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Cour internationale de Justice

LA HAYE

International Court of Justice

THE HAGUE

ANNÉE 2021

Audience publique

tenue le vendredi 30 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 Friday 30 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 now open. The Court meets today to hear the second round of oral argument of Uganda. I now call on Professor Sean Murphy. You have the floor, Professor Murphy.

Mr. MURPHY:

THE DRC WAS EXPECTED, BUT HAS FAILED, TO PRESENT CONVINCING EVIDENCE OF ITS EXACT INJURY; INTERNATIONAL CLAIMS PRACTICE CONCERNING WAR DOES NOT SUPPORT THE DRC

I. Uganda's position is not that the DRC has suffered no loss, but that the DRC has failed to prove the exact injury suffered from Uganda's unlawful acts

1. Thank you, Madam President. On Wednesday, counsel for the DRC said, repeatedly[1], that Uganda's position is that the DRC incurred no losses from the unlawful acts of Uganda that were identified in the 2005 Judgment. Uganda, however, has never said that the DRC ***has*** incurred no loss. Indeed, we accept that losses in fact occurred. I myself noted last week that the *dispositif* of the 2005 Judgment stated that there was loss in the form of destruction of villages and civilian buildings. Such a finding is *res judicata*, and Uganda has never said otherwise.

II. The DRC's was expected, but has failed, to present convincing evidence of its exact injury

2. At the same time, it is inescapable that the findings in the *dispositif* were general in nature; they did not identify the exact injury that occurred. Rather, the Court stated in paragraph 260 of the Judgment that, at this reparations phase, "the nature, form and amount of the reparation due to" the DRC would be determined[2]. Moreover, the Court said that the "DRC would thus be given the opportunity to demonstrate and prove the exact injury that was suffered as a result of specific actions of Uganda constituting internationally wrongful acts for which it is responsible"[3]. I emphasize that the Court did not say Uganda must prove such loss, nor that Uganda had a duty to co-operate with the DRC to prove the DRC's losses, as was urged on Wednesday[4]. Rather, the Court said that the DRC must prove the loss. And the Court's approach makes sense: these events took place entirely in

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[1] See e.g. CR 2021/11, pp. 12-13, para. 3 (Forteau) and p. 29, para. 3 (Corten).

[2] *Armed Activities (2005)*, p. 257, para. 260.

[3] *Ibid*.

[4] CR 2021/11, pp. 20-21, para. 6 (Sands).

the territory of the DRC, not in Uganda. In the aftermath of the war, it was for the DRC, who was in the position to gather evidence on reparations, to do so — not Uganda.

3. The question now before the Court is whether *the DRC* has discharged ~~***this***~~ ***that*** burden. Uganda submits that, for the most part, the DRC has failed to do so, and certainly has failed to prove losses in the amount of US$11.4 billion, which now appears to be the DRC's claim, given the submissions it made on Wednesday[5]. I say that the DRC "for the most part" has failed to prove its losses because the Court can look to some credible evidence before it, notably the carefully compiled and thorough UN Mapping Report, which does identify some situations where there was reason to believe that Uganda was responsible for specific loss. Indeed, when the DRC itself sought on Wednesday to "illustrate" a harm, it typically relied on the UN Mapping Report for that purpose[6]. Further, where such loss is actually proven, the Court might further conclude that such a loss should entail compensation commensurate with levels of compensation paid under the law of the DRC for like harms.

4. But what the Court should not do is go down the path urged by counsel for the DRC, whereby this Court becomes not a court of law, but a court of guesswork and of conjuncture: where a lack of evidence does not really matter; where the quality of evidence is irrelevant; or where multipliers and percentages may be arbitrarily selected based simply upon instinct. That has not previously been the path of this Court, nor the path of other tribunals, including those focused on losses associated with an international armed conflict.

5. Counsel for the DRC spent considerable time on Wednesday asserting that the Court *must* award compensation[7]. What counsel did not do is to address, let alone resolve, all the defects in its evidence that were pointed out by Uganda in the first round. Allow me to take just one example of the problem that the DRC faces and that, unfortunately, the Court now the faces. We pointed out in the first round that there is no evidence whatsoever supporting the DRC's assertion that 8,693 houses were destroyed in Ituri from 1998 to 2003; there simply is no evidence supporting that number[8]. On

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[5] CR 2021/11, pp. 78-80, para. 15 (Kakhozi).

[6] See e.g. CR 2021/11, p. 35, para. 19 (Corten); pp. 41-45, paras. 12, 16 and 25 (Ubéda-Saillard); p. 64, paras. 24-25 (Segihobe).

[7] CR 2021/11, p. 19, para. 2 (Sands).

[8] CR 2021/8, p. 39, para. 7 (Murphy); see Counter-Memorial of Uganda (2018), para. 7.20; Memorial of the DRC (2016), para. 3.45 *(c)*.

Wednesday, counsel for the DRC identified no evidence supporting that number. So there you have it: there is no evidence before the Court supporting the DRC's claim that 8,693 houses were destroyed in Ituri.

6. Instead of focusing on the DRC's own evidence, counsel for the DRC pivoted and instead invoked the Experts' Report as a basis for the Court to decide compensation in this case. But that then requires asking: "What evidence are the experts looking at?" The mere fact that the Court appointed experts cannot mean, as the DRC would apparently have it[9], that those experts may descend *deus ex machina* at the end of these proceedings, so as to abruptly resolve an unsolvable problem in the plot. Indeed, the experts themselves were quite humble in noting that they were simply offering their opinions — which the Court could choose to ignore[10] — and, thus, that their conclusions must be scrutinized, evaluated and only accepted by the Court if they are convincing.

7. In the case of the number of houses destroyed in Ituri, Mr. Senogles did not uncover any evidence on his own. Instead, he looked only at the DRC's evidence so as to arrive at his preferred number, which differed from that of the DRC[11]. He said in the December Experts Report that he looked at the summary table[12] that you see on the screen. He added up the three numbers that you see here. That is how Mr. Senogles arrived at the number of houses in Ituri — a single page, produced by the DRC in an unsigned summary table, with three numbers on it. There was no reliance on photographs of destroyed houses; no reliance on statements of persons whose houses were destroyed; no reliance on statements of local leaders or government officials about what happened to houses in Ituri; no reliance on a post-war survey of houses destroyed in Ituri. There could be no such reliance by Mr. Senogles, because there is no such evidence in the record, even though it is not so difficult to gather such evidence, even in remote areas.

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[9] CR 2021/11, p. 20, para. 4 (Sands).

[10] See e.g. CR 2021/10, p. 15 (Senogles).

[11] Experts' Report (2020), para. 148 and fn. 75.

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

8. In the March 2021 Experts' Response, Mr. Senogles says he also looked at a sub-annex containing a further unsigned list of losses[13]. But if you go to that list[14], which is also vague and unsubstantiated, it does not provide any support for those three numbers that you just saw on the screen. As we pointed out last week[15], the numbers just do not add up. And yet, based on this information alone, Mr. Senogles declared how many houses he believed were destroyed in Ituri. With all due respect, this approach seems rather analogous to "the mere placing of a finger in the air" to determine the speed and direction of the wind[16].

III. The Court's jurisprudence requires proof of exact injury, proof that it was caused by the Respondent, and proof of valuation

9. Ultimately, the DRC's strategy to overcome this dilemma of having virtually no evidence is to implore the Court to set aside the standards of its jurisprudence regarding reparations, and to ignore the standards used by other international tribunals, all because the DRC was grievously harmed. The DRC was harmed, of that there is no doubt. But that fact alone is not a basis for discarding the legal standards applicable when awarding compensation.

10. The Court's basic jurisprudence on reparations is clear. In the *Diallo* case, the mere fact that, in 2007, the Court found the DRC to have violated international law under various headings did not release Guinea from the burden of proving its loss, damage or injury at the reparations phase. To the contrary, for each head of damage, the Court required proof at the reparations phase of, *first*, whether an injury was established and, *second*, whether there was a sufficiently direct and certain causal nexus between that injury and Guinea's wrongful act[17]. Where Guinea failed to prove these elements, no compensation was awarded, notwithstanding the existence of the liability findings.

11. Similarly, in the case on *Certain Activities Carried Out by Nicaragua in the Border Area*, the Court stated at the reparations phase that it must ascertain whether, and to what extent, each of the various heads of damage claimed by Costa Rica could be established, and whether they were the

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[13] Experts' Responses to the Parties (2021), p. 26, para. 90.

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

[15] CR 2021/8, p. 39, para. 10 (Murphy).

[16] CR 2021/11, p. 27, para. 26 (Sands).

[17] *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012 (I)*, pp. 331-332, para. 14.

consequence of wrongful conduct by Nicaragua that had been determined at the merits phase[18]. Again, if those elements were not proven, no compensation was awarded.

12. The DRC apparently believes that such standards only apply when an "individual" is being compensated[19], and do not apply in a situation of armed conflict or of widespread loss. Yet in a situation where one State is demanding more than US$11 billion in compensation from another State, there is all the more reason to apply such standards. Alleging widespread loss and massive compensation simply cannot be a basis for avoiding the generally applicable evidentiary rules.

IV. The UNCC expected each claimant to prove his or her injury

13. Moreover, other international tribunals faced with a situation of armed conflict and widespread loss have not abandoned such standards.

14. Consider the experience of the United Nations Compensation Commission, which was entirely a reparations-phase process. The fact that Iraq had occupied Kuwait did not place any burden of proof on Iraq before the UNCC to prove the losses it had caused. Nor was Iraq viewed as having an obligation to co-operate with the UNCC, or with the countries appearing before the UNCC, in bringing forward evidence of such loss. To the contrary, it was for the claimants to prove their loss, damage or injury, with the assistance of their governments.

15. In his response to the Parties' comments[20], and in his answers on Monday[21], Mr. Senogles indicated that the fixed amounts of compensation under the UNCC's Category B might be an appropriate standard to be used by this Court in this case. Category B was established by the UNCC so as to allow claimants to present simple documentation and thereby receive fixed amounts of compensation — rather than actual amounts — for personal injury or death[22]. There were two

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[18] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Compensation, Judgment, I.C.J. Reports 2018 (I)*, p. 26, para. 32.

[19] CR 2021/11, p. 21, para. 6 (Sands).

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

[21] CR 2021/10, p. 28 (Senogles).

[22] UNCC Governing Council, *First Session of the Governing Council of the United Nations Compensation Commission*, doc. S/AC.26/1991/1, 2 Aug. 1991, p. 3, para. 12.

amounts: there was a fixed amount of US$2,500 that might be awarded to an individual and there was a maximum fixed amount of US$10,000 that might be awarded to an entire family unit[23].

16. Even in this Category B, the UNCC required evidence from the claimant, who had to prove, *first*, evidence of the fact of the death, *second*, proof of the family relationship between the claimant and the deceased, and *third*, proof of causation, meaning evidence of the link of the death to the invasion and occupation of Kuwait[24]. No compensation was awarded unless such evidence was provided. So, the DRC is asking the Court to award compensation in circumstances that would *not* have led to compensation under Category B, even with its simplified procedures.

17. UNCC Category C also featured in the discussion this week, because this is where Mr. Senogles found his preferred amount of compensation of US$30,000 per loss of life for "deliberate deaths"[25]. Several points may be made in this regard. *First*, the UNCC established Category C so as to allow claimants to file claims for their *actual and proven* amount of loss. As such, Category C required claimants to present evidence *additional* to that required in Category B, which could then lead to compensation for actual, specific loss. *Second*, Mr. Senogles selected the figure of US$30,000 from a particular type of loss in Category C, specifically mental pain and anguish. That type of loss, however, had to be *proved* by demonstrating the existence of what were called "modifying factors"[26]. *Third*, if a claimant was properly in Category C, there was a minimum amount of compensation of US$5,000[27]. This amount could be increased upon proving one or more of the "modifying factors" for mental pain and anguish, but only to a ceiling of US$15,000 for an individual. If multiple family members were seeking such compensation, it was capped at a ceiling of US$30,000[28]. *Fourth*, Mr. Senogles admitted under examination that he did not know about the

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[23] UNCC Governing Council, *First Session of the Governing Council of the United Nations Compensation Commission*, doc. S/AC.26/1991/1, 2 Aug. 1991, p. 3, paras. 12-13.

[24] UNCC, *Recommendations Made by the Panel of Commissions Concerning Individual Claims for Serious Personal Injury or Death (Category "B" Claims)*, doc. S/AC.26/1994/1, 26 May 1994, p. 39.

[25] CR 2021/10, p. 27 (Senogles).

[26] UNCC, *Report and Recommendations Made by the Panel of Commissioners Concerning the First Instalment of Individual Claims for Damages up to US$100,000 (Category "C" Claims)*, doc. S/AC/26/1994/3, 21 Dec. 1994, pp. 263-264.

[27] UNCC, *Report and Recommendations made by the Panel of Commissioners Concerning the First Instalment of Individual Claims for Damages up to US$100,000 (Category "C" Claims)*, doc. S/AC.26/1994/3, 21 Dec. 1994, p. 263.

[28] UNCC, *Report and Recommendations made by the Panel of Commissioners Concerning the First Instalment of Individual Claims for Damages up to US$100,000 (Category "C" Claims),* doc. S/AC.26/1994/3, 21 Dec. 1994), p. 120.

need to prove modifying factors in Category C[29]. He was also unable to explain why he chose the ceiling for a family unit rather than the ceiling for an individual, other than his personal view that it was "more appropriate"[30].

18. Madam President, no amount of money can replace a human life. But if we are to draw guidance from the UNCC, Category B claims are the reference to use, given the dearth of evidence before you in this case.

19. With respect to the types of evidence available despite Iraq's invasion and occupation of Kuwait, Mr. Senogles emphasized that "there was a recognized breakdown of civil order" in Kuwait "after 2 August 1990 because of the Iraqi occupation" and "therefore . . . institutional structures were disrupted"[31]. He went on to say that "normal evidentiary standards [were] relaxed somewhat to take into account the reality faced by the claimants in the jurisdiction at [that] time"[32]. But he was also candid in admitting that he did not actually know what level or types of evidence were required and presented before the UNCC for Category B and C claims[33]. Notwithstanding the fact of an international armed conflict, of an invasion, of an occupation of territory, claimants before the UNCC submitted identity cards, family registration records, death declarations, death certificates and burial certificates; indeed, even in Category B — the lower level of evidence of Category B — a majority of the claimants submitted statements about what happened to them[34]. According to the "First Instalment Report" for Category B: "Nearly all the claims for serious personal injury and death were supported by some form of proof"[35].

V. The EECC expected each State to prove its loss

20. The Eritrea-Ethiopia Claims Commission also featured in the discussion this week. In that regard, several points may be made in response to what has been said.

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[29] CR 2021/10, p. 27 (Senogles).

[30] CR 2021/10, p. 29 (Senogles).

[31] CR 2021/10, pp. 27-28 (Senogles).

[32] CR 2021/10, p. 28 (Senogles).

[33] CR 2021/10, p. 30 (Senogles).

[34] UNCC, *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, pp. 31-33.

[35] *Ibid.*, p. 33.

21. *First*, the situation that confronted the EECC has great similarity to what is now before the Court: it was a conflict on the same continent; it was in the same rough time frame, since the war lasted from 1998 to 2001; it had the same scenario of an invasion and lengthy occupation; and it entailed the same approach of deciding loss, damage or injury based on rules of international law.

22. *Second*, although Eritrea invaded and occupied Ethiopia for a lengthy period of time, no burden was placed on Eritrea to prove Ethiopia's losses. Nor was Eritrea expected by the Commission to co-operate in producing evidence in Ethiopia's favour.

23. *Third*, Ethiopia — perhaps informed by its own experience in submitting claims to the UNCC — sought just over US$5,000 per civilian death[36].

24. *Fourth*, due to Eritrea's violation of the *jus ad bellum*, Ethiopia claimed approximately US$205 million for the death of approximately 40,000 civilians[37]. In support of its claim, Ethiopia attempted to prove that there was a total of 54,000 "additional" civilian deaths in Ethiopia during the war by relying on World Bank data. Since that data did not distinguish by geographic location, Ethiopia then sought to "assign" deaths to the regions directly affected by the war based on relative population sizes of those regions[38]. The Commission rejected that broad-brush approach[39].

25. Instead, the Commission focused on evidence of *actual* deaths in particular places. For example, there was evidence specific to deaths from artillery fire, from shelling, from small arms fire to be found in the declarations submitted by Ethiopian officials from *weredas*, *kebeles* or *tabias*[40]. After carefully considering the accounts of these actual deaths in specific places, the Commission determined that the proven deaths on all three fronts of this three-year war was far lower than that claimed by Ethiopia. For all civilian deaths and injuries relating to the violation of the *jus ad bellum*, the Commission awarded to Ethiopia US$8.5 million[41].

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[36] Eritrea-Ethiopia Claims Commission, *Ethiopia's Damages Claims, Final Award, Decision of 17 August 2009*, in *RIAA*, Vol. XXVI (2009), pp. 733-734, para. 333.

[37] *Ibid.*

[38] Eritrea-Ethiopia Claims Commission, *Ethiopia's Damages Claims, Final Award, Decision of 17 August 2009*, in *RIAA*, Vol. XXVI (2009), p. 734, para. 335.

[39] *Ibid.*, p. 734, paras. 336-338.

[40] *Ibid.*, pp. 735-736, paras. 339-347.

[41] *Ibid.*, p. 737, para. 349.

26. Ethiopia also sought compensation for approximately 14,000 civilian deaths related to violations of the *jus in bello*, such as deliberate killings[42]. The Commission did not identify a specific amount that it awarded for such deaths, but after reviewing the specific evidence at hand, it concluded that "the reports and accounts of Ethiopian officials indicated that the total number of civilian deaths was far below the number Ethiopia now claims were intentionally killed"[43].

27. The EECC had a range of other types of claims before it, but time does not permit describing them in such detail. Were the Court to review the Commission's awards, however, it would reveal an extraordinary array of evidence presented to the Commission. This was done notwithstanding the difficulty of gathering such information in the aftermath of a war; notwithstanding it being a conflict between two African nations who had limited resources; and notwithstanding virtually all of the geographic areas at issue being relatively remote and rural.

28. The evidence before the EECC certainly was not perfect, and one can cherry-pick aspects of the Commission's awards where it acknowledges the limits of what can be expected. But the fact is that the parties presented to the Commission signed declarations by persons with personal knowledge of the events that transpired; presented oral testimony by fact witnesses, including by victims of violence; presented expert testimony; and presented extensive documentary evidence. And the fact is that when the Commission found a lack of evidence, it denied the claim.

29. But I do wish to address one aspect of the Commission's practice relating to property damage. As Professor Akande will soon discuss, Mr. Senogles quite rightly concluded that the DRC's evidence on property loss was pretty much deficient across the board. But to get around that, Mr. Senogles decided to deploy what he calls "evidentiary discount factors". When criticized about this by both Parties, he asserted that he was following the approach of the EECC[44], which he confirmed again on Monday[45].

30. Yet, Madam President, the Commission never used "evidentiary discount factors" and the examples Mr. Senogles points to do not reveal any such use. I asked him on Monday about

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[42] Eritrea-Ethiopia Claims Commission, *Ethiopia's Damages Claims, Final Award, Decision of 17 August 2009*, in *RIAA*, Vol. XXVI (2009), pp. 672-673, para. 95.

[43] *Ibid.*, p. 673, para. 97.

[44] Experts' Responses to the Parties (2021), para. 82.

[45] CR 2021/10, p. 35 (Senogles).

paragraph 82 of the Experts' Response[46]. You see it now on your screen. In that paragraph, Mr. Senogles points as an example to paragraph 144 of the Final Award on Ethiopia's Damages Claims, supposedly to support the use of evidentiary discount factors. Notice the final sentence of paragraph 144, where the EECC refers to 75 per cent. There are two problems with viewing this percentage as an "evidentiary discount factor".

31. The first problem is that Mr. Senogles admitted that he was not aware of the extensive evidence before the Commission concerning the destruction of Zalambessa[47]. In fact, Ethiopia proved to the Commission that the town was shelled, occupied and then largely destroyed by Eritrean military forces ~~***after***~~ ***when*** they invaded in May 1998. To do it, Ethiopia presented ground-level photography of the damage to the city. Ethiopia presented commercially available aerial photography of the damage to the city. Both sides presented sworn affidavits by public works officials, military officers or residents regarding the damage. Ethiopia presented a post-war study completed by the Tigray Emergency Recovery Programme. Ethiopia presented an extensive and detailed post-war engineering study prepared by the Tigray Works and Urban Development Bureau, which the Commission found especially probative as to valuation[48]. So, the fact of the town's destruction *was proven* to the Commission; there was no issue of the evidence being weak or non-existent.

32. The second problem is that Mr. Senogles apparently thinks the 75 per cent referred to by the Commission was some kind of "discounting" downward of Ethiopia's claimed amount, supposedly based on a Commission belief that the property loss had not been fully proven[49]. But you can plainly see here, at the end of paragraph 144, that the Commission was saying that, *of the proven damage*, 75 per cent was a result of Eritrea's violation of the *jus in bello*. The Commission was not taking bad evidence and then arbitrarily applying a discount so as to determine the amount of the loss; the destruction of the town was fully proven, and the only question was how much of that destruction was proven to be the result of unlawful military acts. The same is true of the other

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[46] CR 2021/10, p. 36 (Senogles).

[47] CR 2021/10, pp. 36-37 (Senogles).

[48] Eritrea-Ethiopia Claims Commission, *Ethiopia's Central Front Claims, Partial Award, Ethiopia's Claim 2*, *Decision of 28 April 2004*, in *RIAA*, Vol. XXVI, pp. 180-182, paras. 71-73; *Ethiopia's Damages Claims, Final Award*, *Decision of 17 August 2009*, in *RIAA*, Vol. XXVI, pp. 683-686, paras. 137-145.

[49] CR 2021/10, p. 36 (Senogles).

paragraphs of the EECC's jurisprudence to which Mr. Senogles points, where in each instance the harm at issue was proven to have occurred.

33. Madam President, the DRC has repeatedly said that what must happen at this reparations phase is more in the nature of an art than a science[50]. It is true that, throughout its long history, the Court has always been called upon to exercise judgment, and in doing so there is always a measure of discretion. But that discretion must be anchored in facts and in law; it cannot be — it must not be — anchored in fragments of evidence, arbitrary multipliers and equally arbitrary discount factors, all designed to produce extraordinarily high levels of compensation.

34. Madam President, Members of the Court. I thank you for your attention. I ask that you now call upon Professor Akande to continue Uganda's presentation.

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

Mr. AKANDE:

APPLICATION OF THE EVIDENTIAL STANDARDS TO THE CONTEXT OF THE CONFLICTS IN THE DRC; ICC PRACTICE DOES NOT SUPPORT THE DRC; REPLY TO ARGUMENTS ON PROPERTY DAMAGE

1. Thank you, Madam President. In my presentation this afternoon I will address three issues. *First*, I will discuss the DRC's claim that Uganda proposes unrealistic standards with regard to the collection and presentation of evidence by the DRC. *Second*, I will provide a response to Judge Tomka's helpful question about the International Criminal Court's approach to the valuation of harm in the DRC in the context of the conflict that is now before the Court. *Third*, I will reply to some of the arguments that you heard on Wednesday with regard to DRC's claims for compensation for damage to property.

[50] See e.g. CR 2021/11, p. 20, para. 4 and p. 26, para. 24 (Sands).

I. With respect to the armed conflict in the DRC, Uganda has not proposed unrealistic standards with regard to the collection and presentation of evidence by the DRC

2. On Wednesday, counsel for the DRC suggested that the accepted standards with regard to what must be proved in order for a claim for compensation to succeed, do not apply, and could not possibly apply, in the context of the armed conflict in the DRC. Professor Murphy has just taken you through those standards, more generally, and has shown that other international tribunals have applied these standards even in the context of armed conflicts, indeed even with regard to a conflict on the African continent. However, you were told by counsel for the DRC that when Uganda urges you to simply follow international practice and to apply these standards in this case, it has "an abusively strict conception of proof"[51], indeed we were accused of having a "fastidious evidence syndrome"[52]. Even more colourful language was used to describe our very simple point that compensation can only be awarded where evidence is presented of the nature and extent of the loss; of causation of such loss by Uganda; and of valuation of the loss. You were told that, to require this of the DRC, is to "cross the Rubicon to reach the shores of Utopia"[53] — and to further mix metaphors, apparently applying these standards "takes us into cloud cuckoo land"[54]. What applies everywhere else could not possibly be applicable in the context of the DRC, could not possibly apply to the events in Ituri, Kisangani, Beni or Butembo[55], or could not possibly be applicable in the context of this particular armed conflict. Only Washington DC-based counsel could possibly require this.

3. Madam President, all of these protestations as to what it is possible to expect of the DRC flies in the face of the practice of the ICC when it has assessed reparations for victims in the DRC concerning the very conflicts raging in the DRC at the time. It flies in the face of the evidence that *those* victims have been able to produce to the ICC. As the ICC Trial Chamber noted in the *Katanga* case, DRC victims who have sought reparation in that Court have "finalized their applications for

[51] CR 2021/11, p. 37, para. 4 (Ubéda-Saillard).

[52] CR 2021/11, p. 60, para. 6 (Segihobe).

[53] CR 2021/11, p. 38, para. 6 (Ubéda-Saillard).

[54] CR 2021/11, p. 23, para. 12 (Sands).

[55] CR 2021/11, p. 60, para. 9 (Segihobe).

reparations with statements from witnesses, certificates of residence, habitation, family relationship and death, medical certificates and declarations of livestock ownership"[56].

4. It was suggested to you that, in the DRC, it is totally out of the question to produce death certificates. Yet, these victims who were largely from the village of Bogoro in Ituri, when they sought reparations for harm connected to the death of a relative, the Trial Chamber stated that the "Applicants have mostly presented death certificates and certificates of family relationship with the deceased"[57]. And as I showed you last Thursday, those seeking compensation for physical harm, for the most part, presented medical reports[58].

5. The DRC protests that the situation at the ICC is very different. They cannot, of course, deny that this is the same country, indeed the same region of the country, or that we are speaking of the same conflicts and the same time period. Instead, they say that the victims were not left alone when compiling such evidence for the ICC, but they were supported by that court's Victims and Witnesses Unit[59]. It is somewhat perplexing to listen to the suggestion that, although it *is* possible to gather the necessary evidence, DRC victims, in this case brought by the DRC, have not been given the necessary assistance by the Government and so instead, somehow, the burden shifts to Uganda.

6. The DRC emphasized Uganda's "duty of cooperation", but it is important to emphasize that Uganda has not been the occupying Power in Ituri since 2003, and never occupied other parts of the country. It is the DRC that has access to records in Ituri and elsewhere in the DRC.

7. It was also surprising to hear international counsel for the DRC suggest that the position in this case is different to that of the victims who claim reparation at the ICC, because those victims were aided by international counsel. You were also told that the situation at the ICC is different because the victims there are in the hundreds and not hundreds of thousands. First, it is precisely the claim that there are hundreds of thousands of victims that the DRC is called upon to prove in this case. Mere assertation does not prove it. Second, taking all the ICC cases together, it is not at all clear that we are talking about just hundreds. Third, and most importantly, this discussion of numbers

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[56] ICC, *Prosecutor* v. *Germain Katanga*, Case No. ICC-01/04-01/07, Reparations Order, ICC Trial Chamber II, 24 Mar. 2017, para. 55.

[57] ICC, *Prosecutor* v. *Germain Katanga*, Case No. ICC-01/04-01/07, Reparations Order, ICC Trial Chamber II, 24 Mar. 2017, para. 112.

[58] CR 2021/8, p. 29, para. 25 (Akande).

[59] CR 2021/11, p. 39, para. 8 (Ubéda-Saillard).

is somewhat beside the point. The question is this: what evidence is anyone who has been a victim of damage in the context of the conflicts in eastern Congo able to produce? The uniform answer of the DRC's counsel is: nothing or not much. However, and this is the point, ICC practice shows what is possible.

8. Members of the Court, it is not only ICC practice that shows that it is possible to produce the evidence that the DRC claims is not available in that country. Such evidence has been produced in the domestic courts of the DRC in the context of the conflicts that you are now called upon to deal with. The Court has several of these cases in the record before you.

9. Some examples. In 2010, the Military Garrison of Ituri-Bunia convicted a leader of the Front for Patriotic Resistance in Ituri (FRPI), a group on the other side of the conflict from Uganda, of several war crimes committed between 2002 and 2007[60]. In that case, the Congolese prosecutors were able to prove the killing of more than 1,200 people by Ngiti combatants of the FRPI through "official records drawn up by civil registrars", in which each victim was named, and which were verified by local officials[61]. Several corroborating witness statements provided the dates, location and circumstances of the combatants' acts of sexual violence, pillage of property and destruction of buildings[62].

10. In another case, in Equateur Province, the Mbandaka Military Court convicted 12 Congolese police officers in 2008 of the rape of 38 women and young girls in Waka and Lifumba in February 2006. The court awarded reparations to the victims, who presented the testimony of medical professionals and experts[63].

11. By contrast, in a 2011 case, the Kinshasa court rejected claims for reparations that were not supported "by physical or medical evidence of injury caused by the defendants", especially when

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[60] Tribunal Militaire de Garnison de Bunia, *Auditeur militaire supérieur et parties civiles c. Kakado Barnaba*, Judgment RP 071/09, 009/010 and 074/010, 9 July 2010; DRC Ann. 10.2 (12 Nov. 2018).

[61] Tribunal Militaire de Garnison de Bunia, *Auditeur militaire supérieur et parties civiles c. Kakado Barnaba*, Judgment RP 071/09, 009/010 and 074/010, 9 July 2010, p. 70, para. 70; DRC Ann. 10.2 (12 Nov. 2018).

[62] Tribunal Militaire de Garnison de Bunia, *Auditeur militaire supérieur et parties civiles c. Kakado Barnaba*, Judgment RP 071/09, 009/010 and 074/010, 9 July 2010, p. 70, para. 70, p. 83, para. 106, pp. 84-86, paras. 112, 116-119; DRC Ann. 10.2 (12 Nov. 2018).

[63] Tribunal Militaire de Garnison de Mbandaka, *Waka-Lifumba (MP et PC. c. Botuli)*, RP 134/2007, 18 Feb. 2007, p. 33; Counter-Memorial of Uganda (2018), Ann. 44.

victims "did not appear in person"[64]. This suggests that not only is this sort of evidence possible in Congolese domestic court practice, it is even required.

12. Members of the Court, Uganda is by no means suggesting that all victims should in all cases have medical records, death certificates or other official records provided by the State or some other institution. We simply say that it is possible to gather such evidence, and that the DRC should have produced as much of this evidence as could be collected concerning the harm and causation and valuation. It was indeed feasible and yet it has failed to do so.

13. Where there are gaps in obtaining particular types of evidence, other methods are available. You will have seen from the statement of the ICC Trial Chamber in the *Katanga* case — the one that I put up earlier — seen the variety of types of evidence that was produced and accepted. This included corroborating statements from witnesses. Indeed, counsel for the DRC explained to you on Wednesday that there is, in the practice of the DRC itself, the practice of allowing the use of witness statements as a substitute for official records. You were told that "the practice of proximity testimonies [is] commonly used in the DRC to prove the identity of individuals"[65]. But here the DRC fails to supply even such simple things as corroborating witness statements, or at a broader level, statements by local leaders about what happened in a particular place during the war. I am sure that one does not need paved roads to be able to obtain corroborating statements from one's neighbours and from eyewitnesses.

14. One point, in passing, about what is possible in the DRC. On Wednesday, counsel for the DRC told you about the victims' compensation fund, created by the DRC in December 2019 to provide reparation, including individual reparation, to the victims. However, if in our case it is not possible for the DRC Government to obtain evidence that will allow this Court to identify specific harms caused to specific victims, how can it be possible for the DRC in the years to come to identify victims for payments from its compensation fund? By the DRC's own account, it would appear that such victims cannot be identified and, if that is so, then no funds will be distributed to them.

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[64] Tribunal de Grande Instance de Kinshasa/Kalamu, *Kimbanguistes (MP et PC Kumba et consorts —MP et PC c. Mputu Muteba et consorts)*, RP 11.154/11.155/11.156, 17 Dec. 2011, p. 21; Counter-Memorial of Uganda (2018), Ann. 48.

[65] CR 2021/11, p. 40, para. 10 (Ubéda-Saillard).

II. Valuation of loss in DRC domestic courts: a response to Judge Tomka's question

15. Madam President, Members of the Court, I now turn to the second issue I wish to address. Judge Tomka asked a question about the ICC's approach in relation to valuation of harm in the *Ntaganda* case.

16. You will recall that the Court asked Mr. Senogles to answer the following question: "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?"[66] As Mr. Senogles admitted on Monday, he did not answer the Court's question[67]. He was not able to find support for the DRC's claimed numbers in the Congolese cases on the record, and he did not conduct his own research on the prevailing practice in the DRC[68].

17. In the *Ntaganda* case, the International Criminal Court also appointed independent experts, who did answer this Court's question. The ICC's appointed experts "relied on research on more than 50 recent cases in DRC courts, where perpetrators of war crimes and crimes against humanity were condemned to pay damages to victims, with awards in a number of cases applying a standardised amount of US$5,000"[69]. They also noted that rural victims in Ituri are familiar with a system of customary justice according to which "compensation [is] quantified by a specific number of cows, with loss of life being negotiated with a minimum of ten cows . . . with the value of a cow being between US$500 and US$600"[70]. So customary justice in Ituri, therefore, values a loss of life at a minimum of US$5,000. The ICC's experts also interviewed victims, who "mentioned different amounts they thought would be an appropriate financial reparation, ranging from US$1,000 to US$10,000"[71].

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

[67] CR 2021/10, p. 26 (Senogles).

[68] CR 2021/10, p. 26 (Senogles).

[69] ICC, *Prosecutor* v. *Bosco Ntaganda*, Case No. ICC-01/04-02/06, Reparations Order, Trial Chamber VI, 8 Mar. 2021, para. 237, citing ICC, Experts' Report on Reparation Presented to Trial Chamber VI, 29 Oct. 2020, para. 176, available at: https://www.icc-cpi.int/RelatedRecords/CR2020_05969.PDF.

[70] ICC, *Prosecutor* v. *Bosco Ntaganda*, Case No. ICC-01/04-02/06, Reparations Order, Trial Chamber VI, 8 Mar. 2021, para. 237, citing ICC, Expert Report on Reparations for Victims of Rape, Sexual Slavery and Attacks on Healthcare, Oct. 2020, para. 77, available at: https://www.icc-cpi.int/RelatedRecords/CR2020_05970.PDF.

[71] ICC, Experts' Report on Reparation Presented to Trial Chamber VI, 29 Oct. 2020, para. 178, available at: https://www.icc-cpi.int/RelatedRecords/CR2020_05969.PDF.

18. It is important to put the ICC's expert analysis about valuation of harms and losses in context. The ICC is charged with determining the criminal responsibility of individuals. However, when it deals with reparations, the standard that it applies with respect to what must be proven before compensation is awarded, is consistent with the practice of international tribunals dealing with claims against States. Thus, the ICC only awards reparation to victims who are able to prove their "identity, the harm suffered, and the causal link between the crime and the harm"[72]. Indeed, prior to the paragraphs that Judge Tomka pointed to on valuation, the ICC Trial Chamber in the *Ntaganda* case had carefully set out what must be proved in order for victims to be entitled to reparations. Uganda agrees with the DRC that the ICC — and I quote Ugandan counsel — "determines an 'appropriate' standard of proof and what is 'sufficient' on the basis of the specific circumstances of each case"[73]. But at the very minimum, the ICC requires victims to provide "a coherent and credible account" of the harms they suffered, at least through signed witness statements[74].

19. Uganda also agrees with the DRC that — again, quoting counsel — that "decisions handed down by its national courts . . . allow for the setting of amounts corresponding to Congolese living standards"[75]. In that regard, those decisions from the Congo help this Court to form an appreciation of local conditions with regard to losses. Again, Uganda agrees with the DRC that "the ICC's practice may indeed be a useful source of inspiration for standards of proof or for the calculation and actual awarding of compensation"[76].

20. However, Uganda cannot but fail to note that the amounts that the ICC's experts observe in domestic DRC court practice are lower for particular heads of loss, such as deaths, use of child soldiers and sexual violence, than the amounts that the DRC is seeking in this case. They are also lower than the amounts recommended by Mr. Senogles with respect to deaths and use of child soldiers.

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

[73] CR 2021/11, p. 23, para. 10 *(d)* (Sands); ICC, *Prosecutor* v. *Bosco Ntaganda*, Case No. ICC-01/04-02/06, Reparations Order, Trial Chamber VI, 8 Mar. 2021, paras. 67, 77, 139.

[74] ICC, *Prosecutor* v. *Bosco Ntaganda*, Case No. ICC-01/04-02/06, Reparations Order, Trial Chamber VI, 8 Mar. 2021, para. 139.

[75] CR 2021/11, p. 46, para. 28 (Ubéda-Saillard).

[76] CR 2021/11, p. 39, para. 8 (Ubéda-Saillard).

III. A reply to the arguments on damage to property

21. Madam President, permit me now to move to my third issue. I will now respond to some of the arguments of the DRC with respect to its claims for reparation for damage to property. The only possible conclusion with respect to the DRC's property claims is that there is no evidentiary basis to claim compensation. In the words of Mr. Senogles: the evidence submitted by the Applicant is "relatively poor"[77], "subject to uncertainties"[78], "not well supported"[79] and in some cases there was *even* "no practicable evidentiary basis on which to assess the claim amount put forward"[80].

22. It is true that the Court must assess evidence in light of the circumstances and characteristics of the case[81], however the claim that much of the property at issue in this case is on rural lands does not relieve the DRC of the burden of providing evidence. As I already indicated, at the ICC, victims produced residence certificates, habitation certificates and other documents of a similar kind. And with respect to proof of damage: Professor Murphy discussed this afternoon — in the similar context of the Eritrea-Ethiopia conflict — that *that* Claims Commission was furnished with engineering studies, building-by-building assessment of damaged structures, aerial and ground-level photography and affidavits by public works officials and residents. Nothing of the kind has been produced by the DRC. As Mr. Senogles said on Monday, the DRC "really could have done better"[82], and its failure to do so cannot now work to Uganda's disadvantage.

23. The DRC, aware of the paucity of evidence to prove specific harm to property, has now asked the Court to ignore the DRC's burden and to find that the existence of this injury and its causal link to Uganda was already decided in 2005[83].

24. This is plainly not true. Although the Court found Uganda was responsible for its internationally wrongful acts[84], the only property damage referred to in the *dispostif* was that

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[77] Experts' Responses to the Parties (2021), para. 72.

[78] Experts' Report on Reparations (2020), para. 156.

[79] *Ibid.*, para. 160.

[80] *Ibid.*, para. 162.

[81] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Compensation, Judgment, I.C.J. Reports 2018 (I)*, p. 31, para. 52.

[82] CR 2021/10, p. 38 (Senogles).

[83] CR 2021/11, p. 59, paras. 4-5 (Segihobe).

[84] *Armed Activities* (2005), pp. 280-281, para. 345 (1), (3) and (4).

Ugandan forces "destroyed villages and civilian buildings"[85]. The Court did not identify the specific damage resulting from those violations[86]. That was precisely the DRC's task in these proceedings, as Professor Murphy has explained.

25. Rather than emphasize its claim forms and summary tables, which are replete with defects, the DRC turns instead to the reports that the Court regarded as credible and convincing in making its decision on the merits[87], such as the MONUC Special Report[88] or the Inter-Agency Evaluation Mission to Kisangani[89]. However, these reports were not considered by the Court to determine an appropriate amount of compensation, but to decide whether or not Uganda breached its international obligations[90]. Whether they can serve as a basis to decide on compensation requires careful scrutiny and, as indicated by Mr. Martin on Thursday, those past reports have now been reviewed and assessed by the UN Mapping Report that did not exist in 2005.

26. Let us take one example. Professor Segihobe referred you to the events in Kisangani[91], where the Court in 2005 found that Uganda had breached its obligations under international human rights and humanitarian law[92]. The Court did not, however, make any reference to property damage in Kisangani in the *dispositif*[93], and in the text of its Judgment only briefly referred to the inter-agency evaluation mission to Kisangani[94]. Madam President, two things must be said about that report. First, none of its nine pages attributes responsibility to Uganda for the loss of property in Kisangani[95]. Indeed, the report identifies multiple actors fighting in Kisangani, including Rwanda, the DRC army, and rebel groups, for which Uganda is not responsible[96]. Second, the report's estimation of 4,000 damaged houses was not corroborated by any other source and is, in fact, contradicted by the other

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[85] *Armed Activities* (2005), p. 280, para. 345 (3).

[86] *Armed Activities* (2005); see also Counter-Memorial of Uganda (2018), para. 7.11.

[87] CR 2021/11, p. 59, para. 5 (Segihobe).

[88] CR 2021/11, p. 59, para. 5 (Segihobe), citing *Armed Activities* (2005), p. 239, para. 207.

[89] CR 2021/11, p. 62, para. 18 (Segihobe), citing Report of the Inter-Agency Evaluation Mission, doc. S/2000/1153, 4 Dec. 2000, paras. 15-16 (hereinafter, the "Inter-Agency Report"), Memorial of the DRC (2016), Ann. 4.24.

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

[91] CR 2021/11, p. 61, para. 14 (Segihobe).

[92] *Armed Activities* (2005), p. 280, para. 345 (2).

[93] *Armed Activities* (2005), pp. 279-282, para. 345; Counter-Memorial of Uganda (2018), para. 7.10.

[94] *Armed Activities* (2005), p. 240, para. 208.

[95] Inter-Agency Report, Memorial of the DRC (2016), Ann. 4.24; Counter-Memorial of Uganda (2018), para. 7.66.

[96] Inter-Agency Report, paras. 54-57, Memorial of the DRC (2016), Ann. 4.24.

sources submitted by the DRC, including the list in Annex 1.3 of the DRC's Memorial, which reports 1,341 lost houses[97], or the report of the NGO Groupe Lotus that described 456 affected houses[98].

27. Regarding the loss of property in Ituri, Professor Murphy identified last week the lack of evidence regarding both the quantity and the replacement cost of specific heads of damaged property in that locality. Professor Segihobe decided not to engage with these shortcomings, but pointed instead to the UN Mapping Report[99]. The UN Mapping Report, which took account and weighed the previous United Nations reports, expressly linked much of the damages to the UPC militiamen rebels and not to Uganda[100]. That same report did not repeat nor corroborate[101] the DRC's claim that 200 schools were destroyed[102].

28. In any case, Madam President, both the UN Mapping Report, and those that preceded it, estimate figures that are far more limited than the US$240 million the DRC is seeking for property damage before the Court[103].

29. Besides these reports, Professor Segihobe mentioned Annex 4.3 of the DRC's Memorial to strengthen the claims with regard to damage to property in Kisangani[104]. However, that annex contains nothing more that uncorroborated excerpts clipped from reports by DRC-based NGOs, linking the damage of 21 houses to Rwandan and Burundian troops[105]. Then, to support its position in Gemena, the DRC cites the book authored by the Congo Liberation Army's (MLC) leader Jean-Pierre Bemba, entitled *The Choice of Liberty*[106]. Yet Mr. Bemba insisted that it was he who was

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[97] Memorial of the DRC (2016), Ann. 1.3 ("Liste Biens Perdus et leurs fréquences KISANGANI.pdf").

[98] Groupe Lotus, Rapport sur la guerre de six jours à Kisangani, July 2000, p. 5, Memorial of the DRC (2016), Ann. 4.20.

[99] CR 2021/11, p. 64, paras. 24-25 (Segihobe) citing UN Mapping Report, Memorial of the DRC (2016), Ann. 1.4; Counter-Memorial of Uganda (2018), Ann. 25.

[100] UN Mapping Report, para. 414, Counter-Memorial of Uganda (2018), Ann. 25.

[101] UN Mapping Report, Counter-Memorial of Uganda (2018), Ann. 25 and Counter-Memorial of Uganda (2018), paras. 7.37-7.39.

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

[103] CR 2021/11, p. 78, para. 15 (1) *(a)* (Kakhozi).

[104] CR 2021/11, p. 63, para. 20 (Segihobe).

[105] Memorial of the DRC (2016), Ann. 4.3; Counter-Memorial of Uganda (2018), para. 7.63-7.64.

[106] CR 2021/11, p. 64, para. 26 (Segihobe).

in control of the military ventures, not Uganda[107]. Most importantly, the Court made clear in its 2005 Judgment that the MLC's conduct was not attributable to Uganda[108].

30. Madam President, in concluding, allow me to briefly refer to the DRC's claims regarding SNEL — the electricity company — for which it claims US$97.4 million[109]. On Wednesday, we still did not hear any explanation about the evidentiary flaws of the SNEL report, which according to Mr. Senogles provided "no detailed back-up calculations or underlying evidence"[110]. Indeed, it is hard to believe that a State entity experiencing a loss of US$97 million fails to record the matter at any point in time, except by means of a report hurriedly prepared and submitted on the eve of the filing of a Memorial before this Court. Moreover, if one looks for more specific information about such losses, it cannot be found. As much as Professor Segihobe tries to convince you, the United Nations inter-agency assessment mission never indicated that a SNEL power plant was "destroyed"[111], but rather said that it was "severely disrupted" — and said so without pointing to any Ugandan involvement[112].

31. Madam President that concludes my presentation this afternoon. I thank the judges for their kind attention. And I now invite you to call upon Mr. Martin to continue with our presentation.

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

Mr. MARTIN:

THE DRC'S CLAIMS CONCERNING THE NUMBER OF DEATHS REMAIN UNSUPPORTED

1. Madam President, distinguished Members of the Court, good afternoon. My task today, as it was last Thursday, is to respond to the DRC's claims concerning the number of deaths that Uganda

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[107] Jean-Pierre Bemba, *Le choix de la liberté* (2002), Memorial of the DRC (2016), Ann. 2.13; Counter-Memorial of Uganda (2018), paras. 7.145-7.147.

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

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

[110] Experts' Report (2020), para. 179.

[111] CR 2021/11, p. 65, para. 30 (Segihobe).

[112] Inter-Agency Report, para. 57, Memorial of the DRC (2016), Ann. 4.24; Counter-Memorial of Uganda (2018), para. 7.13.

allegedly caused during the conflict. As Professor Akande has already done so, I will *not* be addressing the issue of the amount of reparation due for each death.

2. Madam President, I am aware that this is a difficult subject. Talking about the death of a human being is not something to be done lightly. It is a heavy responsibility, a responsibility we take very seriously. I will do my best today to be as helpful to the Court as I can be within the limits imposed by time, but more significantly, the evidence in the case file.

3. My comments this afternoon will be divided into two core points. *First*, I will explain why the caricature of Uganda's argument you heard on Wednesday is incorrect, and that the number of deaths neutral sources suggest Uganda is responsible for is much, much lower than the number the DRC claims. *Second*, I will return to Dr. Guha-Sapir's report and underscore the reasons her conclusions are unreliable — a description I very much stand by for reasons I will explain.

4. On Wednesday, we heard both Professor Sands and Professor Ubéda-Saillard present obvious mischaracterizations of Uganda's argument concerning the number of deaths for which it is responsible. According to Professor Sands, "Uganda now persists in trying to argue that just 32 human beings were killed"[113]. And Professor Ubéda-Saillard invoked "the mythical figure of 32 civilian victims, to which Uganda clings as a last resort"[114].

5. But, of course, the figure 32 is not "mythical". It comes directly from Dr. Urdal's analysis of the UCDP dataset. Yes, it is cautious and no doubt an understatement, and we accept that. As Dr. Urdal made clear, however, the extent of the understatement is unknowable[115]. Perhaps an even more important figure that emerged from the Urdal report is one that the DRC dares not address — let alone refute. On his analysis of the data, Uganda was linked to just 0.22 per cent — that is, less than one quarter of one per cent — of the direct civilian deaths during the relevant period[116]. This is a far different picture of reality than the one the DRC has tried so hard to present to you. In contrast, the UCDP data links 9.7 per cent of the reported civilian deaths to the DRC military[117].

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[113] CR 2021/11, p. 24, para. 14 (Sands).

[114] CR 2021/11, p. 43, para. 16 (Ubéda-Saillard).

[115] CR 2021/9, p. 22 (Urdal).

[116] CR 2021/9, p. 26 (Urdal).

[117] Counter-Memorial of Uganda (2018), para. 5.68; Experts' Report (2020), para. 14.

6. In any event, I trust the Court heard what we actually argued last Thursday. We never said "just 32 human beings were killed"[118]. In fact, in an effort to be as helpful as we could to the Court, we acknowledged that there is a range of numbers available in the sources. But none of those numbers look anything like those claimed by the DRC. In addition to the UCDP, we also pointed to the ACLED dataset maintained at the University of Sussex, which suggests somewhat higher numbers of civilian deaths, ranging into the hundreds[119]. Perhaps most importantly, we also pointed to the United Nations Mapping Report, which suggests a figure of civilian deaths for which there is a reasonable suspicion that Uganda may be responsible of approximately 2,300[120].

7. As much time as counsel for the DRC spent lecturing us, and the Court, they spent curiously little time addressing the United Nations Mapping Report. Counsel for the DRC did mention it from time to time when they thought it helpful[121], but they entirely ignored the larger conclusions to be drawn from it with respect to the number of deaths.

8. This is plainly an intentional omission. Professor Murphy explained the importance of the 550-page United Nations Mapping Report last Thursday and I will not repeat those points now[122]. Suffice it to say that it is a distillation of all prior reporting, including United Nations reporting, that the 33-person mapping team deemed reliable. We explained this in our written pleadings[123]. The DRC has never challenged, and cannot challenge, this description. It is simple fact.

9. As I explained last Thursday, Uganda got the number 2,300 by going through the United Nations Mapping Report and logging every instance in which it directly or indirectly links one or more deaths to Uganda during the relevant period[124]. We even included a table of all such instances as Annex 110 to the Counter-Memorial[125]. And, for the avoidance of doubt, by our friends

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[118] CR 2021/11, p. 24, para. 14 (Sands).

[119] Counter-Memorial of Uganda (2018), paras. 5.69-5.71.

[120] CR 2021/8, p. 19, para. 47 (Martin); see also Counter-Memorial of Uganda (2018), Ann. 110; Counter-Memorial of Uganda (2018), para. 5.76.

[121] See e.g. CR 2021/11, p. 35, para. 19 (Corten); p. 41, para. 12 (Ubéda-Saillard); p. 43, para. 16 (Ubéda-Saillard); p. 45, para. 25 (Ubéda-Saillard).

[122] CR 2021/7, pp. 26-27, paras. 33-35 (Murphy).

[123] Counter-Memorial of Uganda (2018), paras. 3.94-3.97.

[124] CR 2021/8, p. 19, para. 47 (Martin).

[125] Counter-Memorial of Uganda (2018), Ann. 110.

on the other side, this specifically includes the numbers from Kisangani, about which we heard so much on Wednesday[126].

10. We did that over three years ago. Uganda submitted its Counter-Memorial in February 2018. Not once since, not in the first round of oral argument or in the second round, has the DRC challenged this exercise or our results. Surely, if it had a basis to criticize what Uganda has done, we would have heard about it. The fact that counsel for the DRC have nothing to say about the United Nations Mapping Report tells the Court all it needs to know.

11. On Wednesday, Professor Ubéda-Saillard attempted to buttress the DRC's numbers by reference to certain numbers stated in a different and earlier report mentioned in the 2005 Judgment[127]. That effort was for naught. In the first instance, the Court itself was not making findings of fact about the number of deaths; it was merely reproducing a quotation from the report[128]. Moreover, as I have said perhaps too many times already, the 2010 United Nations Mapping Report encompasses all those prior reports.

12. Now, perhaps the DRC thinks we are confusing direct and indirect deaths, and that 2,300 may be a reasonable estimate for the number of direct deaths, but that the number of indirect deaths is much higher. We very much understand the distinction the DRC is trying to make, but we do not accept it. That brings me to the second part of my presentation: the reasons Dr. Guha-Sapir's report cannot form the basis for any legal findings.

13. In the first instance, Professor d'Argent will explain shortly why the DRC cannot claim for indirect deaths as a matter of law. By definition, the causal connection is missing.

14. But on the facts, as I said last Thursday and Dr. Guha-Sapir confirmed on examination[129], the number of excess deaths she calculates disappears entirely if one uses the most recently updated mortality data from the United Nations Population Division. In particular, the United Nations Population Division data for the DRC indicates that the crude mortality rates dropped every year from 1997 to 2003[130]. You can see the numbers on the screen now. As I said, Dr. Guha-Sapir

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[126] Counter-Memorial of Uganda (2018), Ann. 110.

[127] CR 2021/11, pp. 42-43, para. 16 (Ubéda-Saillard).

[128] *Armed Activities* (2005), p. 240, para. 208

[129] CR 2021/9, p. 46 (Guha-Sapir).

[130] Written Observations of Uganda (2021), para. 38.

acknowledged that fact[131], she just prefers not to use the most recent data from a division of the United Nations. In that respect, I note that the World Bank does not share her preference and uses the most recently revised United Nations Population Division figures for crude death rate in the DRC in 1997 and all other years[132].

15. In any event, none of the reasons she offered for rejecting United Nations data stand up under scrutiny.

16. *First*, she said that "the UN Population Division statistic is a projection"[133]. With respect, that is not correct. The United Nations website makes crystal clear that the statistics for the *future* are "projections"[134]. The statistics for the past are *not*; they are "estimates" based on data[135].

17. *Second*, she said that the United Nations Population Division's statistics are "not really statistics drawn from data from the crowd"[136]. That is also incorrect. As the United Nations website explains, the Population Division's statistics are based on: (1) "population and housing censuses"; (2) "vital registration of births and deaths"; (3) "surveys, including demographic and health surveys"; (4) "official statistics reported to the Demographic Yearbook of the United Nations"; and (5) "population registers and other administrative sources on international migration statistics"[137].

18. *Third*, there also seemed to be some confusion about the source of the figure she used for the baseline crude death rate. Professor Sands in his questioning referred to it as the "UNICEF"[138] figure because it was taken from a 1999 UNICEF report. But as Uganda pointed out in its Observations[139], and Dr. Guha Sapir acknowledged[140], the 1999 UNICEF report actually took its

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[131] CR 2021/9, p. 46 (Guha-Sapir).

[132] World Bank, "Death rate, crude (per 1,000 people) — Congo, Dem. Rep.", available at https://data.worldbank.org/indicator/SP.DYN.CDRT.IN?end=2003&locations=CD&start=1997.

[133] CR 2021/9, p. 36 (Guha-Sapir); see also *ibid.*, pp. 37, 44, 45 (Guha-Sapir).

[134] United Nations, Department of Economic and Social Affairs, Population Dynamics, *Methodology of the United Nations Population Estimates and Projections*, available at https://population.un.org/wpp/Methodology/.

[135] *Ibid.*

[136] CR 2021/9, p. 36 (Guha-Sapir).

[137] United Nations, Department of Economic and Social Affairs, Population Dynamics, *Methodology of the United Nations Population Estimates and Projections*, available at https://population.un.org/wpp/Methodology/.

[138] CR 2021/9, p. 35 (Sands).

[139] Written Observations of Uganda (2021), para. 42.

[140] CR 2021/9, p. 43 (Guha-Sapir).

statistics from the United Nations Population Division. So, sometimes, apparently the United Nations Population Division numbers are okay and sometimes they are not?

19. Now, Dr. Guha-Sapir did go on to say: "UNICEF does use the UNDP *[sic]* numbers, but they adjust it to their own using their own methodology"[141]. How those adjustments are done, she did not say. UNICEF itself does not indicate that it adjusts such data. For example, the 1999 UNICEF report simply states: "Data for . . . crude birth and death rates . . . are part of the regular work on estimates and projections undertaken by the United Nations Population Division."[142] And in the corresponding section on data sources, it states "Crude death and birth rates — United Nations Population Division"[143].

20. And even if it were true that UNICEF adjusts the numbers according to its own methodology, Dr. Guha-Sapir did not provide any explanation for why any unquantified "adjustments" made by UNICEF, whose mandate is focused on children, are appropriate for this case.

21. *Fourth*, Uganda also finds it curious that Dr. Guha-Sapir chose to use a number published in 1999 rather than the most recent United Nations data. In her response to the Parties' observations, she stated that she did so because "I feel that this baseline more closely reflects the reality of the situation compared to projections made later"[144]. But, with great respect, that just does not make sense. The United Nations Population Division's 2019 statistics incorporate new information that the 1999 UNICEF report did not have. As the UN Population Division explains: "The preparation of each new revision of the official population estimates and projections of the United Nations involves . . . the incorporation of new information about the demography of each country or area of the world, involving in some cases a reassessment of [the past]"[145].

22. Despite relying on UN Population Division data for the baseline crude death rate, she chooses to use small-scale mortality surveys to approximate the posterior crude death rate. In her

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[141] CR 2021/9, p. 43 (Guha-Sapir).

[142] UNICEF, *The State of the World's Children 1999*, p. 92.

[143] *Ibid.*, p. 113.

[144] Experts' Responses to the Parties (2021), para. 27.

[145] United Nations, Department of Economic and Social Affairs, Population Division, *World Population Prospects 2019: Methodology of the United Nations population estimates and projections*, doc. ST/ESA/SER.A/425 (2019), available at https://population.un.org/wpp/Publications/Files/WPP2019_Methodology.pdf, p. 1.

response to the Parties' observations, she justified this choice by saying that United Nations figures "do not provide confidence intervals" whereas the surveys do[146]. We heard this again last Friday[147]. But, of course, the 1999 UNICEF report also does not provide any confidence intervals, so it is not clear why it is okay to use that number for half of her calculation.

23. It is also deeply unclear how you can mix and match numbers derived from two different methodologies to make a sound conclusion. I wish I could come up with something more creative than saying it is like comparing apples and oranges, but there you have it.

24. Dr. Guha-Sapir's choice of mortality surveys to estimate the posterior crude death rate is fraught with other difficulties, as she herself admitted under examination, she has recognized in her own writings[148].

25. She also seemed uncertain about the surveys she relied on. In our observations on her report, we explained that, of the 38 surveys she relied on, 33 were conducted by the International Rescue Committee (or IRC) and five by Médecins Sans Frontières (MSF)[149]. Although she did not contest this in her response to the Parties' observations, when asked to confirm this on Friday, she said that "there were 38 surveys of which 20 were undertaken by the CDC, six by Les Roberts and the IRC, five by the IRC, five by Michel Van Herp of MSF, and one by Coghlan"[150].

26. We stand by our prior statement. I would encourage the Members of the Court to examine Appendix 2.3 of her report and the sources listed there. There are 38 surveys listed, with each survey corresponding to one of four footnotes containing a total of five sources. The fourth source accounts for five surveys, all conducted by MSF. There is no dispute there. But Dr. Guha-Sapir appears to

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[146] Experts' Responses to the Parties (2021), para. 33.

[147] CR 2021/9, p. 36 (Guha-Sapir).

[148] CR 2021/9, pp. 47-48 (Guha-Sapir).

[149] Written Observations of Uganda (2021), para. 47.

[150] CR 2021/9, p. 47 (Guha-Sapir).

have overlooked the fact that the first, second, third and fifth sources — accounting for 33 of the 38 surveys — all report *exclusively* on IRC surveys[151].

27. In our written pleadings and again last Thursday, we also explained that there have been sustained, widespread critiques of the IRC's surveys[152]. I will not flog that dead horse any more now. I will simply note that even now, we have not heard any meaningful response, or really any response at all, from the DRC.

28. For all these reasons, and more, the DRC's excess mortality claim cannot stand up in this court of law. Rather, the Court should do what it has always done; focus on actual evidence of actual deaths of the kind I mentioned at the beginning of my intervention today.

29. Madam President, distinguished Members of the Court, that brings me to the end of my comments today. I thank you again for your kind attention. May I ask that you invite Mr. Parkhomenko to address you next, perhaps after the coffee break***?***

The PRESIDENT: I thank Mr. Martin. Before I invite the next speaker to take the floor, the Court will observe a coffee break of 10 minutes. The sitting is adjourned.

The sitting is adjourned from 4.25 p.m. to 4.40 p.m.

The PRESIDENT: Please be seated. The sitting is resumed, and I now give the floor to Mr. Yuri Parkhomenko. You have the floor.

Mr. PARKHOMENKO:

THE DRC FAILED TO REBUT UGANDA'S ARGUMENTS FOR WHY THE CLAIMS RELATING TO NATURAL RESOURCES ARE UNFOUNDED AND METHODOLOGICALLY FLAWED

1. Thank you, Madam President, and good afternoon. By the time the DRC reached the second round, its claim to compensation for the alleged illegal exploitation of natural resources changed

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[151] International Rescue Committee, *Mortality in Eastern DRC: Results from Five Mortality surveys by the IRC*, May 2000, p. 1, Ann. 50; Les Roberts, *International Rescue Committee Health Unit, Mortality in eastern Democratic Republic of the Congo: Results from 11 Surveys* (2001), cover page; Les Roberts et al., "Elevated Mortality Associated With Armed Conflict — Democratic Republic of Congo, 2002", *CDC Morbidity and Mortality Weekly Report* (2003) (emphasis added), available at https://www.cdc.gov/mmwr/preview/mmwrhtml/mm5220a3.htm; B. Coghlan, R. Brennan, et al., "Mortality in the Democratic Republic of Congo: a nationwide survey", *Lancet*, Vol. 367 (9504), 7 Jan. 2006, p. 44, Ann. 58.

[152] CR 2021/8, pp. 13-14, paras. 22-24; Counter-Memorial of Uganda (2018), paras. 5.27-5.42; Written Observations of Uganda (2021), para. 48.

from nearly US$3.5 billion to nearly US$1.1 billion. That alone suggests that this claim has a grave problem. Yet the central issue remains unchanged: the DRC has provided the Court *no* basis for which even this reduced number, any compensation, can be awarded.

I. The DRC failed to rebut Uganda's arguments

A. The DRC failed to rebut Uganda's arguments with respect to wildlife

2. Starting with wildlife, the DRC no longer claims nearly US$2.7 *billion* for the direct and indirect losses allegedly caused by Uganda to Congolese wildlife in four national parks[153]. On Wednesday, Professor Angelet started his presentation by effectively admitting what Uganda demonstrated: the DRC's claim to indirect losses amounting to US$1.6 billion is baseless[154]. Further, rather than claiming the remaining US$1.1 billion for direct losses, the DRC now claims only around US$681 million[155].

3. Reducing the claim for wildlife by 75 per cent does not make it more credible if it has no foundation in the first instance. And last week Uganda gave four main reasons for why the DRC's claims to direct losses are unfounded[156], to which Professor Angelet offered no meaningful response on Wednesday.

4. *First*, this enormous claim is based on one unsigned, undated, two-page summary table prepared by the government entity for the sole purpose of this litigation. In other words, two pages of paper in support of a 681-million-dollar claim.

5. *Second*, the DRC offers *no* evidence supporting the numbers alleged in the table. The total lack of evidence is especially striking, given that any DRC government entity must have documentation from the course of its day-to-day operations, from its reporting to other government authorities, or from studies or inventories of the national parks conducted prior to, during or after the armed conflict. Indeed, Professor Angelet stated that the Congolese Institute for Nature Conservation

[153] Memorial of Uganda (2016), paras. 8.101 and 8.102.

[154] CR 2021/11, p. 50, para. 3 (Angelet).

[155] CR 2021/11, p. 51, para. 8 (Angelet).

[156] CR 2021/8, pp. 56-58, para. 33 (Parkhomenko).

"collaborated with recognized foreign institutions"[157]. If evidence existed of a massive loss of wildlife in the DRC, it would have been readily available.

6. *Third*, the DRC has offered no proof that the animals in the table were in fact killed.

7. *Fourth*, the DRC has not shown that the allegedly killed animals were killed as a result of Uganda's wrongful conduct. All the DRC does is to quote some unsupported general allegations about the UPDF presence in some areas, and then the DRC leaps to a conclusion that losses in those areas were necessarily caused by Uganda[158]. We demonstrated this faulty logic by reference to the DRC's claims related to Garamba Park, because it was one of the two parks that the DRC mentioned in the first round of the oral hearings[159]. And the DRC repeats the same misconceived exercise for the other three parks[160]. Professor Angelet did it again on Wednesday, referring to Virunga and Okapi Parks[161].

8. Because Professor Angelet invited a response, let us look at the DRC's claims with respect to Okapi Park. In that park, the DRC alleges, based on the two-page summary table, that 1,000 antelopes, 2,000 elephants, 1,000 okapis and 2,000 chimpanzees were killed[162]. To prove the causal link for these very round numbers, the DRC relies, for example, on a single quote from the UNESCO report, which reads as follows:

> "During the civil war, [Okapi Park] was the front line between the warring parties. The breakdown in law and order during the [1990s] provided the opportunity for thousands of itinerant miners, as well as elements from the Ugandan army, to enter the forests of eastern DRC to extract timber and mine for gold, diamonds and coltan. Temporary mining camps composed of miners, their families, hunters, itinerant traders and other hangers-on appeared all over the forest. The effects on wildlife were devastating as the mining camps became centres for the commercial bushmeat and ivory trades."[163]

9. On this basis, the DRC claims that Uganda is responsible for 90 per cent of the alleged losses in Okapi Park[164]. The quoted statement is not supported by any evidence. But even if it were

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[157] CR 2021/11, p. 50, para. 4 (Angelet).

[158] See Counter-Memorial of Uganda (2018), paras. 8.118-8.129.

[159] CR 2021/8, p. 57, para. 33 (Parkhomenko).

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

[161] CR 2021/11, pp. 50-51, paras. 5-6 (Angelet).

[162] Memorial of the DRC (2016), paras. 5.125 *et seq.*

[163] UNESCO, *World Heritage in the Congo Basin*, Memorial of the DRC (2016), Ann. 5.16; see also Memorial of the DRC (2016), para. 5.128.

[164] Memorial of the DRC (2016), para. 5.169.

supported by evidence, it does not begin to establish the necessary causal nexus. Just because unspecified "elements from the Ugandan army" were allegedly present at an unknown time somewhere in Okapi Park, this does not mean that Uganda can be deemed responsible for totally unspecified alleged damages caused by various "warring parties", for "the breakdown in law and order during the [1990s]", for the "thousands of itinerant miners", "hunters", "itinerant traders" and "other hangers-on". This is especially so, given that the DRC has offered *no* other evidence linking any claimed loss in Okapi Park, or any other Congolese park, to specific wrongful acts attributable to Uganda.

10. In fact, an article co-published by Jean Mapilanga, a Congolese official from the Congolese Institute for Nature Conservation, demonstrates that the UPDF sought to prevent smuggling of wildlife in Okapi Park. Starting in 2000, the UPDF actually participated in a joint operation with the Congolese Institute for Nature Conservation, which was called "Operation Tango". During the joint operation, the UPDF worked with Congolese authorities to confiscate weapons and ammunition from smugglers[165]. According to Mr. Mapilanga, after five months of this co-operation, no new signs of poaching were found[166]. In addition, the UPDF trained newly deployed park guards to deal with elephant poaching[167].

11. For all the additional reasons elaborated in Uganda's written pleadings, the alleged direct losses to the Congolese wildlife are therefore entirely unproven[168]. This makes it unnecessary to discuss their valuation[169]. Nonetheless, to highlight the arbitrary nature of the DRC's claim, Uganda also demonstrated in its written pleadings[170] and last week[171] that the monetary values the DRC assigns to quantify compensation are unfounded and arbitrary. On Wednesday, Professor Angelet

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[165] L. Mubalama and J. J. Mapilanga, "Less Elephant Slaughter in the Okapi Faunal Reserve, Democratic Republic of Congo, with Operation Tango", *Pachyderm*, No. 31 (July-Dec. 2001), Counter-Memorial of Uganda, Ann. 80, p. 39.

[166] *Ibid.*.

[167] *Ibid.*, Counter-Memorial of Uganda, Ann. 80, p. 39; 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), Counter-Memorial of Uganda, Ann. 79, p. 79.

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

[169] *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012 (I)*, pp. 331-332, para. 14.

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

[171] CR 2021/8, pp. 59-60, paras. 40-42 (Parkhomenko).

did not even attempt to explain or justify any of those numbers, whether for elephants or mongooses or any other species.

12. In conclusion, the DRC has submitted no evidence on which the claimed compensation for wildlife can be awarded.

B. The DRC failed to rebut Uganda's arguments with respect to deforestation

13. The DRC also failed to rebut Uganda's arguments for why the DRC's claimed compensation for the alleged exploitation of Congolese timber are unproven.

14. On Wednesday, the DRC reiterated, as "its principal claim"[172], that it seeks US$100 million[173]. As Uganda pointed out in the first round, no evidence has ever been presented to support this number[174], and Professor Angelet pointed to no such evidence. As such, this claim must fail for the lack of proof.

15. I also note that this number was initially linked to the DRC's calculations based on the flawed DARA Forest "Case Study"[175]. We pointed out last week why those calculations were unsustainable[176]. On Wednesday, the DRC abandoned those calculations, effectively admitting that its original claim was based on the erroneous and unsupported allegations[177].

16. The DRC has now attempted to advance a new number amounting to nearly US$85.5 million[178]. This number also has no basis in evidence. Moreover, the DRC's theory for why it is entitled to this new amount is based on a faulty premise: the DRC says that because Uganda was an occupying ***p***ower in Ituri, it should be responsible for all timber exploitation in that area[179]. But this theory is inconsistent with the findings of the Porter Commission. The Porter Commission analysed the general allegation that Uganda exploited and exported Congolese timber. The Porter Commission found that allegation unproven. Indeed, the Commission concluded that *"[t]here is no*

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[172] CR 2021/11, p. 54, para. 14 (Angelet).

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

[174] CR 2021/8, p. 54, para. 27 (Parkhomenko).

[175] CR 2021/8, pp. 54-55, paras. 27-29; Counter-Memorial of Uganda (2018), paras. 8.155-8.164.

[176] CR 2021/8, pp. 54-55, paras. 27-29 (Parkhomenko).

[177] CR 2021/11, p. 52, para. 9 (Angelet).

[178] CR 2021/11, p. 54, para. 14 (Angelet).

[179] CR 2021/11, p. 53, para. 12 (Angelet).

evidence . . . that Uganda as a country or as a [g]overnment harvests timber in the Democratic Republic of Congo"[180]. Although timber was "smuggled through the porous borders"[181], the DRC offers no evidence that connects such smuggling or export of timber to specific wrongful acts of Uganda — and certainly no evidence that could justify its claimed amount.

17. The Porter Commission also analysed the general allegations that timber exploitation was directly related to the Ugandan presence in Orientale Province, and that Ugandan soldiers were involved in those activities. Again, the Porter Commission found that such allegations lacked proof. The Commission explained that the "UPDF presence in Orientale Province" only *"provided the security and access to overseas markets denied to the Congolese for so long"*[182].

18. The Porter Commission observed that "there [were] Ugandans who [went] over to the Congo and [bought] trees by negotiating with individual Congolese permit holders or Chiefs, and import[ed] the timber once cut to Uganda"[183]. But "this cross border trade", the Commission explained, "has been carried [out] throughout living memory", and there was nothing illegal about it[184]. The Porter Commission also confirmed that "large quantities of timber transit[ed] Uganda for export to Europe and America, in the *ordinary course of trade*", which is not linked to any wrongful acts of Uganda[185].

19. In conclusion, the DRC has submitted no evidence on which the claimed compensation for deforestation can be awarded.

C. The DRC failed to rebut Uganda's arguments with respect to mineral resources

20. I turn now to exploitation of mineral resources. Last week, Uganda demonstrated numerous flaws in the DRC's effort to prove this claim[186]. This past Monday, in the course of being examined, Dr. Nest also disagreed with some key propositions advanced by Professor Angelet. Unable to cure

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[180] 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)*, Counter-Memorial of Uganda (2016), Ann. 52 (hereinafter "Porter Commission Report"), p. 55, emphasis added.

[181] Porter Commission Report, p. 55, emphasis added.

[182] Porter Commission Report, pp. 61-62, emphasis added.

[183] Porter Commission Report, p. 56.

[184] Porter Commission Report, p. 56.

[185] Porter Commission Report, p. 56, emphasis added.

[186] CR 2021/8, pp. 49-54, paras. 8-26 (Parkhomenko).

the absence of evidence proving the extent of injury caused by Uganda under this head of damages, the DRC on Wednesday continued to press on with its misconceived claim. In response, allow me to make several observations.

21. *First*, the DRC maintains as part of this claim compensation amounts for tin, tungsten and coffee, as estimated by Dr. Nest[187]. However, at no point in these proceedings has the DRC claimed compensation for tin, tungsten and coffee. Nor has it proved any damages or provided any valuations with respect to these three resources. As such, these estimates by Dr. Nest must be disregarded because they are *ultra petita.* The rule of *non ultra petita* precludes awarding a party more than it requested[188].

22. *Second*, the DRC maintains that it has proven the damages to which it is entitled for this claim based solely on the brazen assumption that the difference between the production and export of minerals in Uganda from 1998 to 2003 shows the extent of Uganda's exploitation of natural resources[189]. As we explained last week, and in our written pleadings, there are three main reasons why that assumption is unsustainable[190]. On Wednesday Professor Angelet failed to rebut any of those three reasons. During examination, Dr. Nest conceded the problem with attributing such exploitation to Uganda. As regards the valuation of the alleged damages, Professor Angelet finally admitted, and I quote from page 45 of the examination transcript that: "the DRC cannot claim damages on the basis of the world market price[s], as it did in the Memorial"[191]. He attempted to justify a new claim that the valuation price of gold should be 95 per cent of the world price by reference to some field studies. But those field studies do not support this claim because they have nothing to do with Uganda or UPDF. They concern transactions of Congolese local dealers from 2007 to 2011. As such, the DRC's claim for compensation should be rejected.

23. *Third*, if the Court were to decide that the Nest Report offers an appropriate basis for compensation, the Court should, at minimum, account for three important problems in that report.

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[187] CR 2021/11, p. 58, para. 29 (Angelet).

[188] *Corfu Channel (United Kingdom* v. *Albania), Assessment of Amount of Compensation, Judgment, I.C.J. Reports 1949*, p. 249.

[189] CR 2021/11, pp. 54-56, paras. 17-22 (Angelet).

[190] CR 2021/8, pp. 53-54, paras. 23-25 (Parkhomenko).

[191] CR 2021/10, p. 45 (Angelet).

24. One problem concerns the link between an export surplus and illegal exploitation in the DRC. The Court should ignore Dr. Nest's calculations which are based on the unproven assumption that Uganda's exports surplus of natural resources necessarily originated in what he calls the "Ugandan area of influence" in the DRC[192]. Dr. Nest does this, for example, with respect to gold[193], coltan, tin, tungsten[194] and coffee[195]. Unlike the Liberian Truth and Reconciliation Commission, the Court does not have any evidence showing any link between the export of natural resources and their illegal exploitation[196]. The DRC offered none. And none can be found in the Nest Report, as Dr. Nest admitted[197].

25. Another problem concerns some of the estimates that form the key elements of Dr. Nest's methodology. The Court should treat with caution Dr. Nest's estimates that are not based on reliable evidence as to the actor, the actor's conduct, the amount of illegally exploited natural resources, and the value of those resources. This is justified by the legal authorities on which Dr. Nest relied but did not always follow. Consider, for example, Dr. Nest's estimate that up until June 2000, 75 per cent of the surplus exports of gold originated in the "Uganda Area of Influence", and thereafter 70 per cent originated from that area. Based on these percentages, Dr. Nest estimates that the total amount of gold smuggled from the Ugandan area of influence is more than 22 tonnes[198]. However, none of these percentages appear in the sources Dr. Nest mentions[199]. These are just his estimates, which unlike in the legal precedents he cites, are not informed by knowledge about the amounts exploited by a relevant actor. Indeed, many of his sources do not even attribute stated amounts of gold to Uganda's

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[192] Experts' Report on Reparations (2020), para. 229.

[193] *Ibid.*, para. 236.

[194] *Ibid.*, para. 241.

[195] *Ibid.*, para. 249.

[196] CR 2021/10, pp. 52-53 (Nest).

[197] CR 2021/10, p. 54 (Nest).

[198] Experts' Report (2020), p. 112, Table A4.5.1.2.

[199] CR 2021/10, p. 57 (Nest).

wrongful acts[200]. There is therefore no credible foundation to accept his estimated number of smuggled gold as the basis for calculations.

26. A third problem concerns the use of proxy taxes. The Court should also approach with caution the values of proxy taxes that Dr. Nest recommends, especially with respect to taxes on value in Ituri. As Dr. Nest recognized, many data set out in Annex 4 to his report[201], which he used "as a reference point" or "as a guide", fall outside the relevant time period and geographic area[202]. Moreover, nearly all of the data have no direct connection to Uganda or UPDF personnel, but rather refer to other States, the DRC and/or Congolese rebels. Taxes and levies collected by third parties cannot serve as a reliable basis on which to extrapolate proxy taxes allegedly levied by UPDF personnel. Indeed, only one entry among the sources cited by Dr. Nest vaguely refers to "Ugandan local commanders and some of the soldiers" and alleges a figure relating to the amount of gold exploited by "the local population"[203]. However, the Porter Commission observed that "the reconstituted Panel [gave] no account for [that] *inflationary figure*"[204]. And yet, it is on that inflationary figure that Dr. Nest apparently developed a proxy tax of 28 per cent which he recommends to apply as a tax on value of gold in Ituri[205].

II. Conclusion

27. Madam President, Members of the Court, the DRC knows that the Court made no findings about specific incidents of harm to natural resources. Pursuant to paragraph 260 of the 2005 Judgment, the DRC was expected to prove both the specific incidents of harm it suffered as a result of wrongful actions attributable to Uganda and its valuation. The DRC was also expected to

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[200] See e.g. Experts' Report on Reparations (2020), para. 232 (citing the *USGS Minerals Yearbook: Gold*, available at https://www.usgs.gov/centers/nmic/commodity-statistics-and-information), para. 233 (citing G. Mthembu-Salter, 2015*b*. "Baseline study three: Production, trade and export of gold in Orientale Province, Democratic Republic of Congo", 9th Multi-stakeholder forum on responsible mineral supply chains, held 4-6 May 2015, Paris, France, available at https://www.oecd.org/daf/inv/mne/Gold-Baseline-Study-3.pdf), para. 235 (citing S. Spittaels and F. Hilgert, 2013, Analysis of the interactive map of artisanal mining areas in Eastern DR Congo, Antwerp, International Peace Information Service).

[201] Experts' Report (2020), pp. 108-110, Ann. 4: Reported taxes on natural resources.

[202] CR 2021/10, p. 58 (Nest).

[203] Experts' Report (2020), p. 108, Ann. 4, citing to "(UNPE 2001a: §59)".

[204] Porter Commission Report, p. 161.

[205] Experts' Report (2020), p. 98, table 4.8: Tax range and adopted tax on value, p. 108 and Ann. 4.

present the kinds of evidence that you requested to enable the Court to determine the existence of injury, its extent and valuation.

28. The DRC has failed to discharge its burden of proof — certainly with respect to the exorbitant amounts it claims. The DRC cannot blame anyone that it finds itself in the same situation as Ethiopia did before the Eritrea-Ethiopia Claims Commission. Like here, Ethiopia sought "more than a billion U.S. dollars" for the alleged exploitation of natural resources. Like here, that "huge amount" suffered from "the lack of supporting evidence" left "unanswered questions regarding the [resources'] location[s]" and was infected with "manifold errors in calculating the claimed damages"[206]. The Commission dismissed that claim as unfounded. And the DRC has offered no reason why the same conclusion should not follow here.

29. Madam President, Members of the Court, this concludes my observations. I thank you for your attention and kindly ask you to invite Professor d'Argent to continue our presentation.

The PRESIDENT: I thank Mr. Parkhomenko, and I now give the floor to Professor Pierre d'Argent. You have the floor.

M. D'ARGENT :

CAUSALITE

1. Madame la présidente, Mesdames et Messieurs les juges, mercredi, vous avez entendu le professeur Forteau répéter que la causalité avait été réglée par votre arrêt sur le fond et, ensuite, vous avez entendu le professeur Corten vous expliquer comment, selon la RDC, les causes multiples devaient s'articuler entre elles dans les trois situations qu'il a décrites.

2. Madame la présidente, j'avais espéré ne pas devoir revenir sur le fait que votre arrêt de 2005 n'a rien décidé de spécifique en matière de causalité, mais puisque nos contradicteurs se sont enfoncés dans l'erreur consistant à dire que la «causalité a déjà été décidée»[207], j'y suis contraint.

3. Le professeur Forteau s'est livré à un exercice de lecture découpée des paragraphes 259 et 260 de votre arrêt pour soutenir que la phrase cruciale du paragraphe 260 aurait «un sens très

[206] Eritrea-Ethiopia Claims Commission, *Final Award on Ethiopia's Damages Claims, Decision of 17 August 2009*, paras. 421 and 425.

[207] CR 2021/11, p. 17, par. 16 *b)* (Forteau).

différent de celui [que l'Ouganda] lui prête»[208]. Il ne vous a pas vraiment éclairé sur ce sens particulier, différent des mots clairs que vous avez employés, mais puisque mon collègue a entendu «replacer» cette phrase essentielle «dans [son] contexte d'ensemble»[209], permettez-moi de rappeler très concrètement quel fut le contexte qui amena la Cour à se prononcer comme elle l'a fait.

4. Au paragraphe 1.11 de sa réplique sur le fond déposée en mai 2002, la RDC écrit :

> «Toutes les questions relatives aux conséquences de ce comportement illicite, qu'il s'agisse *d'établir* et de chiffrer un dommage causé par une attaque particulière, *ou de se prononcer sur le lien de causalité existant entre ce comportement et un dommage matériel spécifique*, sont en principe réservées pour un stade ultérieur de la procédure.»

Voici par ailleurs ce qu'a déclaré le professeur Salmon, conseil de la RDC, lors des audiences sur le fond :

> «La République démocratique du Congo ne conteste pas que pour déterminer l'étendue de la réparation, *il lui [reviendra]* de spécifier la nature du préjudice et *d'établir le lien causal* avec l'acte illicite initial.»[210]

Les mots du professeur Salmon ont été repris au paragraphe 258 de votre arrêt — que vous voyez à l'écran —, ce que le professeur Murphy a déjà rappelé jeudi dernier ; le professeur Murphy a aussi eu l'occasion d'attirer votre attention sur la déclaration du juge *ad hoc* Verhoeven, qui, comme vous le voyez aussi à l'écran, a également souligné qu'il reviendrait à la Cour de décider au stade où nous nous trouvons du lien de causalité rattachant chaque dommage dont la réparation est demandée à un acte du défendeur engageant sa responsabilité.

5. Voilà. Ce n'est donc pas l'Ouganda qui «dénature les termes» de votre arrêt ou voudrait «transformer la présente phase de l'instance en une procédure d'appel»[211] ; non, ce n'est pas l'Ouganda, c'est bien plutôt la RDC qui refuse obstinément de lire votre arrêt pour ce qu'il est, pour ce qu'elle a demandé qu'il soit, et qui refuse de s'y soumettre. La Cour n'a pas tranché la question centrale de toute phase indemnitaire que la RDC lui a, comme vous l'avez vu, explicitement demandé de reporter. A nouveau : la seule chose que la Cour a effectivement constatée, c'est que des dommages étaient évidemment survenus lors «des conflits»[212] qui ont déchiré la RDC et elle a décidé

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[208] CR 2021/11, p. 17, par. 16 *d)* (Forteau).

[209] CR 2021/11, p. 16, par. 16 (Forteau).

[210] CR 2005/5, p. 56, par. 20 (Salmon).

[211] CR 2021/11, p. 12, par. 2 ; p. 15, par. 13 (Forteau).

[212] Arrêt de 2005, p. 190, par. 26.

que la RDC avait en principe le droit d'obtenir réparation pour les dommages causés par l'Ouganda. Mais la Cour n'a en rien décidé que chaque dommage que la RDC vous présente aujourd'hui a été causé par l'Ouganda. Comment aurait-elle pu d'ailleurs le faire alors qu'à cette époque la RDC n'avait pas détaillé sa réclamation ?

6. Pour chaque préjudice postulé par la RDC, il y a donc lieu de respecter les trois étapes successives décrites par la Cour dans une autre affaire ayant opposé deux Etats africains dont la RDC, à savoir l'affaire *Diallo*[213]. Le professeur Murphy l'a rappelé ; ces étapes sont élémentaires, elles sont incontournables, et elles ont toutes été reportées à ce stade de la procédure. Aussi différente que soit l'affaire *Diallo* de celle qui nous occupe, les règles applicables et la méthodologie sont néanmoins les mêmes.

7. Le professeur Forteau soutient candidement que puisque la Cour n'a pas jugé nécessaire de se prononcer sur «chacun des incidents» allégués pour établir la responsabilité de l'Ouganda, «on ne voit pas [dit-il] pourquoi il devrait en aller différemment au stade de l'établissement du *quantum*»[214]. Mais la réponse est claire : tout simplement parce que c'est la RDC qui l'a demandé et que la Cour ne peut se prononcer sur le *quantum* qu'au sujet de dommages dont la réalité est établie et qui sont le résultat certain et direct d'une action ou d'une omission constituant l'un des faits internationalement illicites dont l'Ouganda est responsable selon le jugement de 2005.

8. Pour vous convaincre qu'à ce stade indemnitaire vous ne devriez pas vous préoccuper de ***la*** causalité, le professeur Forteau a encore distingué la présente instance de l'affaire *Bosnie c. Serbie* : la Cour ayant constaté l'absence de causalité dans l'arrêt de 2007 et n'ayant en conséquence pas ouvert de phase indemnitaire, le fait qu'une telle phase ultérieure a été réservée dans la présente affaire serait selon lui la preuve que, par contraste, la causalité aurait déjà été tranchée[215]. La RDC prend ici encore le prononcé très général de la Cour — selon lequel son droit à obtenir réparation était ouvert — pour beaucoup plus qu'il ne signifie car le droit du demandeur d'obtenir réparation n'existe, selon le dispositif de votre arrêt, que s'agissant du «préjudice causé»[216]. Par ailleurs,

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[213] *Ahmadou Sadio Diallo (République de Guinée c. République démocratique du Congo), indemnisation, arrêt, C.I.J. Recueil 2012 (I),* p. 331-332, par. 14.

[214] CR 2021/11, p. 16, par. 14 (Forteau).

[215] CR 2021/11, p. 17, par. 17 (Forteau).

[216] Arrêt de 2005, dispositif, p. 280, par. 345, point 5).

l'affaire de 2007 concernait le génocide survenu à Srebrenica, un événement assurément très dramatique mais relativement circonscrit dans le temps, dans l'espace et quant aux acteurs y ayant pris part. Réserver une phase indemnitaire ne signifie pas que la causalité a été tranchée pour les dommages dont la réparation sera ensuite demandée.

9. Ce n'est donc pas «l'étendue» de la causalité qui est ici en cause[217], mais c'est son existence même qu'il y a lieu d'établir. D'ailleurs, Mesdames et Messieurs les juges, qu'est-ce que cela veut dire l'*étendue* de la causalité, si ce n'est son existence dans la mesure où, pour le droit, le dommage relié au fait illicite par un lien de causalité distendu, éloigné, indirect ou interrompu ne doit pas être réparé ? La vérité judiciaire de votre arrêt de 2005 est que les préjudices postulés à ce stade par la RDC ne peuvent pas être considérés *ipso facto* et sans aucune évaluation causale comme le résultat certain et direct des faits illicites dont l'Ouganda a été déclaré responsable.

10. Alors, bien entendu, l'Ouganda reconnaît que si ses soldats ont eux-mêmes tué des personnes ou détruit des biens, le lien causal entre le comportement constituant ces faits illicites et ces pertes humaines et matérielles est dûment établi. Mais comme vous le savez, entretenant à dessein le flou et se cachant derrière des difficultés probatoires et des pourcentages, la RDC n'a pas clairement identifié les dommages découlant matériellement de faits illicites commis par les forces armées ougandaises, ni même des dommages spécifiquement localisés en Ituri ; au contraire, la RDC réclame la réparation de dommages survenus partout en RDC du fait d'autres acteurs, voire même des dommages qu'elle reconnaît elle-même comme étant indirects et qui ne sont matériellement dus à aucun acteur en particulier.

11. Il en est ainsi de l'excès de mortalité. Cet excès est très explicitement considéré comme indirect par la RDC et le D[r] Guha-Sapir, c'est-à-dire comme n'étant pas survenu à l'occasion d'*Activités armées*, pour reprendre le titre de cette affaire. Mon collègue M[e] Martin est revenu sur la matérialité quantitative de cette mortalité et les difficultés méthodologiques entourant sa détermination, mais l'autre question fondamentale qui se pose à cet égard est de savoir si l'Ouganda est tenu de réparer, fût-ce en partie seulement, ce dommage allégué.

[217] CR 2021/11, p. 18, par. 20 (Forteau).

12. La causalité qu'il vous appartient d'apprécier, Mesdames et Messieurs les juges, ce n'est pas «l'effet papillon» et il y a des limites à la prévisibilité[218] selon le droit des événements. L'exigence d'un lien de causalité direct et certain a pour objectif de limiter l'obligation de réparer au seul dommage proche — c'est l'exigence bien connue de la *proximate cause* au sujet de laquelle, faute de temps, je me permets de vous renvoyer à nos écritures[219]. Le professeur Sands a loué la méthodologie du Dr Guha-Sapir car elle serait par ailleurs mise en œuvre aujourd'hui dans le cadre de la crise sanitaire que nous connaissons[220]. Peut-être. Mais la question de causalité, de *proximity* et de prévisibilité dans la chaîne de causalité, et donc de responsabilité, se pose dans le cadre de la pandémie de COVID-19 et dans le cadre de la mortalité excédentaire survenue durant le conflit. A cet égard, le professeur Sands s'est contenté de reprendre les mots du Dr Guha-Sapir : «in these five years … many people who have died who should not have died»[221]. Certes, et cela est profondément regrettable, mais ce constat ne suffit pas pour établir un lien causal et ainsi la responsabilité juridique de réparer. En effet, à la suite de votre question, Madame la présidente, il est clair que corrélation et causalité ne peuvent être confondues. Je cite le Dr Guha-Sapir qui vous répond : «you are absolutely right … it is very difficult to attribute … all of these deaths … to a particular cause. That cannot be done.»[222] Et, il en est évidemment de même du prétendu préjudice macroéconomique sur lequel le professeur Pellet reviendra.

13. Peut-être considérerez-vous que si l'excès de mortalité survenu à Kinshasa, à Lubumbashi ou partout ailleurs dans le très vaste territoire congolais, ne relève pas de la responsabilité de l'Ouganda, il en irait autrement de celui observé en Ituri car l'Ouganda y était puissance occupante et qu'il devait y veiller à la santé de la population. Ce serait néanmoins oublier que, parmi les manquements de l'Ouganda à ses devoirs de puissance occupante, celui-là n'a pas été constaté par la Cour. C'est ce qui ressort très clairement du paragraphe 250 de l'arrêt de 2005 qui a limité le

[218] CR 2021/11, p. 32, par. 10 (Corten).

[219] Contre-mémoire de l'Ouganda (2018), par. 4.23.

[220] CR 2021/11, p. 26, par. 22 (Sands).

[221] CR 2021/11, p. 26, par. 22 (Sands).

[222] CR 2021/9, p. 51 (Guha-Sapir).

manquement à l'article 43 du règlement de La Haye de 1907 aux actes de pillage et d'exploitation des ressources naturelles, pas aux questions sanitaires et de soins[223].

14. En disant cela, Mesdames et Messieurs les juges, l'Ouganda ne prétend évidemment pas qu'il n'y aurait eu aucun mort en RDC ; l'Ouganda souligne seulement que, autant il serait injuste que les dommages incontestablement infligés par ses forces armées demeurent non réparés, autant il serait injuste qu'il doive réparer les dommages qui ne découlent pas, directement et certainement, de ses propres faits illicites, tels qu'ils ont été constatés par la Cour.

15. A cet égard, tout en accusant l'Ouganda de barbarie, la RDC se garde bien de rappeler qu'une part *très* considérable des souffrances de son peuple lui ont été infligées par ses propres forces armées. La base de données de l'Université d'Uppsala utilisée par le professeur Urdal est très claire à cet égard comme M[e] Martin vient de le rappeler : parmi les 14 663 morts civils recensés entre 1998 et 2003, 32 sont attribués à l'Ouganda — un chiffre que le D[r] Urdal confirme[224] en soulignant être incapable de déterminer s'il y en a eu plus[225] —, tandis que la même base de données attribue 1429 morts à l'armée de la RDC[226]. Nous avons rappelé ces chiffres dans notre contre-mémoire[227] et le demandeur ne les a pas contestés. Quelles que puissent être les limites méthodologiques de la base de données d'Uppsala, ces chiffres et la disproportion qui en résulte — 32 d'un côté, 1429 de l'autre — ces chiffres sont saisissants. Ces chiffres sont corroborés par le «Mapping report» qui regorge d'actes de cruauté et de destructions à grande échelle commis par les forces armées congolaises elles-mêmes[228].

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[223] Arrêt de 2005, p. 253, par. 250.

[224] Experts Report on Reparations for The International Court of Justice: Case Concerning *Armed Activities on the Territory of the Congo, The Democratic Republic of the Congo* v. *Uganda* (19 Dec. 2020) (hereinafter «Experts' Report»), par. 39.

[225] CR 2021/9, p. 22 (Urdal).

[226] Contre-mémoire de l'Ouganda (2018), par. 5.68.

[227] *Ibid.*, par. 5.65-5.68.

[228] Haut-Commissariat des Nations Unies aux droits de l'homme, République démocratique du Congo, 1993-2003 : rapport du projet Mapping concernant les violations les plus graves des droits de l'homme et du droit international humanitaire commises entre mars 1993 et juin 2003 sur le territoire de la République démocratique du Congo (août 2010), voir notamment par. 39, 313, 334, 358, 372, 392 et suiv. ; contre-mémoire de l'Ouganda (2018), annexe 25.

16. Le professeur Corten a souligné, en me citant, qu'un Etat agissant en légitime défense avait le droit de récupérer auprès de l'Etat qu'il combattait les dommages résultant de cette riposte[229]. Certes. Mais, comme je l'ai aussi écrit, il y a évidemment une limite très claire à cette logique causale, et elle tient à la rupture du lien de causalité lorsque l'Etat qui agit conformément au *jus ad bellum* viole, à son tour, le *jus in bello*[230]. Cette rupture du lien de causalité est bien plus radicale que l'hypothèse du dommage «totalement imprévisible» que le professeur Corten a reproché à l'Ouganda de ne pas avoir identifié[231].

17. Le droit de légitime défense dont se prévaut la RDC n'implique pas que ses forces armées étaient en droit de commettre ces très nombreuses et bien documentées exactions. L'arrêt de 2005 ne donne pas à la RDC le droit de faire supporter la réparation de ces crimes-là, de ces dommages-là, par l'Ouganda. La RDC a accusé sans vergogne l'Ouganda de «cynisme»[232], mais on peut vraiment s'interroger sur ce que le demandeur cherche finalement à obtenir dans cette affaire. L'Ouganda ne doit indemniser que les dommages résultant directement et certainement de ses propres faits illicites reconnus par la Cour, pas de ceux d'autrui et *a fortiori* pas de ceux de la RDC.

18. Comment discerner les uns des autres ? C'était à la RDC de vous le dire, d'identifier clairement les dommages survenus en Ituri, et de faire d'éventuels décomptes à partir de la base de données de l'Université d'Uppsala, croisée par le «Mapping report», plutôt que de brouiller les cartes constamment et de se réfugier derrière des pourcentages en accusant l'Ouganda de ne pas contribuer à la charge de la preuve qui se trouve pourtant sur son propre territoire. Territoire que l'Ouganda a quitté en 2003, deux ans avant votre arrêt sur le fond.

19. Le professeur Corten a soutenu que la «ventilation» de 45 % à charge de l'Ouganda n'aurait «rien d'arbitraire»[233] car elle serait fondée sur le fait que trois Etats étaient en cause dans le conflit : l'Ouganda à égalité avec le Rwanda et le Burundi à raison de 10 %. Cela fait donc 100 %. Vous voyez donc, Mesdames et Messieurs les juges, comment par ce tour de passe-passe, la RDC

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[229] CR 2021/11, p. 31, par. 8 (Corten).

[230] P. d'Argent, *Les réparations de guerre en droit international public* (2002), p. 657.

[231] CR 2021/11, p. 32, par. 11 (Corten).

[232] CR 2021/11, p. 14, par. 7 *a)* (Forteau).

[233] CR 2021/11, p. 34, par. 15 (Corten).

escamote la causalité et entend faire payer par autrui ses propres violations, fût-ce pour une part seulement. L'Ouganda n'a pas à payer 45 % des exactions commises par les forces armées congolaises, ou par les groupes soutenus par la RDC ou par les alliés de la RDC. L'Ouganda n'a, à vrai dire, pas à payer le moindre pourcentage à cet égard car le lien de causalité est manifestement rompu par un fait illicite distinct.

20. Le professeur Corten a considéré cependant qu'il devait en aller autrement car l'Ouganda — je le cite en lui laissant la responsabilité de ses propos — «n'est pas un Etat comme un autre»[234] et il est revenu sur ce qui est au fond au cœur de la prétention congolaise et que j'ai déjà dénoncé jeudi dernier : la seule cause des dommages de la RDC, ce serait «un comportement unique et global : une «intervention militaire» de grande ampleur».[235]

21. La Cour a certes dénoncé l'ampleur et la durée de l'intervention ougandaise, mais, contrairement aux conseils du demandeur[236], la Cour n'a jamais utilisé le mot «agression» pour décrire le comportement ougandais, ayant même pris le soin en 2005 de souligner que «la RDC lui a fait savoir que ses demandes contre l'Ouganda sont liées à ce qu'elle [c'est-à-dire la RDC] appelle une agression»[237]. Quoi qu'il en soit, la RDC essaie à nouveau de se soustraire aux exigences du paragraphe 260 de votre arrêt de 2005 et tente de faire supporter par l'Ouganda la réparation de ses propres violations graves du droit international humanitaire, ou celles de ses alliés, ou des préjudices indirects et éloignés en soutenant que la guerre serait un événement-cadre. Je ne répéterai pas ce que j'ai déjà dit à cet égard jeudi dernier[238] et combien il est crucial, dans cette affaire, de se souvenir de la matérialité du comportement constituant le fait illicite auquel le dommage doit être rattaché.

22. Il est tout autant crucial d'identifier le lien et, s'il existe, la part causale revenant à l'Ouganda dans les dommages matériellement causés par les groupes qu'il a soutenus. Le professeur Corten concède du bout des lèvres que, comme vous l'avez décidé, les actes commis par ces groupes ne sont pas attribuables à l'Ouganda[239]. Il estime néanmoins que l'Ouganda devrait

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[234] CR 2021/11, p. 36, par. 21 (Corten).

[235] CR 2021/11, p. 36, par. 21 (Corten).

[236] CR 2021/11, p. 75, par. 28 (Mingashang).

[237] Arrêt de 2005, p. 199, par. 54.

[238] CR 2021/7, p. 37, par. 32 ; p. 40, par. 41 (d'Argent).

[239] CR 2021/11, p. 30, par. 6 (Corten).

réparer tous «les dommages causés par les rebelles qu'il soutenait, tout simplement parce que ce soutien rendait prévisible et même inévitable la survenance de ces dommages»[240]. Mais, alors, de la même manière, faut-il comprendre que la violation du *jus ad bellum* par l'Ouganda rendait «prévisible et même inévitable» les dommages infligés par les forces armées congolaises à la population congolaise en violation du droit international humanitaire ? La prévisibilité causale ne permet pas de contourner l'attribution et, très franchement, Madame la présidente, Mesdames et Messieurs les juges, il est difficilement acceptable pour l'Ouganda de s'entendre dire sans aucun élément de preuve que les dommages commis par les groupes qu'il a soutenus auraient été «prévu[s] de commun accord»[241] alors, à nouveau, que votre arrêt sur le fond dit explicitement que l'Ouganda n'a pas créé ces groupes et qu'«aucune preuve convaincante» ne démontre que l'Ouganda «contrôlait ou pouvait contrôler la manière dont [les groupes rebelles, et en particulier le MLC de M. Bemba], utilisait [l']assistance» ougandaise[242].

23. A cet égard, le professeur Corten est revenu sur les combats du 9 août 2000 sur la rivière Ubangi. S'appuyant sur le livre de Jean-Pierre Bemba, il a martelé à nouveau qu'il y aurait eu alors «près de 800 morts»[243]. Pourtant, le «Mapping report» rapporte à ce sujet que deux douzaines de soldats congolais — et non 800 ! — auraient été tués[244], ce que la base de données de l'Université d'Uppsala confirme en les attribuant cette fois au MLC et non à l'Ouganda[245]. La RDC soutient-elle que M. Bemba est plus crédible que ces deux sources ?

24. Plus fondamentalement, et pour revenir sur la prétendue prévisibilité causale au cœur de cet incident qui aurait donc été voulu par l'Ouganda et le MLC, je dois néanmoins vous rappeler que ces faits se sont produits alors que la RDC avait violé le cessez-le-feu conclu quelques mois plus tôt

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[240] CR 2021/11, p. 32, par. 10 (Corten).

[241] CR 2021/11, p. 32, par. 10 (Corten).

[242] Arrêt de 2005, p. 226, par. 160 ; p. 231, par. 177.

[243] CR 2021/11, p. 30, par. 6 (Corten).

[244] Haut-Commissariat des Nations Unies aux droits de l'homme, République démocratique du Congo, 1993-2003 : rapport du projet Mapping concernant les violations les plus graves des droits de l'homme et du droit international humanitaire commises entre mars 1993 et juin 2003 sur le territoire de la République démocratique du Congo (août 2010), par. 392 ; contre-mémoire de l'Ouganda (2018), annexe 25.

[245] Voir la base de données de l'Uppsala Conflict Data Program (UCDP), disponible à l'adresse suivante : https://ucdp.uu.se/.

à Lusaka et était passée à l'offensive en ne faisant pas de quartier dans les villages soupçonnés de sympathie pour le MLC, ce que le «Mapping report» confirme[246].

25. S'agissant des événements de Kisangani, où l'Ouganda n'était pas non plus puissance occupante, la RDC soutient qu'elle pourrait demander la totalité de la réparation des dommages causés par le Rwanda ou par l'Ouganda indifféremment à l'un ou à l'autre. Pas de chance pour l'Ouganda, c'est lui qui a accepté votre compétence et donc ce serait à lui de payer pour le Rwanda sans véritable espoir de pouvoir se retourner contre ce dernier à due concurrence. La RDC vous propose donc de lui faire justice en créant un nouveau différend. Elle s'appuie à cette fin sur l'affaire du *Détroit de Corfou* au sujet de laquelle elle nous reproche d'être demeurés silencieux[247]. Mais la différence fondamentale entre ces deux affaires, c'est que l'on sait, ici, qui est l'autre Etat responsable et que ce dernier, contrairement à ce qui s'est produit en 1946, a agi, à Kisangani, *contre* et non avec le défendeur. Et l'autre différence fondamentale, c'est qu'à Kisangani, le Rwanda et l'Ouganda, s'étant battus l'un contre l'autre[248], ont chacun commis séparément des faits internationalement illicites certes semblables, mais ils ne sont pas responsables «du même fait internationalement illicite»[249] pour reprendre les termes de l'article 47 des articles de la CDI dont le professeur Corten cite le commentaire mais pas le texte même. Dans une telle situation, à nouveau, chaque Etat demeure responsable des dommages causés par son propre fait, d'autant que ces Etats se sont militairement affrontés, même si les mêmes règles de droit ont été violées de part et d'autre. Le professeur Corten soutient que ce qui compte, ce serait «le critère de prévisibilité»[250]. Toutefois, ce critère n'est pertinent que pour établir l'existence d'un lien de causalité, pas pour articuler entre elles des causalités multiples après qu'elles soient établies et des responsabilités distinctes.

26. S'agissant ensuite des vraies situations de causalité complémentaires et lorsqu'une ventilation s'impose, le poids causal de l'action ou de l'omission illicite ougandaise doit se mesurer

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[246] Haut-Commissariat des Nations Unies aux droits de l'homme, République démocratique du Congo, 1993-2003 : rapport du projet Mapping concernant les violations les plus graves des droits de l'homme et du droit international humanitaire commises entre mars 1993 et juin 2003 sur le territoire de la République démocratique du Congo (août 2010), par. 388-392 ; contre-mémoire de l'Ouganda (2018), annexe 25.

[247] CR 2021/11, p. 33, par. 14 (Corten).

[248] Arrêt de 2005, p. 207, par. 80.

[249] A/RES/56/83.

[250] CR 2021/11, p. 34, par. 14 (Corten).

sur une base objective, catégorie de dommage par catégorie de dommage. Jeudi dernier, j'ai cité le pourcentage de civils tués intentionnellement ou non intentionnellement par les forces armées ougandaises, selon le rapport du D[r] Urdal, par rapport au total de ces mêmes morts civils. Je viens de citer les chiffres concernant ces mêmes morts civils, avec la part revenant directement à la RDC. Ici encore, des proportions bien plus crédibles que celles que vous soumet la RDC et qui ont suscité votre neuvième question sans recevoir de véritable réponse peuvent être établies.

27. S'agissant enfin des dommages survenus en Ituri du fait des tiers, l'Ouganda accepte bien évidemment votre arrêt sur le fond. La RDC soutient que le fait d'avoir été puissance occupante rend le test de causalité de l'arrêt *Bosnie c. Serbie* sans pertinence[251]. J'ai déjà répondu à cette affirmation, qui suggère que l'obligation de prévention du droit de l'occupation serait plus exigeante que celle de la convention sur le génocide[252]. Peut-être est-ce le cas, mais c'est sans importance puisqu'il s'agit d'une question tranchée en 2005 : la Cour a reconnu la responsabilité de l'Ouganda à cet égard. Cette question étant réglée, il reste celle de la causalité et le test, incontournable, je l'ai dit, de votre arrêt de 2007.

28. Le contre-factuel proposé par le professeur Corten à ce sujet concerne non pas ce que l'Ouganda a manqué de faire comme puissance occupante pour prévenir utilement les faits de tiers, mais ce qu'il a fait lui-même et qui a été déclaré illicite par la Cour[253]. A nouveau, l'Ouganda ne conteste pas devoir réparer les dommages matériellement causés par ses forces armées, *si* leur existence et leur ampleur sont dûment établies ; mais il s'agit ici de faits de tiers. Comme vous le constaterez, le lien causal entre les dommages des tiers en Ituri et le manquement ougandais à son obligation de les prévenir n'a pas été dûment établi.

29. Madame la présidente, je remercie les membres la Cour de m'avoir accordé leur attention et je vous prie, Madame la présidente, de bien vouloir donner la parole au professeur Alain Pellet.

The PRESIDENT: I thank Professor d'Argent, and I now give the floor to Professor Alain Pellet. Professor Pellet, we do not have audio here at the Great Hall. … We still do not have audio. Now we do. Please go ahead.

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[251] CR 2021/11, p. 35, par. 16 (Corten).

[252] CR 2021/7, p. 35, par. 24 (d'Argent).

[253] CR 2021/11, p. 35, par. 18-19 (Corten).

M. PELLET :

LES DEMANDES ADDITIONNELLES DE LA RDC ET REMARQUES CONCLUSIVES

1. Madame la présidente, Mesdames et Messieurs les juges, fermant la marche, je reviendrai d'abord, sur les «conclusions additionnelles» de la RDC — c'est-à-dire celles qui ne portent pas sur des indemnités (ou qui ne *devraient pas* se traduire par une indemnisation). Je ferai ensuite quelques remarques conclusives, de nature juridique, qui introduiront celles, plus générales que présentera notre agent avant de lire les conclusions de l'Ouganda.

I. Les demandes additionnelles de la RDC

A. La satisfaction

2. Mesdames et Messieurs de la Cour, par ses conclusions finales, la RDC réclame *en plus* d'une indemnisation pour dommages matériels s'élevant à près de 11 milliards 350 millions de dollars des Etats-Unis, le paiement de 125 millions. Cette somme est présentée comme devant abonder deux Fonds créés par elle : l'un pour l'indemnisation des victimes, l'autre pour la réconciliation entre les ethnies Hema et Lendu.

3. Comme je l'ai montré la semaine dernière et quoiqu'en ait dit mon aimable contradicteur M[e] Mingashang[254], cela serait incompatible avec le principe bien ancré en droit international de l'exclusion des dommages-intérêts punitifs. En outre une telle indemnité ferait double emploi avec l'indemnisation des dommages matériels qui, s'agissant d'une affaire interétatique, englobent, je le rappelle, les dommages moraux subis par les ressortissants de l'Etat requérant[255].

4. Quant au Fonds pour la réconciliation entre les Hema et les Lendu, j'ai montré[256] qu'il pouvait difficilement se recommander du «précédent» du *Rainbow Warrior* (et je mets le mot «précédent» entre guillemets tant cet épisode est peu pertinent, du moins à cet égard). Mais je souhaite tout de même ajouter une chose : indépendamment de l'inexistence de toute base juridique à une telle demande, il est pour le moins assez singulier que la RDC entende imposer à l'Ouganda

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[254] CR 2021/11, p. 71, par. 16 (Mingashang).

[255] CR 2021/8, p. 67, par. 18, p. 68, par. 22, et p. 69, par. 25 (Pellet).

[256]. *Ibid*., p. 68-69, par. 24 (Pellet).

de financer la réconciliation entre ces deux ethnies. Leurs dissensions remontent au moins à la période coloniale, ont été attisées par l'administration belge puis par le gouvernement de Mobutu qui, au début des années 1990, au lieu de tenter d'apaiser les tensions grandissantes entre les deux ethnies, a jeté suffisamment d'huile sur le feu pour susciter la création de groupes paramilitaires rivaux[257].

5. Madame la présidente, la ferme constatation des manquements, conforme à la pratique des cours et tribunaux internationaux, constitue «une sanction significative» pour reprendre les termes, cette fois appropriés, du tribunal arbitral dans l'affaire du *Rainbow Warrior*[258]. Elle est la forme la plus habituelle de réparation des dommages immatériels dans la pratique des cours et tribunaux interétatiques (y compris la vôtre) et cela paraît une solution raisonnable dans la présente espèce étant donnée la gravité des manquements que vous avez constatés à la charge de l'Ouganda dans votre arrêt de 2005. On peut d'ailleurs considérer que cette décision constitue par elle-même la satisfaction requise, mais rien n'exclut que vous réitériez ces constatations sévères à titre de satisfaction formelle.

6. Comme l'a dit en termes imagés un tribunal international, il est vrai dans un tout autre contexte (mais l'idée est tout à fait transposable) :

> «Les dommages-intérêts pour tort matériel n'ont jamais d'autre objet que de réparer une perte effectivement subie et ils ne sauraient être considérés ni comme une manne tombée du ciel ni comme la marmite de pièces d'or que l'on est censé trouver au pied de l'arc-en-ciel.»[259]

Ce qui est vrai pour l'indemnisation des dommages matériels vaut à plus forte raison s'agissant d'une réparation sous forme de satisfaction.

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[257] Voir D. Fahey, *L'Ituri : Or, questions foncières et ethnicité dans le nord-est du Congo*, Rift Valley Institute 2013, p. 33 ; voir aussi, C. Young et T. Turner, *The Rise and Decline of the Zairian State*, The University of Wisconsin Press, 1985.

[258] Sentence arbitrale, *Rainbow Warrior (Nouvelle-Zélande/France)*, *Recueil des sentences arbitrales (RSA)*, vol. XX, p. 273, par. 123.

[259] Tribunal administratif de l'Organisation internationale du Travail (TAOIT), recours en révision de l'OIAC, *Bustani*, nº 2328, 14 juillet 2004, par. 8.

B. La question des intérêts

7. Madame la présidente, j'ai peu à ajouter à ce que nous avons dit dans notre contre-mémoire sur la réparation à propos des intérêts[260]. Malgré l'importance des sommes en jeu, la RDC en a traité avec une certaine désinvolture tant dans son mémoire[261] que durant ses plaidoiries orales[262].

8. Les Parties sont d'accord sur le fait qu'il convient de distinguer intérêts compensatoires et intérêts moratoires.

9. En ce qui concerne les premiers, nous nous accordons également à considérer que l'article 38, paragraphe 1, des Articles de la CDI reflète le droit positif. En vertu de cette disposition :

> «Des intérêts sur toute somme principale due en vertu du présent chapitre [relatif à la réparation] sont payables *dans la mesure nécessaire pour assurer la réparation intégrale*. Le taux d'intérêt et le mode de calcul sont fixés de façon à atteindre ce résultat.»

Des intérêts peuvent donc être dus, mais ils sont dus seulement *dans la mesure nécessaire pour assurer la réparation intégrale*.

10. Sans le *moindre* début de commencement de preuve (et sur la base d'un raisonnement passablement confus), la RDC affirme que, pour cela, les intérêts devraient courir à compter du dépôt de son mémoire en réparation et leur taux être de 4 % ou de 6 % — on ne sait pas puisque la RDC a évoqué 6 % dans son mémoire[263] puis 4 % dans son exposé de mardi[264]. Peu importe le chiffre d'ailleurs car cette prétention est contredite par la jurisprudence, à commencer par l'arrêt emblématique de la Cour permanente dans l'affaire du *Vapeur Wimbledon*. Par cette décision, la Cour a attribué des intérêts aux Etats requérants *à compter de la date de l'arrêt*, en considérant qu'ils étaient exigibles seulement à partir «du moment où le montant de la somme due a été fixé et l'obligation de payer établie»[265]. Ce sera le cas dans notre affaire à la date à laquelle vous aurez

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[260] Contre-mémoire de l'Ouganda (2018), par. 10.3-10.29.

[261] Mémoire de la République démocratique du Congo (2016), par. 7.55-7.63.

[262] CR 2021/11, p. 73, par. 22 (Mingashang).

[263] Mémoire de la République démocratique du Congo (2016), par. 7. 62 et 7.89 *b)*.

[264] CR 2021/11, p. 73, par. 22 (Mingashang), et p. 79, par. 15 *b)* (Kakhozi).

[265] *Vapeur Wimbledon*, *arrêts*, *1923, C.P.J.I. série A n°* 1, p. 32 ; dans le même sens : Commission mixte Etats-Unis-Allemagne, 11 décembre 1923, décision administrative n° III, *RSA*, vol. VII, p. 64-65 ; ou sentence arbitrale, 19 octobre 1928, *Georges Pinson (France) c. Etats-Unis du Mexique*, *RSA*, vol. V, p. 453, par. 71 ; sentence arbitrale, 24-27 juillet 1956, *Affaire relative à la concession des phares de l'Empire ottoman (Grèce, France)*, *RSA*, vol. XII, p. 252-253.

rendu votre arrêt. Ainsi que l'a relevé la CDI dans son commentaire de l'article 38 que je viens de citer, «les intérêts peuvent ne pas être accordés lorsque le préjudice est fixé en valeur courante à la date de la sentence»[266] comme ce sera nécessairement le cas en l'espèce, si la Cour fait droit à certaines des demandes d'indemnité de la RDC.

11. Concrètement, cela signifie que les intérêts compensatoires se confondraient, de fait, avec d'éventuels intérêts moratoires[267], dont les Parties s'accordent à considérer qu'ils seraient dus si l'Ouganda ne s'acquittait pas de ses obligations indemnitaires «dans un délai raisonnable». Etant entendu qu'il appartiendrait à la Cour de fixer ce délai en tenant compte des circonstances concrètes de l'affaire, et en particulier, comme nous l'avons souligné[268], il conviendrait à cette fin de tenir compte de l'importance des sommes octroyées et du rythme de leur paiement.

12. Quant au taux de ces intérêts éventuels, ni celui de 6 % qui, s'il a pu être retenu dans le passé par certaines cours ou certains tribunaux internationaux au regard de la situation financière qui prévalait lors de la décision[269], il n'est à l'évidence pas adapté aux circonstances présentes où le taux de l'argent est particulièrement bas. Il en va de même de celui de 4 % lorsque l'on garde à l'esprit que, par exemple, le taux LIBOR à un an est aujourd'hui inférieur à 1 %.

II. Quelques remarques conclusives

13. Mesdames et Messieurs de la Cour, j'en viens dans une seconde partie, à quelques remarques conclusives qui n'ont ni pour ambition de résumer en une poignée de minutes une affaire complexe, ni d'en occulter la dimension humaine douloureuse et tragique. Mais, dans ce prétoire, c'est le droit qui doit être dit.

14. L'Ouganda a admis sa responsabilité pour les faits internationalement illicites reconnus tels par la Cour dans son arrêt de 2005. Par la voix de son agent[270], il a exprimé ses regrets pour la part qu'a prise la Partie ougandaise à cette situation dramatique. Mais, bien entendu, cette

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[266] Articles sur la responsabilité de l'Etat pour fait internationalement illicite, commentaire de l'article 38, *Annuaire* de la CDI, 2001, vol. II, deuxième partie, p. 107, note 602.

[267] *Certaines activités menées par le Nicaragua dans la région frontalière (Costa Rica c. Nicaragua), indemnisation, arrêt, C.I.J. Recueil 2018 (I)*, p. 58, par. 152.

[268] Voir contre-mémoire de l'Ouganda (2018), par. 10.5.

[269] *Vapeur Wimbledon, arrêts, 1923, C.P.J.I. série A nº 1*, p. 32.

[270] CR 2021/7, p. 12, par. 2 et p. 13, par. 5 (Byaruhanga).

responsabilité — et son acceptation par l'Ouganda — se limitent à ce que la Cour a constaté. En particulier, il faut garder à l'esprit que «les actes commis par les diverses parties à ce conflit complexe que connaît la RDC ont contribué aux immenses souffrances de la population congolaise» ~~***— et c'est vous qui parlez***~~[271]. Et l'on ne saurait imputer à l'Ouganda seul tous les malheurs de «ce cœur agité de l'Afrique»[272] qu'est la RDC.

15. Minée par des conflits internes, elle est elle-même, en grande partie, à l'origine de cette situation que vous avez qualifiée de «complexe et tragique». Et, comme vous l'avez relevé, son instabilité «a eu des incidences négatives pour la sécurité de l'Ouganda et de quelques autres Etats voisins»[273]. Ces constatations vous ont conduits à préciser «qu'il fallait garder ce contexte présent à l'esprit» tout en rappelant que «[l]a Cour a néanmoins pour mission de trancher, sur la base du droit international, le différend juridique *précis* qui lui est soumis» et qu'elle «ne saurait» «en interprétant et en appliquant le droit … aller au-delà»[274]. Ce qui valait il y a 16 ans pour apprécier la responsabilité encourue par l'Ouganda vaut tout autant aujourd'hui pour vous prononcer sur la réparation qui est due à la RDC.

16. C'est donc conformément au droit international — et de lui seul — qu'il vous appartient de déterminer, selon une formule qui a été abondamment reprise durant ces plaidoiries — y compris par l'autre Partie[275], «la nature, les formes et le montant de la réparation» qui est due à la RDC en appréciant, *sur la base des preuves apportées par elle*, «le préjudice exact qu'elle a subi du fait des actions *spécifiques* de l'Ouganda constituant des faits internationalement illicites dont il est responsable»[276].

17. A cette fin, deux principes cardinaux ne manqueront pas de vous guider : d'une part, celui de la *res judicata* et d'autre part, *actor incumbit probatio*, ou peut-être, plus exactement, *actore non*

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[271] Arrêt de 2005, p. 245, par. 221.

[272] Robert G. Edgerton, *The Troubled Heart of Africa: A History of the Congo*, New York, St. Martin's Press, 2002.

[273] Arrêt de 2005, p. 190, par. 26 ; voir aussi p. 226, par. 160.

[274] *Ibid.*

[275] Voir CR 2021/11, p. 71, par. 16 *d)* (Forteau).

[276] Arrêt de 2005, p. 257, par. 260 (les italiques sont de nous).

probante, reus absolvitur — si le demandeur n'apporte pas la preuve qui lui incombe, le défendeur doit être relaxé.

18. S'agissant du premier de ces principes, citant votre arrêt de 1986 dans l'affaire du *Nicaragua*, vous avez souligné en 2005 «que, «dans la phase de la procédure consacrée à la réparation, ni l'une ni l'autre des Parties ne pourra remettre en cause les conclusions du présent arrêt qui seront passées en force de chose jugée»»[277]. Cette directive vaut pour la RDC comme pour l'Ouganda.

19. Et, dans votre arrêt sur la responsabilité, vous avez clairement tracé les bornes dans lesquelles la responsabilité de l'Ouganda était engagée :

— D'abord, comme vous l'avez dit, les faits pertinents sont limités à la période allant du 7 août 1998[278] au 2 juin 2003[279].

— Ensuite, l'Ouganda ne peut pas être tenu pour responsable de faits qui se sont produits en dehors de l'Ituri, seul district dans lequel les forces armées ougandaises exerçaient leur autorité ; sa responsabilité n'est pas engagée notamment dans les «zones situées en dehors de l'Ituri, contrôlées et administrées par des mouvements rebelles congolais» sur lesquels, toujours selon votre arrêt, l'Ouganda n'exerçait aucun contrôle[280].

— En outre, sa responsabilité ne peut pas être engagée pour les dommages dont vous avez admis la réalité ou la vraisemblance — j'y reviendrai. Mais je relève tout de même d'ores et déjà que nulle part dans votre arrêt de 2005, vous n'avez évoqué la responsabilité de l'Ouganda pour les préjudices «macroéconomiques» dont la RDC fait aujourd'hui si grand cas — elle les chiffre à plus de 5 milliards 700 millions de dollars, alors qu'ils n'ont fait l'objet d'aucune demande durant l'examen de la responsabilité. Ils se confondent d'ailleurs à l'évidence avec les préjudices résultant des actes de pillage et d'exploitation des ressources naturelles congolaises qui sont, eux, effectivement mentionnés dans l'arrêt sur la responsabilité ; il est d'ailleurs révélateur que ce

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[277] *Ibid.*, citant *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique), fond, arrêt, C.I.J. Recueil 1986*, p. 143, par. 284.

[278] Arrêt de 2005, p. 224, par. 149.

[279] *Ibid.*, p. 259, par. 264 ; voir aussi p. 255, par. 254.

[280] *Ibid.*, p. 231, par. 177, ou p. 253, par. 247 ; voir aussi, par exemple, p. 209, par. 91.

chef de dommages prétendus n'ait fait l'objet d'aucune question de la part de la Cour ni dans son questionnaire du 11 juin 2018 ni dans le mandat des experts qu'elle a désignés. Le moins que l'on puisse dire est que la phrase conclusive du rapport du professeur Collier rappelée par M[e] Mingashang[281] n'aide en rien nos contradicteurs : «All that can reasonably be concluded about these tragic events is that the unauthorized Ugandan overstay *may have incurred some costs* but *they cannot be quantified*.»[282]

— Enfin, seuls engagent la responsabilité de l'Ouganda les faits internationalement illicites ayant causé des dommages *qui peuvent lui être attribués*. Cela ne saurait être le cas des actions relevant de l'un ou l'autre des très nombreux acteurs de ce conflit complexe, comme c'est le cas du Rwanda s'agissant de la prise de Kitona[283] ou des groupes rebelles dont, comme je viens de le rappeler à nouveau, la Cour a clairement dit qu'en dehors de l'Ituri, ils n'étaient pas sous le contrôle de l'Ouganda[284], sans même qu'il soit besoin «de se poser la question de savoir s'il est satisfait aux critères requis pour considérer qu'un degré de contrôle suffisant était exercé à l'égard de paramilitaires»[285].

20. Le principe *res judicata* ne s'étend qu'à ce qui a été effectivement jugé, c'est-à-dire à la responsabilité de l'Ouganda ainsi circonscrite, *ratione temporis*, *ratione loci*, *ratione materiae* et *ratione personae*, mais il ne concerne pas la responsabilité pouvant en résulter. Pour que celle-ci puisse être déterminée, deux conditions supplémentaires doivent être remplies : il faut d'une part que le dommage invoqué résulte directement du fait internationalement illicite et, d'autre part, que ce fait soit attribuable à l'Etat responsable.

21. Et c'est ici qu'intervient le second principe que j'ai mentionné il y a quelques instants, celui qui impose à l'Etat requérant d'administrer la double preuve qu'un dommage lui a été causé (à lui ou à ses ressortissants, à condition que ceux-ci soient dûment identifiés) et que ce dommage est

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[281] CR 2021/11, p. 68, par. 8 (Mingashang).

[282] P. Collier and A. Hoefler, *Assessment of the Impact of the Ugandan Military Involvement in the Democratic Republic of the Congo*, 20 octobre 2017 (contre-mémoire de l'Ouganda (2018), annexe 109), p. 8.

[283] Arrêt de 2005, p. 204-205, par. 69-71.

[284] *Ibid*., p. 204-205, par. 69-71.

[285] *Ibid.* p. 226, par. 160, citant *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique), fond, arrêt, C.I.J. Recueil 1986*, p. 62-65, par. 109-115.

la conséquence du fait internationalement illicite, c'est-à-dire de la violation du droit international qui lui est attribuable — double causalité indispensable : la violation doit être le fait de l'Etat défendeur et la cause du dommage. Or, comme mes collègues l'ont montré de façon concluante, la RDC ne s'est guère acquittée de cette double charge de la preuve. Ces carences ont une incidence très directe sur les réparations auxquelles l'Etat demandeur peut prétendre.

22. Contrairement à la caricature de sa position que fait la RDC, l'Ouganda ne conteste pas que sa responsabilité pour les dommages subis par celle-ci et ses ressortissants soit susceptible de donner lieu à indemnisation. Mais il n'en va ainsi que si les dommages qu'elle invoque sont dûment prouvés conformément aux règles applicables devant une juridiction internationale. Et, selon le type de dommages invoqués *et prouvés*, la réparation à laquelle peut prétendre la République démocratique du Congo peut prendre, séparément ou conjointement**,** les formes habituelles qui sont reconnues en droit international public : la restitution, l'indemnisation ou la satisfaction.

23. La RDC ne conclut à aucune *restitutio*. Elle prétend en revanche à une satisfaction et l'Ouganda ne s'y oppose pas. Toutefois, comme je viens de le rappeler, vous ne sauriez admettre que celle-ci revête les formes insolites exigées par les conclusions congolaises.

24. Quant à l'indemnisation, elle ne peut venir en réparation que de dommages déterminés résultant de violations spécifiques du droit international. La Cour ne saurait accorder d'indemnité sur la base d'allégations non étayées par des preuves, réalistes mais solides, de la réalité et de l'étendue du dommage. Bien sûr, je ne reviendrai pas sur tout ce qui a été dit dans les plaidoiries orales, mais je ferai quelques remarques finales et brèves qui me paraissent appropriées :

1) Il y a une différence entre des preuves insuffisantes et une absence de preuve ; or, dans nombre de cas, nos amis de l'autre côté de la barre ne sont pas allés au-delà de simples affirmations ou de déductions présentées comme logiques mais qui ne répondent assurément pas aux exigences de la preuve en matière judiciaire ;
2) Les conseils de la RDC (et certains experts nommés par la Cour — auxquels on n'en demandait pas tant...) ont insisté sur la prétendue impossibilité où se serait trouvée la Partie congolaise d'apporter la preuve des dommages pour lesquels elle demande réparation. Pourtant, dans des circonstances comparables (n'en déplaise aux adroits conseils de la RDC qui récusent ce précédent..., comme l'a rappelé le professeur Akande), l'Ethiopie et l'Erythrée, se sont acquittées

de cette obligation de manière infiniment plus satisfaisante que la Partie congolaise dans l'affaire qui nous occupe. Et, dans l'affaire *Bosco Ntaganda*, qui concernait les événements mêmes qui sont en cause dans notre affaire, la Chambre de première instance de la CPI, s'est également montrée particulièrement vigilante sur la fiabilité des preuves qui lui avaient été présentées, elle a pu s'appuyer sur des preuves autrement plus satisfaisantes et convaincantes que celles apportées par la RDC dans la présente instance.

3) Durant la présente phase de l'affaire, une grande importance a été donnée aux rapports que, dans sa sagesse, la Cour a cru devoir demander à quatre experts désignés par elle. Indépendamment des doutes sérieux que l'on peut avoir sur la méthodologie appliquée par ces experts, un élément *crucial* limite considérablement l'utilisation que l'on peut faire de leur rapport dans la mesure où, comme ils l'ont déclaré tous les quatre, ils n'ont pas été chargés de se prononcer — et ils ne se sont en effet pas prononcés — sur le rapport de causalité, pourtant décisif, entre l'action (ou l'inaction) imputée à l'Ouganda et les dommages dont ils devaient apprécier la réalité et l'étendue.

4) Nos contradicteurs s'ingénient à minimiser le poids des réparations qu'exige la RDC, qui s'élèvent à près d'un tiers du produit national brut ougandais. Pour ce faire, ils s'emploient de nouveau à neutraliser l'importance du précédent constitué par la décision rendue par la Commission Erythrée-Ethiopie. Dans cette affaire, qui est pourtant la plus raisonnablement comparable à la nôtre, la Commission avait souligné, en se fondant sur les Pactes de 1966, en l'occurrence l'article premier, paragraphe 2, qu'«[e]n aucun cas, un peuple ne pourra être privé de ses propres moyens de subsistance»[286]. Ce serait assurément le cas si vous faisiez droit à la demande de la RDC et l'impossibilité matérielle pour l'Ouganda de supporter le fardeau de sa dette aurait pour effet de faire perdurer le différend alors que votre Statut vous donne mission de *régler* les différends qui vous sont soumis conformément au droit international[287].

25. Une brève réflexion pour terminer, Madame la présidente.

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[286] Sentence finale, *Réclamations de l'Erythrée*, décision du 17 août 2009, *RSA*, vol. XXVI, p. 522, par. 19.

[287] Voir notamment Martins Paparinskis, «A Case Against Crippling Compensation in International Law of State Responsibility», *Modern Law Review* 2020, p. 1246-1286.

26. Comme notre agent l'a dit en ouverture de sa déclaration liminaire et comme il le redira dans un instant, l'Ouganda est prêt à assumer les conséquences juridiques des faits internationalement illicites pour lesquels sa responsabilité est engagée selon votre arrêt de 2005. A cet égard en tout cas, il s'agit d'un précédent très exceptionnel et tout à son honneur : au lieu de se dérober à votre juridiction, l'Ouganda s'est présenté devant vous, sans contester votre compétence — comme trop d'Etats le font systématiquement même lorsque celle-ci n'est pas douteuse — et sans se livrer à une tactique dilatoire — comme il aurait pu en avoir la tentation. Cela aussi plaide pour une application rigoureuse des règles de preuve. Une attitude laxiste conduisant à une indemnisation démesurée risquerait fort et d'encourager à l'avenir des demandes de réparation déraisonnables et de décourager les Etats accusés de graves manquements au droit international de se présenter devant vous.

27. Merci, Mesdames et Messieurs les juges**,** pour votre écoute. Madame la présidente, pourriez-vous, je vous prie, donner la parole à S. Exc. M. William Byaruhanga pour introduire et lire les conclusions de l'Ouganda.

The PRESIDENT: I thank Professor Pellet. I now give the floor to The Honourable William Byaruhanga, Agent of Uganda. You have the floor, Sir.

Mr. BYARUHANGA:

UGANDA'S SUBMISSIONS

1. I thank you, Madam President, distinguished Members of the Court. It is my privilege to close the submissions by the Republic of Uganda.

2. Madam President, it is with a heavy heart that I listened to the DRC's speeches on Wednesday. Madam President, honourable Members of the Court, I would like to repeat that we deeply and sincerely regret the suffering endured during the war by the Congolese people. We express again our regret for the suffering that can be attributed to Uganda.

3. As I emphasized in my opening statement, we have accepted the Court's 2005 Judgment. Uganda recognizes its responsibility as was determined in that Judgment. It is legally binding and we do not dispute your findings.

4. Without in the least wishing to absolve my country of its responsibilities, I wish to draw your attention again to a very particular and extremely important aspect of this case. Contrary to what the DRC would have you believe, Uganda does not bear sole responsibility for the damage suffered by the Congolese people. This case must be placed in its broader context. As I recalled at the beginning of my opening statement last week, there was a concurrence of many different conflicts, involving at least 21 major irregular armed forces and the armies of at least nine other States, including the DRC itself which committed atrocities during the relevant period[288]. In contrast to the other States, Uganda has accepted the Court's jurisdiction and actively participated in these proceedings, right from the DRC's Application in 1999 until today.

5. Since 2003, Uganda has taken a leading role in promoting peace and stability in the DRC and in the region more generally, as both the United Nations and the DRC have recognized[289]. The United Nations specifically praised Uganda's "patient and determined leadership" in facilitating peace agreements between the DRC and all the rebel groups[290]. Uganda currently contributes one of the largest peacekeeping troop contingents to the African Union Mission in Somalia. In addition, Uganda's treatment of refugees, a significant portion of which are from the DRC, has been held up by the United Nations High Commissioner for Refugees as a model for the rest of the world[291].

6. Madam President, to underscore Uganda's commitment to regional peace, I would like to point out that since October 2018, Uganda has been the chair of the Regional Oversight Mechanism,

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[288] UN Mapping Report, paras. 19-20, 38-39, 313, 334, 358, 372, 392, note 36, Counter-Memorial of Uganda (2018), Ann. 25; *Armed Activities* (2005), p. 190, para. 26.

[289] United Nations Security Council, 7150th meeting, *The extension of the Mandate U.N. Stabilization Mission in the Democratic Republic of the Congo (MONUSCO)*, doc. S/RES/2147 (2014), 28 Mar. 2014, p. 2, Counter-Memorial of Uganda (2018), Ann. 28; United Nations Security Council, *Statement by the President of the Security Council 7058th Meeting*, doc. S/PRST/2013/17, 14 Nov. 2013, Counter-Memorial of Uganda (2018), Ann. 27; Republic of Uganda and Democratic Republic of the Congo, *Minutes of the Ministerial Meeting*, 13-14 Sept. 2012, p. 2, Memorial of Uganda (2016), Ann. 7.

[290] United Nations News Centre, "DR Congo: U.N. envoy welcomes end of M23 rebellion, commitment to peace talks", available at http://www.un.org/apps/news/story.asp?NewsID=46423#.Wl6eR6inGbh, 5 Nov. 2013; Counter-Memorial of Uganda (2018), Ann. 26.

[291] UNHCR, Jonathan Clayton, "Grandi praises Uganda's 'model' treatment of refugees, urges regional leaders to make peace", 31 Jan. 2018, available at https://www.unhcr.org/uk/news/latest/2018/1/5a716d994/grandi-praises-ugandas-model-treatment-refugees-urges-regional-leaders.html (last visited 29 Apr. 2021); UNHCR, Dana Hughes, "UNHCR chief praises Uganda's commitment to refugees", 23 June 2017, available at https://www.unhcr.org/uk/news/latest/2017/6/594d3c744/unhcr-chief-praises-ugandas-commitment-refugees.html (last visited 29 Apr. 2021); United Nations Secretary-General, "The Secretary-General's opening remarks to the Uganda Solidarity Summit on Refugees", available at https://www.un.org/sg/en/content/sg/statement/2017-06-23/secretary-generals-opening-remarks-uganda-solidarity-summit-refugees, 23 June 2017, Counter-Memorial of Uganda (2018), Ann. 31; UNHCR, Charles Yaxley, "Uganda hosts record 500,000 refugees and asylum-seekers", available at http://www.unhcr.org/567414b26.html, 18 Dec. 2015, Counter-Memorial of Uganda (2018), Ann. 29.

which is a framework established in December 2013 by 11 countries, including the DRC and Uganda, and ~~***this —***~~ guaranteed by four international organizations (including the United Nations) — for the purpose of promoting peace, security and stability, both in the DRC and the region[292].

7. As I also recalled in my statement of 22 April, Uganda actively participated in bilateral negotiations with the DRC — you might recall, Madam President, I said we had had nine meetings — in the hope of reaching an amicable solution driven by good faith. During the negotiations, Uganda made what it considered a very serious offer, which was higher than what the DRC has told you and commensurate with the relevant precedent from the region. Yet, our goodwill was met with stubborn refusal from the Congolese side. In rejecting that offer, the DRC then assumed the risk of coming back to this Court, knowing full well that it would have to prove its claims before this court of law in accordance with paragraph 260 of the Judgment of this Court.

8. Uganda believes in international justice. That is why we are here today. But justice must be based — and can only be based — on sound legal principles, established facts, rules and standards.

9. Madam President, Members of the Court, to be sure — and other counsel have already said this — no amount of money can replace a human life. But the task of this Court is to determine what losses were actually attributable to Uganda. The Court made clear that it falls to the DRC to prove the nature, extent and valuation of the harm caused by Uganda. In the absence of an agreement authorizing you to depart from the strict law and to rule *ex aequo et bono*, we therefore ask you, honourable Members of this Court, to decide, in accordance with your mission, on the basis of the applicable law and of that law alone. In particular, we hope the Court will follow well-established precedents on evidence and causality and find that, unfortunately, the DRC has not fulfilled its obligations in that regard. We are convinced that by relying on the correct application of international law, your two Judgments will allow the Parties to turn this dark page in their history and allow our two peoples to renew their brotherly relationship.

10. In further demonstration of Uganda's good faith, Uganda agrees to, and hereby does officially, waive its counter-claim for reparation for the injury caused by the conduct of the DRC's

[292] United Nations Office of the Special Envoy for the Great Lakes, Regional Oversight Mechanism, available at https://ungreatlakes.unmissions.org/regional-oversight-mechanism-rom (last visited 29 Apr. 2021).

armed forces, including attacks on the Ugandan diplomatic premises in Kinshasa and the maltreatment of Ugandan diplomats.

11. Madam President, Members of this Court, I would like to conclude with telling this Court that Uganda is the largest refugee-hosting country in Africa and the second largest in the world. It hosts over 1.4 million refugees, with the DRC refugees themselves accounting for about 430,000 of those. Madam President, I would like to repeat that: *Uganda hosts over 1.4 million refugees, with DRC refugees themselves accounting for about 430,000 of those*, and provides them all with land, healthcare, education, and the right to work and own businesses. Contrary to what the DRC tried to depict, this cannot by any stretch of the imagination be the actions or disposition of a bully or a rogue State. As I said last week, every day the DRC and Uganda are working closely together on matters of mutual importance, and Uganda hopes that the Court's decision on reparation will enable the Parties to continue building peace.

12. I shall now read Uganda's final submissions. In accordance with Article 60 of the Rules of Court, the Republic of Uganda respectfully requests that the Court:

(1) Adjudge and declare that:

(a) The DRC is entitled to reparation in the form of compensation only to the extent it has discharged the burden the Court placed on it in paragraph 260 of the 2005 Judgment "to demonstrate and prove the exact injury that was suffered as a result of specific actions of Uganda constituting internationally wrongful acts for which it is responsible";

(b) The Court's finding of Uganda's international responsibility in the 2005 Judgment otherwise constitutes an appropriate form of satisfaction; and

(c) Each Party shall bear its own costs of these proceedings; and

(2) Reject all other submissions of the DRC.

13. Madam President, honourable Members of the Court, I thank you for your kind attention. I would like to thank the Members of the Court for their patience with us. I would also, Madam President, like to take the opportunity to thank all the members of the Registry and the interpreters, and all the helpful staff for their dedicated work throughout these hearings. I thank you for your kind attention.

The PRESIDENT: I thank the Agent of Uganda. The Court takes note of the final submissions that you have presented on behalf of your Government.

This brings us to the end of the hearings in the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*. I thank the representatives of the Parties for the assistance they have given to the Court by their presentations in the course of these hearings. In accordance with practice, I shall request the Agents of the Parties to remain at the Court's disposal to provide any additional information it may require.

The Court will now retire for deliberation. The Agents of the Parties will be advised in due course as to the date on which the Court will deliver its Judgment. As the Court has no other business before it today, the sitting is now closed.

The Court rose at 6.10 p.m.

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