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International Court of Justice

THE HAGUE

ANNÉE 2021

Audience publique

tenue le jeudi 22 avril 2021, à 15 heures, 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 3 p.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 this afternoon to hear the remainder of the first round of oral argument of Uganda. I now call on Mr. Lawrence Martin to continue his speech of this morning. You have the floor.

Mr. MARTIN:

II. The DRC's claim that Uganda caused 180,000 deaths is arbitrary and unsupported

13. Thank you, Madam President. Before the break, I was speaking about what the DRC should have done, and I will now address what it actually did. Rather than presenting evidence of *any* specific deaths caused by *any* specific wrongful act attributable to Uganda, the DRC takes an altogether different approach. It resorts instead to what it calls "studies in the fields of epidemiology or demography which have examined the excess mortality caused by the conflict"[1].

14. Specifically, the DRC cites to a series of four mortality surveys by a non-governmental organization called the International Rescue Committee (or "IRC"), which were conducted between 2000 and 2004. In those surveys, the IRC estimated that there were 3.9 million more deaths than would normally be expected in the DRC between 1998 and 2003[2].

15. This figure includes deaths from all causes. According to the IRC itself, "[l]ess than 10 percent of [these] deaths were due to violence, with most attributed to easily preventable and treatable conditions such as malaria, diarrhea, pneumonia and malnutrition"[3].

16. Apparently relying on the IRC's estimate of the number of *violent deaths*, the DRC submits: "Given the caution which should be observed within judicial proceedings, the DRC considers it reasonable, in this context, to rely on a minimum estimate of 400,000 victims, that is, one tenth of the IRC figure"[4].

17. To get from 400,000 to the 180,000 deaths supposedly attributable to Uganda, the DRC uses "[a]n apportionment" of 45 per cent[5]. In other words, 400,000 times 0.45 equals 180,000. This

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[1] Memorial of the DRC (2016), para. 2.62.

[2] Memorial of the DRC (2016), para. 2.64.

[3] Memorial of the DRC (2016), para. 2.64 (quoting International Rescue Committee, Burnet Institute, *Mortality in the Democratic Republic of Congo: An Ongoing Crisis* (2007), p. ii, Counter-Memorial of Uganda (2018), Ann. 60).

[4] Memorial of the DRC (2016), para. 2.70.

[5] Memorial of the DRC (2016), para. 2.71.

is the number of alleged deaths the DRC contends "which could reasonably be deemed a consequence of [Uganda's] invasion"[6]. This is anything but reasonable. The DRC's reliance on the IRC's estimate and its arbitrary use of fractions are misconceived. I will address each in turn.

A. The IRC studies are unreliable

18. With respect to the DRC's reliance on the IRC estimates, several points bear emphasis.

19. *First*, it is plainly inappropriate to rely on studies of a general epidemiological or demographic nature as a stand-in for the sorts of particularized evidence the Court specifically said it would expect in the 2005 Judgment.

20. *Second*, except for Dr. Guha-Sapir's report, to which I will return shortly, no other source even remotely corroborates the IRC's work.

21. *Third*, the IRC reports were conducted as part of an advocacy campaign to draw attention to the situation in the DRC[7]. They were not undertaken for academic or research purposes and should not be approached as such.

22. *Fourth*, even taken on their own terms, the IRC estimates are unreliable. In fact, they have been widely criticized and contradicted by independent observers. For example, the Health and Nutrition Tracking Service is an inter-agency initiative hosted by the World Health Organization. It reviewed the IRC's work in 2006 and concluded that its estimate of the number of excess deaths was "difficult to substantiate"[8]. Similarly, the Human Security Report Project, an independent research centre affiliated with Simon Fraser University in Canada, challenged key assumptions of the IRC's estimates as unsustainable[9]. Unfortunately, time does not permit me to review all the criticisms of

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[6] Memorial of the DRC (2016), para. 2.71.

[7] See e.g. Human Security Report Project, "Part II, The Shrinking Costs of War", *Human Security Report* (2009-2010) pp. 24-25; A. Lambert, L. Lohlé-Tart, *La surmortalité au Congo (RDC) durant les troubles de 1998-2004: une estimation des décès en surnombre, scientifiquement fondée à partir des méthodes de la démographie* (Oct. 2008), p. 1, Counter-Memorial of Uganda (2018), Ann. 62; Health and Nutrition Tracking Service (HNTS), *Peer Review Report: Re-Examining mortality from the conflict in the Democratic Republic of Congo, 1998-2006* (2009), p. 3, Counter-Memorial of Uganda (2018), Ann. 63.

[8] Health and Nutrition Tracking Service (HNTS), *Peer Review Report: Re-examining mortality from the conflict in the Democratic Republic of Congo, 1998-2006* (2009), p. 21, Counter-Memorial of Uganda (2018), Ann. 63.

[9] Human Security Report Project, "Part II, The Shrinking Costs of War", *Human Security Report* (2009-2010), Counter-Memorial of Uganda (2018), Ann. 64.

the IRC's estimate these two neutral institutions made. I respectfully refer the Court to the relevant sections of Uganda's Counter-Memorial[10].

23. It is not just the two institutions I mentioned that questioned the methodology and results of the IRC's estimates. The IRC *itself* admitted that there were methodological weaknesses in its surveys that likely inflated the number of deaths. The IRC frankly acknowledged that "[t]here was no follow-up or confirmation of the information provided by interviewees. This had two problematic aspects: People may have lied to interviewers or may have been mistaken about the cause, month or age of reported decedents".[11]

24. And that "no independent confirmation of cause of death from health facilities or other sources was sought"[12].

25. We have pointed out these problems before[13], but on Tuesday we heard no response, no effort to rebut these points.

26. Other demographers have conducted their own studies and come to very different conclusions. In particular, in 2008, two Belgian demographers from the Association for the Development of Applied Research to Social Studies, André Lambert and Louis Lohlé-Tart, conducted their own study in which they attempted to estimate the number of excess deaths from all causes throughout the DRC between 1998 and 2004. As the DRC itself admits, they "conclude[d] that 200,000 deaths were due to the conflict, thereby dividing the initial number roughly by 20"[14]. In fact, Lambert and Lohlé-Tart concluded that even this 200,000 figure was likely significantly overstated[15]. And again, these are excess deaths from all causes, not just violent deaths, and not just by Uganda.

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[10]Counter-Memorial of Uganda (2018), paras. 5.30-5.44.

[11] See Les Roberts, IRC Health Unit, M*ortality in eastern Democratic Republic of the Congo: Results from 11 Surveys* (2001), p. 15, Counter-Memorial of Uganda (2018), Ann. 51.

[12] B. Coghlan, R. Brennan, et al., "Mortality in the Democratic Republic of Congo: a Nationwide Survey", *The Lancet*, Vol. 367, No. 9504 (7 Jan. 2006), p. 50, Counter-Memorial of Uganda (2018), Ann. 58.

[13] Counter-Memorial of Uganda (2018), paras. 5.27-5.28; Uganda's Observations on the Experts Report dated 19 December 2020, 15 Feb. 2021 (hereinafter "Written Observations of Uganda (2021)"), footnote 79.

[14] Memorial of the DRC (2016), para. 2.68

[15] A. Lambert, L. Lohlé-Tart, *La surmortalité au Congo (RDC) durant les troubles de 1998-2004: une estimation des décès en surnombre, scientifiquement fondée à partir des méthodes de la démographie*, Oct. 2008, p. 17, Counter-Memorial of Uganda (2018), Ann. 62.

27. As I previously noted, the only source that purports to corroborate the IRC's work is the report Dr. Guha-Sapir submitted at the Court's request. Uganda has already provided its comments on that report[16], so I will be brief today. In the first place, it is more than a bit circular to say that Dr. Guha-Sapir's report "corroborates" the IRC's estimate because much of her work is actually based on the IRC data[17]. In other words, it does not exist independent of the IRC's work.

28. In any event, with great respect, Dr. Guha-Sapir's estimate is demonstrably unreliable. She purports to calculate the number of excess deaths in the DRC between 1998 and 2003 by comparing the crude death rate *before* the relevant period with the crude death rate *during* it. She uses more than 20-year old data from the United Nations Population Division for the first number but then uses different, sample survey data, including IRC data, for the second number[18].

29. However, the number of excess deaths that Dr. Guha-Sapir estimates disappears completely if one uses the most recent data from the United Nations Population Division. This recent data, published in 2019 under the title *World Population Prospects*, indicates that the crude death rate in the DRC in 1997 was actually *higher* than the crude death rate every year from 1998 to 2003 inclusive[19]. Using these numbers to compute the number of excess deaths during the relevant period, the result would be negative.

30. Let me be absolutely clear: we are *not* arguing that the conflicts had no effect upon, or actually caused a decrease in, the death rate in the DRC. Rather, the point is two-fold: *first*, the fact that, according to the most recent United Nations data, the crude death rate decreased during the conflicts indicates that the number of deaths resulting from the conflicts was, at least from a demographic perspective, undetectable; *second*, that Dr. Guha-Sapir's methodology is unreliable and therefore cannot serve as the basis for any legal findings of this Court.

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[16] Written Observations of Uganda (2021), paras. 25-59.

[17] See the Court-appointed Experts Report on Reparations dated 19 December 2020 (hereinafter the "Experts Report on Reparations (2020)"), para. 57, App. 2.3; Written Observations of Uganda (2021), para. 47.

[18] Experts Report on Reparations (2020), paras. 57, 61.

[19] Written Observations of Uganda (2021), paras. 38-39.

B. The DRC's "apportionment" of 45 per cent is entirely arbitrary

31. The next step in the DRC's calculation of the number of deaths for which Uganda is responsible is the ostensible "apportionment" of 45 per cent of these excess deaths to Uganda. This step is equally unfounded. Indeed, it is entirely arbitrary.

32. The DRC Memorial never bothered to explain — let alone provide evidence — as to why the 45 per cent "apportionment" is justified. It literally made no attempt to explain the figure other than the single, conclusory assertion in its Memorial that it takes into account the fact that "other parties bear responsibility for [the war's] outbreak"[20].

33. On Tuesday, Professor Ubéda-Saillard attempted to justify this number by reference to a map purporting to show Uganda's so-called zone of influence. But that map was grossly misleading. *First*, its provenance is entirely unexplained. *Second*, despite the impression it may have been intended to convey, it is not even a map of the entire DRC. It essentially shows only the northern half of the country. *Third*, there is no correlation between the size of an area and the distribution of the population. *Fourth*, it is flatly inconsistent with the 2005 Judgment itself. The Court specifically found that the only area of the DRC that Uganda "occupied" was Ituri district, a very small portion of the areas depicted in the map shown on Tuesday.

34. The Eritrea-Ethiopia Claims Commission held that for claims "seeking many millions of dollars", quantification of injury "must be based on more than subjective assertions of 'reasonableness'"[21]. But when the DRC asks the Court to accept the 45 per cent number because it supposedly yields the number of deaths "which could reasonably be deemed a consequence of [Uganda's] invasion"[22], that is exactly what the DRC does.

35. The "apportionment" the DRC asks the Court to accept is also facially implausible. As the Honourable Agent explained at the outset of today's session, there were innumerable parties to many different conflicts taking place at the same time on the territory of the DRC. Moreover, as Professor d'Argent pointed out, Dr. Urdal's analysis suggests that Uganda was responsible for less than one quarter of one per cent of the direct civilian deaths during the period.

36. In sum, the DRC's "apportionment" is factually and legally unsupportable.

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[20] Memorial of the DRC (2016), para. 2.71.

[21] Eritrea-Ethiopia Claims Commission, *Ethiopia's Damages Claims (Final Award, 2009)*, para. 85.

[22] Memorial of the DRC (2016), para. 2.71.

III. The evidence, including from the DRC, defeats its claims

37. I turn then to the third part of my presentation, in which I will show how the evidence, including documents the DRC itself created specifically for purposes of this litigation, confirms the conclusion that Uganda is, at most, responsible for a number of deaths that is literally several orders of magnitude lower than that alleged by the DRC.

A. The DRC's own evidence disproves its claim

38. The DRC says that it conducted inquiries to establish the nature and extent of the harms Uganda caused during the conflict[23]. In the process, it says it gathered the claims forms that Professor Murphy discussed earlier. Professor Murphy detailed some of the problems with those materials and the summary tables the DRC purports to have produced from them. Still other problems are discussed in our Counter-Memorial and in our Comments on the DRC's Response to the Court's June 2018 questions[24]. I will therefore not belabour the point.

39. What is notable about the DRC's summary tables for present purposes is the extent to which the number of deaths they allegedly record diverges, and diverges radically, from the numbers the DRC claims before the Court. Whereas the DRC claims that Uganda is responsible for causing 180,000 deaths, the number of deaths nominally recorded in the summary tables produced with the Memorial is 5,440[25]. Moreover, of these, fully 4,644, or 85 per cent, are unidentified; the DRC simply labels them as "*non-signalé*". On the screen now, for example, is an excerpt from DRC Annex 1.9, the table purporting to list the deaths recorded in Ituri[26].

40. And when one looks at the actual claims forms, the problems only deepen. As Professor Murphy explained, *not a single one* is connected to corroborating documentation of any kind. Moreover, the large majority of them do not even allege, let alone provide reliable evidence for, the victims' identity, age and employment status, or the allegedly responsible party.

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[23] See Memorial of the DRC (2016), paras. 1.27-1.41.

[24] Counter-Memorial of Uganda (2018), paras. 3.125-3.137; Comments of Uganda (2019), paras. 1.4-1.66.

[25] "Rapport Décès Effectif/Ville de 1998 à 2003" in file Dommage Décès, Memorial of the DRC (2016), Ann. 1.3.

[26] Response of the DRC (2018), Ann. 1.9 (12 Nov. 2018), pp. 1, 6-12.

B. Other independent sources disprove the DRC's case

41. Other sources, too, confirm that the DRC's claim that Uganda is responsible for causing 180,000 deaths is orders of magnitude removed from reality.

42. In the first instance, there is the Urdal Report commissioned by the Court. To determine the number of civilian deaths during the conflict, Dr. Urdal examined what he calls "one of the most trusted sources of armed conflict data in academia as well as the policy domain"[27]: the database maintained by the Uppsala Conflict Data Program (UCDP) at Uppsala University. Based on that examination, he concluded that the "best estimate" of the total number of direct civilian deaths during the relevant period in the DRC was 14,663[28]. That is a shocking number, to be sure. One death is too many. But the UCDP's number is some 92 per cent less than the number claimed by the DRC.

43. More importantly, of these civilian deaths, 32 — *32* — are linked to Uganda. And this includes both collateral victims of violence and targeted killings.

44. In an effort to be helpful to the Court, Uganda itself analysed the UCDP database in its Counter-Memorial and arrived at almost the same numbers as Dr. Urdal[29]. And with respect to the number of civilian casualties linked to Uganda, we arrived at *exactly* the same number: 32[30]. (Just by way of comparison, the UCDP database links more than 1,400 civilian deaths to the DRC military[31].)

45. Unlike Dr. Urdal, Uganda also examined another credible database: the Armed Conflict Location and Event Data Project (ACLED) at the University of Sussex. It estimated a total of 8,012 civilian fatalities in the DRC between August 1998 and June 2003, of which 117 are linked to one-sided violence by Uganda[32].

46. In its terms of reference to the experts, the Court asked them to determine the number of civilian deaths by reference to United Nations Reports[33]. They do not appear to have done that. Again, in an effort to be helpful to the Court, Uganda did. Uganda carefully examined the United Nations

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[27] Experts' Report on Reparations (2020), para. 17.

[28] Experts' Report on Reparations (2020), para. 36.

[29] Counter-Memorial of Uganda (2018), para. 5.67.

[30] Counter-Memorial of Uganda (2018), para. 5.67.

[31] Counter-Memorial of Uganda (2018), para. 5.68.

[32] Counter-Memorial of Uganda (2018), para. 5.71

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

Mapping Report to identify every instance in which it directly or indirectly links one or more deaths to Uganda during the period between 7 August 1998 and 2 June 2003. These instances included circumstances in which individuals were killed in confrontations between Uganda and other armed groups, and in which individuals were killed by other actors with the nominal assistance of Uganda. We included a compilation of all such instances as Annex 110 to our Counter-Memorial.

47. Adding the numbers together, the United Nations Mapping Report suggests the total number of deaths for which there is even a "reasonable suspicion" to believe they resulted from conduct in which Uganda was involved is approximately 2,300[34].

48. That said, a word of caution is in order, in particular about the standard of proof the United Nations Mapping Report adopted. According to the authors,

> "[s]ince the primary objective of the Mapping Exercise was to 'gather basic information on incidents uncovered', *the level of evidence required was naturally lesser than would be expected from a case brought before a criminal court*. The question was therefore not one of being satisfied beyond reasonable doubt that a violation was committed, but rather of *reasonably suspecting* that the incident did occur."[35]

It is therefore likely that the number I just mentioned is significantly overstated.

49. It is worth pausing on the United Nations Mapping Report a moment longer. In its instructions to the experts, the Court asked them to consider "United Nations Reports mentioned in the 2005 Judgment"[36]. Because it was prepared only later, in 2010, the United Nations Mapping Report was obviously not mentioned in the 2005 Judgment. But that only makes it more valuable. As we explained in the Counter-Memorial and Professor Murphy noted earlier, all the reports the Court instructed the experts to consider are encompassed by the United Nations Mapping Report.

50. Also highly relevant, in our view, is the fact that all these figures, whether from the United Nations Mapping Report, UCDP or ACLED, are orders of magnitude less than the numbers the DRC claims. The DRC itself — albeit unintentionally — admits how important this is. Specifically, in its

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[34] Calculated Number of Civilian Deaths between 7 August 1998 and 2 June 2003 (Source: UN Mapping Report), Counter-Memorial of Uganda (2018), Ann. 110.

[35] UN Mapping Report (2010), para. 7 (emphasis added), Counter-Memorial of Uganda (2018) Ann. 25.

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

Memorial, the DRC itself argued that international reports like the United Nations Mapping Report provide the correct order of magnitude for assessing the scope of the harms it alleges[37].

IV. The quantum of compensation the DRC seeks for each victim is unsupported

51. That brings me to the last part of my presentation, which addresses the levels of compensation the DRC claims for each alleged death. As I said at the outset, the DRC claims US$34,000 for each victim of what it calls "deliberate violence", and approximately US$19,000 per victim for deaths resulting from acts other than deliberate violence. Neither amount is justified or justifiable.

52. The DRC never explains why it is appropriate to claim two different amounts for the two categories of alleged victims. To the extent it seeks compensation for the same essential harm (that is, death), it is arbitrary not to claim the same amount. Moreover, the fact that the DRC seeks a heightened amount for victims of so-called "deliberate violence" suggests that it is intended to have a punitive element, which, as Professor Pellet will explain, international law does not permit[38]. In any event, neither of the DRC's methodologies for these two amounts holds up under scrutiny.

53. The DRC purports to determine the amount of compensation due for deaths resulting from deliberate violence based on the quantum that Congolese courts allegedly award to families of persons killed by the Congolese Government in the course of serious international crimes[39]. According to the DRC, the amounts vary from US$5,000 to US$100,000, with an average of US$34,000[40].

54. But even if DRC domestic law were relevant to the issues before the Court, it would be for the DRC to prove that its courts actually award such amounts. In its Memorial, it did not adduce even *a single* judgment demonstrating the amount of compensation courts awarded.

55. The Court gave the DRC a chance to correct this oversight with its June 2018 questions. In response, the DRC submitted just *two* domestic court decisions. For one of those decisions, it

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[37] Memorial of the DRC (2016), paras. 1.36-1.39 (emphasis added). See also Counter-Memorial of Uganda (2018), paras. 5.78-5.82; Written Observations of Uganda (2021), paras. 20-21.

[38] See Counter-Memorial of Uganda (2018), paras. 4.99-4.110.

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

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

presented only fragments, and even those fragments did not indicate the amount of compensation awarded[41].

56. The Court came back to the issue again in its terms of reference for the experts. It asked: "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?"

57. In his report, Mr. Senogles frankly acknowledged that he could not answer that question. He stated that his review of the DRC's evidence ostensibly supporting the US$34,000 figure "reveals that neither of the extracts [of court decisions] provided is complete and neither contains the amounts of compensation awarded by the two courts"[42].

58. Rather than end his analysis there, however, Mr. Senogles did something the Court did not ask him to do. He took it upon himself to try to analogize this case to the mass claims process before the United Nations Compensation Commission to come up with a recommended figure of US$30,000 for deliberate killings[43]. In our view, this effort is not only *ultra vires*, it is also misguided.

59. The United Nations Compensation Commission proceedings could scarcely have been any more different from the proceedings before this Court, for reasons we explained in our observations on the Experts' Report[44]. Unfortunately, time simply does not allow me to linger any longer on these subjects now. We hope to be able to return to them when we put questions to Mr. Senogles next week.

60. Only in its Observations to the Experts' Report did the DRC finally point to any meaningful domestic case law[45]. Of the ten cases that concern instances of death in the publicly available sources

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[41] Response of the DRC (2018), Ann. 10.1.

[42] Experts' Report on Reparations (2020), para. 88.

[43] Experts' Report on Reparations (2020), paras. 92-106.

[44] Written Observations of Uganda (2021), paras. 70-73.

[45] Written Observations of the DRC (2021), paras. 38-40, fns. 51-66.

cited by the DRC that Uganda was able to locate[46], the amounts awarded ranged from a highest verified amount of US$100,000[47] to a low of US$5,800[48]. The most common amount was US$10,000[49]. In every case, the amounts were expressly determined *ex aequo et bono*[50] but the victims who received reparation all provided detailed testimony specifying the circumstances of their injury and its causal link to the crimes (and many were subject to cross-examination)[51]. Many provided medical reports, death certificates, photos and eyewitness testimony[52]. Significantly, when victims did not provide any evidence, no compensation was awarded[53].

61. Unfortunately, time does not permit me to address the many equally problematic methodological flaws in the way the DRC computes the amount of compensation it claims for deaths resulting from acts other than deliberate violence. In that respect, I kindly refer the Court to the detailed points made in our written pleadings[54].

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[46] *"Chebeya" (Auditeur supérieur et parties civiles c. Daniel Mukalay et consorts*), Cour militaire de Kinshasa, Arrêt nº. RP 066/2011, 23 June 2011, available at https://www.fidh.org/IMG/pdf/rdc_verdict_chebeyabazana_230611.pdf; *"Waka-Lifumba" (Auditeur militaire et parties civiles c. Botuli Ikofo et consorts)*, Tribunal militaire de garnison de Mbandaka, jugement no. RP 134/2007, 18 February 2007, in Avocats Sans Frontières, *Recueil de Jurisprudence Congolaise en Matière de Crimes Internationaux* (2013), pp. 32-53; *"Kakado" (Auditeur militaire supérieur et parties civiles c. Kakado Barnaba*), Tribunal militaire de garnison de Bunia, *jugements* no. RP 071/09, 009/010 and 074/010, 9 July 2010, in Avocats Sans Frontières, *Recueil de Jurisprudence Congolaise en Matière de Crimes Internationaux* (2013), pp. 135-174 and Avocats Sans Frontières, *Recueil de Décisions de Justice et de Notes de Plaidoiries en Matière de Crimes Internationaux* (2010), pp. 224-329; *"Kakwavu" (Auditeur General, Ministère Public et Parties Civiles c. Jérôme Kakwavu Bukande)*, Haute Cour militaire, arrêt no. RP 004/2010, 7 November 2014, in *Bulletin des arrêts de la Haute Cour Militaire* (2016), pp. 17-99; *"Kabala"* (also known as *"Mupoke") (Auditeur militaire c. Kabala*), Cour militaire du Sud-Kivu, arrêt no. RPA 230, 20 May 2013 in *Bulletin des arrêts de la Haute Cour Militaire* (2016), pp. 102-154; *"Minova" (Auditeur militaire c. DR Congo et consorts*), Cour militaire opérationnelle du Nord-Kivu, arrêt no. RP 003/2013, 5 May 2014, in *Bulletin des arrêts de la Haute Cour Militaire* (2016), pp. 155-272; *"Songo Mboyo" (Auditeur militaire c. Bokila et consorts)*, Cour militaire de l'Équateur, arrêt no. RPA 014/2006, 7 June 2006, in *Bulletin des arrêts de la Haute Cour Militaire* (2016), pp. 273-308; *"Kavumu" (Auditeur militaire supérieur et parties civiles c. Batumike et consorts)*, Haute Cour militaire, arrêt no. RP 0105/2017, 13 December 2017, (affirmed on appeal on 26 July 2018), available at https://trialinternational.org/wp-content/uploads/2018/07/Arret-Kavumu-HCM.pdf; *"Kimbanguistes" (Ministère public et parties civiles c. Mputu Muteba et consorts*), Tribunal de grande instance de Kinshasa/Kalamu, jugement no. RP 11.154/11.155/11.156, 17 December 2011, in Avocats Sans Frontières, *Recueil de Jurisprudence Congolaise en Matière de Crimes Internationaux* (2013), pp. 10-23; *"Maniraguha"* (*Ministère public et parties civiles c. Jean Bosco Maniraguha alias "Kazungu" et Sibomana Kabanda alias "Tuzargwana"*), Tribunal militaire de garnison de Bukavu, *jugement* no. RP 275/09 and no. 521/10, 16 August 2011, in Avocats Sans Frontières, *Recueil de Jurisprudence Congolaise en Matière de Crimes Internationaux* (2013), pp. 100-125.

[47] *"Minova"* in *Bulletin* (2016), p. 271.

[48] *"Maniraguha"* in Avocats Sans Frontières (2013), p. 125.

[49] *"Songo Mboyo"* in *Bulletin* (2016), p. 305; *"Kakwavu"* in Bulletin (2016), p. 99; *"Chebeya"*, p. 74.

[50] See e.g. *"Chebeya"*, p. 70; *"Kakado"* in Avocats Sans Frontières (2013), p. 174; *"Kabala"* in *Bulletin* (2016), p. 147; *"Minova"* in *Bulletin* (2016), p. 255; *"Kavumu"*, p. 76.

[51] See e.g. *"Minova"* in *Bulletin* (2016), p. 254; *"Kabala"* in *Bulletin* (2016), p. 110.

[52] See e.g. *"Chebeya"*, p. 13; *"Kakado"* in Avocats Sans Frontières (2013), p. 156; *"Maniraguha"* in Avocats Sans Frontières (2013), pp. 105-106, 118; *"Kabala"* in BULLETIN (2016), pp. 37, 45, 116; *"Kakwavu"* in *Bulletin* (2016), pp. 56-57.

[53] See e.g. *"Minova"* in *Bulletin* (2016), pp. 254-255; *"Kimbanguistes"* in Avocats Sans Frontières (2013), p. 21.

[54] Counter-Memorial of Uganda (2018), paras. 5.156-5.179.

62. Madam President, as I said at the outset, the death of any human being is a tragedy. But here, in a court of law, an applicant cannot substitute emotional appeals for evidence. It falls to the DRC to prove its case and it has not done so. Still less has it proved that Uganda is responsible for causing the staggering and wildly inflated numbers of deaths it claims. All neutral sources and the DRC's own evidence point to a number that is a tiny fraction of the number claimed.

63. Madam President, honourable Members of the Court, that concludes my presentation. I am grateful for your customary courtesy and attention. May I ask that you give the virtual floor to Professor Akande?

The PRESIDENT: I thank Mr. Martin. I now give the floor to Professor Dapo Akande. You have the floor.

Mr. AKANDE:

THE DRC HAS FAILED TO PROVE ITS SPECIFIC INJURY WITH RESPECT TO PERSONAL INJURIES

1. Thank you. Madam President, Members of the Court, it is an honour to appear before you, and to represent Uganda in these proceedings. My task this afternoon is to address the DRC's claims for reparations with respect to personal injuries other than loss of life.

2. In this regard, the DRC seeks a total of approximately US$305 million in compensation. It seeks reparation for four categories of personal injuries, namely physical injuries[55]; sexual violence[56]; the recruitment, training and use of child soldiers[57]; and displacement of persons[58].

3. Following on from Professor Murphy's presentation this morning, I will start by describing briefly the international standards for compensation for personal injuries. I will then show how the DRC has failed to establish any of the elements required by these standards. Finally, I will identify problems with the recommendations put forward by Mr. Senogles, the expert appointed by the Court, with regard to valuation of personal injuries.

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[55] Memorial of the DRC (2016), para. 7.21.

[56] *Ibid.*, para. 7.25.

[57] *Ibid.*, para. 7.28.

[58] *Ibid.*, para. 7.32.

4. The flaws in the DRC's claims are numerous, and I will limit my presentation to the most critical ones. Like the DRC's claims with respect to loss of life, its claims with respect to personal injuries relate to matters of grave concern and they must be evaluated with great care. In this case, the DRC's numbers are disproved by the evidence, including the DRC's own evidence.

5. This morning, Professors Murphy and d'Argent took you through the elements that the DRC must prove in order to sustain its claim for reparations. I will show that the DRC has failed to establish any of four elements it needs to prove in order to succeed in its claim for compensation for personal injury:

— *First,* the DRC has failed to identify the specific persons alleged to have been injured.

— *Second,* the DRC has not provided details of the harm it alleges, such as the location, date and the nature of the injuries.

— *Third,* the DRC has not provided evidence that the Respondent's breaches of international law proximately caused these injuries.

— *Fourth,* the DRC has not established the valuation of the losses arising from personal injuries through evidence showing, for example, potential loss of earnings, costs of care and other expenses stemming from the injury.

6. Claimants must prove each of these elements through evidence, which typically will include contemporaneous documentary evidence and sworn affidavits by witnesses. Contrary to what you heard on Tuesday, this is required, even in cases of armed conflict***, a***nd as I will show, it is not an impossible standard.

I. **The DRC has not identified specific victims**

7. *First*, the requirement to identify persons alleged to have been injured. The DRC alleges that Uganda caused physical injuries to 32,140 people[59], and is responsible for the harm suffered by 1,730 alleged victims of sexual violence[60]. In total, it claims for injuries to 33,870 people.

8. However, the DRC has not even attempted to prove the identity of the vast majority of these alleged victims. In the valuation lists produced by the DRC which allegedly summarize the claims

[59] Memorial of the DRC (2016), paras. 7.18-7.21.

[60] Memorial of the DRC (2016), para. 7.24.

forms that Professor Murphy referred to, the DRC listed only 1,353 victims of physical injuries and rape[61]. As you see on the slide in front of you, the listed victims amount to just 4 per cent of the total number of persons for whom the DRC claims. And of that tiny number that are listed, the DRC has identified a maximum of 938 victims by name[62]. That means that only 2.7 per cent of the alleged victims are named. The rest are unidentified and labelled simply as not reported *("non-signalé")*[63].

9. The DRC also claims that Uganda is responsible for the displacement of 668,538 persons[64]. Yet, its valuation lists only makes reference to 2,160 victims of displacement, of which only 1,878 are identified by name[65]. This is 0.3 per cent of the total number of the allegedly displaced persons. The rest are listed as not reported or unidentified. On Tuesday, the DRC's Agent stated that "the DRC does not claim that its assessment of the damage is accurate to the nearest figure"[66]. As you see, the evidence produced of who has been harmed relates only to the tiniest sliver of those in respect of which the DRC claims compensation.

10. Quite apart from the fact that the DRC fails to provide even the names of the overwhelming majority of the victims it alleges, the DRC provides no documentary evidence for identifying even the tiny minority of alleged victims that are listed by name. No identity cards or other identifying information is produced and, in many cases, there is even no corresponding claims forms[67].

11. The International Criminal Court has insisted on evidence of identity of victims in all three cases relating to orders for reparations to victims of crimes committed in the context of the same armed conflicts in the DRC that this Court is now called upon to deal with[68]. As Mr. Martin mentioned just moments ago, it has proved possible for victims to produce such documents to the ICC. In March of this year, in the *Ntaganda* reparations order, the ICC held that victims in the DRC

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[61] Response of the DRC (2018), Anns. 1.6.B, 1.7.B, 1.8.B, 1.9.B, 1.10.B (12 Nov. 2018).

[62] Response of the DRC (2018), Anns. 1.6.B, 1.7.B, 1.8.B, 1.9.B, 1.10.B (12 Nov. 2018).

[63] Response of the DRC (2018), Anns. 1.6.B, 1.7.B, 1.8.B, 1.9.B, 1.10.B (12 Nov. 2018).

[64] Memorial of the DRC (2016), paras. 7.30-7.32.

[65] Response of the DRC (2018), Anns. 1.6.A, 1.7.A, 1.8.A, 1.9.A, 1.10.A (12 Nov. 2018).

[66] CR 2021/5, p. 22, para. 14 (Kakhozi).

[67] Comments of Uganda (2019), p. 2, paras. 1.18-1.66.

[68] *Prosecutor* v. *Bosco Ntaganda*, Case No. ICC-01/04-02/06, Reparations Order, ICC Trial Chamber VI, 8 March 2021, para. 137; *Prosecutor* v. *Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Amended Reparations Order, ICC Appeals Chamber, 3 March 2015, para. 22; *Prosecutor* v. *Germain Katanga*, Case No. ICC-01/04-01/07, Judgment on the appeals against the order of Trial Chamber II of 24 March 2017, ICC Appeals Chamber, 8 March 2018, para. 236; *Prosecutor* v. *Germain Katanga*, Case No. ICC-01/04-01/07, Reparations Order, ICC Trial Chamber II, 24 March 2017, para. 45.

seeking compensation for wrongful acts *must* prove, in addition to the harm suffered, and its causal link~~s~~ to the acts of Mr. Ntaganda, their identity. They ***may*** do so through

> "official or unofficial identification documents, or any other means of demonstrating their identities. In the absence of acceptable documentation, a statement signed by two credible witnesses establishing the identity of the victim and describing the relationship between the victim and any individual acting on their behalf is acceptable."[69]

The DRC has in this case provided no such evidence.

12. On Tuesday you were told — several times in fact — that the DRC has followed a "rigorous methodology"[70]. In reality, it has pulled its alleged numbers out of thin air.

13. Let's take physical injuries for example. The DRC alleges that Uganda caused physical injuries to 30,000 persons in Ituri[71]. This number is based on mere speculation. The DRC arrives at this number by taking its alleged number of deaths in Ituri, which is 60,000, and dividing it by two[72]. Both the starting number of 60,000 and the ratio of one half are unfounded and arbitrary[73]. The starting number is an uncorroborated estimate from a single United Nations report, and there is literally no evidence showing that half of that number of people were injured.

14. In response to the Court's request in Question 2 that it "produce evidence" supporting its estimate, the DRC still did not do so. It referred only to a United Nations report that does not itself provide a number for those who suffered physical injuries[74].

15. The DRC's own tables, ostensibly compiling the data from its claims forms, contradict its claim that 30,000 people suffered physical injuries in Ituri[75]. Its table of such victims, attached to its responses to the Court's questions, lists only 456 persons[76]. And the vast majority of people on this

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[69] *Prosecutor* v. *Bosco Ntaganda*, Case No. ICC-01/04-02/06, Reparations Order, ICC Trial Chamber IV, 8 March 2021, para. 137.

[70] CR 2021/5, p. 30, para. 24 (Chemillier-Gendreau); CR 2021/5, p. 22, paras. 11, 16 (Kakhozi); CR 2021/5, p. 40, para. 10 (Ubéda-Saillard).

[71] Memorial of the DRC (2016), para. 3.28.

[72] Memorial of the DRC (2016), para. 3.28.

[73] Memorial of the DRC (2016), para. 3.28.

[74] United Nations Security Council, *Second special report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC)*, doc. S/2003/566, 27 May 2003, para. 10; DRC Ann. 2.3.B, 12 Nov. 2018.

[75] "Logiciel permettant de consulter les fiches individuelles des victimes (uniquement en format électronique)", Memorial of the DRC (2016), Ann. 1.3; *ibid.*, para. 1.35.

[76] Response of the DRC (2018), Evaluation Lesions Ituri (Ann. 1.9.B), 12 Nov. 2018, p. 18.

table (71 per cent of the total) are unidentified, "*non-signalé*"[77]. The evidence relating to even this very limited number of victims on this list is questionable: as Uganda has explained in its written pleadings and also before you today, many of the claims forms are missing, illegible, or blank[78].

16. Even if this number of 456 is correct, it is orders of magnitude smaller than the 30,000 claimed victims.

17. The DRC's allegation that Uganda is responsible for the harm suffered by 1,730 alleged victims of sexual violence is also mere conjecture[79]. The DRC arrives at these numbers by ostensibly adding up the number of victims in its claims forms and then multiplying that number by five. It speculates that "[g]iven . . . the common practice of not reporting such acts . . . the actual number of rapes for which Uganda is responsible . . . is five times higher than the number reported"[80]. Just like the DRC's percentages and multipliers for loss of life and physical injuries, this multiplier appears to have been chosen at random. It is not clear why the multiplier is not two, or three, or ten. As the Eritrea-Ethiopia Claims Commission concluded, the use of multipliers, and the "mechanical addition of multiple factors" has no precedent in international law and is "arbitrary and without legal foundation"[81].

18. Even with respect to the listed victims, most of them, again, are not named[82], and there is no evidence of their identity.

II. The DRC has not provided details of the harm suffered

19. Madam President, members of the Court, I now turn to the *second element*.

20. Having failed to identify almost all of the victims, the DRC has also failed to provide details of the injuries, including their specific location, date and nature, despite having been afforded a second chance to do so in response to the Court's questions.

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[77] Response of the DRC (2018), Evaluation Lesions Ituri (Ann. 1.9.B), 12 Nov. 2018.

[78] Comments of Uganda (2019), p. 2, paras. 1.18-1.66.

[79] Memorial of the DRC (2016), para. 7.24.

[80] Memorial of the DRC (2016), para. 3.32.

[81] *Ethiopia's Damages Claims, Final Award, Eritrea-Ethiopia Claims Commission, Decision of 17 August 2009*, reprinted in *RIAA*, Vol. 26, (2009) ("*Ethiopia's Damages Claims*"), paras. 62-63.

[82] Response of the DRC (2018), Anns. 1.6.B, 1.7.B, 1.8.B, 1.9.B, 1.10.B.

21. The United Nations Compensation Commission, which it is important to note, was established to deal with claims arising out of a use of force and a situation of occupation took the view that, "in order for a claim for serious personal injury to be compensable", there must be "evidence of the date and fact of the injury"[83]. Such evidence was typically in the form of medical documentation, and where this was not available, witness statements or a personal statement of the claimant was required[84]. Here, the DRC produces practically nothing.

22. As explained in our written pleadings, Uganda decided to sample every tenth entry on each of the valuation lists and examined the underlying victim identification forms[85]. Among the 738 forms it examined, Uganda found that only 62 claims forms specified the alleged injury. Of those 62 forms, only 21 of them allege the extent or the nature of the victim's injury[86].

23. With respect to displacement, the DRC alleged that the victim identification forms "give a sufficient indication of time spent" in displacement[87]. Yet only 10.7 per cent of the sampled claims forms reviewed by Uganda contained *any* information about the duration of the alleged displacements[88]. And among these, many individuals claimed to have been displaced for shorter periods of time than the DRC alleges[89].

24. Uganda is sympathetic to the difficulties inherent in trying to gather evidence of harms that occurred in the context of armed conflict. However, contrary to the points made by Dr. Raphaëlle Nollez-Goldbach on Tuesday, international courts dealing with claims in the context of armed conflicts have still insisted on at least *some* evidence. The evidence presented by individual victims in the *Lubanga*, *Katanga* and *Ntaganda* reparations cases at the ICC in the context of the same

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[83] United Nations Compensation Commission, *Report and Recommendations Made by the Panel of Commissioners Concerning the First Instalment of Claims for Serious Personal Injury or Death ("Category B" Claims)*, doc. S/AC.26/1994/1, 26 May 1994, p. 35.

[84] United Nations Compensation Commission, *Report and Recommendations Made by the Panel of Commissioners Concerning the First Instalment of Claims for Serious Personal Injury or Death ("Category B" Claims)*, doc. S/AC.26/1994/1, 26 May 1994, pp. 31-41.

[85] Comments of Uganda (2019), paras. 1.16-1.17.

[86] Comments of Uganda (2019), App. 11.

[87] Response of the DRC (2018), para. 3.7.

[88] Comments of Uganda (2019), para. 3.9.

[89] See e.g. Response of the DRC (2018), Anns. 1.1, 1.5 (12 Nov. 2018), BENI_SUITE2_CCF08032016_0006_035, BENI_SUITE2_CCF08032016_0007_083, BENI_SUITE2_CCF08032016_0004_006; KISANGANI SUITE1 CCF06032016 0007 060; KISANGANI SUIT E1 CCF06032016 0011 212; KISANGANI SUITE1 CCF06032016 0011 124.

conflicts in the same periods in the DRC, demonstrate that it is possible to present at least *some* supporting evidence. Here, there is literally *none*.

25. In *Katanga*, the ICC Chamber noted "that in support of their allegations, the Applicants have, for the most part, presented medical reports"[90]. Some presented hospital records and forensic reports. A number of applicants claiming compensation for displacement provided refugee cards or refugee family certificates[91].

26. In *Lubanga*, which involved the recruitment of child soldiers in Ituri, many of the 473 claimants presented details of their experience, through signed declarations, corroborating witness testimony, photographs and certificates of demobilization[92].

27. Even in the Congolese court cases cited by the DRC in its Observations on the report of the experts appointed by the Court, the plaintiffs provided detailed evidence of, first, the identity of the victims and, second, the circumstances of the injury, including the specific identity of the perpetrators, and the time, date, location, and nature of the injury. They did so through witness statements, and forensic and medical reports[93].

28. Claims by Eritrea and Ethiopia before the Eritrea-Ethiopia Claims Commission for physical injuries typically only succeeded where they presented similar detailed evidence of the fact, nature and extent of injuries. For example, that Commission stated that "[a]bsent significant

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[90] *Prosecutor* v. *Germain Katanga*, 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, para. 111.

[91] *Prosecutor* v. *Germain Katanga*, 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, para. 138.

[92] *Prosecutor* v. *Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable, ICC Trial Chamber II, 15 Dec. 2017, paras. 44, 62-64, 95-102.

[93] *"Waka-Lifumba" (Auditeur militaire et parties civiles c. Botuli Ikofo et consorts)*, Tribunal militaire de garnison de Mbandaka, jugement no. RP 134/2007 (18 Feb. 2007), in Avocats Sans Frontières, *Recueil de Jurisprudence Congolaise en Matière de Crimes Internationaux* (2013), pp. 32-53; *"Kakado" (Auditeur militaire supérieur et parties civiles c. Kakado Barnaba*), Tribunal militaire de garnison de Bunia, jugement RP 071/09, 009/010 and 074/010 (9 July 2010) in Avocats Sans Frontières, *Recueil de Jurisprudence Congolaise en Matière de Crimes Internationaux* (2013), pp. 135-174 and Avocats Sans Frontières, *Recueil de Décisions de Justice et de Notes de Plaidoiries en Matière de Crimes Internationaux* (2010), pp. 224-329; *"Kakwavu" (Auditeur General, Ministère Public et Parties Civiles c. Jérôme Kakwavu Bukande)*, Haute Cour militaire, arrêt no. RP 004/2010 (7 Nov. 2014) in *Bulletin des arrêts de la Haute Cour Militaire* (2016), pp. 17-99; *"Kabala" (*also known as *"Mupoke") (Auditeur militaire c. Kabala*), Cour militaire du Sud-Kivu, arrêt no. RPA 230 (20 May 2013) in *Bulletin des arrêts de la Haute Cour Militaire* (2016), pp. 102-154; *"Minova" (Auditeur militaire c. DR Congo et consorts*), Cour militaire opérationnelle du Nord-Kivu, arrêt no. RP 003/2013 (5 May 2014), in *Bulletin des arrêts de la Haute Cour Militaire* (2016), pp. 155-272; *"Songo Mboyo" (Auditeur militaire c. Bokila et consorts)*, Cour militaire de l'Équateur, arrêt no. RPA 014/2006 (7 June 2006) in *Bulletin des arrêts de la Haute Cour Militaire* (2016), pp. 273-308; *"Kavumu" (Auditeur militaire supérieur et parties civiles c. Batumike et consorts)*, Haute Cour militaire, arrêt no. RP 0105/2017 (13 Dec 2017) (affirmed on appeal on 26 July 2018), available at https://trialinternational.org/wp-content/uploads/2018/07/Arret-Kavumu-HCM.pdf.

eyewitness evidence of physical abuse, Ethiopia's claims for frequent or pervasive shooting, beating, or other types of physical abuse of civilians . . . fail for lack of proof"[94].

29. Similarly, with respect to displacement, that Commission rejected claims where "the minimal evidence submitted by Eritrea was neither clear nor convincing"[95]. Again, in our case the DRC does not even bother to provide *any* evidence as to the circumstances of the alleged displacement.

III. The DRC has not provided evidence establishing a causal link between the injury and the conduct of Uganda

30. Madam President, Members of the Court, my *third* main point is that the DRC has failed to provide evidence establishing a causal link between the personal injuries it seeks reparation for and the conduct of Uganda.

31. Once again, this failure compares unfavourably with the efforts of DRC victims in the *Lubanga* and *Katanga* cases at the ICC. In *Lubanga*, to prove the causal link between their injury and Mr. Lubanga's conduct, former child soldiers were required to demonstrate that they were recruited by, or participated in, the activities of the relevant armed groups between 1 September 2002 and August 2003, and that they were less than 15 years old during that time period[96]. Many were able to provide the necessary evidence in the form of affidavits, witness statements, identification cards, photographs and certificates of demobilization[97]. In *Katanga*, applicants claiming for forcible displacement provided refugee cards and those claiming for physical injuries provided medical reports, but even those were insufficient to prove the causal link to Mr. Katanga's conduct and the ICC dismissed those claims[98].

32. Again, in contrast, the DRC here produces no such evidence. In fact, its own evidence casts doubt on Uganda's responsibility for the claimed injuries.

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[94] *Ethiopia's Claims 1 & 3, Partial Award, Eritrea-Ethiopia Claims Commission*, 19 Dec. 2005, para. 47.

[95] *Eritrea's Claims 1, 3, 5, 9-13, 14, 21, 25 & 26, Partial Award, Aerial Bombardment and Related Claims,* Eritrea-Ethiopia Claims Commission, 28 Apr. 2004, para. 138.

[96] *Prosecutor* v. *Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable, ICC Trial Chamber II, 15 Dec. 2017, para. 66.

[97] *Prosecutor* v. *Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable, ICC Trial Chamber II, 21 Dec. 2017, paras. 42-44; 61-68.

[98] *Prosecutor* v. *Germain Katanga*, 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. 111, 138.

33. Many of the DRC's claims forms indicate that the alleged perpetrator was not Uganda. Among the 738 forms that Uganda sampled, one third of them do not even allege that the perpetrator was a person whose acts are attributable to Uganda. Instead, they allege that the perpetrators were Rwandan soldiers, an irregular force or another actor. Take, for example, the claim form that you see on the screen[99]. The person filling out that form indicated that the alleged perpetrators were "Rwandan soldiers". In its response to Question 1, the DRC assured the Court that forms indicating Rwanda as the perpetrator were not "taken into account in the assessment presented by the DRC in these proceedings"[100]. Yet the entries in the valuation lists corresponding to this victim identification form indicate that the DRC is seeking more than US$7,000 from Uganda for the actions of Rwanda alleged by this victim[101].

34. Some claims forms list Ngiti combatants[102], the "APC" or the "EFRP"[103] as alleged perpetrators. Yet when the Court asked the DRC for which irregular forces' conduct it is claiming compensation for, the DRC did not list Ngiti combatants, or the APC, or the EFRP[104].

35. These discrepancies are not limited to claims forms, but also extend to United Nations and NGO reports. Regarding physical injuries in Kisangani, for example, the DRC claims that Uganda is responsible for causing injuries during confrontations between the RCD and the FAC in January 1999[105]. However, the Court's 2005 Judgment did not find the acts of the RCD attributable to Uganda[106]. Moreover, according to the United Nations Mapping Report, it was the DRC itself, not the RCD, that caused these alleged injuries by indiscriminately bombing Kisangani in January 1999[107].

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[99] Response of the DRC (2018), Ann. 1.5 (Fiches d'identification de Kisangani),"KISANGANI_SUITE1_CCF06032016_0009_028", 12 Nov. 2018.

[100] Response of the DRC (2018), para. 1.9.

[101] Response of the DRC (2018), Ann. 1.10.A, Evaluation Fuite Kisangani, p. 25; Ann. 1.10.C, Evaluation Biens Kisangani, pp. 233-34, 12 Nov. 2018.

[102] Response of the DRC (2018), Ann. 1.4 (Fiches d'identification de l'Ituri), "ITURI_SUITE4_CCF070 32016_0007_058", 12 Nov. 2018.

[103] Response of the DRC (2018), Ann. 1.4 (Fiches d'identification de l'Ituri), "ITURI_SUITE_CCF05032016 0026_027", 12 Nov. 2018.

[104] Response of the DRC (2018), paras. 8.1-8.5.

[105] Memorial of the DRC (2016), para. 4.21.

[106] *Armed Activities* (2005), pp. 230-231, para. 177.

[107] UN Mapping Report, para. 360; Counter-Memorial of Uganda (2018), Ann. 25.

36. Madam President, Members of the Court, in its Memorial, the DRC, in order to determine the number of child soldiers, whose recruitment it alleges Uganda is responsible for, relies in large part on the United Nations Mapping Report's findings. According to that report: "[i]n 2001, the MLC [the Mouvement de libération du Congo] admitted to having 1,800 [child soldiers] within its ranks"[108]. Yet, in its 2005 Judgment, the Court found, expressly, that the acts of Jean Pierre Bemba's MLC — were not attributable to Uganda[109]. As Professor d'Argent argued this morning, to now hold Uganda responsible for the acts of all armed groups would violate the principle of *res judicata*.

37. Might I also add that the DRC's claim with respect to recruitment, training and use of child soldiers is limited to the Ituri region. However, the United Nations Mapping Report itself finds that the MLC was primarily active in Equateur Province[110], which was not under occupation by Uganda, with the consequence that there would be no basis to hold Uganda responsible for breach of any obligations of an occupying Power there. In addition, in its response to the Court's Question 8, regarding the acts of which irregular forces it is claiming compensation, the DRC did not identify the MLC[111]. It thereby waived any compensation claim relating to alleged acts of the MLC.

38. To conclude on this issue of causation, I note that more than half of the DRC's claims for personal injuries other than loss of life are with respect to displacement. With regard to the numbers of displaced persons in the Ituri region, the DRC relies on the United Nations Secretary-General's second report on MONUC[112]. The numbers in that report are simply an estimate of all internally displaced persons in Ituri, and the DRC picks, without explanation, the high point of the estimated range. Even more problematically, the report does not set out the circumstances of the displacement and the DRC fails to show any causal link between the specific and unlawful conduct of Uganda and

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[108] Memorial of the DRC (2016), para. 3.35, citing Mapping Report, para. 697; Counter-Memorial of Uganda (2018), Ann. 25.

[109] *Armed Activities* (2005), p. 226, para. 160.

[110] UN Mapping Report, para. 697; Counter-Memorial of Uganda (2018), Ann. 25.

[111] Response of the DRC (2018), paras. 8.1-8.5.

[112] Memorial of the DRC (2016), paras. 3.40-41, citing *Second Report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo*, S/2003/566, 27 May 2003, para. 10; Memorial of the DRC (2016), Ann. 3.6.

the injury claimed[113]. It also fails to show, as this Court requires[114], that the exercise by Uganda of its due diligence obligations would have sufficed to have prevented the alleged displacement.

IV. The DRC has not provided evidence of valuation

39. Madam President, Members of the Court, assuming that the DRC is able to demonstrate all three elements that I have set out, there is a *fourth* crucial element that the DRC would be required to establish. It would need to supply evidence establishing and providing valuation of the losses that arise from the personal injuries through evidence that shows potential loss of earnings, costs of care and other expenses stemming from the injuries.

40. However, the DRC's valuation of its personal injuries claim***s*** is unsupported by evidence. Regarding physical injuries, rape and child soldiers, the DRC bases its proposed amounts on alleged compensation awards rendered by DRC courts. Even if the measure of compensation for personal injuries in this Court should be determined by reference to a claimant's domestic court decisions, the content of the DRC's national law is a matter of fact that it must prove[115]. As Mr. Martin has explained, the DRC has not met this burden. The best that it has done is to refer, in its Observations on the Experts' Reports, to a handful of decisions. Almost none of them refer to compensation for physical injuries or bodily harm other than rape[116].

41. Even with respect to the domestic decisions that refer to compensation for rape, the DRC's arguments are at best extremely hard to follow, or, at worst, inconsistent and confused. In its Memorial, the DRC says that the lowest amount of damages granted by the Congolese courts to victims of what *it* calls "simple rape" in the context of the perpetration of serious harms under international law is US$700[117]. However, in response to the Court's Question 10, the lowest amount it refers to is US$5,000[118]. Most recently in its Observations on the Experts' Report, it cited a source

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[113] *Second Report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo*, S/2003/566, 27 May 2003, para 10; Memorial of the DRC (2016), Ann. 3.6.

[114] See *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*, pp. 233-234, para. 462.

[115] See Counter-Memorial of Uganda (2018), Chapter 3, Section I, and para. 3.15.

[116] See Written Observations of the DRC (2021), fns. 54 to 66.

[117] Memorial of the DRC (2016), para. 7.23.

[118] Response of the DRC (2018), para. 10.4.

that included a decision awarding US$500 for rape[119]. So, which is the lowest amount? US$500? US$700? US$5,000? Even if this Court were minded to refer to domestic Congolese court practice, it does not appear that the DRC itself knows what the domestic legal practice is and it certainly has not proved it.

42. Regarding displacement, the DRC changes its approach and does not rely on domestic court practice. Instead, it pulls figures out of the air. Without any support, it claims lump sums of US$300 for each victim allegedly displaced by deliberate violence[120], and US$100 for each victim allegedly displaced *not* as a result of deliberate violence.

V. Flaws in Mr. Senogles' recommendations regarding valuation of personal injuries on the basis of the UNCC's methodology

43. Madam President, ***M***embers of the Court, permit me to make some comments with regard to what the report of Mr. Senogles, the expert appointed by the Court says about the DRC's claimed amounts for physical injury. *First*, Uganda notes that Mr. Senogles strayed from the Court's terms of reference by including physical injuries, sexual violence, child soldiers, and displacement in his report. No question was directed to the experts with respect to these categories of injuries. Thus, the parts of the Mr. Senogles' report devoted to claims for personal injuries other than loss of life are *ultra vires* and his recommendations on them should be disregarded.

44. *Second*, the Court will have noted that Mr. Senogles' report confirms the point that the DRC has not provided *any* evidence for its claimed amounts for personal injuries. In the report, Mr. Senogles says with respect to the amounts claimed by the DRC for physical injury, that there is "no supporting evidence" and "no evidentiary basis on which to assess" the amount claimed in respect of each person[121]. He makes similar statements with respect to the amounts claimed for rape[***122***], child soldiers[***123***] and displacement[***124***]**.**

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[119] *Auditeur militaire c. Luya Nawej*, Cour Militaire du Kasai Oriental, arrêt RPA no. 026/08 (12 Mar. 2014) in *Bulletin des arrêts de la Haute Cour Militaire* (2016), pp. 337-351.

[120] Memorial of the DRC (2016), paras. 7.30-31.

[121] Experts' Report on Reparations (2020), para. 114.

[***122***] ***Ibid., para. 122.***

[***123***] ***Ibid., para. 130.***

[***124***] ***Ibid., para. 135.***

45. My *third* point on the Senogles report is that the references to the amounts awarded by the UNCC are also outside the terms of reference of the experts, which was to examine the prevailing practice *in the DRC*. Instead, the expert proposes lump sums ostensibly based on the UNCC's methodology, which he misapplies.

46. *Fourth*, Uganda reiterates that the UNCC's methodology is not applicable in this case, which does not involve the presentation of mass claims pursuant to established claims procedures, statistical sampling of evidence, and so on.

47. Further, the UNCC's methodology involved categories of claims that depended upon the type and quality of evidence in support of particular claims. Mr. Senogles recommended that the DRC be awarded fixed sums based on the UNCC's Category C claims, which was a category designed to address "actual" or proven loss, not fixed amounts. Indeed, the UNCC established Category C claims to pay compensation for actual loss up to US$100,000[125]. All such claims had to be "documented by appropriate evidence of the circumstances and amount of the claimed loss"[126]. In his response to the Comments of the Parties, Mr. Senogles now says that there "may be a reasonable basis for the Court" to instead make reference to Category B claims[127].

48. Compensation for Category B claims, in contrast, was set at US$2,500 for individuals or up to US$10,000 for families[128]. And to receive those fixed amounts, for serious injury not resulting in death, each claimant was required to submit a form identifying the person, his or her nationality, and to provide "simple documentation of the fact and date of the injury"[129]. When analysing the level of evidentiary support in this category, the panel of commissioners found that "[n]early all the claims

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[125] United Nations Compensation Commission, *Report and Recommendations Made by the Panel of Commissioners Concerning the First Instalment of Individuals Claims for Damages up to US$100,000 ("Category C" Claims)*, doc. S/AC.26/1994/3, 21 Dec. 1994, pp. 6-7.

[126] United Nations Compensation Commission, *Report and Recommendations Made by the Panel of Commissioners Concerning the First Instalment of Individuals Claims for Damages up to US$100,000 ("Category C" Claims)*, doc. S/AC.26/1994/3, 21 Dec. 1994, p. 22 (emphasis added); see also United Nations Compensation Commission, *Decision taken by the Governing Council of the United Nations Compensation Commission at the 27th Meeting, Sixth session held on 26 June 1992*, doc. S/AC.26/1992/10, 26 Jun. 1992, Art. 35 (2) *(c)*.

[127] Experts' Responses to the Parties (2021), para. 76.

[128] United Nations Security Council, *First Session of the Governing Council of the United Nations Compensation Commission Criteria for Expedited Processing of Urgent Claims*, doc. S/AC.26/1991/1, 2 Aug. 1991, paras. 10-13.

[129] United Nations Compensation Commission, *Decision taken by the Governing Council of the United Nations Compensation Commission at the 27th Meeting, Sixth session held on 26 June 1992*, doc. S/AC.26/1992/10, 26 June 1992, Art. 35 (2) *(b)*.

for serious personal injury and death were supported by some form of proof"[130]. Yet, in our case, we do not even have evidence specific to who the claimants are, the fact of injury, the date of injury, that would merit fixed compensation under Category B.

49. Regarding displacement, the DRC referred to the UNCC's Category A claims[131]. Category A claimants needed to submit, through their government or an international organization, at least "simple documentation of the fact and date of departure from Iraq or Kuwait" showing that they fled during a specific period of time[132].

50. All told, documentation was submitted for approximately 923,000 "Category A" departure claims by governments and international organizations. Submission of such documentation was a challenge for many governments, including Sudan and Yemen. They nevertheless were able to do so[133].

51. In contrast, the DRC has provided no such evidence of displacement.

52. For all types of personal injuries it alleges, the DRC makes absolutely no effort to place a value on those injuries based on victim-specific factors, as this Court's consistent jurisprudence requires. The DRC claims that the compensation claimed covers various elements, such as "cost of care", "loss of income" or "loss of opportunities" but it offers no evidence of any kind allowing the quantification of these elements. There are not just gaps in the DRC's evidence, there is a complete void.

53. To conclude, Madam President and Members of the Court, the DRC has failed in all material respects to follow the standard methods for proving the existence and valuation of personal injuries. The amounts it claims are speculative and excessive.

54. Madam President, Professor Murphy will be our next speaker but this may be a convenient time for a coffee break. We are in your hands and I thank you for your kind attention.

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[130] United Nations Compensation Commission, *Recommendations Made by the Panel of Commissioners Concerning Individual Claims for Personal Injury or Death ("Category B" Claims)*, doc. S/AC.26/1994/1, 26 May 1994, p. 33.

[131] Response of the DRC (2018), para. 3.24.

[132] United Nations Security Council, *First Session of the Governing Council of the United Nations Compensation Commission Criteria for Expedited Processing of Urgent Claims*, doc. S/AC.26/1991/1, 2 Aug. 1991, paras. 10-13.

[133] See United Nations Compensation Commission, The Claims, Category A, available at https://uncc.ch/category (last accessed: 20 Apr. 2021).

The PRESIDENT: I thank Professor Akande and I will now give the floor to Professor Murphy with the suggestion that he looks for a suitable time around 30 minutes past the hour to indicate that it would be a good opportunity to take a 10-minute break. Please go ahead, Professor Murphy.

Mr. MURPHY:

THE DRC'S PROPERTY CLAIMS ARE UNSUPPORTED BY EVIDENCE AND METHODOLOGICALLY FLAWED

1. Thank you, Madam President. In this presentation, I will address the DRC's claims for reparation with respect to property, which were addressed by Professor Segihobe on Tuesday.

2. Our understanding is that the DRC seeks a total of approximately US$240 million in compensation for this category[134]. Although the subheads of damages in the DRC's Memorial do not actually add up to that total, the DRC seeks compensation for alleged property loss in five geographic regions that you see on your screen: Ituri District, Kisangani, Beni, Butembo and Gemena. The remaining compensation ~~***is***~~ sought ***is*** primarily for alleged property loss to two public entities: the National Electricity Company, known by the acronym "SNEL", and the Congolese army.

I. What the Court said and did not say in the 2005 Judgment

3. Allow me to begin by addressing what the Court said, and did not say, in its 2005 Judgment with respect to property loss[135]. While the Court found in its *dispositif* that Uganda violated certain important rules of international law[136], the only property loss referred to in the *dispositif* was that Ugandan forces "destroyed villages and civilian buildings"[137]. No other types of property loss were mentioned, such as looting or damage to the Congolese army. Within the *text* of the 2005 Judgment, the Court's discussion of property damage was very general in nature, involving references to reports that only vaguely identify property loss, and that refer to losses far more limited than what the DRC now places before the Court[138]. Consequently, the Court's 2005 Judgment, standing alone, cannot form a basis for identifying or valuing specific damages attributable to Uganda.

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[134] Memorial of the DRC (2016), para. 7.64; see Counter-Memorial of Uganda (2018), para. 7.1.

[135] Counter-Memorial of Uganda (2018), paras. 7.10-7.12.

[136] *Armed Activities (2005)*, para. 345 (1) (3) (4).

[137] *Ibid.*

[138] Counter-Memorial of Uganda (2018), paras. 7.13-7.16.

II. Alleged property loss relating to the geographic regions

4. I turn now to the alleged property loss in the ~~***five***~~ geographic regions. Professor Segihobe on Tuesday did not walk the Court through the DRC's evidence for these regions, but it is critical to focus carefully on that evidence, to see if it supports the DRC's claims. Given the time limitations, I will focus on just one geographic area — Ituri District — as an example of the flawed approach taken by the DRC with respect to each of the geographic areas. Ituri is where the DRC's property claims are the highest and, of course, is where the Court found that Uganda was an occupying Power. The evidentiary flaws with respect to Ituri are basically the same as those for the other geographic regions, as we identified in our written pleadings[139].

5. The DRC claims a total of US$41.5 million in compensation for property loss in Ituri[140]. As you can see, the claimed amounts are for destruction of houses, destruction of infrastructure, and looting. With respect, Madam President, these amounts on your screen appear to have been pulled out of a hat; they are not grounded in actual evidence or in standard methodology for proving property loss in international claims practice, including in time of war.

6. As a threshold matter, I note that the DRC does not attempt — in any fashion — to prove that any of this property loss in Ituri was caused by Uganda. The claim is simply that, since losses allegedly occurred *at some point in time* in Ituri District, and at the hands of *someone*, then it must be attributable to Uganda. Yet the DRC offers no credible evidence that the property loss occurred while Uganda occupied Ituri, nor that the property loss occurred because of actions or omissions by Ugandan forces. Further, the DRC has not provided any serious evidence as to the valuation of the property allegedly lost. Mostly, the DRC has just proposed lump-sum amounts untethered to any valuation evidence.

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[139] Counter-Memorial of Uganda (2018), paras. 7.58-7.131 (Kisangani) and 7.132-7.138 (Beni, Butembo and Gemena); see also Comments of Uganda (2019), pp. 153-161; Written Observations of Uganda (2021), paras. 105-164.

[140] Memorial of the DRC (2016), para. 7.44; see Counter-Memorial of Uganda (2018), para. 7.17.

a) **The DRC's claims relating to houses in Ituri cannot be sustained**

7. Consider first the DRC's claim for destruction of houses in Ituri, which is that 8,693 houses were destroyed from 1998 to 2003[141]. Again, with all due respect, this number is completely made up. There is no evidence before the Court indicating that 8,693 houses were destroyed[142].

8. The DRC appears to rely on Annex 1.3 of its Memorial to support that number[143]. In the section of Annex 1.3 that deals with Ituri, there is a summary table that lists alleged property losses[144]. The relevant page of this summary table[145] — which you see on your screen and which is also at tab 2 of your judges' folder — summarizes on three lines the number of "dwellings" — or, in the original French, "habitations" — that were supposedly lost in Ituri.

9. Even if one were to regard what you see on the screen as some kind of "evidence", there is no indication ***~~here~~*** that the losses identified ***here*** are houses, as opposed to other types of dwellings. There is no indication as to where, in Ituri, the dwellings were located. There is no indication as to when the alleged losses occurred. There is no indication as to whether the harm was partial or total. And there is no indication that Uganda was directly or indirectly responsible for these losses[146]. In his Response of 1 March, Mr. Senogles charges that Uganda "has not carried out an examination of the evidence in the file", apparently because we focused on this page when critiquing his view about the number of dwellings destroyed in Ituri[147]. Yet this page is the *only* evidence that Mr. Senogles cited to in his initial report when discussing his position[148].

10. There is also a 193-page sub-annex associated with Annex 1.3[149], which Mr. Senogles did not cite in his initial report. When Uganda pointed out in its Observations on the experts' report that

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[141] Memorial of the DRC (2016), para. 3.45 *(c)*; see Counter-Memorial of Uganda (2018), para. 7.20.

[142] Counter-Memorial of Uganda (2018), paras. 7.20-7.34.

[143] Memorial of the DRC (2016), para. 3.45 *(c)*, fns. 313-316 (citing to Memorial of the DRC (2016), Ann. 1.3); Counter-Memorial of Uganda (2018), para. 7.26.

[144] Memorial of the DRC (2016), Ann. 1.3, "Liste biens perdus et leur fréquence ITURI.pdf" (appearing also in Response of the DRC (2018), Ann. 1.9.E, 12 Nov. 2018, ("Liste des Biens Perdus Ituri.pdf")).

[145] *Ibid.*, p. 3.

[146] See Counter-Memorial of Uganda (2018), paras. 7.27-7.28.

[147] Experts' Responses to the Parties (2021), p. 26, paras. 89-90.

[148] Experts Report on Reparations (2020), para. 148 and fn. 75 (citing to Memorial of the DRC (2016), Ann. 1.3, "Liste biens perdus et leur fréquences ITURI.pdf", line items 118, 119 and 120).

[149] Memorial of the DRC (2016), Ann. 1.3, "Victimes_PerteBien_ITURI.pdf" (appearing also in Response of the DRC (2018), Ann. 1.9.C, 12 Nov. 2018, "Evaluation pertes des biens Ituri").

the summary table cited ~~***to***~~ ***by*** Mr. Senogles conflicted with the sub-annex[150], Mr. Senogles curiously charged Uganda with ignoring the sub-annex[151]. In any event, the point is that the sub-annex conflicts with the summary table, and neither of them adds up to the fictitious 8,693 dwellings that the DRC claims were destroyed in Ituri. This is true whether one calculates destroyed dwellings by totalling up each reference in the sub-annex to "dwelling", which is apparently Mr. Senogles' preference[152], or one calculates destroyed dwellings by totalling up each reference in the sub-annex to a particular owner, which would seem more sensible. For example, the summary table asserts that 199 medium houses were destroyed, but the sub-annex only accounts for 135 such houses if you total up each reference to *"*habitation*"*, and only accounts for 104 such houses if you count up each owner.

11. After asserting that 8,693 houses were destroyed, the DRC further asserts that 80 per cent of these houses were simple houses, 15 per cent were medium houses, and 5 per cent were luxury houses[153]. When pressed by the Court in its Question number 14 as to where the DRC got those percentages, the DRC answered that it determined the percentages based on the location where the destruction took place, on United Nations reports, and on its claims forms[154].

12. Yet, as we demonstrated in our written pleadings, none of those sources support these percentages[155]. For example, the information from the relevant claims forms is supposedly listed in the previously mentioned 193-page sub-annex. An example of that list now appears on your screen. As we explained in our comments on the DRC's Response to the Court's questions[156], each entry on this list is supposedly linked to a specific claim form included in an electronic file. Yet the list is an unorganized, almost incomprehensible hodgepodge of entries that usually cannot be traced to any particular claim form. As such, in no sense does this list support the DRC's percentages. Mr. Senogles, quite sensibly, also rejected the DRC's percentages, but he instead appears to have

[150] Written Observations of Uganda (2021), para. 118.

[151] Experts' Responses to the Parties (2021), paras. 89-90.

[152] Experts' Responses to the Parties (2021), para. 89.

[153] Memorial of the DRC (2016), para. 7.35.

[154] Response of the DRC (2018), paras. 14.1-14.6.

[155] See Comments of Uganda (2019), paras. 14.1-14.14.

[156] Response of Uganda (2019), paras. 4.4-4.5.

accepted without question the three unsubstantiated entries that appear on the summary table, so as to come up with his own percentages[157].

13. As for valuation, the DRC asserts that a luxury house is worth US$10,000, a medium house is worth US$5,000, and a small or simple house is worth US$300[158]. Those are nice round numbers, which are endorsed by Mr. Senogles[159], but where do they come from? In Question 14, the Court asked the DRC for the answer, but only received a vague and unsubstantiated response. According to the DRC, the numbers reflect reconstruction costs derived from some of the claims forms and from the DRC's own knowledge of the cost of such houses in the region[160].

14. With respect to the claim forms, the DRC does not indicate which ones supposedly support ~~***those***~~ ***its*** lump-sum amounts. Moreover, none of the forms provide any specific information about the original cost of construction or cost of reconstruction of the dwelling, and certainly no underlying evidence, such as contracts, invoices, receipts or tax records. This lack of evidence is especially notable with respect to the alleged "medium" and "luxury" homes, which presumably would have had at least *some* contemporaneous records, private or public, of their existence[161].

15. With respect to the DRC's own knowledge of the costs of reconstruction, the DRC provides no information — literally nothing — about any DRC survey of property values before, during, or after the war. There is no government report provided, no estimates by local mayors, by urban planners, ***or*** by construction companies, as to average construction or reconstruction costs of destroyed houses, and certainly no supporting materials in the form of documents that might corroborate such estimates[162].

16. Thus, neither ***of*** the DRC's assertions as to the basis for these round numbers is grounded in evidence, nor is Mr. Senogles' "desk research", which revealed — to use his own words —

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[157] Experts Report on Reparations (2020), para. 148.

[158] Memorial of the DRC (2016), para. 7.35.

[159] Experts Report on Reparations (2020), para. 152.

[160] Response of the DRC (2018), para. 14.5.

[161] Comments of Uganda (2019), paras. 14.9-14.10.

[162] *Ibid.*, paras. 14.11-14.12.

"no useful data"[163]. And certainly the three photographs presented on Tuesday by counsel for the DRC[164], which were extracted from a 2019 publication found online, shed ~~***any***~~ ***no*** light on the matter.

17. In sum, because the DRC has failed to prove the exact damage for houses in Ituri that were destroyed as a result of wrongful actions of Uganda, it follows that there is no basis for the Court to award compensation for this head of damages.

b) **The DRC's claims relating to infrastructure in Ituri cannot be sustained**

18. I turn now to the DRC's claim regarding infrastructure in Ituri. Here, the DRC seeks US$21.2 million for the alleged destruction of 200 schools, 50 health facilities and 50 office buildings[165]. This compensation is based on the "average cost" of those facilities, which the DRC says may be estimated at US$75,000 for an educational facility, US$75,000 for a health facility, and US$50,000 for an office building.

19. As we explained in our Counter-Memorial, there is no evidence before the Court supporting the number of schools, health facilities and office buildings allegedly destroyed by Uganda[166]. While the DRC cites to United Nations reports in support of these claims, those reports do not say what the DRC claims they say. For example, in support of its claim that 200 schools were destroyed in Ituri by Uganda, the DRC cites[167] to the second special report of the Secretary-General on the United Nations Mission in the DRC. That report, however, simply notes — without providing any evidence — that "[i]t is estimated that" 200 schools were destroyed during the entire armed conflict[168]. The United Nations Mapping Report, which examined the 2003 second special report, does not repeat or corroborate this number, and other evidence contradicts it[169]. Nor is there any evidence as to the average cost of such facilities.

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[163] Experts' Report on Reparations (2020), para. 150.

[164] CR 2021/6, p. 26, para. 20 (Segihobe Bigira).

[165] Memorial of the DRC (2016), para. 7.40.

[166] Counter-Memorial of Uganda (2018), paras. 7.35-7.48.

[167] Memorial of the DRC (2016), para. 3.45 (a).

[168] *Second special report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of Congo*, S/2003/566, 27 May 2003, para. 10; Memorial of the DRC (2016), Ann. 3.6.

[169] See Counter-Memorial of Uganda (2018), paras. 7.37-7.39.

20. This lack of evidence is perplexing, and it perplexed the Court, prompting the Court to ask in Question 4 a question about the valuation issue. In response[170], the DRC provided no evidence specific to average costs of infrastructure, nor any explanation for its valuation methodology. Instead, it made a very general reference to its claims forms[171] and a passing reference to two summary statements[172]. Yet none of the claims forms, the associated sub-annex[173], or the summary statements[174] support the alleged number of infrastructure buildings destroyed, nor their valuation.

21. In sum, because, again, the DRC has failed to prove this exact damage, no compensation can be awarded for infrastructure.

***c)* The DRC's claims relating to looting in Ituri cannot be sustained**

22. Allow me to turn briefly to the DRC's claim regarding looting in Ituri. The DRC seeks US$7.3 million in compensation for alleged looting as a result of Uganda's non-compliance with its obligations as an occupying Power in Ituri[175].

23. If you review the evidence to which the DRC points, you can see that there is just vague descriptions of property, such as "various property items", without any specificity. The sub-annex that I have referred to before does not indicate when or where the property was looted, or whether it was looted by Ugandan soldiers or in circumstances where Ugandan soldiers could have stopped it[176]. And, as I previously noted, one cannot connect the vague list of the DRC to claims forms or other "evidence" for corroboration[177].

24. Moreover, the DRC's valuation of the property allegedly looted is wholly arbitrary[178]. For each of these unspecified property items, the DRC assigns, without proof, markedly high monetary values, ranging from US$10,000 up to US$1 million for a single line item often referred to simply

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[170] Response of the DRC (2018), paras. 4.1-4.8.

[171] *Ibid.*, paras. 4.2-4.3.

[172] *Ibid.*, para. 4.8.

[173] Comment of Uganda (2019), paras. 4.4-4.28.

[174] *Ibid.*, para. 4.3, fn. 116.

[175] Memorial of the DRC (2016), para. 7.43.

[176] Counter-Memorial of Uganda (2018), para. 7.53.

[177] *Ibid.*, para. 7.51.

[178] *Ibid.*, paras. 7.52, 7.54-7.56.

as "various property items"[179]. In fact, the DRC's "detailed list of the property looted" — as you can see on this slide — reveals a striking uniformity in the values of property items[180]. As such, the DRC's valuation numbers for looted property are not based on any information specific to actual property; rather, these are numbers that appear to have been randomly inserted on this list solely for the purpose of this litigation.

25. In sum, because the DRC has failed to prove the exact damage for looted property in Ituri, it follows, again, that there is no basis to award any compensation for this head of damages.

III. Alleged property loss relating to the National Electricity Company (SNEL)

26. The third part of my presentation concerns the DRC's claim for compensation in the amount of US$97.4 million for property loss to the National Electricity Company, or SNEL[181]. As we noted in our Counter-Memorial[182], this claim is based solely on a report that SNEL prepared on 31 May 2016[183] in response to a request from the DRC Ministry of Justice, just a few months before the filing of the DRC Memorial on reparations.

27. The SNEL report has considerable evidentiary flaws. Aside from four pages of conclusory statements, the SNEL report consists of summary tables purporting to list damages to various SNEL facilities[184]. The report avoids any specificity as to time, place or origin of this damage, and there is no corroborating documentation of any kind, including from the time of the events at issue[185].

28. Madam President, with regret, I bring to the attention of the Court an aspect of the DRC's submission of the SNEL report. The SNEL report submitted by the DRC as an annex to its Memorial was not signed, as you can see on the right-hand side of this slide[186]. Even so, the DRC regarded the

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[179] Memorial of the DRC (2016), Ann. 1.3, "Victimes_PerteBien_ITURI.pdf", pp. 49, 60, 169.

[180] Memorial of the DRC (2016), Ann. 1.3, "Victimes_PerteBien_ITURI.pdf", p. 15; see also Counter-Memorial of Uganda (2018), para. 7.55.

[181] Memorial of the DRC (2016), para. 7.47.

[182] Counter-Memorial of Uganda (2018), paras. 7.99-7.115.

[183] Société nationale d'électricité (SNEL), *Réclamation*, N/Réf/DG/2016/4208, 9 June 2016, Memorial of the DRC (2016) Ann. 4.26.

[184] Société nationale d'électricité (SNEL), *Réclamation*, N/Réf/DG/2016/4208, 9 June 2016, pp. 1-4, Memorial of the DRC (2016) Ann 4.26; see Counter-Memorial of Uganda (2018), para. 7.100.

[185] Société nationale d'électricité (SNEL), *Réclamation*, N/Réf/DG/2016/4208, 9 June 2016, pp. 1-2, Memorial of the DRC (2016) Ann 4.26; see Counter-Memorial of Uganda (2018), paras. 7.101-7.103.

[186] Société nationale d'électricité (SNEL), *Réclamation*, N/Réf/DG/2016/4208, 9 June 2016, pp. 14-15, Memorial of the DRC (2016) Ann. 4.26.

report as evidence upon which this Court could rely. We called the lack of signature to the attention of the Court in our Counter-Memorial[187], along with the other flaws. In response to the Court's questions, the DRC submitted in November 2018 a new version of the SNEL report, this time signed[188]. But before I show you the new version, notice in the original version the basic look of the cover page on the left, and the formatting of page 14 in the centre, and notice also that the signature page on the right contains spaces for nine names. I will now switch over to the new version that the DRC submitted in November 2018. This new version does not simply contain signatures. Rather, it has a different cover page, it is formatted differently, and there are now *ten* members of the SNEL Commission who supposedly prepared the report[189]. Yet both the original and the new versions were purportedly prepared on 31 May 2016 and both were submitted to the Court with the exact *same* 9 June 2016 cover letter. There is no explanation from the DRC regarding this modification of its evidence. You will find the last two pages of both versions of the SNEL Report in your judges' folder at tabs 3 and 4.

29. Overall, such a weak and questionable evidentiary foundation simply cannot support the weight of a nearly US$100 million claim, and consequently this claim must fail. Similar problems exist for the DRC's other claims for alleged property loss[190].

Madam President, I have a few minutes left to my presentation, but I pause in case you wish to take the break at this time.

The PRESIDENT: I thank Professor Murphy. Yes, let's go ahead and take a 10-minute break now, and we will resume your presentation after that. Thank you.

The Court adjourned from 4.30 p.m. to 4.45 p.m.

The PRESIDENT: Please be seated. The sitting is resumed. I shall give the floor to Professor Murphy to complete his presentation. Please go ahead.

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[187] Counter-Memorial of Uganda (2018), para. 7.99.

[188] Société nationale d'électricité (SNEL), *Réclamation*, N/Réf/DG/2016/4208, 9 June 2016, Response of the DRC (2018), Ann. dated 1 Nov. 2018.

[189] Société nationale d'électricité (SNEL), *Réclamation*, N/Réf/DG/2016/4208, 9 June 2016, pp.14-15, Response of the DRC (2018), Ann. dated 1 Nov. 2018.

[190] Counter-Memorial of Uganda (2018), paras. 7.116-7.120.

IV. Alleged material damages to the Congolese army

30. Thank you, Madam President. The fourth and final part of my presentation concerning property loss relates to alleged damages that the Congolese army suffered "in combat with the UPDF and rebel movements supported by it"[191].

31. This 69.4-million-dollar claim fails due to the lack of any connection with the Court's findings in the 2005 Judgment. The Court's 2005 Judgment is confined to the DRC's claims as they were advanced in the Application, and as elaborated in the written and oral proceedings, and the DRC's final submissions to the Court. At no time during the merits phase did the DRC raise any issue concerning material damage to the Congolese army and the Court made no findings in that regard[192]. The DRC cannot now seek damages beyond the scope of what was decided at the merits phase[193].

32. Moreover, this property claim also fails for lack of proof. The DRC's claim rests solely on two summary tables included in Annex 7.4 of the DRC Memorial[194]. These summary tables — which now appear on your screen and are at tab 5 of the judges' folder — were prepared by a high-ranking officer of the Congolese army on 31 August 2016, just two weeks before the DRC submitted its Memorial on reparations[195]. The first summary table lists the alleged damages to the Congolese army and purports to quantify them based on the values alleged in the second table. Yet nothing in either table is grounded in any serious evidence before the Court[196], a fact also confirmed by Mr. Senogles[197]. Rather, these are just tables prepared by a self-interested party on the eve of filing a brief before the Court.

33. Because the DRC has failed to prove the exact damage that the Congolese army allegedly suffered, there is no basis to award compensation for this claim.

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[191] Memorial of the DRC (2016), para. 7.48.

[192] Counter-Memorial of Uganda (2018), paras. 7.140-7.142.

[193] *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012 (I)*, p. 332, para. 17; *Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, pp. 27-28.

[194] "Evaluation des dégâts militaires dans les rangs des FARDO par l'armée ougandaise et allies", 31 Aug. 2016, p. 1, Memorial of the DRC (2016), Ann. 7.4.

[195] Counter-Memorial of Uganda (2018), para. 7.143.

[196] Counter-Memorial of Uganda (2018), para. 7.144.

[197] Experts Report on Reparations (2020), paras. 182-87.

34. Madam President, Mr. Senogles rather systematically and candidly recognizes that the DRC has not provided evidence for its property claims, for which he should be commended[198]. At the same time, relying perhaps on his background as an expert accountant, he seeks to get around this problem by deploying what he calls "evidentiary discount factors"[199]. How one can apply "evidentiary" factors in the absence of any serious evidence is a mystery to Uganda, especially if one disavows any responsibility to consider whether the harm at issue is attributable to Uganda, as does Mr. Senogles[200]. In any event, using such "evidentiary discount factors" in this way has not been the practice of the Court, nor was it of the Eritrea-Ethiopia Claims Commission.

35. Madam President, for all the foregoing reasons, Uganda submits that the DRC is not entitled to compensation that it seeks for alleged damages caused to property.

36. If it pleases the Court, Mr. Parkhomenko will be the next speaker for Uganda. Thank you.

The PRESIDENT: I thank Professor Murphy and I now give the floor to Mr. Yuri Parkhomenko. You have the floor.

Mr. PARKHOMENKO:

THE DRC'S CLAIMS RELATING TO NATURAL RESOURCES ARE UNFOUNDED AND METHODOLOGICALLY FLAWED

1. Madam President, Members of the Court, good afternoon. It is an honour to appear before you and to do so on behalf of Uganda.

2. I will address the DRC's claims related to natural resources. The DRC seeks nearly US$3.5 billion for the alleged illegal exploitation of minerals, forests and wildlife. The specific amounts are summarized on this slide, but the *central* issue here is that the DRC has provided the Court *no* basis on which *any* compensation may be awarded for these claims.

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[198] Experts Report on Reparations (2020), paras. 149 ("are not evidenced"), 156 ("absence of detail or evidence"), 160 ("not well supported by evidence"), 162 ("no practicable evidentiary basis"), 170 ("evidentiary basis is" not "complete, fully detailed or supported by documentation"), 172 ("no support for figures can be clearly seen"), 179 ("no detailed back-up calculations or underlying evidence"), 186 ("I would have expected to see documentary support"), 187 ("has not proved possible for me to independently verify").

[199] See e.g. Experts Report on Reparations (2020), paras. 157, 162-63, 171, 173, 180, 188.

[200] Experts' Responses to the Parties (2021), para. 50.

3. Before I turn to this central issue, it is helpful to recall what the Court found, and did not find, in the 2005 Judgment. The Court held that Uganda violated its obligations:

— "by acts of looting, plundering and exploitation of Congolese natural resources committed by members of the Ugandan armed forces in the territory of the [DRC]", 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".[201]

4. The Court made its findings primarily on the basis of the Porter Commission Report[202], which identified misconduct of some Ugandan soldiers who took advantage of their position for *self-profit*[203]. The Court also limited its decisions to acts directly committed by Ugandan forces and to the time and places that Ugandan forces were present in the DRC. Therefore, beyond those limits *ratione materiae*, *ratione personae*, *ratione temporis* and *ratione loci*, the DRC can claim no damages.

5. Equally important is what the Court did *not* find in its Judgment:

— *First*, the Court did not find that there was "a governmental policy of Uganda directed at the exploitation of natural resources of the DRC or that Uganda's military intervention was carried out in order to obtain access to Congolese resources"[204].

— *Second*, the Court did not find that Uganda was responsible for such exploitation committed by rebel groups outside Ituri[205].

— *Finally*, the Court made *no* findings about specific incidents of harm to natural resources[206]. Therefore, consistent with the Court's admonition in paragraph 260 of the 2005 Judgment, the DRC must still prove the injury it suffered as a result of wrongful acts attributable to Uganda, which took the form of illegal exploitation of natural resources, and must prove valuation.

6. The DRC has not met its burden of proof for three main reasons.

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[201] *Armed Activities* (2005), pp. 280-281, para. 345 (4).

[202] Republic of Uganda, *Judicial Commission of Inquiry into Allegations into Illegal Exploitation of Natural Resources and Other Forms of Wealth in the Democratic Republic of the Congo 2001, Final Report*, Nov. 2002 (hereinafter "Porter Commission, Final Report"); Counter-Memorial of Uganda (2018), Ann. 52.

[203] *Armed Activities* (2005), pp. 249-251, paras. 238-242 (citing Porter Commission, Final Report: 13.1, 13.2, 13.4, 13.5, 14.4, 14.5, 15.7, 20.3, 21.3.4; Counter-Memorial of Uganda (2018), Ann. 52).

[204] *Armed Activities* (2005), p. 251, para. 242.

[205] *Armed Activities* (2005), p. 253, para. 247.

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

I. The DRC's claims are not based on evidence normally required to prove the existence and valuation of the damages to natural resources

7. Turning to the first reason: The DRC did not present the kinds of evidence that can prove the existence and valuation of the alleged damages.

8. Professor Angelet kept referring on Tuesday to the "body of evidence"[207] supporting the DRC's claims. But that "body" lacks what the Court specifically asked for: evidence regarding the locations, ownership, average production, and concessions or licenses for *each* mine and forest for which the DRC claims compensation for illegal exploitation by Uganda[208]. The DRC avoids offering the kinds of evidence that you — or any court of law — needs, in order to determine the existence of injury, its extent and valuation.

9. Is there any evidence showing the *locations* of mines exploited by or on behalf of Uganda? No[209]. On Tuesday, like before[210], the DRC submitted only maps that purportedly show only the general location of mineral deposits[211].

10. What about evidence regarding the *ownership* of mines? The DRC has not addressed this issue at all[212].

11. Has the DRC offered anything credible on the *average production* for any minerals? Here, too, the answer is no[213]. The DRC mentioned three gold mines in Gorumbwa, Durba and Adidi, without specifying who seized them and when. And then the DRC alleged that "the average production" of gold in those mines was "on the order of 5,112 kg of gold per year"[214]. But the source the DRC cites provides no support for that allegation[215]. Nor is there any credible evidence for the allegation that, in the town of Watsa, the UPDF collected "2 kilos of gold per day, six days a week"[216].

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[207] CR 2021/6, pp. 46-47, para. 23 (Angelet); see also *ibid.*, pp. 44-45, para. 18.

[208] Letter No. 150485 from the Registrar to the Agent of the Republic of Uganda (11 June 2018), Question 5.

[209] Comments of Uganda (2019), paras. 5.3-5.6.

[210] CR 2021/6, p. 40, para. 4 (Angelet) (citing Memorial of the DRC (2016), Map 5.1, p. 140); see also Response of the DRC (2018), paras. 5.3-5.4.

[211] Comments of Uganda (2019), paras. 5.3-5.6.

[212] Comments of Uganda (2019), paras. 5.7-5.8.

[213] Comments of Uganda (2019), paras. 5.9-5.12.

[214] Response of the DRC (2018), para. 5.18 (citing Human Rights Watch, *The Curse of Gold* (Response of the DRC (2018), Ann. 5.5)).

[215] Comments of Uganda (2019), paras. 5.10-5.11.

[216] CR 2021/6, p. 41, para. 6 (Angelet).

12. Has the DRC provided any evidence of *concessions* or *licences* relating to mines? Again, the answer is no[217]. Given that the DRC expressly admits that it authorized different entities to exploit mineral resources[218], then surely these would be the evidence to that effect, and the DRC should have produced it.

13. Nor has the DRC offered any evidence that the Court requested for each forest allegedly exploited by Uganda[219].

14. Uganda understands that there might be difficulties in gathering evidence during an armed conflict. But the central problem here is that the DRC has offered absolutely *no* evidence that the Court specifically requested, including evidence as to the existence and exploitation of these resources *in peacetime*.

15. And yet the DRC asks you to award compensation based on "just and reasonable inference" or approximations[220]. But the *Trail Smelter* tribunal did not make just and reasonable inferences from the void of evidence; it relied on specific evidence showing specific injury. Nor in *Costa Rica* v. *Nicaragua* was the Court approximating from zero. Costa Rica presented evidence linking specific injury to specific wrongful acts occurring in a specific area and at a specific point in time.

16. But here the DRC seeks immodest amounts without providing even some modest evidence. As you can see on this slide, the DRC claims:

— more than US$650 million for gold;

— more than US$7 million for diamonds;

— nearly US$3 million for coltan/niobium; and

— US$100 million for timber.

17. These claims amount to nearly US$800 million. That this number has no foundation is also confirmed by the Court expert. As you can see on this slide, even after adding three additional commodities of tin, tungsten and coffee — with respect to which the DRC until this Tuesday made no claim[221] — the total amount recommended by Dr. Nest is almost *14 times less* than the total

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[217] Comments of Uganda (2019), paras. 5.13-5.19.

[218] Response of the DRC (2018), para. 5.17.

[219] Letter No. 150485 from Registrar to Agent of the Republic of Uganda (11 June 2018), Question 5.

[220] CR 2021/6, pp. 29-30, paras. 5, 7 (Bodeau-Livinec).

[221] CR 2021/6, p. 45, para. 19 (Angelet).

amount the DRC claims. Although this significantly lower amount is also not well founded, it confirms that inferences and approximations underlying the DRC's valuation — like the quantum itself — are not "just", are not "reasonable".

II. The DRC instead has pursued flawed strategies for proving its claims

18. The second reason the DRC has not met its burden of proof concerns the alternative and flawed strategies it pursues to make up for the lack of evidence.

A. Mineral resources

19. As regards the mineral resources, the DRC proceeds in two disconnected and misconceived steps.

20. As for the first step, the DRC cites a few illustrations of alleged harm, which are not presented to directly establish its claims, but solely to provide a few examples of alleged injury[222]. Even then, these illustrations should be treated with great caution[223].

— *First*, some illustrations do not even fall within the scope of the 2005 Judgment[224]. For example, the DRC again cited on Tuesday the unproven allegations that UPDF trained MLC recruits to exploit gold in Bondo[225]. Even if that were true[226], it would not offer a basis for Professor Angelet's conclusion that Uganda is responsible for the illegal exploitation of gold by MLC rebels[227]. The Court expressly found that Uganda was not responsible for exploitation committed by rebel groups outside Ituri[228]. Wrongful conduct for which the Court did not find Uganda responsible cannot serve as a basis for compensation. *Res judicata* is *res judicata*, as the DRC keeps repeating.

— *Second*, virtually none of the DRC's illustrations contain proof of specific acts attributable to Uganda[229]. For example, the DRC misleadingly cites the so-called La Conmet "case study" from

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[222] CR 2021/6, pp. 40-42, paras. 5-7 (Angelet).

[223] Counter-Memorial of Uganda (2018), paras. 8.25-8.46.

[224] Counter-Memorial of Uganda (2018), paras. 8.25-8.32.

[225] CR 2021/6, pp. 41-42, para. 7 (Angelet); Memorial of the DRC (2016), paras. 5.36-5.38.

[226] Counter-Memorial of Uganda (2018), paras. 8.26-8.28.

[227] CR 2021/6, pp. 41-42, para. 7 (Angelet).

[228] *Armed Activities* (2005), p. 253, para. 247.

[229] Counter-Memorial of Uganda (2018), paras. 8.33-8.42.

the first report of the United Nations Panel of Experts, which alleged that a UPDF officer owned La Conmet, a company exporting coltan without paying fiscal and customs duties to the Congolese authorities[230]. Yet the Porter Commission found those allegations "not supported by credible evidence"[231]. And the Commission obtained corroborated evidence confirming that no Ugandan had any ownership interest in La Conmet[232].

— *Finally*, in those few instances where some evidence is presented about internationally wrongful acts allegedly attributable to Uganda, the DRC fails to prove the extent of injury[233]. For example, based purely on uncorroborated sources, the DRC alleges that "Ugandan soldiers requisitioned gold from [the] OKIMO [company]"[234]. Even if the DRC could prove that allegation, it would still have to prove how much gold was in fact requisitioned[235].

21. The second step in the DRC's misconceived strategy[236] is to leap from a few illustrations of alleged harm to assert, based on misconstrued economic data, that the difference between the production and export of minerals in Uganda from 1998 to 2003 shows the extent of Uganda's alleged exploitation of Congolese minerals[237].

22. The DRC still clings to this flawed speculation, as was evident on Tuesday, a speculation which has its origins in the widely criticized first report of the United Nations Panel of Experts[238]. The DRC conveniently overlooks that, in its final report, the reconstituted Panel, after considering statistical and regulatory factors which were disregarded by the first panel, does not even hint that

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[230] Memorial of the DRC (2016), para. 5.86-5.87 (citing United Nations, Security Council, *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*, doc. S/2002/1146, 16 Oct. 2002, paras. 108-111; Counter-Memorial of Uganda (2018), Ann. 15).

[231] Porter Commission, Final Report, p. 183; Counter-Memorial of Uganda (2018), Ann. 52.

[232] Porter Commission, Final Report, p. 183; Counter-Memorial of Uganda (2018), Ann. 52; Counter-Memorial of Uganda (2018), paras. 8.37-8.39.

[233] Counter-Memorial of Uganda (2018), paras. 8.43-8.46.

[234] Memorial of the DRC (2016), para. 5.32.

[235] Counter-Memorial of Uganda (2018), para. 8.45, fn. 1095.

[236] Counter-Memorial of Uganda (2018), paras. 8.47-8.95.

[237] Memorial of the DRC (2016), paras. 8.47-8.94.

[238] Counter-Memorial of Uganda (2018), paras. 8.12-8.15.

Uganda's exports of minerals during the relevant period was connected to illegal exploitation of Congolese minerals[239].

23. Indeed, this assertion cuts against the Court's express finding that there was no "governmental policy of Uganda directed at" such exploitation[240]. Without such a governmental policy, one cannot approach this issue by arguing that there was a broad scheme of plundering and exporting by the Government of Uganda over a period of several years, such that any increase in Ugandan exports necessarily connects to governmental conduct. Uganda is not a country where the government controls all the means of production; private actors can and do exploit, import and export minerals without effective control by the government, even in time of armed conflict.

24. Nor has the DRC offered any evidence connecting Uganda's export of minerals to specific wrongful actions falling within the scope of the Court's 2005 Judgment. On Tuesday, the DRC again sought to prop up its claims by alleging that two Ugandan private companies were trafficking in and exporting Congolese gold[241]. But the source Professor Angelet cited confirms that those two companies, which were buying gold from private persons in the DRC and exporting it to Dubai, South Africa and Switzerland, "*d[id] not operate illegally*"[242]. Indeed, the DRC has failed to show any evidence connecting the operation of those companies, or any Ugandan company, to specific wrongful acts for which the Court found Uganda responsible. Here again, the DRC disregards that the Court did not find that Uganda was responsible for the unofficial trade in gold carried out by private persons.

25. The DRC also ignores that the Porter Commission found that Uganda's exports of minerals were not linked to the illegal exploitation of Congolese resources[243]. The Commission did observe that gold and diamonds were smuggled through the always "porous borders", circumventing Uganda's authorities, but the Commission specifically found that Uganda was *not* responsible for

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[239] See United Nations, Security Council, *Letter dated 15 Oct. 2003 from the Chairman of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo addressed to the Secretary-General*, doc. S/2003/1027, 23 Oct. 2003; Counter-Memorial of Uganda (2018), Ann. 19.

[240] *Armed Activities* (2005), p. 251, para. 242; Counter-Memorial of Uganda (2018), paras. 8.59-8.95; Comments of Uganda (2019), para. 5.12.

[241] CR 2021/6, pp. 42-43, para. 9, p. 46, para. 22 (Angelet).

[242] Human Rights Watch, *The Curse of Gold*, *Democratic Republic of the Congo* (2005), p. 109 (emphasis added); Counter-Memorial of Uganda (2018), Ann. 57.

[243] Porter Commission, Final Report, pp. 108-111, 113, 123-124, 162, Counter-Memorial of Uganda (2018), Ann. 52.

smuggling of minerals and derived *no* benefit from any such smuggling[244]. Moreover, the Porter Commission found that the United Nations Panel of Experts wrongly attributed smuggling by private actors and rebels to Uganda[245].

26. In sum, the DRC's flawed strategy[246] cannot cure the absence of evidence. This claim for compensation must fail.

B. Deforestation

27. I turn now to the DRC's flawed strategy for proving the alleged exploitation of Congolese timber. The DRC claims US$100 million[247]. On Tuesday, the DRC finally explained that this amount reflects a conservative global estimate[248]. But the DRC still has not explained how it arrived at this number. It might have rounded up that number from nearly US$95 million, because this is the only figure that appears in the DRC's calculations[249]. But that amount rests entirely on a "Case Study" set out in the first report of the United Nations Panel of Experts, which alleged that a putative "Ugandan-Thai" logging company called DARA-Forest illegally exploited and exported Congolese timber[250]. The DRC knows that this serious allegation has been refuted by the Porter Commission and subsequently retracted by the United Nations Panel itself[251].

28. On Tuesday, the DRC misleadingly quoted the Porter Commission[252], ignoring the most relevant parts. After "intensively" investigating the allegations in the DARA-Forest Case Study, the Porter Commission concluded that "the investigation by the original Panel . . . was *fundamentally*

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[244] Porter Commission, Final Report, pp. 108-111, 113, 123-124, 162, Counter-Memorial of Uganda (2018), Ann. 52.

[245] Porter Commission, Final Report, pp. 163-164, 167, Counter-Memorial of Uganda (2018), Ann. 52.

[246] Counter-Memorial of Uganda (2018), paras. 8.47-8.95.

[247] Memorial of the DRC (2016), para. 5.190; CR 2021/6, p. 37, para. 24, p. 38, para. 27 (Livinec).

[248] CR 2021/6, p. 37, para. 24, p. 38, para. 27 (Livinec).

[249] Memorial of the DRC (2016), para. 5.187; Counter-Memorial of Uganda (2018), paras. 8.154, 8.171-174.

[250] United Nations, Security Council, *Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of Democratic Republic of the Congo*, doc. S/2001/357, paras. 47-54; Counter-Memorial of Uganda (2018), Ann. 11; Memorial of the DRC (2016), paras. 5.174-5.175.

[251] Counter-Memorial of Uganda (2018), paras. 8.153-8.165.

[252] CR 2021/6, p. 37, para. 24 (Livinec).

flawed"[253], and that "Dara's operation . . . was not illegal exploitation"[254] and "therefore should not have been . . . used as a basis for criticism" of Uganda[255].

29. The United Nations Panel also retracted its allegations. After taking "a closer look" at DARA-Forest's legal status and operations[256], the Panel concluded that

— DARA-Forest is a *Thai-owned* and *Congolese-registered* logging company[257].

— DARA-Forest obtained logging concessions *from provincial authorities*, which granted these concessions following registration with the *central government*[258].

— DARA-Forest *complied with all the regulations in effect* and *paid its taxes*[259]. It was even granted in 2001 "a certificate of registration from *the Minister of Justice in Kinshasa*", which was *"a clear sign of recognition of the company and acceptance of its work in the rebel-held areas by the Government of the Democratic Republic of the Congo"*[260].

30. What is striking is that the DRC — for the third time[261] — based its entire claim on allegations it knew were erroneous, refuted and retracted.[262] Given that, we find it difficult to see how the DRC can credibly claim before this Court that its assessments are based on good faith[263]. In sum, this claim for compensation for deforestation must also fail.

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[253] Porter Commission, Final Report, pp. 57, 62, Counter-Memorial of Uganda (2018), Ann. 52; Counter-Memorial of Uganda (2018), paras. 8.158-8.162.

[254] Porter Commission, Final Report, p. 159.

[255] Porter Commission, Final Report, p. 159.

[256] United Nations, Security Council, *Addendum to the 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*, doc. S/2001/1072, 13 Nov. 2001, para. 72; Counter-Memorial of Uganda (2018), Ann. 13.

[257] United Nations, Security Council, *Addendum to the 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*, doc. S/2001/1072, 13 Nov. 2001, para. 72; Counter-Memorial of Uganda (2018), Ann. 13.

[258] United Nations, Security Council, *Addendum to the 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*, doc. S/2001/1072, 13 Nov. 2001, paras. 72-73; Counter-Memorial of Uganda (2018), Ann. 13.

[259] United Nations, Security Council, *Addendum to the 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*, doc. S/2001/1072, 13 Nov. 2001, paras. 72-73; Counter-Memorial of Uganda (2018), Ann. 13.

[260] United Nations, Security Council, *Addendum to the 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*, doc. S/2001/1072, 13 Nov. 2001, paras. 72-73; Counter-Memorial of Uganda (2018), Ann. 13.

[261] See Memorial of the DRC (2016), para. 5.176; Response of the DRC (2018), para. 5.25; CR 2021/6, p. 37, para. 24 (Livinec).

[262] Counter-Memorial of Uganda (2018), paras. 8.163-8.165.

[263] CR 2021/5, p. 22, para. 14 (Kakhozi).

C. Wildlife

31. The DRC's strategy for proving its claims for damages relating to wildlife fares no better. As you can see on this slide, the DRC claims nearly US$2.7 *billion* for the direct and indirect losses allegedly caused to 16 species of animals in four Congolese national parks[264]. By contrast, at the merits stage, the DRC only alleged that Uganda was responsible for the killing of 4,000 elephants in the Garamba Park, the possession of 800 kg of ivory, and the deportation of 40 okapis in the Epulu Park[265].

32. The DRC offered no evidence then. And it offers no evidence now. All it does is to expand the scope of its allegations. Even if such expanded allegations were admissible at this stage, the DRC's claims have no evidentiary foundation for all the reasons Uganda detailed in its written pleadings[266], to which the DRC offered no response. Because time is limited, I will focus only on some key points.

33. With respect to the direct losses, the DRC presented them in the form of the numbers of allegedly killed animals. And those numbers are based on a two-page summary table, which was prepared by the Congolese Institute for Nature Conservation, a government entity, for the sole purpose of this litigation[267]. This strategy fails for three reasons:

— *First*, the document is self-serving and cannot, standing alone, constitute evidence in support of a claim for US$2.7 billion[268].

— *Second*, the DRC offers *no* underlying evidence proving the accuracy of any numbers stated in the table[269]. Are those numbers correct? It is impossible to determine. The DRC provides no contemporaneous inventories of animals or eyewitness reports from any of the national parks, even though such information should be fully within its possession. Moreover, some evidence the DRC presents to validate its claims only undermines them[270]. For example, on Tuesday, the

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[264] Counter-Memorial of Uganda (2018), paras. 8.101-102.

[265] Reply of the DRC on the Merits (2002), para. 4.32.

[266] Counter-Memorial of Uganda (2018), Chapter 8, Section II(B).

[267] Memorial of the DRC (2016), para. 5.101; Memorial of the DRC (2016) Ann. 5.13, pp. 22-23.

[268] *Armed Activities* (2005), p. 201, para. 61.

[269] Counter-Memorial of Uganda (2018), paras. 8.111-8.115.

[270] See Counter-Memorial of Uganda (2018), paras. 8.123-8.124.

DRC referred to UNESCO data[271]. But the UNESCO data only highlight the significantly inflated nature of the DRC's claims[272]. For example, the DRC alleges that 5,000 elephants were killed in Garamba Park because there were ostensibly 6,535 elephants in 1998 and 1,535 elephants in 2003/2004. By contrast, UNESCO statistics suggest the following number of elephants in the same park: 5,878 in 1998 and 6,848 in 2004[273]. In other words, they actually show a steady increase in the number of elephants during the conflict[274].

— *Third,* the DRC otherwise offers no proof that the "missing" animals were in fact killed.

— *Fourth,* the DRC also makes no effort to show that allegedly killed animals were in fact killed as a result of Uganda's wrongful conduct. For example, *none* of the UNESCO reports the DRC mentioned on Tuesday or in its written pleadings, suggests that animals in Congolese national parks were killed as a result of Uganda's conduct. Instead, the DRC builds its claim on a faulty reasoning: because UPDF may have been present in the area, any losses in that area were necessarily caused by Uganda[275]. For example, with respect to Garamba Park, the DRC plucks two unfounded allegations[276] that "4000 elephants" were killed "between 1995 and 1999" in the area "controlled by UPDF and Sudanese rebels"[277], and that in August 2000 a UPDF officer was "discovered with 800 kilograms of elephant tusks . . . near Garamba park"[278]. From this shaky foundation, the DRC then makes a giant leap to conclude that Uganda is responsible for "the loss of 5,000 antelopes, 5,000 elephants, 92 giraffes, 21 white rhinoceroses, 3,905 warthogs" and other animals in Garamba Park.[279] The DRC repeats the same misconceived exercise for the other three parks[280]. But this faulty reasoning is inconsistent with the requirement of proximate

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[271] CR 2021/6, p. 35, para. 20 (Livinec).

[272] Counter-Memorial of Uganda (2018), para. 8.116.

[273] Memorial of the DRC (2016), para. 5.120.

[274] See also K. Hillman Smith, "Status of Northern White Rhinos and Elephants in Garamba National Park, Democratic Republic of Congo, During the Wars", Pachyderm No. 31 (July-Dec. 2001), p. 79, Counter-Memorial of Uganda (2018), Ann. 79.

[275] Memorial of the DRC (2016), paras. 5.161-5.165, 5.168-5.171.

[276] Counter-Memorial of Uganda (2018), para. 8.122.

[277] Memorial of the DRC (2016), para. 5.114, citing to United Nations Panel of Experts, first report of 12 April 2001, para. 61.

[278] Memorial of the DRC (2016), para. 5.115, citing to United Nations Panel of Experts, first report of 12 April 2001, para. 62; CR 2021/6, pp. 34-35, para. 18 (Livinec).

[279] Memorial of the DRC (2016), para. 5.117

[280] See e.g. Counter-Memorial of Uganda (2018), para. 8.119.

causation. The lack of any causal link is also clear from how arbitrarily the DRC apportions losses to Uganda: 50 per cent in Garamba Park, 50 per cent in Maiko Park, 80 per cent in Virunga Park, and 90 per cent in the Okapi Reserve[281].

34. The alleged direct losses to the Congolese wildlife are therefore baseless[282].

35. Equally baseless are the alleged indirect losses[283]. The DRC measures these losses by calculating the number of first-generation offspring that would have been born to all animals allegedly killed during the conflict[284]. Because the DRC has proved neither the number of animals killed, nor a causal link to a specific wrongful conduct attributable to Uganda, the entire claim for indirect losses fails for this reason alone.

36. The DRC's calculations of the number of unborn offspring is also incurably flawed. With its passion for high numbers, the DRC defies not just the *rules of evidence* but also the *laws of nature*. Consider the calculations of unborn elephants based on the assumption that an elephant gives birth each year[285]. The DRC said it had consulted with the London and Frankfurt zoological societies[286]. If it did, the DRC would have known that an elephant does not give birth to one baby a year, which is what the DRC assumes for its calculations. Elephants have a gestation period of close to two years and inter-birth intervals of between four to five years. So it is biologically impossible that an elephant would reproduce every year. And yet just for the "unborn" elephants in all four Congolese national parks, the DRC estimates roughly US$640 million[287]. Is that "a decidedly 'conservative' approach to harm", as Professor Bodeau-Livinec professed on Tuesday[288]?

37. In sum, the DRC has presented no evidence on which any compensation can be awarded for wildlife.

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[281] Memorial of the DRC (2016), paras. 5.167, 5.171, 5.165, 5.169; CR 2021/6, p. 36, para. 22 (Livinec).

[282] Counter-Memorial of Uganda (2018), paras. 8.108-8.129.

[283] Counter-Memorial of Uganda (2018), paras. 8.130-8.137.

[284] Memorial of the DRC (2016), paras. 5.135-5.136.

[285] Counter-Memorial of Uganda (2018), paras. 8.133-8.136.

[286] CR 2021/6, p. 35, para. 20 (Bodeau-Livinec).

[287] Counter-Memorial of Uganda (2018), paras. 5.161, 5.166, 5.168 and 5.170.

[288] CR 2021/6, p. 35, para. 19 (Bodeau-Livinec).

III. The DRC's valuation of the alleged harms is methodologically flawed

38. This brings me to the final point, which is that the DRC's valuation of the alleged injuries is also irredeemably flawed. We addressed this thoroughly in our written pleadings[289], so I will only briefly summarize two points.

39. *First*, the DRC erroneously uses export prices of minerals and lumber to measure the alleged damages to non-living resources[290]. Yet, as Uganda explained in its pleadings, whether the DRC owned a mine or a forest or whether it gave concessions to private companies, the measure of any damages cannot be the commercial value of the resources[291].

40. *Second*, the DRC seeks to quantify compensation for the alleged damages to the Congolese wildlife by assigning unfounded monetary values to different types of animals[292]. To do this, the DRC puts everything in the pot: prices mentioned in online advertisements for South African safaris; prices of different species individually sold at auctions in third countries; and even black market prices for Indonesian orangutans and Chinese alligators. It then mixes those poorly sourced prices with speculative assumptions to concoct its own fabricated prices. Based on those prices, the DRC then claims compensation not only for animals allegedly killed, but also for their unborn first-generation offspring.

41. This leads to staggering numbers. For just the first generation of unborn warthogs in Garamba Park alone, the DRC alleges its losses exceed US$1 *billion*[293]. The DRC's approach also leads to *double* counting because, ordinarily, the value of an animal includes its ability to produce offspring. With respect to elephants and rhinos, the DRC even engages in *triple* recovery, claiming losses for allegedly killed adult animals, and also for their unborn animals, and then further still for ivory or horns allegedly taken from all adult animals of those species.

42. These are just a few examples of the DRC's so-called "decidedly 'conservative' approach to harm"[294]. More examples can be found in Uganda's Counter-Memorial[295]. With all due respect,

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[289] Counter-Memorial of Uganda (2018), paras. 8.96-8.100, 8.138-8.150 and 8.170-8.176.

[290] Memorial of the DRC (2016), paras. 5.58 and 5.185-5.187.

[291] Counter-Memorial of Uganda (2018), paras. 8.96-8.100.

[292] CR 2021/6, p. 36, para. 21 (Bodeau-Livinec).

[293] Memorial of the DRC (2016), para. 5.166.

[294] CR 2021/6, p. 35, para. 19 (Bodeau-Livinec).

[295] Counter-Memorial of Uganda (2018), paras. 8.138-8.150.

the DRC's valuation of the alleged damages to the Congolese wildlife is speculative, arbitrary and excessive in the extreme and therefore must be denied.

43. The DRC's compensation claims relating to natural resources are not dissimilar from those that Ethiopia brought before the Eritrea-Ethiopia Claims Commission. As the Commission stated, Ethiopia also made a "huge claim" seeking "more than one billion U.S. dollars" for the alleged exploitation of natural resources[296]. Taking account of "the huge amount claimed, the lack of supporting evidence, the unanswered questions regarding the [resources'] locations, and manifold errors in calculating the claimed damages", the Commission dismissed that claim. The same result should follow here.

44. Madam President, Members of the Court, this concludes my observations. I thank you very much for your courteous attention. I kindly ask you to invite Professor Pellet to continue our oral presentation.

The PRESIDENT: I thank Mr. Parkhomenko. I now give the floor to Professor Alain Pellet. You have the floor.

M. PELLET :

LES MESURES DE REPARATION ADDITIONNELLES

1. Madame la présidente, Mesdames et Messieurs de la Cour, il m'appartient, cette après-midi, de vous présenter la position de l'Ouganda sur la réparation des dommages à laquelle prétend la République démocratique du Congo sous forme de satisfaction. Nos amis et contradicteurs de l'autre côté de la barre n'ayant rien dit de la question des intérêts ni de la très inhabituelle demande de condamnation de l'Ouganda aux dépens, je m'en abstiendrai également.

2. Madame la présidente, la RDC demande, à titre d'indemnisation pour les dommages matériels qu'elle dit avoir subis, la somme très considérable de 13,4 milliards de dollars américains. L'Etat requérant n'en a pas, pour autant, été dissuadé de prier la Cour de dire et juger au surplus que «l'Ouganda est tenu de verser à la RDC la somme de 125 millions de dollars des Etats-Unis au titre de mesure de satisfaction». La RDC demande également qu'il soit ordonné à l'Ouganda

[296] Eritrea-Ethiopia Claims Commission, Final Award on Ethiopia's Damages Claims, 17 Aug. 2009, paras. 421 and 423.

> «de mettre en œuvre des enquêtes et des poursuites pénales à l'encontre des officiers et des soldats de l'UPDF impliqués dans les violations du droit international humanitaire ou des normes internationales de protection des droits de la personne commises en territoire congolais entre 1998 et 2003»[297].

3. J'examinerai ces demandes successivement. Liminairement, il convient de s'interroger sur leur fondement.

A. Le fondement des mesures de satisfaction

4. Nous convenons évidemment que la satisfaction peut constituer un mode approprié de réparation «dans la mesure où» («insofar»), pour citer les Articles de la CDI sur la responsabilité de 2001, «dans la mesure où» le préjudice causé par un fait internationalement illicite «ne peut pas être réparé par la restitution ou l'indemnisation»[298]. Cette expression met en relief «le caractère assez exceptionnel de la satisfaction»[299] souligné par la Commission dans son commentaire. Et, comme la CDI y a insisté, «[c]e n'est que dans les cas où ces deux formes de réparation n'ont pas permis d'assurer une réparation intégrale que la satisfaction peut être nécessaire»[300]. Or en l'espèce, ces deux demandes de «satisfaction» font double emploi avec les indemnisations réclamées par la RDC.

5. Il n'est en outre peut-être pas superflu de rappeler que, si des circonstances exceptionnelles justifient une satisfaction[301], celle-ci «ne doit pas être hors de proportion avec le préjudice et ne peut pas prendre une forme humiliante pour l'Etat responsable»[302]. Du même coup, l'octroi de dommages-intérêts punitifs est exclu en droit international. Le principe, fermement établi depuis l'affaire du *Lusitania*[303], a été pleinement confirmé par la CDI, y compris en cas de violation d'une obligation découlant d'une norme de *jus cogens*.

6. Développant la position de la RDC sur la nature exceptionnelle de l'affaire, les professeurs Chemillier-Gendreau et Mingashang ont insisté sur le «caractère impératif des normes qui ont été

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[297] Mémoire de la RDC (2016), par. 7.89.

[298] Articles sur la responsabilité de l'Etat pour fait internationalement illicite, annexés à la résolution 56/83 de l'Assemblée générale de Nations Unies du 12 décembre 2001, doc. A/RES/56/83, article 37.

[299] Commentaire de l'article 37 des Articles sur la responsabilité de l'Etat pour fait internationalement illicite, *in Annuaire* de la Commission du droit international (CDI), 2001, vol. II, deuxième partie, p. 284, par. 2.

[300] Commentaire de l'article 37 des Articles sur la responsabilité de l'Etat pour fait internationalement illicite, *in Annuaire* de la CDI, 2001, vol. II, deuxième partie, p. 284, par. 1.

[301] Voir *ibid.*, p. 284, par. 2.

[302] Articles sur la responsabilité de l'Etat pour fait internationalement illicite, annexés à la résolution 56/83 de l'Assemblée générale de Nations Unies du 12 décembre 2001, doc. A/RES/56/83, article 37, par. 3.

[303] Mixed Claims Commission (United States and Germany), *Opinion in Lusitania Cases*, 1er novembre 1923, *Recueil des sentences arbitrales (RSA)*, vol. VII, p. 39.

violées»[304]. Il ne saurait en résulter un bouleversement des règles relatives aux modalités de la réparation. L'article 41 du projet de la CDI sur la responsabilité de l'Etat, qui porte sur les «Conséquences particulières d'une violation grave d'une obligation» découlant d'une norme impérative du droit international général, ne prévoit nullement qu'une satisfaction punitive pourrait résulter d'une telle violation. Certes, aux termes du paragraphe 3 de cette disposition, «[l]e présent article est sans préjudice ... de toute conséquence supplémentaire que peut entraîner, d'après le droit international», une telle violation. Mais la Commission a expressément *écarté* de ces possibles conséquences supplémentaires l'imposition de dommages punitifs ; elle l'a précisé dans ses commentaires : «l'allocation de dommages-intérêts punitifs n'est pas reconnue en droit international»[305].

7. Et, d'une façon plus générale, la CDI a souligné que «la satisfaction n'est pas censée avoir un caractère punitif, et n'inclut donc pas de dommages-intérêts punitifs»[306]. Pas davantage que l'indemnisation, la satisfaction «ne doit ... revêtir un caractère punitif ou exemplaire»[307], et les tribunaux d'arbitrage en matière d'investissement l'ont confirmé abondamment[308]. Bien qu'elle s'en défende[309], c'est pourtant très exactement ce que la RDC vous demande de décider en l'espèce.

8. En réponse à la question nº 15 qu'avait posée la Cour, la RDC a indiqué que la satisfaction «est obtenue par la *condamnation* d'un Etat», ce que le Greffe a traduit de manière que je crois un peu inexacte par : «it is obtained through a judgment *awarded against* a State»[310]. De cette manière est gommé le caractère afflictif de l'indemnité supplémentaire que demande l'Etat requérant. C'est

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[304] CR 2021/5, p. 36, par. 43 ; voir aussi p. 30, par. 25 (Chemillier-Gendreau) ou CR 2021/6, p. 60, par. 6 (Mingashang).

[305] *Annuaire* de la CDI, 2001, vol. II, deuxième partie, chapitre III. — Violations graves d'obligations découlant de normes impératives du droit international général, p. 119, par. 5 du commentaire de l'introduction du chapitre III.

[306] Commentaire de l'article 37 des Articles sur la responsabilité de l'Etat pour fait internationalement illicite, *in Annuaire* de la CDI, 2001, vol. II, deuxième partie, p. 115, par. 8.

[307] *Certaines activités menées par le Nicaragua dans la région frontalière (Costa Rica c. Nicaragua), indemnisation, arrêt, C.I.J. Recueil 2018 (I)*, p. 26, par. 31.

[308] Voir par exemple : *CMS Gas Transmission Co c. Argentine* (CIRDI nº ARB/01/8), sentence, 12 mai 2005, par. 404 ; *Ioannis Kardassopoulos c. Géorgie* (CIRDI nº ARB/05/18), sentence, 3 mars 2010, par. 513 ; *AHS Niger and Menzies Middle East and Africa S.A. c. République du Niger* (CIRDI nº ARB/11/11), sentence, 15 juillet 2013, par. 158 ; *Quiborax* v. *Bolivia* (CIRDI nº ARB/06/2), sentence, 16 septembre 2015, par. 560-561 ; *BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH* v. *Kingdom of Spain* (CIRDI nº ARB/15/16), sentence, décision sur la compétence, la responsabilité, et détermination du *quantum*, 2 décembre 2019, par. 628.

[309] CR 2021/5, p. 36, par. 42 (Chemillier-Gendreau) ou CR 2021/6, p. 64, par. 12-13 et p. 66, par. 16-17 (Mingashang).

[310] Réponse de la RDC aux questions posées par la Cour, question nº 15, par. 15.5 (les italiques sont de nous).

ignorer que l'objet de la satisfaction est exclusivement de réparer (en général sous une forme symbolique) ce qui ne peut pas l'être par l'indemnisation. La RDC elle-même paraît d'ailleurs l'admettre lorsque, après avoir mentionné, dans le même paragraphe de sa réponse, que la satisfaction «peut aussi se manifester par le paiement d'une somme d'argent», elle précise qu'il en va ainsi «à titre symbolique»[311] (et ici encore je me permets de marquer un petit désaccord avec la traduction proposée par le Greffe qui remplace le mot, si important, «symbolique» par «nominal», ce qui, sans être inexact, est moins parlant). On rejoint d'ailleurs à nouveau l'idée du caractère accessoire, ou, en tout cas, subsidiaire, de la satisfaction.

9. Comme on l'a écrit dans un ouvrage faisant autorité, également abondamment cité par nos contradicteurs[312], sur *Les réparations de guerre en droit international public*, ce principe d'exclusion des dommages punitifs est applicable dans ce domaine : «les dommages moraux subis par les ressortissants de l'Etat réclamant constituent dans son chef un dommage matériel et non moral»[313]. Se fondant sur une étude approfondie de la pratique, l'auteur constate que l'on ne trouve, en droit international, aucune trace de dommages punitifs, ni même de l'idée selon laquelle des dommages-intérêts correspondant à la gravité de l'atteinte devraient être versés par l'Etat responsable à l'Etat lésé. Je l'ai déjà souligné, cette possibilité a été formellement écartée par la CDI lors de l'examen des Articles de 2001. Cette pratique contemporaine généralisée est «le signe de la volonté de se départir définitivement de la pratique du tribut de guerre, considérée comme illégitime»[314]. Faute de pratique, on ne saurait évidemment fonder des demandes d'indemnité pécuniaire punitive sur quelque coutume que ce soit.

10. Une telle demande ne pourrait pas davantage être légitimée au titre d'énigmatiques «réparations collectives». Les deux Parties s'accordent du reste pour considérer qu'il s'agit d'une notion ne correspondant à aucune définition généralement admise en droit positif[315].

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[311] *Ibid*. Voir aussi par. 15.7.

[312] CR 2021/5, p. 31, par. 27, note de bas de page n° 61 ; voir aussi p. 32, par. 29, note de bas de page n° 65 (Chemillier-Gendreau) ou CR 2021/6, notamment p. 50, par. 9 *e)*, note de bas de page n° 178 (Mampuya Kanunk'a-Tshiabo).

[313] P. d'Argent, *Les réparations de guerre en droit international public*, Bruxelles, Bruylant, Paris, LGDJ, 2002, p. 716 ; voir aussi p. 596 ou p. 839-840.

[314] *Ibid.*, p. 720.

[315] Voir réponse de la RDC aux questions posées par la Cour, question n° 17, par. 17.4, et observations de l'Ouganda sur la réponse de la RDC, par. 17.1.

11. Cette notion de réparations collectives a été introduite tardivement dans ce débat par une question venue de la Cour. Jamais, jusqu'au 11 juin 2018, date du questionnaire adressé aux Parties, il n'avait été question de réparations collectives, que ce soit dans l'arrêt de 2005, dans les plaidoiries écrites ou orales sur la responsabilité, ou dans les mémoires des Parties sur la réparation. Dans son ordonnance du 1er juillet 2015, la Cour avait pourtant enjoint à chacune des Parties d'«exposer dans un mémoire *l'ensemble [the entirety]* de ses prétentions concernant l'indemnisation qu'elle estime lui être due par l'autre Partie et [de] joindre à cette pièce *tous les éléments de preuve* sur lesquels elle entend s'appuyer»[316]. Je note d'ailleurs que la Partie congolaise admet qu'il n'est pas juste d'allouer des réparations collectives aux préjudices individuels même si ceci affecte de nombreuses personnes. Dans ce cas, on peut se demander ce qui pourrait justifier de telles réparations collectives ?

12. Bien qu'il se soit montré discret sur ce point lors des plaidoiries d'avant-hier, l'Etat requérant ne s'en est pas moins saisi de cette notion incertaine pour tenter de justifier ses demandes de satisfaction en alléguant que ces mesures n'auraient pas pour objet la réparation des dommages subis par les victimes directes et réelles, mais seraient destinées à profiter «à toute la communauté à laquelle appartiennent les victimes réelles et directes»[317]. C'est un moyen commode de contourner l'obligation d'établir un lien de causalité direct et nécessaire entre l'action et l'omission constituant le fait internationalement illicite d'une part et le dommage d'autre part ; comme le professeur d'Argent l'a montré ce matin, il s'agit pourtant d'une condition *sine qua non* de la réparation, ainsi que cela résulte de l'article 31 des Articles de la CDI[318].

13. Au surplus, comme nous l'avons souligné dans nos observations sur les réponses de la RDC aux questions de la Cour, les mesures de satisfaction qu'elle demande sont bien présentées par l'Etat requérant comme des satisfactions qui lui sont dues *à lui*, en tant qu'Etat ; même si, à la dernière minute, la RDC semble avoir pris conscience du cynisme de cette position obsolète, qui est en décalage avec la recommandation figurant à l'article 19 des Articles de la CDI sur la protection

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[316] *Activités armées sur le territoire du Congo (République démocratique du Congo c. Ouganda), ordonnance du 1er juillet 2015, C.I.J. Recueil 2015 (II),* p. 583, par. 8. Voir aussi réponse de la RDC aux questions posées par la Cour, question no 17, par. 2 (les italiques sont de nous).

[317] *Ibid.*, par. 17.5.

[318] Voir notamment les paragraphes 4 à 14 du commentaire de l'article 31 (*Annuaire* de la CDI, 2001, vol. II, deuxième partie, p. 242 et 249) ; voir aussi le paragraphe 1 du commentaire de l'article 34 («Formes de la réparation», *ibid.*, p. 253).

diplomatique de 2006. Récemment en effet, la RDC, revenant sur sa position antérieure, a pris l'engagement d'utiliser une partie de ces sommes au profit de deux groupes ethniques[319].

Et nous avons appris mardi que, par un décret du 13 décembre 2019, publié le 1er avril 2020, la RDC en anticipation, semble-t-il, de votre arrêt, a créé un Fonds spécial de répartition de l'indemnisation aux victimes des activités illicites de l'Ouganda en République démocratique du Congo ou à leurs ayants droit. S'agit-il d'un fonds unique, ou de deux ? Les explications de la RDC sont confuses :

— le professeur Mingashang ne s'est référé qu'au fonds de réconciliation entre les populations hema et lendu dont le mémoire congolais avait évoqué la création[320] ;

— l'agent de la RDC a été plus ambigu : tout en se référant au même passage du mémoire de la RDC, M. Kakhozi a semblé assimiler ce que l'on peut appeler le «Fonds satisfaction» au «Fonds indemnisation» créé par le décret de 2019-2020[321] ; et

— Muriel Ubéda-Saillard a expliqué que ce fonds serait chargé de distribuer l'indemnisation demandée par la RDC au titre «de toutes les atteintes aux personnes» (toutefois, elle ne semble pas y inclure la conclusion portant sur les 25 millions au titre de la satisfaction ; au surplus, la formule est assez énigmatique car on ignore si ces atteintes aux personnes incluent ou pas les atteintes aux biens, voire les dommages économiques)[322].

14. On peut d'ailleurs être perplexe sur la manière dont la RDC entend s'y prendre pour répartir entre les victimes les indemnités qui lui seraient versées (que ce soit au titre de l'indemnisation ou de la satisfaction). Nos contradicteurs ont longuement expliqué qu'il est impossible à la RDC d'apporter des preuves précises quant à l'identité des victimes, ou à la nature et à l'importance des dommages subis. On voit mal comment ce qui n'a pas été possible durant les quinze ans écoulés depuis l'arrêt de 2005 le deviendrait mystérieusement et soudainement une fois rendu votre arrêt sur les réparations.

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[319] Mémoire de la RDC (2016), par. 7.75 ; voir aussi Réponse de la RDC aux questions posées par la Cour, question nº 17, par. 57.

[320] CR 2021/6, p. 62-64, par. 9-13 (Mingashang), se référant au mémoire de la RDC (2016), p. 250-252, par. 7.72-7.75.

[321] CR 2021/5, p. 22-23, par. 17 (Kakhozi).

[322] *Ibid*., p. 47-48, par. 27 (Ubéda-Saillard).

15. Quoiqu'il en soit de ce revirement tardif, on peut être quelque peu sceptique sur la portée de ces promesses lorsqu'on lit, dans les commentaires de la Partie demanderesse sur les réponses de l'Ouganda, que la RDC estime qu'il lui appartient de décider de «reverser tout ou partie de la réparation [qui] lui [serait] allouée par le juge international, à ses ressortissants, sous n'importe quelle formule (individuellement ou collectivement)» et que cela «ne devrait pas préoccuper le débiteur de la réparation»[323]. En tout cas, la Cour, elle, a de quoi être préoccupée par le sort réel des «réparations collectives» — comme d'ailleurs de toute autre indemnité — qu'elle viendrait à accorder à la RDC, si elle devait donner suite à ses conclusions à cet égard.

Et ce d'autant plus que le demandeur reconnaît que «certaines victimes qui n'étaient pas identifiées ni recensées par la commission seront mises de côté par le partage des réparations individuelles»[324]. Voilà qui jette une lumière un peu inquiétante sur les intentions de la RDC et, plus généralement, sur les mesures de réparation qu'elle prie la Cour d'ordonner.

B. Le versement d'une somme forfaitaire destinée à réparer le préjudice immatériel subi par l'Etat congolais

16. Madame la présidente, Mesdames et Messieurs les juges, au bénéfice de ces remarques générales, j'en viens maintenant à l'examen de la première conclusion congolaise relative à la satisfaction, qui tend à faire condamner l'Ouganda au paiement de «la somme de 125 millions de dollars des Etats-Unis au titre de mesure de satisfaction pour l'ensemble des dommages immatériels résultant des violations du droit international constatées par la Cour dans son arrêt du 19 décembre 2005»[325]. Cette somme se décompose en deux volets.

17. Le premier concerne 100 millions de dollars à titre forfaitaire «pour les dommages immatériels subis par l'Etat et la population congolaise»[326] du fait de la «profonde humiliation pour l'Etat congolais» et de l'«état d'angoisse considérable auprès de l'ensemble de la population congolaise» en conséquence du «déclenchement et [de] la poursuite de la guerre»[327].

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[323] Observations de la RDC sur la réponse de l'Ouganda, p. 11.

[324] Réponse de la RDC aux questions posées par la Cour, question n° 17, par. 17.27.

[325] Mémoire de la RDC (2016), p. 258, par. 7.89 *c)*.

[326] *Ibid.*, p. 255, par. 7.83.

[327] *Ibid.*, p. 252-253, par. 7.77 et 7.78. Voir aussi la réponse de la RDC aux questions posées par la Cour, question n° 15, par. 15.1.

18. Cette somme, supposée réparer le préjudice moral subi par la RDC, se confond en réalité avec l'indemnité que l'Etat demandeur réclame au titre des dommages matériels qu'il dit avoir subis et que mes collègues ont discutés. Or, je l'ai souligné il y a quelques instants[328], la satisfaction ne trouve sa place dans la panoplie des mesures de réparation que pour réparer des dommages ne pouvant pas faire l'objet d'une indemnisation.

19. Certes, la Cour a déclaré dans son arrêt de 2005 que l'Ouganda avait violé des règles fondamentales du droit international général et nous ne remettons pas ses constatations en question mais elles constituent, par elles-mêmes, une satisfaction équitable et suffisante. C'est la forme de droit commun que revêt la réparation lorsqu'une atteinte aux droits souverains de l'Etat est en cause[329], y compris en cas de recours illicite à la force[330]. Décider autrement, ce serait revenir à la funeste politique des indemnités de guerre punitives. Et, je le répète, une telle conclusion ne trouve aucun fondement dans le droit positif ; la RDC ne peut invoquer nulle règle coutumière à son soutien.

20. Comme je l'ai déjà dit, les Parties s'accordent pour dire que la satisfaction est de nature symbolique. Mais 100 millions de dollars, Madame la présidente, cela n'a rien de «symbolique». L'Ouganda a donné, dans son contre-mémoire et dans ses réponses au questionnaire de la Cour, des exemples de ces réparations «symboliques» ou «nominales»[331]. Par contraste, la demande de la RDC entre à l'évidence dans la catégorie de ce que la CDI considère comme «des demandes excessives faites [dans le passé] sous le couvert de la «satisfaction»»[332].

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[328] Voir ci-dessus, par. 0.

[329] *Rainbow Warrior (Nouvelle-Zélande/France)*, *RSA*, vol. XX, p. 272-273, par. 122 ; *Projet Gabčíkovo-Nagymaros (Hongrie/Slovaquie), arrêt, C.I.J. Recueil 1997*, p. 81, par. 152 ; *Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé, avis consultatif du 9 juillet 2004, C.I.J. Recueil 2004 (I)*, p. 198, par. 152-153 ; *Certaines activités menées par le Nicaragua dans la région frontalière (Costa Rica c. Nicaragua)* et *Construction d'une route au Costa Rica le long du fleuve San Juan (Nicaragua c. Costa Rica), arrêt, C.I.J. Recueil 2015 (II)*, p. 717, par. 139 ; *Certaines activités menées par le Nicaragua dans la région frontalière (Costa Rica c. Nicaragua), indemnisation, arrêt, C.I.J. Recueil 2018 (I)*, p. 24, par. 27.

[330] *Affaire du Carthage (France, Italie)*, 6 mai 1913, *RSA*, vol. XI, p. 460-461 ; *Affaire du Manouba (France, Italie)*, 6 mai 1913, *RSA*, vol. XI, p. 475 ; *Détroit de Corfou (Royaume-Uni c. Albanie), fixation du montant des réparations, arrêt, C.I.J. Recueil 1949*, p. 174 ; *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. 463 ; *Certaines activités menées par le Nicaragua dans la région frontalière (Costa Rica c. Nicaragua)* et *Construction d'une route au Costa Rica le long du fleuve San Juan (Nicaragua c. Costa Rica), arrêt, C.I.J. Recueil 2015 (II)*, p. 717, par. 139.

[331] Contre-mémoire de l'Ouganda (2018), par. 10.41 ; observations de l'Ouganda sur la réponse de la RDC, par. 15.10-15.12.

[332] *Annuaire* de la CDI, 2001, vol. II, deuxième partie, commentaire de l'article 37, par. 8 citant la note conjointe présentée au Gouvernement chinois en 1900 après la révolte des Boxers et la demande formulée contre la Grèce par la conférence des ambassadeurs dans l'affaire *Tellini* en 1923 et renvoyant à C. Eagleton, *The Responsibility of States in International Law*, New York University Press, 1928, p. 187 et 188.

21. La demande congolaise d'indemnité pour tort moral comporte un autre volet, visant au paiement d'une somme supplémentaire de 25 millions de dollars des Etats-Unis «destinée à la création d'un fonds visant à favoriser la réconciliation entre les Hema et les Lendu»[333] — indemnité également qualifiée de «symbolique» par nos contradicteurs[334], qui ont une conception assez singulière du «symbolisme»...

22. Cette demande appelle les mêmes remarques que celles que je viens de formuler au sujet des 100 millions de dollars auxquels elle entend s'ajouter. Elle revient à réclamer une double réparation, puisque la demande en indemnisation couvre l'ensemble des souffrances endurées par les ressortissants congolais en conséquence des faits internationalement illicites que la Cour a attribués à l'Ouganda, y compris les violences ethniques (notamment — et expressément en Ituri[335]). Il faut noter à cet égard que la RDC justifie ses demandes d'indemnisation pour les dommages matériels causés aux personnes, en particulier et très largement, par les violences ethniques commises en Ituri[336]. C'est ce même motif qui est invoqué pour justifier la demande de satisfaction.

23. Il y a une raison supplémentaire de rejeter les deux conclusions de la RDC demandant à la Cour de lui accorder satisfaction sous la forme d'une indemnité de pas moins de 125 millions de dollars. Il s'agit d'un chiffre très considérable, au demeurant parfaitement arbitraire, et à l'appui duquel l'Etat demandeur n'avance aucune justification — ce qui suffit également à écarter la conclusion.

24. Quant à l'affaire du *Rainbow Warrior* dont le professeur Mingashang fait grand cas, il est difficile d'y voir un précédent :

— s'il est exact que le tribunal avait *recommandé* la création d'un fonds *à établir d'un commun accord entre la France et la Nouvelle-Zélande*, il s'agissait d'une simple recommandation, sans valeur obligatoire ;

— le tribunal arbitral avait écarté toute indemnisation ; et, surtout peut-être,

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[333] Mémoire de la RDC (2016), par. 7.73 ; voir aussi par. 7.74-7.75.

[334] CR 2021/6, p. 62, par. 9 et 10 (Mingashang).

[335] Voir arrêt de 2005, p. 257, par. 259.

[336] Mémoire de la RDC (2016), par. 7.05-7.32, et spécialement par. 7.11, 7.13-7.14, 7.18, 7.24, 7.26, 7.30 ; voir aussi la réponse de la RDC aux questions posées par la Cour, question n° 3, par. 3.3, par. 9.21-9.23, par. 10.8, par. 12.1-12.2, par. 14.1-14.6.

— il avait insisté sur le fait que la déclaration de responsabilité de la République française rendue publique par la décision du tribunal constituait une satisfaction appropriée en rappelant qu'il s'agissait d'«une sanction significative» («a significant sanction»)[337]. Si l'affaire du *Rainbow Warrior* présente une pertinence dans notre affaire c'est parce qu'elle établit que, contrairement à ce que prétend le coagent de la RDC, une satisfaction revêtant la forme d'une telle déclaration n'est nullement une mesure «totalement minimaliste»[338] comme il l'a dit.

25. Madame la présidente, les prétentions de la RDC à obtenir satisfaction par le biais de très grosses indemnités en réparation des préjudices moraux qu'elle allègue :

1) ont un caractère clairement punitif, et les dommages-intérêts punitifs ne sont pas reconnus par le droit international contemporain de la responsabilité ; du même coup, ces conclusions présentent un caractère humiliant à l'égard de l'Ouganda ;
2) elles font double emploi avec l'énorme demande d'indemnité pour les dommages matériels et moraux subis par la population congolaise ; et
3) leur montant n'est étayé d'aucune manière.

Il en résulterait une aggravation injustifiée de la charge indemnitaire pesant sur l'Ouganda.

C. La mise en œuvre d'enquêtes et de poursuites pénales

26. Mesdames et Messieurs les juges, dans les conclusions de son mémoire de 2016, la RDC

«demande [en outre] à la Cour de dire et juger que :

. . . . . .

d) l'Ouganda est tenu, au titre de mesures de satisfaction, de mettre en œuvre des enquêtes et des poursuites pénales à l'encontre des officiers et des soldats de l'UPDF impliqués dans les violations du droit international humanitaire ou des normes internationales de protection des droits de la personne commises en territoire congolais entre 1998 et 2003».

27. L'Ouganda ne conteste pas que, lorsqu'il existe des preuves spécifiques de leur implication, les auteurs présumés des violations d'obligations internationales condamnées par la Cour dans son arrêt de 2005 devraient faire l'objet de poursuites pénales[339]. Toutefois, comme son

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[337] *Rainbow Warrior (Nouvelle-Zélande/France), RSA*, vol. XX, p. 273, par. 123.

[338] CR 2021/6, p. 59, par. 2 (Mingashang).

[339] Voir notamment CR 2005/6, p. 13 (Makubuya). Voir aussi The Uganda People's Defense Forces Act, 2 septembre 2005 (réponse de l'Ouganda aux questions posées par la Cour, annexe S-10).

agent l'avait expliqué lors des plaidoiries sur le fond, le Gouvernement ougandais s'est heurté à de grandes difficultés pour passer de l'intention aux actes[340].

28. L'Ouganda a appuyé dès l'origine la création du groupe d'experts sur l'exploitation illégale des ressources naturelles et autres richesses de la République démocratique du Congo[341]. Malgré ses réserves sur le contenu du rapport, le Gouvernement ougandais s'est rapidement attaché à mettre en œuvre ses recommandations, ainsi que celles du rapporteur spécial sur la situation des droits de l'homme en RDC l'invitant à «lancer des enquêtes» sur des massacres survenus à Bunia en janvier 2001 «afin d'identifier les responsables et de les traduire en justice»[342]. Dès le 23 mai 2001, une commission judiciaire d'enquête indépendante — dite «commission Porter», du nom de son président, ancien juge à la Cour suprême du Kenya[343] — a été chargée de se pencher «into Allegations into Illegal Exploitation of Natural Resources and Other Forms of Wealth in the Democratic Republic of Congo»[344].

29. Ainsi, avant même que le Conseil de sécurité engage les Etats concernés «à procéder à leurs propres enquêtes ... pour élucider de façon crédible les conclusions du Groupe»[345], l'Ouganda avait déjà pris les mesures nécessaires à cette fin. Le Conseil en a pris note avec satisfaction par sa résolution 1457 du 24 janvier 2003, exhortant les autres Etats à faire de même[346]. Le Gouvernement ougandais a accepté les conclusions de la commission Porter et s'est employé à les mettre en œuvre, et notamment à engager toutes les actions nécessaires, disciplinaires, judiciaires et autres, afin d'enquêter et de punir les personnes responsables[347].

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[340] CR 2005/6, p. 13-14 (Makubuya).

[341] Voir S/PRST/2000/20, 2 juin 2000. Voir aussi : S/RES/1457 (2003), «La situation concernant la République démocratique du Congo», 24 janvier 2003.

[342] Sixième rapport du Secrétaire général sur la MONUC (S/2001/128), 12 février 2001, par. 57 ; voir mémoire de la RDC (2016), par. 7.68.

[343] Les deux autres membres de la commission étaient : M. Joseph P. Berko, magistrat ghanéen exerçant en Ouganda et M. John G. Rwambuya, ancien représentant de l'Ouganda auprès des Nations Unies (voir annexe 55 UR 2005).

[344] Republic of Uganda, Judicial Commission of Inquiry into Allegations into Illegal Exploitation of Natural Resources and Other Forms of Wealth in the Democratic Republic of the Congo 2001, Final Report (November 2002) (Annex 52 CM Uganda on reparation).

[345]Résolution 1457 adoptée par le Conseil de sécurité à sa 4691e séance, le 24 janvier 2003, doc. S/RES/1457(2003), par. 15.

[346] *Ibid.*, par. 17.

[347] Uganda's Governement White Paper on the Report of Judicial Commission on Inquiry into Allegations of Illegal Exploitation of Natural Resources and other Forms of Wealth in the DRC 2001 (ICJ, Submission by the Republic of Uganda of new documents in accordance with article 43 of the Statute and article 56 of the Rules of the Court, 20 October 2003). Voir aussi CR 2005/6, p. 13-14 (Makubuya).

30. Comme l'Ouganda l'a indiqué dans sa réponse à la question nº 7 posée par la Cour l'an dernier, ces poursuites, après avoir semblé aboutir, se sont heurtées à des obstacles de nature juridique qui n'ont pu être surmontés que par l'adoption d'une nouvelle loi en 2005. Mais, du fait du principe fondamental de la non-rétroactivité de la loi pénale, cette loi est inapplicable aux faits antérieurs à son adoption[348]. Les suspects convaincus d'être les auteurs des crimes dont ils étaient accusés ont été systématiquement exclus de l'armée ougandaise[349] — ce qui répond largement à la demande de la RDC, telle qu'elle était formulée dans son mémoire visant à demander à la Cour d'ordonner à l'Ouganda de procéder à des sanctions *disciplinaires*[350].

31. J'ajoute qu'en invoquant cet argument, l'Ouganda ne cherche pas à s'abriter derrière les insuffisances supposées de sa législation ou à «justifier des violations du droit international par l'application de son droit interne», comme M. Mingashang voudrait le faire croire[351]. Le principe de la non-rétroactivité de la loi pénale n'est pas seulement une règle de droit ougandais, c'est un principe général de droit très largement reconnu dans les instruments de protection des droits humains les plus solennels, la Déclaration universelle de 1948[352] ou le Pacte de 1966 relatif aux droits civils et politiques[353] notamment, et aussi dans les conventions régionales — la Charte africaine des droits de l'homme et des peuples en son article 7, paragraphe 2, ou les conventions européenne~~s~~ et interaméricaine~~s~~[354]. Qualifié d'«absolu» par certaines cours régionales[355], ce principe peut sans doute prétendre à la qualité de norme de *jus cogens*. Et je ne pense pas que l'éminent juriste congolais qu'est M. Mingashang me contredira sur ce point. L'article premier du Code pénal de la RDC concerne précisément la non-rétroactivité de la loi pénale.

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[348] Réponse de l'Ouganda aux questions posées par la Cour, p. 6-7.

[349] Voir, par exemple, Uganda Peoples' Defence Forces, Directorate of Records, *Discharge of RA 134917 PTE Okello Otono Tonny* (14 October 2004), réponse de l'Ouganda aux questions posées par la Cour, annexe S-9.

[350] Mémoire de la RDC (2000), p. 275 ; voir aussi réplique de la RDC (2002), p. 398.

[351] CR 2021/6, p. 60, par. 6 (Mingashang).

[352] Déclaration universelle des droits de l'homme, art. 11, par. 2.

[353] Pacte international relatif aux droits civils et politiques, art. 15, par. 1.

[354] Convention européenne des droits de l'homme, art. 7, par. 1. ; voir aussi l'article 9 de la convention interaméricaine.

[355] CEDH, *M. c. Allemagne*, requête nº 19359/05, 10 mai 2010, par. 134 ; Cour de justice de la CEDEAO, *Hissein Habré c. République du Sénégal*, nº EXW/CCJ/JUD/06/10, 10 novembre 2010, par. 58 et 61.

32. Et il faut noter un dernier élément, Madame la présidente. Dans sa réponse embarrassée à la même question n° 7, que la Cour avait adressée aux deux Parties, la RDC se montre également, pour sa part, incapable de faire état de poursuites systématiques contre les personnes accusées de violations du droit international humanitaire. Comme nous l'avons souligné dans nos commentaires sur les réponses congolaises[356], ce n'est que dans des circonstances très exceptionnelles qu'elle en a engagé (alors même que son droit interne n'y fait pas obstacle). Faut-il lui jeter la pierre ? Dans l'abstrait, assurément oui : comme je l'ai dit, l'Ouganda est fermement convaincu que de telles violations doivent être punies sans faiblesse. Concrètement, force est cependant de reconnaître que, compte tenu des circonstances politiques, des tensions ethniques, des problèmes de financement, ce manquement, à moitié avoué par la RDC, ne doit sans doute pas être condamné sans nuance. Ce qui vaut pour la RDC vaut aussi pour l'Ouganda. Il serait regrettable que la Cour ne tienne pas compte de ces éléments et qu'elle condamne l'un sans condamner l'autre : *in pari causa turpitudinis cessat repetitio*.

33. En bref, Mesdames et Messieurs les juges, il nous semble que, certes, la République démocratique du Congo peut prétendre à une satisfaction pour certains préjudices immatériels qui ont résulté de faits internationalement illicites constatés par la Cour dans son arrêt de 2005. Mais ces constatations constituent, en elles-mêmes, la satisfaction équitable à laquelle a droit la RDC sans qu'il soit possible d'aller plus loin. Vous ne sauriez admettre un cumul de réparations financières pour les mêmes dommages qualifiés à la fois de matériels et de moraux.

34. Madame la présidente, Mesdames et Messieurs les juges, ceci clôt ma plaidoirie ; je vous remercie de l'avoir écoutée avec votre bienveillance habituelle. Et ceci met fin, du même coup, au premier tour des plaidoiries de la République d'Ouganda.

The PRESIDENT: I thank Professor Pellet, whose statement brings to an end the first round of oral argument of Uganda. The Court will meet again tomorrow, at 3 p.m., for the first of two sessions of questioning of the Court-appointed experts. The sitting is adjourned.

The Court rose at 5.55 p.m.

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[356] Observations de l'Ouganda sur la réponse de la RDC, p. 117-121.