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International Court of Justice

THE HAGUE

ANNÉE 2021

Audience publique

tenue le jeudi 22 avril 2021, à 11 h 30, au Palais de la Paix,

sous la présidence de Mme Donoghue, présidente,

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

Réparations dues par les Parties

COMPTE RENDU

YEAR 2021

Public sitting

held on Thursday 22 April 2021, at 11.30 a.m., at the Peace Palace,

President Donoghue presiding,

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

Reparations owed by the Parties

VERBATIM RECORD

Présents : Mme Donoghue, présidente
M. Gevorgian, vice-président
MM. Tomka
Abraham
Bennouna
Yusuf
Mmes Xue
Sebutinde
MM. Bhandari
Robinson
Salam
Iwasawa
Nolte, juges
M. Daudet, juge *ad hoc*

M. Gautier, greffier

Present:	President	Donoghue
	Vice-President	Gevorgian
	Judges	Tomka
		Abraham
		Bennouna
		Yusuf
		Xue
		Sebutinde
		Bhandari
		Robinson
		Salam
		Iwasawa
		Nolte
	Judge *ad hoc*	Daudet
	Registrar	Gautier

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The PRESIDENT: Please be seated. The sitting is open. The Court meets today to hear the first round of oral argument of Uganda. I shall now give the floor to the Honourable William Byaruhanga, Agent of Uganda. You have the floor, Sir.

Mr. BYARUHANGA:

INTRODUCTION

1. Madam President, distinguished Members of the Court, good morning. I am honoured to appear before you as Agent for the Republic of Uganda.

2. The tragic events of the past have brought the Parties before the Court. Uganda sincerely regrets the human suffering that occurred in the Democratic Republic of the Congo (hereinafter "the DRC") during this conflict. But, if I may say, the word "conflict" does not begin to describe the reality of what happened between 1998 and 2003 in the Great Lakes Region of Africa. In fact, there were many different conflicts involving the armies of at least nine other States — Angola, Burundi, Chad, the DRC, Libya, Namibia, Rwanda, Sudan and Zimbabwe — and at least 21 major irregular armed forces taking place at the same time[1].

3. I must also say that we were taken aback by the tone of the speeches that we heard from the DRC on Tuesday. Uganda does not consider such strong language appropriate or even helpful to the Court and will therefore not respond in kind. The DRC's harsh tone was also inconsistent with the reality of the day-to-day relations between our two countries. Every day we are working closely together on matters of mutual importance, particularly along the border. Uganda hopes that the Court's decision on reparation will help bring this dispute to an end in a way that will enable the Parties to continue consolidating their renewed friendly relations.

[1] United Nations, Office of the High Commissioner for Human Rights (OHCHR), Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003, Geneva, August 2010, (hereinafter "Report of the Mapping Exercise" or "the Mapping Report"), paras. 19-20 and 38, fn. 36, Counter-Memorial on Reparation of Uganda (hereinafter "Counter-Memorial of Uganda (2018), Ann. 25; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005* (hereinafter "*Armed Activities* (2005)" or "the 2005 Report"), p. 190, para. 26.

4. The Court decided in 2005 that both Parties are obligated to make reparation to each other[2]. The Court also took note of the DRC's "intention to seek initially to resolve the issue of reparation by . . . negotiations" and instructed the Parties to "seek in good faith an agreed solution"[3].

5. Contrary to what you heard on Tuesday, Uganda sought in good faith to reach an agreed solution with the DRC. We accepted that, in light of the Court's Judgment, Uganda should pay compensation for loss, damage or injury resulting from acts properly attributable to Uganda. My Lords: *properly attributable to Uganda*. The critical issue, however, was finding common ground on what losses were actually attributable to Uganda and at what value?

6. I will not burden you with the full history of the negotiations[4]. I will only highlight their crucial turning points to show that, regrettably, the full potential of negotiations was not exhausted before the DRC came back to Court.

7. We had a very promising start when we concluded the Ngurdoto Agreement on 8 September 2007 under which we established a committee to resolve reparation claims[5].

8. Three years later, in May 2010, the DRC *for the first time* presented to Uganda a compensation claim[6]. It was more than US$23.5 *billion*, almost as much as Uganda's Gross Domestic Product (GDP). In economic terms, just to give context, this would have been like the London Schedule of Payments imposed on Germany following the Versailles Peace Treaty[7].

9. Uganda examined this claim in light of the 2005 Judgment, in light of international law, and State practice. Because the claimed amount was unprecedented in modern history, Uganda proposed at the meeting in September 2012 that the DRC present "a more realistic figure" as well as "respective proofs"[8] as was underlined in the 2005 Judgment.

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[2] *Armed Activities* (2005), p. 282, para. 345 (12) and (13).

[3] *Armed Activities* (2005), p. 257, para. 261.

[4] See Memorial of Uganda on Reparation (hereinafter "Memorial of Uganda (2016)"), paras. 1.16-1.52.

[5] Memorial of Uganda (2016), paras. 1.17-1.18.

[6] Government of Uganda and the Government of the DRC, *Agreed Minutes of the Ministerial Level Meeting between the Republic of Uganda and Democratic Republic of Congo*, 25 May 2010, Memorial of Uganda (2016), Ann. 6.

[7] Counter-Memorial of Uganda on Reparation (hereinafter "Counter-Memorial of Uganda (2018)"), para. 1.30.

[8] Government of Uganda and the Government of the DRC, *Minutes of the Ministerial Meeting between the Republic of Uganda and Democratic Republic of Congo*, 13-14 Sept. 2012, p. 2, Memorial of Uganda (2016), Ann. 7.

10. The Parties subsequently met in December 2012, November 2014 and March 2015. The DRC kept insisting on its original claim of US$23.5 billion[9]. Uganda explained the evidentiary and methodological shortcomings of that claim[10]. To break the stalemate, Uganda suggested that both Parties agree on "the *criteria* which should be used as a basis for compensation to the DRC"[11]. However, the DRC dismissed Uganda's position as "technical" and "object[ed] to using any criteria to assess her claim"[12]. Less than two months later, in May 2015, the DRC requested the Court to reopen the proceedings[13].

11. As a matter of international law and State practice, Uganda considered the DRC's unbending demands to be both unfounded and excessive in the extreme.

12. So the Parties again stand before this Court. What has changed after the DRC revived the case? Nothing, except that the DRC reduced its demand from roughly US$23.5 billion to almost US$13.5 billion. This significant drop only confirms that the DRC's claims are rooted in tactics, not reality.

13. I should add also that the Parties have continued to try to negotiate since the DRC came back to court. In total, we have met no less than nine times since 2010 and actually had made substantial progress towards narrowing the gap between them, though regrettably agreement remained out of reach. Specifically, we met in

— May 2010 in Kampala, Uganda;

— September 2012 in Johannesburg, South Africa;

— December 2012 in Kinshasa, DRC;

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[9] Government of Uganda and the Government of the DRC, *The Joint Report of the Meeting of Experts of the Democratic Republic of Congo and the Republic of Uganda on the Implementation on the Judgment of the ICJ of 19th December 2005*, 13-17 Mar. 2015, p. 12, Memorial of Uganda (2016), Ann. 10.

[10] Government of Uganda and the Government of the DRC, *The Joint Report of the Meeting of Experts of the Democratic Republic of Congo and the Republic of Uganda on the Implementation on the Judgment of the ICJ of 19th December 2005*, 13-17 Mar. 2015, pp. 5-7, Memorial of Uganda (2016), Ann. 10.

[11] Government of Uganda and the Government of the DRC, *The Agreed Minutes of the 4th Meeting of Ministers of the Democratic Republic of Congo and the Republic of Uganda on the Implementation of the Judgment of the ICJ of 19th December 2005*, 17-19 Mar. 2015, p. 2, Memorial of Uganda (2016), Ann. 11.

[12] Government of Uganda and the Government of the DRC, *The Agreed Minutes of the 4th Meeting of Ministers of the Democratic Republic of Congo and the Republic of Uganda on the Implementation of the Judgment of the ICJ of 19th December 2005*, 17-19 Mar. 2015, pp. 1-3, Memorial of Uganda (2016), Ann. 11.

[13] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Order of 1 July 2015, I.C.J. Reports 2015 (II)*, p. 581, paras. 1-4.

— November 2014 in Johannesburg, South Africa;

— March 2015 in Johannesburg, South Africa;

— August 2016 in Kasese, Uganda;

— February 2017 in Pretoria, South Africa;

— January 2018 again in Pretoria, South Africa; and

— December 2019 in Entebbe, Uganda.

14. Therefore, it is unfair and even untrue to suggest that Uganda made no effort towards the resolution of this matter bilaterally.

15. From a legal perspective, the DRC's claim before you remains unfounded. From a historical perspective, it is dangerously disproportionate. From an economic perspective, it is ruinous. Allow me to explain briefly these three points.

16. *First*, the 2005 Judgment specifically conditioned the obligation to make reparation on the requirement that the DRC must prove the exact injury it suffered as a result of specific wrongful acts attributable to Uganda.

17. Claims like those the DRC presents before you could only be upheld on a solid evidentiary record. The graver the charge the more confidence there must be in the materials presented to the Court. Yet what the DRC presented inspires *no* such confidence. The DRC's claims have no basis in evidence proving the specific injury caused by specific wrongful acts attributable to Uganda.

18. Let me be clear: Uganda is mindful of the seriousness of the Court's findings in the 2005 Judgment. Uganda also acknowledges that the DRC suffered losses. Yet the 2005 Judgment does not by itself provide a basis on which to award reparation. The Court made clear that it falls to the DRC to prove the nature, extent and valuation of the harm caused by Uganda. It is therefore not bad faith for us to point out that the DRC has entirely failed to do so.

19. *Second*, aside from being unfounded, the DRC's claims are dangerously disproportionate from a historical perspective.

20. If history teaches us anything, it is that war reparations must be addressed with sensitivity and due regard to the long-term consequences that a monetary award may have for relations between the countries concerned, as well as international peace and security.

21. The DRC appears to ignore these lessons when it essentially seeks to make Uganda responsible for everything that happened during the conflicts, as reflected in the staggering amounts that it claims.

22. This approach also ignores other important historical realities affecting reparation in this case. With great, great respect, economic decline, instability and inter-ethnic violence have characterized the DRC since colonial times. The problems for which the DRC blames Uganda did not start in 1998.

— When the DRC claims that Uganda is responsible for nearly US$5.7 billion in macroeconomic damages, presuming that, but for the conflict, the Congolese economy would have flourished, it must not be overlooked that before 1998 the Congolese economy was already in an extended decline after many years of mismanagement[14].

— When the DRC paints Uganda as an unmitigated villain responsible for countless deaths and injuries, it must not be overlooked that, as the Court itself underscored, "the actions of the various parties in the complex conflict in the DRC have contributed to the immense suffering faced by the Congolese population"[15].

— When the DRC portrays Uganda as being solely responsible for the conflict between the Hema and the Lendu in Ituri, it must not be overlooked that this long-standing conflict predates Uganda's intervention by over a whole century. The ethnic tensions, first ignited by the colonial Powers, and then stoked by the Congolese Government, were beyond anyone's power to control. Uganda neither created the conflict in Ituri, nor was it capable of resolving it.

23. Madam President and Members of the Court, let us also not forget Uganda's role in restoring peace in the DRC. The United Nations Security Council recognized Uganda's facilitation of talks between the Congolese Government and the M-23 rebel group, which ended hostilities between the two[16]. The Council also commended the efforts of Uganda in facilitating the conclusion

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[14] Counter-Memorial of Uganda (2018), Chap. 2.I and 9.V.

[15] *Armed Activities* (2005), p. 245, para. 221.

[16] United Nations Security Council, 7150th meeting, *The extension of the Mandate U.N. Stabilization Mission in the Democratic Republic of the Congo (MONUSCO)*, UN doc. S/RES/2147 (2014), 28 Mar. 2014, p. 2, Counter-Memorial of Uganda (2018), Ann. 28.

of these talks[17]. Even the DRC Government itself "expressed the gratitude . . . for the positive role played by Uganda in the stabilization of the Great Lakes region"[18].

24. *Finally*, the staggering amount the DRC claims is fraught with ruinous economic consequences.

25. Compensation must neither exceed the payment capacity of the responsible State nor deprive the people of the responsible State of their means of subsistence[19]. These principles, which the DRC appears to disregard, were reaffirmed by the Eritrea-Ethiopia Claims Commission.

26. Ethiopia claimed nearly US$14.3 billion for damages resulting from Eritrea's violations of *jus ad bellum* and *jus in bello*[20]. Eritrea itself claimed nearly US$6 billion[21]. The Commission then expressed concern about the magnitude of these claims, calling them "huge, both absolutely and in relation to the economic capacity of the country against which they were directed"[22]. Claims of such magnitude, the Commission observed, raise "serious questions involving the intersection of the law of State responsibility with fundamental human rights norms"[23], because "huge awards . . . would require large diversions of national resources from the paying country — and its citizens needing health care, education and other public services"[24].

27. Although Eritrea violated *jus ad bellum* and *jus in bello*, the Commission held that "compensation should be limited" to ensure that the burden on Eritrea "would not be so excessive, given [its] economic condition and its capacity to pay, as seriously to damage [its] ability to meet its people's basic needs"[25].

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[17] United Nations Security Council, *Statement by the President of the Security Council 7058th Meeting*, UN doc. S/PRST/2013/17 (14 Nov. 2013), Counter-Memorial of Uganda (2018), Ann. 27; United Nations News Centre, *DR Congo: U.N. envoy welcomes end of M23 rebellion, commitment to peace talks*, available at http://www.un.org/apps/news/story.asp?NewsID=46423#.Wl6eR6inGbh, 5 Nov. 2013, Counter-Memorial of Uganda (2018), Ann. 26.

[18] Republic of Uganda and Democratic Republic of the Congo, *Minutes of the Ministerial Meeting* (13-14 Sept. 2012), p. 2, Memorial of Uganda (2016), Ann. 7.

[19] *Ethiopia's Damages Claims, Final Award, Eritrea-Ethiopia Claims Commission, Decision of 17 August 2009*, reprinted in United Nations, *Reports of the International Arbitral Awards (RIAA)*, Vol. 26 (2009) (hereinafter *"Ethiopia's Damages Claims (Award 2009)"*), para. 19; *Eritrea's Damages Claims, Final Award, Eritrea-Ethiopia Claims Commission, Decision of 17 August 2009, Eritrea's Damages Claims (Award 2009)*, reprinted in *RIAA*, Vol. 26 (2009), para. 19.

[20] *Ethiopia's Damages Claims (Award 2009)*, paras. 18-19.

[21] *Eritrea's Damages Claims (Award 2009)*, para. 18.

[22] *Ethiopia's Damages Claims (Award 2009)*, para. 18; *Eritrea's Damages Claims (Award 2009)*, para. 18.

[23] *Ethiopia's Damages Claims (Award 2009)*, para. 19; *Eritrea's Damages Claims (Award 2009)*, para. 19.

[24] *Ethiopia's Damages Claims (Award 2009)*, para. 21; *Eritrea's Damages Claims (Award 2009)*, para. 21.

[25] *Ethiopia's Damages Claims (Award 2009)*, para. 313.

28. Ordering Uganda to pay the approximately US$13.5 billion the DRC seeks would mean that about twice Uganda's consolidated annual public spending would need to be transferred to the DRC[26]. The toll on the well-being of the Ugandan people would be enormous. It would also compromise the programmes that Uganda has been conducting to promote peace and stability in the whole of the Great Lakes region[27].

29. Uganda would like also to underscore its serious concerns regarding the 19 December 2020 Experts' Report. The experts appear to have taken many, if not all, of the DRC's allegations at face value without regard to Uganda's pleadings, in which it systematically dismantled the DRC's claims as well as their evidence. Uganda is actually gravely concerned about some of the recommended numbers and the manner in which they were derived — matters counsel will address later. Suffice it to say, the experts' opinions are not a substitute of the duty assigned to the DRC by the 2005 Judgment. We trust that the Court will only determine what weight, if any, is to be given to the assessments contained in the Experts' Report in full light of Uganda's observations.

30. Madam President, Members of the Court, Uganda's counsel will further develop my observations by responding to the specific aspects of the DRC's claims and the Experts' Report.

31. Madam President and Members of the Court, I thank you for your kind attention and kindly ask you to invite to the podium Professor Murphy. Thank you.

The PRESIDENT: I thank the Agent of Uganda, and I now give the floor to Professor Sean Murphy. You have the floor, Professor Murphy.

Mr. MURPHY:

THERE ARE SYSTEMATIC FLAWS IN THE DRC'S APPROACH TO EVIDENCE

1. Thank you, Madam President. It is a great honour to appear, once again, before this Court, and to do so on behalf of Uganda.

2. I will address in this speech the systematic flaws in the DRC's overall approach to evidence in this case, flaws that have not been resolved by the Court-appointed experts.

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[26] Counter-Memorial of Uganda (2018), para. 1.32.

[27] Counter-Memorial of Uganda (2018), para. 1.33.

I. The 2005 Judgment only decided on general categories of international law violations, not specific incidents of harm, which must now be proven

3. On Tuesday, counsel for the DRC began their presentation by referring to the three broad findings by the Court in its 2005 Judgment[28]. We acknowledge that the Court broadly found that Uganda's conduct violated the *jus ad bellum*[29]. The Court also broadly found that Uganda's armed forces violated the *jus in bello* and human rights law which caused harm to persons and property in the DRC, including as an occupying Power in the district of Ituri[30]. Finally, the Court reached a broad finding targeted at such conduct as it relates to exploitation of natural resources[31].

4. What counsel for the DRC did not emphasize is that such broad findings expressed important temporal, geographic and subject-matter limitations. For example, the Court concluded in the 2005 Judgment that Uganda was not responsible for exploitation committed by rebel groups outside of Ituri[32]. Therefore, when the DRC now seeks reparation for the exploitation of gold by rebels in Equateur District[33], that clearly falls outside the scope of this proceeding[34].

5. Even more important, counsel for the DRC neglected to acknowledge that such broad findings did *not* address any specific incidents that had occurred, and that the Court expected the DRC to prove at this phase of the proceeding its specific loss, damage or injury.

6. Indeed, the Court expressly stated that it was not making any findings of fact with respect to specific incidents of harm. For example, it said at paragraph 237 of the 2005 Judgment that***, and I quote***: "In reaching its decision on the DRC's claim, it is not necessary for the Court to make findings of fact with regard to each individual incident alleged."[35] ***End of quote.*** Rather, the Court only viewed the evidence before it in 2005 as sufficient to reach broad conclusions that violations had occurred, with no determination as to their exact magnitude or scope, as would be needed when determining reparation.

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[28] CR 2021/5, p. 24, para. 3 (Chemillier-Gendreau).

[29] *Armed Activities* (2005), p. 280, para. 345 (1).

[30] *Ibid.*, para. 345 (3).

[31] *Ibid.*, pp. 280-281, para. 345 (4).

[32] *Ibid.*, p. 253, para. 247.

[33] Memorial on Reparation of the Democratic Republic of the Congo, Sept. 2016 (hereinafter "Memorial of the DRC (2016)"), paras. 5.36-5.38.

[34] See Counter-Memorial of Uganda (2018), para. 8.26-8.28. See *Armed Activities* (2005), p. 253, para. 247.

[35] *Armed Activities* (2005), p. 249, para. 237.

7. In 2005, the DRC was well aware of what it had proved and what it had not proved at the merits phase, and the burden it would bear at this reparations phase. At paragraph 258 of the 2005 Judgment, the Court observed***, and I quote***: "The DRC acknowledges that 'for ~~***the***~~ purposes of determining the extent of reparation it must specify the nature of the injury and establish the causal link with the initial wrongful act'"[36]. ***End of quote***. In fact, the DRC at the merits phase repeatedly said to the Court that it was only seeking a judgment "of principle", as was noted by Judge *ad hoc* Verhoeven in his declaration[37].

8. Judge *ad hoc* Verhoeven went on to say that it would be incumbent upon the DRC, at the reparations phase, to establish exact incidents "falling within the category on which the Court has ruled" and to establish "the causal nexus between an injury suffered and an act by the Respondent engaging its responsibility"[38].

9. Madam President, Uganda is not arguing that the DRC must relitigate the findings made in 2005. Rather, my first point is simply that those findings were made at a very general level — they were not of a nature to allow quantification of harm, and they instead left to the DRC the burden, at this phase, of proving the loss, damage or injury suffered as a result of Uganda's unlawful acts.

II. In proving specific incidents of harm, the 2005 Judgment said the DRC must present evidence of exact injury, causal nexus to a wrongful act and attribution

10. My second general point is that, when proving such specificity, the Court anticipated proof of three components. I direct your attention to paragraph 260 of the Court's 2005 Judgment, which counsel for the DRC on Tuesday also saw as quite important[39].

11. The first component is that the DRC must demonstrate and prove "the exact injury" that was suffered. Those are the words of the Court, not of Uganda. In other words, the DRC must prove, through its evidence, that exact persons or property — in specific places and at specific times — incurred loss, damage or injury[40].

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[36] *Ibid.*, p. 256, para. 258.

[37] *Armed Activities* (2005), declaration of Judge *ad hoc* Verhoeven, pp. 355-357, para. 2.

[38] *Ibid.*, p. 357, para. 2 *(a)*.

[39] CR 2021/5, p. 27, para. 13 (Chemillier-Gendreau).

[40] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Compensation, Judgment, I.C.J. Reports 2018 (I)* (hereinafter "*Certain Activities* (2018)"), p. 46, para. 103.

12. The second component is that the DRC must prove that the injury was a result of one of the "internationally wrongful acts" identified in the 2005 Judgment. As such, it is not enough to demonstrate simply that a specific person died or was injured. Rather, the DRC must prove that such injury was the consequence of one of the violations of international law determined by the Court in 2005[41].

13. The third component is that the DRC must bring forward evidence that the injury was a result of "specific actions of Uganda". As such, it must be proven that it was a wrongful act of Uganda, and not of some other actor, that caused the harm.

14. Professor d'Argent will address in greater detail the legal requirements relating to attribution of conduct and to the causal nexus[42]. But these three components — proof of exact injury, proof of causation and proof of attribution — are central when considering, as a general matter, the evidence that the DRC has advanced in support of reparation. We submit that the DRC has failed to take *any* of these three components seriously in developing and presenting its evidence at this phase. Further, the report of the Court-appointed experts does not fix these flaws[43]; rather, it often confirms such flaws, while simultaneously skirting the problem in unusual ways, such as by the use of so-called "evidentiary discount factors".

III. International claims practice imposes on the DRC the burden of proving each component of its claims with convincing evidence to a high level of certainty

15. My third general point is that the effort on Tuesday by DRC counsel[44] to impose the burden of proof on Uganda is not just inconsistent with the 2005 Judgment, but also with the Court's overall jurisprudence, which clearly places the burden upon the DRC to prove each of the three

[41] See e.g. *ibid.*, p. 50, para. 121, on lack of a causal connection between the internationally wrongful act and the alleged harm.

[42] See also *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012 (I)* (hereinafter "*Diallo* (2012)"), p. 332, para. 14; *Certain Activities* (2018), p. 26, para. 32; p. 35, para. 72; p. 39, para. 89; pp. 47-48, para. 112; p. 56, para. 144.

[43] E.g. on attribution, see Experts' Responses to Observations of the Democratic Republic of the Congo and Uganda, 1 Mar. 2021 (hereinafter "Experts' Responses to the Parties (2021)"), p. 6, para. 16; p. 11, para. 23; p. 14, para. 38; p. 18, para. 45; p. 19, para. 50; p. 21, para. 63.

[44] See e.g. CR 2021/5, p. 34, para. 34 (Chemillier-Gendreau).

components[45]. Further, the consequence of failing to discharge this burden is that the applicant State cannot receive reparation in its favour[46].

16. In the past, Parties seeking reparation from the Court have been expected to present various types of evidence in support of their claims, including sworn affidavits, invoices, other documentary evidence and contemporaneous government information[47]. On Tuesday, counsel for the DRC asserted that such evidence could not possibly be gathered in the context of an armed conflict involving occupied territory[48]. Leaving aside that Uganda did not occupy any DRC territory other than Ituri, that assertion about an inability to gather evidence relating to war is demonstrably untrue. Iraq's invasion *and occupation* of Kuwait did not prevent victims or their families from identifying to the United Nations Compensation Commission the names of those who died or were injured in Kuwait[49]. Eritrea's invasion *and occupation* of northern Ethiopia did not prevent the presentation of sworn declarations by eyewitnesses, or by ***the*** mayors or elders of destroyed Ethiopian towns and villages[50]. As Mr. Martin will explain, such types of evidence have been gathered for reparation claims before the International Criminal Court *for the very same conflict that is now before this Court*[51]. The DRC cannot simply invoke the difficulty of gathering evidence as a basis for not doing so, or as a basis for shifting the burden to Uganda.

17. Not only is the burden upon the DRC to prove the facts supporting its claims for reparation, but it must do so with *convincing* evidence that establishes, with a *high level of certainty*, the three

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[45] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 71, para. 162; *Certain Activities* (2018), p. 26, para. 33.

[46] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)* (hereinafter "*Bosnian Genocide* (2007)"), pp. 233-234, para. 462.

[47] See e.g. *Corfu Channel (United Kingdom* v. *Albania), Assessment of Amount of Compensation, Judgment, I.C.J. Reports 1949* (hereinafter "*Corfu Channel* (Dec. 1949)"), pp. 248-250; see also Memorial of the United Kingdom, in *Corfu Channel* (Dec. 1949), Ann. 12; Observations submitted under the Order of the Court of 9th April 1949, by the Government of the United Kingdom of Great Britain and Northern Ireland, in *Corfu Channel* (Dec. 1949), pp. 392-397; *Certain Activities* (2018), pp. 41-43, paras. 92-99; p. 45, para. 105.

[48] See e.g. CR 2021/5, pp. 33-34, paras. 33-34 (Chemillier-Gendreau); CR 2021/6, p. 24, para. 14 (Segihobe Bigira).

[49] See e.g. Recommendations Made by the Panel of Commissioners Concerning Individual Claims for Serious Personal Injury or Death (Category "B" Claims), pp. 31 and 44, available at: https://uncc.ch/sites/default/files/attachments/documents/r1994-01.pdf.

[50] S. Murphy et al., *Litigating War: Arbitration of Civil Injury by the Eritrea Ethiopia Claims Commission* (2013), pp. 86-92.

[51] See e.g. *Prosecutor* v. *Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07-3728, Order for Reparations pursuant to Article 75 of the Statute, ICC Trial Chamber II, 24 Mar. 2017.

components that I previously discussed. Indeed, the Court's jurisprudence indicates that charges of "exceptional gravity" require "a degree of certainty", and that evidence must "suffice to constitute decisive legal proof" or "conclusive evidence"[52]. Many of the DRC's allegations constitute assertions of "exceptional gravity". There is, for example, exceptional gravity in alleging that Uganda is responsible for the deaths of 180,000 people.

18. In the *Diallo* case, the DRC itself repeatedly and unequivocally insisted on the need for convincing evidence of specific harm[53]. The Court agreed and declined to award compensation in many instances where Guinea failed to present convincing evidence that a specific harm had occurred or was caused by the DRC[54]. While it may be acknowledged that valuation sometimes requires a degree of flexibility in considering adequate evidence[55], proof ***that ~~of~~ a specific harm occurred,*** and that such harm was *attributable* to the wrongful act of a State, must be achieved through convincing evidence to a high degree of certainty.

IV. The DRC's methodology instead is to present illustrations, non-specific reports and fabricated multipliers or percentages

19. My fourth general point is that, when one reviews the materials submitted to the Court at this reparations phase, it is readily apparent that the DRC has not met the evidentiary standard for any of the three components ***~~I~~*** previously discussed.

20. Rather than come forward with the requisite evidence, the DRC relies, in essence, upon the findings ***in ~~of~~*** the Court's 2005 Judgment as themselves proving that Uganda must pay compensation, and in the extraordinary amount of US$13.4 billion. I say "in essence" because the DRC *does* make assertions, some of which are quite difficult to follow, as to why it is entitled to the compensation that it seeks. Although it pursues different tactics for the different categories of harm at issue, the DRC usually ***undertakes*** the following three steps.

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[52] *Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, pp. 16-17; see also *Bosnian Genocide* (2007), pp. 129-130, paras. 209-10.

[53] See Counter-Memorial of Uganda (2018), fn. 246; see e.g. Counter-Memorial of the Democratic Republic of the Congo, Question of Compensation Owed to Guinea by the DRC, in *Diallo* (2012) (Compensation), para. 2.36 ("[T]he Applicant must either produce documentary evidence in support of its financial claims or withdraw those claims for lack of evidence").

[54] Counter-Memorial of Uganda (2018), paras. 3.38-3.46. See *Diallo* (2012), p. 333, para. 18; p. 334, para. 21; p. 335, para. 25; p. 337, paras. 31-33; p. 337, paras. 34 and 36; p. 340, para. 41; p. 343, para. 55; pp. 344-346, paras. 60 and 61.

[55] *Diallo* (2012), p. 337, para. 33; *Certain Activities* (2018), pp. 26-27, para. 35.

21. First, for a given category of alleged harm, the DRC provides a few "illustrations" of circumstances where harm purportedly occurred. Such illustrations are not an effort actually to identify, let alone prove, incidents of harm; rather, ***these*** are merely examples of the types of harms that allegedly occurred.

22. Second, the DRC points to certain general numbers that appear in random reports by international or non-governmental organi***s***ations, numbers unconnected to the three components of proof that are required.

23. And then third, the DRC ***then*** uses arbitrary multipliers or percentages, so as to manipulate the already-dubious numbers into extraordinarily inflated compensation claims.

24. At times, the DRC has been remarkably candid in acknowledging that it has made no meaningful effort to prove the exact injury suffered as a result of specific incidents of internationally wrongful actions of Uganda, such as when the DRC says in its Memorial that it will not "identify individually each specific injury caused during" the war[56], or that "no distinction will be drawn between injuries according to the rule of international law that was broken in each instance"[57].

25. Counsel for the DRC on Tuesday exaggerated that we are looking for surgical precision in establishing the DRC's loss, damage or injury[58]. We are not looking for such precision, but we are looking for convincing evidence and not sheer guesswork, which ultimately is what the DRC is offering to prove its claims. At the end of the day, the DRC is essentially proposing that it simply be given a large sum of money, for harms to unnamed persons and unspecified property. While paying lip service to the rule that the DRC must prove through evidence financially assessable harms[59] for "actual damage to property or persons"[60], the DRC's claims in reality are based on highly-generali***s***ed information that invites the awarding of lump-sum amounts[61] — in effect, a massive claim for moral damage to the DRC itself. But, that type of claim has already been addressed through reparation in the form of satisfaction, as Professor Pellet will discuss.

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[56] Memorial of the DRC (2016), para. 2.07.

[57] *Ibid.*, para. 2.05.

[58] CR 2021/6, p. 23, para. 10 (Segihobe Bigira).

[59] See International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001), Art. 36.

[60] *Ibid.*, Art. 36, cmt. 1.

[61] Memorial of the DRC (2016), para. 1.18; see also *ibid.*, para. 6.76.

26. Counsel for the DRC on Tuesday also claimed that the Court's procedures for handling this case somehow confirm the DRC's "evidentiary régime" for proving its case[62]. That position is not tenable. The Court in June 2018 asked a rather large number of questions to the DRC, after the close of the normal written proceedings, precisely because the DRC had failed to meet its evidentiary burden. Then, in September 2020, the Court sought the assistance of experts because, to use the Court's own words, "the estimates and figures submitted by the DRC on certain heads of damage raise questions of a technical nature"[63], which obviously the DRC had failed to ***explain*** ~~***address***~~. Such steps by the Court were far from an endorsement of the DRC's evidentiary régime; rather, they were an effort to make ***some*** sense out of it.

V. What evidence the DRC has presented to the Court is critically flawed

27. My fifth general point is that the materials annexed to the DRC's Memorial as evidence, when carefully scrutinized, have deep and irredeemable flaws. As time is limited, I will focus on just three ways that the annexed materials are critically flawed, though Uganda will return to these points in the presentations to follow.

(a) *DRC evidence that is highly general in nature*

28. One critical flaw I have already foreshadowed: the DRC's annexed materials are highly general in nature. The DRC does not purport to assess the specific harm it suffered, even on a locality-by-locality basis, as a result of specific unlawful acts by Uganda.

29. So, in the DRC's annexes, you will not find death certificates or medical, clinical or hospital records for those killed or injured; you will not find lists of deceased persons, let alone ***ones indicating*** their age~~s~~, their occupation or whether they have surviving family members; you will not find contemporaneous documentation as to property damage; you will not find receipts establishing the value of such property when acquired; you will not find the invoices for the restoration or reconstruction of property; you will not find other documentary evidence that should be available, even in times of war. There are no sworn statements by victims or their families. There are no sworn

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[62] CR 2021/6, p. 13, para. 5, p. 15, para. 12 (Nollez-Goldbach).

[63] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Order of 8 September 2020*, para. 15.

statements by public officials, such as mayors of towns, church leaders or others, describing the harms to their community from Ugandan acts. Counsel for the DRC on Tuesday acknowledged this problem[64]; their answer ***to it*** seems to be that, in the aftermath of ***~~an~~ the*** armed conflict, the DRC had no possibility to gather up *any evidence* of that kind, even though the feasibility of doing so is readily apparent from other international proceedings.

(b) ***Failure of the DRC evidence actually to support the DRC's assertions***

30. A second critical flaw in the DRC's annexes is that, when you read them closely, the annexes do not actually support the assertions advanced in the text of the DRC's pleading[65]. We pointed out numerous instances of this in our Counter-Memorial[66], and we trust that the Court itself will carefully scrutinize the annexes with that in mind.

(c) ***Problems with particular categories of the DRC evidence***

31. A third critical flaw concerns the DRC's indiscriminate reliance on certain categories of evidence.

32. One category of evidence that the DRC seeks to use without discrimination are United Nations reports. United Nations reports are, of course, important, but the Court has previously treated such reports with care if they are being used to prove facts. The Court has recognized that the probative value of United Nations reports depends, in particular, on two factors: the evidence used to prepare the report; and whether the United Nations report is corroborated by other information[67].

33. Usually, the United Nations reports upon which the DRC relies are not corroborated and often are contradicted by other, better sources, including subsequent United Nations reports. A good example of such contradiction arises from the DRC's reliance on United Nations reports that predated the August 2010 United Nations Mapping Report. The United Nations Mapping Report — which was undertaken by the Office of the United Nations High Commissioner for Human

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[64] See, e.g., CR 2021/5, pp. 33-34, paras. 33-34 (Chemillier-Gendreau).

[65] Counter-Memorial of Uganda (2018), paras. 3.75-3.78.

[66] See, e.g., Counter-Memorial of Uganda (2018), para. 7.32, in reference to Memorial of the DRC (2016), para. 3.42 *(j)*, and Mapping Report, para. 414, Counter-Memorial of Uganda (2018), Vol. II, Ann. 25.

[67] Counter-Memorial of Uganda (2018), paras. 3.85-3.111; see *Armed Activities* (2005), pp. 225-226, para. 159, p. 239, para. 205; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015 (I)*, p. 87, para. 239.

Rights"[68] — is the result of an effort to "map" the most serious violations of human rights and international humanitarian law committed within the territory of the DRC between March 1993 and June 2003. To complete it, more than twenty United Nations human rights officers were deployed across the DRC between October 2008 and May 2009 to gather documents and information from witnesses. The United Nations Mapping Team reviewed 1,500 documents from many different sources, including the United Nations, the DRC Government and NGOs. The team also met with more than 200 NGO representatives and DRC authorities[69].

34. All of the early United Nations reports that are cited in the DRC Memorial were considered by the United Nations Mapping Team. Further, the United Nations Mapping Team assessed the reliability of the information it obtained through "a two-stage process involving evaluation of the reliability and credibility of the source, and then the validity and veracity of the information itself"[70]. Further, the report ***also*** "identif[ied] the armed group[s] to which the alleged perpetrator[s] belong[ed]"[71].

35. Yet, the conclusions reached in the United Nations Mapping Report often contradict the information in the earlier United Nations (and other) reports upon which the DRC relies. No doubt this is why the DRC rarely cites to the United Nations Mapping Report to support the various numbers it now places before the Court.

36. A second category of evidence that the DRC seeks to use in support of its claims are reports by non-governmental organi***s***ations (NGOs). Here too, the DRC fails to take into consideration that the Court approaches NGO reports with caution, given that they are often poorly sourced, based on second-hand information or uncorroborated. For this reason, in its 2005 Judgment, the Court declined to rely on reports by certain NGOs, such as Human Rights Watch, where they were uncorroborated or where they were not, in fact, saying what the DRC was alleging[72]. Yet, at this phase, the DRC continues to cite repeatedly and without hesitation to such reports as primary evidence[73].

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[68] Mapping Report, Counter-Memorial of Uganda (2018), Vol. II, Ann. 25.

[69] *Ibid.*, para. 3.94.

[70] *Ibid.*, para. 7.

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

[72] *Armed Activities* (2005), pp. 225-226, para. 159.

[73] See e.g. Memorial of the DRC (2016), fns. 158-59, 214, 227, 242, 341, 373, 460, 464, 469, 473, 476, 478, 491, 494 and 531.

37. A third category of evidence that the DRC seeks to use to support its claims are materials prepared by the DRC itself for the purpose of this litigation. As a general matter, when a self-interested party creates new materials specifically for litigation purposes, such information must be viewed as having little probative value[74].

38. In particular, the DRC produced with its Memorial a series of summary tables in support of its request for compensation[75]. None of those tables are signed or sworn to; who made them and when is completely unclear, and they otherwise are seriously flawed as evidence[76]. The DRC asserted in its Memorial that the summary tables were based on information contained in what the DRC calls "victim identification forms"[77]. Further, the DRC represented that it had gathered approximately 10,000 such forms, each of which supposedly contained the name of a victim, the damages the person suffered and, in some cases, the approximate value of the injury[78]. The DRC, however, did not submit these forms with its Memorial.

39. Most probably because the information ostensibly summarized in the summary tables does not constitute reliable evidence, the Court asked the DRC in June 2018 to produce the claim forms. The DRC's response[79], however, raised a whole host of further problems, given the many defects in the claim forms that it produced, defects which in turn undermine the summary tables[80].

40. First, the DRC did not in fact submit to the Court 10,000 forms but, rather, only 4,645 forms[81]. Second, it turns out that the claims forms submitted relate only to a very small proportion of the victims who the DRC alleges were harmed. Third, most of the forms consist of just

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[74] See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 43, para. 70; *Armed Activities* (2005), paras. 61, 64.

[75] See Memorial of the DRC (2016), Ann. 2.1 ("Tableau de Synthèse Effectif Décès"); Ann. 2.2 ("Rapport Fréquence Type Lésions de 1998 à 2003"); Ann. 2.3 ("Tableau de Synthèse Effectif Fuite"); Ann. 2.4 ("Tableau de Synthèse Effectif Perte Biens"); Ann. 4.8 ("Tableau Synthèse du Dépouillement Manuel des Fiches Individuelles de Victimes de la Guerre de Six Jours à Kisangani du 5 au 10 juin 2000 Entre les Forces Armées Ougandaises et Celles du Rwanda").

[76] See also Counter-Memorial of Uganda (2018), paras. 3.123.-3.137; Comments of Uganda on the Response of the DRC to questions put by the Court under Article 62 of its Rules, 7 Jan. 2019 (hereinafter "Comments of Uganda (2019)"), pp. 9-51.

[77] Memorial of the DRC (2016), para. 1.30.

[78] Memorial of the DRC (2016), para. 1.35.

[79] Response of the DRC to questions put by the Court under Article 62 of its Rules, 26 Oct. 2018 (hereinafter "Response of the DRC (2018)", Anns. 1.1, 1.2, 1.3, 1.4, 1.5, and 1.5.1.

[80] See Comments of Uganda (2019), paras. 1.4-1.66.

[81] *Ibid.*, fn. 12.

a single page containing very little information. Fourth, a majority of these forms do not even identify the victims of the alleged harm, referring to them instead only as "not reported". Fifth, not a single form is connected to corroborating documentation of any kind. As such, the DRC has not — and cannot — do any of the statistical sampling of evidence that served as the hallmark of the United Nations Compensation Commission (hereinafter the "UNCC"), when considering the accuracy of claims forms. Sixth, many of the forms are illegible. Seventh, many of the forms assert that the alleged perpetrator was someone other than Uganda. Eighth, many of the forms fail to indicate any valuation for the injury alleged. Finally, the forms were prepared years after the events in question, by a self-interested party, and especially for purposes of this case[82].

41. This concludes my overall presentation on the systematic flaws in the DRC's approach to evidence. As will be apparent in the presentations that follow on individual headings of alleged damage, these evidentiary flaws are fatal to the DRC's ability to recover compensation in this case.

42. Madam President, I ask that you now call upon Professor d'Argent.

The PRESIDENT: I thank Professor Murphy. I now give the floor to Professor Pierre d'Argent. You have the floor.

M. D'ARGENT : Merci, Madame la présidente.

LA CAUSALITE ; RECLAMATION MACROECONOMIQUE

1. Madame la présidente, Mesdames et Messieurs les juges, je suis très honoré de prendre la parole devant vous ce matin, et de le faire cette fois au soutien de l'Ouganda. Mon exposé sera divisé en deux parties :

— Dans un premier temps, je reviendrai sur une question centrale dans cette affaire, celle de la causalité.

— Dans le prolongement de cet examen de la causalité, j'aborderai ensuite, plus brièvement, la partie de la réclamation de la RDC portant sur son prétendu préjudice macroéconomique.

[82] See *Eritrea's Damages Claims, Final Award, Eritrea-Ethiopia Claims Commission, Decision of 17 August 2009*, reprinted in *RIAA* (2009), Vol. 26, p. 665, para. 66.

LA QUESTION DE LA CAUSALITE

2. Madame la présidente, selon la RDC, la question de la causalité est très simple. En effet, au paragraphe 1.25 de son mémoire, la RDC affirme que

> «l'ensemble des dommages causés par le comportement illicite de l'Ouganda découle … de l'invasion du territoire congolais … ainsi que du soutien que cet Etat a apporté … à des groupes irréguliers»[83].

Cette approche a été réitérée devant vous mardi. La professeure Monique Chemillier-Gendreau a même soutenu qu'en matière de causalité, vous n'auriez en réalité rien à décider à ce stade car la question aurait été réglée avec force de chose jugée par votre arrêt de 2005[84]. La professeure Chemillier-Gendreau a encore considéré que, parmi les causes complexes et multiples qui justifieraient la réclamation qui vous est présentée, certaines seraient «cumulatives»[85], tandis que d'autres seraient «complémentaires»[86], un adjectif également utilisé par la professeure Muriel Ubéda-Saillard et qu'elle considère synonyme à «concomitantes»[87].

3. Qu'en est-il ?

4. S'agissant tout d'abord de votre arrêt de 2005, la seule chose qu'il a décidée avec autorité de chose jugée, c'est que «la République de l'Ouganda a l'obligation, envers la [RDC], de réparer *le* préjudice causé»[88]. Le motif qui sous-tend cette conclusion est le paragraphe 259 de votre arrêt, par lequel la Cour a considéré que les faits illicites dont l'Ouganda a été reconnu responsable «ont entraîné *un* préjudice pour la RDC»[89]. La différence entre l'article indéfini du motif («un préjudice») et l'article défini du dispositif («le préjudice causé») est éclairante. L'arrêt de 2005 n'a donc pas mis la charrue avant les bœufs et n'a rien décidé de concret en matière de dommages ou de causalité, l'un n'allant pas sans l'autre. Le professeur Murphy l'a déjà rappelé.

5. D'ailleurs, et c'est bien la raison pour laquelle l'approche globalisante de la RDC en matière de causalité est profondément erronée, l'arrêt de 2005 a été extrêmement clair au sujet de ce qu'il

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[83] Mémoire de la République démocratique du Congo (2016), par. 1.25 ; par. 2.05.

[84] CR 2021/5, p. 28, par. 14 (Chemillier-Gendreau).

[85] CR 2021/5, p. 31, par. 27-28 (Chemillier-Gendreau).

[86] CR 2021/5, p. 32, par. 29 (Chemillier-Gendreau).

[87] CR 2021/5, p. 41, par. 13 (Ubéda-Saillard).

[88] *Activités armées sur le territoire du Congo (République démocratique du Congo c. Ouganda), arrêt, C.I.J. Recueil 2005* (ci-après, l'«arrêt de 2005»), p. 281, par. 345, point 5).

[89] Arrêt de 2005, p. 257, par. 259.

revenait à la RDC d'établir à ce stade. En effet, en admettant même que la RDC ait apporté la preuve des différents préjudices exacts qui font l'objet de sa demande, encore faut-il, pour que l'Ouganda soit tenu de les réparer, que le demandeur établisse que chacun de ces préjudices a été «subi du fait des actions spécifiques de l'Ouganda constituant des faits internationalement illicites dont il est responsable»[90] (c'est le paragraphe 260 de votre arrêt sur le fond déjà cité par le professeur Murphy).

6. En rattachant toute sa réclamation à la violation des principes de non-recours à la force et de non-intervention, la RDC a contourné la directive que vous lui aviez adressée en évitant d'identifier pour chacun de ses préjudices, ou même chaque catégorie de préjudices, l'action ou l'omission illicite dont l'Ouganda est responsable et qui en est la cause. La RDC subvertit la question de la causalité en présentant le fait illicite abstrait, ou plutôt la règle de droit violée, comme la cause de ses dommages.

7. Un tel raisonnement est évidemment profondément erroné car la cause du dommage réside toujours dans l'action ou dans l'omission qui constitue le fait illicite et que l'on qualifie comme tel ; la cause du dommage, ce n'est pas la norme violée, c'est l'action ou l'omission qui contredit l'obligation contenue dans la norme. C'est à cette action ou à cette omission — en d'autres termes au comportement étatique concret qui constitue le fait illicite — que le dommage doit être rattaché par un lien de causalité certain et direct. Ce que je dis là est élémentaire et on ne satisfait pas à cette exigence en se cachant derrière des causes prétendument «cumulatives», «complémentaires» ou encore «concomitantes», autant d'adjectifs sur lesquels je reviendrai. En effet, avant d'articuler ce qui apparaît comme des causes multiples entre elles, il faut établir que chacune d'elles est effectivement une cause du dommage.

8. L'exigence d'un «lien de causalité *suffisamment direct et certain*»[91] entre l'action ou l'omission constitutive du fait illicite et le préjudice est bien établie par votre jurisprudence et elle conditionne le déclenchement de l'obligation de réparer ; c'est ce que le paragraphe 260 et le dispositif de votre arrêt sur le fond ont simplement rappelé.

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[90] Arrêt de 2005, p. 257, par. 260.

[91] *Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Serbie-et-Monténégro), arrêt, C.I.J. Recueil 2007 (I)*, p. 234, par. 462 ; *Ahmadou Sadio Diallo (République de Guinée c. République démocratique du Congo), indemnisation, arrêt, C.I.J. Recueil 2012 (I)*, p. 590, par. 14.

9. Madame la présidente, je voudrais revenir sur trois difficultés liées à la causalité. Il s'agit, d'une part, du lien causal dans le cadre du soutien illicite de l'Ouganda à certains groupes rebelles, où qu'ils aient opéré en RDC ; d'autre part, du lien causal dans le cadre du manquement de l'Ouganda à ses obligations de puissance occupante en Ituri ; enfin, du lien causal dans le cadre du manquement de l'Ouganda au principe de non-recours à la force. La RDC prétend apporter une réponse à ces difficultés causales en recourant à différents pourcentages. J'y reviendrai également.

Lien causal et non-intervention

10. S'agissant de la violation du principe de non-intervention, la RDC use de manière simpliste de la causalité afin de contourner votre arrêt sur le fond, en ce qu'il y fut décidé que les faits illicites commis par les différents groupes armés soutenus par l'Ouganda n'étaient pas imputables, n'étaient pas attribuables, au défendeur[92]. Malgré cette décision de non-attribution revêtue de l'autorité de la chose jugée, la RDC soutient que l'Ouganda devrait néanmoins réparer tous les dommages matériellement causés par les groupes armés — qu'ils soient ou non situés dans la province d'Ituri — parce que l'Ouganda les a soutenus.

11. La RDC applique ici un rudimentaire «but for test» et prétend donc, sans le démontrer, que ces groupes armés n'auraient pas commis les exactions, les pillages et les destructions dont ils sont seuls responsables sans le soutien de l'Ouganda. Rien ne saurait être plus éloigné d'une analyse correcte du lien causal et plus en contradiction avec votre arrêt sur le fond. En effet, ce que la RDC reste en défaut d'établir, c'est que tel soutien de l'Ouganda à tel groupe armé est la cause directe et certaine de tel préjudice matériellement attribuable à ce groupe.

12. Le soutien politique ou financier de l'Ouganda à certains groupes, dans la mesure où il est établi, a certes été illicite, mais cela n'en fait pas pour autant automatiquement et sans autre démonstration la cause directe et certaine des exactions commises par ces groupes. Par ailleurs, s'agissant du soutien militaire, il faut rappeler que les groupes armés étaient souvent constitués d'anciens militaires congolais déjà entraînés et qu'ils se sont appropriés des armes abandonnées par les forces armées congolaises ou ont commis nombre de leurs exactions avec des machettes et d'autres armes traditionnelles.

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[92] Arrêt de 2005, p. 226, par. 160 ; p. 230-231, par. 177 ; et p. 253, par. 247.

13. Madame la présidente, Mesdames et Messieurs les juges, il est fondamental de se souvenir à cet égard que la Cour a dit pour droit, *premièrement*, qu'il n'était pas établi que l'Ouganda avait créé ces groupes, *deuxièmement*, qu'il n'était pas établi que l'Ouganda contrôlait ou pouvait contrôler leurs opérations, pas plus, *troisièmement*, qu'il n'était établi qu'ils agissaient sur les instructions, la direction ou le contrôle de l'Ouganda[93].

14. Votre arrêt de non-attribution ne signifierait rien si l'Ouganda était maintenant tenu de réparer tous les préjudices commis par les groupes qu'il a soutenus. Il suffit d'appliquer correctement les exigences du droit international en matière de causalité pour éviter un tel contournement auquel la RDC vous invite pourtant.

15. Mme Chemillier-Gendreau a estimé que le soutien de l'Ouganda à certains mouvements rebelles créait une situation de causalité «cumulative» car, postulant ce qu'elle aurait dû démontrer, ces groupes «n'ont pu mener leurs actions que *grâce* à [l']intervention»[94] de l'Ouganda. Elle rapporte un — un seul — exemple à cet égard, raconté par Jean-Pierre Bemba : le MLC, qu'il dirigeait, aurait attendu la présence d'un bataillon de l'UDPF pour mener un combat sur la rivière Ubangi.

16. Madame la présidente, en admettant même que ces faits soient établis, de deux choses l'une : soit le bataillon ougandais a participé à ce combat et l'Ouganda est responsable du fait de ses forces armées — ce qui n'est pas établi et que même Jean-Pierre Bemba ne dit pas —, soit il n'y a pas participé et sa présence à proximité du théâtre des opérations ne saurait constituer une cause «cumulative». Pourquoi ? Parce que la figure de la causalité cumulative — qui est très rarement rencontrée en pratique[95] —, n'existe que lorsqu'*aucune* des causes multiples du dommage n'est à elle seule suffisante pour le produire, tel qu'il est survenu[96]. Même si l'on considère que la présence du bataillon de l'UDPF est une des causes circonstancielles du dommage survenu sur la rivière Ubangi, il est néanmoins clair que, dans cet exemple, tout le dommage, tel qu'il s'est produit, est le résultat matériel de l'attaque du MLC ayant agi seul. Il est parfaitement possible d'attribuer à chaque acteur le dommage qui lui revient et, comme la Commission du droit international l'a rappelé, le

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[93] Arrêt de 2005, p. 226, par. 160 ; p. 230-231, par. 177 ; et p. 253, par. 247.

[94] CR 2021/5, p. 31, par. 28 (Chemillier-Gendreau).

[95] P. d'Argent, «Reparation, cessation, assurances and guarantees of non-repetition in situations of shared responsibility» in *Principles Of Shared Responsibility In International Law: An Appraisal Of The State Of The Art (2014)*, p. 208-250 (p. 227).

[96] *Ibid*. Voir aussi P. d'Argent, *Les réparations de guerre en droit international public* (2002), p. 639.

principe général en cas de pluralité de responsables est que chacun est «séparément responsable du comportement qui lui est attribuable»[97].

17. Je me permets de rappeler enfin que la Cour a décidé en 2005 qu'elle ne pouvait conclure que l'Ouganda a manqué à son devoir de vigilance s'agissant des activités illégales de groupes rebelles en dehors de l'Ituri[98]. Les dommages survenus hors de l'Ituri du fait de tiers ne peuvent donc être rattachés à un prétendu manque de vigilance de l'Ouganda puisque la Cour a décidé qu'aucune responsabilité ougandaise n'existait sur cette base hors de l'Ituri. La rivière Ubangi est un affluent du fleuve Congo situé à près de 1000 kilomètres à vol d'oiseau à l'ouest de l'Ituri.

Lien causal et occupation

18. J'en viens à un deuxième problème lié à la causalité, qui ne se pose, cette fois, qu'à propos des dommages localisés en Ituri. Il s'agit du lien causal devant être établi par la RDC entre le manquement de l'Ouganda à ses obligations de puissance occupante de l'Ituri et les dommages survenus dans ce district du fait de particuliers ou de groupes, qu'ils fussent, ou non, soutenus par l'Ouganda. Le manquement constaté à cet égard par la Cour en 2005 consiste en «un défaut de la vigilance requise pour prévenir les violations des droits de l'homme et du droit international humanitaire par d'autres acteurs présents sur le territoire occupé»[99]. L'Ouganda a manqué à cette obligation de prévention par omission.

19. La Cour a déjà eu l'occasion de se prononcer sur le test de causalité applicable en cas de violation par omission d'une obligation de prévention. Dans l'affaire *Bosnie c. Serbie*, la Cour a jugé que le lien de causalité entre le défaut d'agir et le dommage n'existe qu'à la condition que l'on puisse

> «déduire de l'ensemble de l'affaire, avec un degré suffisant de certitude, que [le dommage] aurait été *effectivement* empêché si le défendeur avait adopté un comportement conforme à ses obligations juridiques»[100].

20. En d'autres termes, pour qu'un manquement de l'Ouganda puisse être considéré comme la cause directe de dommages survenus en Ituri du fait de tiers, la RDC doit démontrer avec un degré

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[97] Commission du droit international, cinquante-troisième session, *Annuaire* de la CDI (2001), vol. II, partie 2, A/56/10, p. 133.

[98] Arrêt de 2005, p. 253, par. 247.

[99] Arrêt de 2005, p. 231, par. 179.

[100] *Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Serbie-et-Monténégro), arrêt, C.I.J. Recueil 2007 (I)*, p. 234, par. 462.

suffisant de certitude que ces dommages, matériellement causés par des tiers dont le comportement n'est pas attribuable à l'Ouganda, que ces dommages ne seraient pas survenus si l'Ouganda s'était correctement acquitté de ses obligations de puissance occupante.

21. Toutefois, la RDC reste en défaut d'identifier les mesures conformes au droit de l'occupation qui auraient dû être prises par l'Ouganda et qui auraient pu effectivement empêcher la survenance de dommages clairement identifiés causés en Ituri par des tiers, compte tenu de la taille de ce territoire densément boisé, grand — on vous l'a dit mardi —, comme deux fois la Belgique[101], compte tenu du nombre de troupes déployées, de la réalité du terrain et notamment — l'agent l'a rappelé —, des luttes tribales bien antérieures à la présence des troupes ougandaises et qui se sont prolongées depuis leur retrait.

22. La professeure Chemillier-Gendreau considère de manière indistincte et englobante qu'en Ituri, «la responsabilité de l'Ouganda est engagée pour les dommages causés par des tiers, alors même qu'il ne soutenait pas ces derniers»[102]. Votre arrêt sur le fond n'a toutefois nullement jugé l'Ouganda responsable de tous les dommages causés par les tiers en Ituri du fait de son occupation. A nouveau, la RDC tente d'escamoter la causalité.

23. La professeure Chemillier-Gendreau a par ailleurs soutenu que le test de causalité mis en œuvre par la Cour dans l'affaire *Bosnie c. Serbie* «n'a pas de pertinence ici» car les circonstances des deux affaires seraient fondamentalement différentes du fait de «la réalité de l'occupation d'une région entière de la RDC d'une part, et de l'importance de la zone d'influence ougandaise de l'autre»[103].

24. La différence entre les deux affaires tient seulement à la source de l'obligation de prévenir le dommage : dans le cas de l'arrêt de 2007, il s'agissait de la convention sur le génocide ; dans le cadre de l'arrêt de 2005, il s'agit du droit de l'occupation belligérante. Dans les deux cas, l'obligation de prévention est régie par un standard de diligence requise («due diligence») et sa violation consiste en une omission.

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[101] CR 2021/6, p. 65, par. 15 (Mingashang).

[102] CR 2021/5, p. 25, par. 6 (Chemillier-Gendreau).

[103] CR 2021/5, p. 32, par. 30 (Chemillier-Gendreau).

25. Madame la présidente, Mesdames et Messieurs les juges : quel autre test de causalité que celui dégagé par la Cour en 2007 pourrait être appliqué lorsque le fait illicite est constitué par une omission ? La RDC n'en dit rien. Pour le reste, la prétendue «zone d'influence congolaise» hors de l'Ituri est sans *aucune* pertinence pour appliquer ce test incontournable car le champ d'application territorial de l'obligation de prévention ayant pesé sur l'Ouganda est, par l'arrêt de 2005, limité à l'Ituri.

Lien causal et non-recours à la force

26. J'en viens au lien causal dans une situation de violation du principe de non-recours à la force.

27. Vu l'importance de ce principe dans les relations internationales, il est tentant — c'est d'ailleurs la tentation à laquelle la RDC vous soumet — de voir dans sa violation l'origine, et donc la cause, de tous les maux, de tous les préjudices, qui survinrent ensuite en RDC. Toutefois, comme je l'ai rappelé à la lumière de votre arrêt sur le fond, il revient à la RDC d'établir qu'elle a subi chaque préjudice dont elle demande la réparation du fait d'une «action spécifique» de l'Ouganda constituant l'une des violations constatées par la Cour en 2005. Cette exigence est générale, mais elle est particulièrement cruciale s'agissant de la violation du principe de non-recours à la force au regard du fond de cette affaire.

28. En effet, ainsi que la Cour l'a constaté, la présence militaire ougandaise en RDC était à l'origine couverte par le consentement du défendeur, consentement qui, selon la Cour, «a été retiré, au plus tard, le 8 août 1998»[104]. Par ailleurs, la Cour a jugé qu'il n'était pas établi que l'Ouganda eût participé à l'offensive militaire d'envergure à Kitona, localité située à l'ouest de la RDC, à 1800 kilomètres de la frontière ougandaise[105].

29. Ainsi, la violation par l'Ouganda du principe de non-recours à la force ne consistait pas en une invasion brutale de grande ampleur, une agression, comme la présentation de la réclamation congolaise le suggère.

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[104] Arrêt de 2005, p. 199, par. 53.

[105] Arrêt de 2005, p. 199-205, par. 55-71.

30. En cas de violation de l'interdiction du recours à la force, le lien de causalité direct et certain entre le comportement concret constituant ce fait illicite et le préjudice ne peut être établi par un raisonnement simpliste fondé sur le «but for test». Cette manière d'appréhender la causalité en cas de violation du *jus ad bellum* a été explicitement rejetée par la Commission d'indemnisation des Nations Unies, alors même que la guerre entre l'Irak et le Koweït procédait d'une invasion subite et massive, suivie d'une occupation de tout le territoire koweïtien[106]. Par ailleurs, la Commission des réclamations établie entre l'Ethiopie et l'Erythrée a refusé de tenir l'Etat auteur d'une violation du principe de non-recours à la force pour responsable de toutes les pertes et de tous les préjudices survenant à sa suite : «[a] breach of the *jus ad bellum* ... does not create liability for all that comes after»[107].

31. Madame la présidente, Mesdames et Messieurs les juges, ici comme ailleurs, il revient à la RDC d'établir l'existence d'un lien de causalité direct et certain entre, d'une part, un préjudice spécifique dont la réparation est demandée et, d'autre part, une action militaire de l'Ouganda postérieure au 8 août 1998 et illicite au regard du *jus ad bellum* puisque non couverte à partir de cette date par le consentement congolais. Les exigences habituelles du droit international en matière de causalité s'appliquent *ne varietur* à l'action de l'Etat qui constitue un emploi illicite de la force[108].

32. Il ne suffit donc pas de prétendre, comme le soutient le demandeur, qu'aucun préjudice ne serait survenu si l'Ouganda avait immédiatement obtempéré à la demande du Gouvernement de la RDC de voir ses forces armées quitter le territoire congolais. La violation du principe de non-recours à la force n'est pas un événement-cadre sans lequel des événements dommageables ne se seraient pas produits. Comme la commission franco-italienne instituée par le traité de paix de 1947 l'a rappelé, pour que le belligérant illicite — celui qui a violé le *jus ad bellum* — soit tenu de réparer un dommage matériel, il faut prouver «un lien de causalité direct entre le dommage et un fait dommageable dû à la guerre qui a frappé le bien»[109].

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[106] Contre-mémoire de l'Ouganda (2018), par. 4.30.

[107] *Ethiopia's Damages Claims, Final Award, Eritrea-Ethiopia Claims Commission, Decision of 17 August 2009*, reprinted in *RIAA* (2009), vol. 26 ("Ethiopia's Damages Claims"), p. 722, par. 289.

[108] P. d'Argent, *Les réparations de guerre en droit international public* (2002), p. 622-660.

[109] *Différend Società Mineraria et Metallurgica di Pertusola* — décisions n^{os} 47, 95 et 121, 13 *RIAA* 174 (11 mai 1950 et 3 mars 1952), p. 186, *in* CMO, note 389.

Lien causal et pourcentages

33. J'en viens à ma dernière observation en matière de causalité. La RDC tente de masquer l'incurie dont procède sa réclamation à cet égard en recourant à différents pourcentages. Ainsi, sous couvert d'équité et de caractère raisonnable[110], la RDC vous dit qu'elle a ajusté sa réclamation à une prétendue part causale revenant à l'Ouganda. Chaque pourcentage avancé par la RDC correspondrait à la part dommageable qui reviendrait à l'Ouganda en termes de causalité. On quitte donc le domaine, le terrain de la causalité prétendument cumulative pour celui de la causalité complémentaire.

34. Je ne reviendrai pas sur ces différents pourcentages, fixés tantôt à 45 %, 50 % ou 90 % selon le type de préjudice, mais sans guère d'explication. La Cour a également été intriguée par ces pourcentages, ainsi qu'en témoigne sa neuvième question posée à la RDC. Vous connaissez la réponse du demandeur, de même que les commentaires formulés par l'Ouganda à la suite de cette réponse. A ce jour, aucun élément objectif ne vient justifier ces différents pourcentages qui demeurent totalement arbitraires. La RDC vous a présenté une carte censée représenter une zone d'action et d'influence de l'Ouganda en RDC et elle applique une proportion territoriale[111]. C'est tout. M[e] Martin y reviendra.

35. Mais, Madame la présidente, pour vous donner une idée du caractère absolument arbitraire des pourcentages avancés par la RDC, je voudrais revenir sur les chiffres présentés par les experts désignés par la Cour.

36. Dans son rapport, M. Urdal évalue à 14 663 le nombre de morts civils résultant directement d'incidents armés durant le conflit[112]. Parmi ces victimes civiles, 32 auraient été tuées intentionnellement ou non intentionnellement par les forces armées ougandaises, en Ituri mais aussi ailleurs en RDC[113]. Autrement dit, 32 civils tués par les troupes ougandaises durant les cinq années du conflit selon l'expert de la Cour dans toute la RDC, sur un total de 14 663, soit moins de 0,22 %. Pourtant, s'agissant de l'excédent de mortalité parmi la population civile, Mme Guha-Sapir reproduit sans aucun examen critique les pourcentages de la RDC qui estime que 45 % des 10 % de cet

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[110] Mémoire de la République démocratique du Congo (2016), par. 1.24, 5.164, 5.167.

[111] CR 2021/5, p. 42, par. 13 (Ubéda-Saillard).

[112] Experts Report on Reparations for The International Court of Justice: Case Concerning Armed Activities on the Territory of the Congo, *The Democratic Republic of the Congo* v. *Uganda* (19 December 2020) (ci-après, «Experts' Report»), par. 36-37.

[113] Experts Report, par. 39.

excédent, c'est-à-dire 4,5 %, est «attribuable» à l'Ouganda. Comment peut-on soutenir qu'alors que l'Ouganda serait responsable de moins de 0,22 % des décès de civils survenus directement du fait de ses forces armées au cours du conflit, il serait néanmoins responsable de 4,5 % des morts qui seraient survenues *indirectement* de toutes sortes de causes, y compris épidémiques[114], durant les cinq années du conflit dans l'ensemble de la population civile congolaise ? La RDC prétend que ses pourcentages sont raisonnables et modestes ; en réalité, ils sont totalement arbitraires tandis qu'aucune responsabilité pour dommage indirect ne saurait exister.

37. Mais l'essentiel est ailleurs. En effet, avant d'imaginer un partage d'indemnisation au sujet de tel ou tel autre préjudice, il faut d'abord établir que l'obligation de le réparer est déclenchée à charge de l'Ouganda. Et pour cela, il faut prouver qu'il existe un lien causal direct et certain entre l'action ou l'omission ougandaise constituant un des faits illicites pour lesquels la Cour a reconnu sa responsabilité en 2005, et le préjudice subi. Les pourcentages mis en avant par la RDC sautent cette étape essentielle et masquent — ou plutôt prouvent — son incurie en matière de causalité par une apparence de modération. En réalité, il n'y a pas lieu de s'aventurer dans les méandres de partages d'indemnisation en cas de causes multiples lorsque l'une des causes supposées, celle pour laquelle la responsabilité du défendeur est recherchée, n'est pas établie. L'établissement du lien causal n'est pas une affaire d'équité, mais d'appréciation juridique compte tenu des faits ; il en est de même du poids relatif de chacune des causes complémentaires après que celles-ci soient dûment établies.

LE PRETENDU PREJUDICE MACROECONOMIQUE

38. Madame la présidente, Mesdames et Messieurs les juges, j'aborde enfin très brièvement la partie de la réclamation congolaise portant sur son prétendu préjudice macroéconomique

39. La demande congolaise sur ce point est sans aucun fondement, ni juridique ni économique, et elle doit être rejetée pour le tout.

40. Tout d'abord, en droit, il n'y a pas de préjudice sans atteinte à un intérêt juridiquement protégé. Or, la RDC n'établit nullement que les Etats auraient un intérêt protégé par le droit international de bénéficier en tout temps d'une croissance économique, ou du moins de ne pas subir un ralentissement économique. Ce type de préjudice n'a jamais été reconnu dans la pratique

[114] Experts Report, par. 54, 70 ; Experts' Responses to Observations of the Democratic Republic of the Congo and Uganda regarding Case Concerning Armed Activities on the Territory of the Congo (1 March 2021), par. 38.

internationale, pas même dans celle des traités de paix imposés à la suite des deux guerres mondiales, tandis que la jurisprudence internationale — en particulier celle de la Commission d'indemnisation des Nations Unies et de la Commission Ethiopie-Erythrée — a toujours rejeté ce type de préjudice[115]. Il n'y a pas là de droit spécial ; c'est le droit général[116].

41. Non seulement il ne s'agit pas d'un préjudice reconnu par le droit international qui, contrairement à ce qu'avance la RDC, n'a rien à voir avec le *lucrum cessans*, mais en réalité, il s'agit d'un prétendu dommage purement spéculatif fondé sur une conception nécessairement indirecte et incertaine de la causalité qui prend la guerre pour un événement-cadre ce qui, je l'ai rappelé, est profondément erroné. Nos écritures sur cette question sont fort complètes, aussi je me permets de vous y référer faute de temps[117].

42. Erronée en droit, la prétention congolaise est également sans aucun fondement économique ; elle procède en effet d'études méthodologiquement erronées.

43. Les experts de la RDC ont prétendu baser leurs évaluations macroéconomiques sur les travaux du professeur Paul Collier de l'Université d'Oxford. L'Ouganda a demandé au professeur Collier ce qu'il pensait de la manière dont ses travaux ont été utilisés et quel crédit l'on pouvait accorder aux études déposées par la RDC. Le rapport du professeur Collier est l'annexe 109 de notre contre-mémoire, volume III. Ce rapport est accablant. En bref, les évaluations de la RDC sont fondées sur une fiction qui, hélas, n'a jamais correspondu aux réalités économiques congolaises et elles procèdent d'erreurs méthodologiques graves. Faute de temps, je me permets de vous référer à nouveau à nos écritures sur ce point[118].

44. Madame la présidente, Mesdames et Messieurs les juges, je vous remercie de votre bienveillante et habituelle attention. Puis-je vous demander, Madame la présidente, de bien vouloir inviter M[e] Lawrence Martin à prendre la parole ?

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[115] Voir les références dans le contre-mémoire de l'Ouganda (2018), par. 9.7-9.14, notes 1270 (UNCC) et 1271-1278 (EECC).

[116] CR 2021/6, p. 50, par. 9 (Mampuya).

[117] Contre-mémoire de l'Ouganda (2018), par. 9.7-9-41.

[118] Contre-mémoire de l'Ouganda (2018), par. 9.42-9.53.

The PRESIDENT: I thank Professor d'Argent. I now give the floor to Mr. Lawrence Martin. You have the floor, Sir.

Mr. MARTIN:

THE DRC'S CLAIMS CONCERNING DEATHS ARE UNSUPPORTED

1. Madam President, distinguished Members of the Court, good afternoon. It is a privilege to appear before you today on behalf of Uganda. My task today is to respond to the DRC's claims concerning the number of deaths that Uganda allegedly caused during the 1998-2003 conflict and the quantum of reparation due.

2. The DRC seeks over US$4 *billion* for 180,000 alleged civilian deaths that it asserts were caused by wrongful acts attributable to Uganda. According to the DRC, 40,000 of these deaths resulted from "deliberate acts of violence"[119] against the population in Ituri, while another 140,000 resulted from "situations other than those of deliberate acts of violence"[120] in Ituri, Kisangani and elsewhere. For each of these 40,000 deaths purportedly resulting from deliberate violence, the DRC claims US$34,000 per victim. For each of the other 140,000 alleged deaths, the DRC claims a different amount: just over US$18,900 per victim.

3. None of these figures — whether those relating to the alleged number of deaths or the quantum of compensation sought — is supported by any evidence. In fact, the DRC's numbers are actually *disproved* by the evidence, including the DRC's own evidence, and other neutral sources. The DRC's claims concerning the number of deaths Uganda allegedly caused are, with respect, a house of conjecture built atop a foundation of speculation.

4. Madam President, Members of the Court, we are mindful of the gravity of these issues. The death of any human being is a tragedy, a matter of the gravest concern. But precisely for that reason, allegations that a State is responsible for causing deaths, let alone the staggering number that the DRC claims, must be evaluated with great care, through the sober lens of the law. Findings like those the DRC asks you to make could only be made on a solid evidentiary record, but the DRC has

[119] Memorial of the DRC (2016), para. 7.12.

[120] Memorial of the DRC (2016), para. 7.14.

presented you no such record. It has given you no plausible basis on which to award the compensation it seeks under this head of damages.

5. My intervention will be divided into four parts:

— *First*, I will briefly discuss the standard methods for proving the existence and valuation of deaths in inter-State proceedings. I suspect I will stop there for the lunch break and resume thereafter.

— *Second*, I will discuss the very different basis on which the DRC claims that Uganda is responsible for causing 180,000 civilian deaths and show why that claim fails.

— *Third*, I will show how the evidence, including documents the DRC created specifically for purposes of this litigation, confirms the conclusion that Uganda is, at most, responsible for a vastly, vastly lower number of deaths than the DRC claims.

— *Fourth*, I will discuss why the levels of compensation the DRC claims for each alleged death are unsupported and unsupportable.

6. Before taking up these points, Madam President, I hasten to add one thing. The flaws in the DRC's claims are many and they are deep. Time does not permit me to do more than touch on some of the most critical points. For the avoidance of doubt, Uganda stands by our case as presented in our Counter-Memorial and in our Comments on the DRC's Responses to the Court's June 2018 Questions in all respects.

I. The standard method for proving the existence and valuation of deaths

7. I turn now to my first point: what does the DRC have to prove to establish its case for compensation for loss of life? The practice of international courts and tribunals indicates that specific information is required both as to (1) the identity of the persons who are alleged to have been killed, including their name, nationality, and the date, location and cause of death; and (2) the potential earnings lost by those identified individuals[121].

8. How are these elements proven? As Professor Murphy said, typically through various forms of documentary evidence contemporaneous with the alleged deaths, supplemented as necessary by

[121] See, generally, Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims* (1916); Jackson H. Ralston, *The Law and Procedure of International Tribunals* (1926); Marjorie M. Whiteman, *Damages in International Law* (1937); A. H. Feller, *The Mexican Claims Commissions, 1923-1934: A Study in the Law and Procedure of International Tribunals* (1935); Green H. Hackworth, ed., *Digest of International Law*, Vol. 5 (1943); Richard B. Lilich, ed., *International Law of State Responsibility for Injuries to Aliens* (1983); Christine Gray, *Judicial Remedies in International Law* (1987).

sworn affidavits from persons who observed the killings or local leaders familiar with the incidents at issue.

9. One might ask whether it is possible to gather such evidence during or after an armed conflict. The answer is unequivocally "yes", as the practice of other States indicates[122]. Professor Murphy mentioned the Eritrea-Ethiopia Claims Commission and the United Nations Compensation Commission. But, in fact, one does not have to look further than the evidentiary showing made by victims seeking reparations before the International Criminal Court in the *Katanga* case, for example. That case concerned the massacre of at least 200 civilians in Bogoro village in the Ituri region of the DRC in 2003. In other words, in the same area and at the same time as the events at issue in this case.

10. Notwithstanding the remoteness and the poverty of the area, as well as the lapse of time between the commission of the crimes and the reparations phase (which only began in 2015), DRC claimants were nevertheless able to present various forms of hard evidence. This included (1) death certificates signed by a civil status registrar in the DRC; (2) certificates of family relationship (to establish the familial connection between the claimant and the decedent); and (3) in cases where certificates of family relationship were not available, other information sufficient to establish the existence of a familial relationship, for example showing that the surnames on the claimants' voter cards matched those on a death certificate[123].

11. If ordinary people managed to collect such evidence and prove their claim for reparation before that court, it is only reasonable to expect the DRC — with all the machinery and resources of a State — to present similar evidence before this Court. Yet even after ten years of allegedly extensive effort, the DRC has presented *no* evidence of the type normally expected. We are not insisting on a Utopian approach to evidence, as Professor Ubéda-Saillard suggested on Tuesday[124]. The heart of the problem here is not just that there are gaps in the record, but rather there is a total void.

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[122] See e.g. *Eritrea-Ethiopia Claims Commission, Final Award on Ethiopia's Damages Claims*, 17 Aug. 2009, paras. 64 and 84.

[123] *Prosecutor* v. *Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07-3728, *Order for Reparations pursuant to Article 75 of the Statute* (ICC Trial Chamber II, 24 Mar. 2017), paras. 118-120.

[124] CR 2021/5, p. 40, para. 11 (Ubéda-Saillard).

12. So, what does the DRC do instead?

That brings me to my next point, but perhaps now is a convenient moment for a break, Madam President.

The PRESIDENT: I thank Mr. Martin. This first part of your statement brings to an end this morning's session. The Court will meet again this afternoon, at 3 p.m., to hear the remainder of the first round of oral argument of Uganda. The sitting is adjourned.

The Court rose at 1 p.m.

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