CR 2005/15 (traduction)

CR 2005/15 (translation)

Mercredi 27 avril 2005 à 15 heures

Wednesday 27 April 2005 at 3 p.m.

8 Le PRESIDENT : Veuillez vous asseoir. L'audience est ouverte. Je donne la parole à M. Brownlie.

La question des droits de l'homme

M. BROWNLIE : Monsieur le président, Madame et Messieurs les juges.

1. Je me propose, dans mon exposé, de répondre au conseil du Congo sur la question des violations des droits de l'homme.

Les arguments d'ordre procédural

2. M. Kalala a été surpris par les arguments de l'Ouganda, qui étaient à ses yeux d'ordre purement procédural. Or, Monsieur le président, ces arguments d'ordre purement procédural concernent l'utilité des plaidoiries, le principe du contradictoire et la question de savoir quelle est la thèse à laquelle l'Etat défendeur doit répondre. Les solutions de continuité, l'amnésie et l'approche sporadique du sujet traité causent en effet de très graves difficultés à l'Etat défendeur.

3. Il n'est pas surprenant de constater que l'article 49 du Règlement de la Cour présuppose clairement la continuité. Car, après tout, cet article prescrit à quelle fin et dans quel ordre les pièces de procédure écrite sont déposées. M. Kalala qualifie les critiques formulées au nom de l'Ouganda d'«objections préliminaires». Bien sûr, il ne s'agit pas, formellement parlant, d'exceptions préliminaires. Mais le parallèle est intéressant car, dans certains systèmes de droit, il existerait une procédure permettant d'écarter d'emblée les demandes manifestement non fondées en droit.

4. Le conseil du Congo se demande quelles conséquences juridiques découlent de l'analyse faite par l'Ouganda de la méthode d'argumentation défaillante adoptée par le Congo (CR 2005/12, p. 55). M. Kalala semble croire qu'il ne peut y avoir de conséquences, mais il est évident que la manière de plaider, les carences en matière de preuves et l'absence de continuité auront forcément une incidence sur le jugement que portera la Cour au sujet de la thèse congolaise. Et cela devrait d'autant plus être le cas que la charge de la preuve incombe au Congo.

5. Avant de passer au stade suivant de mon exposé, il me faut demander, au nom de l'Ouganda, si le conseil du Congo a contribué à faire avancer le débat. Malheureusement, la

9 réponse est «non». En fait, la confusion semble s'être accrue. Ainsi, vers le début de son exposé, M. Kalala explique que les écritures congolaises (MRDC, par. 5; RRDC, par. 2.05) indiquent quels éléments sont devenus sans objet, ce qui est d'ailleurs vrai. Mais c'est reconnaître en même temps l'existence du problème. Le passage visé de la réplique précise que celle-ci est désormais «l'instrument de référence» par rapport à la requête et au mémoire.

6. Quoi qu'il en soit, ce système de renouvellement cyclique est lui-même quelque peu obscur et, un peu plus loin dans la même intervention, le conseil du Congo affirme à la Cour que les éléments de preuve à présenter s'inscrivent toujours pleinement dans le cadre de la requête initiale (CR 2005/12, p. 54, par. 6).

7. Le conseil du Congo s'est plaint que les critiques de l'Ouganda n'ont pas contribué au débat judiciaire. Mais, Monsieur le président, dans une telle confusion et après de tels changements de tactique, il est difficile d'avoir un débat.

La valeur probante du rapport de la MONUC

8. Le Congo, dans ses écritures, fait grand cas du rapport de la MONUC du 16 juillet 2004, notamment M. Kalala au second tour des plaidoiries (CR 2005/13, par. 17-24). Pour répondre à cela, l'Ouganda estime nécessaire de montrer à quel point le rapport de la MONUC n'est pas l'outil adéquat pour mener une analyse avec la rigueur qui sied au cadre judiciaire.

9. En particulier, les éléments suivants doivent être relevés :

Premièrement, la mission de la MONUC n'était pas équipée pour faire des enquêtes de nature spécifiquement juridique. On ignore si des juristes ont participé à ces enquêtes.

Deuxièmement, de graves problèmes d'accès existaient en Ituri aussi bien avant qu'après le déploiement des forces multinationales en juin 2003.

Troisièmement, le rapport émet des hypothèses quant aux causes du conflit entre les Hema et les Lendu — hypothèses dépourvues de fondement historique.

Quatrièmement, le rapport fait état de violations graves d'une ampleur similaire à celles commises au Rwanda; dans ce cas, pourquoi la communauté internationale n'y a-t-elle pas prêté attention ?

Cinquièmement, d'après les conclusions et recommandations (annexe I), l'Ouganda aurait formé plusieurs groupes composés d'habitants de la région et les forces ougandaises auraient ensuite combattu chacun de ces mêmes groupes peu de temps après. L'Ouganda nie avoir formé ces groupes et trouve étonnant d'être mis en cause pour une suite d'événements aussi étrange.

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Sixièmement, l'Ouganda estime singulier et hautement contestable de supposer que ses forces aient été associées à des exactions systématiques en Ituri, alors que rien de tel ne s'est produit dans d'autres régions.

L'occupation prétendue du Congo par l'Ouganda

10. Au second tour de plaidoiries, M. Corten a rappelé la position congolaise selon laquelle l'Ouganda avait le statut de «puissance occupante» à l'égard du Congo (CR 2005/12, p. 42-52). L'Ouganda a déjà réfuté cette thèse à plusieurs reprises, tant du point de vue du droit qu'en ce qui concerne l'étendue du territoire congolais en cause.

11. L'emploi du terme «occupation» par le Congo, à la fois dans les écritures et les plaidoiries, est depuis le début équivoque. Le terme est-il synonyme du régime juridique particulier connu sous le nom d'occupation de guerre, tel qu'il est décrit dans les manuels de droit militaire et les ouvrages de droit international ? L'exposé de M. Corten (CR 2005/12, p. 49, par. 16) ne fait qu'ajouter au doute. Au paragraphe en question, M. Corten cite pêle-mêle des exemples d'occupation militaire. Les cas cités sont juridiquement très hétéroclites, et le fait de les avoir rapprochés dans une même liste dénote une maîtrise insuffisante du sujet. Ainsi, l'occupation par l'Allemagne de plusieurs pays d'Europe durant la seconde guerre mondiale est placée sur le même plan que des cas qualitativement différents.

12. L'incapacité des représentants du Congo à reconnaître les cas véritables d'occupation de guerre ressort dans une large mesure des faits suivants.

Premièrement : Il y a occupation de guerre si l'état de guerre est déclaré ou reconnu comme tel par les belligérants ou les Etats neutres.

Or, ni l'une, ni l'autre des Parties n'a reconnu l'état de guerre. Aucun Etat tiers, aucun Etat de la région, n'a déclaré sa neutralité.

Deuxièmement : Un conflit peut être à l'origine d'un état de guerre si les parties reconnaissent ultérieurement l'existence de l'état de guerre. Or, les Parties à la présente instance ne parlent jamais d'un état de guerre entre elles, mais parfois d'une guerre civile au Congo.

11 *Troisièmement :* Le Gouvernement ougandais a, par son comportement, démontré qu'il ne revendiquait pas le pouvoir d'administrer les zones concernées. Or, s'il y *avait* eu occupation de guerre, l'Ouganda aurait eu le pouvoir d'administration reconnu par le droit des conflits armés.

Quatrièmement : Contrairement à ce qu'affirme le Congo, l'applicabilité des conventions relatives aux droits de l'homme ne permet pas de conclure à l'existence ou à l'inexistence d'une occupation de guerre.

Cinquièmement : Comme mon collègue M. Reichler l'a souligné ce matin, l'accord de Lusaka et les accords conclus ultérieurement n'ont absolument rien à voir avec la notion juridique d'occupation de guerre.

Le rôle de l'Ouganda dans le processus de pacification de l'Ituri

13. Dans son intervention de lundi, dans laquelle il répondait à l'exposé que j'ai présenté au nom de l'Ouganda dans le premier tour de plaidoiries (CR 2005/10, p. 18-20, par. 51-58), M. Kalala a minimisé le rôle joué par l'Ouganda dans le processus de pacification de l'Ituri. De l'avis de l'Ouganda, les Parties s'opposent sur cette question. Il reste difficile de concilier le rôle joué par l'Ouganda, dont les détails ne sont pas contestés, avec le cynisme dont nos contradicteurs nous accusent.

Les événements de Kisangani

14. Dans son dernier exposé de lundi, M. Kalala est revenu sur la question de la recevabilité de la demande relative aux événements de Kisangani : je vous renvoie à cet égard aux paragraphes 13 à 16 de sa plaidoirie (CR 2005/12, p. 57-58). En particulier, il a invoqué la décision rendue en l'affaire *Nauru*. Les Parties se sont déjà opposées sur cette question. Le Congo a invoqué l'affaire *Nauru* dans la réplique (par. 1.23-1.31). L'Ouganda maintient la position qu'il avait adoptée à partir d'une analyse détaillée de la jurisprudence, que l'on trouvera aux paragraphes 272 à 278 du contre-mémoire; je vous renvoie aussi aux paragraphes 33 à 38 de la

duplique. Le Congo n'a pas reconnu que, en l'affaire *Nauru*, la question n'avait en fait pas été tranchée.

Conclusion

15. En guise de conclusion à cette brève intervention, je suis obligé de contredire la thèse de M. Kalala qui affirme, contrairement aux faits, que l'Ouganda aurait reconnu sa responsabilité dans les différentes violations des droits de l'homme dont il est accusé : je parle des paragraphes 18
12 et 19 de son exposé de lundi après-midi (CR 2005/13) — affirmation d'autant plus surprenante que l'Ouganda a réservé sa position au premier tour de plaidoiries (CR 2005/10, p. 23).

J'en ai terminé avec mon exposé. Je tiens à remercier la Cour de la courtoisie et de la considération dont elle a fait preuve durant ces deux longs tours de plaidoiries et je tiens aussi à remercier les fonctionnaires du Greffe et tous ceux qui contribuent de manière générale au bon déroulement des audiences. Monsieur le président, je vous demanderais de bien vouloir appeler à la barre mon ami et collègue, M. Suy.

Le PRESIDENT : Je vous remercie, Monsieur Brownlie. Je donne à présent la parole à M. Suy.

Mr. SUY:

THE QUESTION OF NATURAL RESOURCES

1. Mr. President, distinguished Members of the Court, in his presentation yesterday, Professor Sands, on behalf of the Democratic Republic of the Congo, answered some of the arguments developed by Uganda last week, but avoided answering others. I should like now to comment briefly on those remarks of the DRC. I shall first address Mr. Sands's observations concerning the establishment of the facts (I), before turning to his remarks on the legal characterization of the facts (II).

I. Replies to the DRC's comments on the establishment of the facts

2. Two clarificatory responses by Uganda are called for in regard to this problem. The first relates to the continuing differences between the Parties regarding the need for the DRC to

establish the facts and injury (A); the second concerns the failure of the DRC's attempt to deny the existence of major discrepancies between the findings of the Porter Commission's Report and those of the United Nations Panels (B). I promise to be brief on each of these two points.

A. The persistent differences between the two Parties regarding the establishment of the facts and of injury

3. I shall first deal with the problem of the establishment of the facts *(a)* before going on to the question of proof of injury *(b)* by the DRC.

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(a) *The DRC has refused to specify precisely the facts for which it seeks to hold Uganda responsible*

4. Despite our appeals, the DRC has refused precisely to specify the wrongful acts for which it requests your Court to hold Uganda internationally responsible. It continues to take refuge behind a judgment which it seeks to characterize as "declaratory", erroneously interpreting the Court's position in the case concerning *Military and Paramilitary Activities in and against Nicaragua*. Uganda has already expressed its astonishment at this approach. Even if it were accepted that the DRC could, at a later stage, specify "the precise amount" and "the precise form" of reparation[1], this could only, by definition, relate exclusively to the facts established during the current phase of the proceedings, which would thus be covered by *res judicata*. However, the DRC requests the Court to declare now, *in abstracto*, that Uganda committed internationally wrongful acts, and then subsequently to *reopen the entire* case at a later stage, in order to define, *in concreto*, *what* those internationally wrongful acts *are*. Uganda categorically opposes this approach and it will fall to the Court to settle this dispute. We hope, however, that the DRC will not thus transform this case into a modern-day stone of Sisyphus to be carried for evermore by your Court and the defenders of Uganda.

5. I shall now turn to the second problem concerning the proof of injury.

(b) *The DRC has failed to demonstrate that it suffered any direct injury*

6. Despite the urgent demands of Uganda, the DRC has completely failed in its duty to demonstrate that it suffered *direct injury* as a result of acts which it seeks to impute to Uganda.

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[1]Cf. CR 2005/3, p. 20, para. 8 (Mr. Sands), and CR 2005/5, p. 56, para. 20 (Mr. Salmon).

Instead, Professor Sands denied that injury constitutes a condition for engaging the international responsibility of States and he referred in this connection to the approach adopted by the ILC in its draft Articles 1 and 2 on State Responsibility[2]. In reply, allow me to refer to what was written on this subject by one of the authors I cited last week — whose eminence Professor Sands himself acknowledged. In the general course on international law which he gave some years ago at the

14 Hague Academy of International Law, Professor Prosper Weil made the following point: "*One of the most revolutionary aspects of the work* of the International Law Commission consisted in defining international responsibility without including injury as a condition therefor."[3]

7. This makes clear the way in which the ILC's approach is characterized in this field: it is "revolutionary", which means that the possible elimination (and I deliberately use the word "possible" since the actual circumstances are always much more complicated) of injury as one of the conditions for the ILC's engagement of State responsibility can only be defined as a normative proposition *de lege ferenda* for the progressive development of international law, and not as a codification of existing international law in this field, which always, as I showed last week, upholds the principle: "no injury, no international responsibility".

8. Respect for this principle is all the more necessary in this area since the DRC has utterly failed to specify whether the alleged acts caused injury to the State itself, or rather to private, natural or legal persons. For example, if a particular company — such as "*La S*ociété *Victoria*" so frequently cited by Professor Sands — sought to "purchase" diamonds in the DRC while paying the necessary taxes to the local Congolese administration — again citing the documents submitted by Professor Sands — who would have been injured by this act, even assuming that it could be characterized as "internationally wrongful"? The State itself? An individual? Another company? Uganda has placed great emphasis on the fact that the DRC was under an obligation to establish that it sustained *direct* injury and that any injury suffered by private individuals could be taken into account by this Court only after the exhaustion of local remedies, in accordance with the

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[2]CR 2005/13, p. 34, para. 36.

[3]P. Weil, *Le droit international en quête de son identité*, *RCADI*, 1992/VI, Vol. 237, 1996, p. 340: emphasis added.

procedures for diplomatic protection. In this connection, the DRC has given no response other than that injury is not a condition for establishing the responsibility of a State.

9. I now turn to a second set of responses concerning the DRC's attitude to the establishment of the facts and injury and the content of the Porter Report.

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B. The Democratic Republic of the Congo's failure to explain away significant differences between the findings of the Porter Commission and those of the United Nations Panels

10. Last week, I explained these differences to the Court at length, and I shall not go over them again. In all honesty, I stated at the outset that it was not "my intention to deny the existence of certain points of agreement between the investigations in question as far as the individual conduct of certain soldiers and officers is concerned". I nevertheless pointed out that my objective was to bring to the Court's attention the fact that the findings of the Porter Commission Report and those of the United Nations Panels (especially the first report, cited at length in the annexes and written pleadings of the DRC) exhibit significant quantitative and qualitative differences. I also explained that these differences were of decisive importance for the subsequent stage of legal characterization of the facts, particularly inasmuch as the findings of the Porter Commission, on which the DRC now relies *exclusively*, in no sense permit Uganda's international responsibility to be engaged for "violation of the principle of the permanent sovereignty of the Congolese people over its natural resources", or again, to cite the submissions made the day before yesterday by the Agent of the DRC, for violation of the "rights of peoples to self-determination"[4].

11. What did Professor Sands have to say in response to all this? Well, next to nothing! He seems to have accepted these differences.

12. It is true that he suggested that my presentation was "selective". However, notwithstanding the fact that he made little effort to clarify that remark, I should like to reply that the selective approach was his rather than mine, that is, the presentation of only *his* side of the coin, without having the courage to accept openly that the findings of the Porter Commission report render totally groundless many of the serious allegations made against Uganda in the DRC's written pleadings.

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[4]CR 2005/13, p. 37, para 1.

13. Mr. Sands also claimed that I "carefully avoided" referring to page 196 of the report[5] which contains a passage that states: "in general this Commission and the *reconstituted Panel* are not so far apart"[6]. Here again, however, Mr. Sands does me an injustice. In actual fact, not only did I not fail to cite that page, but on the contrary I supplemented the highly selective citation of the section mentioned by Mr. Sands by pointing out that, while the Porter Commission expressed agreement with the *reconstituted Panel* on the fact that certain individuals, soldiers or officers conducted themselves in the DRC "in a manner unbecoming", it particularly emphasized that: "There is agreement that the original Panel's allegations against Uganda as a State, and against President Museveni *were wrong*."[7] I similarly took great care to explain that, more generally speaking, the reports issued by the reconstituted Panel abandoned or revised most of the accusations made by the original Panel, and that the Porter Commission, in agreement with the reconstituted Panel, also rebutted them.

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14. Finally, Professor Sands stated that an analysis of the non-exhaustive list of 15 "differences" that I had presented was "instructive". This time we are in full agreement. The Porter Commission, *on whose findings the DRC now relies exclusively*, concluded that the overwhelming majority, if not all, of the allegations concerning the exploitation of the DRC's forest and agricultural resources by Uganda or by Ugandan soldiers, allegations previously reproduced at length in the written pleadings of the DRC, before being played down the day before yesterday by Professor Sands — were not proven. The Porter Commission found that several allegations of looting were also unfounded. It found that Uganda had at no time intended to exploit the natural resources of the DRC or to use those resources to "finance the war" and that it did not do so. On the contrary, it found that the Ugandan authorities had repeatedly issued clear orders and had acted resolutely to prevent any excesses by certain soldiers — but this, too, is no longer at all denied by the DRC, which even projected on the screen behind me several documents

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[5]Page 198 according to Mr. Sand's numbering, which is not identical to that of the official Court document. See Report of the Judicial Commission of Inquiry into allegations of illegal exploitation of natural resources and other forms of wealth in the DRC, in ICJ, Submission by the Republic of Uganda of new documents in accordance with Article 43 of the Statute and Article 56 of the Rules of Court, 20 October 2003.

[6]Emphasis added.

[7]*Ibid.*, p. 196, para. 40.8: emphasis added. Cf. CR 2005/5, p. 33, para. 12 (Mr. Sands).

demonstrating the unceasing efforts of the Ugandan authorities to bring recalcitrant soldiers to order and put an immediate end to any questionable conduct.

17 15. What remains, therefore, of the massive case initially presented by the DRC in its Reply? The DRC now relies exclusively, I repeat, on the findings of the Porter Commission Report. All that remains today, therefore, is the various findings of that Commission concerning the individual and private conduct of certain soldiers and officers who, in clear violation of orders given by the highest State authorities, "have conducted themselves in the Democratic Republic of Congo in a manner unbecoming", before doing everything possible ("a conspiracy of silence" — according to the Porter Commission) to conceal their activities from those same authorities. These are the facts to which you must give a legal characterization, Members of the Court, and my modest contribution to this effort at legal characterization can only take the form, at this stage, of a quick review of the replies which Uganda wishes to furnish to Mr. Sand's comments on this point.

II. Replies to the DRC's comments on the legal characterization of the facts

16. Four of the points that Professor Sands addressed (or evaded) on behalf of the Congo call for a response. The first concerns the lack of a Congolese response concerning the confusion deliberately maintained by the Congo between an "illegal" and an "internationally wrongful" act (A). The second concerns Mr. Philippe Sands's criticisms on the subject of international humanitarian law (B). The third concerns the separate question of the alleged violation of the "principle of the permanent sovereignty of the Congolese people over its natural resources" (C). And the fourth and final point concerns the duty of diligence (D).

A. The lack of a response concerning the deliberate failure to distinguish between "illegal" acts and "internationally wrongful" acts

17. My lengthy exposition on this point last week elicited only a terse response from Mr. Sands. He found them, he said, "interesting, but . . . totally irrelevant"[8]. However, the interest aroused in Professor Sands by that exposition should have prompted him to look into this important question a little more carefully in order to grasp its *total relevance*.

[8]CR 2005/13, para. 34.

18 18. As I explained last week, the DRC deliberately maintained, and even cultivated, in its written pleadings, the confusion generated by the United Nations Panel reports, which had attached the label "illegal" to acts which could never be characterized by an international tribunal as *"internationally wrongful acts"*. I even provided several examples in support of my assertions, such as "respect for the DRC's regulatory framework", "discrepancy between widely accepted practices in trade and business and the way business is conducted in the Democratic Republic of the Congo", or even violation of "soft law" and of the OECD's soft law guidelines. Professor Sands now attempts[9] to correct his aim by recognizing that the DRC can only accuse Uganda of violating "its obligations under international law". In the process, he also seems to accept implicitly[10] that the routine trading activities conducted between Uganda and the territories controlled by the rebels did not in principle constitute "illegal exploitation", even if the regulations of the central Government in Kinshasa could not be respected and even if taxes were paid to the local Congolese authorities rather than to the central Government.

19. The question that this Court thus faces is whether all the acts noted by the Porter Commission and relied upon by the DRC necessarily constitute "*internationally wrongful acts"*. Uganda does not believe that they do. If such a characterization could perhaps be applied to certain acts of looting committed, according to the Porter Commission, by a limited number of soldiers and officers, it is certainly not applicable to the overwhelming majority of the acts described in that report.

20. This is a crucial issue since, before any act by an individual can be attributed to a State in order to engage the latter's international responsibility, the "internationally wrongful" character of that act must first be established. This is underscored, for example, by the commentary on Article 7 of the International Law Commission's draft articles, which makes it clear that the Article in question "is not concerned with the question whether the [unauthorized] conduct [of an agent of

19 a State] amounted to a breach of an international obligation"[11]. However, although the Porter Commission referred to several cases of *violations of the internal law of Uganda* by certain

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[9] *Ibid.*

[10] Cf. *ibid.*, para. 30.

[11] Commentary on Article 7, in Report of the International Law Commission to the United Nations General Assembly, A/56/10, 2001, p. 103.

individuals, or even certain cases of non-observance by those individuals of certain rules and practices of the Kinshasa central Government in the territories where only rebels exercised *de facto* administrative authority, this does not necessarily constitute an "*internationally wrongful act*". Even the document projected on the screen two days ago in which the leader of a major rebel group "*granted permission to" La Société Victoria* "to *do business in* coffee, diamonds, gold" in certain towns while paying "all local taxes" for that purpose, does not automatically, in the absence of other evidence, constitute an "*internationally wrongful act"* — although it certainly constitutes totally unbecoming conduct, contrary to orders, by Brigadier Kazini, against whom proceedings were instituted.

21. At the end of my presentation, I shall return to this important issue. For the moment, Uganda respectfully requests the Court to study the Porter Report and to focus exclusively on those acts which could be considered to constitute a "violation of an international obligation".

22. I now turn to the question of humanitarian law.

B. The question of humanitarian law

23. Professor Sands voiced certain criticizms in this respect and reproached me for not having said "a single word" about the rules of humanitarian law.

24. I would like to begin my response with an observation. The Application of the DRC invokes no rules of humanitarian law with respect to the question of natural resources. This was the very reason why Mr. Sands requested permission from this Court to amend the claims of the DRC in order to "make clear that in respect of natural resources the finding should encompass also violations of international humanitarian law"[12]. Neither does the Memorial of the DRC invoke any rule of humanitarian law in connection with the issue of natural resources. As for the Reply of the DRC, it devotes 50 closely argued pages to the question of natural resources, including ten on

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Uganda's alleged breach "of the sovereignty of the DRC over its natural resources" and the alleged breach of "the obligation of vigilance". But within that abundant discourse, how much space is devoted in this respect to humanitarian law? *Six lines*, Mr. President, just six lines, which appear at the very end of those 50 closely argued pages and where only Article 33 of the Fourth Geneva

[12]CR 2005/13, para. 39.

Convention of 12 August 1949, on the prohibition of pillage, is expressly invoked. To be sure, the DRC has now understandably realized, in the light of the Porter Commission's conclusions, that it is impossible to obtain a finding against Uganda in respect of the two charges initially relied on, and it is obviously for this reason that the DRC has amended the legal basis of its claim and its requests to the Court. The case presented by the DRC in this respect, as in other respects, certainly resembles the myth of Proteus: when you finally think you have grasped it, it has already changed shape . . . But to accuse Uganda of not responding to certain legal arguments on natural resources never raised by the DRC in the written proceedings before the Court is really going a step too far.

25. That accusation appears particularly unfounded as far as I am concerned, since I was careful, in my statement last Wednesday, to address the arguments based on humanitarian law raised by Mr. Sands during his first statement.

26. Turning, first, to the arguments concerning "authority over the occupied territories" — to cite Philippe Sands — I have repeatedly explained that Uganda did not exercise any acts of authority over those territories, that it did not control the Congolese rebel groups exercising such authority and that it had no power over the acts of authority performed by those *de facto* authorities. In this respect, I particularly focused on the findings of the Porter Commission, which emphasized that the original Panel's allegations that the Ugandan authorities "directly and indirectly appointed regional governors or local authorities" were unfounded, and which also pointed out several times that Uganda had no jurisdiction over the Congolese nationals and rebel groups.

27. Mr. President, honourable Members of the Court, it should be mentioned here that if Uganda had intended, as the Congo claims, to "exploit" the natural resources of the Congo, it

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would have been in its best interest to exercise such acts of administration and to invoke the right of occupation and the corresponding privileges conferred by law upon the occupant.

28. Need it be recalled that Article 48 of the Fourth Hague Convention confers on the occupant the right to collect taxes, dues and tolls? Need it be recalled that Article 49 authorizes the occupant to levy other money contributions in the occupied territory "for the needs of the army or of the administration of the territory in question"? Need it be recalled that Article 32 authorizes "requisitions in kind" of private property "for the needs of the army of occupation"? Need it be

recalled that Article 53 authorizes the occupant to take possession of "all movable property belonging to the State which may be used for military operations"? Need it be recalled that Article 55 authorizes the occupant to administer public buildings or forests and agricultural estates belonging to the hostile State in accordance with the rules of usufruit? And so the list goes on, Mr. President. In this connection it is revealing that one of the most important articles written on the subject, that of Professor Antonio Cassese[13], mentioned my Mr. Sands, represents a perfect illustration of the fact that the real principle in this area is not that the right of occupation prohibits any exploitation of the resources of the occupied State by the occupant, but rather the contrary, that is to say that this right seems to have conferred upon the occupant broad — perhaps too broad — powers that, in one way or another, must be restricted. Uganda has never invoked such powers. It has never exercised acts of authority and has not sought to interfere in any way in the authority exercised by the Congolese people itself over the territories of eastern Congo.

29. Let us move away now from the "rules of occupation" and turn towards the *other rules of humanitarian law*. I must confess that I have some difficulty in comprehending why Professor Sands devoted so much energy (with reference, for example, to the Lusaka Agreement), to showing that they were applicable in the present case. Uganda has never in fact argued the contrary. This is particularly true for the prohibition against looting in time of armed conflict. Uganda has never denied that principle and has not sought to hide behind Article 7 of the International Law Commission's draft articles, as Mr. Sands claimed. Quite the contrary, Uganda

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has acknowledged the findings of the Porter Commission in this sphere concerning certain acts of looting by some soldiers acting in a purely private capacity for their personal enrichment, and has undertaken to prosecute those soldiers. But an act of looting is an act of looting. It cannot by magic be transformed into a "violation of the principle of permanent sovereignty of peoples over their natural resources" or into a "violation of the right of peoples to self-determination". It is towards that most significant question that I would now like to turn.

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[13]Cassesse, A., "Powers and Duties of an Occupant in Relation to Land and Natural Resources", in Playfair, E., (ed.). *International Law and the Administration of Occupied Territories*, Clarendon Press, Oxford, 1992, pp. 419-442.

C. The principle of the permanent sovereignty of the Congolese people over its natural resources

30. In the light of my comments and clarifications last week, I had hoped that the DRC would withdraw this outrageous accusation which, as I have explained, resurrects the spectre of colonialism in Africa. Since the DRC is unwilling to do so, I feel justified in making the following observations.

31. First, I trust there is agreement among all the jurists present in this room that the principle in question is not a principle of humanitarian law. Professor Sands could not — and indeed did not — say anything to the contrary. He simply sought to show that this principle, which was shaped in a totally different context, that of decolonialization, may also be applicable in time of war. In this respect, he invoked — and reiterated the day before yesterday — certain General Assembly resolutions concerning a particular well known conflict. Regardless of the pertinence of those resolutions for the conflict in question, I should like to point out, Members of the Court, that the case before you today has *nothing to do* with the conflict mentioned in the General Assembly resolutions, which concern certain *deliberate* and *intentional* policies adopted by a particular State over the past few decades. Now, and this is why earlier on I placed emphasis on the establishment of the facts, in the case before you it is established beyond any reasonable doubt that not only did Uganda never once intend to exploit in any way the natural resources of the DRC but, on the contrary, the Ugandan authorities, on several occasions, issued clear orders and acted in a determined manner to avoid any excesses on the part of certain soldiers acting in a personal capacity.

23 32. Last week, I pointed out that the mechanism of attributability in international law is not some magic wand that can be used to alter the characterization of an international offence, miraculously transforming an act of looting, committed by an individual in violation of orders and instructions, into a heinous crime of the State on account of the "violation of the principle of the permanent sovereignty of the Congolese people over its natural resources". I even raised the rhetorical question whether an act of looting committed by a United Nations peacekeeper could be legally classified as a violation by the United Nations of the "principle of the permanent

sovereignty of the people of that country over its natural resources" or as a "violation of the right of peoples to self-determination". Most surprisingly, Mr. Sands replied in the affirmative[14].

33. Nevertheless, Mr. President, as we say in French: "Let's call a cat a cat." A cat is not an elephant and still less a dinosaur. An act of looting remains an act of looting. It cannot be transformed, on the basis of the clear elements before your Court, either into a violation of the "principle of the permanent sovereignty of the Congolese people over its natural resources" or into a violation of "the right of peoples to self-determination".

34. Mr. President, Members of the Court, in this beautiful city where your Court has its seat, an outstanding museum has recently been opened to exhibit the work of the Dutch artist Maurits Escher, the wizard of metamorphosis. Among his works, one can admire a woodcut called "Metamorphosis I", where a tiny individual is miraculously transformed before our very eyes — into a city in southern Italy[15]. But here, Members of the Court, we are not in the Palace of the Lange Voorhout but in the Peace Palace; Mr. Sands, despite his talent, is no Maurits Escher and cannot transform a pumpkin into a coach; and the mechanism of attributability is not an optical illusion. For this reason, Uganda reiterates before this Court that it respectfully requests you to dismiss all of the outrageous accusations concerning "foreign subjugation and exploitation", the violation of the "principle of permanent sovereignty over natural resources" and the violation of the "right of peoples to self-determination".

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35. I will now move on to the last part of my analysis regarding the obligation of vigilance.

D. The obligation of vigilance

36. In its first round of oral argument, the DRC accused Uganda of having sought to mislead the Court by "hiding" from it the Porter Commission Report. Uganda had hoped that, after my intervention to put the record straight last Wednesday, the DRC might have presented its apologies or at least have graciously acknowledged the reality.

37. Instead of that, in its second round of oral argument, the DRC fell still further into error in its assessment of Uganda's attitude towards the Porter Commission Report.

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[14]CR 2005/13, para. 33.

[15]See The (E.), *The Magic of M.C. Esher*, Joost Elffers Books, Harry Abrams Publ., New York, pp. 50-51.

38. This time the DRC has come up with a wire from a Ugandan newspaper report retrieved from the Internet. A certain Edison Mbiringi, presented in that report as "The Deputy Inspector General of Police", is reported as having stated to the paper "[w]e have closed all the files relating to UPDF operations in Congo . . ." — a sentence read and emphasized several times by Philippe Sands last Monday, with obvious implications for Uganda.

39. In reality, Mr. President, Members of the Court, no "crime" has been committed and if that event proves anything at all, it will only be the merits of the wisdom and prudence with which this Court always deals with material from the press. I would like to examine that document more closely.

40. We can pass over the fact, first of all, that the individual in question, Mr. Edison Mbiringi is not, as the journalist claims, "The Deputy Inspector General of Police", but a minor official of the Ugandan police force. We can also pass over the fact that his statements were completely distorted by the journalist, in her quest for a "scoop". Let us look rather at certain objective elements, the precise content of that official's statement, as reported in the article in question and as censored in the selective presentation by Philippe Sands. Here is the entire
25 "statement", of which Professor Sands only read the first part: "We have closed all files relating to the UPDF operations in Congo *and that marks the end of everything as regards the two files that were for investigations*."[16]

41. Furthermore, the rest of the report, referring to "two files" and "the fate of the files", makes it clear that this only concerns *two* particular files and certainly not the *whole series* of investigations undertaken in response to the findings of the Porter Commission which, for their part, are *continuing* and which remain entirely open in Uganda.

42. So what are those two files that have been closed? The answer is most revealing, and Uganda *is entitled to respond* to the DRC's accusations and to provide the Court with the whole picture.

43. Mr. President, those two files are dated 9 February 2005. The first file concerns the Porter Commission's findings with respect to the airline "Take Air Ltd" — findings which take up

[16]Document cited by Philippe Sands in CR 2005/13, para. 20 (tab 44 in the judges' folder submitted by the DRC); emphasis added.

just nine lines out of the whole 250 pages in the Porter Commission Report[17]. What is this about? According to the Porter Commission, it is about a book-keeping problem involving an airline company which, in 1998, received from the UPDF 111 million shillings (some US$ 65,000) to convey material and personnel in the DRC but which subsequently failed to produce the necessary supporting documents to prove that the paid services had been rendered. The police investigated the existence of an "offence of causing financial loss to government" and concluded that the elements in the case file did not justify the prosecution of the airline's managing director.

44. The second file which has been shelved concerns an investigation into a possible violation of Section 396 of the Ugandan Companies Act, because a minor was allegedly appointed as a director of a Ugandan company, contrary to the provisions of the said Act[18].

45. Thus these are the only two files concerning the Porter Report that have been closed. The question now is the following: are those files really of interest to this Court? Are those

26 precise investigations into particular cases of breaches of Ugandan *domestic legislation* by certain individuals really of any relevance whatsoever to the case before you? I am sure you will understand, Mr. President, Members of the Court, why I have emphasized so much in both my statements the necessary distinction between the various "illegal" acts (from the point of view of domestic law) observed by the Porter Commission and the United Nations Panels and the possible "*internationally wrongful* acts" which alone fall within the purview of this Court. Mr. President, I have now come to the end of my statement on this part, on the question of natural resources, and I would kindly request a break before I begin my statement on the counter-claims. Thank you, Mr. President.

The PRESIDENT: Thank you, Professor Suy. Indeed this is the proper place for you to stop. The Court will have a ten-minute break, after which you will continue.

The Court adjourned from 4 to 4.10 p.m.

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[17]"Report of the Judicial Commission of Inquiry into allegations of illegal exploitation of natural resources and other forms of wealth in the DRC", in ICJ, Submission by the Republic of Uganda of new documents in accordance with Article 43 of the Statute and Article 56 of the Rules of Court, 20 October 2003, p. 81, para. 18.4.

[18]See *ibid.*, pp. 80 and 153.

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

Mr. SUY:

THE UGANDAN COUNTER-CLAIMS

1. Mr. President, honourable Members of the Court, Uganda's reply to the arguments presented last Friday by the Democratic Republic of the Congo on the Ugandan counter-claims will be set out as follows: first, I should briefly like to rehearse the reasons why Uganda considers that, contrary to what was said last Friday, the preliminary objections as to admissibility raised by the DRC are themselves inadmissible at this stage in the proceedings (I). Secondly, I shall respond to the DRC's treatment of the first counter-claim, covering both the alleged "renunciation" by Uganda and the merits of the case. I shall thus show that, by allowing various rebel bands to use its territory to prepare and launch terrorist attacks and acts of subversion against Uganda, or even supporting and aiding these rebels, the DRC breached a number of international obligations — contrary to what was claimed last Friday by our honourable opponents (II). Third and last, I shall address the question of the second counter-claim in order to reply both to the objections to admissibility raised by the other Party and to the denials of the facts, which are however clearly established, and represent the very cornerstone of this claim (III).

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I. The DRC cannot legitimately raise preliminary objections at this stage in the proceedings

2. I should thus like to reply first to the arguments put forward last Friday by Professor P. Klein concerning the admissibility, at this stage in the proceedings, of the objections of inadmissibility raised by the DRC against Uganda's counter-claims.

3. In this connection, Professor Klein referred to your Court's recent decision in the *Oil Platforms* case. It is indeed well known that, in its Judgment of 6 November 2003, the Court agreed to consider the objections of inadmissibility made by Iran, notwithstanding the United States argument that the Court had finally settled the matter in its Order of 10 March 1998 relating specifically to the American counter-claims. What my distinguished colleague nevertheless omitted to mention is that this decision of the Court was dictated by the *very particular*

circumstances of the case, which justify the view that the Court's solution on 6 November 2003 does not constitute *the principle*, but rather *the exception to the rule*.

4. More precisely, a careful examination of the *Oil Platforms* case shows that the Iranian preliminary objections were indeed raised before the Order of 10 March 1998; moreover, Iran wished the Court to consider them in those initial proceedings. However, it was the United States itself, the counter-claimant, which, in March 1998, had continually requested the Court to limit its consideration to matters relating to the connection between the counter-claims and the principal claim, and to reserve its reply on the preliminary objections for a later stage in the proceedings — a request the Court ultimately acceded to.

28 5. The oral arguments of counsel for Iran at the hearings *in February-March 2003* dwell on this fact at length. For example, counsel for Iran stated that, in his "very humble opinion, the Court could already have" settled the preliminary objections issue in the Order of 10 March 1998, but "in its wisdom, it decided otherwise"[19]. However, he stressed that, in view of this situation, in view of the fact that, in 1998, "the United States had *urged the Court to confine itself solely to the issues* of admissibility regarding the connection of the counter-claim with the subject-matter of the main claim"[20], Iran was entitled to ask the Court, in 2003, to "rule on the points — and there are a number of them — on which [the Court] did not decide, *in accordance with the clear position (then) taken by the United States, which cannot, as it is now doing, blow cold after previously blowing hot and urging you to take the position which you took*"[21].

6. Your Court, moreover, itself emphasized this important point in its Judgment of 6 November 2003. Thus, just before the passage from that Judgment quoted last week by Professor Klein, there is another in which the Court explains its position. Let me remind you of it:

> "The United States contends that the Order of 10 March 1998 settled definitively in its favour all such issues of jurisdiction and admissibility as might arise.
>
> *The Court notes however that the United States is adopting an attitude different from its position in 1998*. At that time, while Iran was asking the Court to rule generally on its jurisdiction and on the admissibility of the counter-claim, the United States was basing itself solely on Article 80. It argued in particular that

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[19]CR 2003/14 of 28 February 2003, para. 3 (Pellet).

[20]CR 2003/19 of 7 March 2003, para. 2 (Pellet); emphasis added.

[21]CR 2003/14 of 28 February 2003, para. 4 (Pellet).

> '[m]any of Iran's objections to jurisdiction and admissibility involve contested matters, which the Court cannot effectively address at this stage, particularly not in the context of the abbreviated procedures of Article 80, paragraph 3' (cited in *I.C.J. Reports 1998*, p. 200, para. 22)."[22]

29 7. Thus it is logical to take the view that your Court's position in the *Oil Platforms* case was exclusively dictated by the very particular circumstances of the case I have just set out to you — a fact which the Court itself emphasized.

8. However, the present case has no similarity with the situation just described, and Uganda's attitude can in no way be equated with that of the United States in the *Oil Platforms* case. It is clear to the Government of Uganda that the imperatives of legal security and the sound administration of justice, as well as a reasonable interpretation of the Rules of Court, require the DRC to present *all* of its preliminary objections at once. To allow the DRC to present its objections in "instalments" could only be prejudicial to the counter-claimant State, obliging it, contrary to what is laid down by Article 79 for the applicant State, to continue to reply to the various exclusively preliminary objections until the final stage of the proceedings. Such an interpretation of the Rules would thus create inequality between the parties, which would certainly be contrary to the spirit and the letter of the Statute and Rules of Court. As Judge Rosalyn Higgins so neatly summed it up, recalling the principle of equality of treatment between the parties, in her separate opinion appended to the Order of 10 March 1998 relating to *Oil Platforms*, "matters going to jurisdiction should, wherever possible, be disposed of *before proceeding to the merits*"[23].

9. For all these reasons, Uganda requests the Court to adjudge and declare that the Order of 29 November 2001 definitively settled all issues of admissibility and that it had the effect of *estopping* the DRC from filing further preliminary objections.

10. Mr. President, it is thus only in the alternative that Uganda will reply to those objections in the context of its discussion of the first and second counter-claim, to which I should now like to turn.

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[22] *Judgment*, pp. 209-210, para. 104; emphasis added.

[23] *Oil Platforms, Counter-Claim, Order, I.C.J. Reports 1998*, separate opinion of Judge Higgins; emphasis added.

II. The first counter-claim

11. Allow me first of all to address the matter of the alleged "renunciation" by Uganda (A), before briefly reverting to the merits of this first counter-claim (B).

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A. The alleged "renunciation"

12. While the "slicing" technique is skilfully employed by the DRC in order to induce your Court to adopt a fragmented approach to its preliminary objections, this technique is raised to a veritable art form where the treatment by the Democratic Republic of the Congo of the first Ugandan counter-claim is concerned. Just like Zeno, who in one of his famous paradoxes divided a race into a sequence of separate parts in order to prove that Achilles would never beat the tortoise, the DRC also takes a continuing wrongful act and chops it into slices, in order to contend before your Court that you should not concern yourself with certain of them. The art thus lies in creating the illusion of a clear contrast between "the period *before* the accession to power of President Laurent Kabila" and "the period *after* the accession to power of President Laurent Kabila", between "Zaire" on the one hand and the "DRC" on the other — which are supposedly not the same.

13. By removing the period before May 1997 from consideration by your Court, the DRC thus seeks to limit Uganda's counter-claim to a brief period of 15 months, for which Uganda is required to furnish overwhelming evidence of the DRC's ambiguous conduct. The Court will thus no longer have before it the complete picture, which could but be highly advantageous to a State that for over seven years either tolerated or sponsored and supported armed bands, which were using its territory tranquilly to train and prepare and — just as tranquilly — launch attacks against Uganda, before once again finding a safe refuge on Congolese soil.

14. The problem raised by this approach is that Zaire and the DRC *are not* distinct entities. By virtue of the State continuity principle, it is precisely the same legal person responsible for the explosive situation which has prevailed in eastern Congo all these years — a situation caused by the shelter given to anti-Ugandan rebels in that region. There is therefore no reason to make any distinction between Doctor Jekyll and Mr. Hyde, and thus to "slice" the Ugandan claim in this way.

15. Mr. President, Members of the Court, the argument that Uganda allegedly "renounced" part of its first counter-claim is thus completely without foundation. In reality, this is a mere ploy

dreamed up by the DRC as a response to the rejection by the Court, in its Order of
31 29 November 2001, of the Congolese argument that there is no connection between the principal claim and this alleged "slice" of the first Ugandan counter-claim, for which the Court has nevertheless clearly indicated that it was part of *"facts of the same nature"*, i.e. of a *"conflict in existence between the two neighbouring States, in various forms and of variable intensity since 1994"*[24].

16. Members of the Court, last week I made a lengthy analysis of international jurisprudence on the subject of waiver, which would seem to have gone unchallenged by the other Party. Yet the DRC has not been able to adduce even a single shred of evidence of any waiver whatever, whether express or implicit, which, according to the clear position of the International Law Commission, must in any event be "unequivocal"[25]. In reality, Uganda's conduct throughout the period concerned shows only one thing: Uganda's continuous, varied and multifaceted reaction to a serious situation caused by the actions and omissions of Zaire/DRC in the east of that country, accompanied by an equally continuous and uninterrupted plea by Uganda to Zaire/DRC for it to take all necessary steps to put an end to the situation.

17. The fact, as this Court pointed out, that this dispute between these two neighbouring States took "various forms" or was of "variable intensity" from one period to another, does not warrant the inference of any "renunciation" by Uganda. The fact that at one time or another some statement or timid action by President Mobutu or President Laurent Kabila could have nourished the hope that Zaire/DRC was perhaps going to decide to change its attitude — a hope soon dashed moreover by the actions and highly ambiguous conduct of that State — in no way warrants the conclusion that there was any "renunciation" whatever. And what was required of Zaire/DRC by the "international stability" referred to by my distinguished colleague Pierre Klein last week was certainly not that it should infer from Kampala's attitude some form of "renunciation", but rather that it should make a serious response to the latter's continuous claims by putting an end to the situation created in eastern Congo.

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[24]Order of 29 November 2001, para. 38; emphasis added.

[25]ILC Report, doc. A/56/10, 2001, p. 331; emphasis added.

B. The facts and the law

32 18. I should now like to respond briefly to what the DRC maintained last week regarding the "merits" of this first counter-claim.

In my presentation last week I cited a number of legal principles applicable to the present case, principles which have not been denied in any way by our opponents, so I will not need to return to them now.

19. Neither has there been any rebuttal of the lengthy listing by my colleagues and myself of the actions of the rebel groups using Congolese soil as a refuge in order to carry out murderous attacks on Uganda, and above all on the Ugandan civilian population, nor of the long list of these attacks presented before the Court. Quite to the contrary, these facts have clearly been accepted by the other Party, as witness, for example, the precise words used by Professor Corten, pleading on behalf of the DRC:

> "A few days ago, counsel for Uganda reeled off a list of the various Ugandan rebel groups that had been operating from Congolese territory[26]. They also dwelt on various actions by those groups, providing details of some of their military activities[27]. *The DRC has never denied these facts*, and it is therefore surprised at their being repeated so insistently."[28]

20. Mr. President, Members of the Court, let us turn our attention briefly to this point. The Congo acknowledges that many rebel groups have used its territory for years to train for and prepare attacks on its neighbour. The Congo acknowledges the existence and accuracy of the list of bloodthirsty armed attacks that my colleagues have put before you, and also acknowledges that these appalling attacks occurred over a period of several years. The Congo does not deny for a moment that it was from its own territory that the rebels launched their attacks undisturbed for years and went off to massacre Ugandan civilians or to burn a hundred or so innocent children alive at Kichwamba College — before returning to find refuge on Congolese soil. The only thing that the Congo refuses to accept is that these facts can be regarded in any way whatever as a violation of international law imputable to the State which harboured rebels and terrorists for so many years. Thus the unfortunate neighbour of that State should have passively accepted these attacks without

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[26]CR 2005/7, pp. 9-11, paras. 3 and 4 (Mr. Brownlie).

[27]*Ibid.*, p. 11, para. 8 (Mr. Brownlie).

[28]CR 2005/11, para. 4; emphasis added.

33 the right to invoke self-defence, or to invoke necessity, or even the right to invoke *a violation of international law* by the State which offered rebels and terrorists a safe haven for so many years.

21. The reason for so extraordinary a conclusion was given last week by Professor Corten: the Congo has not violated international law, either by act or by omission[29].

22. Let us start first of all with *the sensitive issue of "omission"*. The Congo accepts that a duty of vigilance exists in international law in this area. This duty requires a State to take drastic measures to prevent any group from being able to use its territory in order to organize and conduct subversive or terrorist activities against another State. However, the Congo claims that such measures were adopted with effect from May 1997.

23. I would point out that, even without its having to rule on this argument, *these assertions by the Congo allow the Court, with no need for other evidence, to recognize the international responsibility of that State, at least for the period prior to May 1997.* If the Congo accepts that for all those years before May 1997 rebels were using its territory to launch numerous attacks on Uganda, and if the Congo acknowledges that until May 1997 it took *no* measures to comply with its duty of vigilance (and, I repeat, no measures have been mentioned by Professor Klein or Professor Corten), the DRC automatically incurs responsibility. Mr. Hyde *can no longer* hide behind Doctor Jekyll. Thus one readily understands our opponents' desperate efforts to enable the Congo to escape its responsibility through recourse to "slicing" techniques and to the ingenious device of an alleged "renunciation".

24. But even during the period between May 1997 and August 1998 the argument that the Congo had at last fulfilled its duty of vigilance is unconvincing. Thus it should be stressed that it is not enough for a State to declare that it is co-operating or to pretend to co-operate in order to comply with its duty of vigilance. Neither did signing an agreement such as the April 1998 Protocol mean that it could claim indulgence for past and future acts. This morning my distinguished colleague and friend, Paul Reichler, recalled all the ambiguities in Congolese policy

34 during that period and showed that "co-operation" was merely the visible tip of an iceberg of continuing tolerance of and support for anti-Ugandan rebels.

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[29] *Idem*., paras. 2 *et seq*.

25. This indeed leads us to wonder whether Congo has not only violated international law by omission, by failing in its duty of vigilance, but also by its *acts*. Professor Klein and Professor Corten have denied *in toto* that there were any such acts on the part of the Congo. Nevertheless the facts before the Court leave little room for doubt in this respect. Of course, when a State is supporting rebels or terrorists it does not often organize press conferences in this connection and rarely makes a televised statement about it. From this point of view, Uganda unfortunately cannot produce to the Court solemn declarations by President Mobutu or President Laurent Kabila claiming ultimate responsibility for the acts of rebels.

26. However, the evidence produced by Uganda in the annexes to its written pleadings is sufficient to establish the truth of the facts. In his presentation this morning, my colleague Paul Reichler dwelt at length on this point regarding the period under Mr. Laurent Kabila's presidency, so I am not going to return to it. As to the period under Mr. Mobutu's presidency, aid by the Congo to anti-Ugandan rebels is established beyond all reasonable doubt by a whole series of different documents, including several statements by a large number of anti-Ugandan rebels themselves who explain, for example, how *"ADF requested for bases in the Congo (DRC) to establish camps which was granted"*[30] by Mr. Mobutu's Government, how the activities of anti-Ugandan rebels proceeded *"under the direct authority of President Mobutu"*[31] or how *"ADF received several weapons from the Sudan Government with help of the Government of Zaire"*[32]. Uganda is not going to revisit all of these documents here in order to present each one of them individually. Uganda simply respectfully requests the Court to examine the following Annexes with care:

35 — in the Ugandan Counter-Memorial: Annex 3 (pp. 1-2), Annex 4, Annex 5 (p. 2), Annex 7 (pp. 3-5), Annex 10 (p. 1), Annex 18 (pp. 2-3), Annex 60 (p. 6), Annex 62 (p. 1), Annex 63 (p. 1), Annex 64 (p. 1), Annex 71 (p. 1), Annex 90 (pp. 3-7);

— in the Ugandan Rejoinder: Annex 19 (p. 2), Annex 20 (p. 2), Annex 21, Annex 22 (p. 3), Annex 25 (pp. 1-3), Annex 85, Annex 108 (pp. 4-10).

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[30]CMU, Ann. 64, p. 1; emphasis added.

[31]*Idem*., Ann. 71, p. 1; emphasis added.

[32]CMU, Ann. 60, p. 6 or again Ann. 62, p. 1; emphasis added.

27. In the light of all of these documents and all of this evidence, Uganda is asking the Court to adjudge and declare that actions in support of the rebels on the part of the Congolese authorities all constitute violations of the legal principles that I analysed last week.

28. With your permission, Mr. President, I should now like to move on to the second part of my presentation, which concerns the second counter-claim.

III. The second counter-claim

29. In this last section I would like to comment very briefly on the preliminary objections raised by the DRC (A) before turning, also briefly, to the merits (B).

A. The preliminary objections to the second counter-claim

30. My distinguished colleague Jean Salmon reiterated here before you the preliminary objections belatedly raised by the DRC. My responses follow.

(a) *The objection relating to the alleged modification of Uganda's second claim resulting from the alleged belated addition of the Vienna Convention on Diplomatic Law to the list of rules violated by the DRC*

31. Without repeating here what I said last week, Uganda will make the following four points in response.

32. *First*, this objection is patently inadmissible since the issue of the admissibility of this claim has already been settled, as I have said, by the Order rendered by the Court on 29 November 2001.

33. *Secondly*, there is nothing new in the formulation of Uganda's second claim. Contrary to the DRC's contention, the 1961 Vienna Convention was invoked in Uganda's Counter-Memorial,

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and no fewer than *three times* in paragraph 402 of the Counter-Memorial. It is impossible to see in this respect why paragraph 402, despite its clarity, would be ineffective for this second claim and that only paragraphs 405 and 408 would be relevant — to again cite the argument advanced by my friend Jean Salmon[33]. Further, we should recall what the Court said in its Order of 29 November 2001:

[33] CR 2005/11, p. 42, para. 1.

> "in respect of Uganda's second counter-claim . . ., it is evident from the case file that the facts relied on by Uganda occurred in August 1998, immediately after its alleged invasion of Congolese territory; whereas each Party holds the other responsible for various acts of oppression allegedly accompanying an illegal use of force; whereas these are facts of the same nature, and whereas the Parties' claims form part of the same factual complex . . .; and whereas each Party seeks to establish the responsibility of the other by invoking, in connection with the alleged illegal use of force, certain rules of *conventional* or customary international law relating to the protection of persons and property; whereas the Parties are thus pursuing the same legal aims"[34].

It is thus clear that the "conventional . . . law" to which the Court referred is none other than the Vienna Convention on Diplomatic Relations, the only conventional instrument expressly named in that part of the Counter-Memorial devoted to the second claim.

34. *Thirdly*, and in the alternative, even assuming that the Court concludes, in spite of everything, that the Vienna Convention was not invoked in the Counter-Memorial, it is difficult to see why the Court should take the view that the reference to the Convention changes the subject-matter of the claim, making it into a "new claim".

35. I shall recall in this connection that the Court, in its Judgment of 6 November 2003 in the *Oil Platforms* case, rejected a similar argument made by Iran, even though the particulars and incidents added by the United States after having formulated the counter-claim were far more important than Uganda's alleged addition, minimal as it is, of a reference to the Vienna Convention in this case. Yet, in its 6 November 2003 Judgment in the *Oil Platforms* case, the Court rejected Iran's argument, finding that the United States had not "by doing so, transformed the subject of the dispute originally submitted to the Court, nor has it modified the substance of its counter-claim,
37 which remains the same . . ."[35]. We believe that the same conclusion should, *a fortiori*, be adopted here.

36. *Finally*, and again in the alternative, even assuming that the Court decides, in spite of everything, that the claim is a "new" one, we would have difficulty understanding why it should be dismissed on the basis of Article 80, paragraph 1, of the Rules of Court. This claim's historical connection is perfectly clear: it relates to exactly those facts in respect of which the Court recognized such a connection in its Order of 29 November 2001. The legal connection is just as clear, the Court having pointed out that such a connection is established by the fact that the two

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[34] *Op. cit., I.C.J. Reports 2001*, p. 679, para. 40; emphasis added.

[35] *Op. cit.*, para. 118.

States invoke the same rules relating to "the protection of persons and property". Let us observe finally that a decision to the effect that Uganda should file a new, separate application concerning the Vienna Convention's applicability to the facts already submitted to the Court for consideration would be contrary to the principles of procedural economy and, beyond that, the principle of sound administration of justice.

(b) ***The other objections***

37. Last Friday, my friend Jean Salmon said practically nothing about the objection relating to the exercise of diplomatic protection. I explained at length in my statement last Wednesday (CR 2005/10) why recourse to diplomatic protection was inapplicable in the present case. I therefore stand by those arguments.

38. On the other hand, Jean Salmon tried to sow confusion in respect of that part of the second claim concerning attacks on "Ugandan nationals". Uganda has however always made a very clear distinction between, on the one hand, members of the diplomatic staff of the Mission, including all persons covered by the provisions of the Vienna Convention, and, on the other hand, other Ugandan nationals who are not diplomats and who, Uganda believes, are entitled to the protection extended by general principles of international law concerning treatment of foreign nationals. Therefore, while the rather histrionic performance by my friend Jean Salmon, brilliantly bringing to life a fable by La Fontaine, was no doubt amusing and very nice after two exhausting weeks of proceedings, it was nevertheless legally irrelevant.

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B. Examination of the second claim on the merits

39. Maître Tshibangu Kalala then endeavoured to show that Uganda's second counter-claim should be rejected because unfounded both in law and in fact. His conclusions are as simple as they are categorical: "none of these accusations made against (the DRC) by the Respondent has any serious and credible factual basis" (CR 2005/11, p. 51, para. 3). And he concludes from this: the Ugandan diplomatic mission was never attacked: Ugandan nationals were not mistreated, either at the embassy or at Ndjili International Airport; public immovable property of Uganda was never ransacked but rather voluntarily abandoned by Ugandan diplomats and, notwithstanding its "dilapidation", remains at the disposal of Uganda. According to the DRC, Uganda is unable to

prove that four vehicles remaining in Kinshasa were stolen by Congolese soldiers. Certain archives and official documents belonging to Uganda's mission in Kinshasa were not stolen by the DRC either and the DRC did not seize certain [moveable] property of the Ugandan mission. The few documents produced by Uganda in support of its claims are said to be without probative force: they are alleged to have been "concocted" (paras. 24 and 28) by Uganda with a view to engaging the responsibility of the DRC! Words cannot express Uganda's indignation at such charges!

40. The Luanda Treaty of 6 September 2002 provided for an inspection of Uganda's chancery and official residence in Kinshasa by a joint delegation of Ugandan and Congolese officials. A report dated 28 September concerning the condition of those buildings was thus prepared and signed by the two States' officials. This report is found in Annex 88 of Uganda's Rejoinder. Maître Tshibangu Kalala is aware of both the existence and content of this report, but he feels that this inventory

> "can only constitute evidence if compared with a separate inventory, prepared *in tempore non suspecto* at the time when the Ugandan diplomats were evacuated from Kinshasa. However, no such inventory was ever made, probably because the members of Uganda's diplomatic mission took with them all property and archives of any value . . ." (CR 2005/11, p. 57, para. 20.)

39 However, this joint report notes: (1) that the two buildings were occupied — and certainly not by Ugandan officials; (2) that they were in a state of total ruin; and (3) that the delegation did not find any moveable property belonging to the Ugandan Embassy or its former officials. But the DRC no doubt considers this document, like all the others moreover, to be worthless, even though it is bilateral in nature and, in this case, was not unilaterally "concocted" by Uganda.

That, Mr. President, honourable Members of the Court, brings to a conclusion my statement on Uganda's counter-claims in the second round of oral argument. Thanking you, Mr. President, and Members of the Court, for your kind attention, I would now like to ask you to give the floor to the Honourable Khiddu Makibuya, Attorney General of the Republic of Uganda, who will make a brief statement and present Uganda's final submissions. Thank you.

Le PRESIDENT : Je vous remercie, Monsieur Suy. Je donne à présent la parole à S. Exc. M. Khiddu Makubuya, agent de l'Ouganda.

M. KHIDDU MAKUBUYA :

1. Monsieur le président, Madame et Messieurs de la Cour, c'est avec un grand plaisir que je prends de nouveau la parole devant vous, cette fois pour clore la plaidoirie de l'Ouganda. Avant d'en venir aux conclusions formelles de l'Ouganda, j'espère que vous me permettrez de formuler quelques dernières observations au nom de mon gouvernement.

2. Au cours des deux semaines et demie qui viennent de s'écouler, chacune des Parties a défendu ses thèses avec véhémence, et je dirais même avec éclat. Si les plaidoiries de la RDC furent parfois pénibles à entendre, je n'en ai pas moins été impressionné par l'opiniâtreté avec laquelle ses conseils ont — infatigablement — défendu leur cause contre l'Ouganda. Ce qui rendit l'écoute pénible, ce ne furent pas seulement les terribles accusations formulées à l'encontre de l'Ouganda. C'est aussi que cela nous a tous contraints à revenir sur une période qui fut traumatisante pour la RDC, pour l'Ouganda et d'ailleurs pour l'Afrique tout entière, période que l'Ouganda croyait révolue depuis fort longtemps.

3. Comme je l'ai dit lorsque j'ai eu l'honneur de me présenter une première fois devant la Cour le vendredi 15 avril dernier, les relations bilatérales entre l'Ouganda et la RDC sont nettement

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meilleures depuis les dernières années, tout particulièrement depuis la signature de l'accord de paix de Luanda en septembre 2002. J'ai été heureux d'entendre M. l'ambassadeur Masangu-a-Mwanza et M^e^ Kalala en apporter l'un et l'autre confirmation au nom du Congo. Pour insister sur ce fait, je vous dirai que, la semaine dernière, alors même que se déroulaient nos audiences, des représentants de l'Ouganda, de la RDC et du Rwanda ont tenu à Lubumbashi, au Congo, la deuxième réunion de la commission tripartite mise en place par l'accord tripartite d'octobre 2004 — dont une copie figure au dossier des juges, à l'onglet 10. Avec l'aide et la médiation de l'Organisation des Nations Unies, de l'Union européenne, de l'Union africaine, de la Belgique, des Etats-Unis d'Amérique et du Royaume-Uni, les Parties ont convenu de créer une «cellule conjointe de collecte, d'exploitation et d'analyse du renseignement» — une initiative qui s'inscrit dans le cadre de l'action que nous menons sans relâche pour aider à mettre vraiment un point final au conflit qui ensanglante la région des Grands Lacs depuis 1994, et en particulier pour en finir avec la présence de bandes armées qui subsistent dans certaines parties du Congo.

4. Lundi, j'ai entendu M^e^ Kalala reprocher à l'Ouganda et à ses conseils d'invoquer inutilement l'histoire et la politique régionale dans le cadre de leur défense. L'Ouganda estime qu'on ne peut pas comprendre les événements en cause devant la Cour sans avoir une connaissance approfondie du contexte régional et historique dans lesquels ils s'inscrivent. D'où la nécessité de suivre la voie qu'ont été contraints d'emprunter tous les pays d'Afrique centrale depuis le génocide barbare commis au Rwanda en 1994. D'où, aussi, la nécessité de revenir plus particulièrement sur le rôle indéniable joué et par le Rwanda et par le Soudan dans ces événements. Il ne m'agrée pas plus qu'à M^e^ Kalala d'entendre le nom du «Soudan» répété 250 fois, mais les faits sont ce qu'ils sont et non ce que nous voudrions qu'ils soient.

5. Tandis qu'il morigénait l'Ouganda parce que ce dernier évoquait des faits relevant de la politique et de l'histoire régionale, M^e^ Kalala s'est employé à souligner que c'est un jugement en droit que la RDC demande à la Cour dans le différend qui l'oppose à l'Ouganda[36]. Mais ici, il me faut m'arrêter un instant et revenir sur un point que j'ai soulevé dans ma première intervention et que la RDC s'est abstenue de traiter. Il s'agit des termes de l'accord de paix de Luanda. A l'article 4, sous l'intitulé «Des relations judiciaires», l'Ouganda et la RDC ont convenu de «trouver une formule à l'amiable pour résoudre tout litige juridique entre elles». Or donc, si M^e^ Kalala est dans le vrai et qu'il s'agit en effet ici d'un simple différend «en droit», celui-ci est par définition
41 couvert par l'article 4 de l'accord de Luanda. En conséquence, les Parties sont tenues de trouver une «formule à l'amiable» pour le résoudre. Quand la RDC veut de façon absolument *unilatérale* inscrire une nouvelle fois cette affaire au calendrier de la Cour — et, là-dessus, elle fait tout bonnement litière de l'objection expresse de l'Ouganda — la RDC formule une demande tout simplement contraire à l'engagement qu'elle a contracté dans l'accord de paix de Luanda.

6. La Cour, point n'est besoin pour moi de le rappeler, est bien plus qu'une simple cour de justice. C'est un rouage essentiel du système de l'Organisation des Nations Unies visant à promouvoir et à faciliter le règlement pacifique des différends. Son mandat ne se résume donc pas, tant s'en faut, à appliquer des principes abstraits de droit international sans se soucier des conséquences politiques et humaines que sa décision est appelée à avoir sur le terrain.

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[36] CR 2005/12, p. 9, par. 3.

7. Monsieur le président, Madame et Messieurs les Membres de la Cour, je veux être parfaitement clair. L'Ouganda a le plus grand respect pour la Cour et pour les règles du droit international. Voilà pourquoi, contrairement à certains des autres protagonistes de la pièce qui s'est déroulée dans ce prétoire, l'Ouganda a accepté sa juridiction obligatoire en 1963, peu après avoir accédé à l'indépendance. Voilà aussi pourquoi l'Ouganda — et c'est, à sa connaissance, le seul pays de la communauté internationale à l'avoir fait — a voulu créer une commission judiciaire indépendante chargée d'enquêter sur les allégations de pillage des richesses congolaises. D'ailleurs, j'ai pu, en ma qualité d'*Attorney General* de l'Ouganda, constater avec ironie que c'est précisément l'attachement de l'Ouganda à la transparence et à la primauté du droit qui a permis aux conseils de la RDC de vous faire entendre ce qu'ils considèrent à tort comme des arguments servant leur cause. Le Congo s'est fortement appuyé sur des documents internes du Gouvernement ougandais et de l'armée ougandaise, produits dans le cadre de la mission de la commission Porter. Il va sans dire que la même possibilité d'examiner les dossiers internes du Gouvernement congolais ou de l'armée congolaise n'a pas été donnée à l'Ouganda. Dans sa résolution 1457 de 2003, au paragraphe 15, le Conseil de sécurité avait engagé tous les Etats de la région à créer leur propre commission d'enquête pour mener une instruction indépendante sur les allégations. La RDC a bien cité abondamment le rapport de la commission Porter, mais il aurait été plus utile pour la Cour de l'entendre faire état du rapport de sa propre commission judiciaire d'enquête — encore aurait-il fallu que celle-ci existe.

8. Respecter le droit international consiste pour partie à honorer les engagements contractés par la voie de traités internationaux. Et c'est là ce que nous demandons à la RDC et ce que nous attendons de sa part. La Cour sait parfaitement qu'en novembre 2003, les Parties ont convenu d'une «formule à l'amiable» afin de résoudre leur différend par la voie de négociations
42 diplomatiques. Ensuite, sans consulter au préalable l'Ouganda, la RDC a unilatéralement exigé que cette affaire soit de nouveau inscrite au calendrier de la Cour. Comme l'Ouganda l'a dit alors à la Cour, cette formule unilatérale n'avait rien d'une formule amiable.

9. Force est pour moi de poser à nouveau la question que j'ai soulevée lorsque l'Ouganda a entamé sa défense le 15 avril 2005. Qui a réellement intérêt à prolonger cette action en justice ? Nous sommes deux pays en développement appelés à acquitter des frais exorbitants notamment

pour notre représentation en justice alors que cet argent pourrait être consacré à un bien meilleur usage. N'aurions-nous pas intérêt à trouver une manière plus constructive de régler ce différend ?

10. J'ai entendu M. Kalala réclamer avec ardeur justice et réparation au nom du peuple congolais. Dois-je en faire autant au nom des civils ougandais, dont on ignore le nombre, qui furent tués délibérément par les rebelles armés opérant en toute impunité depuis le territoire congolais — souvent avec le soutien du Gouvernement zaïrois ou congolais ?

11. Il faut faire la lumière sur les méfaits allégués, certes. Mais, avec tout le respect qui lui est dû, je dirai à la Cour qu'elle favoriserait le plus efficacement et le plus durablement le règlement pacifique de ce différend en incitant les Parties à honorer l'engagement qu'elles ont pris de trouver à cet effet une formule à l'amiable.

12. Permettez-moi de vous dire clairement au nom de mon gouvernement que l'Ouganda est prêt à prendre place à une table avec le Congo, est tout disposé à s'asseoir à cette table pour qu'entre voisins nous cherchions résoudre toutes les questions qui sont à régler entre nous. En ce moment de transition en RDC et dans la région des Grands Lacs tout entière, et c'est un moment périlleux mais aussi un moment historique, l'Ouganda se féliciterait de toute mesure que la Cour pourrait juger opportun de prendre en vue d'inciter ou d'aider les Parties à trouver une formule à l'amiable pour résoudre leur différend ainsi qu'elles en sont tenues en tout état de cause par l'article 4 de l'accord de Luanda.

13. Monsieur le président, Madame et Messieurs de la Cour, ce fut un honneur pour l'Ouganda et pour moi-même que de comparaître devant vous. Conformément à l'article 60 du Règlement de la Cour, je vous soumets à présent les conclusions formelles de l'Ouganda.

14. La République de l'Ouganda prie la Cour :

43 1) De juger et déclarer conformément au droit international :

A) que les prétentions de la République démocratique du Congo relatives aux activités ou aux situations impliquant la République du Rwanda ou ses agents sont irrecevables pour les raisons énoncées au chapitre XV du contre-mémoire et réaffirmées à l'audience;

B) que les prétentions de la République démocratique du Congo tendant à ce que la Cour juge que la République de l'Ouganda est responsable de diverses violations du droit

international, suivant les allégations formulées dans le mémoire, dans la réplique et/ou à l'audience, sont rejetées; et

C) que les demandes reconventionnelles de l'Ouganda formulées au chapitre XVIII du contre-mémoire et renouvelées au chapitre VI de la duplique ainsi qu'à l'audience sont confirmées.

2) de réserver à un stade ultérieur de la procédure la question des réparations en rapport avec les demandes reconventionnelles de l'Ouganda.

15. Monsieur le président, Madame et Messieurs de la Cour, je vous remercie de votre bienveillante attention. Comme l'a indiqué M. Reichler ce matin, l'Ouganda répondra par écrit aux trois questions posées par la Cour à l'issue du premier tour de plaidoiries. Je vous remercie.

Le PRESIDENT : Je vous remercie, Votre Excellence. La Cour prend acte des conclusions finales dont vous avez donné lecture au nom de l'Ouganda. Voilà qui clôt le second tour de plaidoiries de l'Ouganda.

Les audiences en l'affaire reprendront le vendredi 29 avril, de 10 heures à 11 h 30 : la Cour entendra alors la plaidoirie de la République démocratique du Congo sur les demandes reconventionnelles de l'Ouganda. L'audience est levée.

L'audience est levée à 17 h 30.

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