CR 2005/14

Cour internationale de Justice

LA HAYE

International Court of Justice

THE HAGUE

ANNÉE 2005

Audience publique

tenue le mercredi 27 avril 2005, à 10 heures, au Palais de la Paix,

sous la présidence de M. Shi, président,

***en l'affaire des* Activités armées sur le territoire du Congo (République démocratique du Congo c. Ouganda)**

COMPTE RENDU

YEAR 2005

Public sitting

held on Wednesday 27 April 2005, at 10 a.m., at the Peace Palace,

President Shi presiding,

***in the case concerning* Armed Activities on the Territory of the Congo (Democratic Republic of the Congo *v.* Uganda)**

VERBATIM RECORD

Présents : M. Shi, président
M. Ranjeva, vice-président
MM. Koroma
Vereshchetin
Mme Higgins
MM. Parra-Aranguren
Kooijmans
Rezek
Al-Khasawneh
Buergenthal
Elaraby
Owada
Simma
Tomka
Abraham, juges
MM. Verhoeven,
Kateka, juges *ad hoc*

M. Couvreur, greffier

Present:	President	Shi
	Vice-President	Ranjeva
	Judges	Koroma
		Vereshchetin
		Higgins
		Parra-Aranguren
		Kooijmans
		Rezek
		Al-Khasawneh
		Buergenthal
		Elaraby
		Owada
		Simma
		Tomka
		Abraham
	Judges *ad hoc*	Verhoeven
		Kateka
	Registrar	Couvreur

Le Gouvernement de la République du Congo est représenté par :

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comme agent;

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M. Jean Salmon, professeur émérite à l'Université libre de Bruxelles, membre de l'Institut de droit international et de la Cour permanente d'arbitrage,

M. Philippe Sands, Q.C., professeur de droit, directeur du Centre for International Courts and Tribunals, University College London,

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M. Victor Musompo Kasongo, secrétaire particulier du ministre de la justice et garde des sceaux,

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M. Paul S. Reichler, membre du cabinet Foley Hoag, LLP, à Washington D.C., avocat à la Cour suprême des Etats-Unis, membre du barreau du district de Columbia,

M. Eric Suy, professeur émérite à l'Université catholique de Leuven, ancien Secrétaire général adjoint et conseiller juridique de l'Organisation des Nations Unies, membre de l'Institut de droit international,

S. Exc. l'honorable Amama Mbabazi, ministre de la défense de la République de l'Ouganda,

M. Katumba Wamala, (PSC), (USA WC), général de division, inspecteur général de la police de la République de l'Ouganda,

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M. Theodore Christakis, professeur de droit international à l'Université de Grenoble II (Pierre Mendès France),

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Mr. Lawrence H. Martin, Foley Hoag LLP, Washington D.C., member of the Bar of the District of Columbia,

as Counsel;

Captain Timothy Kanyogonya, Uganda People's Defence Forces,

as Adviser.

The PRESIDENT: Please be seated. The sitting is now open. The Court meets today to hear the second round of oral argument of Uganda; and Uganda will be heard this morning and this afternoon. I now give the floor to Mr. Reichler.

Mr. REICHLER:

THE EVIDENCE IN SUPPORT OF UGANDA'S CLAIM OF SELF-DEFENCE

1. Mr. President, distinguished Members of the Court, I am honoured, again, to appear before this most august judicial body, this time for the purpose of commencing the second round of presentations on behalf of the Republic of Uganda. I will speak this morning about the evidence supporting Uganda's claim that she acted in self-defence. In so doing, I will respond, in particular, to the statements made by the advocates for the DRC that there is no proof — no proof — that the Sudan was engaged militarily in the DRC, and no proof that the Government of the DRC collaborated with the Sudan and with Ugandan rebels in armed attacks against Uganda.

2. Mr. President, distinguished Members of the Court, I am confident that you will recall the extremely harsh statements made by Professor Salmon on Monday about Uganda's case. Here are just a few examples: "There is no evidence of any presence of Sudan in DRC territory." "Uganda cannot repeat the same myth *ad nauseum*." "Uganda could just as well have said there were Martians in Congolese territory." "The presence of Sudanese in Congo is a complete fabrication."

3. Now, my friend Professor Salmon is a very learned and erudite scholar. I could not help but be impressed by his recitation of numerous quotations from the great European thinkers and writers of the past. He appears to have read everything there is to read — everything, that is, except his own written pleadings in this case. But it would be unfair of me to single out Professor Salmon. It is quite obvious that the same holds true for my friends, Professor Corten and Professor Klein, who also told this Court that there was no proof — no proof — of the Sudan's military involvement in the DRC, or the DRC's collaboration with the Sudan or the Ugandan rebels in armed attacks against Uganda. It is obvious that they have not read their own pleadings either. None of them has. It therefore falls upon me to do so.

The evidence in the DRC's written pleadings showing the Congo's complicity with the Sudan

4. This is from the DRC's Reply, Annex 108, which is dated 9 September 1998, and states that it is based on "diplomatic and military sources":

> "Sudan has been flying military supplies from the southern capital of Juba to the forces of DRC President Laurent Kabila and his allies in the northeast town of Isiro and in the area of Dongo. One source said military transport planes, apparently bound for the DRC, had left Juba for five consecutive days."

5. The same page of the DRC's own Annex states that "[President] Kabila had enjoyed warm relations with Khartoum long before the current outbreak of fighting". Continuing the quotation: "Sudan has emerged as the big winner from this latest outbreak of fighting."

6. This is also from Annex 108 to the DRC's own Reply, dated 14 September 1998. "Last week," the document states, "2,000 Sudanese soldiers were sent to the DRC to support [President] Kabila's army." *Two thousand Sudanese soldiers* were sent to the DRC to support President Kabila's army: that is 2,000 Sudanese soldiers, not 2,000 Martians, not 2,000 Belgian law professors, but 2,000 Sudanese soldiers, sent to the DRC. And they are confirmed by the DRC's own written pleadings.

7. Again, from the DRC's Reply, Annex 108, this time from the part dated 16 September 1998: "Sudan had sent 2,000 of its soldiers to Kindu, Mainema province, to help DRC President Kabila and his allies." This DRC Annex goes on to state that "since 3 September" there were reports of "Sudanese involvement in the conflict". So now we have 4,000 Sudanese soldiers engaged in the conflict, and we have some of them there since 3 September 1998. And this is confirmed by the DRC's own written pleadings.

8. This is from a report cited 22 times by the DRC in her Reply, and from a source whose reliability the Reply repeatedly vouches for:

> "In September 1998 President Museveni indicated that his troops were holding the main airports in the east of Congo in order to prevent the Sudanese from using them against Uganda. He added that he had information indicating the presence of Sudanese soldiers in Isiro . . . This has also been reported by a source among the humanitarian organizations working in the area." (P. 19.)

9. So now the DRC's written pleadings tell us there were Sudanese soldiers at Isiro, in eastern Congo, in September 1998, just as President Museveni said, and this is confirmed by humanitarian organizations working in the area. The airfield at Isiro, it will be remembered, was

the very first objective of Ugandan forces after the Ugandan High Command, at its meeting on 11 September 1998, ordered the UPDF into action to confront the hostile Sudanese forces who were taking over Congolese airfields for the purpose of attacking Uganda.

10. Does the Court recall Professor Salmon's references to "fictitious" visits by the DRC President Laurent Kabila to Khartoum in furtherance of a military alliance with Sudan? This same report, again cited 22 times in the DRC's Reply, stated further that "President Kabila had secretly visited Khartoum on 28 August to look for aid" (p. 19).

11. This is from Annex 68 to the DRC's Reply:

> "The evolution of the war incited the Sudanese government to invest on [President] Kabila's side. The Khartoum authorities insisted in transporting 300 Ugandan rebels by air to lower Uele at Buta. Their mission was to prepare a counter-offensive to bring back the rebels into their country." (Pp. 28-29.)

12. During his speech on Monday, Professor Salmon cited the book written by Jean-Pierre Bemba, current Vice-President of the DRC and formerly the leader of the MLC rebel organization. Professor Salmon thought it most devastating to Uganda's case that Mr. Bemba, whom he characterized as Uganda's ally: "Does not once mention the presence of a single Sudanese soldier in Gbadolite" — does not once mention the presence of a single Sudanese soldier in Gbadolite — Professor Corten also jumped on this bandwagon. He told the Court that even though Mr. Bemba wrote extensively about the fighting in northern and eastern Congo, he never once mentioned the presence there of Sudanese troops. Professor Corten recommended that Mr. Bemba's book was "well worth reading". And so it is. But neither Professor Corten nor Professor Salmon would have any way of knowing, because they obviously have not read the book themselves. So, once again, it falls upon *me* to do so. I will read not just from Mr. Bemba's book, but from the excerpts from the book that were annexed to the DRC's written pleadings, specifically, Annex 68 to the DRC's Reply:

> "Under the command of Congolese Colonel Deward N'Sau, 14,245 soldiers were assigned to the North Equateur section by the headquarters of the 5th Military Region. Laurent Kabila, knowing the importance of the battle for Gbadolite, gave precise instructions to his high command comprising 246 cadres and officers. On our side, Colonel N'Sau deployed 2,471 and 2,868 soldiers respectively on Yakoma and Businga axis. He also organized 1,207 soldiers to take charge of Gemena sector. It should be noted that the enemy deployed 2,210 Chadian soldiers, 3,932 extremist Hutu Interahamwe *and a detachment of 108 Sudanese soldiers*." (P. 39; emphasis added.)

13. This is also from the excerpts of Mr. Bemba's book that form part of the DRC's pleadings, at Annex 68 to the Reply:

> "At Gbadolite, there was a total demoralization of the troops. Colonel N'Sau informed Kabila of the departure of their Chadian allies and demanded for reinforcement from Kinshasa. At Gbadolite airport, there was only one (1) Antonov 26 having been placed under the responsibility of Colonel N-tita and Major Mwanza in March 1999, *being piloted by Sudanese crew . . .*" (pp. 43-44; emphasis added).

14. Well, Professor Salmon was correct after all. Mr. Bemba did not mention a single Sudanese soldier fighting in the DRC, around Gbadolite. He mentioned 110 of them. Plainly, there were Sudanese troops fighting at and around Gbadolite in 1999, as there were at Businga, Dongo, Buta and Isiro in 1998, the other places where they are acknowledged to have been deployed in the DRC's written pleadings.

15. Mr. President, distinguished Members of the Court, so that we are all perfectly clear, thus far I have read exclusively from the DRC's own written submissions. I could go on a lot further, but I will not. Uganda has only been allotted six hours for her second round, and there are other subjects to discuss, and other speakers to discuss them. I respectfully submit that it is not possible to speak responsibly about there being no proof — *no proof* — of Sudan's involvement in armed activities against Uganda from Congolese territory with the collaboration of the DRC Government. To the contrary, these facts are fully proven by the DRC's own written pleadings and the documentary evidence attached thereto.

The significance of the DRC's failure to deny this evidence

16. This is why — and this is an extremely significant point — the DRC has never expressly denied her military alliance with Sudan, has never expressly denied Sudan's military presence and armed activities in the DRC directed against Uganda, and has never expressly denied Sudan's direct support for and control of the rebel groups attacking Uganda from Congolese territory, with the collaboration of the DRC Government. None of these specific facts has ever been denied. Not in the DRC's written pleadings. Not in the oral pleadings before this Court. Rather, the DRC has been very clever in commenting on these critical facts. I will read from the definitive statement on

this subject that the DRC made in her final written pleading, her Additional Written Observations on Uganda's counter-claims, filed in February 2003:

> "As for the DRC, it would like to reaffirm, in the most solemn manner, that no alliance has ever been made with Sudan *in order to attack Uganda*, in May 1998 or afterwards. Otherwise, the DRC would like to point out that, in spite of what Uganda seems to be wishing, it will *not give an opinion* on the conflict between Uganda and Sudan that has been going on for several years now, either by confirming or by negating the links that exist between the Khartoum régime and certain Ugandan rebel movements." (Paragraph 1.65; emphasis added.)

17. In the circumstances of this case, this is a remarkable statement. It is obviously one that was very carefully and cleverly crafted. It is, to say the least, highly nuanced. The DRC does not deny that it made a military alliance with Sudan, or that it received into its territory thousands of Sudanese soldiers and thousands of Chadian soldiers brought in by Sudan, as well as thousands of Sudanese-trained Ugandan rebels in August and September 1998, whom it incorporated into its national army. Rather, it denies only that the *purpose* of its military alliance with the Sudan was "in order to attack Uganda". Notably, the DRC does not deny that this was the Sudan's purpose, or that the DRC was well aware that this was the Sudan's purpose. In fact, the DRC denies nothing whatsoever about the Sudan's military involvement in the Congo, the Sudan's deployment of its own troops in eastern Congo, or its armed activities, both direct and in support of the Ugandan rebels, that were hostile to Uganda. In the face of Uganda's specific and detailed factual assertions on these matters pertaining to the Sudan, and notwithstanding the fact that these are important matters that bear heavily on Uganda's claim of self-defence, all the DRC is prepared to say about them is "No comment".

18. Thus, the DRC has never denied the following specific and detailed elements of Uganda's case:

1. That on 14 August 1998, Brigadier Saladin Khalil of the Sudanese Army's Equatoria Division supervised the delivery of three planeloads of weapons to the Congolese army in Kinshasa. Indeed, I have already shown that the DRC's own written pleadings confirm that Sudanese military transports delivered supplies to the DRC, from Juba in southern Sudan, for five consecutive days.

2. That Sudanese President Omar al-Bashir persuaded the President of Chad, Idris Deby, to send a brigade of 2,500 soldiers to the DRC to fight against Uganda, and these troops were transported to Gbadolite by the Sudanese air force. In fact, as I just read to the Court a few moments ago, the DRC's written submissions acknowledge that there were at least 2,200 Chadian soldiers deployed against Uganda, and Professor Salmon, in his first round speech admitted that Chadian troops fought in the DRC against Uganda.
3. That the Sudan stepped up its training of Congolese soldiers, including former members of the Rwandan army and Interahamwe militias at camps in the Sudan, and then transported them back to the DRC to fight against Uganda and Rwanda. We shall see, in just a few minutes, that this too is admitted in the DRC's written pleadings.
4. That President Kabila met again with President al-Bashir in Khartoum in late August 1998, and requested more military assistance. In fact, this meeting is admitted to have taken place on 28 August 1998 in the annexes to the DRC's Reply from which I read earlier.
5. That, as a result of this meeting, on 2 September 1998, Sudanese Colonel Ibrahim Ismail Habiballah delivered a planeload of weapons to the Congolese army in Gbadolite for use by units of the Uganda National Rescue Front II, an anti-Uganda rebel group that had been previously incorporated into the Congolese army. The DRC's written pleadings, from which I just read, acknowledge the incorporation into the Congolese army of at least 300 Ugandan rebels, trained by the Sudan, and deployed at Buta against Ugandan forces.
6. That, also in early September, a Sudanese brigade of approximately 2,500 men under the command of Lieutenant General Abdul Rahman Sir Khatim arrived in Gbadolite, whence it deployed first to Businga in preparation for an attack on Ugandan forces. In fact, the DRC's written submissions acknowledge the arrival of at least 2,000 Sudanese troops in northern Congo, and another 2,000 to the south, in Kindu, and they admit that, as of 3 September 1998, Sudanese forces were involved in the conflict.

19. As we have also seen, according to the Annexes to the DRC's Reply, the Sudanese forces deployed as far east as Isiro, whose airport is within easy striking distance of Uganda. In fact, Isiro's airport is capable of handling helicopter gunships, medium-sized transport and cargo planes, and light fighter planes. And it is only 320 km from Ugandan border towns.

20. All of these facts were put forward by Uganda in support of her claim of self-defence. They demonstrate that in August and early September 1998 the increasingly bold armed attacks against Uganda by the rebel groups based in Congolese territory were being bolstered by the military presence and the direct operational and logistical support from the Sudan, with obvious licence from the Government of the DRC. In regard to licence, it is significant that the DRC Government never spoke of the Sudanese or Chadian military intervention as an "invasion" or called for the removal of Sudanese or Chadian troops. Their presence and mission in the DRC were obviously approved by the Congolese authorities. Yet, instead of a denial of these facts, all the DRC and her counsel can come up with is a firm and forceful: "no comment".

21. The silence of the DRC in the face of these facts is — to borrow a word from my distinguished opposing counsel — "deafening". But it is not, as Professor Salmon might say, "a silence of scorn". To the contrary, it is a silence of conscience. I do not criticize Professor Salmon and his colleagues for their failure to deny the specific and detailed facts of the Sudan's military involvement in the DRC, and its participation directly and indirectly in armed attacks against Uganda from Congolese territory. To the contrary, I applaud them for having the integrity not to deny what they know to be the truth. I am sure that, as honourable men, they will not dishonour themselves by suddenly reversing course and standing up on Friday, in their final presentation to the Court in these proceedings, which is supposed to relate solely to Uganda's counter-claims, and deny what they have steadfastly failed to deny through three extensive written pleadings and three weeks of oral hearings. In any event, such a denial, at the last possible moment before the lights go out and in circumstances that would not permit Uganda to respond, would be recognized as a desperate and highly inappropriate measure totally lacking in credibility.

22. And if they should pretend to moral outrage and cite to you pages and pages of the Reply, where they claim to have denied the military role of the Sudan in this conflict, and the collaboration between the Sudan and the DRC, my humble advice is: read the fine print, as I did. You will find that it is only an attack on Uganda's proof. The specific facts and details that I have described here this morning, and in my speech of 15 April, are never expressly denied in the DRC's written pleadings.

23. Because they cannot deny the facts, my distinguished opponents devote themselves instead to an attack on the sufficiency of Uganda's proof. In particular, they argue that Uganda's specific factual assertions about the Sudan's military presence and activities in the Congo, derived from Uganda's military and intelligence services, cannot constitute evidence because they emanate from a Party to the proceedings and are therefore unreliable and inadmissible. But this is a gross misstatement of the law of evidence, as my colleague Ian Brownlie will further explain this morning. Uganda's evidence is still evidence. The fact that it comes from a Party to the proceedings may affect the weight that the Court chooses to give it, but does not render it inadmissible. And as to the weight the Court should give this evidence, surely the Court may take into account the fact that the DRC has never specifically or expressly denied it. In the face of the DRC's highly revealing "no comment", Uganda submits that the evidence stands unchallenged, and therefore is entitled to a great deal of weight. In any event, as we have seen, Uganda's evidence is fully corroborated by the documentary proof annexed to the DRC's own written pleadings.

24. Because they are unable to deny the critical facts about the Sudan's military presence and activities in the Congo hostile to Uganda in August and early September 1998, the DRC and her advocates have developed two counter-arguments. First, as I just mentioned, they have challenged Uganda's proof. Hence the empty refrain from all three counsel that there is no proof — no proof — to support Uganda's claims. As we have seen, we need look no farther than the DRC's own written pleadings, and the documentary evidence incorporated therein, to find sufficient proof to support all of Uganda's assertions regarding the role of Sudan — a role which, it bears repeating, the DRC has never expressly denied.

25. The DRC's second counter-argument, developed for the first time in these oral proceedings, is that the Sudan's military activities in the Congo against Uganda are irrelevant. The DRC's new theory is that, since Uganda "invaded" the DRC on 7 August 1998, any military collaboration against Uganda that occurred between the DRC and the Sudan — or between the DRC and the Ugandan rebel groups — *after* that date, constituted self-defence on the part of the DRC. Thus, according to the DRC, there is no need even to discuss what the DRC or the Sudan did individually, or what they did in collaboration, after 7 August 1998, because whatever it was, it was self-defence. So, in addition to "no comment", the DRC says "not relevant" to the undeniable

evidence of collaboration between the DRC, the Sudan and the Ugandan rebels in armed attacks against Uganda.

26. This theory was very painstakingly articulated by Professor Corten last Friday. As the Court will recall, he emphasized repeatedly that there were two distinct time periods. The period *before* 7 August 1998, which for him was characterized by no proof of collaboration by the DRC Government with the Ugandan rebel groups and the Sudan, and the period *after* 7 August 1998, with respect to which he asserted that collaboration by the DRC with her Sudanese or Ugandan rebel allies was not unlawful, because everything that the DRC did to Uganda after 7 August 1998 was self-defence.

The evidence in the DRC's written pleadings showing the DRC's complicity with Ugandan rebels

27. I will return in a few moments to the emphasis the DRC now attempts to place on the date of 7 August 1998. But before doing so, I wish to complete my presentation in response to the DRC's argument that there is no proof that the DRC collaborated with the Sudan or the Ugandan rebel groups in armed attacks against Uganda. I have already brought to the Court's attention the extensive and impressive proof — from the DRC's own written pleadings, no less — of the Sudan's use of Congolese territory to conduct and support armed attacks against Uganda, and the DRC Government's collaboration with the Sudan in that regard. It remains for me to address the proof of the DRC Government's collaboration with the Ugandan rebel groups in armed attacks against Uganda, and this proof is equally extensive and equally impressive, notwithstanding Professor Salmon's representation to the Court that: "There is not a shred of evidence that the DRC gave assistance to the Ugandan rebels." I discussed some of the evidence on collaboration between the DRC and the Ugandan rebel groups in my opening speech during the first round. I will not repeat any of those remarks today. I will merely refer the Court for a review of that evidence to CR 2005/6, page 29, paragraphs 40 to 44. Today, I will highlight only proof not previously discussed in prior speeches, starting, as I did earlier, with the proof included in the DRC's own written pleadings.

28. This is from the DRC's Reply, paragraph 3.24, quoting with approval a document dated 13 August 1998. After describing a "falling out of the three former allies — Uganda, DRC and

Rwanda", the document relied on by the DRC describes "a new geopolitical order in the region", in which President Kabila was

> "looking for new external alliances with Sudan, Cuba, the Central African Republic, Zimbabwe and Angola, as well as other internal groups like the former Rwandan army and the Interahamwe militias, ex-Mobutu generals, the Mai-Mai, ADF rebels and Burundian insurgents, who are hostile to the Rwanda, Uganda and Burundi régimes".

29. This is from Jean-Pierre Bemba's book, and is attached to the DRC's Reply at Annex 68:

> "From the beginning of the year 1998, secret training camps were opened for training Rwandan genocide criminals. Abroad, [President] Kabila sends to Sudan, who is a sworn enemy of Uganda, several tens of young Congolese, most of whom are coming from one province, to enable them to train in terrorism and guerrilla tactics. The Rwandan intelligence was quick to inform [President] Kagame of [President] Kabila's undertakings." (P. 6.)

30. This is from a report cited as authoritative five times in the DRC's Reply:

> "As early as February 1998, the Rwandans started planning a coup, said to have been vetoed by Uganda on the ground that it was not going to be credible either internationally or regionally. (P. 21.)
>
> . . . . . .
>
> Early in 1998, all the heads of the intelligence agencies met in Kampala to discuss the security situation and prepare summits of heads of state . . . Another meeting of the same people was held in Kinshasa, where Uganda, Rwanda, Angola and Zimbabwe were shocked to discover that Sudan was also invited. The heads of State meeting on security was therefore cancelled. (Pp. 21-22.)
>
> By May 1998, there were signs that [President] Kabila was also preparing for war with Rwanda and Uganda. (P. 21.)
>
> . . . . . .
>
> According to Bizima Karaha [who was President Kabila's Foreign Minister at the time], [President] Kabila made a secret trip to Sudan in June 1998 to ask for assistance in preparing for an attack from Uganda and Rwanda. (P. 22.)
>
> . . . . . .
>
> Privately, regional security officials complained that [President] Kabila was double-faced. While allowing Ugandan troops to enter Congo to pursue ADF rebels, he was supposedly offering a corridor in the northeast of the country where Sudan could airdrop weapons for Ugandan rebels. The intensification of attacks by rebel groups based in Congo on Rwanda and Uganda by February 1998, and the obvious tolerance of the DRC government to the presence of those groups, increased the feeling that [President] Kabila had betrayed his former allies after they helped him take power in 1997." (P. 22.)

31. All of this evidence of collaboration by the DRC Government with the Ugandan rebel groups and with the Sudan is extracted from, as I have said, the DRC's own written pleadings and

documents annexed thereto or cited as authoritative therein. I believe that the last quotation from those pleadings satisfactorily answers the question posed by Professors Salmon, Corten and Klein — they do have a penchant for repeating themselves — as to how it was possible for President Kabila to have been co-operating with Uganda by allowing Ugandan troops to fight the rebel groups inside Congolese territory, and at the same time to have been collaborating with the rebel groups both directly and via the Sudan. The answer, supplied by the DRC herself, is that President Kabila was playing a double game, or, according to the language of the DRC's document, he was "double-faced", covertly maintaining military pressure on Uganda while at the same time overtly appearing to lend some co-operation to her.

32. It must be remembered, as well, that Congolese policy was evolving during the critical year of 1998, during the first half of which President Kabila was trying to break free of Rwanda. Congolese policy moved from co-operation with Uganda at the beginning of the year, through a hybrid period of mixed co-operation with Uganda and simultaneous collaboration with her enemies, to what finally became, in August and September 1998, open membership in an anti-Uganda alliance with the Sudan, Chad, the Ugandan rebel groups, and other assorted elements, including the ex-FAR and Interahamwe militiamen.

The evidence supplied by Uganda

33. The military intelligence reports supplied to the Court by Uganda, and annexed to her written pleadings, abundantly confirm this evolution in Congolese policy. All of these reports are original, contemporaneous documents. They were not altered or sanitized in any way. Handwritten reports and statements were not retyped. Grammatical and spelling mistakes, and other obvious errors as to dates or locations, were not corrected. These documents are the real thing. The information was collected from defectors, captured rebels, human intelligence agents and electronic interception of communications. Indeed, reading them in context confirms their authenticity. The information was considered sufficiently reliable by the Ugandan Government and armed forces either to base their military strategy and tactics on it, which they did, or to confirm similar intelligence received earlier. The documents were not prepared after the fact or for use in this case. Rather, they are contemporaneous intelligence reports that had to be declassified

so Uganda's counsel could use them. The fact that they are Ugandan documents affects their weight, not their admissibility as evidence. Their contents, the circumstances in which they were created, and the fact that most of the information is corroborated by other sources, including the annexes to the DRC's own written pleadings, confirm that the weight to which they are entitled is substantial.

34. So as not to burden the Court excessively, I will read only a few excerpts from this evidence. First, a document dated 2 July 1997:

> "Of recent, command structure of AFDL [those are the forces loyal to President Kabila] along the border has been changed. The original devoted Banyamulenge [that is, the Congolese Tutsi] commanders have been replaced by former FAZ commanders who have been under reorientation. [The FAZ was the army under President Mobutu.] These are the same commanders who were manning these borders points and giving sanctuary to these dissidents inside Congo. Their vigilance and trust to deal with the groups which they once collaborated with, is doubtful." (Counter-Memorial, Ann. 12.)

35. Another document, a little bit later, dated 23 February 1998:

> "The former Operational Brigade Commander, Col. Ebamba, has been posted back here as Brigade Commander, plus many of the former officers. This officer was directly in charge of NALU [that is, National Army for the Liberation of Uganda, one of the rebel groups] — organization, training, finance control and operations up to the last moment NALU attacked Uganda on 13/11/96 at Bwera . . . People are wondering if he is not coming to supply the enemy with arms and ammunitions especially when among the enemy we have some FAZ . . . It would be best if he was removed immediately together with most FAZ who were here and now dominate the current forces here." (Counter-Memorial, Ann. 18.)

36. And this, a little bit later, from the debriefing of ADF defector Fred Tukore, dated 27 June 1998: "Noted so far as collaborators from this side are Colonel Ebamba (Beni) and Colonel Mayala, Brigade Commander Bunia. These are to act as a go-between the rebels and the DRC Government for logistical support and sanctuary in case the going becomes tough." (Counter-Memorial, Ann. 20).

37. This is from the debriefing of ADF Commander Junju Juma:

> "In 1998 ADF agreed to take on same agreement to Kabila government to fight Uganda government. Col. Ibamba representing Kabila government agreed to support ADF for those purposes. Later a link up was made between ADF-SUDAN-DRC, which led to arms and logistics being delivered to ADF through DRC government." (Counter-Memorial, Ann. 64.)

38. The evolution continues from the debriefing of ADF leader Lyavala Ali:

> "Around 1998, Kabila fell out with Museveni. I myself started establishing links with Kabila through his operatives in the area. The delegation he sent to us for negotiations included a Minister from Butembo and another whose name I do not recall. By this time, Uganda had not entered Beni. [That is, this occurred before Ugandan forces entered Beni on 7 August 1998]." (Counter-Memorial, Ann. 71.)

39. And it continues: this is from the debriefing of ADF Commander Issa Twatera Embundu:

> "A meeting with three FAC commanders followed. The chef (local leader) of Masembu arranged for the meeting to take place. The three commanders expressed disappointment with Museveni's government and pledged support to ADF. After this meeting they reported to Colonel Ibamba of FAC in Beni who took message to President Kabila . . . who agreed to support ADF . . . The government of Congo then started by supplying ammo." (Counter-Memorial, Ann. 76.)

40. ADF Commander Embundu also stated:

> "FAC started supplying arms and ammo in big quantities, equipment were airlifted from Sudan to Kisangani, but UPDF captured Kisangani [the Court will recall that the UPDF first sent a battalion to Kisangani on 1 September 1998] before ADF could pick the arms. Kabila then arranged for more weapons and sent for ADF to collect them. A team of five people led by Moses went to Kinshasa to negotiate with Kabila through Khartoum. This was followed by two air droppings of arms and ammo in Rwenzori ADF bases." *[Ibid.]*

41. Finally, I would like to respond to Maître Kalala, who challenged Uganda's assertion that Taban Amin, the son of Idi Amin and the leader of the West Nile Bank Front rebel group, was appointed by President Kabila to the rank of Major General in the FAC (the Congolese army). We have today submitted to the Court a new report from the public domain, dated 20 January 2005, concerning Taban Amin's statements on this matter, after he returned to Uganda under the government's amnesty programme for former rebels:

> "Former West Nile Bank Front (WNBF) rebel leader Taban Amin has said he was promoted to Major General by the late DR Congo President Laurent Kabila. Taban Amin yesterday attacked army spokesman Major Shaban Bantariza for questioning his rank. The son of former dictator Idi Amin insisted he received the rank from the government of the DR Congo while Laurent Kabila was President."

With the Court's permission, this document will be inserted at tab 20 to the judges' folder.

42. Mr. President, distinguished Members of the Court, I hope you will forgive me for taking so much of the Court's time reviewing the proof of the DRC's collaboration with the Sudan and with Ugandan rebel groups in armed attacks against Uganda. I feel, and I hope the Court will agree, that this was both a necessary and a proportionate response to the attack on Uganda's evidence by Professor Salmon and his colleagues, who repeatedly advised the Court, that there was

no proof — no proof — to support Uganda's claims that the DRC in fact collaborated with and licensed both the Sudan and the Ugandan rebel groups in armed attacks against Uganda, both before and after 7 August 1998.

There was no Ugandan invasion of the DRC in August 1998 (or thereafter)

43. I will now turn to the DRC's theory that 7 August 1998 is a watershed date in these proceedings, because everything supposedly changed on that date. The DRC's argument is that Uganda "invaded" her on 7 August 1998, and therefore it was lawful self-defence *thereafter* for the DRC to join in or support armed activities against Uganda in collaboration with the Ugandan rebel groups and the Sudan. I should like to observe at the outset that the DRC's theory concerning the paramount importance of 7 August is new, and represents a significant departure from her earlier view of the case, as expressed throughout her written pleadings. Previously, the DRC contended that Uganda instigated the Congolese rebellion against President Kabila and his Government on 2 August 1998, and invaded the DRC on that date in support of the Congolese rebels. But for all intents and purposes, the DRC abandoned that approach in the oral proceedings. There appear to be two reasons for this shift in position. First, the evidence does not support the DRC's earlier contention that Uganda instigated the Congolese rebellion of 2 August, or that she sent in her troops to support it. Rather, the evidence shows that it was Rwanda, and not Uganda, which promoted the Congolese rebellion and immediately invaded the DRC, and rapidly advanced halfway across the country. Second, the DRC appears to have changed position in order to wrap itself around certain new documents, which the DRC submitted to the Court after the close of the written pleadings. These new documents are excerpts from the testimony of UPDF officers to the Porter Commission about Operation "Safe Haven", which were discussed by the DRC for the first time on 11 April, and a document, presented to the Court for the first time last Friday, listing all of the military deployments of Operation "Safe Haven", from 7 August 1998 to 31 July 1999.

44. To be sure, these documents show that Ugandan military forces *were* deployed at Beni, in eastern Congo, on 7 August 1998, and this is listed as the first deployment of Operation "Safe Haven". But this is nothing new. Uganda stated in her Counter-Memorial, filed more than four years ago, that her troops were at Beni on 6 and 7 August 1998, where they came under fire from

ADF forces accompanied by some Congolese army units. Uganda also stated in her Counter-Memorial that, following the encounter at Beni, her troops deployed to Bunia, also in the border area, and took control of the airfield there on 13 August. This, too, is listed in the Operation "Safe Haven" document introduced by Professor Corten last Friday. The document also shows two UPDF deployments that I described in my speech on 15 April — to Watsa, also in the border area, on 29 August and to Kisangani on 1 September. Being the self-appointed mischief-maker that he is, Professor Salmon strains to make Uganda look like she contradicted herself regarding these deployments. He accuses Uganda of asserting in her written pleadings that there were no troop deployments in the DRC during August of 1998, and then acknowledging these deployments at the oral proceedings. But, as clearly set forth in the Counter-Memorial — as far back as that — Uganda has always acknowledged that she had troops in the border region of eastern Congo, and specifically at Beni and Bunia, as of 7 and 13 August 1998.

45. Of the four UPDF troop contingents inside eastern Congo between 7 August and 1 September, the one at Beni came under attack. These were the same troops that had been at Beni and the surrounding area for more than a year, since President Kabila first invited Ugandan troops to station themselves in the border areas of eastern Congo to arrest the activities of the ADF and other Ugandan rebel groups.

As regards Bunia, another place close to the border where Ugandan troops had regularly operated and visited for more than a year with the consent of President Kabila, the DRC's Reply states, at paragraph 2.59: "Thanks to the complicity of Mr. Kibonge, in command of the FAC 225th Brigade based in Bunia, the UPDF occupied that town without resistance on 12 August 1998." In other words, the so-called "invading" forces were welcomed to Bunia by the Congolese army commander. Nor was there any combat at Kisangani, where a UPDF battalion deployed to the airport there on 1 September. Kisangani had been taken by Rwandan troops and their Congolese rebel allies, the RCD, soon after the fighting broke out on 2 August. As set forth in the DRC's Reply, from which I read this morning, the Kisangani airport had been a major delivery point for the DRC Government and Sudanese arms and ammunition to the ADF and other Ugandan rebel groups. Accordingly, Uganda accepted the invitation from Rwanda and the Congolese rebels to assure that the airport would not continue to be used for supplying the Ugandan rebel groups.

46. Let us look again at the Operation "Safe Haven" document. There is nothing else — nothing at all — prior to 17 September 1998. There you have it all. Let us recall that this document was presented by the DRC as part of her case, and was highlighted to the Court only last Friday. Where does it show an "invasion" of the DRC by Ugandan forces? Not on 7 August at Beni: Ugandan troops were already in the area, with the DRC's consent, for more than a year. Not on 13 August, when they went to Bunia, also within their normal zone of operation for over a year, and were welcomed as friendly forces, not invaders, by the Congolese brigade commander in that city. Not on 29 August, when they arrived at Watsa, also in the border area. Not when a small contingent arrived at Kisangani, already in Rwanda's hands, to guard the airport. And certainly not when these four small contingents sat still and remained in place during this entire period prior to 11 September.

47. The DRC and her counsel have not challenged Uganda's evidence as to the number or location of UPDF forces in eastern Congo during August and early September 1998. As Uganda has said, during this period there was only a modest reinforcement of the approximately 2,000 troops that had been there since at least April 1998, in order to shore up her border protection efforts after the outbreak of civil war in eastern Congo and the complete breakdown of law enforcement authority in the region. And all of these troops were confined exclusively to the border areas of eastern Congo, except for the small contingent guarding the airport at Kisangani, which was the supply gateway to the border areas. This is confirmed by all of the excerpts from the testimony of the Ugandan officers to the Porter Commission, which I discussed on 15 April, and by the new Operation "Safe Haven" document introduced by the DRC's advocates last Friday. Once again, the DRC's case is defeated by her own documents; they show beyond doubt that there was no Ugandan "invasion" of the DRC in August 1998.

There was no "joint offensive" in August 1998

48. On Monday, Professor Corten invoked the Porter Commission testimony of former Ugandan General James Kazini in support of the contention that there was a Ugandan invasion of the DRC on 7 August 1998. But General Kazini said no such thing. He actually said two things, which Professor Corten strained to stitch together into the same thought. First, General Kazini told

the Porter Commission that Operation "Safe Haven" began on 7 August at Beni. That is uncontested. Second, in answer to a different question, he said that, as part of Operation "Safe Haven", Ugandan forces "decided to launch an offensive together with the rebels". General Kazini did not testify that this offensive was launched on 7 August. He did not give any date for the launching of the offensive. The best, indeed the only, evidence on the date of the joint offensive is the Operation "Safe Haven" document that the DRC introduced last Friday. It is — as the DRC's advocates have correctly represented it to be — a comprehensive list of all military activities in the DRC carried out by the UPDF, as well as allied Congolese rebel forces, between August 1998 and July 1999. It shows joint military engagements involving both the UPDF and the Congolese rebel forces beginning in June 1999, as the UPDF prepared for its major and final offensive on Gbadolite. These are shown in items 47, 49, 52, 54, 55 and 64, where the units involved are listed as "FLC", which are the initials for the MLC's armed forces. They show participation by the MLC in the joint offensive on Gbadolite between 30 June and 4 July 1999.

49. Earlier in my presentation, I read from excerpts of Jean-Pierre Bemba's book, annexed to the DRC's Reply, and cited therein, which confirm that the MLC fought in collaboration with the UPDF in a joint offensive against Gbadolite. The MLC, it will be recalled from the DRC's own oral presentation, was not even created until late September 1999, and did not have a trained fighting force until sometime thereafter. There is no other evidence in this case of a joint offensive by Ugandan and Congolese rebel forces. It plainly did not occur in August 1998.

The DRC's own official documents confirm there was no Ugandan presence at Kitona

50. Last Friday, Professor Corten revived the shibboleth of Kitona. Here was yet another attempt to portray Uganda as having "invaded" the DRC in early August 1998. He repeated the accusation that Ugandan troops participated in the attack on Kitona, in far western Congo, on 4 August 1998. But he cited no credible evidence to support his claim. I already addressed, on 15 April, the unreliability and insufficiency of the contradictory journalistic accounts that have been offered as proof by the DRC. In addition, I showed that the pilot who allegedly flew Ugandan soldiers to Kitona, and whose affidavit was expressly offered for that purpose, actually said he did not know whether there were any Ugandan soldiers on the plane, and could not identify any of the

soldiers as Ugandans. I was surprised, therefore, to hear Professor Corten, last Friday, invoke this same affidavit in support of his contention that Ugandan soldiers were flown to Kitona.

51. In fact, I was particularly surprised that Professor Corten and the DRC would attempt to rely on such affidavit testimony, produced years after the events in question and expressly for the purpose of assisting the DRC in this case. Both Professor Corten and Professor Salmon have strongly denounced the affidavit testimony offered by Uganda on the ground that it was produced unilaterally and specially for purposes of this case, and therefore is so inherently biased and unreliable that it should not be considered as evidence by the Court. Uganda would say the same about the recently produced and self-serving affidavits offered by the DRC, and with even more justification. The affidavits submitted by the DRC on the Kitona matter were not only produced specially for purposes of this case, but they were all produced by the infamous DEMIAP, the DRC's infamous military intelligence service, which has repeatedly been accused by independent third parties, including the United States Department of State, of gross human rights violations, including torture of those unlucky enough to fall into its hands. To the same effect is the affidavit, prepared solely for purposes of this case, submitted on behalf of the notorious Colonel Ebamba, the Congolese army officer who facilitated military collaboration between the DRC Government and the Ugandan rebels. According to the same standards set by Professors Salmon and Corten, all of these recently produced and self-serving affidavits, prepared specially for this case, should be treated as nullities.

52. The coup de grâce for the DRC's Kitona allegations, however, is supplied by the DRC's own, official, contemporaneous statements — that is, the ones that were not created specially for the purposes of this case. To be specific, on 11 August 1998 the DRC formally complained to the United Nations about the attack on Kitona. Here is what the DRC said about the attack at that time, shortly after it occurred, and long before it thought about initiating a case against Uganda in this Court. The entire document is part of the DRC's written pleadings, at Annex 41 to the DRC's Reply, and I quote from that official statement by the DRC:

> "As soon as the repatriation of the Rwandan soldiers was over, the Congo was the victim of armed aggression by Rwanda and its allies . . . Many columns of Rwandan army trucks filled with well-armed Rwandan soldiers violated Congolese borders in order to take the towns of Bukavu and Goma on 2 and 3 August . . . Three Boeing aircraft belonging to Congolese private companies were commandeered by a

> Rwandan subject who had served as Chief of Staff of the Congolese Armed Forces until the end of July. The aircraft transported some 800 Rwandan soldiers to the Kitona military base in the western part of the Congo, with the objective of rallying the support of the Congolese soldiers being trained at the military base, and taking the port of Matadi, vital to the Congolese capital of Kinshasa . . ."

The aircraft transported some 800 *Rwandan* soldiers.

53. A short time later, on 31 August 1998, the DRC again reported to the United Nations on the Kitona attack, and once again reported that Rwanda — and *only* Rwanda — carried out the attack on Kitona. The second Congolese report to the United Nations, like the first, made no mention of Uganda in connection with the attack on Kitona. Only Rwanda was accused by the DRC of attacking Kitona (Memorial of the Democratic Republic of the Congo, Ann. 27, p. 7). I trust that, now that these contemporaneous, official and comprehensive statements of the DRC to the United Nations have been brought to the Court's attention, there is no need to spend more time on the subject of Kitona.

The significance of 11 September 1998

54. The DRC, then, has failed to support her original claim that Ugandan troops invaded the Congo on or immediately after 2 August 1998, or her new claim, introduced in these oral proceedings, that Ugandan troops invaded the Congo on 7 August 1998. The evidence shows that the watershed date in this case was not 2 August 1998, or 7 August 1998, but 11 September 1998. That is the date on which Uganda's High Command decided, for reasons duly recorded in a confidential internal memorandum that Uganda declassified and presented to this Court, to deploy thousands of new troops to the DRC, for the purpose of subduing the Ugandan rebels and the combined military forces led by the Sudan and Chad that were committing and supporting armed attacks against Uganda from Congolese territory. I discussed this document, its meaning and its implications, at some length on 15 April, and I will not repeat myself here. About this important document, I will say only that Professor Corten's attempt, last Friday, to construe the language in a way that would support the DRC's claim that Ugandan troops invaded the Congo before 11 September is illogical and unsustainable. Professor Corten focuses on the use of the word "maintain" — as in, quoting from the document, "the High Command sitting in Kampala this 11th day of September, 1998 resolves to maintain forces of the UPDF in the DRC in order to secure Uganda's legitimate security interests . . ." — and he says: "Aha! Now I've got them.

Maintain means to keep them there, so the Ugandan forces referred to by this memorandum must have already been there as of 11 September."

55. There are several flaws in this reasoning, all of them fatal to Professor Corten's argument. In the first place, in English, "maintain" does not have the same meeting as "retain". "Maintain" can mean to keep someone or something in place, but it can also mean to put someone or something in place and support them while they are there. In any event, it is silly to quibble about word choice. The document was not written by international lawyers, and it was not intended for publication. It was intended to record what the High Command considered a momentous decision, which it was. In any case, even in the event of some ambiguity in the wording, the meaning of the document is fully demonstrated by the subsequent conduct of those involved in its creation. The evidence given to the Porter Commission, for example, which I discussed on 15 April, showed that, on 12 September 1998, one day after the decision taken on 11 September, orders were given to Ugandan forces, for the first time, to advance westward from their existing positions in the border areas of eastern Congo, and engage with Sudanese and Chadian forces then located at Isiro. In the days and weeks that followed, thousands of fresh Ugandan troops were sent into the DRC, eventually bringing the total number deployed near to 10,000. The movement of the Ugandan forces from their four locations in eastern Congo — Beni, Bunia, Watsa and Kisangani airport — is shown on the Operation "Safe Haven" document that the DRC brought to the Court's attention last Friday. It shows no movement of any kind between 1 September, when a contingent of UPDF arrived at Kisangani airport, and 17 September, six days after the 11 September decision. In fact, Uganda introduced no new troops into the DRC during this period, and the DRC has produced no evidence to the contrary. The lack of military activity before 11 September, compared to the heavy volume of activity thereafter, demonstrates that the watershed date in this case is 11 September 1998, because that is the date on which Uganda decided to introduce significant numbers of new troops into the Congo and, for the first time, to deploy them beyond the immediate border area.

56. The reasons Uganda took this momentous decision are set forth in the 11 September memorandum itself. In our previous speeches to the Court, both Mr. Brownlie and I have fully identified and discussed those reasons, and described the circumstances that led Uganda to take this

action. Our remarks on this subject can be found at CR 2005/6, pages 38 and 39, paragraphs 60 and 61, and CR 2005/7, pages 14 and 15, paragraphs 18 and 19. As Mr. Brownlie explained on 18 April, and as he will reaffirm today when he follows me to the podium, Uganda's actions on and subsequent to 11 September 1998 were a response to armed attacks from Congolese territory carried out by Ugandan rebels fully supported and directed by the Sudan, which already had commenced her own direct military operations against Uganda, in collaboration with the Government of the DRC. There is no evidence of any other motive on the part of President Museveni and the High Command. There is, accordingly, no merit whatsoever to Professor Philippe Sands's suggestion on Monday that "access to gold, diamonds and natural resources was at the heart of the conflict". In fact, the Porter Commission, for whose independence, accuracy and reliability Professor Sands fully vouches, totally rejected the idea that President Museveni or the Ugandan Government sent the UPDF into the Congo for economic or commercial reasons. There is simply no basis for, and no evidence to support, such a slanderous claim against Uganda's senior governmental leaders.

Concluding remarks

57. Mr. President, distinguished Members of the Court, when I spoke to the Court on 15 April, as the first of Uganda's speakers, I suggested that this is a case in which there are no angels and no demons, and where both Parties are victims. I believe the evidence that has been placed before the Court, both in the written and oral proceedings, and on behalf of both Parties, demonstrates what I said to be true. The DRC was a victim. It was a victim of invasion by foreign forces, the forces of Rwanda, which very nearly succeeded in capturing Kinshasa and overthrowing the DRC Government. Uganda, too was a victim. It was a victim of armed aggression by a foreign power, the Sudan. Unfortunately, the two States guilty of invasion and armed aggression could not be made parties to these proceedings. Ironically and sadly, only the two victim States are here before you, left to fight it out between themselves. Two poor countries that have far more urgent uses for the precious resources they are forced to spend in litigation — uses such as schools, hospitals, fighting the AIDS pandemic, and economic development. Uganda acknowledges that the Government of the DRC had every right to defend itself and its territory against the invasion by

Rwanda, including the right to seek military assistance from third States. Were it not for obtaining that assistance, especially from Zimbabwe and Angola, the DRC Government very likely would have succumbed to the Rwandan army. Unfortunately, to save itself, one of the foreign Powers to which the DRC turned for military support in its hour of need was the Sudan. The Sudan was only too willing to provide its support, for a price. And that price was the freedom to deploy her own forces to eastern Congo and escalate the armed attacks that its Ugandan rebel proxies were carrying out against Uganda, as well as to attack Uganda directly from strategically located airfields in eastern Congo. Uganda had no reasonable alternative but to commit her military forces to the DRC to defeat the rebel groups and their Sudanese masters. These are the facts. This is what, at the end of the day, the proof shows. In these circumstances, Uganda most respectfully submits, there is not an adequate basis in fact or in law to sustain the DRC's claim that Uganda has committed armed aggression against her.

58. Mr. President, distinguished Members of the Court, I am reminded of what my very good friend Professor Sands said at the outset of the proceedings when he quoted former Judge Sir Robert Jennings as giving the following advice: keep the facts simple. In all honesty, I do not think either side has done that in this case. But I think they can both be excused, because the facts in this case are far from simple. Indeed, they are extremely complex. It will not be an easy task for the Court to sort them all out. I hope my effort to elucidate these facts, which commenced on 15 April and concludes here now, will prove to be of some benefit to the Court, and lighten its burden in this regard.

59. Mr. President, distinguished Members of the Court, this concludes my presentation on the evidence bearing on Uganda's claim of self-defence. It has been an honour, once again, to appear before you and I thank you for your courteous attention. I should now like to ask you, Mr. President, if you would see fit to call my distinguished colleague, Ian Brownlie, as Uganda's next speaker or, if you deem it appropriate, to select this moment as an appropriate time for the morning break.

The PRESIDENT: Thank you, Mr. Reichler. It is time to have a break of ten minutes, after which I shall give the floor to Professor Brownlie.

The Court adjourned from 11.15 a.m. to 11.30 a.m.

The PRESIDENT: Please be seated. Professor Brownlie, you have the floor.

Mr. BROWNLIE: Thank you, Mr. President.

SELF-DEFENCE

Mr. President, distinguished Members of the Court, in my first second round speech I shall respond to the Congolese presentations bearing upon self-defence. And in doing so, I shall refer to certain questions of evidence and the issue of belligerent occupation.

First, there is the question of evidence. The representatives of the Congo have repeatedly alleged that Uganda has been at fault in her handling of evidence. Uganda sees the matter differently. International justice is administered within a rule of law framework and this is the International Court of Justice, after all. It follows that the principles of evidence apply and should be applied with appropriate rigour and not flexibly, as suggested by our distinguished opponents.

At the second round, the position on questions of evidence has not changed very much. Professor Klein continues to assert that there is no evidence of direct participation in armed attacks by the central Government. This is not the case and my colleague, Mr. Reichler, has pointed that out very effectively this morning.

In a different context, that of alleged human rights violations, Maître Kalala has criticized Uganda's response to the dysfunctional presentation of the case on human rights by our distinguished opponents. But, Mr. President, in doing so he merely perambulated around the problem without solving it. Indeed, in my opinion, in the result, the confusion has been both widened and deepened. Moreover, the specific examples of error and wrong identification of armed forces provided in my first round speech were not challenged. On these matters the transcript speaks for itself.

The Congolese delegation continues to adopt an approach to the principles of evidence which is baffling. Maître Kalala argues that because official documents are "unilaterally" produced they should be inadmissible. But such documents, of course, are by their very nature unilaterally produced. They are evidence, of course, as recognized in case after case in front of this Court.

The Congolese approach to evidence has another unusual aspect. Apparently, evidence must consist of documents or of written instruments. What basis does that have in the law? None whatsoever. No legal authority exists which would confine the admissibility of evidence in such a way. The conduct of States is well-recognized as a form of evidence as, for example, in the *Temple* case (Merits) (*I.C.J. Reports 1962*, p. 6). Moreover, in the *Corfu Channel* case on the Merits in 1949, the Court accepted evidence of what it called the "attitude" of Albania (*I.C.J. Reports 1949*, p. 4).

The true basis of the Congolese approach is the desire to exclude unfavourable sources of evidence, and especially evidence of the meetings which Congolese leaders had at critical junctures with the leaders of the armed groups based in eastern Congo, and also the key meetings between Congolese and Sudanese officials. The evidence of these activities on the part of the Congo necessarily takes the form of intelligence sources, to some extent. Governments are permitted to speak of their own knowledge. In the *Corfu Channel* case on the Merits, the United Kingdom was allowed to refer to the existence of an Admiralty Order relating to the purpose of the passage of the British warships. The Court also admitted various forms of evidence concerning the conduct of the two Governments, and this without undue difficulty.

Similarly, in the *Platforms* case, the Court showed no sign of rejecting evidence simply on the basis that the various forms of evidence were produced "unilaterally" by the respective Governments.

And one further point. The representatives of the Congo would treat as inadmissible even protest notes and official reports produced, as would be normal, *after* incidents such as the sacking of an embassy. Such documents cannot be set aside on the basis of a presumption of nullity or inadmissibility. The rule of law principle is surely the presumption of regularity or validity.

Before I leave the subject of evidence, I must, on behalf of the delegation of Uganda, refer to the allegation by counsel of the Congo that evidence was "fabricated" by the representatives of

Uganda. This allegation, and it was repeated several times, is unacceptable. No evidence of fabrication was given. It would be unfortunate indeed, if the less experienced counsel sitting in court were to think that such behaviour were normal. I have not heard such an allegation in this Court before.

After these preliminary matters, I can move on to Professor Klein's speech on self-defence in the second round (CR 2005/12, pp. 23-42). It is an unfortunate circumstance that Professor Klein chose to ignore or, which is the same thing, not to take seriously, the central elements of my arguments on self-defence. His response was to rely upon generalities about preventive action.

His position on the question of armed attacks was, in the first, place, to assert that there was no evidence of direct participation by the central Government of the Congo in armed attacks against Uganda. This question has been addressed this morning, effectively and at great length, by Mr. Reichler. There is evidence of such participation and, indeed, it is referred to in the Congo's own pleadings.

If I can return to the law. Professor Klein and his colleagues studiously avoid a careful or, indeed, *any* examination of the concept of an armed attack. And, as I pointed out in the first round, the Congo is shy of the significant views of Professor Dinstein.

Professor Klein has made some progress in this respect and Professor Dinstein is now cited in a footnote, in the transcript at page 26 (CR 2005/12). The text is not, however, quoted. Dinstein deals expressly with the problem of armed bands as follows — and there is a rubric: *"Support of armed bands and terrorists"*.

> "In the *Nicaragua* case, the International Court of Justice held that 'it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border', but also the despatch of armed bands or 'irregulars' into the territory of another State. The Court quoted Article 3 *(g)* of the General Assembly's Definition of Aggression (see *supra*, Chap. 5, B), which it took 'to reflect customary international law'."

And Dinstein continues:

> "It may be added that, under the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, adopted unanimously by the General Assembly in 1970, 'every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands . . . for incursion into the territory of another State'. The Draft Code of Offences against the Peace and Security of Mankind, formulated by the International Law Commission in 1954, listed among

these offences the organization, or the encouragement of the organization, by the authorities of a State of armed bands for incursions into the territory of another State, direct support for such incursions, and even the toleration of the use of the local territory as a base of operations by armed bands against another State.

Since assaults by irregular troops, armed bands or terrorists are typically conducted by small groups, employing hit-and-run pinprick tactics, the question whether they are of 'sufficient gravity' and reach the *de minimis* threshold of an armed attack — or the consensus Definition of Aggression — is clearly apposite (see *supra* (ii)). This is not to say that every single incident, considered independently, has to meet the standard of sufficient gravity. A persuasive argument can be made that, should a distinctive pattern of behaviour emerge, a series of pinprick assaults might be weighed in its totality and count as an armed attack (see *infra*, Chap. 8, A *(a)*,(ii)).

The Judgment in the Nicaragua case pronounced that 'while the concept of an armed attack includes the despatch by one State of armed bands into the territory of another State, the supply of arms and other support to such bands cannot be equated with armed attack'. The Court did 'not believe' that 'assistance to rebels in the form of the provision of weapons or logistical or other support' rates as an armed attack. These are sweeping statements that ought to be narrowed down. In his dissenting opinion, Judge Sir Robert Jennings expressed the view that, whereas 'the mere provision of arms cannot be said to amount to an armed attack', it may qualify as such when coupled with 'logistical or other support'. In another dissent, Judge Schwebel stressed the words 'substantial involvement therein' (appearing in Article 3 *(g)* of the Definition of Aggression), which are incompatible with the language used by the majority."

In the third edition of Dinstein's monograph, published in 2001, the text continues in the following form:

"When terrorists are sponsored by Arcadia against Utopia, they may be deemed '*de facto* organs' of Arcadia. [T]he imputability to a State of a terrorist act is unquestionable if evidence is provided that the author of such act was a State organ acting in that capacity. Arms shipments alone may not be equivalent to an armed attack. But an armed attack is not extenuated by the subterfuge of indirect aggression or by reliance on a surrogate. There is no real difference between the activation of a country's regular armed forces and a military operation carried out at one remove, pulling the strings of a terrorist organization (not formally associated with the government apparatus). Not one iota is diminished from the full implications of international responsibility, if 'it is established' that the terrorists were 'in fact acting on behalf of that State'."

And the last paragraph is as follows:

"In 1999, the Appeals Chamber of the International Criminal Court for the Former Yugoslavia (ICTY) pronounced, in the *Tadic* case, that acts performed by members of a military or paramilitary group organized by a State may be considered 'acts of *de facto* State organs regardless of any specific instruction by the controlling State concerning the commission of each of those acts'. The ICTY focused on the subordination of the group to overall control by the State: the State does not have to issue specific instructions for the direction of every individual operation, nor does it have to select concrete targets. Terrorists can thus act quite autonomously and still remain *de facto* organs of the controlling State."

And so, Mr. President, contrary to the complaint by Professor Klein, it can be seen that Professor Dinstein did take account of the *Tadic* case — when he was able to —, and it made no difference to his basic reasoning. It is this basic reasoning which Professor Klein has ignored, and if I could test the patience of the Court by emphasizing the key passage in Dinstein which the other side is very shy of. Remember, he said:

> "Since assaults by irregular troops, armed bands or terrorists are typically conducted by small groups, employing hit-and-run pinprick tactics, the question whether they are of 'sufficient gravity' and reach the *de minimis* threshold of an armed attack — or the consensus Definition of Aggression — is clearly apposite (see *supra* (ii)). This is not to say that every single incident, considered independently, has to meet the standard of sufficient gravity. A persuasive argument can be made that, should a distinctive pattern of behaviour emerge, a series of pinprick assaults might be weighed in its totality and count as an armed attack."

This passage appears in the Counter-Memorial dated April 2001 and four years later the silent response of the Congo continues. This passage remains unchanged from Dinstein's first edition of 1988.

There remains the question of toleration of the presence of armed bands which are known to carry out operations against the territory of a neighbouring State.

The position of the Uganda is clear, and Professor Klein has signally failed to deal with the argument made on behalf of Uganda in the first round. With your indulgence, Mr. President, could I remind the Court Uganda argued as follows. I said:

> "I come now to one of the most serious flaws in Professor Corten's argument. On the one hand, he asserts that there were no 'armed attacks' by the Congo against Uganda (CR 2005/3, paras. 10-13). These assertions are to be understood as statements that the attacks on Uganda launched by armed bands based in the Congo were not under the control of the Central Government of the Congo. At the same time, the Congo admits the presence on its territory of long-established groups of militia (see the Rejoinder of Uganda, paras. 65-67).
>
> The missing link is provided by the principles of State responsibility and the duty to prevent the use of national territory by armed bands launching armed actions against neighbouring States. My opponent fails to recognize that, in accordance with the principles of State responsibility, the Congo is responsible for the armed attacks of the various rebel groups. This responsibility arises in the conditions set forth in the Definition of Aggression of 1974 in which paragraph *(g)* calls for the direct involvement of a State. But . . . it also exists in accordance with the principles of general international law in conditions where there is simply a failure to control the activities of armed bands. In her Reply (para. 3.131) the Congo seeks to argue that the responsibility of the territorial sovereign is limited by the provisions of Article 8 of the Articles on State Responsibility adopted by the International Law Commission on a second reading in 2001. This Article has been quoted already, and it refers to conduct

> directed or controlled by a State. According to the Congo this provision applies a stringent test to the attribution to a State of the acts of private persons." (CR 2005/7, pp. 29-30, paras. 76-77.)

I then dealt with that point and continued.

> "Where does this reasoning lead? It inevitably leads back to Article 51 of the Charter, which reserves the right of self-defence in terms of customary law 'if an armed attack occurs'.
>
> As in the case of the other aspects of the concept of an armed attack, armed attacks by armed bands whose existence is tolerated by the territorial sovereign generate legal responsibility and therefore constitute armed attacks for the purpose of Article 51. And thus, there is a separate, a super-added standard of responsibility, according to which a failure to control the activities of armed bands, creates a susceptibility to action in self-defence by neighbouring States." (*Ibid*., p. 30, paras. 79-80.)

Mr. President, Professor Klein made no attempt to respond to these points.

There is a reasonably full literature concerning armed bands going back to the period between the two world wars. A good number of countries adopted definitions of aggression according to which there was responsibility for failing to control armed bands carrying out activities on the territory of neighbouring States. The practice is described in an article published by the speaker in the *International and Comparative Law Quarterly* (October 1958, pp. 712-735). The subject appears in other sources, including Brownlie, *International Law and the Use of Force by States* (1963, pp. 386-387, and in other passages). Whilst the article of 1958 appears in a footnote on the transcript in the first round, the delegation of the Congo has shown little interest in the previous practice.

There is a further and important point which Professor Klein has ignored. In the first round Uganda explained the connection between the concept of armed attack in the Charter of the United Nations and the principle of responsibility for toleration. The point was expressed as follows on behalf of Uganda;

> "If the concept of necessity of self-defence is to be applied on the basis of effectiveness and common sense, it is . . . the view of the *victim* State and its nationals which must prevail. And that view must be based upon an objective standard related to the *effects* of the armed attacks. The consequence is that, for the victim State, the results remain the same, and the *necessity* remains the same, whether the State from which the armed attacks emanate *is* directly involved or is only responsible for harbouring or tolerating the armed bands responsible." (CR 2005/7, p. 34, para. 92.)

This received no response in the second round.

There are a few further points concerning Professor Klein's speech in the second round. In the first place, he contends that in my response in the first round I did not respond to the Congo's arguments relating to necessity and proportionality. With respect, I did deal with these questions thoroughly in CR 2005/7 (pp. 28-32). It is true to say that the position of Uganda is that necessity is to be regarded as an *inherent* part of the concept of self-defence and not as a separate particle, but that is not a question of ignoring necessity, as I endeavoured to explain.

In his second round speech Professor Klein argues that the requirement of necessity was not satisfied because, it is alleged, Uganda made no complaint to the Security Council.

This issue has also been examined carefully in my first round speech and the Court is respectfully referred to the relevant passages in the transcript (CR 2005/7, paras. 90 and 91).

Mr. President, I can now summarize the position of Uganda on the question of self-defence.

First, in the case in which the territorial sovereign tolerates the activities of armed bands and the armed attacks which they launch against a neighbouring State, the failure to control renders the State harbouring such armed bands susceptible to action in accordance with Article 51 by the victim State. This consequence is the result of the application of well-recognized principles of State responsibility and the existence of direction and control by the territorial sovereign is *not* necessary.

Secondly, there is responsibility for the armed attacks, and a liability to face defensive action, in those cases in which there is direct involvement in accordance with the General Assembly's definition of aggression. Such direct involvement is denied by the Congo.

These propositions of law are not offered on the basis that one formula fits all cases. The chronology of the case is very important and the situation changed in parallel with the changes in the political alliances of the central Government of the Congo.

Mr. President, what is absolutely clear is that the applicant State does not deny the existence of the facts to which the first proposition — the proposition based upon toleration of armed bands — applies. In relation to the second proposition — concerning direct involvement in the activities of armed bands — Mr. Reichler has this morning presented the evidence of such involvement by the Central Government of the Congo and it is also available in the written pleadings.

Mr. President, I would thank the Court for its patience and courtesy and ask you to give the podium to my colleague, Mr. Reichler.

The PRESIDENT: Thank you, Professor Brownlie. I now give the floor to Mr. Reichler.

Mr. REICHLER:

The DRC's consent to the presence of Ugandan military forces in Congolese territory

1. Mr. President, distinguished Members of the Court, now that Mr. Brownlie has finished Uganda's treatment of the issue of self-defence, I will address the issue of the DRC's consent to the presence of Ugandan troops in Congolese territory.

The Lusaka Agreement is a manifestation of consent

2. Mr. President, distinguished Members of the Court, there are two words that strike fear in the hearts of my distinguished colleagues on the other side of the podium: Lusaka Agreement. Whenever these words are mentioned, the DRC's counsel start running for cover. The reason is clear. The Lusaka Agreement constitutes formal consent for the presence of Ugandan military forces in the DRC from 10 July 1999 forward. After 10 July 1999, the DRC has no valid argument that the physical presence of Ugandan forces in the Congo was unlawful.

3. Despite the paramount importance of the Lusaka Agreement to this case, or perhaps because of it, counsel for the DRC have done everything possible to avoid dealing with it. Thus far, they have addressed the Court for 19½ hours in these oral proceedings, of which they devoted a total of 15 minutes to the Lusaka Agreement. Professor Corten was the first DRC spokesman on this subject. In five minutes, he dismissed the Lusaka Agreement as a mere ceasefire agreement, provisional in nature and binding on no one. On Monday, the DRC not only abandoned this argument; it abandoned poor Professor Corten. The unhappy task of dealing with the Lusaka Agreement was reassigned to Professor Klein, who devoted ten minutes to it. But his argument fares no better than that of Professor Corten.

4. The DRC and her advocates continue to argue that the Lusaka Agreement did not constitute authorization for Ugandan troops to remain on DRC territory after 10 July 1999. Indeed,

my very able opponent, Professor Klein, went so far as to argue that the Lusaka Agreement did not authorize Uganda's presence even for the 180-day period initially provided for in Annex "B" (which was subsequently extended with the agreement of all parties, including the DRC). With respect, Professor Klein's reading of the Agreement could not be more mistaken.

5. Uganda's chain of legal reasoning is, I submit, unbreakable. In fact, as I will show, it is confirmed by the DRC's own logic. I begin from first principles. As I observed in my first speech on the subject of consent, on 19 April, the Court expressly stated, in its Order on Interim Measures, that the Lusaka Agreement is "an international agreement binding on the Parties" (Order on Interim Measures, para. 37). Therefore, Uganda (or any of the other parties for that matter) could not validate the terms of the Agreement without running afoul of her treaty obligations. That is step one.

6. Step two consists of the terms of the Agreement itself and the requirements they impose. Paragraph 11.4 of Annex A (projected on the screen behind me) states that "All forces shall remain" — "shall remain" — in place "until: in the case of foreign forces, withdrawal has started in accordance with the JMC [Joint Military Commission]/OAU, United Nations withdrawal schedule." This language is unmistakable. "Shall", "remain", "until". "Shall", of course, is imperative, unequivocal. It leaves no margin for interpretation. "Remain" needs no elaboration. "Until" in this context signifies that foreign forces were not to withdraw prior to the realization of the condition precedent identified in paragraph 11.4 — the adoption of "the JMC/OAU, United Nations withdrawal schedule." As I demonstrated on 19 April, the Lusaka Agreement expressly provided that the "JMC/OAU, United Nations withdrawal schedule" was not to commence — withdrawal was not to commence — until *after* the designated armed groups that had been attacking Uganda and other neighbouring States were disarmed, demobilized, resettled and reintegrated (CR 2005/8, pp. 23-25, paras. 15-20). This is set forth clearly in Annex "B", the list and sequential order of the so-called "Major Ceasefire Events."

7. Step three in this chain is simply the conclusion to be drawn: Uganda could not withdraw her troops in any manner inconsistent with the withdrawal schedule adopted by the JMC, OAU and United Nations, without violating her international treaty obligations. Consequently, the only

logical way to read the Lusaka Agreement is as authorization, indeed as an express mandate, for Uganda's troops to remain in the DRC until the withdrawal schedule called for their withdrawal.

8. Now, my distinguished opponents are fond of citing the Luanda Agreement of September 2002 as a counter-example to Lusaka. Both Professors Corten and Klein have referred to the Luanda Agreement as an archetypical manifestation of consent. The operative provisions of the Lusaka Agreement, they say, are different. I beg to differ. In fact, what is striking is how similar the relevant provisions of the two agreements are.

9. The language of Article 1, paragraph 4, of the Luanda Agreement is projected on the screen behind me, and is also in the judges' folder at tab 8. It reads: "The Parties agree that the Ugandan troops *shall remain* on the slopes of Mt. Ruwenzori *until* the parties put in place mechanisms guaranteeing Uganda's security . . ."

10. Uganda, of course, agrees that this is indeed an unambiguous manifestation of consent. And since it is, so too is the Lusaka Agreement. The linguistic formulation in both treaties is the same: Ugandan troops "shall remain" — in both treaties — in location "until" — in both treaties — the occurrence of a specific condition precedent. In the case of Luanda, that condition precedent was the creation of a mechanism guaranteeing Uganda's security, and, in the case of Lusaka, the condition precedent was the formulation by the JMC, OAU and United Nations of a withdrawal plan, following the disarmament, demobilization, resettlement and reintegration of the armed groups that had attacked Uganda and other States from Congolese territory.

11. Since the linguistic formulation is the same, the legal consequence also must be the same: the Lusaka Agreement is a manifestation of the Congo's consent to the presence of Uganda's troops in the DRC, just as the Luanda Agreement is a manifestation of the DRC's consent to their presence. The only material differences between these two treaties in this regard are in the different conditions precedent to the withdrawal of the Ugandan forces, which I have just described, and in the locations where the Ugandan troops were authorized to remain pending the fulfilment of these conditions precedent. In the Luanda Agreement, the UPDF was authorized to remain on the western slopes of the Ruwenzori Mountains; in the Lusaka Agreement, they were authorized to remain in all of their existing locations in the DRC.

12. As I explained in my speech last Tuesday, both the Secretary-General and the Security Council confirmed Uganda's reading of the Lusaka Agreement. When in April 2001, Uganda announced that it was going to unilaterally withdraw all her troops from the DRC, the Secretary-General implored her not to do so in writing. Thus, from the perspective of the United Nations, Uganda was not only authorized to remain in the Congo, but required to do so, at least pending the implementation of the withdrawal plan called for by the Agreement. I listened carefully to my learned opponents' first and second round presentations on the subject of consent. Neither Professor Corten nor Professor Klein even adverted to the Secretary-General's letter, much less confronted it squarely. It was only when Maître Kalala spoke Monday afternoon in connection with the DRC's human rights claims that the letter was addressed. Maître Kalala suggested that rather than a request to stay in the Congo, the Secretary-General's letter was actually the opposite — a request to leave. Mr. President, distinguished Members of the Court, this interpretation of the letter makes no sense — especially in light of the DRC's own written pleadings. At paragraph 2.90 of the Reply, the DRC exposes the fallacy of this argument by acknowledging the circumstances giving rise to the Secretary-General's letter. The DRC's Reply states: "On 3 May 2001 [that is, the day *before* the Secretary-General's letter], a Note Verbale from the Permanent Mission of Uganda to the United Nations forwarded yet another statement by President Museveni that Ugandan forces would shortly be withdrawn from the DRC." (Para. 2.90.) And what was the Secretary-General's response? Far from greeting Uganda's announcement with satisfaction, as one would expect if the Lusaka Agreement called for the withdrawal of all Ugandan troops at that time, his response was a letter to President Museveni asking Uganda to "stay fully engaged" in the Lusaka peace process, and to withdraw Ugandan forces only in accordance with that process, that is, according to the withdrawal schedule to be prepared by the JMC, OAU and United Nations. In response to the Secretary-General's letter, President Museveni rescinded his decision to withdraw Uganda's forces unilaterally and immediately from the Congo. The Secretary-General manifested not the slightest objection. There is no mistaking the meaning of his letter.

The Lusaka Agreement is not a mere ceasefire agreement

13. On Monday, Professor Klein revised the argument that Professor Corten first articulated in his opening round speech that the Lusaka Agreement was a mere ceasefire agreement that cannot have conferred Congo's consent to the presence of Ugandan military forces. Whereas Professor Corten argued that the whole of Lusaka was just a ceasefire agreement, Professor Klein settled for half a loaf. He fell back to a new defensive position, to the effect that, well, maybe Lusaka was more than a ceasefire agreement with respect to the *internal dimension* of the Congolese conflict, but it was still just a ceasefire agreement with respect to the *external dimension* of the conflict. Now, it is worth pointing out that Professor Corten's argument, that all of Lusaka was a mere ceasefire agreement, was presented for the first time at these oral proceedings. The DRC never made such an argument in her written pleadings. Professor Klein's argument, that only half of Lusaka was a ceasefire agreement, was invented just for the second round of these proceedings; it, too, was never advanced earlier. One can only wonder what the DRC's position would be, and which of her counsel would deliver it, if these proceedings were extending to next week. Fortunately, they end on Friday.

14. The fatal error in Professor Klein's argument begins with his presumption, supported nowhere in the text of the treaty, that the internal and external dimensions of the conflict can be severed from one another. In effect, his argument presumes that there are two Lusaka agreements, one governing each aspect of the conflict. But as I discussed on 19 April, the parties to the Agreement agreed that the two conflicts were interrelated. Indeed, the Preamble to the Agreement expressly recognizes this fact when it states — as projected behind me — that the parties recognize "that the conflict has both internal and external dimensions that require intra-Congolese political negotiations and commitment of the Parties to the implementation of this Agreement to resolve".

15. Thus, the parties recognized that the internal and external dimensions of the conflict were inextricably interlinked, and that the resolution of the external dimension, involving the DRC, Uganda and other neighbouring States, was dependent on the prior resolution of the internal dimension. They provided that the external dimension would be resolved after first resolving the internal dimension, through the holding first of "intra-Congolese political negotiations" leading to a "new political dispensation" in the Congo, that is, to a new national government composed of all of

the Congolese parties to the agreement, plus the political *forces vives* inside the Congo. This is reflected, among other places in the Agreement, in the implementation calendar included as Annex "B" to the Agreement, in which the successful conclusion of the intra-Congolese dialogue and the establishment of a new political dispensation in the Congo were scheduled to occur *before* the deployment of United Nations peacekeepers, the disarmament of armed groups and the orderly withdrawal of foreign troops. This is not only what the Lusaka Agreement says — and it is what it says — but it is also just plain common sense. As long as the DRC remained in turmoil, with civil war raging across the country, centralized authority gone and armed bands running amok, especially in the remote eastern border regions, there was no way the borders of neighbouring States, including Uganda, could be secure. Thus, achieving a peaceful settlement of the internal conflict was a *sine qua non* for resolving the external conflict, the explicit objective of which was to provide secure borders for the DRC and her neighbours.

16. Contrary to Professor Klein's second-round thesis, it is simply not possible to divorce the internal from the external elements. And since the Lusaka Agreement is now admittedly not a mere ceasefire agreement with respect to the internal dimension of the conflict, neither can it be with respect to the external dimension, with which it is inextricably bound.

17. Now, just supposing one could disentangle the two, as Professor Klein would like, his theory would still not work on any objective reading of the Agreement. Even with respect to the purely external aspects of the conflict, the Agreement provides for much more than a mere cessation of hostilities. Indeed, among the "Principles of the Agreement" set forth in Article III, are "the normalization of the situation along the international borders of the Democratic Republic of the Congo, including the control of the illicit trafficking of arms and the infiltration of armed groups" (para. 17); "the need to address the security concerns of the DRC and her neighbouring countries" (para. 21); and the need "for disarming militias and armed groups, including genocidal forces" (para. 22). These "principles" find fuller expression as binding commitments in Chapters 7, 8, 9 and 12 of Annex "A" to the Agreement.

18. Accordingly, there is no serious argument that the Lusaka Agreement, or any dimension of it, is just a ceasefire agreement. As the Court itself said in its Order on Interim Measures, the

Agreement addresses "methods for resolving the conflict in the region agreed at a multilateral level" (para. 42).

19. For many of these same reasons, it is untenable to argue, as Professor Klein did, that the "fundamental purpose" of the Lusaka Agreement was to secure the withdrawal of foreign troops. As I have stated, Article III of the Agreement sets forth the "Principles" that were agreed to. There are 21 principles. To be sure, one of the 21 principles is the withdrawal of foreign forces. But this is treated in the Agreement as a consequence of the achievement of an even more fundamental objective: the resolution of the external dimension of the Congolese crisis by bringing peace and security to the borders of the DRC, Uganda and other neighbouring States. It is only after border peace and security are achieved — through a peaceful political settlement of the Congolese civil war, and the disarmament, demobilization and removal of the armed groups using Congolese territory to launch attacks against Uganda and other States — that the parties to the Agreement planned for the withdrawal of foreign forces to commence. Thus, the withdrawal schedule to be prepared by the United Nations, the OAU and the JMC was not to begin until 16 of the other "Major Ceasefire Events", listed in Annex "B" to the Agreement, had been completed, including the disarmament and demobilization of the armed groups.

The Security Council resolutions invoked by the Congo support Uganda's reading of the Lusaka Agreement

20. The DRC has sometimes invoked one or the other of two Security Council resolutions, which supposedly undermine Uganda's case concerning the meaning of the Lusaka Agreement. Their most frequently cited resolution is resolution 1234 of April 1999. But that resolution provides little guidance in interpreting the Lusaka Agreement, which did not exist at the time the resolution was adopted, and was not concluded until 10 July 1999, three months afterwards. However, the resolution foreshadows the Lusaka Agreement in "condemn[ing] the continuing activity of and support to all armed groups, including the ex-Rwandese Armed Forces, Interahamwe, and all others in the [DRC]" and in "reaffirm[ing] the obligation of all States to respect the territorial integrity, political independence and national sovereignty of the [DRC] and all other States in the region . . ." I was reading from paragraphs 1 and 7 of resolution 1234.

21. The other Security Council resolution cited by the DRC is resolution 1304 of 16 June 2000, an excerpt of which is included in the judges' folder submitted by the DRC. But the DRC would do well to supply the full text of the resolution. In paragraph 4 *(a)* of the resolution, the Security Council calls on Uganda and Rwanda to "withdraw all their forces from the territory of the Democratic Republic of the Congo without further delay, *in conformity with the timetable of the [Lusaka] Ceasefire Agreement and the 8 April 2000 Kampala disengagement plan*".

22. This language, which calls for withdrawal only *in conformity with* the Lusaka Agreement and Kampala disengagement plan, can be contrasted with the language of paragraph 3, which precedes paragraph 4 of the resolution, and which unconditionally calls for Rwanda, Uganda and all other forces to "immediately and completely withdraw from Kisangani", which Uganda promptly did. Thus, contrary to the DRC's arguments, resolution 1304 actually recognized that the withdrawal of Ugandan forces from the DRC as a whole — as distinguished from the city of Kisangani — was only to be done in accordance with the multilateral agreements reached at Lusaka and Kampala.

23. It should also be highlighted that paragraph 4 *(b)* of the resolution demands "that each phase of withdrawal completed by Ugandan and Rwandan forces be reciprocated by the other parties in conformity with the same timetable" — that is, the withdrawal completed by Ugandan and Rwandan forces must be reciprocated by the other parties in conformity with the same timetable. Thus, the Security Council recognized that a fundamental tenet of Lusaka was the *reciprocal* withdrawal of *all* forces, foreign and domestic, invited and uninvited, just as Uganda has said. I refer the Court as well to paragraph 4 *(c)* of the resolution.

24. Now, before leaving resolution 1304, it is worth quoting some additional paragraphs that the DRC left out. In the recitals of the resolution, the Security Council recalls "its strong support for the Lusaka Ceasefire Agreement". In paragraph 10, the Security Council "[d]emands that all parties cease all forms of assistance and cooperation with the armed groups referred to in Annex A, Chapter 9.1 of the Ceasefire Agreement"; which include, of course, all seven anti-Uganda armed bands about which the Court has now heard so much. Thus, resolution 1304, far from undermining Uganda's reading of the Lusaka Agreement, fully supports it.

25. It is instructive in this regard to recall the Court's Order on interim measures of 1 July 2000. Following the adoption of Security Council resolution 1304 on 16 June 2000, the DRC came before this Court on interim measures, and urged the Court, based on resolution 1304, to order Uganda immediately to withdraw all her forces from all parts of the Congo. This was the principal measure the DRC asked the Court to adopt. It is worth recalling that in her presentation to the Court at that time, the DRC made no mention whatsoever — uttered not a single word — about the Lusaka Agreement. Uganda, for her part, provided the Court with a detailed textual analysis of the Agreement, much like the one I was privileged to provide on 19 April, and which I have supplemented today. The Court, as we have said, concluded that the Lusaka Agreement was "a binding international agreement". It did *not* grant the DRC's request; it did *not* order Uganda to withdraw her forces from the Congo.

The Court's Order on Uganda's counter-claims

26. In his opening round speech on the issue of consent, Professor Corten cited the Court's November 2001 *procedural* ruling on Uganda's counter-claims and suggested that by holding Uganda's third counter-claim, concerning Congo's violations of the Lusaka Agreement, inadmissible, the Court somehow precluded Uganda from invoking the Lusaka Agreement as part of its *substantive* defence to the DRC's claim of aggression. But that argument cannot stand. There is nothing in the Court's Order that suggests that the Lusaka Agreement is irrelevant to the DRC's claims or Uganda's defences. Rather, it holds merely that Uganda could not maintain her counter-claim against the DRC based on Congo's violations of the Lusaka Agreement because the particular delicts identified in that counter-claim did not arise from the same circumstances as the DRC's claim against Uganda. But obviously, this is not the same thing as holding that the Agreement is irrelevant to all facets of the case, or that it cannot be invoked by Uganda in defence as proof of the DRC's consent to the presence of Ugandan forces in the Congo after 10 July 1999.

The scope of Uganda's presence remained within the parameters of Lusaka

27. The DRC also argues that Uganda maintained an occupation of the whole of northern Congo because she "controlled" that area with just the few thousand men she had in the DRC. Mr. Brownlie has already dealt with some of the legal aspects of this question, so I will address it

only in so far as it relates to the requirements of the Lusaka Agreement. By its terms, the Lusaka Agreement made clear that local administrative authority was vested in the Congolese rebels, including the MLC and RCD, in the areas under their *de facto* control, and it legitimized the exercise of that authority, at least until the conclusion of the intra-Congolese political dialogue. For example, Article III, paragraph 18, provided: "In accordance with the terms of this Agreement and upon conclusion of the Inter-Congolese political negotiations, state administration shall be re-established throughout the national territory of the Democratic Republic of the Congo."

28. Thus, pending the "re-establishment" of "state administration" after the intra-Congolese dialogue, administrative authority was necessarily vested in the Congolese powers in place; that is, in the respective regions , the MLC and RCD.

29. Similarly, paragraph 6.2 of Annex "A" provided:

> "On the coming into force of this Agreement, there shall be a consultative mechanism among the Congolese parties [that is, the DRC government, the MLC and the RCD] which shall make it possible to carry out operations or actions throughout the national territory which are of general interest, more particularly in the fields of public health . . ., education . . ., migrations, movement of persons and goods."

30. Again, this paragraph makes clear that civil administrative authority was vested in the hands of the Congolese parties within their respective areas of control. This is also spelled out in the Kampala Disengagement Agreement of 8 April 2000, at paragraph 4:

> "The Parties [which included the MLC and the RCD Congolese rebel organizations as well as the DRC Government] shall provide a safe and secure environment for all persons in their respective jurisdictions *[in their respective jurisdictions]*, by maintaining civilian law enforcement agencies . . ."

31. Subsequently, in the Harare Disengagement Agreement of 6 December 2000, the same parties identified four separate disengagement areas. Area 1, the northernmost of the four, is the only one in which Ugandan troops were located. As set forth at pages 3 and 4 of the Agreement, area 1 was divided between "Forces of MLC and UPDF" on the one hand, and "of FAC — that is, the Congolese army — and their allies" on the other. The Agreement did not differentiate between MLC and UPDF as to number of troops or locations within area 1. In fact, as I pointed out previously, the MLC troops far outnumbered the UPDF forces, and covered the entire area; Ugandan troops were largely confined to the eastern border region and to several strategic locations, especially airports. The DRC appears to have accepted this on Monday.

32. Furthermore, following the Harare Disengagement Agreement, as we have shown, Uganda rapidly drew down her troop strength in the DRC so that by April 2001 there were no more than 3,000 Ugandan soldiers in the Congo, with the vast majority in the eastern border region. The DRC has not challenged these facts either.

33. Indeed, the DRC's arguments about a Ugandan "occupation" are undermined by her own written pleadings. For example, at paragraph 2.127 of the Reply, the DRC wrote: "In many cases, when Ugandan troops withdrew from an occupied locality or territory, they leave it under MLC control. This was the case, *inter alia*, with Buta and Gemena." Mr. Bemba's book, which the DRC's counsel identified as recommended reading for the Court, repeatedly emphasizes that local administration in eastern Congo was handled by the MLC and RCD, not Uganda (Rejoinder, Ann. 46, pp. 65, 66, 129 and 156).

34. The DRC has several times complained about the supposed hostile activities by the UPDF after the Lusaka Agreement took effect. She has not been forthcoming about the circumstances in which the alleged hostilities took place, however. In fact, the hostilities the Congo refers to were initiated by the FAC — the Congolese army — which, in contravention of the Lusaka and Kampala Disengagement Agreements, sought to retake ground previously won by the MLC. The MLC responded militarily to repel the FAC forces and to hold the positions assigned to it by these Agreements. Uganda does not deny that she provided some limited support. But, when Mr. Bemba sought to take advantage of this situation and extend the area under his control, Uganda restrained him as it had done on prior occasions (Rejoinder, Ann. 46, pp 31 and 81).

35. In her judges' folder, the DRC included various maps purporting to show the presence or military operations of Ugandan troops in the Congo. These maps were presented for the first time at these oral proceedings. As such, Uganda understands that they are not evidence, but merely graphical aids to the arguments of counsel. Even so, Uganda objects to their use in these proceedings because the representations on these maps, pertaining to the presence or activities of Ugandan forces, are not supported by the evidence in this case and they are frequently contradicted by the evidence. The maps to which Uganda objects are the ones located at the following tabs of the judges' folders submitted by the DRC: 2, 3, 16, 18, 24, 25 and 26.

36. By September 2002, when the Luanda Agreement was signed by Uganda and the DRC, Ugandan forces in the Congo were located only at Gbadolite, Beni, Ituri Province and the western slopes of the Ruwenzori Mountains, as set forth in that Agreement. And the Luanda Agreement addressed all of those troops. In particular, it called for the immediate withdrawal of Ugandan troops from Gbadolite and Beni, and the eventual withdrawal of Ugandan troops from Ituri, after the Ituri Pacification Commission forged an agreement to halt the inter-ethnic violence that was occurring there. Uganda fully complied with the terms of the Luanda Agreement, promptly pulling her forces out of Gbadolite and Beni and, in timely fashion, withdrawing all her remaining troops from Congo by 2 June 2003. The DRC has not contested these facts.

37. Mr. President, distinguished Members of the Court, the facts show that from 10 July 1999 through 2 June 2003, Uganda's military forces were present in the Congo with the consent of the DRC Government, as initially given in the Lusaka Agreement, and as extended and reconfirmed in the Kampala and Harare Disengagement Agreements and ultimately, the Luanda Agreement of September 2002. Uganda will respond in writing to the question put by Judge Elaraby, concerning the extensions the parties made to the timetable included in Annex "B" of the Lusaka Agreement, as well as to the questions put by Judge Vereshchetin and Judge Kooijmans.

The DRC's consent in August and September 1998

38. There remains one more topic to cover on the subject of consent, and that is the consent that covered Uganda's forces in the DRC during August and the early part of September 1998. I set forth Uganda's position on 19 April, and need not do so again. However, several of Professor Klein's statements on Monday demand a rebuttal. Before doing so, however, let me confirm what is a significant point of agreement between the Parties, as stated by Professor Klein: Ugandan troops were present on Congolese territory until August 1998 with the consent of the DRC Government.

39. What Congo persists in denying is that her consent prior to August 1998 was formalized in any fashion. According to what we have heard from the DRC's counsel at these oral hearings, the DRC's consent prior to that time was purely informal. We have also heard that the

27 April 1998 written Protocol between the two countries was not a manifestation of consent to the presence of Ugandan troops in the Congo because, they say, it said nothing explicit about Ugandan troops operating within the DRC. At first blush, the formal/informal distinction may seem unduly formalistic. Nonetheless, it is important because if the DRC's consent was formalized pursuant to an instrument duly signed by her agents, her consent could only be revoked formally. To this day, the DRC has never contended that her consent was formally revoked because, in fact, it never was. The DRC's entire line of argumentation on this point is built around an awkward effort to strip this critical fact of its necessary legal consequence.

40. The DRC's advocates, including Professors Salmon, Corten and Klein have each in their separate ways dismissed the April 1998 Protocol as irrelevant to the issue of consent. That they have given the Protocol so much attention, and by so many counsel, is testimony to its importance. To be sure, the language of the Protocol is diplomatic. But the circumstances in which it was executed, which the DRC avoids mentioning, give obvious meaning to its bare words. First, there is the admitted conduct of the DRC. Uganda has stated — and the DRC has never denied — that prior to the Protocol, two Ugandan battalions were stationed in the eastern border regions of the DRC. Uganda has also stated — and the DRC has never denied — that after the Protocol was signed, a third Ugandan battalion was soon deployed to eastern Congo. This by itself is enough to demonstrate the meaning of the Protocol. There is also the factual context on the ground. There were no rebel groups based in Uganda, and it was never the intention of the Parties — and the DRC has never said otherwise — to have Congolese troops carry out military or other activities on the Ugandan side of the border. Thus, the only meaning the April 1998 Protocol could have possibly had was to authorize Ugandan troops to operate against rebel groups on Congolese territory.

41. In addition, the Court has before it the testimony before the Porter Commission of a senior Ugandan official, Mr. Ralph Ochan, then Permanent Secretary in Uganda's Ministry of Foreign Affairs, describing the circumstances giving rise to, and the purpose of, the Protocol of 27 April 1998 (Rejoinder, Ann. 64). At least three times now, advocates for the DRC have denigrated Mr. Ochan as a mere "functionary" and labelled his testimony confused. According to them, Mr. Ochan's testimony is unreliable because he allegedly stated that it was the June 1998 attack on Kichwamba Technical School that motivated the April 1998 Protocol — an obvious

impossibility. My learned opponents' determination to discredit Mr. Ochan and his Porter Commission testimony is obviously born of their self-consciousness about the DRC's vulnerability concerning the meaning of the Protocol. I submit that any fair reading of Mr. Ochan's testimony shows that he is guilty of no confusion whatsoever. Testifying retrospectively in 2001 about events that occurred in 1998, he merely used the Kichwamba attack as a very well-known example of the *kind* of problem the Protocol was meant to deal with. In other words, as Mr. Ochan plainly testified, the Protocol was designed to help prevent terrorist attacks against Uganda by permitting the deployment of Ugandan troops in Congolese territory. As such, the Protocol represents a formal manifestation of consent that required a formal withdrawal — a formal withdrawal which never came.

42. Now, Uganda's position is not so blindly formalistic that she would contend that, because the Congo's consent was never formally withdrawn, it extends to this day. Obviously, there came a point when the DRC's original consent to the presence of Ugandan units in the eastern border region, as manifested formally by the April 1998 Protocol, no longer applied, and that is when Uganda decided on 11 September 1998 to extend her troops beyond the immediate border area for the first time. But until that time, and for reasons I stated more fully last week and with which I won't burden the Court by repeating here, the status of Uganda's troops in the border region was unchanged (CR 2005/8, pp. 17-18, paras. 4-5). The consent formally given had not been formally revoked.

Conclusion

43. Mr. President, distinguished Members of the Court, I have come to the end of my presentation. Since this is the last time I will address the Court in these oral proceedings, I want to thank you, Mr. President, and the entire Court, for granting me the distinct honour and privilege of appearing before you, and for all the kind and courteous attention you, the Court, the Registry and the outstanding translators have bestowed on me throughout these proceedings. Thank you all and good day.

The PRESIDENT: Thank you, Mr. Reichler.

This brings to a conclusion this morning's hearings. The hearings will be continued this afternoon at 3 o'clock. The sitting is adjourned.

The Court rose at 12.45 p.m.

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