRC"[150]. In his reply of 5 February 2002, the Ugandan Minister of Defence made not the slightest attempt to dispute this nevertheless very clear characterization as occupying Power[151]. Mr. Mbabazi, now Ugandan counsel and lawyer in this case, made no objection or reservation, seeming on the contrary to accept Uganda's obligations in its capacity as occupying Power. You will find the complete text of this letter as Annex 76 to the Ugandan Rejoinder.

23. Mr. President, Members of the Court, acquiescence may be defined in international law as — I am here citing a reference source — "consent given by a state, by virtue of its (active or passive) conduct in a given situation"[152]. In our case, it is clear that Uganda's conduct may be interpreted as acquiescence in its status of occupying Power. Not only did Uganda not object when this status was established in various texts drawn to its attention (passive conduct), but also concluded a number of agreements which contain a clear recognition of this status (active conduct). In short, Uganda may therefore be regarded as having itself acquiesced in its status of occupying Power.

52 24. Mr. President, I should not like to conclude this presentation without already at this stage giving some elements of a reply to the question put by Judge Kooijmans last Friday. The territories occupied by Uganda have varied in size as the conflict has developed. During the phase when the UPDF troops were advancing, the area initially covered Orientale Province and part of Nord-Kivu

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[149]Oral argument of Mr. Klein, 13 April 2005, CR 2005/4, p. 27, para. 16, quoting document 1 of the documents submitted by the DRC for the oral proceedings, January 2005, para. 6.

[150]*Ibid.*

[151]Uganda Rejoinder, Ann. 76.

[152]Jean Salmon, ed., *Dictionnaire de droit international public*, Bruxelles, Bruylant/AUF, 2001, see "acquiescement", p. 21.

Province. In the course of 1999, it increased to cover a major part of Equateur Province too. Uganda subsequently maintained control of this area through the rebel troops operating under its authority, even when it had withdrawn part of its army. Earlier, I showed various maps giving some indication of the maximum area of occupation. Here is one of them again. A more specific determination, chronologically as well as geographically, will be provided at a later stage by the Democratic Republic of the Congo with the aid of a sketch, in conformity with the timetable laid down by the Court.

25. Mr. President, Members of the Court, thank you for your attention. May I ask you to give the floor to Maître Tshibangu Kalala, who will begin consideration of one of the consequences of the occupation by Uganda: the human rights violations in the occupied territories.

Le PRESIDENT : Merci, Monsieur le professeur Corten. Je donne maintenant la parole à Monsieur Kalala.

Mr. KALALA:

Uganda's violations of human rights and of international humanitarian law

1. Mr. President, Members of the Court, the DRC listened attentively to the replies given by Professor Brownlie[153] on behalf of Uganda, concerning the evidence of violations of human rights and of international humanitarian law set out in the written pleadings of the Congo and in the oral presentations of 13 April by Professors Pierre Klein, Olivier Corten and myself[154]. Pursuing a pleading strategy that is surprising, to say the least, Uganda refrained from a specific rebuttal of the

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different cases of human rights violations cited in the Congolese oral arguments on the basis of varied and concordant sources. Instead, Mr. Brownlie chose to spend his time challenging the substance of certain allegations in the Congo's Application filed in 1999, even though the Congo had clearly indicated, in its Memorial[155] and in its Reply[156], that it would no longer be seeking to hold Uganda internationally responsible for certain of the acts mentioned in its Application. In

[153]CR 2005/10, 20 April 2005, pp. 8 *et seq.* (Mr. Brownlie).

[154]CR 2005/4, 13 April 2005.

[155]MDRC, para. 5.

[156]RDRC, para. 2.05.

other words, the respondent State preferred to challenge points which the DRC had already abandoned rather than responding to the charges maintained against it by the Congo. Thus, Uganda has once again, in its oral pleadings, chosen not to contribute to moving the judicial debate forward.

2. In his presentation, Mr. Brownlie focused his objections to the evidence of Uganda's responsibility for serious violations of human rights and international humanitarian law in the DRC by confining himself to procedural matters and rules of evidence. In this connection, he developed three categories of argument.

3. First, Uganda raised two types of preliminary objection. On the one hand, it claimed that the DRC's arguments concerning human rights violations were characterized by "discontinuity", in that it was presenting fresh allegations of human rights violations at successive stages of the proceedings, amounting to a "new case"[157]. On the other, Uganda stated that the Court could not rule on human rights violations that took place during the fighting in Kisangani between its troops and those of Rwanda, given the latter State's absence from these proceedings[158].

4. Secondly, Uganda persists in impugning, in very broad terms, the reliability of sources establishing the responsibility of the UPDF for violations of international humanitarian law and human rights[159].

54 5. Thirdly, Uganda denies any responsibility for breaches of the duty of due diligence, imposing an obligation to prevent and punish human rights violations perpetrated in the areas under its control, for the simple reason that it claims not to be an occupying Power in the DRC[160]. Overall, Uganda considers that the accusations made against it, in respect of actions or omissions by its army in Ituri, are totally groundless because it played a peacekeeping role in that region[161].

6. Mr. President, Members of the Court, I shall endeavour in this presentation to show that the arguments put forward by Uganda are totally without foundation. First, I shall establish that the evidence submitted by the DRC in the different phases of the proceedings, including the oral phase,

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[157]CR 2005/10, 20 April 2005, p. 15, paras. 37-38; p. 16, paras. 43-44 (Mr. Brownlie).

[158]*Ibid*., p. 22, paras. 67 and 68.

[159]*Ibid*., p. 16, paras. 39-42.

[160]CR 2005/10, 20 April 2005, p. 15, para. 39 (Mr. Brownlie).

[161]*Ibid*., p. 17, paras. 47 *et seq.*

is fully consistent with its initial claim, as formulated in its Application, and on no account constitutes a "new case". In the second part of my argument, which I shall take up this afternoon, I shall show that the numerous violations of human rights and international humanitarian law attributable to the Ugandan forces are proved beyond any reasonable doubt by credible, varied and concordant sources. Thirdly, I shall explain that Uganda's claims that the Democratic Republic of the Congo and the United Nations recognized the UPDF's peacekeeping role in the region of Ituri are baseless and that, on the contrary, Uganda's action consisted in fomenting the conflicts in that region, in violation of its duty of vigilance.

I. Uganda's preliminary objections must be rejected

7. In the first part of this presentation, Mr. President, I shall deal in turn with the two preliminary arguments raised by Uganda in its oral pleadings.

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A. The facts adduced by the DRC at the different stages of the proceedings as evidence of Uganda's human rights violations are fully consistent with its initial claim, as set out in its Application

8. In his oral presentation of 20 April, Mr. Brownlie accused the Congo of having presented a "new case" on human rights violations at the various stages of the written proceedings, and subsequently in oral argument, a case allegedly distinct from its initial claim in the Application instituting proceedings[162]. As regards the present oral stage, the Ugandan argument is based on the fact that the DRC's oral pleadings are said to deal exclusively with cases of human rights violations in Ituri, to which no clear reference had been made in the written pleadings.

9. Mr. President, Members of the Court, the argument raised by Uganda is without any foundation and totally devoid of effect, as I shall explain in what follows.

10. At the outset, it should be emphasized that Uganda failed in its oral pleadings to identify any particular legal consequence that flows from its argument, so that the latter would seem to be purely gratuitous. It would appear, however, that the opposing Party is seeking nevertheless to make this argument a sort of objection to admissibility, when it concludes that the DRC should not be allowed to "gain an advantage as a consequence of the eccentric and ineffective methods of

[162] *Ibid.*, p. 15, paras. 37-38; p. 16, paras. 43-44.

pleading and proof she has chosen to adopt"[163]. Mr. President, the argument put forward by Uganda calls for serious clarification. The DRC would have far preferred that its human rights case remained as it was at the time of its 1999 Application, or of its Memorial or its Reply. The DRC would have far preferred not to have to produce what Mr. Brownlie calls "a new case". Mr. President, Members of the Court, this is not a new claim by the DRC before this Court. Rather, it is a matter of new violations, or new evidence of human rights violations committed by Uganda, which have added themselves to the *same*, existing charges against it. In the circumstances, the apparent *"discontinuity"*, to cite the language used by Mr. Brownlie, with which the DRC has presented its human rights arguments in the course of the different stages of the proceedings, is in fact only the result of the *"continuity"* with which the UPDF's troops persisted

56 in their violations of human rights in the regions of the DRC occupied by them. In this connection, it should be noted that the Court's case law allows reference to be made, up to the close of the oral proceedings, to facts occurring after submission of the Application which are properly consistent with the initial claims[164].

11. I would remind you that the Application submitted by the DRC in June 1999 requests the Court to adjudge that:

> "Uganda is committing repeated violations of the Geneva Conventions of 1949 and their Additional Protocols of 1977, in flagrant disregard of the elementary rules of international humanitarian law in conflict zones, and is also guilty of massive human rights violations in defiance of the most basic customary law."[165]

The Application clearly indicates that it concerns "the various human rights violations perpetrated by the Ugandan Republic since 2 August 1998", while making it clear that the facts referred to are mentioned "by way of illustration" and "in no sense constitute an exhaustive list". Moreover, the Application reserves the DRC's right to "supplement and amplify the present request in the course of the proceedings". The new documents and new cases of human rights violations submitted by the DRC in the different phases of the proceedings, including those concerning events in Ituri, are thus fully in keeping with the request as set out in the Application instituting proceedings. All of

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[163] *Ibid.*, paras. 68 *et seq.*

[164] Case concerning *Military and Paramilitary Activities in and against Nicaragua, Judgment, I.C.J. Reports 1986*, p. 39, para. 58.

[165] Application instituting proceedings, filed in the Registry of the Court on 23 June 1999, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*.

these incidents and documents concern repeated violations of human rights committed since August 1998 by Uganda in conflict zones in the DRC.

12. Contrary to what Uganda contends[166], the DRC has never, in the course of the present oral stage, confined its human rights case against Uganda to events in Ituri exclusively. Indeed, this point had been made clear by Professor Klein:

> "It should, however, be made clear, at this stage in the argument, that the situation in Ituri will be evoked here merely as one example of Uganda's breaches of its obligations as an occupying power, specifically in the area of fundamental human rights. The conclusions we will come to in this case can obviously be applied to the other areas of the Congo where Uganda exercised control and similarly breached its obligations."[167]

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In the circumstances, Mr. President, Members of the Court, it can only be a matter of surprise that Uganda gives the impression of having failed to appreciate the purely illustrative nature of the Ituri incidents described by the DRC in its oral argument, and the fact that it is fully consistent with the Application filed by the DRC in 1999.

B. There is no problem of jurisdiction for that part of the claim relating to the events in Kisangani

13. Mr. President, Members of the Court, I shall now address the second preliminary objection raised by the opposing Party. Although the Court's jurisdiction is clearly established in the present case with regard to the entire dispute placed before it, the respondent State nevertheless seeks to remove from that jurisdiction the question of the events that occurred in Kisangani in 1999 and 2000. In the hope of evading the responsibility it has incurred as a result of the unlawful conduct of its armed forces in Kisangani, Uganda contends that the absence of Rwanda from the proceedings precludes the Court from ruling on those events. It is regrettable that Uganda contented itself, in the course of its oral pleadings, with simply referring the Court to its written pleadings on this point[168]. The DRC, for its part, will take the trouble to give an oral presentation of the legal arguments showing that there is no reason to deny the Court jurisdiction to rule on the responsibility of Uganda for the events in Kisangani.

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[166]CR 2005/10, 20 April 2005, pp. 16-17, paras. 44-46 (Mr. Brownlie).

[167]CR 2005/4, 13 April 2005, p. 23, para. 8 (Mr. Klein).

[168]CR 2005/10, p. 22, para. 67 (Mr. Brownlie).

14. First of all, I would respectfully remind the Court of the precise purpose of the Congolese claim in relation to the events that occurred in Kisangani. The purpose of the DRC's claim is simply to secure recognition of *Uganda's sole* responsibility for the use of force by its own armed forces in Congolese territory, on three occasions, in and around Kisangani, as well as for the serious violations of essential rules of international humanitarian law committed on those occasions[169].

58 15. Rwanda's absence from these proceedings is totally irrelevant and cannot prevent the Court from ruling on the question of Uganda's responsibility. The Court has no need whatever to rule on the legal position of Rwanda in order to take a decision on the complaints made by the Congo against Uganda in respect of the events at Kisangani. The Court may adjudicate on those events without having to consider the question of whether it should be Rwanda or Uganda that is held responsible for initiating the hostilities that led to the various clashes in and around Kisangani. Mr. President, no argument based on the absence of an allegedly "indispensable" third State can preclude the exercise by the Court of its jurisdiction with regard to this aspect of the dispute of which it is seised today. As the Court recalled in the *Nauru* case, there is nothing to prevent it exercising its jurisdiction with regard to a respondent State, even in the absence of other States implicated in the Application. In that case, the Court had considered that the interests of the two States absent from the proceedings "[did] not constitute the very subject-matter of the judgment to be rendered on the merits of Nauru's Application" and that "the determination of the responsibility of New Zealand or the United Kingdom [was] not a prerequisite for the determination of the responsibility of Australia, the only object of Nauru's claim"[170]. The circumstances are exactly the same with regard to the aspect of the present dispute which concerns us here.

16. Having regard to the foregoing, the DRC respectfully requests the Court unconditionally to reject as without foundation the procedural arguments put forward by Uganda.

Mr. President, I stand ready, if you wish, to interrupt my presentation at this point in order to resume at 3 p.m.

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[169]Request for the indication of provisional measures, submitted by the Democratic Republic of the Congo in June 1999, *I.C.J. Reports 2000*, p. 115, para. 13; RDRC, pp. 320-322, paras. 5.14-5.17.

[170]*I.C.J. Reports 1992*, pp. 261-262, para. 55.

Le PRESIDENT : Merci, M. Kalala. Le moment est en effet venu de s'arrêter, et voici qui conclut l'audience de ce matin. Les plaidoiries reprendront cet après-midi à 15 heures et je vous donnerai à nouveau la parole. Je vous remercie.

La séance est levée.

L'audience est levée à 13 heures.

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