CR 2005/3 (traduction)

CR 2005/3 (translation)

Mardi 12 avril 2005 à 10 heures

Tuesday 12 April 2005 at 10 a.m.

8 The PRESIDENT: The sitting is open. I give the floor first to Professor Salmon.

Mr. SALMON: Mr. President, Members of the Court,

UGANDA'S LITIGATION STRATEGY

1. Before addressing the debate on the merits, the Democratic Republic of the Congo would draw the attention of the Court to certain singular features of our opponents' written pleadings. As in every case before the Court, the parties put forward arguments of fact and law in support of their positions. There is, however, a further form of argument to which our opponents have had ample recourse, that is to say, the rhetorical one. By appealing to extrajudicial values or employing rhetorical devices, Uganda seeks to make the Court receptive to its position. However, we feel it may be instructive to subject this approach to closer scrutiny, and see how it really operates. To this end, I shall divide my presentation into two parts: first, Uganda's reliance upon extrajudicial values or fictions, and then its use of rhetorical devices and the pitfalls of such discourse.

I. Uganda's reliance upon extrajudicial values or fictions

2. The Court will by now have seen through our opponents' litigation strategy. What they are seeking to do is covertly to impose upon the Court the following images.

***First image*: Uganda the gentle lamb**

3. Uganda presents an idealized image of itself as an open and tolerant State. According to its Counter-Memorial, it is "an African-led state that had overthrown a horrible dictatorship and established a broad-based, non-sectarian government that was tolerant and inclusive of all political, religious and ethnic forces in the country"[1]. The Respondent then magnanimously offers the

9 Congo advice on how to reduce internal conflict through "good governance" (that fashionable buzzword), national dialogue and involvement of civil society[2] — another fashionable notion.

4. A pretty picture, but one difficult to accept at face value. The Court will doubtless be asking itself how it is that a State so concerned with good governance and, of course, dialogue with

[1] CMU, p. 11, para. 16.

[2] *Ibid*., p. 44, para. 55 and p. 51, para. 56.

civil society, was based until very recently on a one-party system[3] and has succeeded in provoking a quite extraordinary number of insurgent movements, of which our opponents themselves have provided an impressive list: Allied Democratic Forces (ADF), Former Uganda National Army (FUNA), Lord's Resistance Army (LRA), Uganda Rescue Front II (UNFR II), West Nile Bank Front (WNBF) and National Army for the Liberation of Uganda (NALU)[4]. Even after the Parties had filed their written pleadings, a new insurgent group was established by — ironically — officers of the Ugandan army of occupation in the eastern Congo: the Peoples' Redemption Army.

5. We are bound also to ask ourselves why, for so many years, and indeed right up to the present time, Uganda has been unable to bring these lost sheep back into its welcoming fold. On our opponents' own admission, insurgents have been active on Ugandan territory since January 1986 (when President Museveni came to power) and — it is important to stress this — even at a time when relations with the Congo's successive governments were excellent, or when Ugandan troops were occupying a substantial part of Congolese territory. This shows that responsibility for the situation lies not with the Congo — as our opponents imply — but with the Ugandan Government itself, which stubbornly refuses to open political dialogue with its numerous opposition movements and seeks, with singular lack of credibility, to lay the blame on external scapegoats.

***Second image*: Uganda the innocent victim**

10 6. The image which Uganda gently whispers to us is that of innocent victim. We are asked to accept the following scenario: Uganda as victim of a plot, of an aggressive triple alliance between the Democratic Republic of the Congo, Sudan and Ugandan rebels assisted or controlled by Kinshasa. That is said to justify Uganda's "modest" presence on Congolese territory — in exercise, of course, of its right of self-defence.

Uganda shows itself here to be a master of the art of understatement. According to its Counter-Memorial:

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[3]"Uganda is one of the few fifty-four Commonwealth member countries with a single party system of governance", *The Monitor*, Kampala October 14, 2003, http://allafrica.com/stories/printable/200310150103.html.

[4]*Ibid*., p. 1, para. 4.

> "The Ugandan forces present in the territory of the DRC are confined to a limited number of specific locations with the purpose of disarming and demobilizing anti-Uganda insurgents . . . and controlling military airfields and lines of communication, which would otherwise be available for the deployment of Sudanese military equipment and logistical support to the anti-Uganda insurgents."[5]

Oh, how prettily this is put!

7. Quite apart from the fact that there is no evidence whatever of Sudanese involvement before the Ugandan attack, one is baffled as to why, in order to secure the border area in the Ruwenzori Mountains — which, I would remind you, are in fact adjacent to the Rwandan frontier — it was necessary for the Ugandan army to conquer a huge swathe of Congolese territory as far as Gbadolite? That city lies 1,120 km from the Ugandan border. It is almost as if the Netherlands, in order to secure its southern boundary, occupied Belgium, France and part of Spain as far as Barcelona. In these circumstances, the argument of a threat to security — still unproven — looks very much like a mere pretext.

***Third image*: Uganda the apostle of peace**

8. A third image which Uganda seeks to present of itself is that of apostle of peace. Thus, according to the Respondent, the presence of its troops on Congolese soil for five years is explicable by reason of their role as peacekeepers in the eastern Congo, of benefactors of the Congolese people, of trustees of the country's natural resources in the best interests of the Congolese people. Uganda as "Salvation Army", or provider of humanitarian assistance. Its

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presence is claimed to be justified by some sort of international mandate deriving from resolutions of international conferences, as well as by the consent of the Democratic Republic of the Congo.

9. Professor Olivier Corten will deal with Uganda's first justification, based on a so-called consent deriving from various international agreements. Let us simply point out, at this stage, that this argument ignores the Security Council's clear condemnation of Uganda's invasion and of its instruction to the Respondent to withdraw from the territory[6]. It is also at odds with the successive commitments undertaken by Uganda itself since September 1998, which it has deliberately

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[5]CMU, p. 178, para. 325.

[6]See Statement by the President of the Security Council of 31 August 1998, SPRST 1998/26, MDRC, Ann. 14; Statement by the President of the Security Council of 11 December 1998, SPRST 1998/36, MDRC, Ann. 15; Security Council resolutions 1234 (1999) of 9 April 1999 and 1304 (2000) of 16 June 2000.

violated. I have evoked these points here. It will be for Professor Klein to show what we are to think of Uganda's peacekeeping role in the Ituri.

It is bad enough that Uganda seeks to misrepresent fiction as reality; still worse are the rhetorical devices employed in the course of that exercise.

II. Uganda's rhetorical devices and the pitfalls of such discourse

10. The DRC would now like to illustrate the systematic use by Uganda of certain rhetorical devices, mainly designed to discredit its opponent, to distort the reality by misrepresentations and to sidestep the judicial debate.

Discrediting the opponent

11. Among the devices used to discredit the opponent, what first springs to the eye is the general arrogance of the discourse, with its erudite tone and sermonizing on the "dos and don'ts" of international procedure. The Respondent thus accuses the DRC of "eccentricities" or of "procedural anomalies" in its pleadings, but its allegations are not based on any provisions of the Statute or Rules of Court[7]. It speaks of "the claimant State as an ineffective appearing State"[8].

12 A similar arrogance — in this case, the arrogance of the jackboot — can be found when Uganda refers to the use of force. "Ugandan forces succeeded in occupying all the key airfields and river ports that served as gateways to eastern Congo and the Uganda border."[9] Or again: "Uganda pursued the only action possible . . . Between 16 and 20 September 1998, she sent her troops into Congo to drive the Sudanese out."[10] Such a style leaves one speechless. *Quia nominor leo*.

To some extent, it is an arrogance that verges on the comical. According to Uganda's Rejoinder: "the calls by various DRC officials for Uganda to withdraw her troops was itself a hostile act that threatened Uganda's security"[11]. I am not making this up! So much for Uganda's idea of a "threat"!

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[7] CMU, Chaps. VII and VIII.

[8] *Ibid.*, p. 107.

[9] *Ibid*, p. 43, para. 54.

[10] RU, pp. 40-41, para. 88.

[11] *Ibid.*, p. 47, para. 101.

12. Another noteworthy device is the characterization as an established fact of the opponent's alleged breach of the rules of judicial debate. Uganda thus repeatedly claims in its most recent pleadings that the Congo failed to address certain arguments[12], whereas the Congo did so systematically in its Reply[13]. One can appreciate that Uganda was not satisfied with the responses — even though they were substantiated — but to deny the very existence of a response from the Congo goes much further, indeed too far: using unfair means in order to discredit the opponent[14].

In the same way, Uganda makes great play of an alleged lack of rigour in the evidence presented by the DRC, but, as will be seen a little later, it does not exhibit the same scruples when it comes to its own evidence. For example, it asserts that a witness statement produced by the DRC

13 is "unreliable" because it emanates from Colonel Ebamba of the Congolese armed forces[15], but has no hesitation in itself using affidavits prepared by its own officials for the purposes of the case[16].

13. The *defamatory description* of the DRC's judiciary is, quite frankly, unacceptable. I quote: "plagued by corruption and lack of funding, resources and personnel, the Congolese courts are not, and have never been, impartial dispensers of justice"[17]. Is that really the way to express oneself in documents submitted to this Court?

Misrepresentation

14. Misrepresentation is another device to which our opponents are partial. It includes the technique of *attributing to the Congo an attitude that it did not adopt*; for example, when it claims that the Congo accepted statements by Uganda in its pleadings and thus gave its *acquiescence*, whereas the statements in question were firmly disputed in every case, in particular those

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[12]"failure to contest critical evidence presented by Uganda", *ibid.*, p. 21, para. 58.

[13]RDRC, pp. 179-192, paras. 3.68-3.94; pp. 355-368, paras. 6.16-6.47; and pp. 370-375, paras. 6.54-6.64.

[14]See the DRC's response in AWODRC, p. 34, para. 1.46, 4.

[15]RU, p. 306, para. 662.

[16]See CMU, Anns. 31 and 60.

[17]RU, p. 328, para. 708.

concerning the alleged collusion with Sudan[18]: this method is systematically used by the Respondent. Uganda even goes as far as claiming that the DRC did not respond to an argument when 130 pages of the Reply have been devoted to refuting it[19]. It is somewhat childish, and will not escape the vigilance of the Court, for Uganda repeatedly to distort or ignore the pleadings of its opponent, which has clearly and methodically responded to its arguments: The DRC cannot but protest at this technique, which verges on falsification.

15. Uganda makes frequent use of *distorted and fallacious references to documents*: thus, with respect to the Protocol of 27 April 1998[20], Uganda presents this text as "formalising the invitation and committing the armed forces of both countries to jointly combat the anti-Uganda insurgents in Congolese territory and secure the border region"[21].

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But what does that Protocol actually say? "The two parties recognized the existence of enemy groups which operate on either side of the common border. Consequently, the two armies agreed to co-operate in order to insure security and peace along the common border."[22]

This is clearly not quite the same thing.

16. The evidentiary techniques employed in Uganda's pleadings are hardly conducive to revealing the truth.

— Uganda constantly repeats claims or allegations without providing the slightest tangible evidence for them, in particular with respect to the presence of Sudanese troops in the DRC or to an alleged plot with that State in order to destabilize Uganda[23]. That recurrent allegation in Uganda's argument is never once substantiated. Uganda refers to protests made to Kinshasa about an alleged visit by President Kabila to Khartoum for that purpose, but it is unable to provide evidence of them[24]. The Respondent cites a document produced by the Congo which

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[18]"None of these facts are now in dispute" (RU, p. 5, para. 17); "the DRC has now admitted either directly or by failure to contest" (*ibid.*, pp. 21-23, para. 59); "all of the above is expressly admitted by the Reply or uncontested by the Reply. It must now be taken as facts" (*ibid.*, p. 25, para. 60); "the Reply concedes" (*ibid.*, p. 34, para. 75); "the Reply acknowledges" (*ibid.*, pp. 34-35, para. 76); "As the admitted and uncontested facts now show" (*ibid.*, p. 35, para. 77); "none of these facts is denied in the *Reply*" (*ibid.*, p. 38, para. 81); "DRC concedes" (*ibid.*, pp. 39-40, para. 85).

[19]See references in Congo's Additional Observations, p. 35, para. 1.48

[20]CMU, Ann.19.

[21]*Ibid.*, p. 23, para. 31.

[22]*Ibid.*, Ann.19.

[23]RU, p. 119, para. 277.

[24]CMU, p. 30, para. 39.

envisages the hypothesis that such a visit could have taken place; but that inconclusive document certainly provides no indication that any such visit could have been motivated by aggressive intentions[25].

— Our opponents refer to evidence that has allegedly disappeared: the Ugandan Ambassador in Kinshasa is said to have left on the Embassy premises, on his departure in August 1998, certain documents dating back several years and proving President Mobutu's implication in a plot to have President Museveni assassinated[26]. It is curious, to say the least, that an experienced diplomat could have left behind such evidence, and even more curious that he would have been imprudent enough not to safeguard it by earlier transmitting it to his capital. It is even more surprising that this diplomat, who participated in the drafting of the Ugandan Counter-Memorial, only recalled those facts at the Rejoinder stage[27].

— Uganda cites documents that supposedly prove an attack by the Democratic Republic of the Congo on the Bwindi National Park or against Fort Portal. In reality, those documents, which emanate from the Ugandan security services and which were drawn up *ex post facto* at the time when the pleadings were being drafted, do not even mention the Congo as being responsible for these attacks[28].

— A Ugandan document relies on the statements of a witness arrested in May 2000 who describes air-drops that allegedly took place in November 2000. However, the same document indicates that this witness had been taken prisoner by the UPDF troops on 17 May 2000. The air-drops thus took place while he was in prison. I am sure the Court will agree that his capacity to testify about this demonstrates exceptional gifts or clairvoyance[29].

Evasion

17. The device of evasion has been used in various forms.

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[25]AWODRC, p. 44-45, para. 1.64.

[26]RU, p. 322, para. 695 and Ann. 87, para. 9 and 14.

[27]See AWODRC, p. 24, para. 1.35 and RU, Ann. 87, para. 26 and AWODRC, pp. 96-97, p. 2.52.

[28]RDRC, pp. 470-372, paras. 6.52 to 6.58; AWODRC, p. 46, para. 1.68.

[29]RDRC, pp. 373-374, paras. 6.60-6.62.

First, when Uganda explicitly refuses to address certain of its opponent's arguments. Among many examples, we would cite the argument concerning the law applicable to the pillaging of natural resources in the Congo[30].

18. A more subtle form is the *technique of underlining*, in which Uganda has become highly skilled. The idea is to reproduce texts in which only those points on which it seeks to base its arguments are highlighted, with other essential aspects of the text being ignored. Thus the passages which make reference — albeit often in vague terms — to Uganda's "security concerns" are extensively underlined. However, in that connection, Uganda carefully avoided drawing attention

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to passages which imposed on Uganda an immediate ceasefire and the withdrawal of its troops from the territory of the Congo[31].

19. The Respondent is also not averse to the *circular argument.* A typical example of this can be found in the claim that the tank seized by the Democratic Republic of the Congo near Kinshasa could not have belonged to the Ugandan army because that army did not take part in the attack on Kitona[32], or that the DRC "cannot demonstrate that Uganda invaded the DRC in August 1998 when, in fact, this did not happen"[33]. Most convincing!

20. Another device is the one-sided presentation of certain claims. Thus, with respect to security concerns, these are presented as being specific to Uganda, whereas, according to the texts, they are shared by both Parties. The text of the 27 April 1998 Protocol indicates that insurgent groups, hostile both to the DRC and Uganda, were operating on both sides of the border. The Protocol was thus synallagmatic in nature[34].

21. Uganda is also skilled in the art of completely changing position when caught in the act of making false claims. Thus, after denying it supported the MLC in its Counter-Memorial[35], it was obliged to acknowledge this fully in its Rejoinder[36].

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[30]RU, para. 512.

[31]See for example CMU, pp. 45-46, paras. 58 and 59; *ibid.*, p. 165, para. 301, p. 166, para. 303 and p. 167, para. 304.

[32]RU, p. 61, para. 143.

[33]RU, pp. 49-50, para. 107.

[34]See CMU, pp. 186-187, para. 338.

[35]CMU, pp. 91-92, para. 143.

[36]RU, pp. 80 *et seq.*, paras. 180 and 185.

22. These few examples, Mr. President, Members of the Court, will serve — should that be necessary — to sharpen the critical sense for which this Bench is famous when faced with intemperate pleading.

23. In the presentations which will follow, the Democratic Republic of Congo will do its best to avoid similar pitfalls.

I would like to thank the Court for its kind attention. I would now kindly ask you, Mr. President, to give the floor to Professor Philippe Sands.

Le PRESIDENT : Je vous remercie, Monsieur Salmon. Je donne à présent la parole à M. Sands.

17 M. SANDS : Je vous remercie. Monsieur le président, Madame et Messieurs de la Cour, c'est un honneur pour moi que de comparaître aujourd'hui devant vous au nom de la République démocratique du Congo.

QUESTIONS DE PREUVES

1. Je vais ce matin examiner quelques points généraux ayant trait à la nature et à la portée des éléments de preuve invoqués par la RDC à l'appui de sa cause, et je vais devoir soulever une question cruciale pour toutes les cours de justice : comment prouver des faits ? En préparant cette plaidoirie, j'ai eu maintes occasions de me remémorer le propos que m'a tenu sir Robert Jennings, mon tout premier professeur de droit international, quand j'ai sollicité ses conseils sur la préparation d'un dossier. La règle d'or, m'a-t-il répondu, c'est de ne jamais — jamais — perdre de vue les faits. Et d'ajouter, avec ce pétillement malicieux du regard que je revois encore : «Et de les présenter aussi simplement que possible.»

2. On aurait en l'espèce le plus grand mal à perdre de vue les faits car ces derniers sont à présent parfaitement connus. Nous reviendrons un peu plus tard et aussi demain sur des questions de preuve plus précises, en rapport avec chacun des trois principaux griefs que la RDC formule à l'encontre de l'Ouganda, qu'elle accuse d'avoir, premièrement, illégalement recouru à la force et occupé de larges parties du territoire de la RDC, deuxièmement, commis des violations systématiques et massives des droits fondamentaux de l'homme et, troisièmement, manqué aux

obligations qui lui incombaient en n'empêchant pas le pillage de l'or, de diamants et des autres ressources naturelles de la RDC. Ce matin, je m'en tiendrai à certaines questions plus générales soulevées dans le cadre de la procédure écrite.

3. Pour nous, les éléments de preuve soumis à la Cour établissent amplement les faits sur lesquels se fonde la RDC. Dans son contre-mémoire, l'Ouganda a qualifié d'«excentricité» la manière dont la RDC traite la question des preuves[37]. Dans sa réplique, la RDC a répondu en quatre points à cette allégation, soutenant 1) que les objections formulées par l'Ouganda à l'encontre de la méthodologie suivie par la RDC en matière de preuves sont dépourvues de fondement; 2) que les éléments de preuve produits par la RDC satisfont, par leur nature et leur qualité, aux prescriptions du Statut, du Règlement et de la pratique de la Cour; 3) que le critère de preuve que devait remplir la RDC était de tenir pour faits pertinents ceux qui présentaient un degré

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de «certitude raisonnable»; et 4) que les moyens produits ont consisté à fournir à la Cour les faits pertinents répondant à ce critère[38]. La Cour aura peut-être relevé que, dans sa duplique, l'Ouganda s'est abstenu de répondre aux arguments concrets et précis de la RDC, préférant se contenter de renouveler son allégation initiale[39].

4. La Cour aura relevé également la parcimonie dont fait quant à lui montre l'Ouganda en matière de preuves. L'Ouganda invoque, dans ses écritures, des extraits pour le moins choisis des retranscriptions des auditions organisées dans le cadre de l'enquête de sa propre commission, la commission Porter. Mais, nous le savons maintenant, ce matériau sur lequel se fonde l'Ouganda est sélectif et, en ce sens à tout le moins, spécieux — nous y reviendrons. Ce qui est frappant, c'est que l'Ouganda n'a pas éprouvé le besoin de transmettre à la Cour le rapport final de la commission Porter, qui a été communiqué à son gouvernement en janvier 2003 et au Secrétaire général des Nations Unies peu de temps après. Nonobstant l'article 50 du Règlement de la Cour qui fait obligation aux parties de joindre en annexe «tous documents pertinents produits à l'appui des thèses» d'une partie, ce n'est pas l'Ouganda, mais la RDC qui a soumis ce rapport à la Cour — la RDC qui a dû solliciter la version intégrale des transcriptions et annexes établies par la commission

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[37] CMO, deuxième partie, p. 76 et suiv.

[38] Voir par exemple RRDC, par. 1.69.

[39] Voir par exemple DO, par. 45 et suiv.

Porter que l'Ouganda a fournies à l'Organisation des Nations Unies mais pas à son «organe judiciaire principal». Six mois durant, l'Ouganda les a gardées par-devers lui, ne donnant d'informations ni à la Cour ni à la République démocratique du Congo. Entre-temps, il en a fourni au compte-gouttes, dans ses écritures, quelques extraits dont il ne pouvait cependant méconnaître le caractère spécieux ou incomplet au regard du rapport final de la commission Porter. Et c'est la RDC qui a dû verser au dossier de la Cour certains de ces nouveaux documents. Dans ces conditions, la Cour voudra bien, je l'espère, me pardonner de trouver pour le moins piquant d'entendre l'Ouganda taxer d'«excentricité» l'attitude que la RDC adopte à l'égard des éléments de preuve et affirmer que le demandeur ne s'est pas acquitté de la charge lui incombant en la matière.

5. Néanmoins, la démarche de l'Ouganda dans ses écritures mérite une certaine attention. Elle fournit l'occasion de s'assurer que les moyens qui vous ont été soumis répondent bien à deux questions fondamentales qui se posent : quels faits incombe-t-il à la RDC d'établir à ce stade de la procédure et comment ces faits doivent-ils être établis ? L'argumentation de l'Ouganda revient finalement à reprocher un double manquement à la RDC, laquelle aurait omis, *premièrement*, de

19 produire des «éléments de preuve destinés à établir un rapport d'imputabilité entre l'Etat défendeur et la conduite présumée délictuelle» et, *deuxièmement*, de présenter des éléments de preuve précis attestant «un quelconque préjudice causé par la conduite de l'Etat défendeur»[40]. En d'autres termes, l'Ouganda affirme que les moyens produits n'établissent pas suffisamment que les actes dont la RDC lui fait grief lui sont imputables ni qu'il y a eu préjudice. La Cour verra bien, je l'espère, quelle est ici la démarche de l'Ouganda : l'Ouganda ne prétend pas ici que les éléments de preuve ne suffisent pas à établir que les faits allégués — ou certains d'entre eux — se sont produits. L'Ouganda semble même avoir admis désormais que, par exemple, la présence des forces armées ougandaises sur le territoire de la RDC est amplement avérée, affirmant maintenant que ce point n'est pas controversé. L'Ouganda ne conteste pas davantage que certains outrages à la personne ont bien été commis, ni que certaines ressources naturelles d'une grande valeur ont quitté le territoire occupé de la RDC pour aboutir sur le sien : ce n'est pas là ce que plaide l'Ouganda. Ce que fait valoir l'Ouganda en ce qui concerne les preuves, c'est fondamentalement qu'il n'a pas été

[40] CMO, p. 77, par. 103.

démontré que les actes allégués sont imputables à l'Ouganda; c'est ce que l'on pourrait appeler «l'argument de l'imputabilité».

I. EN GUISE D'INTRODUCTION

6. Avant d'aborder au fond le différend qui semble opposer les Parties, je voudrais formuler trois observations générales concernant les éléments de preuve produits devant la Cour.

7. Ma *première* observation est la suivante : il ne faut pas oublier que, tout au long de la procédure écrite, le Gouvernement de la RDC n'avait accès à aucune des régions occupées par l'Ouganda. C'est-à-dire qu'il n'avait pas accès aux régions mêmes où furent commises les violations pour y recueillir les preuves de première main que l'Ouganda l'accuse de ne pas s'être procurées. Impossible, par exemple, de se rendre dans les mines pour déterminer les quantités exactes de ressources naturelles, notamment de diamants et d'or, sorties illégalement du territoire de la RDC sous les yeux, sinon sous le contrôle, des forces ougandaises. Impossible aussi de rencontrer des victimes individuelles à même de fournir des témoignages de première main — sous forme de dépositions — attestant certaines des atrocités perpétrées. Pendant toute cette phase de la procédure écrite, la RDC n'a pu faire autrement que de se fonder essentiellement, encore que non

20 exclusivement, sur des sources de seconde main, précisément parce que l'Ouganda exerçait le contrôle exclusif du territoire en question. Ce que dit la Cour en l'affaire du *Détroit de Corfou* présente à cet égard une pertinence toute particulière :

> «Du fait de ce contrôle exclusif, l'Etat victime d'une violation du droit international se trouve souvent dans l'impossibilité de faire la preuve directe des faits d'où découlerait la responsabilité. Il doit lui être permis de recourir plus largement aux présomptions de faits, aux indices ou preuves circonstancielles *(circumstantial evidence)*.»[41]

8. Ma *deuxième* observation liminaire et générale est tout aussi importante. Elle a trait à la phase de la procédure dans laquelle nous nous trouvons actuellement. La réparation que la RDC cherche à obtenir est de nature déclaratoire — faire admettre que l'Ouganda a violé des règles coutumières et conventionnelles relatives à l'emploi de la force, à l'exploitation des ressources naturelles et à la protection des droits fondamentaux de l'homme et du droit humanitaire. Cette phase de la procédure s'apparente à celle qu'a conclue l'arrêt du 27 juin 1986 en l'affaire des

[41] *C.I.J. Recueil 1949*, p. 4.

Activités militaires et paramilitaires, une affaire qu'affectionnent, j'en suis sûr, MM. Brownlie et Reichler[42]. La RDC a amplement expliqué qu'elle ne cherche pas, à ce stade, à obtenir les réparations précises — réparations ou indemnités — qu'appellent ces violations de certaines normes. Pareilles mesures pourraient faire l'objet d'une phase ultérieure de la procédure, puisque, en l'absence d'accord entre les Parties, c'est justement une phase ultérieure qui serait réservée à la détermination des formes et du montant de toute réparation qui pourrait être exigée[43]. En conséquence, les faits que la RDC doit établir à ce stade-ci ne s'étendent pas à la preuve du préjudice exact qu'elle a subi ni à la portée de la réparation à laquelle elle a droit. C'est ultérieurement que la RDC serait appelée à faire la preuve des pertes encourues à la suite, par exemple, de l'occupation illicite. Aussi, quand l'Ouganda soutient que la RDC n'a pas fourni de preuve précise des dommages dus au comportement de l'Ouganda — qu'il s'agisse d'actes ou d'omissions — l'argumentation est infondée. L'Ouganda est à côté de la question.

9. Ma *troisième* observation d'ordre général a trait à la thèse de «l'imputabilité» que l'Ouganda défend. L'Ouganda part du principe que, pour établir que sa responsabilité internationale se trouve engagée, la RDC devrait prouver, dans les *faits*, que les actes allégués sont
21 imputables à l'Ouganda, au sens où celui-ci aurait donné l'ordre de les commettre. Mais l'Ouganda — je le dis avec tout le respect qui lui est dû — se méprend. La question de l'imputabilité porte à la fois sur des éléments de fait et des éléments de droit — M. Salmon y reviendra en temps voulu. Pour l'heure, je m'emploierai à illustrer mon propos en prenant pour exemple le pillage des ressources naturelles, mais je tiens à ajouter que la même démonstration vaut pour les violations massives et systématiques des droits fondamentaux de l'homme commises sous le regard même de l'Ouganda. Les règles pertinentes de droit international n'imposent pas à la RDC d'établir que l'Ouganda a ordonné d'exploiter certaines ressources naturelles de RDC et de les sortir de son territoire. Ainsi que je l'expliquerai mercredi après-midi, le droit — et en particulier le règlement de La Haye de 1907 — fait expressément obligation à la puissance occupante de n'autoriser l'exploitation des ressources naturelles du pays occupé qu'au bénéfice de

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[42] *C.I.J. Recueil 1986*, p. 3.

[43] Voir *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique), ordonnance du 18 novembre 1987, C.I.J. Recueil 1987*, p. 188.

celui-ci. De sorte qu'il suffit à la RDC, pour faire admettre sa thèse sur la question donnée en exemple, de prouver :

1) que l'Ouganda a occupé son territoire;
2) que pendant cette occupation, des individus investis d'une part de l'autorité ougandaise, notamment le général Kazini, chef de l'armée ougandaise, se sont livrés, ou ont assisté, à l'exploitation illégale de ressources congolaises; et
3) que les autorités ougandaises se sont abstenues d'intervenir, au mépris de la diligence due par elles, pour mettre un terme aux pillages commis par des membres de leurs forces armées, par des armées rebelles ou par des tiers.

10. Je me permets de dire qu'à notre avis, les moyens soumis à la Cour prouvent sans l'ombre d'un doute la véracité de ces trois propositions. A nouveau, en ce qui concerne les ressources naturelles, les rapports du groupe d'experts de l'Organisation des Nations Unies sur l'exploitation illégale des ressources naturelles de la République démocratique du Congo, groupe constitué par le Secrétaire général à la demande du Conseil de sécurité, fournissent des preuves incontournables à l'appui des faits invoqués par la RDC. Aucun doute raisonnable n'est permis à cet égard. Le rapport de la commission judiciaire d'enquête mise en place par l'Ouganda lui-même — la commission Porter —, lequel a été publié après la clôture de la procédure écrite et diffusé sur Internet, prouve irréfutablement que les plus hauts responsables de l'armée ougandaise présente sur
22 le territoire de la République démocratique du Congo se livraient intensément à cette exploitation illégale[44]. D'après la commission Porter, ces conclusions s'appuyaient sur des preuves solides.

11. Il pourrait être utile de s'arrêter un instant sur la manière dont fut conduite l'enquête en question. La commission fut établie en mai 2001 pour enquêter sur les allégations contenues dans les premiers rapports de l'ONU. Elle comptait trois membres éminents et bénéficiait du concours du premier procureur d'Etat ougandais et d'un conseil principal; elle était présidée par le juge David Porter. La commission recueillit de très nombreuses preuves sur une période de dix-huit mois et acheva son enquête en janvier 2003. Elle s'est appuyée sur des dépositions, de hauts

[44] Par exemple, la commission Porter examine dans le détail les allégations à l'encontre du chef de l'état-major ougandais en RDC et constate qu'elles sont «solidement fondées sur des éléments de preuve», p. 202. A la page 198 de son rapport, elle indique entre autres qu'il y a accord sur le fait que «des officiers, y compris de rang très élevé, et des soldats des UPDF se sont conduits de façon malséante en République démocratique du Congo».

responsables notamment, faites sous serment, ce qui leur confère une autorité particulière. Il convient à cet égard de rappeler que, dans son arrêt de 1984 en l'affaire *Nicaragua*, la Cour a indiqué que les déclarations émanant de hauts responsables «possèdent une valeur probante particulière lorsqu'elles reconnaissent des faits ou des comportements défavorables à l'Etat que représente celui qui les a formulées. Elles s'analysent alors en une sorte d'aveu.» Ce point de vue était exprimé au sujet de personnalités politiques, mais vaut assurément pour les hauts responsables militaires, tels le général de brigade Kazini et certains de ses collègues, et les responsables judiciaires, tels le juge Porter et ses collègues.

12. L'on peut dès lors s'interroger sur l'effet qu'ont, devant la Cour, les conclusions de la commission Porter sur les faits. Selon nous, cet effet est assimilable à celui des conclusions de même nature rendues par une juridiction nationale : sans être contraignant en tant que tel, il est revêtu d'une grande autorité. Il impose à l'Ouganda de réfuter les faits, une tâche dont celui-ci n'a pas même entrepris de chercher à s'acquitter. Donc l'Ouganda mérite certes tout notre respect pour avoir ouvert cette enquête mais il ne saurait ensuite se soustraire aux conséquences qui en découlent. Du point de vue des faits, ce rapport Porter est extrêmement préjudiciable à la cause que l'Ouganda défend devant la Cour. C'est peut-être la raison pour laquelle l'Ouganda aurait préféré que la Cour n'ait pas accès au rapport ni aux moyens soumis à la commission – et puis-je indiquer combien je regrette que la RDC, conformément à la pratique de la Cour, n'ait pu produire qu'un infime échantillon des milliers de pages de preuves communiquées à la commission Porter et consultables sur les divers CD-Roms que l'Ouganda a finalement fournis au Greffe. Bien sûr, la Cour n'est pas une juridiction pénale et elle a par conséquent forcément une autre façon de traiter la question des preuves.

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13. Le rapport Porter est accablant en ce qui concerne la conduite de certains hauts responsables des forces de défense du peuple ougandais (UPDF), dont le général de brigade Kazini. N'oublions pas que ce dernier était le chef de l'état-major des UPDF directement responsables de l'opération «Safe Haven» en République démocratique du Congo. Après la publication du rapport, le général de brigade Kazini fut «limogé»[45]. Le rapport met également en cause le général

[45] Rapport final du groupe d'experts, 23 octobre 2003, p. 23, par. 71.

Salim Saleh — demi-frère du président Museveni — et sa femme Jovial Akandwanaho pour leurs déplacements par voie aérienne à destination et en provenance de la RDC et pour contrebande de diamants. Le rapport Porter conclut que les pillages ne sont pas imputables au président Museveni. Mais ils ont eu lieu et, aux fins d'établir la responsabilité étatique de l'Ouganda, cette conclusion particulière n'est pas pertinente. Le fait est que ce comportement fut celui «de personnes investies de l'autorité gouvernementale»[46] et relève manifestement de la règle exprimée à l'article 7 du projet d'articles de la CDI sur la responsabilité de l'Etat. Ainsi que l'expliquera demain M. Salmon, peu importe que, par leurs actes, certains membres des UPDF aient abusé de leur autorité ou enfreint les ordres, si tant est qu'ils l'aient fait.

II. LA PRATIQUE DE LA COUR EN MATIÈRE DE PREUVE

14. J'aborde à présent trois points plus concrets ayant trait aux éléments de preuve présentés à la Cour. Quels principes en matière d'établissement des preuves la Cour doit-elle appliquer lorsqu'elle analyse les arguments de la RDC et les moyens de défense que l'Ouganda fait valoir ?

15. En établissant ses pièces de procédure, la République démocratique du Congo a pris soin de s'inspirer de la pratique constante de la Cour qui est établie de longue date ainsi que de l'instruction de procédure III. La République démocratique du Congo n'a pas demandé — pas plus qu'elle ne demande aujourd'hui — de dérogation quelconque à ces règles ni à cette pratique. Le point de départ, cela va sans dire, est l'article 52 du Statut de la Cour, qui fait obligation aux parties estant devant elle de produire les «preuves et témoignages» sur lesquels elles se fondent. En vertu de l'article 49 du Règlement de la Cour, les pièces de procédure doivent contenir «un exposé des faits sur lesquels la demande est fondée», et l'article 50 prévoit que soient joints en annexe «tous documents pertinents produits à l'appui des thèses formulées dans cette pièce». L'Ouganda, selon nous, ne prétend pas que la RDC n'a pas satisfait à ces conditions formelles. Les allégations de l'Ouganda portent sur trois autres questions : la charge de la preuve, le critère d'établissement des preuves, enfin le caractère concluant et la force probante des éléments de preuve présentés par la République démocratique du Congo.

[46] *Petrolane, Inc.* v. *Islamic Republic of Iran* (1991), 27, Iran-USCTR 64, p. 92 [*traduction du Greffe*].

16. S'agissant de la *charge de la preuve*, dans sa pratique, la Cour a systématiquement suivi le principe général qui est que la charge de la preuve d'un fait incombe à la partie qui invoque celui-ci[47]. Les Parties semblent être d'accord sur ce point.

17. Mais de toute évidence, ce n'est là qu'un aspect de la question, lequel n'est pas non plus nécessairement décisif. La Cour reconnaît depuis longtemps qu'elle est en droit de prendre en considération des faits qui sont parfaitement connus : ce fut le cas, par exemple, dans l'affaire des *Pêcheries*[48]. Et, dans l'affaire relative au *Personnel diplomatique et consulaire des Etats-Unis à Téhéran*, la Cour s'est appuyée sur des faits qu'elle considérait «[pour la plupart] de notoriété publique et [qui avaient] été largement évoqués dans la presse mondiale ainsi que dans des émissions de radiodiffusion et de télévision de l'Iran et d'ailleurs»[49]. De plus, ainsi que le juge Lauterpacht l'a déclaré succinctement dans son opinion relative à la décision rendue sur la demande en indication de mesures conservatoires en l'affaire *Bosnie-Herzégovine c. Yougoslavie :* «Nombreux sont les systèmes juridiques qui connaissent l'institution du constat judiciaire. Les juridictions ne peuvent refuser, ni ne refusent, de voir les faits qui s'imposent à elles.»[50]

18. Dans les situations où les faits sont généralement connus, voire de notoriété publique, ce qui importe, c'est «la concordance générale des moyens de preuve»[51] ainsi que la Cour l'a reconnu dans ses arrêts de 1980 et de 1986[52]. Lorsque les faits sont parfaitement connus — comme en l'espèce — c'est à l'Ouganda de prouver qu'ils sont inexacts. Or l'Ouganda n'a pas même fait la moindre ébauche de démonstration en ce sens. Et nous disons que l'Ouganda n'est pas en mesure de s'engager dans cette voie, en particulier parce qu'il a refusé de sa propre initiative de soumettre à la Cour la plupart des annexes les plus pertinentes, notamment celles du rapport de la commission Porter. L'Ouganda ne peut tout simplement pas supprimer des moyens de preuve en les mettant de côté. Il ne peut écarter, par exemple, les déclarations du président du Conseil de sécurité quand

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[47] *Temple de Préah Vihéar, fond, arrêt, C.I.J. Recueil 1962*, p. 15-16.

[48] *Pêcheries, arrêt, C.I.J. Recueil 1951*. p. 138-139.

[49] *C.I.J. Recueil 1980*, p. 9, par. 12. Voir aussi *C.I.J. Mémoires*, p. 192 et suiv., 329 et suiv. pour cette affaire. La Cour s'est également fondée sur ce passage en l'affaire des *Activités militaires et paramilitaires au Nicaragua et contre celui-ci, C.I.J Recueil 1986*, p. 40-41, par. 63.

[50] *Application de la Convention pour la prévention et la répression du crime de génocide, mesures conservatoires, ordonnance du 13 septembre 1993, C.I.J. Recueil 1993*, p. 423, par. 42.

[51] *Ibid*., par. 43.

[52] Supra. n° 13, *C.I.J. Recueil 1980*, p. 10, par. 13 et *C.I.J. Recueil 1986*, p. 41, par. 63.

25 celui-ci dit que le Conseil considère que les combats livrés à Kisangani en mai 2000 violent les résolutions du Conseil de sécurité[53]. Il ne peut écarter les résolutions par lesquelles le Conseil de sécurité établit le lien entre l'occupation par l'Ouganda et «l'exploitation illégale des ressources naturelles de la République démocratique du Congo», cette résolution-là soulignant que le retrait des troupes ougandaises s'impose pour «mettre fin au pillage des ressources naturelles de la République démocratique du Congo»[54]. L'Ouganda a tout simplement fait abstraction de ces points. Et nous avons hâte d'entendre bientôt les explications de l'Ouganda sur la masse d'éléments nouveaux désormais accessibles dont la Cour est à présent saisie — lesquels émanent principalement de l'Ouganda lui-même.

19. S'agissant du *critère d'établissement de la preuve*, la RDC considère qu'elle a *pleinement* adopté la démarche appropriée et que les éléments de preuve sur lesquels elle fonde ses arguments de fait répondent manifestement au critère requis. Contrairement à ce que l'Ouganda affirme dans ses pièces écrites, les Parties ne semblent pas être en désaccord sur la démarche à suivre. En particulier, sur le fait que les juridictions internationales ne sont pas liées par ces «règles strictes» appliquées par les juridictions nationales et qui, aux dires du juge Fitzmaurice, «ne conviennent pas à des litiges entre gouvernements»[55]. La Cour a fait preuve de souplesse dans sa démarche. Dans l'affaire *El Salvador/Honduras*, la Chambre de la Cour a estimé que, faute de nombreux éléments de preuve dans un sens comme dans l'autre, le critère à retenir était celui de la probabilité la plus forte que l'on détermine «en pesant les probabilités»[56]. Dans l'affaire du *Détroit de Corfou*, la Cour dit que la «preuve pourra résulter de présomptions de fait à condition que celles-ci ne laissent place à aucun doute raisonnable.»[57] Et en l'absence de toute preuve documentaire directe, le juge Fitzmaurice a estimé pouvoir se fonder sur ce qu'il a appelé une «conjecture raisonnable, qui est justifiée par les faits dont on a connaissance et dont le bien-fondé paraît probable» en donnant effet à «une présomption très raisonnable quant à la manière dont les

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[53] Déclaration du président du Conseil de sécurité, 5 mai 2000, S/PRST/2000/15.

[54] Résolution 1457 (2003) du Conseil de sécurité, par. 2 et 5, onglet 19 du dossier de plaidoiries.

[55] *Barcelona Traction* (opinion individuelle du juge Fitzmaurice), *C.I.J. Recueil 1970*, p. 98, par. 58.

[56] *El Salvador/Honduras*, arrêt du 11 septembre 1992, *C.I.J. Recueil 1992*, p. 506, par. 248.

[57] *C.I.J. Recueil 1949*, p 18.

choses ont dû se passer»[58]. En l'espèce, nous sommes d'avis qu'il est inutile d'avoir recours à une quelconque notion de «conjecture raisonnable» : les moyens de preuve présentés devant la commission Porter, les décisions du Conseil de sécurité et les documents dont disposaient les groupes de travail de l'Organisation des Nations Unies ainsi que les nombreux autres documents que la RDC a soumis à la Cour sont autant d'éléments dont la valeur probante est considérablement plus forte que celle de ladite conjecture.

26 20. L'Ouganda affirme en outre que la RDC cherche à éviter l'application du critère de preuve prescrit par la Cour[59]. Toutefois, dans ses pièces écrites, l'Ouganda paraît incapable de citer la moindre prétention de cette nature de la part de la RDC. Je tiens à être absolument clair sur ce point : la RDC a bel et bien voulu appliquer le critère retenu par la Cour dans sa pratique. Elle ne vise aucun autre critère, que le niveau en soit plus faible ou plus élevé, que celui qui a été adopté auparavant.

21. S'agissant de la *nature des éléments de preuve*, la Cour reconnaît depuis longtemps qu'une partie est habilitée à se fonder sur des preuves tant directes qu'indirectes. Quant à la recevabilité et à l'effet des «moyens de preuve indirecte», la Cour a répondu à la question en l'affaire du *Détroit de Corfou* dans les termes suivants :

> «[L]es moyens de preuve indirecte sont admis dans tous les systèmes de droit et leur usage est sanctionné par la jurisprudence internationale. On doit les considérer comme particulièrement probants quand ils s'appuient sur une série de faits qui s'enchaînent et qui conduisent logiquement à une même conclusion.»[60]

22. Depuis ce premier arrêt, qui établissait le principe selon lequel des moyens de preuve indirecte sont susceptibles d'être employés et revêtus d'une force probante particulière lorsqu'ils s'appuient sur une série de faits qui s'enchaînent et qui conduisent logiquement à une même conclusion, la Cour a exprimé, à maintes reprises, ses vues sur la nature des «moyens de preuve indirecte» qu'elle juge acceptables. La Cour a aussi exprimé ses vues au sujet de la force probante et du caractère concluant qu'il y a lieu de conférer à des éléments de types divers. Je pense avoir déjà appelé votre attention sur l'affaire relative au *Personnel diplomatique et consulaire des*

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[58] *Supra* n° 19, *C.I.J Recueil 1970*, p. 98, par. 58.

[59] Duplique de l'Ouganda, p. 19, par. 49.

[60] *C.I.J. Recueil 1949*, p. 18.

Etats-Unis à Téhéran, dans laquelle la Cour mentionnait plusieurs documents qu'elle considérait «d'une cohérence et d'une concordance totales en ce qui concerne les principaux faits et circonstances»[61]. Et j'ai aussi appelé votre attention sur la décision rendue en l'affaire des *Activités militaires et paramilitaires*[62].

23. En l'espèce, bien entendu, la RDC est en mesure de se fonder sur beaucoup plus d'éléments encore. Les preuves émanent de sources multiples et sont entièrement concordantes. La RDC s'appuie sur des éléments documentaires et des preuves directes, dont des dépositions écrites et des témoignages de militaires ougandais et d'autres catégories de personnel. La Cour dispose à présent de bien davantage d'éléments de preuve émanant de la commission Porter. Ainsi que M[e] Tshibangu l'a démontré, vu ces preuves directes, l'argument de l'Ouganda consistant à dire que ses troupes seraient entrées en RDC postérieurement au 11 septembre 1998 s'effondre comme
27 un château de cartes : M. Kavuma et d'autres personnes ont confirmé devant la commission Porter qu'elles y sont entrées beaucoup plus tôt, au début d'août 1998[63].

24. Dans les éléments de preuve figurent des résolutions et d'autres décisions d'organisations internationales (dont des rapports) — émanant en particulier du Conseil de sécurité de l'Organisation des Nations Unies — ainsi que des rapports établis par des organisations non gouvernementales indépendantes. Il n'y a rien d'original dans la démarche de la RDC. La Cour s'est appuyée par le passé sur des preuves relevant de toutes ces catégories. Elle a déclaré expressément que, «pour parvenir à la vérité . . . elle peut . . . prendre acte des propos tenus par les représentants des Parties . . . ainsi que des résolutions adoptées ou discutées par ces organisations»[64]. Et la Cour a confirmé, ainsi que je l'ai dit, que des déclarations émanant de personnalités politiques officielles de haut rang possèdent une valeur probante particulière lorsqu'elles reconnaissent des faits ou des comportements défavorables à l'Etat[65]. Cette citation, à

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[61] *Supra* n° 13, p. 10, par. 13.

[62] *C.I.J. Recueil 1986*, p. 40, par. 63.

[63] Procès-verbaux des auditions de la commission ougandaise d'enquête Porter, déposition du général Kazini, p. 128, reproduite sous l'onglet 11 du dossier de plaidoiries.

[64] *Activités militaires et paramilitaires*, *C.I.J. Recueil 1986*, p. 44, par. 72.

[65] *Ibid*., p. 41, par. 64.

notre avis, s'applique exactement aux éléments dont nous disposons par l'intermédiaire de la commission Porter[66].

III. CONCLUSIONS

25. Pour conclure, Monsieur le président, Madame et Messieurs de la Cour, les faits sur lesquels la RDC s'appuie et fonde ses demandes sont, pour la plupart, désormais de notoriété publique. Les preuves et autres éléments par lesquels la RDC étaie ses affirmations de fait sont recevables et satisfont pleinement aux conditions prescrites par le Règlement et par la pratique de la Cour. La prétention en sens contraire de l'Ouganda est dénuée de substance ou de fondement. Les éléments présentés à la Cour ne laissent planer aucun doute raisonnable sur les motivations de l'invasion illicite de l'Ouganda, sur la responsabilité qui lui incombe dans la violation systématique et massive des droits fondamentaux de la personne humaine et sur l'exploitation illicite et généralisée des ressources naturelles de la RDC.

26. En revanche, ce qui laisse planer un doute sérieux, c'est la question de savoir si, dans sa demande reconventionnelle, l'Ouganda a satisfait aux critères applicables en matière de preuve. Et la comparaison entre la démarche adoptée en matière de preuve par la RDC dans son

28 argumentation et celle qui transparaît dans les éléments versés au dossier à l'appui des demandes reconventionnelles est riche d'enseignements. L'argumentation de l'Ouganda repose entièrement sur ses propres documents internes — trois documents seulement — et n'est fondée sur aucun élément émanant de sources indépendantes, tel que rapports de l'ONU par exemple, articles de presse ou dépositions de témoins. La comparaison fait apparaître un abîme entre les deux démarches.

27. A cet égard, en guise de conclusion, Monsieur le président, la RDC a constaté la présence au sein de la délégation ougandaise du ministre de la défense et de l'inspecteur général de la police de la République de l'Ouganda, et nous relevons que l'un et l'autre sont censés faire partie des conseils et avocats puisque la Cour a décidé de ne pas les autoriser à comparaître en qualité de témoins. Il va de soi que l'Ouganda est entièrement libre de conférer à toute personne de son choix

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[66] République de l'Ouganda, *Livre blanc du Gouvernement relatif au rapport de la commission judiciaire d'enquête sur l'exploitation illégale des ressources naturelles et autres formes de richesse en République démocratique du Congo*, 2003, p. 13-14, reproduit sous l'onglet 20 du dossier de plaidoiries.

la qualité de conseil ou d'avocat. Toutefois, les arguments susceptibles d'être présentés par ces deux personnes devront être considérés comme présentés à ce titre, c'est-à-dire comme des arguments et des conclusions de caractère juridique. Quelle que soit leur nature, les déclarations de ces deux personnes ne sauraient nullement être considérées comme des avis d'expert ni comme des éléments de preuve à l'appui d'une des questions soumises à la Cour. A défaut de pouvoir procéder à un contre-interrogatoire, ce serait, à notre avis, une excentricité que d'adopter une autre démarche et cela inciterait la RDC, à son grand regret, à soulever une objection officielle.

28. Monsieur le président, ici s'achève mon exposé sur cet aspect de l'affaire, et je vous prie de bien vouloir appeler à la barre M. le professeur Corten.

Le PRESIDENT : Je vous remercie, Monsieur Sands. Je donne à présent la parole à M. Corten.

Mr. CORTEN:

NO BASIS FOR THE SELF-DEFENCE ARGUMENT

1. Mr. President, Members of the Court, please allow me first to express the great honour which I feel in appearing once again before the world's highest court. This feeling is all the more sincere in that, in allowing me to plead on its behalf in this case, the Congo is at the same time giving me the opportunity to defend one of the most basic rules of international law, the prohibition on the use of force. One of the issues at stake in this case is the defence of this principle, which Uganda seeks quite simply to strip of all meaning through its unjustifiable reliance on two arguments: that of self-defence and that of the alleged consent of the Congolese authorities. The

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consent argument will be addressed tomorrow morning. Thus, only the first, the self-defence argument, will be dealt with today.

2. What is Uganda's argument in this respect? If the Respondent's pleadings are to be believed, the invasion of the Congo was justified by the serious threat to Uganda resulting from the outbreak of civil war in the Congo. The Sudanese authorities allegedly took advantage of this civil war, which began in early August 1998, in order to make use of Congolese territory and to pose a serious threat to Uganda, all supposedly with the co-operation of Ugandan rebel forces and

Congolese Government authorities. Uganda argues that in mid-September it therefore had no other choice but in turn to deploy its army in the Congo to ward off any threat to its security.

3. This argument was already refuted yesterday morning from a purely factual point of view. My colleague and friend, Maître Tshibangu Kalala, showed you that, far from being the consequence of the outbreak of war in the Congo, Uganda's military intervention was one of its constituent elements. As we have seen, this military intervention did not commence in mid-September 1998, in other words, nearly six weeks after the start of the conflict. Rather, the intervention was one of the elements marking the outbreak of the conflict, as it had already begun in the first days of August, with Operation "Safe Haven", conducted jointly by the Ugandan army and Congolese irregular forces. That operation — Operation Safe Haven — the starting date of which is placed by the Ugandan military at 7 August 1998, cannot, logically speaking, be described as an act of self-defence in response to events which in fact occurred later. The same is true of Uganda's participation in the Kitona airborne operation, which, as we also saw yesterday, began on 4 August. Uganda's self-defence argument does not therefore stand up to scrutiny in the light of the factual chronology, as Maître Tshibangu Kalala showed you yesterday.

4. The point of the statement which the Congo will now devote to self-defence is to show that the argument is unfounded not only in fact but also in law. This is true, as we shall see, if we look to the actual date at which Uganda's intervention began, in early August 1998, and even if we accept, strictly on a hypothetical basis, Uganda's view that the relevant date was in mid-September.

30 5. From the legal poin of view, the Democratic Republic of the Congo must first point out the very peculiar conception of self-defence seen in the Respondent's pleadings. According to Uganda, it reacted in "self-defence" in response not to armed aggression but rather to mere "security concerns" in respect of its border with the Congo. This conception is found throughout Uganda's pleadings, according to which:

— Uganda had an "inherent right to self-defence against grievous and imminent *threats* to her security"[67], the action it took having therefore been "*vital* to Uganda's security"[68];

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[67]RU, p. 9, para. 28; see also *ibid.*, p. 5, para. 16; p. 40, para. 86; p. 81, para. 183; p. 49, para. 106; *ibid.*, p. 7, para. 23; p. 35, heading B and para. 78; p. 75, para. 169.

[68]*Ibid.*, p. 46, para. 100.

— elsewhere in the pleadings we learn that the Ugandan army began occupying airfields in eastern and north-eastern Congo "to *prevent* the DRC and Sudan from using them to attack Uganda"[69]: to prevent an attack, therefore, not to respond to one;

— finally, to cite a last example, but there are others, the sole objective underlying Uganda's action was allegedly that of protecting Uganda against "the *threat* posed to her security by the DRC's military alliance with her most dangerous enemies"[70]: self-defence in response to a threat — not to an armed attack, as stated in Article 51 of the United Nations Charter.

6. Mr. President, Members of the Court, this line of argument calls upon doctrines which one would have thought to be matters of the past, such as "self-help", "vital interests", and even "*Lebensraum*"; it completely distorts the contemporary conception of self-defence and, indirectly, the entire system prohibiting the use of force established by the United Nations Charter. The Congo will first show you — and this will be the object of my statement this morning — that Uganda has never been the victim of an "armed attack" within the meaning of Article 51 of the
31 Charter, and that this — not the existence of mere "security concerns" — is clearly the condition on which self-defence may be invoked. My colleague Professor Pierre Klein will then show that, in any case, the invasion of the Congo and its subsequent occupation cannot be considered to be "necessary and proportionate" actions, as international law requires self-defence measures to be.

Uganda has never established that it has been the victim of an armed attack ascribable to the Congo

7. Uganda has never established that it has been the victim of an armed attack ascribable to the Congo. And it would indeed be very difficult for it to do so. Unlike Uganda, the Congo has never entered onto its neighbour's territory or, *a fortiori*, occupied it. As I have already pointed out, Uganda nevertheless accuses the Congolese authorities of having hatched a plot with Ugandan irregular forces and Sudan to destabilize the Ugandan State. It was for the purpose of eradicating this "grievous and imminent threat", in the words of the Rejoinder, that the Ugandan army is said to have reacted by invading and then occupying the Congo.

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[69] *Ibid.*, p. 78, para. 175; see also *ibid.*, p. 80, para. 179.

[70] *Ibid*., para. 84, para. 192.

8. The Congo has already responded at length to these allegations in its written pleadings[71], to which I refer the Court, but I would like to lay stress on the following four elements, which will constitute four parts of my statement:

— first, Uganda has not demonstrated involvement by the Democratic Republic of the Congo in even one armed attack; nor has it demonstrated the Congo's involvement in the organization, functioning or activities of irregular forces;

— secondly, Uganda has accordingly not demonstrated that it was first the victim of a prior armed attack, within the meaning Article 51 of the United Nations Charter;

— thirdly, Uganda cannot show that it was the victim of a plot between the Congo and Sudan, allegedly justifying a form of "preventive action" on its part;

— finally, and in a fourth section, we will see that this is all confirmed by the conduct of Uganda itself, which clearly did not, *in tempore non suspecto*, consider itself to be in a situation of self-defence.

32

I. Uganda has failed to demonstrate significant involvement by the Democratic Republic of the Congo in a single armed attack or in the organization, functioning or activities of irregular forces

9. First, Uganda has failed to demonstrate significant involvement by the Congo in a single armed attack or in the organization, functioning or activities of irregular forces. This fact can first be ascertained for the period prior to the start of Uganda's aggression, that is, the period preceding August 1998. But it is also the case, as we shall see, for the period immediately after this critical date; that is what we shall see subsequently.

A. The absence of evidence of the Congo's involvement in attacks carried out by Ugandan rebels before the beginning of August 1998

10. Let us first consider the period prior to August 1998, the only period which is really relevant in this case, since Uganda is obviously required to show that, at the date of its intervention, it was already a victim of armed attack. In its Counter-Memorial, Uganda levelled very serious accusations against the Congo. According to the Respondent, several attacks on it had been carried

[71] MDRC, pp. 198-205, paras. 5.05-5.24; RDRC, pp. 147-204, paras. 3.04-3.115; AWODRC, pp. 2-45, paras. 1.01-1.65, especially pp. 28-45, paras. 1.41-1.65.

out under "the direction and control" of the Congolese Government and through Ugandan rebels[72]. These extravagant claims are not to be found in its Rejoinder. Even though it previously claimed that the Congo was *directing* the attacks, Uganda now confines itself to accusing the Congo of "involvement" or "direct participation"[73] in certain armed actions. More generally, it even asserts that the Congo maintained certain "ties" with Ugandan rebel groups, without specifying the exact nature of those ties.

11. This softening of Uganda's argument can be explained very simply by the total absence of any evidence which could support its position. For, in truth, it is clear that not only did the Congo not direct or control *any* armed attack against Uganda, it was not even involved in any. But what exactly are the attacks which the Congo might have carried out against its neighbour, provoking a response by Uganda in August 1998? Uganda's Counter-Memorial cites two: these
33 were military actions carried out against Kichwamba on 8 June 1998 and then against Kasese on 1 August of that year. But the Counter-Memorial offers no evidence of any involvement whatsoever of the Congo in these attacks. The existing sources, including Ugandan ones, do not name the Congo, but only the ADF — Alliance of Democratic Forces, a Ugandan rebel group — as responsible for these attacks[74]. There is absolutely no indication whatsoever that Congolese authorities, soldiers or agents took part in preparing or carrying out these two actions. This no doubt explains why Uganda fails even to refer to the Kichwamba and Kasese attacks in its Rejoinder[75]. At this stage in the proceedings, it can therefore be said that Uganda has implicitly admitted its inability to demonstrate the Congo's involvement — and I stress "involvement", without there even being any question of direction or control — in any armed attack against it before the month of August 1998, when the Ugandan invasion and occupation began.

12. More generally, can Uganda show that the Congo supported or was involved in any way in the activities of rebel groups? Despite all its efforts, the Respondent has failed to do so. By

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[72]CMU, paras. 5, 40 and 389.

[73]RU, p. 308, para. 666

[74]RDRC, p. 189, para. 3.90 and pp. 365-368, paras. 6.38-6.47.

[75]AWODRC, p. 29, paras. 1.42-1.43.

contrast, the Congo has shown in its written pleadings[76] that, even while it was itself confronted with serious security problems, the Congolese Government in 1997 and 1998 carried on an active fight against the Ugandan rebels, and did so in close co-operation with the Ugandan authorities. Far from being passive or negligent, the Congo thus fought, as far as its circumstances permitted, against all the irregular forces making use of its territory[77].

13. True, this co-operation came to a halt with the start of the aggression in early August 1998. But that does not mean that the Congo suddenly began to support the Ugandan rebels, as Uganda claims. Thus, I come to an examination of the period beginning in August 1998 and ending on 11 September of that year.

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B. The absence of evidence of the Congo's involvement in attacks carried out by Ugandan rebels between the beginning of August and 11 September 1998

14. Mr. President, Members of the Court, as I said when beginning this presentation, the chronology is obviously crucial in questions of self-defence. Confronted by the clear lack of evidence in support of its argument, Uganda does not dare make a real claim that it was in a situation of self-defence in early August 1998. According to the Respondent, it was only on 11 September 1998, as we saw yesterday, that the threat took on such a degree of seriousness that it justified the response. This argument by Uganda thus requires a showing both that Uganda's intervention only began on 11 September and that, during the month of August 1998 or at the beginning of September, Uganda had been the victim of a prior armed attack on the part of the Congo.

15. As for the first of these elements, Maître Tshibangu Kalala showed yesterday morning that the Ugandan army did in fact invade the Congo in early August 1998, not in mid-September. We therefore have before us two separate facts: first, Uganda invaded the Congo at the beginning of August 1998 and, second, as we have just seen, Uganda cannot show that it was the victim at that date of any attack on the part of the Congo. These two facts suffice thoroughly to discredit the self-defence claim and, in fact, the Democratic Republic of the Congo could virtually stop here.

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[76]RDRC, pp. 150 *et seq*; AWODRC, pp. 38-42, paras. 1.53-1.60; RDRC, p. 189, para. 3.90 and pp. 365-368, paras. 6.38-6.47; AWODRC, pp. 29-34, paras. 1.44-1.46.

[77]RDRC, pp. 158-166, paras. 3.26-3.43.

16. But, in any event, even if we hypothesize — and this is only an hypothesis — that Uganda did not invade the Congo until mid-September, it must be noted that Uganda produces *no* documentary evidence showing any Congolese military attack against it, or any significant involvement of the Congo in the functioning or activities of rebel groups at that date. Thus, no more so in mid-September than in early August 1998[78].

17. Uganda would moreover have great difficulty in proving a Congolese attack or threat against it in early August or September 1998. It must be recalled that the Congolese authorities during that period were no longer in control of the parts of Congolese territory occupied by the aggressor forces. You need only refer to the map appearing behind me to realize this. Roughly
35 speaking, the area with red hatch marks is the Congolese territory occupied by Uganda in September 1998. It would simply have been impossible at that time to furnish significant support to the irregular forces operating in this zone. Even if they had wished to do so, for reasons which Uganda has never really brought out, the Congolese authorities could not have assisted the armed forces then operating in the north-eastern Congo.

18. Finally, the Congo does not deny that, unbeknownst to it and against its wishes, some Ugandan rebels might have entered or taken refuge at various times in parts of its territory. The thesis of Congolese *support* for these rebels has, on the other hand, never been proved by Uganda. The difficulties experienced by the State authorities, Congolese as well as Ugandan, in asserting control over the border area moreover rule out any contention as to a lack of vigilance or a failure to exercise due diligence. Accordingly, Uganda cannot claim to have been acting in self-defence in August 1998 or even in September of that year; this brings me to the second point of my statement, which will be devoted to consideration of Article 51 of the United Nations Charter.

Mr. President, before I elaborate on this point, you may perhaps deem it appropriate to suspend the proceedings for a few minutes for the break.

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[78]RDRC, pp. 370-375, paras. 6.51-6.64; AWODRC, pp. 64-66, paras. 1.98-1.101.

The PRESIDENT: Thank you, Professor Corten.

It is now time to have a break of ten minutes, after which you will continue your statement.

The Court adjourned from 11.20 to 11.30 a.m.

The PRESIDENT: Please be seated.

Professor Corten, please continue.

Mr. CORTEN: Thank you, Mr. President.

II. In the circumstances, Uganda has not demonstrated that it was the victim of prior armed attack within the meaning of Article 51 of the United Nations Charter

19. Thank you. Mr. President, not content with exaggerating or falsifying the facts in order to bring them to within the definition of aggression, Uganda also seeks to lower the level of legal
36 requirement by attempting to equate "armed attack", within the meaning of Article 51 of the Charter, with any hostile act, or indeed any tolerance for the perpetration of such acts. As there was no such tolerance, as we have just seen, the discussion could stop there. The Congo, however, feels itself bound to respond to the arguments developed on this point by the respondent State, so seriously do they undermine existing legal categories.

20. The disagreement between the Parties may be summarized as follows. For the Congo, pursuant to Article 3 *(g)* of the definition of aggression contained in General Assembly resolution 3314, an armed attack implies the sending of an irregular force or, at the very least, the "substantial involvement" of a State in the activities of such forces[79]. For Uganda, on the other hand, a mere "conspiracy" between a State and irregular forces would be equivalent to a grievous and imminent threat to its security, a threat which would confer on it a right of self-defence[80]. I refer the Court to the written pleadings for the details of the respective arguments. At this stage, the Congo will respond to the Ugandan thesis on four points.

21. First, the Congo is astonished at the ferocity with which Uganda attacks the case law of the International Court of Justice in an attempt to substitute therefor what it itself calls an

[79]MDRC, pp. 200-203, paras. 5.11-5.17, RDRC, pp. 206-229, paras. 3.118-3.158.

[80]CMU, pp. 180-216, paras. 329-368; RU, pp. 116-119, paras. 268-276.

"alternative approach"[81]. In its *Nicaragua* Judgment, the Court stressed the need to maintain a distinction between cases of armed attack and "other less grave forms" of the use of force[82]. This distinction remains fully valid today, and the Court reaffirmed it once again, as you know, in 2003, in the *Oil Platforms* case[83]. It is necessary in the present case to maintain the distinction between the situation of a State which massively supports armed groups, including by deliberately allowing them access to its territory, and a case of mere negligence, such as would enable groups of this type to act against a third State. Only the first hypothesis could be characterized as an "armed attack" within the meaning of Article 51 of the Charter, thus justifying a unilateral response. Although the second engages the international responsibility of the State concerned, it constitutes no more than a

37 "breach of the peace", enabling the Security Council to take action pursuant to Chapter VII of the Charter, without, however, creating an entitlement to a unilateral response based on self-defence. In the instant case, neither the first nor the second hypothesis is in any event applicable, as the Congo neither instituted nor tolerated the activities of Ugandan rebel forces.

22. Secondly, the Congo maintains that its legal position is shared by the great majority, or indeed all, of legal writers[84]. None of the authors cited by Uganda claims, however, that ill-defined notions of negligence, conspiracy or tolerance would, as such, be equivalent to an "armed attack" within the meaning of Article 51 of the Charter. At best, some consider that massive logistical and military support by a State for a group of irregulars could, even in the absence of substantial involvement in an attack, be equivalent to an armed attack. Once again, however, this hypothesis is far from being applicable in the present case. The Congolese State has never provided massive logistical and military support to Ugandan irregular forces.

23. Thirdly, the Congo considers that the practice of States, particularly of the States directly concerned, is a relevant factor to be taken into account in the context of this case. In this connection, mention should be made of the communiqués by the States of Southern[85], Central[86]

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[81] *Ibid.*, p. 202, para. 350; RU, p. 116, para. 268.

[82] *I.C.J. Reports 1986*, p. 101, para. 191.

[83] *I.C.J. Reports 2003*, Judgment of 6 November 2003, p. 186, para. 51.

[84] RDRC, p. 212, para. 3.130 and Ian Brownlie "International Law and the Activities of Armed Bands", *ICLQ*, 1958, p. 731.

[85] MDRC, Anns. 118 and 119.

[86] *Ibid.*, Ann. 61.

and East[87] Africa, as well as those of the OAU[88]. Mr. President, Members of the Court, you will find the texts of those communiqués in the Congolese pleadings, as referenced in the footnotes to this presentation. You will note that the communiqués denounce the aggression suffered by the Democratic Republic of the Congo, reaffirm the independence and territorial integrity of the Democratic Republic of the Congo, and call for the withdrawal of foreign troops from the territory of the Democratic Republic of the Congo. It is in fact the Congo, not Uganda, which is considered to be the State under attack. It is thus in reality the Congo, not Uganda, which is generally considered to be in a situation of self-defence.

38 24. This brings me to a fourth and final point, which is perhaps the most decisive one. As we all know, the Security Council has been given significant powers to determine that an act of aggression has been committed and, more broadly, to assess situations of self-defence[89]. In the present case, however, the Security Council very clearly rejected the Ugandan claims, while on the contrary recognizing that the Democratic Republic of the Congo was in a situation of self-defence. The extracts from the relevant resolutions are to be found in your judges' folder under tab 21. In its resolution 1234, adopted on 9 April 1999, the Council

> "Recalling the inherent right of individual or collective self-defence in accordance with Article 51 of the Charter of the United Nations,
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> . . . . . .
>
> Deplores the continuing fighting and the presence of forces of foreign States in the Democratic Republic of the Congo in a manner inconsistent with the principles of the Charter of the United Nations, and calls upon those States to bring to an end the presence of these uninvited forces and to take immediate steps to that end."[90]

In that resolution, the Security Council recognizes the right of self-defence, and the Congo's entitlement thereto is clearly recognized. The Council deplores the behaviour of "foreign States" and of "uninvited" forces, these being the terms it uses. And it is indeed Uganda, *inter alia*, which is being referred to here; if any doubt remained, it was definitively dispelled by the adoption of

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[87] *Ibid.*, Ann. 62.

[88] *Ibid.*, Anns. 49, 51.

[89] Resolution 3314 of the United Nations General Assembly, Article 2 of the annexed definition.

[90] MDRC, Ann. 1.

resolution 1304 of 16 June 2000, which confirms that "Uganda and Rwanda . . . have violated the sovereignty and territorial integrity of the Democratic Republic of the Congo"[91].

25. Through these resolutions, which have been repeatedly reiterated by the Security Council[92], the latter exercised its prerogatives by recognizing the Congo's right of self-defence.

39 These resolutions were formally accepted by Uganda[93]. Finally, it may be considered that they settle the legal debate concerning self-defence in this case. There is no possible reason for the Court to call in question the factual and legal assessments made on a number of occasions by the Security Council.

26. This conclusion — and this brings me to the third part of my presentation — cannot be impugned by claims concerning an alleged alliance between the Congo and Sudan, which, again according to Uganda, justified its preventive military action.

III. Uganda has not demonstrated the existence of a plot between the Democratic Republic of the Congo and Sudan such as would justify its preventive military action

27. The thesis of a plot between the Congo and Sudan comes up regularly in the Ugandan written pleadings. According to Uganda, President Kabila is said to have hatched this plot in the course of a trip (according to the Counter-Memorial) or three trips (according to the Rejoinder) to Khartoum, in May 1998 (according to the Counter-Memorial), or in June, August or September 1998 (according to the Rejoinder)[94]. The inconsistencies of this scenario, which was clearly concocted for the purposes of these proceedings, have already been denounced in the Congolese pleadings[95]. At this late stage in the proceedings, Uganda has provided not even a shred of evidence that a plot was hatched against it by the Congolese and Sudanese authorities, a plot

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[91] *Ibid.*

[92] Resolutions 1258 of 6 August 1999 (first preambular paragraph), 1273 of 5 November 1999 (first preambular paragraph), 1279 of 30 November 1999 (first preambular paragraph), 1291 of 24 February 2000 (first preambular paragraph), 1304 of 16 June 2000 (first preambular paragraph), 1316 of 23 August 2000 (first preambular paragraph), 1323 of 13 October 2000 (first preambular paragraph), 1332 of 14 December 2000 (first preambular paragraph), 1341 of 22 February 2001 (first preambular paragraph), 1355 of 15 June 2001 (first preambular paragraph), 1399 of 19 mars 2002 (first preambular paragraph), 1417 of 14 June 2002 (first preambular paragraph), 1445 of 4 December 2002 (first preambular paragraph), 1457 of 24 January 2003 (first preambular paragraph), 1468 of 20 March 2003 (first preambular paragraph), 1484 of 30 May 2003, and 1493 of 28 July 2003 (first preambular paragraph); statement of the President of 24 June 1999 (S/PRST/1999/17).

[93] CMU, p. 151, para. 270.

[94] *Ibid.*, pp. 30-31, paras. 38-39; RU, pp. 35-36, paras. 79-80.

[95] RDRC, pp. 179-182, paras. 3.70-3.71; AWODRC, pp. 42 -45, paras. 1.61-1.65.

which allegedly motivated the invasion and subsequent occupation of the Congo from the beginning of August 1998.

28. Uganda further claims that, around the end of August 1998, Sudanese armed forces began deploying on Congolese territory, at the request of the Government of the Democratic Republic of the Congo. It was due to the fear that those forces might take possession of certain airports in the north and east of the Congo that the Ugandan army is said to have been prompted to intervene on a preventive basis, in mid-September 1998, in Congolese territory[96]. Mr. President, Members of the Court, this second version of the conspiracy theory is no more convincing than the first one.

40 **A. The lack of evidence of an alliance between the DRC and Sudan**

29. In the first place, this theory is also not supported by any evidence. When it suffered the external aggression which began in early August 1998, the Congo officially called on other States of the region for help, invoking its right of collective self-defence, in accordance with existing international law. The States concerned are well known, and have moreover been involved in every phase of the subsequent peace process. They are the States of Angola, Namibia, Zimbabwe and, to a more limited degree and over a more limited period of time, Chad. The Congolese Government, on the other hand, did not call on Sudan to support or defend it. That is why Sudan, unlike the other States I have just mentioned, was not associated with the Lusaka ceasefire Agreement or with any other instrument of this type. The Ugandan allegations are barely credible and, in fact, the respondent State has not even been capable of demonstrating that a single Sudanese soldier was present in the Congo, any more than it has been capable of demonstrating that it took a single one of such soldiers prisoner.

30. This brings me to a second remark, which again relates to the chronology of events. Uganda's attack on the Congo began early in August 1998. From that date, the Congolese Government was entitled to request and receive support from other States. Uganda is therefore particularly ill-advised to accuse it of an act which has not only not been proven but, even if it were, would make absolutely no difference to the legal situation. By what right can Uganda not

[96]RU, p. 78, para. 175.

only invade the Congo but also deny it the right to defend itself, including by calling on other States for help in repelling the aggression?

31. Uganda replies that its military intervention began only in mid-September, i.e. after Sudanese troops entered Congolese territory. However, even if this version of the facts was established as true — which is in no way the case, as I have just pointed out — that would make absolutely no difference in legal terms. Under international law, there was nothing to prevent the Congo from authorizing Sudanese troops to enter its territory in time of peace or in time of war. Uganda cannot claim to have been injured, still less to have been attacked, by the mere presence of Sudanese troops on Congolese territory. Its self-defence arguments could only be accepted if it
41 was established that armed attacks were carried out by Sudan with the participation of the Congolese authorities, or with their help or assistance. But Uganda — as we have seen — fails to demonstrate the existence of any attack of this kind.

B. The Ugandan doctrine of "preventive action" is at variance with Article 51 of the Charter

32. On this point, the Congo can only wonder at the tenor of Uganda's legal argument. According to the respondent State, it was prompted to intervene not in order to *repel* an armed Sudanese or Congolese attack, but to avoid the *risk* that such an attack might occur. Again, according to the Ugandan pleadings, if it was necessary to seize all the localities in the north and east of the Congo, it was to *prevent* or *deter* a possible attack by the Sudanese army against Uganda. I began this presentation by citing several passages from the Ugandan pleadings, which refer *inter alia* to an operation designed to "*prevent* the DRC and Sudan from using the [airfields] to attack Uganda"[97]. Uganda goes so far as to claim — and again I am quoting from its Rejoinder — that the Congolese authorities' calls for a withdrawal of the Ugandan troops "was itself a hostile act that threatened Ugandan security"[98] and that it could not tolerate the presence of Sudanese troops at airfields "that *could* be used to bomb Ugandan targets".[99] Further on, Uganda again confirms that it was a question of "*preventing* eastern Congo from being used as a base for

[97]RU, p. 78, para. 175; emphasis added by the DRC.

[98]RU, p. 47, para. 101.

[99]RU, p. 40, para. 86; emphasis added by the DRC.

attacks against her".[100] Even if it dares not espouse them as such, Uganda thus seems to be endorsing the theories of "preventive", or "pre-emptive", action, the avowed purpose of which is to make radical changes to the rules of the United Nations Charter.

33. Uganda's arguments serve precisely to demonstrate the excesses to which this type of doctrine can lead. According to Uganda, its action was designed to prevent the Sudanese army from using the airfields against it, and this is said to have justified the seizure of towns with

42 airfields such as Bunia, Beni, Isiro, Buta, Bumba, Lisala and Gbadolite. These localities are shown on the map projected behind me, a map which you will find in your judges' folders under tab 22. Mr. President, Members of the Court, Uganda has, however, never demonstrated that an attack had been carried out, was on the point of being carried out, or was even planned against it, from any of these localities. Uganda acknowledges, moreover, that no Sudanese troops were present in those towns, when it states that it had "no alternative but to deploy more troops to Eastern Congo and to gain control of the strategic airfields and river ports in Northern and Eastern Congo *before* the Sudanese/Chadians/FAC and other allied forces could occupy them".[101] Uganda even resorts to producing a map justifying its invasion through the seizure of "strategic airfields in the DRC from which Uganda was "*vulnerable to attack*" in August-September 1998"[102]. You can check the exact title of this map by looking behind me or by consulting your judges' folder under tab 23. These airfields were thus effectively attacked and occupied because they would have made Uganda "vulnerable to attack"; "vulnerable to attack", I am not making this up, these are the actual words used by Uganda to present its map.

34. Mr. President, Members of the Court, in light of the Respondent's argument, there is only one question Congo needs to ask: why did the Ugandan army stop when it had already got so far? Why did the UPDF not attack all the localities shown on this map, which you will find as No. 24 in your judges' folders? Bumba, Lisala, Gbadolite, but also Lubumbashi, Kolwezi or . . . Kinshasa, all have fully operational airports which, still according to the doctrine of preventive action as defended by Uganda, could constitute a "serious risk" to Uganda's security, making that

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[100]RU, p. 80, para. 178; emphasis added by the DRC.

[101]CMU, p. 41, para. 52.

[102]RU, p. 80 *bis*; emphasis added by the DRC.

country "vulnerable to attack". So these towns could allegedly have been attacked "before" hostile forces could use them!

35. Mr. President, Members of the Court, until proof of the contrary, Article 51 of the
43 Charter has not been amended, and the doctrine of "preventive" or "pre-emptive" action — the name is not important — has not been accepted in international law. Self-defence always presupposes an "armed attack", as the Court again reaffirmed in two decisions delivered respectively in 2003 in a contentious case[103] and, in 2004, in an advisory case[104], decisions which the Democratic Republic of the Congo is today asking the Court to confirm. Uganda is bound to show that it has been the victim of a prior armed attack by the Congo. It is not enough for it to assert that it felt threatened or that it was, to quote its own words one last time, "vulnerable to attack".

36. Furthermore, and lastly, Congo even has every reason to doubt that Uganda genuinely felt threatened by Sudan. In October 1998, it was Sudan, not Uganda, which seised the Security Council to complain of aggression by armed Ugandan forces. Thus it was Sudan, not Uganda, which invoked its right of self-defence and threatened to exercise it[105]. And what was Uganda's reaction? The Ugandan Minister for Foreign Affairs replied on the subject of a possible counter-attack by Sudan, and I quote: "In my view that is an empty threat, and [Sudan] has no capacity to do it."[106] This is, to say the least, very hard to square with the fear of a "grave and imminent threat" scenario today being peddled by Uganda.

IV. The baselessness of the self-defence argument is confirmed by the conduct of Uganda itself, which was very late in invoking it

37. Mr. President, Members of the Court, in the fourth and last section of my statement this morning, I should like to ask a question which perfectly illustrates the weakness of Uganda's argument. What does a State suffering an attack do? This simple question may be met with an equally simple reply. An aggressed State immediately protests, and demands that the aggressor

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[103]Case concerning *Oil Platforms*, Judgment of 6 November 2003, *I.C.J. Reports 2003*, p. 186, para. 51.

[104]Case concerning *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, para. 139.

[105]IRIN 516, 5 October 1998, RDRC, Ann. 108.

[106]IRIN 518, 7 October 1998, RDRC, Ann. 108.

44 State cease the aggression. The aggressed State then invokes its right of self-defence and, in accordance with Article 51 of the Charter, reports the matter to the Security Council, asking it to take appropriate measures pursuant to Chapter VII.

38. This is precisely the strategy pursued by the Congo, like other aggressed States before it and others since. Since the beginning of August 1998, Congo has accused Uganda of aggression, including in the United Nations, and has asked it to put an end to it[107]. The Congo immediately exercises its right of self-defence and seises the Security Council with a request for it to act. The Council, as I have reminded you, then recognizes the Congo's right of self-defence.

39. Let us now consider the conduct of Uganda, which today claims that it suffered an armed attack in August 1998, a few weeks earlier, or in the month of September. Uganda has not accused the Congo of aggression. It has not, for example, asked it to cease launching attacks, to withdraw from its territory, or to cease its involvement in the activities of any irregular force. When itself accused of aggression at the beginning of August 1998, its first reaction is to deny all involvement in the conflict[108]. Uganda does not then write to the Security Council requesting it to take action pursuant to Article 51 of the Charter. Not until September would Uganda start to criticize the Congo, yet without ever accusing it of aggression. The legal basis then relied on by Ugandan officials to justify their forces' presence on Congolese territory was not self-defence, but rather the prevention of a "genocide", or vague "security concerns"[109], which thus having nothing to do with self-defence. In March 1999, in other words over six months after the event, a senior Ugandan official for the first time mentions Article 51 of the Charter. But this was in fact to justify the support given by Uganda to the forces of Laurent-Désiré Kabila, at a time, in 1997, when they were battling the official Government of Zaire, and not to explain its position in the conflict which broke

45 out in August 1998[110]. It was indeed only in the context of the present proceedings that the self-defence argument would for the first time be clearly and explicitly invoked by the Respondent.

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[107]RDRC, pp. 173-174, para. 3.58 and MDRC, Ann. 27.

[108]RDRC, pp. 174-178, paras. 3.58-3.67.

[109]RDRC, Ann. 16.

[110]CMU, Ann. 42, pp. 14-17.

40. Mr. President, Members of the Court, the facts here speak for themselves. Uganda has never behaved like an aggressed State, and for a very simple reason. Not only did it neither feel, nor actually was, attacked but it knew perfectly well that it was the aggressor. This clearly explains why it first chose to deny any involvement in the conflict, hoping that the result would be the rapid overthrow of the Congolese Government. Only when this position was no longer tenable did it little by little and willy-nilly cobble together the scenario of "self-defence", soon embellished with the theory of a plot. A scenario which, as we have seen, has never convinced anyone, certainly not the United Nations Security Council, which, as we have also seen, ruled to the precise opposite effect.

41. Uganda is, to say the least, embarrassed by this aspect of the case. It therefore pretends not to grasp its implications, stating in its Rejoinder that its persistent silence — which it thus does not deny — cannot be equated with "acquiescence" in the armed attack, of which it suddenly claims to have been the victim[111]. But at this stage in the argument, Congo does not seek to rely on any claim of acquiescence. It simply notes that, as stated by the Court in the *Nicaragua* case when dealing with a similar issue, the Respondent's conduct "hardly conforms with the latter's avowed conviction that it was acting in the context of collective self-defence as consecrated by Article 51 of the Charter"[112].

42. Lastly, Mr. President, Uganda's conduct is, if anything, proof of its belief that, north-east Congo constitutes a sort of "hinterland", into which it feels able to move when and how it chooses. In April 2003, when the withdrawal of the Ugandan troops was finally announced after almost five years of continuous occupation, the Ugandan Minister for Foreign Affairs declared — officially — that "removal of troops from the DRC will not mean we shall not go back there to defend our security"[113]. A statement which says much about Uganda's concept of "self-defence" and takes us back to an era we hoped was past, where self-protection permitted any State to attack another as and when it chose and felt able to do so.

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[111]RU, p. 115, para. 264.

[112]*I.C.J. Reports 1986*, p. 121, para. 235.

[113]AFP, 17 April 2003.

43. Mr. President, Members of the Court, thank you for your kind attention. May I ask you to give the floor to Professor Pierre Klein, so that he may continue the argument of the Democratic Republic of the Congo by showing you that the conditions of necessity and proportionality required in order to justify a claim of self-defence are not met in this case.

The PRESIDENT: Thank you, Professor Corten. I now give the floor to Professor Pierre Klein.

Mr. KLEIN:

THE CONDITIONS OF NECESSITY AND PROPORTIONALITY FOR SELF-DEFENCE ARE NOT MET

1. Mr. President, Members of the Court, let me say before anything else how sensible I am of the very great honour of appearing for the first time before the Court in plenary session. I am also anxious to express my thanks to the Democratic Republic of the Congo for honouring me with its confidence in the present dispute, which raises issues of very great importance in both legal and human terms. As the Court has just heard, Uganda is claiming to have exercised a right to self-defence in invading and subsequently occupying Congolese territory for nearly five years, to respond to what it describes as "security concerns". A short while ago my colleague Olivier Corten explained that there is nothing to show that Uganda was the victim of an "armed attack" by Congo within the meaning of Article 51 of the Charter of the United Nations. I for my part will explain to
47 the Court that the Respondent is also still incapable of proving that it has met the other conditions to which international customary law submits the exercise of the right of self-defence.

2. In its opinion on the *Legality of the Threat or Use of Nuclear Weapons* the Court clearly stated:

> "The submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law. As the Court stated in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America) (I.C.J. Reports 1986*, p. 94, para. 176): 'there is a specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law'. This dual condition applies equally to Article 51 of the Charter, whatever the means of force employed."[114]

[114] *I.C.J. Reports 1996*, p. 245, para. 41. See, to the same effect, the dissenting opinion of Judge Rosalyn Higgins, *ibidem*, p. 583.

The close relationship between the actual concept of self-defence and the two conditions of necessity and proportionality was brought out very clearly by Roberto Ago in his last report on the responsibility of States. Allow me to cite it also:

> "the requirements of the 'necessity' and 'proportionality' of the action taken in self-defence can simply be described as two sides of the same coin. Self-defence will be valid as a circumstance precluding the wrongfulness of the conduct of the State only if that State was unable to achieve the desired result by different conduct, involving either no use of armed force at all or merely its use on a lesser scale."[115]

3. In our case Uganda could have adopted conduct other than the invasion and subsequent occupation of a very substantial part of Congolese territory for five years, an invasion and occupation which in addition were accompanied by numerous cases of looting and atrocities. To be specific, Uganda has observed neither the condition of necessity nor the condition of proportionality required by international customary law. I will deal with these two criteria in succession, starting with the requirement of necessity.

I. Uganda has not observed the condition of necessity

4. First and foremost, the meaning of the term "necessity" should be borne in mind in order to be able to assess the conduct of Uganda with regard to this first requirement. The *Robert* dictionary defines "*nécessité*" as follows: "*caractère nécessaire d'une chose, d'une action*", and defines "*nécessaire*" in the following way: "*se dit d'une condition, d'un moyen dont la présence ou l'action rend seule possible une fin ou un effet*". Cornu's *Vocabulaire juridique* dictionary defines the term "*nécessaire*" as "*ce qui est impérieusement dicté par les circonstances*"[116]. The meaning of the term in English is identical. According to the *Concise Oxford Dictionary*, "necessary" means "1. Required to be done, achieved, or present; needed. 2. Inevitable: *a necessary consequence*"[117]. All these definitions, like the decision of the Court cited above, have one feature in common: the exclusive, imperious, indispensable nature of the condition of necessity. It must be stressed in this connection that international law allows a State claiming to have had recourse to force in self-defence very limited room for manoeuvre when a decision on the necessary nature of

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[115] *YILC*, 1980, Vol. II, Part 1, p. 67, para. 120.

[116] 6th edition, *PUF*, Paris 1987, p. 549.

[117] 10th edition, *OUP*, 1999, p. 953.

such use of force is in issue. The Court stated this very clearly in the *Oil Platforms* case, when it stressed that "the requirement of international law that measures taken avowedly in self-defence must have been necessary for that purpose is strict and objective, leaving no room for any "measure of discretion"[118].

4. The conduct of Uganda falls far short of this standard. Even assuming that Uganda really felt threatened in August and September 1998, in no sense would this fear make the invasion and subsequent occupation of Congolese territory an exclusive or indispensable response to the alleged attack. It is clear that the Respondent allowed its objectives to remain uncertain and failed to exhaust peaceful means of settling its dispute with the Congo before resorting to force.

A. Uganda has allowed the objectives of its military intervention to remain uncertain

5. First of all the criterion of necessity implies – and this has not been disputed by Uganda – that the aim of self-defence is to "repel an attack and to prevent it from succeeding and nothing
49 else"[119]. By definition, necessity can be envisaged only in relation to a specific objective, and in accordance with Article 51 of the Charter that objective can only be a response to an "armed attack".

6. In order to circumvent this requirement, Uganda has allowed the objectives of its action to remain uncertain.. As Congo has demonstrated in its written pleadings, with quotations in support, the Ugandan authorities themselves have put forward various justifications that go far beyond a response to an armed attack[120]. In substance they claimed that the reasons for their armed intervention in the Congo were the restoration or maintenance of security in the region and, in the actual words of President Museveni, "the prevention of genocide"[121].

7. The first of these objectives goes far beyond a response to an "armed attack" within the meaning of international law. According to Uganda's pleadings, its objective was extended to dealing with its "security concerns", a notion that was clearly taken in a very broad sense. Thus the Respondent states that "[a]gainst the perceived threat of increased destabilization of Uganda

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[118] *I.C.J. Reports 2003*, Judgment of 6 November 2003, para. 73.

[119] *YILC*, 1980, Vol. II, Part 1, p. 67, para. 67.

[120] RRDC, pp. 232-235, paras. 3.162-3.164.

[121] RRDC, Ann. 16.

especially by Sudan using Congolese territory as it had previously done, Uganda deployed additional forces *to counter this threat*"[122]. Here we are witnessing a semantic shift away from the fundamental concepts of positive international law. On this view, necessity is no longer linked to the objective of *responding to an armed attack* but to a far vaguer one: *the prevention of a threat*. Professor Corten has just cited other statements of this kind which demonstrate the extent of Uganda's adherence to the doctrines of "preventive", or "pre-emptive", action, seeking not to repel an attack but to remove a "threat" whose limits remain largely undefined. It is clear that in our case Uganda has sought to assume regional police and peacekeeping powers, without ever having been authorized to do so by the Security Council. This is conduct which, whatever view one might take of it in other respects, is far from corresponding to the institution of self-defence as it exists in present-day international law.

50 8. The same applies *a fortiori* to the purported "right of humanitarian intervention" which President Museveni appeared to evoke at one point when he claimed that Uganda's objective was "the prevention of genocide" in the region, an objective which, putting it mildly, hardly sits well with the grave violations of humanitarian law of which the Ugandan forces themselves have been guilty, as the Democratic Republic of Congo will demonstrate in detail tomorrow. In any event, it is an objective which has absolutely nothing to do with a response to an armed attack, the essential characteristic of self-defence.

B. Uganda failed to exhaust peaceful means before having recourse to force

9. Let us assume for the moment, for the sake of argument, that Uganda's objective was simply to respond to an armed attack. According to the work of the International Law Commission on State Responsibility, the condition of necessity required by international law in order to justify the exercise of the right of self-defence also presupposes that there is an "extremely urgent situation [which] obviously leaves no means for requesting other bodies, including the Security Council, to undertake the necessary defensive action"[123]. In his comments on that requirement,

[122]UCM, pp. 40-41.

[123]Roberto Ago, addendum to the Eighth Report on State Responsibility, *YILC*, 1980, Vol. II, Part One, p. 70, para. 123.

Roberto Ago pointed out that the condition of necessity was fulfilled when the state concerned had exhausted all other means before having recourse to force[124].

10. In its pleadings, Uganda did not once call those legal criteria into question. However, it never went to the Security Council, either before or during the invasion and occupation of the Congo, to explain the situation of extreme peril that it was supposedly facing. Neither did Uganda request the Security Council to take any necessary or urgent measures to ensure the maintenance of peace and security along its common border with the Congo. Nor did it ask the Security Council to authorize the Ugandan State to send its troops into that area in order to curb the activities of hostile armed groups operating therein, or to prevent the genocide which was purportedly about to be committed there.

51 11. Nor, at regional level, did the Respondent refer the matter in timely fashion to regional African organizations such as the OAU or the SADC. Nor did it bring the case before the Heads of State in the region during the numerous informal summits that took place at the time. Uganda thus failed to use the appropriate forums to seek a peaceful solution to its security concerns, whereas, had it failed in such an initiative, it might then have been entitled to use force against the Congo as a last resort — assuming, once again, that aggression was established.

12. Lastly, on a bilateral level, Uganda failed to contact the Congolese authorities in order to register its complaints and propose solutions with a view to strengthening security along the common border. As Uganda has abundantly emphasized in other contexts, there was indeed, since the conclusion of the 27 April 1998 agreement, a legal framework in which any remaining problems of security "along the common border", to use the very terms of that agreement, could be addressed.

13. In its pleadings[125], the Respondent itself admits that it made no formal protest against the Democratic Republic of the Congo before October 1998. That is to say — on its own admission — after it had launched its military intervention in Congolese territory. Furthermore Uganda does not claim to have called upon any regional organization or the Security Council to complain of the

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[124] *Ibid.*, p. 69, para. 120.

[125] *Ibid.*, p. 121-122, para. 282-284.

"armed attack" of which it now claims to have been the victim and to request that appropriate measures be taken to put an end to that situation.

14. In these circumstances, there is no doubt that the condition of necessity was not respected by Uganda.

15. The Respondent replies that, in order to assess that condition of necessity, one has to take into account a whole series of circumstances that prevailed at the time[126], but that is precisely what the Congo has done. And when the circumstances of the material time are taken into account, it can be seen very clearly that unilateral recourse to force was certainly not a necessary measure of

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self-defence in August, or even September, 1998. Perhaps Uganda could have explained its refusal to exhaust peaceful remedies by the fact that it was the victim of a sudden attack, which would have left it no choice of means or time for deliberation, to use a well-known form of words. But, on the contrary, the Respondent does not complain of any attack of that kind, but of some vague threat to its security which had developed over a period of months or even years[127]. In these circumstances, it is obvious that the Ugandan authorities were perfectly capable of using peaceful means to settle their dispute with the Democratic Republic of the Congo before envisaging the military option.

16. In the light of all these elements, it is clear that Uganda's objectives in invading and occupying the Congo were certainly not to repel any armed attack by the Congo. Nor has Uganda succeeded in proving that it was obliged to act urgently or that its military measures against the Congo were the only possible ones. It follows that the invasion and occupation of a very significant area of Congolese territory by the Respondent do not fall within the framework of self-defence and are contrary to international law. This is especially true, in as much as the military action taken by Uganda was patently disproportionate in relation to the circumstances of the case, which brings me to the second condition that our opponents have failed to satisfy.

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[126] *Ibid.*, p. 121-122, para. 282-284.

[127] CMU, Vol. 1, pp. 25-43.

II. UGANDA DID NOT RESPECT THE CONDITION OF PROPORTIONALITY

17. Unlike necessity, the criterion of proportionality is more flexible. It establishes a relationship between two elements whereby the extent of the reaction can be measured against the gravity of the event which it is intended to counter. However, it must be said that, in the total absence of an armed attack launched from the Congo, any "counter measure" by Uganda could only be disproportionate. If proportionality is applicable in the case of vague threats, the very concept of proportionality disappears; it loses all meaning. Any counter-measure whatsoever may become appropriate to deal with an undefined threat. Thus the requirement of proportionality inherently precludes any extension of the concept of self-defence to pre-emptive action; otherwise, it would simply be subsumed in arbitrary notions of characterization. I will return briefly to that point at the end of this statement. But I would first like to address the point that the extent of the
53 occupation of the Congolese territory by Uganda was totally disproportionate, as well as the fact that Uganda's support for a number of Congolese insurgent groups patently fell outside the framework of a proportionate counter-measure of self-defence.

A. The extent of the occupation of Congolese territory was totally disproportionate to the alleged objective of response to an armed attack

18. Mr. President, Members of the Court, I wish to draw your attention to this map. To the north-east of the Congo, you can see here — where the marker is positioned — is the border zone between Uganda and the Congo, where security problems have long existed. Then, coloured in red, is the zone representing the areas of Congolese territory occupied by the Ugandan army. A simple comparison of the extent of those two zones probably requires no comment. However, I would like to emphasize two points at this stage.

19. First, the depth of the advance of the Ugandan army inside Congolese territory. As you will see illustrated in your judges' folder under tab 25, Uganda sent its troops to invade and occupy the towns of Kisangani, located 650 km from the border, Bumba and Lisala, respectively 900 and 1050 km from the border, Gbadolite, 1120 km from the border, Libenge, 1350 km from the border, Mobenzene, 1420 km from the border, as well as — the most extreme case — the town of Kitona, attacked by Ugandan airborne forces in early August 1998 and located as far as 2160 km from the Ugandan border. There is probably no need to emphasize further the fact that military actions of

such scope, carried out by Uganda so far from its western border, are patently disproportionate to the Respondent's alleged objective of repelling an alleged threat "along its common border".

20. Secondly, the extent of the Congolese territory occupied by the Ugandan Army. On this subject, as we already stated yesterday, Uganda has shown surprising modesty in admitting that it only occupied, in the Democratic Republic of the Congo, an area corresponding roughly to the size of Germany[128] — which, I am sure you will agree, is already quite significant in itself. In reality,

54 the territory occupied by Uganda in the Congo, as is clearly shown on another map, to be found in the judges' folders under tab 26, represents almost one third of the entire area of Western Europe. The occupied territory extends over three Congolese provinces and covers a surface area of some 900,000 square km, about 22 times the size of the Netherlands or twice the size of Germany. In these circumstances, where is the proportionality between the use of force by Uganda and the aggression of which it was purportedly the victim? There are, moreover, further grounds demonstrating such absence of proportionality. Thus we could cite the massive damage caused by the invasion and occupation of the Congo to the Congolese Armed Forces and to the Country's civil infrastructure. How can it be claimed that there is the slightest sense of proportion between that very substantial damage and what was allegedly suffered by the UPDF forces or Ugandan infrastructure as a result of armed actions purportedly carried out on Ugandan territory by insurgent groups coming from the Democratic Republic of the Congo? That total absence of proportionality is very clearly displayed in the support given by Uganda to a number of Congolese insurgent groups.

B. The support for Congolese rebel groups clearly fell outside the framework of a proportionate counter-measure of self-defence.

21. In order to assess the necessity and proportionality of the military action undertaken by Uganda in the Congo, we must certainly not forget the support given by the Respondent to a number of Congolese rebel groups. This was the case in particular of the MLC (Movement for the Liberation of the Congo), whose clearly declared objective was to overthrow the regime of President Kabila or, failing that, to obtain a change in the constitutional order in the Democratic

[128]RU, Vol. 1, p. 8, para. 26 and p. 87, para. 199.

Republic of the Congo. As my colleague Maître Tshibangu Kalala had occasion to recall yesterday, Uganda, after long denying its role in the creation and operation of such rebel movements, was finally obliged to acknowledge it. The Court will judge whether it can be regarded as a "necessary and proportionate" measure of self-defence for a Member State of the United Nations to create and support, by all possible means, a number of insurgent groups with a view to changing the constitutional order in another State. For the Democratic Republic of the
55 Congo, it quite simply amounted to intervention in its internal affairs, which is strictly prohibited by contemporary international law and which bears no relation to the exercise of a purported right of self-defence.

Lastly, I would like briefly to return to the point that, if self-defence may be invoked on a pre-emptive basis, as Uganda seems at times to claim, then the notion of proportionality becomes totally meaningless.

C. The requirement of proportionality of self-defence would lose all meaning if the notion of pre-emptive armed action were accepted

22. On this point, one cannot but stress once again the danger of including the threat of a possible armed attack among circumstances capable of justifying the exercise of the right of self-defence. What would then become of the condition of proportionality? Should the proportionality of the counter-measure be gauged in relation to the subjective sentiment of the State which considers itself threatened? Would that not open the door to all kinds of abuse, giving States freedom to decide on military intervention wherever they see fit in order to counter a threat that they alone would be in a position to define? Such broadening of the rule would lead to an virtually limitless anarchy, since the strongest would always be able to allege the existence of a threat coming from the weakest and consider that they had taken "necessary and proportionate" military counter-measures against that threat. The best evidence of the risks of such disorder can precisely be found in Uganda's action in the Congo. The Respondent took advantage of the collapse of the Congolese army and armed forces and of the weakness of the Congolese State after the fall of Marshal Mobutu's régime in order to invade and occupy the Congo for almost five years, whilst at the same time committing extensive pillaging and numerous atrocities there. And all under cover of an alleged right of preventive or pre-emptive self-defence.

23. Mr. President, Members of the Court, to conclude my statement, I would like to observe that the Democratic Republic of the Congo, as a Member State of the United Nations, is profoundly attached to respect for the rules of international law governing friendly relations between States. The Congo has never undertaken any armed attack against Uganda, either directly nor indirectly, as my colleague Olivier Corten has shown this morning. In these circumstances, the invasion and

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prolonged occupation of Congolese territory, together with other hostile acts perpetrated by Uganda against the Democratic Republic of the Congo, on the pretext of repelling a non-existent armed attack, cannot be justified by the exercise of any right of self-defence. That is particularly so, in that those acts in any event fail to meet the conditions of necessity and proportionality that are required for self-defence to be validly invoked.

It is doubtless because Uganda is well aware of the weakness of its arguments on self-defence that it has also sought to justify its military presence in the Congo by a second argument: the purported existence of consent by the Congolese authorities. Professor Olivier Corten will return tomorrow morning to that second argument and will show that it is totally unfounded. For now, this statement brings to an end today's oral presentation by the Democratic Republic of the Congo. I would like to thank the Court for its attention.

The PRESIDENT: Thank you, Professor Klein.

Indeed, this brings to a close this morning's hearings. The Court will resume the hearings tomorrow morning at 10 o'clock.

The sitting is closed.

The Court rose at 1 p.m.