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Cour internationale de Justice

LA HAYE

International Court of Justice

THE HAGUE

ANNÉE 2005

Audience publique

tenue le mercredi 13 avril 2005, à 15 heures, au Palais de la Paix,

sous la présidence de M. Shi, président,

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

COMPTE RENDU

YEAR 2005

Public sitting

held on Wednesday 13 April 2005, at 3 p.m., at the Peace Palace,

President Shi presiding,

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

VERBATIM RECORD

Présents : M. Shi, président
M. Ranjeva, vice-président
MM. Koroma
Vereshchetin
Mme Higgins
MM. Parra-Aranguren
Kooijmans
Rezek
Al-Khasawneh
Buergenthal
Elaraby
Owada
Simma
Tomka
Abraham, juges
MM. Verhoeven,
Kateka, juges *ad hoc*

M. Couvreur, greffier

Present:	President	Shi
	Vice-President	Ranjeva
	Judges	Koroma
		Vereshchetin
		Higgins
		Parra-Aranguren
		Kooijmans
		Rezek
		Al-Khasawneh
		Buergenthal
		Elaraby
		Owada
		Simma
		Tomka
		Abraham
	Judges *ad hoc*	Verhoeven
		Kateka
	Registrar	Couvreur

Le Gouvernement de la République du Congo est représenté par :

S. Exc. M. Honorius Kisimba Ngoy Ndalewe, ministre de la justice et garde des sceaux de la République démocratique du Congo,

comme chef de la délégation;

S. Exc. M. Jacques Masangu-a-Mwanza, ambassadeur extraordinaire et plénipotentiaire auprès du Royaume des Pays-Bas,

comme agent;

M. Tshibangu Kalala, avocat aux barreaux de Kinshasa et de Bruxelles,

comme coagent et avocat;

M. Olivier Corten, professeur de droit international à l'Université libre de Bruxelles,

M. Pierre Klein, professeur de droit international, directeur du centre de droit international de l'Université libre de Bruxelles,

M. Jean Salmon, professeur émérite à l'Université libre de Bruxelles, membre de l'Institut de droit international et de la Cour permanente d'arbitrage,

M. Philippe Sands, Q.C., professeur de droit, directeur du Centre for International Courts and Tribunals, University College London,

comme conseils et avocats;

M. Ilunga Lwanza, directeur de cabinet adjoint et conseiller juridique au cabinet du ministre de la justice et garde des sceaux,

M. Yambu A Ngoyi, conseiller principal à la vice-présidence de la République,

M. Mutumbe Mbuya, conseiller juridique au cabinet du ministre de la justice,

M. Victor Musompo Kasongo, secrétaire particulier du ministre de la justice et garde des sceaux,

M. Nsingi-zi-Mayemba, premier conseiller d'ambassade de la République démocratique du Congo auprès du Royaume des Pays-Bas,

Mme Marceline Masele, deuxième conseillère d'ambassade de la République démocratique du Congo auprès du Royaume des Pays-Bas,

comme conseillers;

M. Mbambu wa Cizubu, avocat au barreau de Kinshasa (cabinet Tshibangu et associés),

M. François Dubuisson, chargé d'enseignement à l'Université libre de Bruxelles,

M. Kikangala Ngoie, avocat au barreau de Bruxelles,

The Government of the Democratic Republic of the Congo is represented by:

His Excellency Mr. Honorius Kisimba Ngoy Ndalewe, Minister of Justice, Keeper of the Seals of the Democratic Republic of the Congo,

as Head of Delegation;

His Excellency Mr. Jacques Masangu-a-Mwanza, Ambassador Extraordinary and Plenipotentiary to the Kingdom of the Netherlands,

as Agent;

Maître Tshibangu Kalala, member of the Kinshasa and Brussels Bars,

as Co-Agent and Advocate;

Mr. Olivier Corten, Professor of International Law, Université libre de Bruxelles,

Mr. Pierre Klein, Professor of International Law, Director of the Centre for International Law, Université libre de Bruxelles,

Mr. Jean Salmon, Professor Emeritus, Université libre de Bruxelles, member of the Institut de droit international and of the Permanent Court of Arbitration,

Mr. Philippe Sands, Q.C., Professor of Law, Director of the Centre for International Courts and Tribunals, University College London,

as Counsel and Advocates;

Maître Ilunga Lwanza, Deputy *Directeur de cabinet* and Legal Adviser, *cabinet* of the Minister of Justice, Keeper of the Seals,

Mr. Yambu A. Ngoyi, Chief Adviser to the Vice-Presidency of the Republic,

Mr. Mutumbe Mbuya, Legal Adviser, *cabinet* of the Minister of Justice,

Mr. Victor Musompo Kasongo, Private Secretary to the Minister of Justice, Keeper of the Seals,

Mr. Nsingi-zi-Mayemba, First Counsellor, Embassy of the Democratic Republic of the Congo in the Kingdom of the Netherlands,

Ms Marceline Masele, Second Counsellor, Embassy of the Democratic Republic of the Congo in the Kingdom of the Netherlands,

as Advisers;

Maître Mbambu wa Cizubu, member of the Kinshasa Bar (law firm of Tshibangu and Partners),

Mr. François Dubuisson, Lecturer, Université libre de Bruxelles,

Maître Kikangala Ngoie, member of the Brussels Bar,

Mme Anne Lagerwal, assistante à l'Université libre de Bruxelles,

Mme Anjolie Singh, assistante à l'University College London, membre du barreau de l'Inde,

comme assistants.

Le Gouvernement de l'Ouganda est représenté par :

S. Exc. E. Khiddu Makubuya, S.C., M.P., *Attorney General* de la République de l'Ouganda,

comme agent, conseil et avocat;

M. Lucian Tibaruha, *Solicitor General* de la République de l'Ouganda,

comme coagent, conseil et avocat;

M. Ian Brownlie, C.B.E., Q.C., F.B.A., membre du barreau d'Angleterre, membre de la Commission du droit international, professeur émérite de droit international public à l'Université d'Oxford et ancien titulaire de la chaire Chichele, membre de l'Institut de droit international,

M. Paul S. Reichler, membre du cabinet Foley Hoag, LLP, à Washington D.C., avocat à la Cour suprême des Etats-Unis, membre du barreau du district de Columbia,

M. Eric Suy, professeur émérite à l'Université catholique de Leuven, ancien Secrétaire général adjoint et conseiller juridique de l'Organisation des Nations Unies, membre de l'Institut de droit international,

S. Exc. l'honorable Amama Mbabazi, ministre de la défense de la République de l'Ouganda,

M. Katumba Wamala, (PSC), (USA WC), général de division, inspecteur général de la police de la République de l'Ouganda,

comme conseils et avocats;

M. Theodore Christakis, professeur de droit international à l'Université de Grenoble II (Pierre Mendès France),

M. Lawrence H. Martin, membre du cabinet Foley Hoag, LLP, à Washington D.C., membre du barreau du district de Columbia,

comme conseils;

M. Timothy Kanyogongya, capitaine des forces de défense du peuple ougandais,

comme conseiller.

Ms Anne Lagerwal, Assistant, Université libre de Bruxelles,

Ms Anjolie Singh, Assistant, University College London, member of the Indian Bar,

as Assistants.

The Government of Uganda is represented by:

H.E. the Honourable Mr. E. Khiddu Makubuya S.C., M.P., Attorney General of the Republic of Uganda,

as Agent, Counsel and Advocate;

Mr. Lucian Tibaruha, Solicitor General of the Republic of Uganda,

as Co-Agent, Counsel and Advocate;

Mr. Ian Brownlie, C.B.E, Q.C., F.B.A., member of the English Bar, member of the International Law Commission, Emeritus Chichele Professor of Public International Law, University of Oxford, member of the Institut de droit international,

Mr. Paul S. Reichler, Foley Hoag LLP, Washington D.C., member of the Bar of the United States Supreme Court, member of the Bar of the District of Columbia,

Mr. Eric Suy, Emeritus Professor, Catholic University of Leuven, former Under Secretary-General and Legal Counsel of the United Nations, member of the Institut de droit international,

H.E. the Honourable Amama Mbabazi, Minister of Defence of the Republic of Uganda,

Major General Katumba Wamala, (PSC), (USA WC), Inspector General of Police of the Republic of Uganda,

as Counsel and Advocates;

Mr. Theodore Christakis, Professor of International Law, University of Grenoble II (Pierre Mendes France),

Mr. Lawrence H. Martin, Foley Hoag LLP, Washington D.C., member of the Bar of the District of Columbia,

as Counsel;

Captain Timothy Kanyogonya, Uganda People's Defence Forces,

as Adviser.

The PRESIDENT: Please be seated. The sitting is open. I will give the floor first to Mr. Kalala.

M. KALALA :

LE PILLAGE ET L'EXPLOITATION ILLÉGALE DES RESSOURCES NATURELLES DE LA RÉPUBLIQUE DÉMOCRATIQUE DU CONGO

I. Aperçu général sur les ressources naturelles de la RDC

1. Monsieur le président, Madame et Messieurs les juges, la République démocratique du Congo, Etat situé au cœur de l'Afrique, avec sa superficie de 2 345 000 kilomètres carrés et ses soixante millions d'habitants, est un véritable miracle géologique et écologique, comme vous le constaterez au vu des cartes que vous trouverez dans vos dossiers de juges aux cotes n^{os} 34 à 38. Le Congo est en effet doté d'une biodiversité remarquable de ressources minérales, forestières, agricoles et écologiques qui provoquent la convoitise de certains Etats étrangers.

2. Avec ses mines de cuivre, de cobalt, d'or, de diamant, d'étain, de manganèse, etc., l'industrie minière congolaise est encore de nos jours le moteur de l'économie du pays. A l'est de la RDC, ces mines sont essentiellement situées dans les provinces orientale, du Nord-Kivu, du Sud-Kivu et de Maniema.

3. Les forêts congolaises, qui représentent 47 % des ressources forestières de l'Afrique, sont sous-exploitées et renferment notamment des essences recherchées pour leur haute qualité dans l'industrie du bois et le caoutchouc.

4. Dans la production agricole congolaise, des produits comme le café et le thé sont des cultures industrielles dont l'apport dans le budget du pays n'est plus à démontrer. Le café arabica se développe essentiellement dans le Kivu tandis que le café robusta se cultive dans les provinces forestières comme l'Equateur, notamment dans les zones d'Ikela, Bokungu, Bolomba, Lisala, Budjala et Gemena, et dans la province orientale, première productrice pour le Congo avec le district de Haut-Uélé.

5. Sur le plan écologique, la République démocratique du Congo possède dix-huit aires protégées parmi lesquelles sept parcs nationaux dont cinq ont été déclarés patrimoine commun de l'humanité. Etablis essentiellement dans les provinces orientale (Garamba et Maiko), du Sud-Kivu

(parc de Virunga), du Nord-Kivu (parc de Kahuzi-Biega) et de l'Equateur (parc de Salongo Nord), ces parcs servent à la conservation et à la protection des espèces protégées par les instruments internationaux.

II. La réalité du pillage et de l'exploitation illégale des ressources naturelles congolaises par l'Ouganda

6. Monsieur le président, Madame et Messieurs les juges, l'occupation ougandaise a eu pour effet, depuis août 1998, de soustraire au contrôle du Gouvernement légal de la RDC et à la réglementation congolaise normalement applicable l'ensemble des activités économiques se déroulant dans la partie du territoire illégalement occupée. Ce fait, qui n'est pas fondamentalement contesté par la Partie ougandaise, constitue une évidente violation de la souveraineté de la République démocratique du Congo sur ses ressources naturelles, qui s'est traduite par des préjudices considérables.

7. Selon de nombreux rapports internationaux, la présence d'abondantes richesses naturelles au Congo, surtout dans l'est du pays, a constitué l'un des principaux facteurs expliquant la poursuite du conflit[1]. Non contentes d'occuper une partie substantielle du territoire du Congo en violation de sa souveraineté, les troupes de l'UPDF ont profité de leur présence pour se livrer au pillage et à l'exploitation illégale des ressources naturelles congolaises. A cet égard, il faut souligner le fait que les troupes d'occupation se sont précisément concentrées sur les territoires du Congo recelant les ressources naturelles les plus importantes, et en particulier la région aurifère de l'Ituri.

8. L'exploitation illégale des ressources naturelles de la RDC par les forces étrangères d'occupation, y compris l'Ouganda, a pris une ampleur telle que plusieurs organisations internationales se sont déclarées profondément alarmées par la situation. Pour sa part, le Conseil de sécurité des Nations Unies a institué un groupe d'experts chargé d'enquêter sur le pillage et l'exploitation illégale des ressources naturelles du Congo. Le groupe d'experts de l'ONU a ainsi

[1] Rapport du groupe d'experts sur l'exploitation des ressources naturelles et autres richesses de la République démocratique du Congo, 12 avril 2001, Nations Unies, doc. S/2001/357, par. 32; réplique du Congo, annexe 69.

rendu quatre rapports, dont le dernier en date a été publié le 23 octobre 2003[2]. Ces rapports établissent, Monsieur le président, de façon incontestable, l'implication de l'UPDF dans des activités de pillage et d'exploitation illégale de richesses naturelles congolaises, et soulignent le défaut d'action des autorités ougandaises afin de prévenir ou de réprimer adéquatement ces activités. Au vu de ces rapports, le président du Conseil de sécurité notait avec inquiétude que le pillage des ressources naturelles et autres formes de richesses de la RDC puisse ainsi continuer et condamnait énergiquement ces activités illégales[3].

9. Monsieur le président, Madame et Messieurs les juges, à la suite de la publication du premier rapport du groupe d'experts de l'ONU en avril 2001, le Conseil de sécurité des Nations Unies, alarmé par les informations faisant état d'importantes activités d'exploitation illégale des ressources du Congo, a demandé instamment aux gouvernements concernés de procéder à leur propre enquête afin de se prononcer sur les allégations contenues dans le rapport[4]. La RDC a ainsi constitué une commission d'experts nationaux sur le pillage et l'exploitation illégale des ressources naturelles et autres richesses de la RDC. Cette commission a rendu un rapport en octobre 2001 dont les conclusions confirment celles du groupe d'experts de l'ONU quant à la responsabilité des autorités ougandaises[5].

10. De son côté, l'Ouganda a également créé une commission d'enquête nationale, mieux connue sous le nom de «commission Porter». Cette commission a livré un rapport intérimaire en octobre 2001[6], et rendu son rapport final en novembre 2002, sur lequel nous reviendrons plus loin dans nos plaidoiries.

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[2] Lettre du Secrétaire général des Nations Unies, datée du 23 octobre 2003, adressée au président du Conseil de sécurité par le Secrétaire général (groupe d'experts sur l'exploitation illégale des ressources naturelles et autres richesses de la République démocratique du Congo), Nations Unies, doc. S/2003/1027.

[3] Déclaration du président du Conseil de sécurité du 9 décembre 2001, Nations Unies, doc. S/PRST/2001/39.

[4] Déclaration du président du Conseil de sécurité du 3 mai 2001, Nations Unies, doc. S/PRST/2001/13.

[5] *Rapport de la commission congolaise des experts nationaux sur le pillage et l'exploitation illégale des ressources et autres richesses de la RDC*, octobre 2001, par. 32, 35, 40, 48, 51, 90, 93, 101, 131 et 148, réplique du Congo, annexe 74.

[6] Judicial Commission of inquiry into allegations into illegal exploitation of natural resources and other forms of wealth in the Democratic Republic of Congo, Interim Report, October 2001.

L'établissement des faits par des sources indépendantes, concordantes et variées

11. Dans ses écritures, l'Ouganda s'est évertué à nier toute participation de l'UPDF dans des activités d'exploitation illégale des ressources naturelles et autres richesses du Congo[7]. Pour ce faire, l'Ouganda consacre de nombreuses pages à attaquer la crédibilité du groupe d'experts de l'ONU et de ses rapports, dont il prétend qu'ils ne sont fondés que sur des «ouï-dire»[8] ou des informations peu fiables[9]. Les preuves d'activités de pillage et d'exploitation illégale des richesses congolaises par des troupes de l'UPDF ne seraient ainsi, si l'on suit l'Ouganda, que le fruit de l'imagination de la République démocratique du Congo et de quelques experts de l'ONU, ou d'une hallucination.

12. Monsieur le président, Madame et Messieurs de la Cour, si la réalité du pillage des ressources congolaises par l'UPDF constituait le fruit d'une hallucination, il s'agirait alors d'une hallucination *collective et mondiale*. En effet, tous les experts, je dis bien *tous* les experts, qui ont analysé cette question ont abouti à une seule et même conclusion : les troupes ougandaises ont bel et bien pris part à de multiples activités de pillage et d'exploitation illégale des richesses du Congo depuis 1998. En ce sens, on trouve, bien entendu, les rapports du groupe d'experts de l'ONU, qui constituent une source essentielle à laquelle la Cour doit avoir égard. Mais, contrairement à ce que prétend l'Ouganda dans ses écritures[10], il ne s'agit pas, loin s'en faut, de l'unique source sur laquelle le Congo se fonde afin d'établir la preuve de l'implication de l'Ouganda dans le pillage des ressources congolaises. Le Congo se permet de rappeler à l'Ouganda que la réalité de ces faits est établie par de nombreux autres rapports provenant d'organes aussi variés, indépendants et crédibles qu'une délégation du Parlement britannique[11], des ONG de réputation internationale comme Human Rights Watch[12], l'International Crisis Group[13], OXFAM[14] ou encore d'une personnalité

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[7] Duplique de l'Ouganda, p. 136 et suiv.

[8] *Ibid.*, p. 139.

[9] *Ibid.*, p. 137.

[10] *Ibid.*, p. 136.

[11] All Party Parliamentary Group on the Great Lakes and genocide prevention, «Visit to democratic Republic of Congo 2nd-6th August 2001», réplique du Congo, annexe 4.7.

[12] Human Rights Watch, «L'Ouganda dans l'est de la RDC : Une présence qui attise les conflits politiques et ethniques», rapport de mars 2001.

[13] International Crisis Group, «Le partage du Congo : Anatomie d'une sale guerre», ICG Afrique — Rapport n° 26, 20 décembre 2000.

comme Aldo Ajello, représentant spécial de l'Union européenne pour la région des Grands Lacs, auditionné devant une commission d'enquête parlementaire du Sénat de Belgique[15]. Si besoin en est, on en trouve encore confirmation dans diverses sources ou témoignages journalistiques[16].

13. L'ensemble de ces sources variées convergent pour aboutir à un seul constat irréfutable : les troupes de l'UPDF ont participé activement au pillage et à l'exploitation illégale des ressources naturelles de la RDC et ont aidé des rebelles congolais et des particuliers à mener ce type d'activités, pendant que les autorités ougandaises fermaient les yeux. Dans ses écritures, l'Ouganda n'a pas pris la peine de réfuter chacune de ces sources, se contentant de s'en prendre uniquement aux rapports du groupe d'experts de l'ONU. Lorsque l'on prend en considération l'ensemble des sources concordantes, la position de l'Ouganda consistant à nier l'existence de toute preuve crédible établissant l'implication de l'UPDF dans le pillage de ressources naturelles devient pour le moins difficile à soutenir.

La confirmation des faits par la commission judiciaire d'enquête ougandaise Porter

14. Monsieur le président, Madame et Messieurs les juges, la thèse de l'Ouganda s'effondre définitivement à la lecture du rapport final de la commission Porter, rendu en novembre 2002 et publié en mai 2003[17]. En effet, les conclusions de ce rapport final établissent clairement la réalité d'une série de faits de pillage et d'exploitation illégale des ressources naturelles congolaises par l'UPDF, faits dont l'Ouganda prétendait pourtant dans ses écritures qu'ils étaient démentis par des éléments fiables. Les principales conclusions du rapport de la commission Porter, dont vous trouverez les extraits pertinents dans vos dossiers de juges sous la cote n° 39, sont les suivantes :

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[14] Oxfam GB, «Poverty in the Midst of Wealth, The Democratic republic of Congo», 18 janvier 2002, réplique du Congo, annexe 4.9.

[15] Audition de M. Aldo Ajello, représentant spécial de l'Union européenne pour la région des Grands Lacs, devant la commission d'enquête parlementaire «Grands Lacs», Sénat de Belgique, session ordinaire 2001-2002, vendredi 18 janvier 2002, http ://senate.be/crv/GR/gr-08html, réplique du Congo, annexe 4.8.

[16] G. Willum, «Rebel leader confirms what Western donors deny : Uganda plunders Congo», *Aktuelt*, 22 janvier 2001, réplique du Congo, annexe 4.10; audition de M. François Misser, journaliste, devant la commission d'enquête parlementaire «Grands Lacs», Sénat de Belgique, session ordinaire 2001-2002, vendredi 22 février 2002, http ://senate.be/crv/GR/gr-11html, réplique du Congo, annexe 4.8; Colette Braeckman, «Guerres sans vainqueurs en République démocratique du Congo», *Le Monde diplomatique*, avril 2001, p. 16-17.

[17] Judicial Commission of inquiry into allegations into illegal exploitation of natural resources and other forms of wealth in the Democratic Republic of Congo 2001, Final Report, November 2002, http ://www.mofa.go.ug/speeches.

— dès le début de la guerre, des hauts officiers de l'UPDF ont prévu de faire des affaires en République démocratique du Congo et le général James Kazini, commandant de l'UPDF pour les opérations menées en RDC, en avait parfaitement connaissance et a couvert ces comportements[18];

— le général Kazini avait des intérêts dans la société Victoria[19], qui menait des activités d'exploitation illégale des ressources naturelles congolaises dans le domaine du diamant, de l'or et du café;

— des officiers de l'UPDF et leurs soldats ont participé à l'exploitation de mines et à la perception de taxes sur cette exploitation[20], ainsi qu'à des pillages[21] et des opérations de contrebande[22];

— des avions militaires de l'UPDF et leurs soldats ont transporté vers l'Ouganda des marchandises en provenance du Congo, pour le compte d'hommes d'affaires ougandais ou congolais[23].

15. Monsieur le président, Madame et Messieurs les juges, la commission Porter a pu aboutir à ces conclusions dont je viens de donner lecture en dépit de ce qu'elle a elle-même appelé une «conspiration du silence» régnant au sein de l'UPDF[24]. Si la commission est parvenue à briser cette conspiration du silence et à établir la responsabilité de hauts officiers de l'UPDF en dépit de leurs mensonges[25], c'est notamment grâce à une collaboration qui a pu s'instaurer avec le groupe d'experts de l'ONU et la fourniture de documents par celui-ci[26]. Après avoir trompé la commission Porter à plusieurs reprises, le général Kazini a été ainsi confondu par les documents transmis par les experts de l'ONU et forcé de faire des révélations confirmant de nombreuses allégations contenues dans les rapports des Nations Unies[27]. Ceci montre bien, Monsieur le

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[18] *Ibid.*, p. 18, par. 13.1; p. 29, par. 14.4, dossier des juges, doc. n° 39.

[19] *Ibid.*, p. 124, par. 21.3.4, dossier des juges, doc. n° 39.

[20] *Ibid.*, p. 65 et suiv., par. 16.2; p. 181, par. 37.5 et les conclusions y afférentes, p. 202-203, dossier des juges, doc. n° 39.

[21] *Ibid.*, p. 22, par. 13.4, dossier des juges, doc. n° 39.

[22] *Ibid.*, p. 22 et suiv., par. 13.5, dossier des juges, doc. n° 39.

[23] *Ibid.*, p. 18-19, par. 13.1; p. 30 et suiv., par. 14.6, dossier des juges, doc. n° 39.

[24] *Ibid.*, p. 35, dossier des juges, doc. n° 39.

[25] *Ibid.*, p. 18, 20, 35, 38, 40, 47, 71, 84, 122 et 190.

[26] *Ibid.*, p. 192, dossier des juges, doc. n° 39.

[27] *Ibid.*, p. 17 et suiv., par. 13.5, dossier des juges, doc. n° 39.

président, Madame et Messieurs les juges, à quel point les critiques émises par l'Ouganda sur le manque de crédibilité du travail du groupe d'experts de l'ONU sont dénuées de tout fondement. Dans sa duplique, l'Ouganda souligne tout le sérieux et la crédibilité qu'il convient de reconnaître aux travaux de la commission Porter[28]. Le Congo espère que l'Ouganda conservera cette même position, maintenant que les conclusions finales de la commission Porter établissent très clairement la responsabilité de l'UPDF.

16. La Cour ne manquera pas, Monsieur le président, de saisir toute l'importance de ces conclusions, qui lèvent absolument tout doute sur la réalité de l'implication d'organes de l'Etat ougandais dans les activités de pillage et d'exploitation illégale des ressources naturelles congolaises. Participation aux activités illégales de sociétés privées, perception de taxes, transport par vols militaires d'importantes cargaisons de café vers l'Ouganda, exploitation de mines, pillage, contrebande, tel est le tableau de la présence de l'UPDF au Congo que dresse le rapport de la commission Porter. Celle-ci a d'ailleurs souligné que «UPDF has revealed a lack of discipline which has shamed Uganda on the International Scene»[29].

Voilà qui tranche singulièrement, Monsieur le président, avec l'image disciplinée et désintéressée de l'UPDF que tente de faire passer l'Ouganda dans ses écritures. Il reviendra, dans un instant, au professeur Sands d'examiner le détail de ces faits et leurs conséquences juridiques.

17. Monsieur le président, Madame et Messieurs de la Cour, les *preuves* du pillage et de l'exploitation illégale des ressources naturelles du Congo par les hauts responsables ougandais sont aujourd'hui administrées par une commission d'enquête judiciaire établie par l'Etat défendeur lui-même. Il n'y a donc pas meilleure preuve que l'aveu qui est considéré comme la reine des preuves. La République démocratique du Congo prie la Cour de bien vouloir accorder toute la valeur probante qu'ils méritent aux éléments de preuve fournis par la commission Porter, c'est-à-dire par l'Ouganda lui-même. Je remercie la Cour pour sa particulière attention et la prie de donner la parole au professeur Sands qui exposera les règles de droit international violées par l'Ouganda ainsi que l'étendue de sa responsabilité à la suite de ces violations. Je vous remercie.

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[28] Duplique de l'Ouganda, p. 170.

[29] Judicial Commission of inquiry into allegations into illegal exploitation of natural resources and other forms of wealth in the Democratic Republic of Congo 2001, Final Report, November 2002, p. 203, dossier des juges, doc. n° 39.

The PRESIDENT: Thank you, Mr. Kalala. I now give the floor to Professor Sands.

Mr. SANDS:

NATURAL RESOURCES — THE APPLICABLE LEGAL RULES

1. Mr. President, Members of the Court, to the best of my knowledge, this is the very first time that the Court has been called upon to address the responsibilities of a State for the illegal exploitation of natural resources which are located in the territory of another State which it occupies. The fundamental importance — and pertinence — of the subject is plain. The relationship between conflict and the exploitation of natural resource is the subject of great international interest currently and action at the very highest levels. In December 2004, the Report of the United Nations Secretary-General's High Level Panel on Threats, Challenges and Change identified the role of international law in preventing war and the need to give greater attention to international norms which govern what it called the sources and accelerators of conflict. The Report emphasized in particular the inflammatory role of natural resources in conflicts, and it referred explicitly to the situation in the Democratic Republic of the Congo. It stated: "More legal mechanisms are necessary in the area of natural resources, fights over which have often been an obstacle to peace."[30] It is not, however, only that new rules may be needed. In our submission, greater attention has to be given to existing rules, and in particular to their application and enforcement. In a world of finite resources and increasing demand it is here, in this dispute, that the Court's judicial function can play a vital role.

2. In its written pleadings the Democratic Republic of the Congo provided extensive arguments as to the law and evidence which establishes Uganda's involvement in — and responsibility for — the illegal exploitation of — amongst other resources — gold, diamonds, forestry resources, coltan and many other natural resources of the DRC. I do not propose here and now, to repeat all of that material in the pleadings. Instead, I will focus on the law and on the new evidentiary material which has become available since the close of the written pleadings and its implications for the legal arguments which, by reference to the written pleadings, appear to divide

[30] 2 December 2004, paras. 89-93.

the Parties. Maître Tshibangu Kalala has summarized the context and provided some background, in particular the extraordinarily wealthy natural resource base of the Democratic Republic of the Congo. My presentation will be divided into two parts. In the first part, I will begin by setting out the rules of international law that governed the conduct of Uganda in its occupation. In the second part, I will apply the facts to the law to show the full extent of Uganda's responsibility in international law for the exploitation of natural resources that took place in the DRC in the period between 1998 and 2003.

The applicable law

3. I begin then with the applicable law. This was addressed in some considerable detail by the Democratic Republic of the Congo in its written pleadings, and I refer you in particular to Chapter 4 of the Reply[31]. What did Uganda say in response to those arguments? Some 108 pages of the Ugandan Rejoinder is devoted to the DRC's claim in relation to the illegal exploitation of natural resources. Amongst those 108 pages the law was addressed in just one line. What did Uganda say? It said simply: "there is not much value in a detailed examination by Uganda of the quality and relevance of the legal principles set forth by the DRC"[32]. That is the full extent of Uganda's argument on these issues. I would add that the word "detailed" seems redundant, for, in fact, Uganda chooses to say nothing at all about the law. For Uganda, the matter can be disposed of on the facts alone. In our submission, that silence speaks very loudly indeed.

4. Perhaps Uganda may have felt able to take that approach at the time of its written pleadings, before the Porter Commission had published its Final Report[33]. Or perhaps Uganda believed that its own judicial enquiry would provide exoneration, would conclude, as it may have hoped, that the reports of the United Nations panel were simply wrong, and that the opprobrium of the world, as reflected in a number of Security Council resolutions, could simply be set aside. Perhaps Uganda believed that Brigadier-General Kazini would be able to remain in post when he got back from the Congo. In fact, as we now know, the Porter Commission reached a rather

[31]See especially paras. 4.59-4.84.

[32]Rejoinder of Uganda, para. 511.

[33]Excerpts of the Porter Report's findings on the illegal exploitation of natural resources can be found in the judges' folder, tab 39.

different conclusion. It confirmed the essential facts upon which the DRC's claims in relation to natural resources was based. It concluded, in particular, that the most senior figures in the Ugandan armed forces who were present in the DRC — *the most senior figures* — were directly and personally involved in widespread exploitation of the natural resources of the DRC. And more to the point, the Porter Commission confirmed the conclusions of the reports of the United Nations expert panel.

5. Against this background, it is, we say, impossible for Uganda to challenge the fact that its armed forces were directly involved in the exploitation of the natural resources of the DRC. Does that involvement give rise to the responsibility of Uganda, the occupying Power? The answer to that question turns on the legal obligations which were incumbent upon Uganda. Uncomfortable as it may be, Uganda must now engage with the law; legal arguments it has sought to avoid, it must break its silence. If that silence is maintained Uganda must be considered as having accepted as correct the totality of the DRC's legal arguments as to what international law required, and what the consequences of a failure to meet those requirements must mean. But curiously, as matters now stand on the basis of what is before the Court, Uganda and the DRC do not appear to be in disagreement as to the requirements of international law.

6. The legal obligations incumbent upon Uganda as an occupying Power were abundantly clear in 1998 and they are even more clear today. They leave, in our submission, no room for doubt. The principle of permanent sovereignty over natural resources, the laws of war, and the rules of State responsibility impose very significant constraints on an occupying Power. Respect for these principles, laws and rules lies at the very heart of this case.

A. Permanent sovereignty over national resources

7. The detailed rules of the law of armed conflict in relation to the exploitation of natural resources have to be considered against the background of this fundamental principle of permanent sovereignty over natural resources. The acts which occurred while Uganda occupied large parts of the DRC were wholly inconsistent with the General Assembly's landmark resolution 1803 of 1962 — more than 40 years ago — on permanent sovereignty over natural resources. That resolution confirmed explicitly the "right of peoples and nations to permanent sovereignty over

their natural wealth and resources", and that the exploitation of such resources had to be "exercised in the interest of . . . the well-being of the people of the State concerned". These rights and interests continue to apply at all times, including during armed conflict, including during occupation. There is no question that an occupying State is entitled to exploit resources for its own benefit. And nor may it permit — or fail to prevent, or turn a blind eye to — the exploitation of resources by its armed forces for personal benefit. The principle of permanent sovereignty is an "inalienable right of all States"[34].

8. Recognition that the principle continues to apply during times of occupation and armed conflict goes back more than three decades. General Assembly resolution 3005 (XXXVII) of 15 December 1972 — concerning Israel and the Occupied Territories — affirmed in terms "the principle of the sovereignty of the population of the occupied territories over their natural wealth and resources"[35]. And resolution 3171 (XXVIII) of the following year, in 1973, expressed the Assembly's resolute support for States under "foreign occupation in their struggle to regain effective control over their natural resources".

9. The principle has also provided authority for resolutions of the United Nations Security Council in the present conflict. The Council has repeatedly reaffirmed Uganda's obligation to refrain from exploitation of the natural resources of the DRC[36]. On 19 December 2001 a statement of the President of the Security Council stressed that external parties — and groups or individuals under their control — should not "benefit from the exploitation of the DRC's natural resources" or "use the natural resources of the DRC to finance the conflict in the country"[37].

10. Mr. President, the exploitation of natural resources lies at the very heart of this terrible conflict, a fact that has been consistently reflected in the actions of various United Nations bodies. The events between 1998 and 2003 confirm the need to reaffirm the relevance and effectiveness and applicability of the principle of permanent sovereignty, not only for what has happened in the DRC in the past but also for what is happening now and for what may happen in the future.

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[34]GA resolution 1803 (1962)

[35]GA resolution 3005, para. 4.

[36]See, for example, Security Council resolutions 1355 (2001), 1457 (2003); 1493 (2003); 1499 (2003).

[37]Statement by the President of the Security Council, 19 December 2001, S/PRST/2001/39, Reply of the Democratic Republic of the Congo, Ann. 71.

B. The laws of war and armed conflict

11. The principle of permanent sovereignty is also reflected in the 1907 Hague Regulations and the 1949 Geneva Convention, and I turn now to the laws of war and armed conflict. These rules have been confirmed and strengthened by the 1977 Additional Protocols. The ICRC Commentary confirmed that the rules applicable to Uganda have achieved the status of customary international law[38]. And, of course, last year this Court's Advisory Opinion of July 2004 determined in the most authoritative way possible "that the provisions of the Hague Regulations have become part of customary international law"[39].

12. The law of armed conflict established certain fundamental principles which are relevant to the exploitation of natural resources. *First*, the occupant does not acquire sovereignty over the territory it occupies: it merely exercises *de facto* authority. *Second*, occupation is a provisional situation: the rights of the occupant are transitory and are accompanied by an overriding obligation to respect the existing laws and rules of administration. *Third*, in exercising its powers the occupant must comply with two basic requirements, namely (1) the fulfilment of its military needs and (2) respect for the interests of the inhabitants. And *fourth*, the occupying Power must not exercise its authority in order to further its own interests, or to meet the demands of its own population[40]. The occupying Power exercises temporary *de facto* control in accordance with the defined rights and obligations under Geneva Convention IV and the Hague Regulations, and including in particular the specific requirement that an occupying Power shall not permit the exploitation of natural resources other than for the benefit of the occupied State.

Substantive obligations

13. Uganda has ignored these substantive rules, both in its occupation of large parts of the territory of the DRC and in its written pleadings in this case; there is, in that, at least, a degree of consistency. If Brigadier Kazini had met his responsibilities he would have paid acute attention to

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[38]In 1946 the Nüremberg IMT stated with regard to the Hague Convention on land warfare of 1907: "by 1939 these rules . . . were recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war" (reprinted in *AJIL*, Vol. 41, 1947, pp. 248-249). In 1948, the IMT for the Far East expressed a similar view.

[39]*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004*, para. 89.

[40]See *inter alia* A. Cassesse, *Land and Natural Resources* in Emma Playfair (Ed.) International Law and the Administration of Occupied Territories, Clarendon Press, Oxford, 1992, pp. 419-442.

Articles 46 and 52 to 56 of the Regulations set out in the Annex to the Hague Convention IV[41], and it may be that the programme of retraining, which he is currently undertaking, will include an element of retraining on these rules. The Regulations distinguish between private property and public property, and between moveable property and immoveable property.

14. As regards *private property* it has to be respected and it cannot be confiscated (Art. 46 (2)), subject to very tightly constrained exceptions permitted by Article 53 (2) in relation to *munitions de guerre* and transport and communication facilities. Article 52 is quite clear: private property — and that includes gold, diamonds, minerals and other resources from privately owned mines — may only be requisitioned if two conditions have been met: first, the requisition must be "for the needs of the army of occupation"; and second, it must be upon payment in cash or a receipt given and payment made as soon as possible. Neither condition has been met in relation to the taking of privately owned natural resources from the DRC under Uganda's watch which are the subject of enquiry by the United Nations expert panel and by the Porter Commission.

15. As regards *public property* — that is to say mines and other assets belonging to the State, and that would include forests and wildlife — this is covered by Articles 53 (1) and 55 of the Hague Regulations. An occupant can seize movables — that is to say cash funds, realizable securities, depots of arms, means of transports, stores and supplies — but only if they "may be used for military purposes" (Art. 53)[42]. For immovable property — public buildings, real estate, forests, and agricultural estates — the occupant shall be regarded "only as administrator and usufructuary": the occupant has the obligation to "safeguard the capital of these properties and administer them in accordance with the rules of usufruct" (Art. 55)[43]. It has been very long recognized for more than half a century that the occupant may only use the proceeds for the purposes of the occupation itself. The capital cannot be used to finance the conflict, and it cannot be applied to the personal benefit of individual members of the Ugandan armed services or groups or individuals who may be

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[41]In addition, Article 47 forbids pillage, Article 50 forbids general penalties, while Articles 48, 49 and 51 regulate the collection of taxes, levies and contributions.

[42]Some commentators take the view that the expression "used for military operations" in Art. 53 refers to all goods *susceptible* to military use; the actual use to which the occupant puts them is seen as immaterial and may be non-military. In other words the limitation "which may be used for military operations" is only intended to identify the class of property of which the occupying army can take possession. The *U.S. Manual* mirrors Art. 53 with regard to movable property. See *British Manual,* para. 612 with respect to public movable property.

[43]See *U.S. Manual,* Art. 400 and the *British Manual,* paras. 609 *et seq*.

supported from time to time by Uganda. This was clarified during and after the Second World War, in particular by a resolution of the London International Law Conference of 1943[44] and by a judgment of the Nuremberg International Military Tribunal in 1947[45]. It is also the approach taken by national courts, for example in the *Singapore Oil Stocks* case[46] in the mid-1950s, which confirmed that oil could only be used for the costs of the occupation. Similar requirements have long been reflected in authoritative military manuals; I refer you in particular to the British and United States Manuals, the earlier editions, on the laws of land warfare[47].

16. Closely related, is the additional obligation of Uganda to use due diligence to ensure that activities that violate the rights of the DRC do not occur in areas which are under its control[48], that of course was an obligation confirmed by this Court in the *Military and Paramilitary Activities* case[49]. The obligation required Uganda to take adequate measures to ensure that members of its military and its nationals, or groups that it controlled, did not engage in any illegal exploitation of the natural resources of the DRC. By December 2001 the Security Council had plainly reached the view that Uganda was in breach of this obligation. That month, speaking through its President, the Council urged Uganda "to take, on an urgent basis, the necessary steps to end all illegal

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[44] "The rights of the occupant do not include any rights to dispose of property, rights or interests for purposes other than the maintenance of public order and safety in the occupied territory. In particular, the occupant is not, in international law, vested with any power to transfer a title which will be valid outside that territory to any property rights or interests which he purports to acquire or create or dispose of; this applies whether such property, rights or interests are those of the State or of private persons or bodies. This status of the occupant is not changed by the fact that he annexes by unilateral action the territory occupied by him."

The full text of the resolution is von Glahn, "The Occupation of Enemy Territory", 1957, pp. 194-195.

[45] "[Articles 49 and 52], together with Article 48, dealing with the expenditure of money collected in taxes, and Articles 53, 55 and 56 dealing with public property, make it clear that under the rules of war, the economy of an occupied country can only be required to bear the expenses of the occupation, and these should not be greater than the economy of the country can reasonably be expected to bear": see *Goering et al*, Trial of the Major War Criminals before the International Military Tribunals, 1 (1947), pp. 238-239.

[46] *N.V. De Bataafsche Petroleum Maatschappij* v. *The War Damage Commission*, (1956) 51 *AJIL* 808.

[47] See the *British Manual*, para. 526: "the economy of an occupied country can be required to bear only the expenses of the occupation; these must not be greater than the economy of the country can reasonably be expected to bear". A similar provision is at Art. 364 of the *U.S. Manual* (1956). Art. 402 states that "the occupant does not have the right of sale or unqualified use of the real property of the state", a provision echoed in the *British Manual*, para. 609.

[48] See Reply of the Democratic Republic of the Congo, para. 4.71; R. Pisillo-Mazzeschi. "The due diligence rule and the nature of international responsibility of States", 1992 Germ. *YBIL*, 22 *et seq*.

[49] *I.C.J. Reports 1986*, pp. 129-130, paras. 254-256.

exploitation of the natural resources of the DRC, by their national or others under their control"[50]. Those words are important; they assume that illegal occupation was occurring and they assume that Uganda had both the responsibility and the ability to prevent it. The statement goes further, because it implies a state of fact and imposes in effect a recognition of a legal obligation on Uganda. Of course we know that illegal exploitation did not end, and that Uganda did not comply with the exhortation of the Security Council through its President. As the Report of the Porter Commission makes clear, senior members of the Ugandan military continued to be directly involved in illegal exploitation of gold, diamonds and coltan on a very large-scale basis, as did other groups under the control of Uganda.

International practice

17. International practice has further clarified the obligations of an occupying State in relation to the exploitation of natural resources. Examples which spring to mind include Israel, the West Bank and Gaza; Iraq; and the Democratic Republic of the Congo[51].

Israel and the Occupied Territories

18. As regards Israel and the Occupied Territories, between 1972 and 1983 a series of General Assembly resolutions have confirmed the application of the principle of permanent sovereignty to territories under occupation, the very limited nature of Israel's economic rights, and its responsibilities in relation to the exploitation of resources[52]. A 1983 report by the United Nations Secretary-General confirmed that natural resources could not be used by the occupying Power beyond the limits imposed by the Hague Regulations and the Fourth Geneva Convention, which meant that public land could not be used beyond usufruct and the proceeds could only be

[50]Statement by the President of the Security Council, 19 December 2001, S/PRST/2001/39, Reply of the Democratic Republic of the Congo, Ann. 71.

[51]For other territories administered/occupied by third States including the case of Namibia and the exploitation of its resources by South Africa and other States and enterprises and Panama and the administration of the canal, see Nicolaas Schrijver, *Sovereignty over Natural Resources*, Cambridge University Press, 1997, p. 143.

[52]See General Assembly resolutions 3175 (1973) adopted by 90 votes to 5, with 27 abstentions; 3336 (1974) adopted by 99 votes to 2, with 32 abstentions; 3516 (1975); 31/186 (1976); 32/161 (1977) adopted by 109 votes to 3, with 26 abstentions; 34/136 (1979) adopted by 118 votes to 2, with 21 abstentions; 35/110 (1980); 36/173 (1981); 37/135 (1982); 38/144 (1983) on permanent sovereignty. The voting record on the last three resolutions remained virtually the same with the United States and Israel voting against. See also resolutions 37/88 C, 36/147 C, 35/122 C, 34/90 A, 33/113 C, 32/91 C, 31/106 C, 3525 (XXX) A, 3240 (XXIX) A and 3092 (XXVIII) B.

used in connection with the costs of the occupation[53]. The Secretary-General's report stated that that the principle of permanent sovereignty enhanced and reinforced the law of belligerent occupation, which was to be "interpreted and applied to protect to the greatest extent possible the principle of permanent sovereignty". The report says, no depletion of natural resources should be permitted[54]. Subsequent resolutions have reaffirmed the principle of permanent sovereignty of peoples under foreign occupation over their natural resources[55].

Iraq

19. A consistent and similar approach is reflected in United Nations practice recently in relation to Iraq. On 22 May 2003 the Security Council adopted resolution 1483. This stressed the right of the Iraqi people freely to control their natural resources. The resolution called on the occupying Powers to comply fully with their obligations as such under the Hague Regulations and the Geneva Conventions[56]. The resolution explicitly directs that *all* proceeds from export sales of petroleum, petroleum products and natural gas from Iraq are to be deposited into the Development Fund for Iraq, until an internationally recognized, representative government of Iraq is properly constituted[57]. The point is very clear: the occupying Powers had no rights over any of the oil. The same principle applies to any other resource.

Democratic Republic of the Congo

20. In the context of the conflict in the Democratic Republic of the Congo, the Security Council has gone out of its way to reaffirm the sovereignty of the DRC over its natural resources and to categorically condemn the illegal exploitation of natural resources and other forms of wealth[58]. The Security Council in particular has underscored "the link between the illicit

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[53]See the Report A/38/265 at http://domino.un.org/unispalselect.nsf/0/6d55c7f840e6da06052567c9004b75de?OpenDocument

[54]*Ibid.*, para. 52. See Conclusions, paras. 50-53.

[55]See General Assembly resolutions 51/190 (1996); 52/207 (1997); 53/196 (1998); 54/230 (1999); 55/209 (2000); 56/204 (2001); 57/269 (2002); 58/229 (2003) and 59/251 (2004).

[56]Security Council resolution 1483 (2003), para. 5.

[57]*Ibid*, para. 20.

[58]See for e.g. Security Council resolutions 1291 (2000); 1304 (2000); 1332 (2000); 1341 (2001); 1355 (2001); 1457 (2003); 1493 (2003) and 1533 (2004).

exploitation and trade of natural resources in certain regions and the fuelling of armed conflicts"[59]. I refer in particular to resolution 1565; that resolution urged States in the region to take appropriate steps in order to end these illegal activities, including if necessary through judicial means, and to report to the Council as appropriate[60]. In that regard, judicial means would include national and international instances.

Responsibility

21. The responsibility of the occupying Power in relation to these substantive rules is equally clear: the crucial provision is Article 3 of the Hague Convention (IV) which states unambiguously and clearly that "a belligerent party . . . shall be responsible for all acts committed by persons forming part of its armed forces". The words "all acts" are very broad indeed, and appear to admit of no exceptions. The same language is reproduced in Article 91 of the first Additional Protocol to the Geneva Conventions. And the ICRC Commentary confirms that the requirements of Articles 3 and 91 of these instruments reflect customary law[61]. In the light of the Report of the Porter Commission, and in particular the conclusions and findings of fact in relation to the acts committed by UPDF Chief of Staff, Brigadier General Kazini, it is difficult — if not impossible — to see *how* Uganda can possibly avoid the consequences which flow inevitably from this strict and clear rule of international law reflected in Articles 3 and 91.

22. This specific rule is entirely consistent with the more general rule now reflected in Article 7 of the International Law Commission's Articles on State Responsibility. And I remind you that Article 7 confirms that:

> "The conduct of an organ of a State or of a person or entity empowered to exercise elements of authority shall be considered an act of that State under international law if the organ, person or entity acts in that capacity, *even if it exceeds its authority or contravenes instructions*." (Emphasis added.)

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[59]See *inter alia* Security Council resolution 1565 (2004), para. 22, which also refers to Security Council resolutions 1493 (2003), 1533 (2004) and 1552 (2004). See also Security Council resolution 1592 (2005), para. 10, urging all States neighbouring the DRC to impede any kind of support to the illegal exploitation of Congolese natural resources, particularly by preventing the flow of such resources through their respective territories.

[60]Security Council resolution 1565 (2004), para. 22.

[61]International Committee of the Red Cross, Commentary on the Additional Protocols (Geneva, 1987), pp. 1053-1054 (ICRC Commentary).

23. So Uganda is responsible even when the members of its armed forces exceed their authority or contravene instructions[62]. This aspect seems to have concentrated minds in proceedings before the Porter enquiry. An exchange between Justice Porter and Brigadier General Kazini during the Porter enquiry is rather instructive:

> "Justice Porter: So the decision to assist Congolese businessmen was yours?
>
> General Kazini: Yes it was mine.
>
> Justice Porter: It was yours?
>
> General Kazini: Yes.
>
> Justice Porter: Contrary to the order of the Commander in Chief?
>
> General Kazini: When you are given a directive, Your Lordship, there must be flexibility . . .
>
> Justice Porter: It was contrary to the order of the Commander-in-Chief or it wasn't?
>
> General Kazini: I didn't contradict your Lordship. I just . . .
>
> Justice Porter: But you were shipping Congolese businessmen . . .?
>
> General Kazini: I was just being flexible."

24. For present purposes, as I said, it matters not whether Brigadier General Kazini's "flexibility" was or was not in contravention with instructions: under Articles 3 and 91, as well as the customary rule reflected in Article 7 of the ILC Articles, Uganda's responsibility is engaged in respect of "all" acts committed by its armed forces, whether they were lawful or not[63]. If the "conduct was carried out by a person cloaked with governmental authority", in this context it is attributable to the State[64]. Brigadier General Kazini was Chief of Staff responsible for activities in the DRC. His "flexibility" engages the responsibility of the Ugandan State. And, as the ILC makes abundantly clear in its Commentary, any issue of drawing the line between unauthorized but official conduct on the one hand and private conduct on the other does not arise where the conduct complained of is "systematic and recurrent, such as the State knew or ought to have known of it

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[62]ILC Commentary to the Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001, Commentary on Art. 7 (ILC Commentary).

[63]ICRC Commentary, pp. 1053-1054.

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

and should have taken steps to prevent it"[65]. And its here that Security Council resolutions become very significant against the background of a pattern of Security Council resolutions, and in particular the statement of the President of December 2001, to which I drew your attention, it is simply unarguable for Uganda to claim that it did not know, or that it could not have known, or that it could not have prevented the plunderous acts of Brigadier Kazini and his colleagues.

25. Responsibility also arises in respect of acts of other persons subject to the control of the Ugandan authorities. These failures of Uganda to act to prevent the illegal exploitation of the DRC's natural resources are also attributable to Uganda[66]. In the *Corfu Channel* case the Court ruled that Albania was responsible where it knew, or must have known, of the presence of mines in its territorial waters but did nothing to warn third States of their presence[67]. In the *United States Diplomatic and Consular Staff* case, the Court concluded that the responsibility of Iran was entailed by the "inaction" of its authorities which "failed to take appropriate steps", in circumstances where such steps were evidently called for[68]. Similarly, where Uganda has failed to act with due diligence to prevent the exploitation of natural resources under conditions which are known to the whole world and which are plainly incompatible with the Hague Regulations[69], then it must follow, as night follows day, that Uganda is internationally responsible. Any other conclusion is an invitation to lawlessness.

Conclusion

26. Mr. President, Members of the Court, the rules of international law concerning the principle of permanent sovereignty and the law of armed conflict are clear and they are confirmed by consistent practice. Three principles dominate. *First*, the natural resource capital of a State cannot be depleted by the occupying Power except in accordance with the strict requirements of the Hague Regulations. The extraction of minerals — coltan, gold, diamonds — constitutes a depletion of capital. As Planiol put it in his *Traité élémentaire de droit civil*: "What is extracted

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[65]ILC Commentary, Commentary to Art. 7.

[66]ILC Commentary, Arts. 1 and 2.

[67]*I.C.J. Reports 1949*, pp. 22-23.

[68]*I.C.J. Reports 1980*, pp. 31-32.

[69]ICRC Commentary, pp. 1053-1058.

from a mine or from a quarry is not a product of the soil. It is the soil itself which is being extracted, the 'exploitation' inevitably results in the exhaustion of the mine."[70]

27. *Second principle*: the exploitation by members of the armed forces of an Occupying Power for private purposes is not permitted in any circumstances[71].

28. And *third*, Uganda is required to exercise due diligence in preventing the groups and persons which it controlled from engaging in the illegal exploitation of natural resources.

29. Mr. President, that concludes the first part of my presentation. As I have sought to show, international rules already exist which place very considerable constraints on the exploitation of natural resources. With your permission I turn now to the second part of my presentation: the application of these rules of law to the specific facts of this case.

Mr. President, I am in your hands as to whether this is an appropriate moment to break or whether you would like me to continue for a few minutes and find an appropriate break point in, say, about ten or 15 minutes.

The PRESIDENT: Thank you, Professor Sands. I think it is time to have a break of ten minutes, after which I will give you the floor.

The Court adjourned from 4 to 4.10 p.m.

The PRESIDENT: Please be seated. Professor Sands, will you please continue.

Mr. SANDS: Thank you, Mr. President

UGANDA IS INTERNATIONALLY RESPONSIBLE FOR THE VIOLATION OF ITS OBLIGATIONS CONCERNING NATURAL RESOURCES

1. I turn now to the second part of my submissions this afternoon, in which I will apply to the facts the law that I have just described to show the full extent of Uganda's international

[70] *Traité élémentaire de droit civil*, Vol. I, 3rd ed., No. 3590, p. 1173) cited by the Arbitration Tribunal in the ARAMCO case (Saudi Arabia *v*. Arabian American Oil Company (1958), *ILR*, Vol. 27 (1963), p. 157.

[71] The *U.S. Army Field Manual* (1956) notes that neither officers or soldiers of its armed forces are allowed to make use of their position or power in the hostile country for private gain, not even for commercial transactions otherwise legitimate.

responsibility for violating its obligations in relation to natural resources which were found in the territory of the DRC in relation to the occupation which took place between 1998 and 2003.

2. In my first presentation on Tuesday morning, I addressed evidentiary issues relating to proof, and it may be appropriate just to recap briefly on a couple of points. *First*, the DRC's evidentiary material, we say, is of a character and quality which fully meets the requirements of the Court's Statute, Rules and practice; *secondly*, that the relevant standard of proof which the DRC has to meet is one of "reasonable certainty" in establishing the relevant facts. That, we say, is the test which needs to be kept in the forefront of our minds; and *third*, that the evidentiary material establishes the relevant facts to that standard[72].

3. In our submission, the evidence before this Court is overwhelming in support of two central facts. The *first* is the fact that military personnel of the UPDF — at the very highest level, at the top, including Brigadier General Kazini — were present on the territory of the DRC, engaged in the exploitation of the DRC's natural resources for personal gain[73]. The *second* fact is that the UPDF turned a blind eye to the acts of these persons and to private persons — both Ugandan nationals and persons associated with Congolese rebel groups — which engaged in the illegal exploitation of the natural resources of the DRC[74]. We say also that other administrative agencies of Uganda also turned a blind eye to the acts of members of the UPDF and private persons who were engaged in the exploitation of the DRC's natural resources for personal gain[75].

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[72]See first pleading of Professor Philippe Sands, Q.C., Tuesday 12 April 2005 (CR 2005/3).

[73]With regard to allegations of illegal exploitation of the natural resources of the DRC by top army officials, the Porter Report found

> This Commission has found a number of areas in which the allegations of the original Panel against General Kazini are soundly based in evidence. The main area was General Kazini's involvement with Khalil and Victoria, [a diamond company] . . . In the matter of control of his commanders in the field, investigation, follow up and disciplinary action in relation to complaints under this officer's area of command were suspiciously weak . . . (P. 204, para. 43.4.)

[74]The Commission found that:

> "exploitation has been carried out by . . . businessmen . . . operating through Uganda . . . by senior army officers working on their own and through contacts in the [DRC]: by individual soldiers taking advantage of their postings: by cross border trade and by individuals living in Uganda . . ." (p. 201, para. 43.1.1).

[75]The Porter Report, pp. 151-157 makes several critical findings with respect to Ugandan administrative organizations including the Registrar of Companies who "does not come well out (*sic*) of its investigation", and that it is not doing its job;" (pp. 151-154) and the Uganda Revenue Authority, with regard to which the Commission states that its "systems of controlling imports and exports are not entirely effective. In fact there are many loopholes for smuggling products to or from one country to the other." (Pp. 156 *et seq.)* See also Reply of the Democratic Republic of the Congo, Anns. 12, 14.

4. Those facts, we say, are established without any room for doubt — no room for doubt — on the basis of the evidence before the Court. Of course we do not have time today to take you through all the relevant documents and all their attachments and all their annexes which accompany them. But we do invite you, in particular, with a bit more time available to you to consider with careful attention the reports of the United Nations panel of experts on the illegal exploitation of natural resources[76] and, since the written pleadings were concluded, their final report presented to the Secretary-General in October 2003[77]. All of these reports point in one direction only.

5. What does Uganda say in relation to the evidence and arguments presented by the DRC? We have already heard that they did not have much to say about the law. What about the facts? Uganda's response is set out in Chapter IV of its Rejoinder. The Chapter runs to 105 pages, and it is the longest of the Rejoinder. The Chapter was prepared prior to 6 December 2002 — the date, of course, when the Rejoinder was filed with the Court. And so it cannot take account of materials which have become available since that date. In particular — and entirely understandably — it takes no account of the Final Report of the Porter Commission, or the Ugandan Government's own White Paper report responding to that Report, or the subsequent steps taken against, amongst others, Brigadier General Kazini. These materials present Uganda with considerable difficulties — and that may be an understatement. The Final Report of the Porter Commission unambiguously confirms the DRC's allegations. It totally undermines the arguments put forward by Uganda in its Rejoinder of December 2002. So, we look forward with very great interest to hearing what Uganda will have to say about the Porter Report and all of the related evidentiary material, to which the Court's attention has been drawn.

6. In its Rejoinder, Uganda makes eight arguments to oppose the Democratic Republic of the Congo's factual claims. But perhaps the most striking aspect of the Ugandan argument in its reply is that it never actually says that the facts described by the Democratic Republic of the Congo are untrue. Remarkable! Uganda attacks the quality of some of the evidence, or the object or nature of Uganda's intervention in the DRC, or the nature of economic trade between the two countries, or the absence of evidence to show that Uganda failed to take steps to act against illegal activity. The

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[76]Reply of the Democratic Republic of the Congo, First Report, Ann. 69; Second Report, Ann. 70.

[77]Final Report of the United Nations panel of experts, 23 October 2003.

closest Uganda gets to attacking the truth of the facts is to make a rather general assertion that some specific allegations are contradicted by some of the evidence. But, of course, that claim came before the publication of the Final Report of the Porter Commission, presumably in the mistaken belief that you may not, as judges, have had access to all the evidence that was put before the Porter enquiry. What is singular and striking is that there is no outright denial of the fact of illegal exploitation of natural resources on Uganda's watch. With that, by way of introduction, I will now try to deal with each of Uganda's eight arguments in turn, in the order in which they address them in their own Rejoinder.

1. The United Nations reports are not credible

7. Uganda's first argument is that the United Nations reports on illegal exploitation may not be relied upon because they were only intended to provide a foundation for a political solution and not to establish culpability[78]. Uganda claims that these reports were merely intended "to spur debate in the United Nations Security Council"[79]. That calls for two responses.

8. *First*, Uganda's characterization of the purpose for which the United Nations reports were commissioned is simply wrong as a matter of fact. The United Nations reports were prepared pursuant to a request made by the Security Council to the United Nations Secretary-General, as first read out in a statement by the then Security Council President Jean-David Levitte of France on 2 June 2000. According to that statement the purpose of the report was to "collect information on all activities of illegal exploitation of natural resource and other forms of wealth of the DRC, including in violation of the sovereignty of that country"[80]. It is plain that the reports were intended to establish the facts on an authoritative and independent basis and we say that is what they have done. They were not, as Uganda puts it, debating documents. They provide evidence for Security Council resolutions and they led inexorably to Porter.

9. The second point is that the DRC does not rely upon the United Nations reports alone. We do not need to, because the United Nations reports merely confirm facts which are based upon

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[78]Rejoinder of Uganda, paras. 332-338.

[79]Rejoinder of Uganda, para. 323.

[80]Document S/PRST/2000/20, Security Council Press Release SC/6871, Memorial of the Democratic Republic of the Congo, Ann. 19.

evidence arising from numerous other sources. For example, Uganda has not challenged the way in which the Porter Commission carried out its tasks, it has not rejected the Report of the Porter Commission that was made available to the Government of Uganda in January 2003. To the contrary, as Maître Tshibangu Kalala mentioned, Uganda treats Porter, in terms of its process, as legitimate and probative, and it relies extensively in its written pleadings on extracts of transcripts relating to hearings before the Porter Commission[81], although it does so rather selectively. Uganda does not say that the Porter processes or its Report are not credible. For the most part the United Nations reports and the final Porter Report are consistent on the key facts: there is between these documents, to take an expression used in judgments of this Court, a concordance — a concordance — in the material before the Court. Concordance between Porter and the United Nations reports confirms the credibility of the latter. It establishes the facts beyond any reasonable doubt. As the Court said in the *Corfu Channel* case, indirect evidence "must be regarded as of special weight when it is based on a series of facts linked together and leading logically to a single conclusion"[82]. The United Nations reports, the Security Council resolutions, the Final Report of the Porter Commission, the evidence before the Porter enquiry and all the other material before the Court lead inevitably and inexorably to a "single conclusion".

2. The United Nations reports have been universally discredited

3. The inherent defects of the United Nations reports undermine the allegations against Uganda

10. Uganda's second argument is that the United Nations reports have been universally discredited[83]. Its third argument is that the inherent defects of the United Nations reports undermine the allegations against Uganda[84]. I think it is safe to take these two points together.

11. Even if it was true that the United Nations reports had been "universally discredited" — which is not the case — the DRC would have ample other evidence upon which to base its claim. Unfortunately for Uganda the claim concerning its exploitation of natural resources is not based on

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[81]Rejoinder of Uganda, *inter alia* Anns. 58-67, 78.

[82]*I.C.J. Reports 1949*, p. 4.

[83]Rejoinder of Uganda, paras. 339-379.

[84]Rejoinder of Uganda, paras. 380-405.

some one-legged rhinoceros which collapses when its remaining leg — the evidence contained in the United Nations reports — is kicked away. Uganda is confronted by what my son would call a "many-legged rhinoceros", a multitude of other independent sources, not the least the material upon which the Porter Commission based its damning report, the report of the Belgian Senate's Commission of Enquiry[85], the report of the British Parliament's All Party Parliamentary Group, which concluded in terms that commanders from the Ugandan army and their political and business associates had established a system of military commercialization in their zones of influence[86], and the independent reports produced by authoritative entities such as Oxfam, again referring to the concept of "military commercialism"[87], Human Rights Watch, the International Crisis Group, many other NGOs and many independent press statements[88] — without even mentioning the Porter Report.

12. In any event, the United Nations reports have not been discredited, universally or at all. Quite the contrary. The DRC accepts . . .

The PRESIDENT: Professor Sands, would you speak slightly more slowly.

Mr. SANDS: With pleasure, Mr. President. Thank you for that guidance.

The DRC accepts that there may be points of difference between the Porter Report and the United Nations reports, for example with regard to the case study on the Dara Forest, which was set out in the First United Nations Report. In the course of further investigation, the company concerned was indeed found to have complied with the relevant laws, and this was then acknowledged in the Second United Nations Report[89]. The Porter Report itself acknowledges this reconsideration. But the matters upon which there may be differences are not material to the

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[85]See *inter alia* Reply of the Democratic Republic of the Congo, Ann. 76.

[86]See Reply of the Democratic Republic of the Congo, para. 4.47. In its Reply, the DRC referred to the interim report of the APPG, Ann. 75. In November 2002 the APPG published its Final Report "Cursed with Riches: Who Benefits from Resource Exploitation in the Democratic Republic of Congo" which was independently commissioned after the publication of the Final United Nations Report: available at: www.appggreatlakes.org/downloads/riches.pdf.

[87]Oxfam's observations concur with the broad findings of the United Nations panel of experts report released in April 2001, and the largely corroborative Addendum report released in November 2001. See Oxfam, "Poverty in the Midst of Wealth", Oxfam GB 18 January 2002, Oxfam briefing paper 12, Reply of the Democratic Republic of the Congo, Ann. 77.

[88]See Memorial of the Democratic Republic of the Congo, Ann. 92; and Reply of the Democratic Republic of the Congo, para. 4.11 and Ann. 83.

[89]Second United Nations Report, paras. 72-73.

DRC's case in these proceedings. To a very great extent the Porter Report and the United Nations reports are concordant. Indeed, the Final Report of the Porter Commission includes a section which is entitled "Agreement in General"; and it says:

> "Nevertheless, leaving aside details and personalities, in general this Commission and the Final Panel are not so far apart . . . There is agreement that officers at a very senior level, and men of the UPDF have conducted themselves in the DRC in a manner unbecoming."[90]

13. For conduct in a "manner unbecoming" one might substitute the words in a "manner engaging in illegal exploitation of natural resources". Chapter 3 of the Porter Report does not mince words. It is entitled "Illegal Exploitation of Natural Resources"[91]. The Chapter begins by addressing the role and activities of Brigadier General Kazini. The Porter Report confirms the co-operation it received from the United Nations panel, prompting a recall of General Kazini for a third time. The Report of the Porter Enquiry states that Brigadier General Kazini's evidence confirms "some of the allegations made by the First United Nations Panel"[92]. Specifically, the Porter Report confirms that UPDF officers were conducting business[93], as the United Nations report alleged; the Porter Report confirms that "top officers of the UPDF were planning . . . to do business in Congo"; the Porter Report confirms that UPDF Commanders "in business partnership with Ugandans were trading in the Congo"; the Porter Report confirms that Ugandan military aircraft were misused for carrying businessmen and cargo[94]. And the Porter Report even more unambiguously states that its findings corroborate "many of the original Panel's allegations in respect of officers of the UPDF"[95].

14. There is an equally concordant set of conclusions in relation to the DRC's claims, for example, on gold mining[96], or on the use of intelligence and security funding[97], or on looting[98], or

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[90]Porter, p. 198. See also e.g. *Porter Pins Kazini, Saleh*, New Vision (Kampala) 18 February 2003.

[91]Porter, pp. 17-128, judges' folder, tab 39 sets out some extracts.

[92]Porter, p. 17.

[93]Porter, pp. 17 *et seq.*, para. 13.1.

[94]Porter, pp. 18-19. The Report states "military aircraft were carrying Congolese businessman . . . and carrying items" and Kazini had "given directions to assist Congolese businessman to travel back and forth . . . and even allowed them to carry goods . . .". See also Additional Documents submitted by the DRC to the Court, January 2005, Documents 6, 7, 9 and 10.

[95]Porter, pp. 20 *et seq.*

[96]Porter, pp. 20 *et seq.*, para. 13.2.

[97]Porter, p. 21, para. 13.3.

on smuggling[99]. The Porter Report states that evidence relating to Brigadier General Kazini confirmed that "many of the allegations of misconduct of the UPDF were the same as that which reached the original Panel"[100]. And for good measure the Report of the Porter Commission of Enquiry adds:

> "The picture that emerges is that of a deliberate and persistent indiscipline by the commanders in the field, tolerated and even encouraged and covered by General Kazini, as shown by the incompetence or total lack of inquiry and failure to deal effectively with breaches of discipline at senior levels."[101]

I emphasize the words "deliberate" and "persistent". "Misconduct", "indiscipline", "incompetence", "lack of inquiry", one could go on. Do we associate these words with an army and a State which is meeting its obligations of due diligence?

15. The Report of the Porter Commission makes many findings of fact consistent with the First United Nations Report. For example, with regard to allegations against the most senior echelons of the UPDF, it confirms that "some UPDF officers were excited about the possibility of self-enrichment in the DRC"[102]. It confirms the involvement in looting of individual UPDF soldiers, to quite a senior level and with the support of senior officers[103]. It confirms that the allegations of UPDF soldiers imposing gold taxes were so poorly investigated that "the whole question of inquiry into complaints against the officers of the UPDF needs to be looked at carefully"[104]. The Porter Report finds as a matter of fact that with regard to allegations of systematic and systemic exploitation of natural resources, a number of UPDF officials who presented evidence before the Commission were lying[105]. It finds as a matter of fact that General Salim Saleh, half-brother of the President of Uganda, purported to change his shareholding in an air company so as to circumvent the President's directive forbidding army officers from doing

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[98]Porter, p. 22, para. 13.4. [See also Reply of the Democratic Republic of the Congo, Ann. 24].

[99]Porter, p. 22, para. 13.5

[100]Porter, p. 22

[101]Porter, p. 23

[102]Porter, pp. 29 *et seq.*, para. 14.4.

[103]Porter, *inter alia* p. 72. See the Commission's finding that the allegation in the First United Nations Report regarding individual UPDF colonels collecting/demanding tax "is supported", pp. 79-80. The fact that individual soldiers were "lining their pockets" is also acknowledged at p. 134.

[104]Porter, p. 72.

[105]Porter, see *inter alia* pp. 67, 69, 70 etc.

business in the Democratic Republic of the Congo, whilst at the same time actually maintaining a controlling interest in the company which continued to do business in the DRC[106]. It finds as fact that Brigadier General Kazini "gave specific instructions to UPDF Commanders . . . to allow Victoria (a privately owned company created to facilitate illegal activities[107]) to do business uninterrupted in the areas under their command"[108]. And it finds as fact that Brigadier General Kazini took steps "to facilitate the interests of Victoria which were above and beyond the call of duty, and further, inappropriate to the UPDF's role in providing security"[109]. For Uganda there can be no escape from those words.

16. The Porter Report focuses on three individuals who were identified as "key actors" by the First United Nations Report. They are Major General Salim Saleh[110], his wife Jovial Akandwanaho[111] and Brigadier General Kazini, the Chief of Staff of the UPDF[112]. In respect of the activities of these individuals the Porter Report concludes that several of the allegations of the First United Nations Report relating to resource exploitation were "supportable" and "true", and recommended that these cases be pursued for appropriate action[113]. Indeed, after the publication of the Porter Report, it was reported that senior military officers and business people in Uganda were to be prosecuted for their role in the illegal exploitation of the natural resources of the DRC[114]. It was also reported that President Museveni had issued instructions to the Ministry of Defence to investigate Lt. Gen Saleh and Brigadier General Kazini[115].

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[106]Porter, pp. 82-83, paras. 18.3-18.4.

[107]First United Nations Report, para. 79 makes allegations regarding such companies; para. 80 names Victoria. See also Reply of the Democratic Republic of the Congo, Annex 21 and Memorial of the Democratic Republic of the Congo, Annex 92, and Additional Documents submitted by the DRC to the Court, January 2005, document 4.

[108]Porter, p. 84.

[109]Porter, p. 84.

[110]Porter, pp. 88-90, para. 20.1. The Porter Commission noted *inter alia* his attempt to circumvent the President's directive not to engage in commerce in the DRC. It noted "the unsatisfactory registration and irregular handling" of his airlines; his failure to declare his assets and the possibility of his involvement with Trinity. It was reported that General Saleh resigned from the UPDF in November 2003, soon after the publication of the final United Nations Report. See *Uganda: Army to Replace Gen. Saleh next week, The Monitor*, Kampala, 18 January 2004 (Lexis).

[111]Porter, p. 90, para. 20.2. The Commission has evidence linking her with Victoria and diamond smuggling.

[112]Porter, pp. 90-94, para. 20.3. This refers to Kazini's connections with Victoria and Diamond smuggling, misbehaviour of senior UPDF officers, lying to the Commission and others. See also the "Kazini revelations" pp. 17-24.

[113]Porter, pp. 89 and 205.

[114]See *inter alia Uganda Plans looting charges*, BBC web edition, 15 May 2003.

[115]*CID to Take up Kazini, Saleh Case on Congo Looting*, 18 May 2003 from http;//allafrica.com.

In June 2003, a few months after the Porter Report was handed to the Government, Brigadier General Kazini was removed as Chief of Staff of the UPDF. An army spokesman stated that the removal from office was not as a result of the United Nations and Porter Reports but that General Kazini had been sent for "further training"[116]. The link is clear. And one might well ask: has anyone been prosecuted in Uganda for this gross misconduct and illegality? We look forward to an answer to that question from Uganda later this week or next.

17. On the role of the UPDF in exploiting natural resources, the views of the Porter Commission of Enquiry are scathing[117]. Of particular concern to this judicial Commission is the UPDF's failure to investigate allegations of exploitation and looting. The Porter Report finds as fact that "the Military Intelligence's investigations are not good enough, nor concentrated on misbehaviour of officers and soldiers in the field"[118]. The Report finds as fact that "certain cases were not even reported to Headquarters"[119]. It finds as fact that investigations were wholly inadequate: it cites what I found to be one of the most remarkable examples of an allegation made against a named senior army officer and a named junior army officer where "[t]he local UPDF Commander asked the senior army officer to investigate himself and report to him"[120]. We have to ask ourselves, when a State allows an alleged miscreant to investigate himself, is it meeting the standard of due diligence? The Porter Report finds as fact that "all an officer has to do is to deny an incident for the investigation to be dropped"[121]. It expresses dissatisfaction with the conduct of many of the UPDF officers who gave evidence, not least "because when they started to be asked awkward questions they resorted to a conspiracy of silence, or in the case of one very senior officer, levity and disrespect of the civil process"[122]. The Porter Report provides many specific examples of poor investigations; for example the allegation in paragraph 62 of the First United Nations Report that in August 2000 UPDF Col. Mugenyi and a crew of his soldiers were

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[116]*Top Ugandan Army Officer sacked*, BBC Online, 6 June 2003 at http://news.bbc.co.uk/1/hi/world/africa/2970426.stm. See also *Museveni purges Ugandan Military*, BBC Online 2 December 2003 at http://news.bbc.co.uk/1/hi/world/africa/3256160.stm.

[117]Porter, pp. 108-110.

[118]Porter, p. 109.

[119]Porter, p. 109.

[120]Porter, p. 109.

[121]Porter, p. 109.

[122]Porter, p. 109.

discovered "with [no less than] 800 kg of elephant tusks in their car near Garambwa Park"[123]. The allegation was not investigated until nine months after the incident, by which time, according to the Porter Report, it was too late to ascertain the truth.

18. With regard to the exploitation of minerals, the Porter Report also makes findings of fact which confirm the United Nations reports. It finds as fact that diamonds were being smuggled and falsely declared as sourced in Uganda[124], and that the people named in connection to the Victoria company were "quite clearly engaged in smuggling diamonds through Uganda"[125]. It finds as fact that the Ugandan military air base was "being used to smuggle diamonds across Uganda, sometimes with military transport"[126]. It finds as fact that these diamond smuggling operations had been set up with "UPDF assistance"[127]. It finds as fact that Brigadier General Kazini was connected with Victoria and with diamond smuggling[128]. It finds as fact that he deliberately lied in giving evidence[129]. It finds as fact that Brigadier General Kazini gave instructions to his commanders to allow the Victoria Company "to do business in coffee, gold and diamonds in their areas, that taxes were to be paid to the rebel group [*Mouvement de Libération Congolais* (Congolese Liberation Movement)], and that the commanders should 'let Victoria do its business uninterrupted by anybody'"[130]. In summary, the Porter Report concludes, that it could only come to one conclusion:

> "General Kazini had more interest in Victoria's operations than he was prepared to admit: and that conclusion supports many of the allegations of the original [United Nations] panel in respect of General Kazini.[131]
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> . . . . . .
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> These conclusions put General Kazini at the beginning of a chain as an active supporter in the [DRC] of Victoria, an organization engaged in smuggling diamonds

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[123]Porter, p. 109.

[124]Porter, p. 116.

[125]Porter, p. 119.

[126]Porter, p. 121.

[127]Porter, p. 121.

[128]Porter, pp. 121 *et seq.*

[129]Porter, p. 122.

[130]Porter, p. 122. See also Additional Documents submitted by the DRC to the Court, January 2005, documents 4, 6 and 7.

[131]Porter, p. 123.

> through Uganda: and it is difficult to believe that he was not profiting for himself from the operation."[132]

19. Mr. President, I could go on — there is a lot more. These are not the conclusions of a partisan non-governmental organization or an individual with a grudge. They are the conclusions of a Ugandan judicial enquiry. In the face of this material, how can Uganda claim that the material facts concerning smuggling and exploitation of natural resources which are identified in the United Nations reports are, to use his words, discredited? We say that it is established beyond any reasonable doubt that personnel of the UPDF were directly engaged in these illegal activities. We say that the Ugandan Government itself has recognized this, in undertaking to take steps to implement the Porter Report recommendations. President Museveni himself, in a BBC interview given in September 2004, accepted that the Porter Commission had upheld some of the United Nations expert panel's findings[133]. And he stated that Uganda was following up the Porter Commission Report, that those found guilty would be charged[134]. This constitutes acceptance — at the very highest level of the Ugandan State — of findings of fact in the Porter Report, findings which concord with the conclusions of the United Nations reports.

4. The nature of the Congo's intervention in the DRC was inconsistent with exploitation

20. Uganda's fourth argument is that the nature of its intervention in the DRC was inconsistent with exploitation[135]. In our submission this argument collapses completely in the face of the evidence before the Court. Even if the Court were to accept that the presence of UPDF troops in eastern Congo was solely motivated by "security concerns"[136] — which we say was plainly not the case — that fact would not be sufficient for Uganda to avoid its international responsibility. Whatever Uganda's motivations may have been, the fact is that natural resources — gold, diamonds, elephant tusks, forestry timbers and so on — were exploited by members of the UPDF and by other persons acting with the support or under the protection of the UPDF.

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[132]Porter, p. 124.

[133]See *Uganda: Museveni on BBC*, *New Vision*, 21 September 2004.

[134]*Ibid.*

[135]Rejoinder of Uganda, paras. 406-413.

[136]Rejoinder of Uganda, para. 406.

21. Whatever the reasons for which Brigadier General Kazini happened to find himself in eastern Congo, the fact is that he was there as Chief of Staff of the UPDF and that he was engaged in the systematic and illegal exploitation of Congolese natural resources, in some cases thousands of kilometres from the Ugandan border. It is simply not a defence for those acts to say that his presence in the DRC was formally for another purpose. The claim — this fourth claim — is implausible. It is hopeless, we would say.

5. The first United Nations report inaccurately construes the context of Uganda's intervention in the Congo

22. The same may be said of Uganda's fifth argument, that the First United Nations Report (on which the DRC's case is said by Uganda to rest) inaccurately construes what is called the context of Uganda's intervention in the Congo[137].

23. I have already explained that the DRC does not rest its case on the First United Nations Report. That should be clear from the written pleadings and abundantly clear from the presentations we have made over the course of this week. The DRC's case is based in part on the concordance between numerous United Nations reports and the Porter Report, as well as certain other independent and authoritative reports, on Security Council resolutions and their findings of fact, and on the actions — and inactions — of Uganda to investigate and discipline some of those individuals who were responsible for illegal acts. The DRC's case is based on the totality of the evidence which is before this Court and which supports these facts.

24. Uganda argues that the "context" of its intervention in the Congo has been misunderstood. With great respect, the "context" is wholly irrelevant to the question of whether Uganda is internationally responsible for the exploitation of the DRC's natural resources by its military officers. The Court needs to be satisfied of two facts only in this respect: were natural resources exploited during Uganda's occupation of the DRC otherwise than in accordance with the applicable law of the DRC and international law? The answer to that question is plainly "yes". And was that exploitation in fact carried out by members of the UPDF or by other persons acting

[137]Rejoinder of Uganda, paras. 414-429.

with the support or under the protection of the UPDF? The answer to that question is also plainly "yes".

25. With these two affirmative answers it is difficult to see how an argument about context can get Uganda off the hook. Once this Court accepts that Brigadier General Kazini and his colleagues engaged in or turned a blind eye to the illegal exploitation of the natural resources in the DRC then the responsibility of Uganda is engaged. That fact is established by the United Nations reports. By the Report of the Porter Commission. By the testimony of witnesses before the Porter Commission. By resolutions of the Security Council which make findings of fact. Short of Uganda bringing new evidence to the Court to show that the illegal exploitation of the DRC's natural resources was overseen not by Brigadier General Kazini but by some imaginary battalion of white rhinoceroses, I simply do not see how "context" can provide any assistance to Uganda. When lawyers talk about context in this way they enter the realm of fiction. This is the Ugandan Peoples' Defence Force in Congo. It is not Tintin in Congo.

6. Trade between Uganda and Congo is benign and legitimate

26. Uganda derives no more assistance from its sixth argument, to the effect that trade between Uganda and Congo is benign and legitimate[138]. Again, this argument is directed not at the DRC's pleadings but at the United Nations reports. And the argument appears to be based on a confusion between the concept of exploitation of resources and international trade in those resources. Exploitation and trade are different things.

27. It may indeed be the case, as Uganda puts it, that "the residents of eastern Congo and Uganda have been trading with each other since time immemorial"[139]. But that fact, even if it were true, is not a defence to the evidence which establishes beyond any doubt that diamonds, gold and other natural resources were exploited during Uganda's occupation of the DRC by or for the benefit of members of the UPDF or by other persons acting with the support or under the protection of the UPDF. Some trade between the two countries may indeed have been legitimate. But the cross-border trading activities in diamonds of Brigadier General Kazini and his colleagues and

[138]Rejoinder of Uganda, paras. 430-455.

[139]Rejoinder of Uganda, para. 430.

friends were not legitimate. And the fact that some diamond trading activity may have been legitimate cannot legitimate his illegal acts. The exploitation described in the evidence before the Court plainly did not take place in accordance with Congolese law. Nor did it take place in accordance with the defined rights and obligations under Geneva Convention IV and the Hague Regulations which I described earlier in my presentation. The trading cannot be said to have taken place for the benefit of the occupied State.

28. Uganda makes a further argument under this head. It claims that the trade which the DRC has placed at the heart of these proceedings was essential to the survival of the population of eastern Congo[140]. Mr. President, this goes into the category of legal arguments which may be entitled "grossly cynical". Is it really being argued, by Uganda, that Brigadier General Kazini engaged in his activities for the benefit of the population of eastern Congo? Did General Kazini, Jovial Akanwanaho, and possibly Salim Saleh, secretly facilitate — as the Porter Report puts it — the Victoria and Trinity companies in order to assist the population of eastern Congo to survive[141]? Were "diamonds . . . smuggled through Uganda, and declared [as the Porter Report puts it] as sourced in Uganda by the smugglers on arrival in Antwerp"[142] to feed the people of the Democratic Republic of the Congo? I think not.

29. Uganda is asking the judges to suspend disbelief. The illegal activities were widespread, long lasting and notorious. The activities caused numerous Security Council resolutions to be adopted[143], they led to an international outcry, they led to steps being taken to limit the activities of those who benefited most directly. Nowhere and never has it been claimed or suggested that these activities were to the benefit of the occupied State.

7. The specific allegations are contradicted by sworn testimony and documentary evidence

30. Uganda's seventh argument is that the specific allegations are contradicted by sworn testimony and documentary evidence[144]. With the greatest respect to my learned friends on the

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[140]Rejoinder of Uganda, para. 442.

[141]Porter, p. 150.

[142]Porter, p. 165.

[143]See, for example, Security Council resolutions 1291 (2000); 1304 (2000); 1332 (2000); 1341 (2001); 1355 (2001); 1457 (2003); and 1493 (2003).

[144]Rejoinder of Uganda, paras. 456-494.

other side of this room, this argument is simply unarguable in the face of the evidence before you, much of which Uganda would presumably had hoped you would not have had sight of.

31. To give Uganda its credit — and credit really is due — it is true that the argument was prepared before the Porter Commission published its final report. And it is also true that the interim report of the Porter Commission may have provided some hopeful indications to Uganda and her counsel. But now that the Porter Report has reported, the facts are incontrovertible.

32. In its Rejoinder, Uganda goes to some lengths to defend Brigadier General Kazini and his reputation[145]. What does the Report say?

> "[H]aving watched General Kazini giving evidence, this Commission is fully satisfied that it was a deliberate lie by Uganda's Acting Army Commander, displaying an arrogance and contempt of civil authority . . . General Kazini's comments were actually instructions to his Commanders, pointing out that La Société Victoria had been granted permission to do business in coffee, gold and diamonds in their areas, that taxes were to be paid to MLC, and that the Commanders should 'let Victoria to do its business uninterrupted by anybody'."[146]

33. Similarly unsustainable are Uganda's claims that the DRC relies on what it calls "vague generalities and unfounded allegations that have [says Uganda] no probative value"[147]. The documents before you speak for themselves[148]. The Porter Commission is the product of an independent judicial enquiry. Its probative value, as well as those of its conclusions, is overwhelming.

34. The documentary evidence and testimony before this Court provides compelling support for the DRC's claim in respect of natural resources.

8. No evidence that Uganda failed to act against illegal activity

35. Finally, Uganda's eighth head of argument — the last of its arguments, and there are no others — is that there is no evidence that Uganda failed to act against illegal activity while it was occurring[149]. In support of that argument, Uganda relies, amongst other materials, on a message sent by President Museveni to the effect that it should be ensured that no officer or man of the

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[145]See e.g. paras. 460, 462 and 463.

[146]Porter, p. 122.

[147]Rejoinder of Uganda, para. 465.

[148]See Additional Documents submitted by the DRC to the Court, January 2005, documents 2 and 4-12.

[149]Rejoinder of Uganda, paras. 495-503.

UPDF in the Congo should engage in business, and that other public servants who engaged in business should be reported to him[150]. Whilst referring to this message, the Porter Report confirms that officers at the very highest level and men of the UPDF did indeed, in violation of this directive, engage in extensive commercial activities, and that they were unpunished. As the Porter Commission put it: "the Military Intelligence Investigations are not good enough, nor concentrated on misbehaviour of officers and soldiers in the field"[151]. As I have mentioned, Porter concluded that "all an officer has to do is to deny an incident for the investigation to be dropped"[152]. If President Museveni has identified an objective, the United Nations and Porter reports describe the reality of measures actually taken, or not taken, to prevent officers engaging in natural resource activities.

36. There is another aspect of President Museveni's message to his troops. He encouraged them to assist Ugandan businessmen "to do business in Congo to alleviate the acute needs of the population and also to establish links for the future". For our part, we find it difficult to see how this entreaty can be squared with the obligations of Uganda under international law, and in particular the obligations to ensure the natural resource capital of a State is not depleted by the occupying Power, except in accordance with the strict requirements of the Hague Regulations, and to exercise due diligence in preventing persons which it controls from engaging in the illegal exploitation of natural resources.

Summary

37. Mr. President, Members of the Court, before I turn to summarize and conclude, one aspect must by now be evident. None of the eight arguments of Uganda — for that is all there is — actually denies that the acts alleged by the DRC, and now confirmed by the United Nations and Porter reports, ever occurred. The totality of Uganda's arguments goes to matters of evidence and proof, to the nature and quality of the material before you, to the inferences to be drawn relating to the context of the invasion, historical matters, and so forth. That, presumably, was Uganda's litigation strategy. It now has to live with the consequences of that strategy in the face of the

[150]Rejoinder of Uganda, para. 502; *ibid.*, Ann. 31.

[151]Porter, p. 109.

[152]Porter, p. 109.

material that is before you. In the light of the Porter Report, which the Ugandan Government has received and accepted and undertaken to act upon, we invite Uganda to now confirm that it accepts the facts concordantly identified in the United Nations and Porter reports.

38. In our view, they have no other option. The evidence before you from these authoritative and independent sources is compelling. It demonstrates that not one of these eight Ugandan arguments has a shred of merit to support it. It demonstrates, in particular, the concordant conclusions of the United Nations reports and the Porter Report on two key following points. *First*, the personnel of the UPDF were directly involved in the exploitation of the natural resources of the Democratic Republic of the Congo, and that such involvement reached to the very highest level of military authority amongst the occupying troops; and s*econd*, the UPDF itself was complicit in the activities of groups and private persons active in the DRC, including members of the Ugandan business community, by

— supporting illegal exploitation of natural resources;

— failing to take action against persons found to be acting illegally; and

— allowing weaknesses — weaknesses — in its administrative system to permit illegal exploitation — diamond smuggling, for example; the use of military aircraft for private purposes, for example — without investigation or other preventive act.

Uganda's responsibility

39. With your permission, I will now conclude with some preliminary observations on the relationship between these facts I have outlined and the question of Uganda's responsibility for the illegal exploitation of natural resources, a subject to which Professor Salmon will return immediately after me.

40. Uganda has been silent on its responsibilities in respect of the obligations set forth by international humanitarian law in regard to the exploitation of natural resources. In its pleadings it has said nothing about the applicable law on this issue. But we say the rules are very clear. Uganda simply exercised temporary *de facto* control over those parts of the territory which it occupied in the eastern Democratic Republic of the Congo. We say that it was subject to the defined rights and obligations under Geneva Convention IV and the Hague Regulations, and

customary international law. We say that Uganda was obliged, in international law, to ensure that natural resources were not depleted, and we say that Uganda was obliged under international law to ensure that the members of the UPDF did not exploit the natural resources of the DRC for private purposes under any circumstances whatsoever. And we say that Uganda was required to exercise due diligence in preventing the groups and persons which it controlled from engaging in the illegal exploitation of natural resources.

41. The facts before you show clearly that Uganda has failed in these obligations. As regards the acts of its armed forces, the applicable standard is a very strict one — and rightly so — both in respect of the acts which were carried out and the failure to prevent the acts of third persons under their control. The standard set forth in Article 3 of the Hague Convention (IV) is unambiguous: Uganda "shall be responsible for all acts committed by persons forming part of its armed forces".

42. The UPDF plainly were empowered to exercise elements of authority, and the acts of its officers — including but not only Brigadier General Kazini — were undoubtedly "acts of authority". It is plain from the rule reflected in Article 7 of the International Law Commission's Articles that the acts of Brigadier General Kazini and colleagues are attributable to Uganda, even if they were acts which exceeded authority or contravened instructions. Messages of the kind I have drawn your attention to from President Museveni provide no defence to Uganda, no means to escape the attribution of those acts to the State. The approach set forth by the International Law Commission in its Article 7 was based on established international jurisprudence[153].

43. It refers, for example, to the Caire claim[154] of 1929, in which Mexican officers exceeded their authority and murdered a French national. It refers to the judgment of the Inter-American Court of Human Rights, in the case of Velasquez Rodriguez, which established precisely the same point in respect of acts of military officers of Honduras[155].

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[153]"The State cannot take refuge behind the notion that, according to the provisions of its internal law or to instructions which may have been given to its organs or agents, their actions or omissions ought not to have occurred or ought to have taken a different form." J. Crawford (ed), *The ILC's Articles on State Responsibility: Introduction, Text and Commentaries* (2002), p. 106.

[154]United Nations *RIAA*, Vol. 5, p. 516 (1929).

[155]95 *ILR* 259, at 296.

44. These two cases are directly analogous to the case before you. The evidence shows compellingly that the conduct of the highest members of the UPDF was obviously "cloaked with governmental authority"[156]. The evidence shows also that illegal acts of exploitation cannot be said to be, as the ILC Commentary puts it, "isolated instances of outrageous conduct on the part of persons who are officials"[157]. The acts we have described to you during the course of this week were systematic, they were part of a pattern of behaviour which took place over many years, over a massive geographic area, and involving a very large number of people employed by the Ugandan State. This is not a case about isolated incidents. If it was, I am sure we would not be here before you today. The Security Council would not have adopted resolutions about isolated incidents. The exploitation of Congo's natural resources is widely documented and broadly regarded as one of the very worst excesses of war in modern times.

45. It is simply not good enough for Uganda to say that it did not order the acts which occurred, or that those acts were not part of the governmental policy of Uganda. The acts of natural resource exploitation occurred under Uganda's watch. The acts were undertaken by Ugandan army officers. The acts were systematic. They were extensive. They are notorious and Uganda must take its international responsibilities.

46. Mr. President, Members of the Court, you have the material before you. In our submission Uganda cannot be permitted to avoid its responsibility under international law on this most fundamental of issues. Thank you very much for your attention. I ask you, Mr. President, to please invite Professor Salmon to the Bar.

The PRESIDENT: Thank you, Professor Sands. I now give the floor to Professor Salmon.

M. SALMON : Merci, Monsieur le président.

PROBLEMES DE RESPONSABILITE INTERNATIONALE

1. Monsieur le président, Madame et Messieurs de la Cour, ce dernier exposé du premier tour de plaidoiries de la République démocratique du Congo souhaite attirer l'attention de la Cour

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[156]See *Petrolane* v. *Islamic Republic of Iran* (1991) 27 *Iran-US CTR* 64 at 292.

[157]ILC Commentary, p. 108.

sur quelques problèmes relatifs à la responsabilité internationale à propos desquels les vues des Parties semblent irréductiblement opposées.

L'Ouganda a défendu, à propos des questions de responsabilité internationale, des thèses, il faut bien le dire, assez confuses[158]. Ici, l'Ouganda soutient qu'il n'y aurait de responsabilité internationale que lorsqu'il y a une détermination faite expressément à cet égard. A l'appui de cette thèse, il soutient que les constatations par le Conseil de sécurité de violations du droit international n'emporteraient responsabilité que dans l'hypothèse où le Conseil prévoirait expressément la réparation du dommage[159]. Il s'agit là d'une conception étrangement réductrice du mécanisme de la responsabilité en droit international.

Là, l'Ouganda reproche aux écritures de la République démocratique du Congo de ne pas faire la distinction entre responsabilité et réparation[160]. Ce que pourtant, la République démocratique du Congo croyait avoir fait clairement.

Comme, lorsque les étudiants n'ont pas compris, il y va souvent de la faute du professeur, c'est de bonne grâce que nous reprendrons le raisonnement dans l'ordre. La Cour me pardonnera si l'on trouvera ici quelques répétitions avec ce qu'ont dit certains de mes collègues. Il s'agit ici de faire la synthèse des questions de responsabilité dans la présente affaire. Nous examinerons donc d'abord les conditions d'existence de la responsabilité et ensuite les conséquences de la responsabilité.

I. Les conditions d'existence de la responsabilité

2. La Partie ougandaise n'est pas sans ignorer l'article premier des articles de la Commission du droit international sur la responsabilité de l'Etat pour fait internationalement illicite[161] : «Tout fait internationalement illicite de l'Etat engage sa responsabilité internationale.» Et selon l'article 2 du même texte :

> «Il y a fait internationalement illicite de l'Etat lorsqu'un comportement consistant en une action ou une omission

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[158] Ceci apparaît dès le contre-mémoire de l'Ouganda, par. 170-183 et 204 et suiv., et est poursuivi dans la réplique, p. 10-11, par. 30 à 32.

[159] Contre-mémoire de l'Ouganda, p. 119-120, par. 205-206.

[160] Duplique de l'Ouganda, p. 10-11, par. 30-32.

[161] Annexe à la résolution de l'Assemblée générale des Nations Unies, AG Res. 56/83 du 12 décembre 2001.

a) est attribuable à l'Etat en vertu du droit international; et

b) constitue une violation d'une obligation internationale de l'Etat.»

La responsabilité internationale de l'Etat occupant

3. *Au stade actuel de la procédure, le souci de la République démocratique du Congo est bien d'établir que l'Ouganda est internationalement responsable d'un certain nombre de faits illicites* qui sont *imputables* aux forces armées ou aux agents ougandais par actions ou omissions sur le territoire occupé.

4. La situation de responsabilité internationale de l'occupant illégal est classique en droit international.

Comme l'écrit excellemment mon collègue et vieil ami Ian Brownlie dans son ouvrage classique *System of the Law of Nations — State Responsibility* : «Thus liability may be generated by the activities of forces lawfully present on foreign territory and equally by the unlawful activities of an army of occupation.»[162] On ne peut mieux dire.

La Cour internationale de Justice a été amenée, à plusieurs reprises, à affirmer le principe de la responsabilité internationale de l'Etat occupant. Elle l'a fait dans son avis consultatif du 26 janvier 1971, *Conséquences juridiques pour les Etats de la présence continue de l'Afrique du Sud en Namibie (Sud-Ouest africain) nonobstant la résolution 276 (1970) du Conseil de sécurité*. Elle y avait relevé notamment :

> «Le fait que l'Afrique du Sud n'a plus aucun titre juridique l'habilitant à administrer le territoire ne la libère pas des obligations et responsabilités que le droit international lui impose envers d'autres Etats et qui sont liées à l'exercice de ses pouvoirs dans ce territoire. C'est l'autorité effective sur un territoire, et non la souveraineté ou la légitimité du titre, qui constitue le fondement de la responsabilité de l'Etat en raison d'actes concernant d'autres Etats.»[163]

Dans son avis consultatif du 9 juillet 2004, *Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé,* la Cour a déclaré :

> «La Cour ayant constaté que l'édification du mur dans le territoire palestinien occupé, y compris à l'intérieur et sur le pourtour de Jérusalem-Est, et le régime qui lui est associé, étaient contraires à diverses obligations internationales d'Israël, il s'ensuit que la responsabilité de cet Etat est engagée selon le droit international.»[164]

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[162] Oxford University Press, 1983, p. 183.

[163] *C.I.J. Recueil 1971*, p. 54, par. 118.

[164] Avis du 9 juillet 2004, par. 147.

5. Pour établir cette responsabilité de l'Etat occupant, le Congo doit établir qu'un certain nombre *de faits illicites accomplis en territoire congolais occupé* sont *imputables* aux forces armées ou aux agents ougandais par actions ou omissions.

A. Les faits illicites

6. En ce qui concerne la *détermination des faits illicites*, le Congo espère que la Cour sera convaincue par ses écritures et par les présentes plaidoiries. Il demande à la Cour, dans ses trois premières conclusions de constater ces faits illicites. Dans la conclusion 1, les violations liées à l'invasion et l'occupation du territoire; dans la conclusion 2, les violations liées au pillage des ressources naturelles et dans la conclusion 3, les violations liées aux exactions contre la population civile.

B. L'imputabilité

7. Les problèmes relatifs à l'*imputabilité* appellent certains éclaircissements tenant au fait qu'il s'agit de faits qui se sont produits dans le cadre d'un conflit armé et d'une occupation belligérante.

Plusieurs cas de figure se présentent.

8. Premier cas de figure : l'imputabilité des faits illicites des forces armées. L'imputabilité des actes et omissions des forces armées à l'Etat belligérant est une disposition classique du droit des conflits armés.

Selon l'article 3 de la convention IV de La Haye du 18 octobre 1907 concernant les lois et coutumes de la guerre sur terre :

> «La partie belligérante qui violerait les dispositions dudit règlement [règlement concernant les lois et coutumes de la guerre sur terre annexé à la présente convention] sera tenue à indemnité s'il y a lieu. Elle sera responsable de tous actes commis par les personnes faisant partie de sa force armée.»

L'article 91 du protocole additionnel aux conventions de Genève du 12 août 1949 relatif à la protection des victimes des conflits armés internationaux (protocole I du 8 juin 1977) énonce une règle similaire :

«*Responsabilité*

> La partie au conflit qui violerait les dispositions des conventions ou du présent protocole sera tenue à indemnité s'il y a lieu. Elle sera responsable de tous actes commis par les personnes faisant partie de ses forces armées.»

On inclut traditionnellement dans les forces armées les organes civils chargés de tâches administratives par l'occupant dans le territoire occupé.

A cet égard, comme le relevait hier mon collègue le professeur Philippe Sands, le fait que la commission Porter ait cru bon de déclarer que les pillages n'étaient pas attribuables au président Museveni en personne, est sans pertinence quant à la responsabilité de l'Etat ougandais pour faits de pillage ou autres exactions. L'imputabilité ne doit pas se rapporter au chef d'Etat pour engager l'Etat, même si le pouvoir est personnalisé. La responsabilité de l'Etat est engagée par les actes et omissions de n'importe quel organe de l'Etat. Les actes de pillage ou les violations des droits de l'homme sont ici imputables à des fonctionnaires de l'Etat ougandais agissant en tant qu'organes sur le territoire occupé du Congo.

Le fait que ces fonctionnaires auraient agi en dehors de l'exercice de leurs fonctions est pareillement sans pertinence. Comme l'a déclaré la Commission du droit international dans son projet d'articles sur la responsabilité de l'Etat pour fait internationalement illicite, à l'article 7

> «Le comportement d'un organe de l'Etat ou d'une personne ou entité habilitée à l'exercice de prérogatives de puissance publique est considéré comme un fait de l'Etat d'après le droit international si cet organe, cette personne ou cette entité agit en cette qualité, même s'il outrepasse sa compétence ou contrevient à ses instructions.»

9. Deuxième cas de figure : l'imputabilité des faits illicites des bandes rebelles qui, quoique n'ayant pas fait partie organiquement des forces armées ougandaises, agissaient, en l'occurrence, sous le contrôle effectif de l'Ouganda.

Cette situation a été prévue explicitement par l'article 8 des articles de la Commission du droit international sur la responsabilité internationale des Etats :

> «Le comportement d'une personne ou d'un groupe de personnes est considéré comme un fait de l'Etat d'après le droit international si cette personne ou ce groupe de personnes, en adoptant ce comportement, agit en fait sur les instructions ou les directives ou sous le contrôle de cet Etat.»

Cette hypothèse fut envisagée par la Cour dans l'affaire des *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique)* lorsqu'elle a déclaré :

> «Pour que la responsabilité juridique de ces derniers [il s'agissait des Etats-Unis] soit engagée, il devrait en principe être établi qu'ils avaient le contrôle effectif des opérations militaires ou paramilitaires au cours desquelles les violations en question se seraient produites.»[165]

La République démocratique du Congo pense avoir démontré que telle était bien la situation dans la présente affaire.

10. Une troisième hypothèse est à envisager du fait des règles de fond qui régissent les devoirs de vigilance que la puissance occupante doit remplir à l'égard des faits se produisant sur le territoire occupé.

Le principe a été énoncé en termes clairs par le Tribunal arbitral germano-portugais dans sa sentence du 30 juin 1930 relative aux *Réclamations portugaises contre l'Allemagne*, selon laquelle : «la responsabilité de l'Etat occupant est engagée par tout acte contraire au droit des gens ordonné ou *toléré* par les autorités militaires ou civiles en territoire occupé»[166]. En dépit de son ancienneté, ce texte reste particulièrement utile.

11. En ce qui concerne les bandes armées n'agissant pas pour le compte de l'Ouganda qui ont accompli des faits illicites — et c'est là une différence notable par rapport à l'affaire *Nicaragua c. Etats-Unis*, car les Etats-Unis n'avaient pas été une puissance occupante au Nicaragua — certaines bandes armées opéraient dans la zone de contrôle de l'Ouganda. Il appartenait, comme on vient de l'exposer, à la puissance occupante de faire régner l'ordre dans le territoire qu'elle occupait, qu'elle contrôlait et d'empêcher toute exaction. C'était là une *obligation de vigilance* à laquelle cette puissance occupante ne pouvait échapper. L'Ouganda est donc responsable des violations du droit international humanitaire ou des pillages que ces bandes ont accomplis impunément dans le territoire soumis à son contrôle. Dans l'hypothèse examinée ici, la responsabilité de l'Ouganda n'est pas fondée sur le fait que les bandes armées se seraient comportées comme agents de cet Etat, mais sur le fait que ces entités agissaient dans des zones sur

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[165] *C.I.J. Recueil 1986*, p. 65, par. 115.

[166] *RSA*, vol. II, p. 1040.

lesquelles l'Ouganda exerçait son contrôle et devait faire régner l'ordre en tant que puissance occupante. Dans ce cas, la responsabilité de l'Ouganda repose sur son absence de vigilance dans son devoir de contrôle comme puissance occupante.

12. On peut donc résumer cette partie du présent exposé en disant que la République démocratique du Congo estime l'Ouganda internationalement responsable d'un certain nombre de faits illicites imputables à ses forces armées. Cette première requête de la République démocratique du Congo correspond en quelque sorte à une mission traditionnelle de la Cour lorsqu'il lui est demandé de se prononcer sur «la réalité de tout fait qui, s'il était établi, constituerait la violation d'un engagement international» (art. 36, par. 2, al. *c)*, du Statut de la Cour).

13. Le contre-mémoire de l'Ouganda fait donc preuve d'un défaut de perception lorsqu'il soutient[167] que la République démocratique du Congo propose de postposer la détermination du montant du préjudice *(«quantum of damage»)*, alors qu'elle ne prouverait pas l'existence du fait illicite *(«violations of legal obligations»)*. Tel n'est pas le cas ici. La preuve de faits illicites, et même de ceux que l'on peut qualifier de violations graves d'obligations découlant de normes impératives du droit international général, imputables à l'Ouganda, est entièrement rapportée, à la fois dans les pièces écrites produites par le Congo dans le cadre de la présente instance et dans les exposés oraux qui ont été présentés au nom du Congo cette semaine.

Ce faisant, la République démocratique du Congo distingue donc correctement l'établissement des *conditions* de la responsabilité (faits illicites et imputabilité) des *conséquences* de celle-ci. Le préjudice n'est pas une *condition* de la responsabilité mais une *conséquence* possible de celle-ci.

II. Les conséquences de la responsabilité

14. Envisageons maintenant les conséquences de la responsabilité. On se trouve ici encore une fois dans un domaine classique.

[167] Contre-mémoire de l'Ouganda, p. 102-104, par. 170-174.

A. La cessation de l'acte illicite

La responsabilité peut entraîner d'autres conséquences juridiques qu'une réparation pour préjudice, ainsi, *une action en cessation*.

Cette conséquence de la responsabilité d'un occupant illégal a été soulignée à plusieurs reprises par la Cour. Ainsi, dans son avis consultatif du 26 janvier 1971, *Conséquences juridiques pour les Etats de la présence continue de l'Afrique du Sud en Namibie*. Dans ce cas, le paragraphe 118 déclarait :

> «L'Afrique du Sud … a … l'obligation de retirer son administration du territoire de la Namibie. Tant qu'elle laisse subsister cette situation illégale et occupe le territoire sans titre, l'Afrique du Sud encourt des responsabilités internationales pour violation persistante d'une obligation internationale.»[168]

La Cour s'est encore exprimée de la manière suivante sur ce point dans son avis consultatif du 9 juillet 2004, *Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé* :

> «La Cour observe qu'Israël a également l'obligation de mettre un terme à la violation de ses obligations internationales, telle qu'elle résulte de la construction du mur en territoire palestinien occupé. L'obligation d'un Etat responsable d'un fait internationalement illicite de mettre fin à celui-ci est bien fondée en droit international général et la Cour a, à diverses reprises, confirmé l'existence de cette obligation (*Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique), fond, arrêt, C.I.J. Recueil 1986*, p. 149; *Personnel diplomatique et consulaire des Etats-Unis à Téhéran, arrêt, C.I.J. Recueil 1980*, p. 44, par. 95; *Haya de la Torre, arrêt, C.I.J. Recueil 1951*, p. 82).»[169]

C'est ce qui motivait la conclusion 4 du premier tiret de la réplique de la République démocratique du Congo qui demandait à la Cour de dire que l'Ouganda était tenu

> «de cesser immédiatement tout fait internationalement illicite qui se poursuit de façon continue et en particulier son occupation du territoire congolais, son soutien aux forces irrégulières opérant en République démocratique du Congo et son exploitation des ressources naturelles et des richesses congolaises».

L'occupation du territoire sans l'accord de la République démocratique du Congo ayant désormais cessé, cette conclusion sera reformulée pour ne plus viser que le soutien aux forces irrégulières et l'exploitation des ressources naturelles.

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[168] *C.I.J. Recueil 1971*, p. 54, par. 118.

[169] Avis du 9 juillet 2004, par. 150.

B. Les garanties et assurances spécifiques de non-répétition

15. Ainsi encore, la demande que l'Ouganda fournisse *des garanties et assurances spécifiques de non-répétition* des faits illicites dénoncés, demeure justifiée par les menaces qui ont accompagné le retrait des troupes en mai 2003, menaces auxquelles il a été fait allusion à plusieurs reprises dans nos écritures et au cours des présentes plaidoiries.

C. La réparation des préjudices subis

16. Le second souci de la RDC est d'obtenir *réparation des préjudices causés* par les violations graves du droit international dénoncées plus haut.

Que ces années d'invasion, d'occupation, de violations des droits humains fondamentaux et de pillages de ressources naturelles aient entraîné des dommages de guerre d'une grande magnitude est une évidence. Et c'est pourquoi la République démocratique du Congo demande à la Cour de dire et juger que ces faits illicites engagent la responsabilité internationale de l'Ouganda et entraînent par conséquent l'obligation de réparer tout préjudice causé par ces faits illicites.

17. Il n'y a là rien d'innovant. Le concept de *dommages de guerre* est une notion classique du droit international commun. Chaque fois qu'il a été déterminé qu'un Etat s'était comporté comme un agresseur, son obligation de réparer les dommages résultant de son agression et de son occupation illicite du territoire étranger a été proclamée.

De nombreux extraits d'instruments conventionnels relatifs au règlement des réparations à la suite des deux guerres mondiales en témoignent.

Ainsi, l'article 231 du traité de Versailles :

> «l'Allemagne et ses alliés sont responsables, pour les avoir causés, de toutes les pertes et de tous les dommages subis par les gouvernements alliés et associés et leurs nationaux en conséquence de la guerre, qui leur a été imposée par l'agression de l'Allemagne et de ses alliés».

L'article 232 du même traité imposait à l'Allemagne de réparer «tous les dommages causés à la population civile de chacune des Puissances alliées et associées et à ses biens, pendant la période où cette Puissance a été en état de belligérance avec l'Allemagne, par ladite agression…».

La pratique a enregistré d'autres formules comme «Germany must pay in kind for the losses caused by her to the Allied nations in the course of the war» (traité de Yalta); l'accord de Paris du 21 décembre 1945 envisageait les créances des Etats alliés et de leurs ressortissants «issues de la

guerre»; les traités de paix de Paris en 1947 prévoyaient l'obligation d'indemniser les Etats créanciers «des pertes causées du fait des opérations militaires et de l'occupation» de leurs territoires.

Dans le traité de paix avec l'Italie, on évoquait les «pertes et dommages résultant de faits de guerre, y compris les mesures prises à la faveur de l'occupation de leur territoire, imputables à l'Italie, et survenues en dehors du territoire italien» (art. 80). Les commissions de conciliation défendirent une interprétation large, mettant l'accent sur une «cause and effect relation between the war and the damage»[170].

Le traité de San Francisco avec le Japon du 8 septembre 1951, spécifiait que «le Japon devrait payer aux Puissances alliées la réparation des dommages et des souffrances qu'il a causés pendant la guerre»[171].

Plus récemment, le précédent de l'Irak va dans le même sens, le Conseil de sécurité reconnaissant dans sa résolution 687 (1991) la responsabilité de l'Irak pour

> «toute perte, tout dommage — y compris les atteintes à l'environnement et la destruction des ressources naturelles — et de tous les autres préjudices directs subis par des Etats étrangers et des personnes physiques et sociétés étrangères du fait de son invasion et de son occupation illicites du Koweït» (par. 16).

En dépit de la mention du caractère «direct» du préjudice, l'expression soulignée a été interprétée de façon très large, une décision administrative précisant qu'elle s'étendait aux préjudices subis à la suite :

> «— des opérations militaires ou des menaces d'action militaires des deux parties au cours de la période du 2 août 1990 au 2 mars 1991…;
>
> — des actions commises par des fonctionnaires, des salariés ou des agents du Gouvernement iraquien ou d'entités placées sous son contrôle pendant cette période ou à l'occasion de l'invasion ou de l'occupation;
>
> — de la rupture de l'ordre civil au Koweït ou en Iraq au cours de cette période; ou
>
> — d'une prise en otage ou toute autre forme de détention illégale»[172].

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[170] *RSA*, XIV, p. 210.

[171] *RTNU*, vol. 136, p. 47.

[172] Citée par Pierre d'Argent, «Les réparations de guerre en droit international public», *LGDJ* - Bruylant, Paris-Bruxelles, 2002, p. 381.

18. Ainsi, une fois qu'un Etat est reconnu comme agresseur et occupant, il doit réparer tous les dommages qu'il a causés à l'occasion de son occupation. Peu importe que, par ailleurs, ces dommages résultent en outre de violations de règles spécifiques du droit de la guerre ou d'autres règles de droit international. Le simple fait qu'ils soient la conséquence de l'occupation suffit, conformément aux principes généraux de la responsabilité internationale rappelés plus haut, à obliger l'Etat occupant à les réparer.

19. C'est dans cette optique que, dans ses conclusions, la République démocratique du Congo demande à la Cour de dire et juger

> «que la République d'Ouganda est tenue envers la République démocratique du Congo de l'obligation de réparer tout préjudice causé à celle-ci par la violation des obligations imposées par le droit international et énumérées dans les conclusions 1, 2 et 3 ci-dessus».

Déterminer «la nature ou l'étendue de la réparation due pour la rupture d'un engagement international» est aussi une des missions traditionnelles de la Cour (art. 36, par. 2, al. *d)*, du Statut de la Cour).

Toujours dans son avis du 9 juillet 2004, la Cour rappelait les modalités essentielles de la réparation en droit coutumier formulées par sa devancière, la Cour permanente de Justice internationale dans l'affaire de l'*Usine de Chorzow* — c'est dire que ces conditions sont bien anciennes :

> «Le principe essentiel, qui découle de la notion même d'acte illicite et qui semble se dégager de la pratique internationale, notamment de la jurisprudence des tribunaux arbitraux, est que la réparation doit, autant que possible, effacer toutes les conséquences de l'acte illicite et rétablir l'état qui aurait vraisemblablement existé si ledit acte n'avait pas été commis. Restitution en nature, ou, si elle n'est pas possible, paiement d'une somme correspondant à la valeur qu'aurait la restitution en nature; allocation, s'il y a lieu, de dommages-intérêts pour les pertes subies et qui ne seraient pas couvertes par la restitution en nature ou le paiement qui en prend la place; tels sont les principes desquels doit s'inspirer la détermination du montant de l'indemnité due à cause d'un fait contraire au droit international.» (*Usine de Chorzów, fond, arrêt n° 13, 1928, C.P.J.I. série A n° 17*, p. 47.)[173].

20. La République démocratique du Congo ne conteste pas que pour déterminer l'étendue de la réparation, il lui appartiendra de spécifier la nature du préjudice et d'établir le lien causal avec l'acte illicite initial. C'est cette phase de la procédure que la République démocratique du Congo sollicite la Cour de postposer en lui demandant par la conclusion suivante de dire et juger : «que la

[173] Avis du 9 juillet 2004, par. 152.

nature, les formes et le montant de la réparation seront déterminées par la Cour, au cas où les Parties ne pourraient se mettre d'accord à ce sujet, et qu'elle réserve à cet effet la suite de la procédure».

Dans l'affaire *Nicaragua c. Etats-Unis*, la Cour avait accédé à une demande similaire. Elle n'a pas agi autrement dans l'affaire du *Mur* précitée. La RDC est à fortiori en position de formuler une telle demande dès lors que son territoire faisait encore récemment l'objet de l'occupation ougandaise et qu'elle n'est pas encore en mesure de mettre sur pied les commissions d'enquête en vue de préciser l'ampleur et les détails des préjudices subis.

Ainsi se termine mon intervention de ce jour, relative aux violations des principes les plus fondamentaux du droit international par l'Ouganda et à la responsabilité internationale qui en découle pour cet Etat.

Le présent exposé oral met un terme au premier tour de plaidoiries de la République démocratique du Congo.

Je remercie la Cour de sa bienveillante attention.

The PRESIDENT: Thank you, Professor Salmon.

This marks the end of today's sitting, and also the end of the first round of oral argument of the Congo on its own claims. The Court will meet again, starting on Friday 15 April at 10 o'clock, to hear the first round of oral argument of Uganda, both on the claims of the Democratic Republic of the Congo and on the counter-claims of Uganda. On Friday 22 April at 10 a.m., following Uganda's presentation, the Democratic Republic of the Congo will conclude its first round of oral argument with respect to the counter-claims. Thank you. The Court is adjourned.

The Court rose at 5.45 p.m.

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