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INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING

ARMED ACTIVITIES ON THE TERRITORY OF THE CONGO

(DEMOCRATIC REPUBLIC OF THE CONGO *v.* UGANDA)

SECOND PHASE

QUESTION OF REPARATION

OBSERVATIONS OF THE DEMOCRATIC REPUBLIC OF THE CONGO ON THE EXPERTS' REPORT OF 19 DECEMBER 2020

14 February 2021

[Translation by the Registry]

2 1. On 8 July 2020, the Registrar of the Court informed the Parties that the Court considered it necessary to arrange for an expert opinion, pursuant to Article 67, paragraph 1, of its Rules, with respect to three heads of damage identified by the Democratic Republic of the Congo (DRC) in its written pleadings: loss of human life, loss of natural resources, and property damage.

2. By an Order of 8 September 2020, the Court decided to obtain this expert opinion

> "[f]or the purposes of determining the reparation *owed* to the Democratic Republic of the Congo by Uganda for the injury caused as a result of the breach by Uganda of its international obligations, as determined by the Court in its 2005 Judgment"[1].

3. After receiving each Party's observations on the four independent experts it had identified to carry out the expert opinion it deemed necessary, the Court appointed the experts by an Order dated 12 October 2020. In that Order, the Court recalled that the Parties would have the opportunity to comment on the experts' report and to put questions to the experts in the course of the oral proceedings. It also noted that "it w[ould] be for the Court to determine what weight, if any, to be given to the assessments contained in the expert report"[2].

4. Further to the Court's request, the experts delivered their report on 19 December 2020, and the Court asked the Parties to submit their observations by 21 January 2021 at the latest. In response to a request by Uganda, the Court agreed to extend to 15 February 2021 the time-limit for the submission of the Parties' observations on the experts' report. The latter comprises four distinct reports, which should nonetheless be read together. The present document sets out the DRC's observations on the experts' report. These observations are preliminary in nature and will be kept relatively brief. They are without prejudice to any additional observations or clarifications that the DRC may find it necessary to make in the oral proceedings. They are, of course, also without prejudice to the final claim that the DRC will submit to the Court, after it has become acquainted with the written observations of Uganda and when it reads out its final submissions at the close of
3 the hearings, pursuant to Article 60, paragraph 2, of the Rules of Court.

5. Before setting out its observations, the DRC would like to recall, as it noted on filing its Memorial on the merits, that beyond specific discussions on any particular event, evidentiary document or expert opinion, it is appropriate to adhere in general to the principle of full reparation: reparation must indeed cover *all* the damage caused by a wrongful act. This principle was expressly recalled in the 2005 Judgment on the merits: Uganda "is under an obligation to make *full* reparation for the injury caused" by its wrongful acts[3]. It is codified in the work of the International Law Commission on State responsibility[4] and has been enshrined in international jurisprudence, including that of the Court[5].

6. The DRC's observations will be presented in four parts. First, the DRC will set out its general views on the methodology and scope of the experts' reports (I). It will then put forward more

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[1] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Order of 8 September 2020*, para. 16; emphasis added.

[2] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Order of 12 October 2020*, p. 3.

[3] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 257, para. 259; emphasis added.

[4] Art. 31 of the articles on the responsibility of States for internationally wrongful acts, A/RES/56/83, 12 Dec. 2001.

[5] Memorial on Reparation of the Democratic Republic of the Congo (MRDRC), 2016, para. 1.02.

specific considerations relating to personal injury (II), the exploitation of natural resources (III) and property damage (IV), respectively.

I. THE GENERAL METHODOLOGY AND SCOPE OF THE EXPERTS' REPORTS

7. The terms of reference that the Court provided to the experts are as follows:

"**1. Loss of human life**

(a) Based on the evidence available in the case file and documents publicly available, particularly the UN Reports mentioned in the 2005 Judgment, what is the global estimate of the lives lost among the civilian population (broken down by manner of death) due to the armed conflict on the territory of the Democratic Republic of the Congo in the relevant period?

(b) What was, according to the prevailing practice in the Democratic Republic of the Congo in terms of loss of human life during the period in question, the scale of compensation due for the loss of individual human life?

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2. Loss of natural resources

(a) Based on the evidence available in the case file and documents publicly available, particularly the UN Reports mentioned in the 2005 Judgment, what is the approximate quantity of natural resources, such as gold, diamond, coltan and timber, unlawfully exploited during the occupation by Ugandan armed forces of the district of Ituri in the relevant period?

(b) Based on the answer to the question above, what is the valuation of the damage suffered by the Democratic Republic of the Congo for the unlawful exploitation of natural resources, such as gold, diamond, coltan and timber, during the occupation by Ugandan armed forces of the district of Ituri?

(c) Based on the evidence available in the case file and documents publicly available, particularly the UN Reports mentioned in the 2005 Judgment, what is the approximate quantity of natural resources, such as gold, diamond, coltan and timber, plundered and exploited by Ugandan armed forces in the Democratic Republic of the Congo, except for the district of Ituri, and what is the valuation of those resources?

3. Property damage

(a) Based on the evidence available in the case file and documents publicly available, particularly the UN Reports mentioned in the 2005 Judgment, what is the approximate number and type of properties damaged or destroyed by Ugandan armed forces in the relevant period in the district of Ituri and in June 2000 in Kisangani?

(b) What is the approximate cost of rebuilding the kind of schools, hospitals and private dwellings destroyed in the district of Ituri and in Kisangani?"[6]

It is thus within this authoritative framework that the experts were invited to give their opinions.

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[6] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Order of 8 September 2020*, para. 16.

8. In view of this general framework, before examining the different reports any further, the DRC will comment on the methodology used to assess the reparation (A), and the scope of the experts' terms of reference (B).

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A. The methodology which should generally be applied in assessing the reparation

9. It is clear from the terms of reference recalled above that a methodology has been chosen which is appropriate to the nature of the injury suffered in the present case (1), has generally been applied by the experts in making their observations, and is wholly consistent with the DRC's approach to the evidence included in the case file (2).

1. A methodology appropriate to the nature of the injury

10. The experts' reports contain numerous assessments which confirm that the methodology applied in establishing the facts has to be appropriate to the nature of the damage caused in the context of war. In keeping with the logic of the terms of reference provided to them by the Court, the experts give general estimates and rely on United Nations reports and other official documents. They also employ techniques which consist in establishing rates or proportions, so as to encompass the situation as a whole.

2. The experts' consideration of the evidence filed by the DRC to establish injury

11. In general, the experts are clearly of the view that the evidence filed to establish injury, and in particular that produced to support the DRC's claim, merits consideration. The experts present their estimates as "comparable to the ones presented by the Congo Memorial"[7], or even as "agree[ing]" with them[8], and consider that the figures included in the claim are "reasonable"[9], "not unreasonable"[10] or "minor"[11]. Moreover, in their report they adopt some specific features of the approach taken by the DRC. Examples of this include grouping the victims of Uganda's acts into two categories (direct and indirect)[12], and the arguments for taking account of excess mortality which were originally set out in the DRC's Memorial[13].

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12. Looking beyond the general approach, however, some criticisms and questions arise with regard to certain specific aspects of the experts' report. Before setting out these criticisms and questions, it is essential to state clearly the scope as well as the limits of the report. On that basis, it will be possible to clarify its place in the present dispute.

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[7] Experts' Report (ER), para. 51.

[8] *Ibid.*, para. 68.

[9] *Ibid.*, paras. 106, 109, 110.

[10] *Ibid.*, para. 138.

[11] *Ibid.*, para. 117.

[12] *Ibid.*, paras. 42 and 84 *et seq*.

[13] MRDRC, paras. 2.62 and 7.14.

B. Scope and limits of the experts' report

13. Before setting out the precise scope and limits of the report in the material sense (2 to 4), it should be noted, in general, that the sometimes particularly conservative estimate of the damage resulting from the conflict may raise questions (1).

1. The conservative nature of certain estimates presented in the report

14. Henrik Urdal notes in his report that "there are important limitations" to the UCDP data on which he relies[14], due in particular to the likely "underreporting of armed activity that could have qualified for inclusion in the . . . database"[15] and the fact that no account is taken of events "for which casualty estimates cannot be established"[16]. The UCDP website also assumes this particularly cautious tone and states that

> "[d]ue to the lack of available information in many conflict zones, it is quite likely that there are more fatalities than given in the best estimate, but it is very unlikely that there are fewer"[17].

Quite logically, Henrik Urdal states that "[e]ven the 'high estimate' is considered to be a cautious assessment as the UCDP specifically avoids including unreasonable claims in the high estimate of fatalities"[18], with the result that "[g]enerally, UCDP fatality numbers are conservative"[19]. His report even notes that the UCDP "tends to be *highly conservative* when counting fatalities"[20]. On that basis, he openly acknowledges that the stated estimates of deaths are "conservative, or cautious estimates"[21].

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15. In the same vein, with regard to the exploitation of natural resources, Michael Nest observes that he "assumed that every such incident that ever occurred within the UAI [Ugandan area of influence] during the time period was not documented or made available in the case file documents"[22].

16. The DRC will return in greater detail to certain aspects of the experts' report later on. At this stage, and in general, it should be noted that this wording clearly shows that the report is far from providing a high — let alone an extreme — estimate of the damage resulting from the conflict.

17. The limited nature of the report can thus be inferred directly from the valuations and items covered by it. However, it is also and especially related to the aspects of the DRC's claim that were *not* covered by the report. The terms of reference provided to the experts by the Court encompass three areas: loss of human life, unlawful exploitation of natural resources, and property damage. It is within the limits of these terms of reference that the experts carried out their work, fixed their

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[14] ER, para. 25.

[15] *Ibid*., paras. 26 *et seq*.

[16] *Ibid.*, para. 28.

[17] https://www.pcr.uu.se/research/ucdp/methodology/.

[18] ER, para. 21.

[19] *Ibid.*, para. 21.

[20] ER, App. 1.3; emphasis added.

[21] *Ibid*., para. 30; see also para. 29 ("a moderate estimate of direct deaths").

[22] *Ibid*., para. 205.

valuations and produced their report. It must therefore be interpreted accordingly, as not covering the aspects of the DRC's claims which fall outside these terms of reference (point 2, below) or which were not construed as falling within them (point 3). Finally, one last category concerns certain aspects of the report that fall within the scope of the terms of reference but were not included in the DRC's original claim (point 4).

2. Aspects of the DRC's claim not covered by the experts' terms of reference

18. This category comprises various elements, some of which were discussed at length in the DRC's claim as set out in its Memorial. They concern several areas.

8 19. It should first be noted that the DRC included in its claim *all* injury caused by the Ugandan aggression, be it due to the violation of the prohibition of the threat or use of force, the violation of the norms of international humanitarian or human rights law, or the violation of the prohibition of the unlawful exploitation of natural resources. This logically includes *all* injury caused to the Congolese State, that is to say, the loss not only of civilian lives but also that of the *soldiers and other State agents* who died, sometimes heroically, while attempting to fend off (or put an end to) the aggression. As the DRC noted in its Memorial, taking into account the legally recognized principle of full reparation, it is hard to see how this particular component of the claim could be excluded[23].

20. The experts' report does not appear to address this particular aspect of the DRC's claims. As it mentions at the outset, Report 1, prepared by Henrik Urdal, exclusively concerns civilians. However, "[d]eaths of military personnel are not included as they were not part [of] the TOR"[24]. Indeed, the Court limited the scope of the expert opinion to "lives lost among the civilian population", as mentioned above. Report 2, drafted by Debarati Guha-Sapir, concerns "*civilian* deaths in excess to normal mortality rates that can be attributed to the conflict"[25]. She is therefore not supposed to include civilian (let alone military) deaths which are "intentional . . . [and] addressed in Report 1"[26]. It is in any event clear from Report 3 that the scale of compensation due for damage resulting from lives lost or the physical injuries suffered by the victims is based on calculations for "civilian populations"[27]. These terms also appear, moreover, in Table B at the beginning of the experts' report[28].

21. Nor do the terms of reference provided to the experts by the Court include an assessment of the macroeconomic injury caused to the DRC by Uganda as a result of the Ugandan army's activities on Congolese territory between August 1998 and June 2003. This injury was identified by the DRC — which devoted a full chapter of its Memorial to it[29] — as a component of the reparations
9 owed to it for loss of revenue *(lucrum cessans)*, in accordance with the above-mentioned principle of full reparation.

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[23] MRDRC, in particular pp. 54 *et seq*. and 70-71.

[24] ER, para. 9.1.

[25] *Ibid.*, para. 9.2; emphasis added.

[26] *Ibid*., para. 9.2; emphasis added.

[27] *Ibid*., para. 84.

[28] *Ibid*., para. 6.

[29] MRDRC, Chap. 6.

22. The same conclusion must also be reached in respect of other aspects of the DRC's claims, including in particular:

— the claim of compensatory interest at a rate of 6 per cent on any amounts that the Court may order Uganda to pay, calculated as from September 2016, the date on which the DRC's Memorial was filed; payment of this interest is all the more warranted given that Uganda has since refused to engage in any serious negotiations or, ultimately, to pay any compensation, even partially;

— the claim of US$125 million as satisfaction for all non-material injury resulting from the violations of international law found by the Court in its Judgment of 19 December 2005;

— the request that the Court order Uganda, as satisfaction, to conduct criminal prosecutions of the members of its armed forces who were involved in the violations of international humanitarian law or international human rights law committed in Congolese territory;

— the claim for all the costs incurred by the DRC in the context of the present case.

23. In keeping with the terms of reference provided by the Court, which did not prejudge these aspects of the DRC's claim, the experts' report addresses none of these various points and they thus remain entirely open to judicial debate. This was formally recalled in paragraph 9 of the Order of 8 September 2020, according to which the Court decided to arrange for an expert opinion with respect to certain heads of damage "while continuing to examine the full range of heads of damage claimed by the Applicant and the defences invoked by the Respondent".

3. Aspects of the DRC's claim which the experts did not include in their report: no expert opinion on fauna

24. Although the Court broadly defined the scope of the expert opinion as including an assessment of the "loss of natural resources", the experts' report remains totally silent on the question of damage to fauna. The report neither excludes it as a matter of principle, nor includes it. In fact, the report never mentions or refers to it but appears simply to ignore it. There being no justification for this exclusion in the report, the DRC can only make assumptions and conjectures on this point. A discussion of this question is set out below, in the part of these observations which concerns natural resources[30]. Although it is not mentioned in the experts' report, damage to fauna forms part of the injury caused to the DRC's natural resources. It therefore must be taken into account in accordance with the principle of full reparation. The DRC thus maintains in full this aspect of its claim.

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4. Aspects of the report which enable the DRC's claim to be updated

25. As the DRC will discuss in detail later on, Michael Nest took account of the damage resulting from the unlawful exploitation of tin, tungsten and coffee in his report on natural resources. None of these resources were directly addressed in the DRC's Memorial, which referred to gold, diamonds, coltan and timber, as well as fauna[31].

26. However, this in no way precludes damage resulting from the unlawful exploitation of tin, tungsten and coffee from being included in the claim for reparation that the DRC will present to the Court in its final submissions. In its Memorial, at the end of the chapter on natural resources, the DRC stated that its claim was made "at this stage of the proceedings and without prejudice to

[30] Paras. 44-49, below.

[31] MRDRC, para. 5.190.

supplementary claims"[32]. The submissions in the DRC's Memorial were, by the same logic, expressly made "subject to any changes made to its claims in the course of the proceedings"[33].

27. In these circumstances, the DRC now expressly includes in its claim for reparation the damage resulting from the unlawful exploitation of tin, tungsten and coffee, and adopts the amounts specified in this regard in Mr. Nest's report. More generally, this report must be considered as supplementing the DRC's claim as it is set out in the submissions of its Memorial.

28. That said, a number of more specific comments and questions arise on reading the report. They concern personal injury, the unlawful exploitation of natural resources and property damage, and will be set out in that order.

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II. OBSERVATIONS ON THE PARTS OF THE REPORT CONCERNING PERSONAL INJURY

29. The part of the experts' terms of reference relating to loss of human life reads as follows:

> "*(a)* Based on the evidence available in the case file and documents publicly available, particularly the United Nations Reports mentioned in the 2005 Judgment, what is the global estimate of the lives lost among the civilian population (broken down by manner of death) due to the armed conflict on the territory of the Democratic Republic of the Congo in the relevant period?
>
> *(b)* What was, according to the prevailing practice in the Democratic Republic of the Congo in terms of loss of human life during the period in question, the scale of compensation due for the loss of individual human life?"

30. The aim of the following observations is to present the initial thoughts and questions of the DRC on reading the reports relating to loss of human life and personal injury. They are without prejudice to any further observations the DRC reserves the right to make during the oral phase of the proceedings.

31. In general, the DRC notes with satisfaction that the experts have taken the measure of the severe impact of conflict-related excess deaths, in accordance with their terms of reference which consisted in establishing a "global estimate of the lives lost among the civilian population"[34]. The applicant Party will take due account of this assessment and will make any comments it might consider necessary during the hearings and in its final submissions. It further notes that the experts have endorsed the methodology used in its Memorial for the determination of categories of victims and compensable injuries, as well as the choice of applicable standards of proof[35]. In light of these general remarks, the DRC wishes to make the following more detailed observations.

32. As regards the question of "Loss of Life: Conflict Deaths" (Report 1), the DRC is surprised at the extremely low numbers given by the expert: 11,227 direct civilian victims and 3,436 indirect

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[32] MRDRC para. 5.190.

[33] *Ibid*., para. 7.89.

[34] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Order of 8 September 2020*, p. 6; emphasis added.

[35] ER, paras. 42, 84 *et seq.*, 96 *et seq.*, 120, 129 and 136.

civilian victims[36], whereas according to the DRC's objective estimates there were 40,000 and 140,000 victims respectively[37]. As has already been pointed out, the expert himself acknowledges that "there are important limitations"[38] in the data from the single source on which he relied, namely the studies conducted by the UCDP independent observatory of the University of Uppsala, in particular because of the likely "underreporting of armed activity that could have qualified for inclusion in the . . . event database"[39] and the fact that events "for which casualty estimates cannot be established"[40] are not taken into account. The DRC concludes that the expert chose to give a lower estimate of the number of direct and indirect victims, even though there is no rational basis for this, in particular in other "documents publicly available" mentioned in the terms of reference provided by the Court[41].

33. Similarly, the DRC notes the low financial assessment of US$30,000 per direct victim and US$15,000 per indirect victim[42]. By way of comparison, in the *Diallo* case, the Congolese State was directed by the Court to pay compensation of US$95,000 (of which US$85,000 was for non-material injury) in respect of a person in its territory who was wrongfully arrested, detained and expelled[43]. It would be rather paradoxical for the compensation recommended by the expert for a direct death to be three times lower.

34. Finally, regarding the valuation and amounts recommended in compensation for human lives lost (Report 3), the DRC notes that the expert has made full allowance for the necessary adaptation of standards of proof in a context of mass atrocities. It is hard to understand why he requires specific evidence for the valuation of deaths, while he admits in the case of rape and child soldiers that "[g]iven the . . . circumstances . . ., it is unsurprising and reasonable that no documentary evidence is provided on an individual basis"[44].

13 35. The individual amount of US$30,000 for human lives lost proposed by the expert[45] therefore seems to be insufficiently substantiated. It is based, without any particular justification, solely on the practice of the United Nations Compensation Commission (UNCC) for Iraq, whereas the ICJ takes into account the practice of a large number of international courts, tribunals and bodies[46], in particular in cases of human rights violations. Why would the valuations of the UNCC alone be reasonable, as the expert seems to think[47]? Given the particular features of the UNCC's practice, one might nevertheless think that it would have been more appropriate to refer to the

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[36] ER, para. 14.

[37] MRDRC, paras. 7.13 and 7.15.

[38] ER, para. 25.

[39] *Ibid.*, paras. 26 *et seq.*

[40] *Ibid.*, para. 28.

[41] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Order of 8 September 2020, op. cit.*

[42] ER, para. 40.

[43] *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012 (I)*, p. 337, para. 56.

[44] ER, para. 120; see also para. 129.

[45] *Ibid*, paras. 93 *et seq.* and para. 105.

[46] See in this regard *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012 (I)*, p. 352, para. 13.

[47] ER, paras. 137-138.

activities of regional African judicial and quasi-judicial bodies in assessing the reparation for the various material and non-material injuries caused in the Congolese situation.

36. Similarly, the flat-rate amount of US$5,000 recommended for both simple and aggravated rape[48] takes no account of the real differences in circumstances between the two categories of victim, and the extremely low amount proposed by the expert would be hard to accept for women expecting reparation for the suffering they have endured.

37. The expert does not contest the reference made in the DRC's Memorial to judgments of national courts regarding the assessment of compensation[49]. Furthermore, in setting out this part of the experts' terms of reference, the Court itself mentioned the need to take account of relevant national practice[50]. Yet the expert does not analyse "the prevailing practice" before Congolese courts in order to determine "the scale of compensation due for the loss of human life".

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38. General guidelines can be identified in Congolese judicial practice, available from public sources[51], which highlight the clear inadequacy of the amounts proposed by the expert. In a large number of decisions on killings as a war crime or crime against humanity, the *lowest* amount awarded to a civil-party applicant is around the equivalent of US$10,000, while in decisions on rape, the *lowest* amount awarded per civil-party applicant is around US$5,000[52]. The mathematical average of compensation awarded by all decisions rendered would however be much higher, since there are cases in which the individual found guilty of murder was ordered to pay the civil-party applicant the sum of US$60,000[53] and the individual accused of rape was ordered to pay the sum of US$30,000[54].

39. In this connection, it should be noted that, unlike the UNCC's practice taken into account by the expert and which correlates compensation with the act constituting the offence, the amount of compensation awarded by Congolese courts is not fixed in relation to that act — for example a murder, assassination or rape — but is determined per civil-party applicant. Given that, in the DRC, (i) families are generally large (parents having on average six children, making a total of eight people

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[48] ER., para. 124; to recall, the DRC sought compensation of US$12,600 for simple rape and US$23,200 for aggravated rape (para. 119).

[49] *Ibid.*, para. 87.

[50] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, Order of 8 September 2020, *op. cit.*

[51] See in particular the two *Bulletins des arrêts de la Haute Cour militaire*, one published in Kinshasa (by Média Saint-Paul) in 2013 and the other in Paris (by L'Harmattan) in 2016. See also *Recueils de décisions de justice et de notes de plaidoiries en matière de crimes internationaux*, published by Avocats sans frontières, in 2010 and 2013 (and available online).

[52] Cour militaire de l'Equateur, *Auditeur militaire supérieur et parties civiles* v. *Bokila et consorts* (*Songo Mboyo*), judgment No. RPA 014/06, 7 June 2006, published in the *Bulletin des arrêts de la Haute Cour militaire*, Paris, L'Harmattan, 2016, p. 305; Cour militaire du Sud-Kivu, *Auditeur militaire* v. *Kabala*, judgment No. RPA 230, 20 May 2013, published in the same *Bulletin*, p. 150; Cour militaire du Sud-Kivu, *Auditeur militaire supérieur et parties civiles* v. *Batumike et consorts* (*Kavumu* case), judgment No. RP 0105/2017 of 13 Dec. 2017. This judgment was upheld by the Haute Cour militaire in its judgment No. 139/2018 of 26 July 2018, available online [https://trialinternational.org/wp-content/uploads/2018/07/Arret-Kavumu-HCM.pdf] (visited on 28 Jan. 2021).

[53] Cour militaire du Katanga, *Auditeur militaire supérieur et parties civiles* v. *Kyungu Mutanga Gédéon et consorts*, judgment No. RPA 025/09 of 16 Dec. 2010, published in the *Bulletin des arrêts de la Haute Cour militaire*, 3rd edition, Kinshasa, Média Saint-Paul, 2013, p. 376.

[54] Haute Cour militaire, *Auditeur général et parties civiles* v. *Jérôme Kakwavu*, judgment No. 004/2010 of 7 Nov. 2014, published in the *Bulletin des arrêts de la Haute Cour militaire*, Paris, L'Harmattan, 2016, p. 98; see also Haute Cour militaire, *Auditeur général* v. *Kibibi et consorts*, judgment No. 047/2011, 10 July 2020, p. 61 (unpublished), judgment in which the civil-party applicants in respect of rape were awarded US$10,000.

per nuclear family) and (ii) in the context of armed conflicts or deliberate attacks against civilians criminal acts such as murder and rape are perpetrated in the presence of family members, several members of the same family are entitled to apply individually for civil-party status in respect of a single criminal act. When this occurs, a Congolese judge has no hesitation in awarding compensation *to each of them*. In these circumstances, the overall amount of compensation for a single act is assessed by adding together the amounts that each of the potential civil parties could have been awarded. In this regard, the judgment rendered in the *Daniel Mukalay et consorts* case (commonly referred to as the *Chebeya* case) provides a particularly clear example of the methodology used. Following the assassination of Mr. Chebeya Bahizire, the Military Court of Kinshasa awarded US$50,000 to his widow, US$35,000 to each of the deceased's six children, US$20,000 to his six brothers and sisters, US$10,000 to the NGO *La voix des sans voix pour les droits de l'homme*, of which the victim was the executive director, and US$10,000 to RENADHOC, a national network of human rights NGOs in which the victim participated[55]. A number of decisions confirm this methodology used by the Congolese courts:

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— Tribunal militaire de garnison de Mbandaka, *Auditeur militaire et parties civiles* v. *Botuli Ikofo et consorts* (*Waka Lifumba* case), judgment No. RP 134/2007, 18 February 2007[56];

— Cour militaire de l'Equateur, *Auditeur militaire supérieur et parties civiles* v. *Bokila et consorts* (*Songo Mboyo* case), judgment No. RPA 014/06, 7 June 2006[57];

— Tribunal militaire de Kisangani, *Auditeur militaire et parties civiles* v. *Basele Lutula et consorts* (*Colonel Thom's et consorts* case), judgment No. RP 167/08, 3 June 2009[58];

— Haute Cour militaire, *Auditeur général et partie civile* v. *Ahono Abena*, judgment No. RPA 033/09, 29 October 2009[59];

— Cour militaire du Sud-Kivu, *Auditeur militaire* v. *Kabala*, judgment No. RPA 230, 20 May 2013[60];

— Cour militaire du Katanga, *Auditeur militaire supérieur et partie civile* v. *Ramazani Salumu*, judgment No. RPA 236/2012, 18 June 2013[61];

— Cour militaire opérationnelle du Nord Kivu, *Auditeur militaire et parties civiles* v.*Nzale Nkumu et consorts*, judgment No. 003/2013 of 5 May 2014[62];

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[55] Cour militaire de Kinshasa (Gombe), *Auditeur supérieur et parties civiles* v. *Daniel Mukalay et consorts*, judgment No. RP 066/2011, 23 June 2011, p. 68. The text of the judgment is available online: [https://www.fidh.org/IMG/pdf/rdc_verdict_chebeyabazana_230611.pdf].

[56] Judgment published in *Recueil ASF* 2013, pp. 32-54, available online [https://issuu.com/avocatssansfrontieres/docs/asf_rdc_jurisprudencecrimesinternat].

[57] Judgment published in the *Bulletin des arrêts de la Haute Cour militaire*, Paris, L'Harmattan, 2016, p. 305. The judges awarded US$5,000 per civil-party applicant for simple rape, US$10,000 for rape having caused death.

[58] Judgment published in *Recueil ASF* 2010, pp. 192-216, available online: [https://issuu.com/avocatssansfrontieres/docs/asf_rdc_crimesinternationaux_part4/10].

[59] Judgment published in the *Bulletin des arrêts de la Haute Cour militaire*, 3rd ed., Kinshasa, Média Saint-Paul, 2013, p. 48. The judges awarded US$200,000 for a killing.

[60] Judgment published in the *Bulletin des arrêts de la Haute Cour militaire*, Paris, L'Harmattan, 2016, pp. 101-154 (see in particular p. 150). The judges awarded US$5,000 per civil-party applicant for rape.

[61] Judgment published in the *Bulletin des arrêts de la Haute Cour militaire*, Paris, L'Harmattan, 2016, p. 335. The judges awarded US$10,000 per civil-party applicant for rape.

[62] Judgment published in the *Bulletin des arrêts de la Haute Cour militaire*, Paris, L'Harmattan, 2016, p. 271. The judges awarded US$15,000 per civil-party applicant for rape.

16 — Cour militaire du Sud-Kivu, *Auditeur militaire supérieur et parties civiles* v. *Batumike et consorts* (*Kavumu* case), judgment No. RP 0105/2017, 13 December 2017[63].

40. Decisions pertaining to acts committed in the "relevant period"[64] defined by the Court reflect the large amounts awarded per civil-party applicant:

— Tribunal militaire de garnison de Bunia, *Auditeur militaire supérieur et parties civiles* v. *Kakado* (*Kakado* case), judgment Nos. 071/09, 009/010 and 074/010, 5 August 2007[65]: US$750,000 awarded per civil-party applicant for rape and sexual slavery; US$750,000 awarded for rape and inhumane treatment; US$50,000 awarded for murder;

— Cour militaire de Kisangani, *Auditeur supérieur et parties civiles* v. *Kahwa* (*Kahwa* case), judgment No. 023/2006, 13 August 2014: US$10,000 to US$20,000 awarded per civil-party applicant for murder;

— Haute Cour militaire, *Auditeur militaire supérieur et parties civiles* v. *Kakwavu* (*Kakwavu* case), judgment No. 004/2010, 7 November 2014[66]: US$30,000 awarded per civil-party applicant for rape; US$20,000 for murder; US$5,000 for torture.

A review of the practice of Congolese courts thus shows that the amounts of compensation are much higher than those proposed by the expert. In this respect, the amounts in the DRC's Memorial are in the lowest range of compensation awarded by Congolese courts for injury of the same kind and are therefore reasonable.

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III. OBSERVATIONS ON THE REPORT CONCERNING NATURAL RESOURCES

41. For "loss of natural resources", the terms of reference established by the Court's Order of 8 September 2020[67], and reproduced in paragraph 2.2 of the experts' report, are as follows:

"**II. Loss of natural resources**

(a) Based on the evidence available in the case file and documents publicly available, particularly the United Nations Reports mentioned in the 2005 Judgment, what is the approximate quantity of natural resources, such as gold, diamond, coltan and timber, unlawfully exploited during the occupation by Ugandan armed forces of the district of Ituri in the relevant period?

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[63] This judgment was upheld by the Haute Cour militaire in its judgment No. 39/2018 of 26 July 2018, available online [https://trialinternational.org/wp-content/uploads/2018/07/Arret-Kavumu-HCM.pdf] (visited on 28 Jan. 2021). The judges awarded US$15,000 per civil-party applicant for murder and US$5,000 for rape.

[64] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Order of 8 September 2020*, para. 16.

[65] Decision cited in the Response of the Democratic Republic of the Congo to questions put by the Court and published in the *Recueil de décisions de justice et de notes de plaidoiries en matière de crimes internationaux*, Avocats sans frontières, 2010, p. 225, *Recueil de jurisprudence congolaise en matière de crimes internationaux*, Avocats sans frontières, 2013, pp. 135-174. The decision is also available online: [https://asf.be/wp-content/uploads/2013/12/ASF_RDC_JurisprudenceCrimesInternat_201312.pdf].

[66] Decision cited in the Response of the Democratic Republic of the Congo to questions put by the Court and published in the *Bulletin des arrêts de la Haute Cour militaire, la lutte contre les violences sexuelles*, Paris, L'Harmattan, 2016, pp. 17-99.

[67] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Order of 8 September 2020*, para. 16 (2) (II).

(b) Based on the answer to the question above, what is the valuation of the damage suffered by the Democratic Republic of the Congo for the unlawful exploitation of natural resources, such as gold, diamond, coltan and timber, during the occupation by Ugandan armed forces of the district of Ituri?

(c) Based on the evidence available in the case file and documents publicly available, particularly the United Nations Reports mentioned in the 2005 Judgment, what is the approximate quantity of natural resources, such as gold, diamond, coltan and timber, plundered and exploited by Ugandan armed forces in the Democratic Republic of the Congo, except for the district of Ituri, and what is the valuation of those resources?"

42. Where necessary, these terms of reference must be interpreted in light of the Court's Judgment of 19 December 2005[68]. With this in mind, the DRC will comment on the scope of Michael Nest's report (A). Several observations can also be made about the valuation methods used (B) and values given (C) in the report.

A. Observations on the scope of the report

43. The observations on the scope of Michael Nest's report relate, first, to the natural resources concerned, and in particular the non-inclusion of fauna and deforestation (1), and second, to the acts engaging Uganda's responsibility which must be taken into account in the expert opinion, and the expert's failure to consider wrongful exploitation by civilians in Ituri (2).

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1. The non-inclusion of fauna and deforestation

44. As regards the natural resources concerned, the DRC observes that the three paragraphs of the terms of reference relate to "natural resources, such as gold, diamond, coltan and timber". The phrase "such as" is clear: this list is indicative, and not restrictive.

45. In its Memorial, the DRC seeks reparation for "[t]he prejudice caused to the DRC's natural resources by Uganda" (chapter 5), and divides this head of damage into three subcategories: "Looting, plundering and illegal exploitation of minerals" (section 1), "Prejudice caused to Congolese fauna" (section 2) and "Looting, plundering and wrongful exploitation of Congolese flora" (section 3).

46. The DRC thus devotes a significant portion of the arguments put forward in its Memorial to its reparation claim for damage to fauna as part of the injury more generally caused to its natural resources by Uganda[69]. Indeed, as this portion of the Memorial shows, the attack on and occupation of a part of Congolese territory had disastrous consequences for wildlife. In particular, the DRC demonstrates how a number of national parks covering several thousand square kilometres were devastated and, in some cases, plundered, notably in connection with the illicit — and lucrative — ivory trade. In this respect alone, and on the basis of a rigorous and documented analysis, the DRC

[68] In its Order of 8 September 2020, the Court decided that an expert opinion would be obtained "to examine the full range of claims and defences to the heads of damage claimed by the Applicant", "[f]or the purposes of determining the reparation owed to the Democratic Republic of the Congo by Uganda for the injury caused as a result of the breach by Uganda of its international obligations, as determined by the Court in its 2005 Judgment" (*ibid*., para. 16 (2)).

[69] MRDRC, chap. 5, sec. 2, paras. 5.93-5.172.

makes a claim of almost US$2.7 billion (US$2,692,980,468 to be precise)[70]. In its Counter-Memorial, Uganda refuses to provide any compensation for this ecological and economic damage[71].

47. Yet the section of the report on the "[s]election of resources for consideration"[72] contains no explanation as to why the expert has not included wildlife or forest resources (with the exception of timber) in his analysis. On the other hand, the expert does justify the inclusion in his analysis of three additional resources: tin (cassiterite), which "is often found in the same ore body as niobium-tantalite (coltan)"[73]; tungsten (wolframite), which with tin and tantalite forms the "3Ts"[74]; and finally coffee, which is included in the reports of the United Nations Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo and in those of the United Nations Mission in the Democratic Republic of the Congo. In view of these explanations, the DRC supports the inclusion of these three items on the list of resources whose exploitation is compensable. Nonetheless, it is surprised that the same reasoning did not lead the expert to consider damage suffered by wildlife, which, according to the United Nations Panel of Experts, is also of "intense interest"[75] and has a "connection"[76] to the conflict in the DRC.

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48. Moreover, according to the terms of reference, the experts are to base their report "on the evidence available in the case file and documents publicly available, particularly the United Nations Reports mentioned in the 2005 Judgment". These reports contain numerous references to natural resources other than those explicitly mentioned in the terms of reference, and address wildlife and forests in particular. Thus, in its very first report, the United Nations Panel of Experts explained that it had taken three categories of product into consideration: mineral resources; "agriculture, forests and wildlife, including timber, coffee and ivory"[77]; and financial products. In its final report, it again recalled that its fact-finding had focused on "diamonds, gold, coltan, copper, cobalt, timber, [and] wildlife reserves"[78].

49. In light of the foregoing, there can be no doubt that the experts' report covers only part of the injury suffered by the DRC on account of the exploitation of natural resources. In this regard, the DRC maintains all the claims that it made and substantiated in its written pleadings.

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[70] MRDRC, chap. 7.

[71] Counter-Memorial on Reparation of Uganda (CMRU), pp. 384 *et seq*.

[72] ER, Report 4, "Exploitation of Natural Resources", sec. 1.1.

[73] *Ibid*., para. 200.2. The expert states that there is "no good reason to *include* coltan in this report but *exclude* tin" (*ibid*.; emphasis added).

[74] *Ibid*., para. 200.3.

[75] *Ibid.*

[76] *Ibid*.

[77] Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, S/2001/357, 12 Apr. 2001, para. 13 (MRDRC, Ann. 1.7).

[78] Final report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, S/2002/1146, 16 Oct. 2002, para. 4 (MRDRC, Ann. 1.10).

2. The acts attributable to Uganda: the expert's failure to take account of the unlawful exploitation of natural resources by civilians in Ituri

50. Turning to the acts which engage Uganda's responsibility, it should be recalled that, in its Judgment of 19 December 2005, the Court concluded that

> "Uganda is internationally responsible for acts of looting, plundering and exploitation of the DRC's natural resources committed by members of the UPDF in the territory of the DRC, for violating its obligation of vigilance in regard to these acts and for failing to comply with its obligations under Article 43 of the Hague Regulations of 1907 as an occupying Power in Ituri in respect of all acts of looting, plundering and exploitation of natural resources in the occupied territory"[79].

Similarly, in paragraph 4 of the Judgment's operative clause, the Court found that

> "the Republic of Uganda, by acts of looting, plundering and exploitation of Congolese natural resources committed by members of the Ugandan armed forces in the territory of the Democratic Republic of the Congo and by its failure to comply with its obligations as an occupying Power in Ituri district to prevent acts of looting, plundering and exploitation of Congolese natural resources, violated obligations owed to the Democratic Republic of the Congo under international law".

51. It is in the light of this finding that the experts' terms of reference must be understood. Paragraphs *(a)* and *(b)* of those terms relate to the unlawful exploitation of Congolese natural resources in the district of Ituri during its occupation by Uganda. They therefore cover not only the plundering and exploitation of natural resources by Ugandan agents and other allied armed forces of Uganda, but also unlawful exploitation by civilians, brought about by Uganda's violation of its international obligations as an occupying Power in Ituri.

52. Paragraph *(c)* of the terms of reference relates to Uganda's actions outside Ituri district. It focuses on Congolese natural resources "plundered and exploited by Ugandan armed forces in the Democratic Republic of the Congo, except for the district of Ituri". Indeed, since Uganda was not the occupying Power outside Ituri, while it is responsible for any acts of plundering and exploitation attributable to it, it is not responsible for lack of vigilance with regard to unlawful exploitation by third parties outside Ituri.

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53. Lastly, the DRC observes that paragraph *(b)* instructs the experts to assess the "damage" suffered by the DRC, while paragraph *(c)* asks them "what is the valuation of" the resources plundered and exploited by Uganda. The injury suffered by a State as a result of the spoliation of its natural resources may exceed the value of those resources: for example, damage can also include the loss of tax and customs revenues which would have been collected had the resources been lawfully exploited. The DRC sees no reason to exclude such damage from the experts' report under paragraph *(c)* when it is included in paragraph *(b)*. It is therefore of the view that this difference in the wording of the terms of reference should not be interpreted as restricting the assessment of damage under paragraph *(c)* to the sole value of the natural resources plundered or exploited by Uganda.

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[79] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 253, para. 250.

54. In light of the above, the DRC considers that the expert has based his report on a partial assessment of the acts attributable to Uganda under the Court's 2005 Judgment and the applicable international law. More specifically, he has failed to take account of the unlawful exploitation of natural wealth in Ituri *by civilians*, which exploitation constitutes a breach of Uganda's international obligations as the occupying Power. This crucial misreading of the legal framework for the expert opinion has resulted in a failure to deliver fully on the terms of reference provided to the experts by the Court.

55. In paragraph 193 of the report, the expert states the following:

"193. The activity of exploiting value from resources was defined as falling into two categories:

193.1 In the [Ugandan area of influence] outside Ituri (in non-Ituri) when undertaken by UPDF personnel only. This means any exploitation by, for example, personnel of the Mouvement de Libération du Congo (MLC), is excluded from this report.

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193.2 Within Ituri when undertaken by *any and all armed forces and any affiliated administrative personnel*, including both UPDF and Congolese."[80]

The expert has thus confined his assessment to the exploitation of natural resources in Ituri by "any and all armed forces", both Ugandan and irregular Congolese, and has excluded exploitation by civilians, when such exploitation was made possible by Uganda's violation of its international obligations as an occupying Power.

56. In so doing, the expert has failed to carry out a full assessment of the damage caused to the DRC's natural resources as a result of Uganda's breach of its international obligations. In view of that failure, there can be no doubt that the experts' report covers only part of the injury suffered by the DRC on account of the exploitation of natural resources. In this respect, the DRC maintains all the claims made and substantiated in its written pleadings.

B. Observations on the valuation methods used in the report

57. Turning to the methods used to assess unlawfully exploited natural resources, the DRC, in line with the United Nations Panel of Experts, gives a central place in its Memorial to Ugandan exports of natural resources that cannot be explained by local production. The DRC is of the view that, until proven otherwise by Uganda, such exports reflect plundered quantities and values. Although the report takes account of those exports and provides useful clarifications in this regard, the expert takes a substantially different approach. He calculates the resources stolen by Uganda and other armed forces by applying a "proxy tax" to the total resources exploited in the Ugandan area of influence (UAI) during the relevant period (1), and takes a different approach to the DRC in accounting for Ugandan exports that cannot be explained by national production (2).

[80] Emphasis added.

23 **1. The estimation of stolen resources based on a "proxy tax"**

58. The expert's estimation of the injury suffered by the DRC on account of the unlawful exploitation of its natural resources[81] is based on three elements: (i) theft; (ii) fees and licences; and (iii) taxes on sales, exports and other taxable items.

59. The DRC has questions about the scope of these various elements and, more specifically, about the relationship between the concept of "theft", as used by the expert, and those of "plunder", "exploitation" and "unlawful exploitation" in the terms of reference. In this regard, it is the DRC's understanding that the concept of "theft" does not cover unlawful exploitation by civilians caused by Uganda's breach of its international obligations, since the expert has expressly confined himself to exploitation by military personnel[82]. If this is the case, the expert opinion does not address all the claims made by the DRC. It appears particularly important to understand the exact scope applied to the concept of "theft" by the expert, as compared with those used by the Court in its 2005 Judgment and in the experts' terms of reference.

60. As regards "theft", the expert observes that:

> "314. It is necessary to make an estimate for theft notwithstanding inconsistent and incomplete information about it or the high likelihood that theft extended beyond the examples mentioned above. A proxy tax rate for theft is estimated in Table 6 (data are the same as those in Table 5)".

Tables 4.5 and 4.6 in turn show various percentages representing the proxy tax rate. These vary between 0 and 5 per cent depending on the resources concerned and whether or not they were exploited in Ituri. For gold, the rate is 5 per cent in Ituri and 2 per cent outside Ituri. The same observation and the same figures appear in paragraph 309.

24 61. The DRC has doubts about the appropriateness of using a "proxy tax rate" to calculate the damage in question. More specifically, it wonders why the expert has used this proxy tax rate to assess the resources concerned, rather than basing his calculations on Ugandan exports that cannot be explained by national production, as the DRC did in its Memorial, in line with the United Nations Panel of Experts.

2. The way in which Ugandan exports are taken into account

62. The expert had recourse, among other things, to the export and import data of various countries, including Uganda, for the natural resources concerned. In particular, he compared Uganda's exports with its far inferior, almost non-existent, national production. The expert used that information for his "[e]stimat[ation of] resource quantities in [the] Ugandan Area of Influence" (heading 3.2), which appears to make reference to "resources produced in [the] UAI"[83] (of which the expert considers no more than 5 per cent to be "stolen"). However, the expert does not appear to use

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[81] Under the heading "Estimating the Exploitation of Value", the expert states that Table 4 "shows the total estimated value extracted by [military] personnel" (para. 305) and that the estimates in Table 4.4 "were calculated using assumptions about the methods of exploiting value. This report categorises the extraction of value from resources into three different methods: 306.1 Theft[;] 306.2 Fees and licences, including permission to extract, trade or export a resource[;] 306.3 Tax(es) on the value of sales or exports" (para. 306). It is understood, therefore, that the "methods of exploiting value" refer to the various methods by which Uganda unlawfully deprived the DRC of natural resources or their associated taxes.

[82] See para. 55 above.

[83] ER, para. 221 and Table 4.1.

the difference between Uganda's exports and its national production as reflecting, until proven otherwise, the Congolese natural resources *unlawfully exploited by Uganda*. Thus, the expert observes in particular that:

> "222. . . . export and/or import data for countries trading in the DRC resources were used to estimate probable production within the UAI. For example, there are ComTrade data . . . Such data were used as a 'proxy' for DRC production.
>
> 223. Given what is known about the location of each resource (derived from a mix of case file and other documents), an estimate was then made to understand what percentage of these imported resources probably came from UAI."

In paragraphs 229 to 230, the expert compares Uganda's national production and Ugandan exports "[f]or other resources", which, from paragraph 228, seems to mean resources other than gold and timber. In paragraphs 230 and 223, this information (for certain resources only, not for gold) is
25 cross-referenced again, with any Ugandan imports from other neighbouring countries, such as Burundi, and with an independent estimation of Uganda's formal production.

63. The DRC is curious to know why the expert took this information into account in order to assess the quantity of resources exploited in the UAI and subsequently conclude that only a very small portion of that amount was "stolen". This approach is at odds with that of the United Nations Panel of Experts, which was followed in the DRC's Memorial and according to which all resources exported by Uganda that cannot be explained by local production reflect, until proven otherwise, the quantity of Congolese resources unlawfully exploited as a result of Uganda's violations of its international obligations.

C. The values given in the report

64. As regards the values given in the report, the DRC has questions about the fixing of the price of resources (1) and the assessment of the relevant quantities (2).

1. The fixing of the price of resources

65. In respect of the method used by the expert to determine the price of resources to serve as the basis for calculating damage, the DRC's reservations are twofold. They concern, first, the significant discounting of prices (by 35 per cent) as compared with the market rate and, second, the relevant period (1998-2003).

66. The expert sets out his method for determining prices in the introduction to the section of the report entitled "Resources Prices":

> "271. Estimating the value of resources before exploitation by personnel involved three steps:
>
> 271.1 Identifying base annual average prices *for 1998-2003* (either an international price or a price specifically identified as relevant to the DRC, such as ComTrade data for imports from the DRC).
>
> 271.2 *Discounting base prices by an appropriate amount to reflect probable prices relevant for producers, traders and exporters in UAI*. This report calls this the 'adopted price'.

26 271.3 Adjusting adopted prices into 2020 USD by 'inflating' them using a standard rate." (Emphasis added.)

67. According to the expert, the purpose of discounting prices is to reflect "the price estimated to be relevant" within the UAI[84]. It is clear from Table 4.2[85] that the expert has applied a discount of 35 per cent as compared to the base price for all natural resources without distinction and for all years from 1998 to 2003. The DRC does not understand on what basis it was possible to systematically apply such a significant reduction without any apparent regard for the specific value of each resource.

68. Moreover, the DRC would note that, if the price considered relevant in the UAI is deemed to be lower than the base price, this is the consequence of Uganda's unlawful armed activities in Congolese territory. From a legal perspective, this reduction cannot be applied in respect of the DRC. The relevant price is that which would have been applied had Uganda not violated its international obligations.

69. Next, the DRC also has questions about the relevant period used and the calculation of an average price for that period (or those periods).

70. The expert states that his aim is to determine the base prices (and consequently the discounted prices) for each year of the conflict individually, from 1998 to 2003, and to smooth out any temporary price hikes. This is also clear from Table 4.2 and is explained earlier in paragraph 272, in which the expert states:

> "For example, gold in 2003 was about 30% more expensive than in 1999, and coltan had peak prices from November 2000 to February 2001 that were ten times prices in 1998. Thus, rather than take an average price for the entire 58 month period, an average annual price for each year was adopted to obtain a more accurate figure (a monthly price would be even more accurate, but these are impossible to ascertain for the full 1998-2003 from ComTrade data)."

71. However, in the DRC's view, this approach is legally problematic. It does not take account of the market conditions in the UAI, caused by Uganda's breach of international law. As the DRC observes in paragraph 5.56 of its Memorial, throughout the period in question (1998 to 2003), the **27** price of gold was historically low. On this basis the DRC asserts that

> "[i]n the context of the spoliation economy that the DRC suffered, Congolese gold resources were obviously exploited and sold as a matter of urgency, with no regard for market conditions. Had they been exploited and sold legally, on the other hand, operations could have been delayed until the market had recovered. Consequently, one should not look solely at the prices that applied during the war — that is to say, between 1998 and mid 2003."[86]

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[84] ER, para. 274.

[85] *Ibid*., para. 274.

[86] MRDRC, para. 5.57.

2. The assessment of the quantities of gold and timber

72. Independently of the questions about methodology raised above, the DRC also has questions about some of the quantities of natural resources taken into account by the expert, which differ from those given in its Memorial.

73. The quantities of gold exported by Uganda between 1998 and 2003 shown in line 4 of the expert's Table A4.5.1.3[87] differ from those given in the DRC's Memorial[88]. The DRC wonders how these apparent disparities can be explained. It also wonders why the expert did not use ComTrade data, which was used for other resources, or the statistics produced by the Ugandan Government itself, to which the DRC has itself referred in its Memorial[89].

74. As regards timber, in paragraph 245 of the report, the expert estimates that informal sawn wood exported from the DRC to Uganda, Kenya and Rwanda totalled around 70,000,000 kg (70 million kg or 70,000 tonnes) annually. In paragraph 246, the expert estimates that 60 per cent of those 70,000,000 kg per year passed through Uganda. Twenty per cent, i.e. 8,400,000 kg per year, came from the UAI[90]. However, the expert does not explain in this paragraph how he came to estimate informal production of timber in the UAI at 20 per cent of the total for the DRC.

28

IV. OBSERVATIONS ON THE REPORT CONCERNING PROPERTY DAMAGE

75. For property damage, the terms of reference given to the experts by the Court are as follows:

> "*(a)* Based on the evidence available in the case file and documents publicly available, particularly the United Nations Reports mentioned in the 2005 Judgment, what is the approximate number and type of properties damaged or destroyed by Ugandan armed forces in the relevant period in the district of Ituri and in June 2000 in Kisangani?
>
> *(b)* What is the approximate cost of rebuilding the kind of schools, hospitals and private dwellings destroyed in the district of Ituri and in Kisangani?"

The observations that follow will focus on the wording and scope of the experts' terms of reference (A), the categories or types of property (B), and the valuation methods and evidence relied on in the experts' report as compared to those used by the DRC (C).

A. The wording and scope of the terms of reference

76. In its 2005 Judgment, the Court found that, as the "occupying Power", Uganda was responsible for the acts of its armed forces (UPDF), but also for lack of vigilance in preventing violations of human rights and international humanitarian law by other actors present in the occupied

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[87] ER, p. 124.

[88] MRDRC, paras. 5.41-5.45 and 5.55.

[89] *Ibid*., paras. 5.41-5.43.

[90] There is a discrepancy in this respect between the English and French versions of the report. According to the French version, the expert has "*retranché*" (deducted) 20 per cent.

territory, including rebel groups acting on their own account[91]. In keeping with this reasoning, the expert did not confine himself to damage resulting from acts of Ugandan armed forces in Ituri alone.

77. In terms of geography, alongside Ituri and the city of Kisangani, the expert also assessed property damage in three other cities, specifically Beni, Butembo and Gemena, thereby covering the two areas identified by the DRC in its Memorial, namely Ituri and the area beyond Ituri, including "Kisangani and the rest of the territory invaded by Uganda"[92].

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B. Categories or types of property damaged or destroyed

78. The DRC notes that the expert has included in his report most categories of property damaged or destroyed during the conflict, namely dwellings, infrastructure and looted property, including that of the National Electricity Company (SNEL) and of Congolese armed forces. However, he has not included places of worship. The DRC does not understand the reasons for this omission. In its Memorial, the DRC clearly identified the places of worship destroyed[93], and those properties should have been taken into account by the expert. Indeed, not only do they hold material value, but they are of cultural and religious value too: their destruction resulted in emotional trauma and a moral void, which is why the damage to them should be compensated in full.

C. Valuation methods and evidence

79. As a preliminary, the DRC would like to clarify one point relating to the assessment of the number of dwellings destroyed during the conflict in the relevant areas of Congolese territory. In this regard, it would note above all that in paragraph 148 of the report, the percentages of dwellings destroyed given by the expert would seem to be the result of an error. His proposed assessment in this regard appears to be based on his own analysis of Annex 1.3 of the DRC's Memorial. However, that particular annex takes no account of dwellings destroyed in Ituri. The fact that the expert uses it to assess all the dwellings destroyed in the conflict during the relevant period can only lead to an underestimation of this category of damage. This is a point to which the DRC will return during the oral proceedings.

80. As regards the schools destroyed, the expert refers to the Secretary-General's report on the United Nations Mission in the Democratic Republic of the Congo, dated 27 May 2003. He expresses reservations, however, about the assessments made for both clinics and "administrative buildings" in that report. In the expert's view, the DRC's calculations are approximate: "That they are round sums, as in the case of dwellings (above), inevitably makes them subject to uncertainties due to an absence of detail or evidence in respect of each individual property"[94]. There is no doubt here that the figure mentioned by the DRC is the result of an overall assessment. It is nonetheless important to note that this figure is based on the above-mentioned report of the Secretary-General, which is a reliable source on this point.

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81. As a consequence of this lack of precision and of what the expert describes as a lack of sufficient evidence produced by the DRC in support of its claims, he proposes to reduce the amounts

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[91] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 231, para. 179.

[92] MRDRC, para. 7.45.

[93] *Ibid*., paras. 4.31, 4.53, 4.71, 4.75.

[94] ER, para. 156.

claimed by the DRC as reparation for the damage caused to various categories of property. To this end, he suggests applying the following discount factors:

— 25 per cent for the destruction of infrastructure "by way of seeking to take account of the inherent uncertainty in the way this claim has been put forward"[95];

— 40 per cent for damage in respect of Kisangani[96];

— 40 per cent for the National Electricity Company (SNEL)[97]; and

— 40 per cent for damage to the Congolese armed forces (FARDC)[98].

The DRC has reservations here about the fundamental basis of the approach taken by the expert in this regard and, in particular, how the percentages used for these various discount factors were calculated. This is another question to which the DRC reserves its right to return during the oral proceedings.

Done at Kinshasa, 14 February 2021

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[95] ER, para. 157.

[96] *Ibid.*, para. 173.

[97] *Ibid.*, para. 178 *(b)*.

[98] *Ibid.*, para. 188.