INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING ARMED ACTIVITIES ON THE TERRITORY OF THE CONGO

DEMOCRATIC REPUBLIC OF THE CONGO v. UGANDA

COUNTER-MEMORIAL OF UGANDA ON REPARATION

VOLUME I

Table of Contents

CHAPTER 1	INTRODUCTION1
	I. The 2005 Judgment1
	II. Post-Judgment Efforts to Settle the Case7
	III. War Reparations in Historical and Economic Perspective
	IV. Structure of the Counter-Memorial17
CHAPTER 2	THE CONTEXT AND SCOPE OF UGANDA'S INTERVENION23
	I. The Historical Background to the 1998 Conflict24
	A. Colonisation and the Creation of Ethnic and Land Conflicts
	B. Post-Independence Authoritarian Rule and Economic Decline
	C. The Increase in Ethnic Tensions During the 1990s 37
	D. The Impact of Civil Wars in the Region38
	II. Uganda's Role in the 1998 Conflict40
	A. The Parties to the Conflict40
	B. Uganda's Role in Ituri46
	C. The Post-War Situation51
CHAPTER 3	SYSTEMATIC FLAWS IN THE DRC'S APPROACH TO EVIDENCE
	I. The DRC Bears the Burden of Proof60
	II. To Sustain Its Burden, the DRC Must Present Convincing Evidence Proving Financially Assessable Harm with a High Level of Certainty

A	The Requirement to Present Convincing Evidence Proving Specific Harm with a High Level of Certainty
E	3. The Requirement That the Harm Be Financially Assessable
C	C. The Distinction between Traditional Inter-State Claims Proceedings and Specialised Techniques of Contemporary Mass Claims Programs75
	The DRC Relies upon Evidence That Is Deeply Flawed and Not Convincing80
A	The DRC Systematically Fails to Present Evidence Related to Specific Harms Caused by Uganda and the Valuation of Such Harms80
E	The DRC's Systematic Failure to Present Evidence That Connects to and Supports Assertions Contained in Its Memorial
C	2. Defects in the Main Types of General Information Presented by the DRC
	1. United Nations Reports87
	2. NGO Reports98
	3. Materials Collected by the DRC for Purposes of Litigation
	EMATIC FLAWS IN THE DRC'S APPROACH TO THE111
A	ne DRC Ignores the Requirements to Prove Specific actions of Uganda and the Existence of a Causal Connection between Those Actions and the Harm It alleges
A	The DRC Must Prove the Specific Actions of Uganda Falling within the Scope of the Court's General Findings in 2005

В.	Each	DRC Must Also Prove the Causal Nexus between Specific Action of Uganda and the Harm It ges
	1.	The Requirement of a Direct and Certain Causal Nexus
	2.	The Causal Nexus Requirement Applies to Violations of Obligations of Due Diligence 121
	3.	The Causal Nexus Requirement Also Applies to Violations of the Principles Against the Use of Force and Non-intervention
C.	Actio Cour	DRC Memorial Fails to Prove Either Specific ons of Uganda Falling within the Scope of the rt's General Findings or the Required Causal as
D.	The	Proper Approach to Attribution and Causality. 129
	1.	Acts of the Ugandan Military That Directly Caused Harm129
	2.	Uganda's Support to Rebel Groups129
	3.	Uganda's Violations of Its Due Diligence Obligations
	4.	Uganda's Violations of Use of Force and Non- intervention Norms
of	Com	C Essentially Asks the Court to Decide the Issue pensation <i>Ex Aequo et Bono</i> , Which It Cannot
A.		DRC Disregards International Law regarding arations for Inter-State Claims135
В.	Unex That	DRC's Claims Systematically Rely on applained Percentages, Discounts or Multipliers Are Asserted to Be "Reasonable" or hitable"

		Court Lacks Power to Decide This Case <i>Ex Aequo t Bono</i>
		C Essentially Asks the Court to Award Punitive es, Which It Also Cannot Do152
		C Cannot Obtain Compensation That Exceeds ment Capacity of Uganda157
CHAPTER 5	METHODOLI	CLAIMS RELATING TO LOSS OF LIFE ARE GICALLY FLAWED AND UNSUPPORTED BY
	Method	C's Claims Are Not Based on the Standard or Evidence for Proving the Existence and on of Deaths
		C Has Failed to Prove the Extent of the Injury It concerning the Alleged Loss of Life166
	Deat	DRC's Claim that Uganda Caused 182,000 hs in the DRC Is Speculative and apported
	1.	The DRC's Reliance on the IRC's Retrospective Mortality Surveys Is Misplaced170
	2.	The DRC's Claim that Uganda Is Responsible for 45% of the the Alleged Deaths that Occurred Throughout the DRC Is Wholly Arbitrary181
	3.	Other Sources, Including the DRC's Own "Evidence", Disprove the DRC's Claims concerning the Number of Deaths in the DRC
	High	Flawed Nature of the DRC's Claims Are lighted by the Way in Which It Attempts to cate the Number of Deaths by Region
	1.	Locations Other than Ituri and Kisangani193
	2	Ituri 106

		3.	Kisangani20	12
		4.	Congolese Soldiers21	1
			RC's Valuation of the Injury Related to Loss of Methodologically Flawed21	3
Chapter 6	THAN L	OSS	CLAIMS RELATING TO PERSONAL INJURIES OTHER OF LIFE ARE UNSUPPORTED AND OGICALLY FLAWED22	
	or	Evid	RC's Claims Are Not Based on Standard Methods lence for Claiming Compensation for Personal	
	Inj	uries	RC Has Failed to Prove the Extent Personal s That Were Suffered as a Result of Specific s of Uganda	2
		Exte	DRC Has Failed to Prove the Number, Nature and ent of Physical Injuries That Were Suffered as a all of Specific Actions of Uganda23	
		1.	Ituri23	5
		2.	Kisangani24	.3
		3.	Other Locations (Beni, Butembo and Gemena)24	8
		Viol	DRC Has Failed to Prove Incidents of Sexual ence That Were Suffered as a Result of Specific ons of Uganda24	9
		Chile	DRC Has Failed to Prove Injury with Respect to d Soldiers that was Suffered as a Result of eific Actions of Uganda25	57
		Disp	DRC Has Failed to Prove Injury with Respect to blaced Persons That Was Suffered as a Result of eific Actions of Uganda	52
		1.	Ituri	3

	2. Kisangani265
	3. Other Locations (Beni, Butembo and Gemena)
	III. The DRC's Valuation for Personal Injuries Is Methodologically Flawed
	A. The DRC's Valuation of Personal Injuries268
	1. Physical Injuries268
	2. Sexual Violence
	3. Child Soldiers272
	4. Displacement272
	B. The DRC's Approach to Valuation of Personal Injury Damages Is Unsupported by Evidence and Methodologically Flawed
Chapter 7	THE DRC'S CLAIMS RELATING TO HARM TO PROPERTY ARE UNSUPPORTED BY EVIDENCE AND METHODOLOGICALLY FLAWED
	I. The DRC's Claims Are Not Based on the Standard Method or Evidence for Proving the Existence and Valuation of Property Damage
	II. The DRC Has Failed to Prove the Extent of the Property Damages It Claims, and Its Valuation of Those Damages Is Methodologically Flawed
	A. Ituri
	1. Houses286
	2. Infrastructure
	3. Movable Property297
	B. Kisangani
	1. Houses301

	2.	Movable Property	306
	3.	Educational and Medical Institutions	308
	4.	Places of Worship	311
	5.	Public Companies	314
	6.	Private Companies	324
		as Other Than Ituri and Kisangan (Beni, B Gemena)	
	D. The	Congolese Army	332
Chapter 8	Unsupport	CLAIMS RELATING TO NATURAL RESOURGED BY ITS EVIDENCE AND METHODOLOGIC	CALLY
	for Prov	C's Claims Are Not Based on Standard Moving the Existence and Valuation of the Da	amages It
	Natural	C Has Failed to Prove the Extent of the H Resources It Claims, and Its Valuation of Is Methodologically Flawed	Those
	A. Min	eral Resources	348
	1.	The DRC Has Failed to Prove the Existe the Alleged Harms Relating to Mineral Resources	
	2.	The DRC's Valuation of Alleged Damaş Methodologically Flawed	-
	B. Wile	dlife	384
	1.	The DRC's Has Failed to Prove the Exist the Injury to Wildlife It Seeks to Ascribe Uganda	e to
	2.	The DRC's Valuation of Alleged Damaş Methodologically Flawed	

	C. Deforestation406
	1. The DRC's Has Failed to Prove Any Specific Acts Attributable to Uganda Resulting in Deforestation in the DRC
	2. The DRC's Valuation of Its Alleged Damages Is Methodologically Flawed417
CHAPTER 9	MACROECONOMIC INJURY421
	I. Macroeconomic Injury Claims Like the DRC's Have Uniformly Been Rejected in Practice and Case-Law422
	II. The Macroeconomic Injury Is Speculative and Causally Remote
	III. Macroeconomic Injury Does Not Constitute <i>Lucrum</i> Cessans
	IV. The DRC's Macroeconomic Injury Claim Is Inconsistent with the 2005 Judgment
	A. The Macroeconomic Injury Claim Fails to Meet the 2005 Judgment's "Exact injury" Requirement432
	B. The DRC's Macroeconomic Injury Claim Disregards the Requirement That It Must "Result" from "Specific Actions" of Uganda
	C. The DRC's Macroeconomic Injury Claim Is Premised on Uganda Being Responsible for a "War of Aggression", Which It Is Not
	V. The DRC Macroeconomic Injury Claim Is Economically and Methodologically Flawed in Any Event437
CHAPTER 10	THE DRC IS NOT ENTITLED TO THE OTHER REPARATION IT SEEKS
	I. The DRC Is Only Entitled to Simple Interest Calculated from the Date of a Judgment Ordering Payment of Compensation

]		e DRC Is Not Entitled to the Additional Satisfaction	
	A.	Satisfaction in the Form of an Order to Investigate Prosecute UPDF Officers and Soldiers	
	В.	Satisfaction in the Form of an Order to Pay US\$ 12 Million for Intangible Harm	
]		ne DRC Is Not Entitled to Its Costs, Including ttorneys' Fees	.468
SUBMISSIONS			.473
CERTIFICATION	•••••		.474
LIST OF ACRONY	/MS		.475
I IST OF ANNEYE	25		479

CHAPTER 1

INTRODUCTION

1.1 Pursuant to the Order of the Court dated 6 December 2016 fixing 6 February 2018 as the applicable time-limit, Uganda respectfully submits this Counter-Memorial responding to the Memorial on reparation submitted by the Democratic Republic of the Congo ("DRC") in September 2016.

I. The 2005 Judgment

- 1.2 The DRC originally instituted these proceedings by Application dated 23 June 1999. In its Application, the DRC asserted a number of claims against Uganda relating to its presence in and activities on the territory of the DRC. In its 21 April 2001 Counter-Memorial on the merits, Uganda responded to the DRC's claims on the merits and included a number of counter-claims relating, *inter alia*, to the DRC's mistreatment of Ugandan nationals and diplomats, and the breach of international obligations it owed with respect to Uganda's diplomatic mission in Kinshasa. The Court subsequently authorised the exchange of a second round of written pleadings.
- 1.3 After written pleadings, the Court held oral hearings on the merits of the DRC's claims and Uganda's counter-claims in April 2005. The Court thereafter issued its Judgment on the merits on 19 December 2005 ("2005 Judgment"). In the 2005 Judgment, the Court determined that both Parties were obligated to make reparation to each other for the injury caused by their respective internationally wrongful acts.
- 1.4 Insofar as relevant to this Counter-Memorial, the Court determined in the *dispositif* of the 2005 Judgment that Uganda:

- 1. "by engaging in military activities against the Democratic Republic of the Congo on the latter's territory, by occupying Ituri and by actively extending military, logistic, economic and financial support to irregular forces having operated on the territory of the DRC, violated the principle of non-use of force in international relations and the principle of non-intervention;"¹
- 2. "by the conduct of its armed forces, which committed acts of killing, torture and other forms of inhumane treatment of the Congolese civilian population, destroyed villages and civilian buildings, failed to distinguish between civilian and military targets and to protect the civilian population in fighting with other combatants, trained child soldiers, incited ethnic conflict and failed to take measures to put an end to such conflict; as well as by its failure, as an occupying Power, to take measures to respect and ensure respect for human rights and international humanitarian law in Ituri district, violated its obligations under international human rights law and international humanitarian law;"²
- 3. "by acts of looting, plundering and exploitation of Congolese natural resources committed by members of the Ugandan armed forces in the territory of the Democratic Republic of the Congo and by its failure to comply with its obligations as an occupying Power in Ituri district to prevent acts of looting, plundering and exploitation of Congolese

¹ Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005 (hereinafter "Armed Activities (2005)"), para. 345(1).

² *Ibid.*, para. 345(3).

natural resources, violated obligations owed to the Democratic Republic of the Congo under international law;"³ and

- 4. "is under obligation to make reparation to the Democratic Republic of the Congo for the injury caused".⁴
- 1.5 At the outset, Uganda wishes to make clear that it regrets the human suffering that occurred in the DRC during the troubled years that are the focus of these proceedings, and looks forward to the consolidation of renewed friendly relations with its neighbour in the spirit of African brotherhood.
- 1.6 Taking account of the reparation claims presented in the DRC Memorial, Uganda also considers it important to underscore several important limitations in the Court's findings in 2005.
 - *First*, the scope of the Court's determinations *ratione temporis* is expressly limited to the time period between 7 August 1998 (when Uganda's intervention began) and 2 June 2003 (after which Uganda had left the DRC);⁵
 - *Second*, the Court expressly declined to find the acts of Jean Pierre Bemba's *Mouvement de libération du Congo* ("MLC") attributable to Uganda.⁶ Nor did the Court find the acts of any other rebel group operating in the DRC attributable to Uganda;
 - *Third*, although the Court found Uganda responsible for failing to take measures to ensure respect for human rights and international

³ *Ibid.*, para. 345(4).

⁴ *Ibid.*, para. 345(5).

⁵ See ibid., paras. 149, 264.

⁶ *Ibid.*, para. 161.

humanitarian law in Ituri, it did not find Uganda directly responsible for acts committed by others;

- Fourth, while the Court found Uganda responsible for acts committed by members of the Ugandan military that constituted exploitation of Congolese natural resources, it declined to find that there was a "governmental policy of Uganda directed at the exploitation of natural resources of the DRC or that Uganda's military intervention was carried out in order to obtain access to Congolese resources";
- *Fifth*, although the Court found Uganda responsible for failing to comply with its obligations as an occupying Power in Ituri district to prevent the acts of others constituting the exploitation of Congolese natural resources, it did not find Uganda directly responsible for those acts;⁸ and
- *Sixth*, the Court declined to find Uganda even indirectly responsible for acts constituting the exploitation of natural resources committed by rebel groups outside Ituri.⁹
- 1.7 Uganda emphasises these limitations because, as will be discussed in the chapters of this Counter-Memorial that follow, the DRC Memorial presses a number of claims that exceed, in whole or in part, the limitations *ratione materiae*, *ratione temporis*, *ratione loci* and *ratione personae* in the 2005 Judgment. For example, with respect to claims relating to the alleged loss of life, the Memorial proceeds on the (incorrect) basis that Uganda is responsible for acts of killing committed by others anywhere in the DRC at any time during the conflict. Uganda respectfully submits that the DRC cannot ignore the important limitations inherent

⁷ *Ibid.*, para. 242.

⁸ *Ibid.*, para. 345(4).

⁹ *Ibid.*, para. 247.

in the 2005 Judgment any more than Uganda can deny what the Court actually decided. The Judgment and the limitations in it equally constitute *res judicata*.

1.8 Also significant is the Court's plain statement of what the DRC would be required to prove at this reparation phase in order to sustain a claim for reparation. In particular, at paragraph 260 of the 2005 Judgment, the Court held:

"The Court further considers appropriate the request of the DRC for the nature, form and amount of the reparation due to it to be determined by the Court, failing agreement between the Parties, in a subsequent phase of the proceedings. The DRC would thus be given the opportunity to demonstrate and prove the exact injury that was suffered as a result of specific actions of Uganda constituting internationally wrongful acts for which it is responsible." ¹⁰

- 1.9 Uganda will show in Chapter 3 that this requirement to (1) prove (2) the exact injury suffered (3) as a result of, (4) specific wrongful acts is entirely consistent with the Court's case law on reparation and international practice more generally. Uganda, in presenting its own Memorial on reparation in respect of its counter-claims, made every effort to satisfy these strict requirements. Where Uganda considered that it could not meet these thresholds, it declined to make a claim for reparation beyond the satisfaction it already received by virtue of the 2005 Judgment.¹¹
- 1.10 The claims presented in the DRC Memorial, in contrast, fail to make *any* of the requisite evidentiary showings. Uganda will demonstrate that the DRC largely

1010., para. 200 (emphasis added).

¹⁰ *Ibid.*, para. 260 (emphasis added).

¹¹ See, e.g., Memorial of Uganda (hereinafter "UM"), para. 3.33.

eschews the particularised proof the Court indicated it would require in favour of highly generalised claims of a speculative nature.

- 1.11 Using again as an example the DRC's claims with respect to the alleged loss of life, the DRC Memorial does not offer any particularised proof. Rather, its claims are based principally on much-criticised epidemiological studies that attempted to quantify the number of excess deaths, from all causes, that occurred throughout the DRC during and after the conflict. The profound flaws in these studies will be explained in Chapter 5. The point for current purposes is simply that the DRC makes essentially no effort to prove that specific deaths occurred at specific places at specific times as a result of specific internationally wrongful acts of Uganda falling within the general headings identified by the Court in 2005. Instead, the DRC adopts an approach that is disassociated from the kinds of evidence the Court previously stated would be required at this reparation phase.
- 1.12 This failure to take seriously the requirement to prove its claims takes the DRC into the realm of imaginary numbers, characterised by invented "percentages", "distribution keys", and "multipliers", all leading to the truly staggering amount of compensation the DRC claims: roughly US\$ 13.5 *billion*. A claimant State must be expected to come forward with evidence proving a claim for monetary compensation to a high degree of certainty in any case, but all the more when that State claims compensation in such facially exorbitant sums. The DRC Memorial entirely fails to come forward with any such evidence.
- 1.13 Moreover, it is apparent in various parts of the DRC Memorial that the DRC itself does not take its own methodology seriously. It invites the Court instead to come up with numbers that the Court views as "reasonable" or "equitable," even to the point of "fixing a lump sum". Viewed as a whole, the DRC's request is not grounded in law; it is grounded either in a request that the Court decide this matter

ex aequo et bono or impose punitive damages on Uganda that have nothing to do with the harm actually suffered.

1.14 Uganda is mindful of the seriousness of the Court's determinations in the 2005 Judgment. By the same token, the very seriousness of those findings underscores the fact that the Court has, in effect, already awarded the DRC significant reparation in the form of satisfaction.

1.15 The Court did rule in the 2005 Judgment that Uganda is under an obligation to make reparation for the injury caused. That obligation is, however, specifically conditioned on the Court's instruction to the DRC to prove the exact injury it suffered as a result of specific wrongful acts by Uganda. As Uganda will demonstrate in the remaining chapters of this Counter-Memorial, despite having 11 years to do so, the DRC has not complied with the Court's instruction. The DRC has provided the Court no legal basis to award the compensation it seeks, let alone in the patently excessive amount requested.

II. Post-Judgment Efforts to Settle the Case

1.16 In its Memorial at this phase, Uganda recalled the Parties' efforts to settle the issue of reparation through direct negotiation. ¹² Uganda need not recapitulate those efforts here. It does, however, consider it telling that the process of articulating its claim before the Court has caused the DRC to reduce its demand for compensation by over 40%, from the roughly US\$ 23.5 billion it insisted on in the negotiations to the approximately US\$ 13.5 billion it now seeks. Such a dramatic

¹² *Ibid.*, paras. 1.16-1.52.

shift confirms that the numbers advanced by the DRC are rooted in tactics, not reality.

1.17 Uganda also noted in its Memorial that it did not consider the Parties' negotiations on the issue of reparation exhausted. ¹³ In this respect, Uganda wishes to advise the Court that negotiations have continued even after the Parties filed their respective Memorials in September 2016. Specifically, representatives of the Parties met in Pretoria, South Africa on 22 February 2017 and, very recently, on 30 January 2018. Uganda remains hopeful that it may be possible for the Parties to settle their differences bilaterally without having to impose further on the Court.

1.18 Nevertheless, an agreed outcome is far from assured. In accordance with the Court's 6 December 2016 Order, Uganda therefore submits this Counter-Memorial for the purposes of stating its position as a matter of law as clearly as possible.

III. War Reparations in Historical and Economic Perspective

1.19 As stated, subparagraph (5) of the *dispositif* of the 2005 Judgment found "that the Republic of Uganda is under obligation to make reparation to the Democratic Republic of Congo for the injury caused"¹⁴ by the various violations of international law for which Uganda was found responsible. Those violations took place in the context of an international armed conflict. Said differently, "the

¹⁴ *Ibid.*, para. 345(5).

¹³ *Ibid.*, para. 1.47.

question of reparation... [to be] settled by the Court"¹⁵ now is properly characterised as being about war reparations.

1.20 This is the first time in its 70-year history that the Court has been called upon to address a claim for war reparations. Indeed, it is the first time that any permanent international court has been confronted with the issue. Given the unprecedented and exceptional character of this case, Uganda will endeavour briefly to put the question of war reparations in historical perspective and address some of the economic considerations that bear on the legal issues the Court must decide.

1.21 Before the 20th century, many peace settlements included provisions for the payment of large sums of money as a sign of subjugation of the defeated belligerent to the victorious power. This practice of war indemnity (*indemnité de guerre* or *tribut de guerre*) was founded on the idea that a price had to be paid for the restoration of peace.

1.22 The 1919 Treaty of Versailles ending World War I approached "war reparations" as a legal consequence of the responsibility of Germany for causing the war. This is reflected in Article 231 of the Treaty, the (in)famous "*Kriegschuld*" provision, ¹⁶ which represented a paradigm shift according to which the purpose of

-

¹⁵ *Ibid.*, para. 345(6).

¹⁶ The Versailles Treaty June 28, 1919 ("Treaty of Versailles"), Part VIII. Reparation, Section I (28 June 1919), Article 231: "The Allied and Associated Governments affirm and Germany accepts the responsibility of Germany and her allies for causing all the loss and damage to which the Allied and Associated Governments and their nationals have been subjected as a consequence of the war imposed upon them by the aggression of Germany and her allies."

the payment was to compensate the injured States for the injury suffered as a result of Germany's resort to war.¹⁷

1.23 The reparations scheme contained in the Treaty of Versailles proved controversial throughout the interwar period, not only between Germany and the Allied and Associated Powers, but also among the Allies themselves. It also fuelled resentment and revanchist nationalism in Germany. Reflecting on the Versailles war reparations experiment (before its evolution through the Dawes and Young plans, and finally its collapse), John Maynard Keynes wrote prophetically: "International morality, interpreted as a crude legalism, might be very injurious to the world." 18

1.24 The failure of the Versailles reparations scheme loomed large at the end of World War II. The settlements reached in 1945 and afterwards took a different approach: they were marked by pragmatism, not the "crude legalism" of Versailles. ¹⁹ As the Court observed in the *Jurisdictional Immunities of the State* case:

"[A]gainst the background of a century of practice in which almost every peace treaty or post-war settlement has involved either a decision not to require the payment of reparations or the use of lump sum settlements and set-offs, it is difficult to see that international law contains a rule requiring the payment of full compensation to each and every

 $^{^{17}}$ See P. d'Argent, "Réparations" in DICTIONNAIRE DE LA GUERRE ET DE LA PAIX (B. Jeangène & F. Ramel eds., 2002), pp. 1178-1182.

¹⁸ John Maynard Keynes, *The Collected Writings*, Vol. 3: A Revision of the Treaty (1978), p. 94. On the Versailles war reparation settlement, the other World War I settlement and the interwar period. *See* Pierre d'Argent, *Les réparations de guerre en droit international public* (Oct. 2002), pp. 46-104, 105-119, 121-126.

¹⁹ Pierre d'Argent, "Reparations after World War II", Max Planck Encyclopedia of Public International Law (May 2009), p. 2.

individual victim as a rule accepted by the international community of States as a whole as one from which no derogation is permitted."²⁰

1.25 The establishment of the United Nations Compensation Commission ("UNCC") in the aftermath of Iraq's 1990 invasion of Kuwait marked a major contemporary war reparations scheme. The UNCC was a novel creation: it was unilaterally established by the UN Security Council (SC Resolution 687 (1991)), a complex mass-claims procedure was employed, and there was a mechanism for governments, international organisations, individuals and corporations to pursue their claims. The Commission designed various categories of claims, examined most of them through a sampling process and resorted to flexible procedural rules, reserving quasi-judicial adversarial proceedings only for the largest and most complex claims. Concerns about the burdensomeness of the resulting financial rewards were vitiated by the Security Council's decision to create a special UN-administered fund drawing on a percentage of Iraq's export sales of petroleum,

_

²⁰ Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012, p. 141, para. 94.

²¹ As indicated by the Commission: "About 2.7 million claims, with an asserted value of \$352.5 billion, were filed with the Commission. The Commission concluded claims-processing in 2005, and the total compensation awarded was \$52.4 billion to approximately 1.5 million successful claimants. Nineteen Panels of Commissioners reviewed and evaluated the claims submitted by governments, international organisations, companies and individuals. The panels reported their recommendations to the Governing Council for approval. To date, the Commission had paid out about \$47.8 billion in compensation awards to successful claimants. There remains only one claim that has not been paid in full, with a balance of about \$4.6 billion outstanding. This claim was for production and sales losses as a result of damages to Kuwait's oil-field assets and represents the largest award by the Commission's Governing Council." United Nations Compensation Commission, *Home, available at* http://www.uncc.ch/ (last accessed on 7 May 2017).

On the UNCC, see notably Pierre d'Argent, Les réparations de guerre en droit international public (Oct. 2002), pp. 352-418; V. Heiskanen, "The United Nations Compensation Commission", Collected Courses of the Hague Academy of International Law, Vol. 296 (2002); Alexandros Kolliopoulos, La Commission d'indemnisation des Nations Unies et le droit de la responsabilité internationale (2001), p. 2.

petroleum products and natural gas to finance the payments awarded by the UNCC.²²

1.26 By agreement between the two States, a claims commission was also established following the 1998-2000 conflict between Ethiopia and Eritrea. Here, too, it is unnecessary to review in detail the jurisdiction, procedure and findings of the Eritrea and Ethiopia Claims Commission ("EECC"). For present purposes, it is sufficient to note that to date it offers a contemporary example of a comprehensive inter-State arbitral proceeding dealing with war reparations claims. ²⁴

1.27 This Counter-Memorial will rely on and refer to the EECC awards on several crucial points of law where relevant. Uganda regrets that, for its part, the DRC failed to take account of the valuable lessons learned from the EECC. Of special note is the fact that the EECC proceeded mindful of the painful experience of Versailles. The EECC paid special attention to the payment capacity of the

²² Under U.N. Security Council, 3004th Meeting, *Resolution 705 (1991)* (15 Aug. 1991), Annex 2, and U.N. Security Council, 3519th Meeting, *Resolution 986 (1995)*, U.N. Doc. S/RES/986 (14 Apr. 1995), Annex 6, 30% of the proceeds from Iraqi oil sales were to be retained for reparations purposes. That percentage was reduced to 25% in 2000 under U.N. Security Council, 4241st Meeting *Resolution 1330 (2000)*, U.N. Doc. S/RES/1330 (2000) (5 Dec. 2000), Annex 10, and later to 5% after the 2003 conflict and in light of the urgent need to rebuild Iraqi infrastructure and services. *See* U.N. Security Council, *Resolution 1483 (2003) 4761th Meeting*, U.N. Doc. S/RES/1483 (22 May 2003), Annex 18; U.N. Security Council, 4987th Meeting, *Resolution 1546 (2004)*, U.N. Doc. S/RES/1546 (8 June 2004), Annex 20.

²³ Agreement Between the Government of the State of Eritrea and the Government of the Federal Democratic Republic of Ethiopia ("Agreement between Eritrea and Ethiopia"), Vol. 2138, I-37274 U.N.T.S. 94 (2001), entered into force 12 Dec. 2000.

²⁴ On the EECC, see notably Sean D. Murphy et al., Litigating War: Mass Civil Injury and the Eritrea-Ethiopia Claims Commission (2013); Pierre d'Argent & Jean d'Aspremont, "La Commission des réclamations Erythrée-Ethiopie: un premier bilan", Annuaire français de droit international, Vol. 53 (2007), pp. 347-396; Pierre d'Argent, "La Commission des réclamations Erythrée-Ethiopie: suite et fin", Annuaire français de droit international, Vol. 55 (2009), pp. 279-297.

parties, as well as the sociocultural and economic context in which the claims were made.

1.28 Ethiopia sought approximately US\$ 14.3 billion before the EECC; Eritrea sought US\$ 6 billion. In its award on compensation, the EECC awarded only a small fraction of these claims: US\$ 174,036,520 to Ethiopia and US\$ 163,520,865 to Eritrea (including payments for individuals).

1.29 Uganda recognises that the customary rules on the international responsibility of States for internationally wrongful acts apply equally in the context of war reparations as in other settings. In other words, there is no *lex specialis* to be applied in this case.²⁵ Nevertheless, the customary rules on the international responsibility of States cannot be applied blindly irrespective of the context of the case. If history teaches anything, it is that questions of war reparations must be treated with sensitivity and with due regard to the long-term implications of any monetary award for relations between the States concerned, as well as international peace and security more generally. That being the case, it is impossible to ignore the economic implications of the facially exorbitant amounts claimed by the DRC.

1.30 Uganda recalled in its September 2016 Memorial that, during negotiations between the Parties after the 2005 Judgment, the DRC demanded, without support, approximately US\$ 23.5 billion in compensation.²⁶ To put this claim in economic and historical perspective, it helps to recall that:

13

²⁵ Pierre d'Argent, *Les réparations de guerre en droit international public* (Oct. 2002), pp. 441-49, 830-831; Andrea Gattini, *Le riparazioni di guerra nel diritto internazionale* (2003), pp. 494-495, 510-511, 524-528.

²⁶ See UM, paras. 1.22, 1.35.

- According to the World Bank, the entire GDP of Uganda in 2015 was US\$ 27.059 billion;²⁷ and
- Under the 1921 London schedule of payments, Germany was obliged to pay the equivalent of about US\$ 450 billion in today's dollars, ²⁸ an amount approximating its entire GDP at the time. ²⁹

In other words, during the negotiations between the Parties, the DRC claimed an amount roughly equivalent to Uganda's entire GDP, exactly as the London schedule of payments imposed a similar burden on Germany. The consequences of the latter are well known to history.

1.31 Before the Court, the DRC has now reduced its claim by roughly US\$ 10 billion, to approximately US\$ 13.5 billion. Yet ordering Uganda to pay even this reduced amount would mean that about half of Uganda's GDP—i.e., half of the market value of all final goods and services produced in Uganda in the course one year—would need to be confiscated and transferred to the DRC. Simply put, the Congolese claim remains staggering. Awarding such an amount would no less impose on Uganda an "economic vivisection" than the Treaty of Versailles imposed on Germany after World War I.

1.32 Viewing the amount sought by the DRC from a budgetary perspective is equally sobering. The US\$ 13.5 billion the DRC seeks equates to roughly twice the

²⁷ The World Bank, *Uganda*, *available at* https://data.worldbank.org/country/uganda (last accessed 15 Jan. 2018).

²⁸ United States Department of Labor, Bureau of Labor Statistics, *CPI Inflation Calculator*, *available at* https://www.bls.gov/data/inflation_calculator.htm (last accessed 25 Jan. 2018).

²⁹ Ihid

³⁰ John Wheeler Wheeler-Bennett, *The Wreck of Reparations: Being the Political Background of the Lausanne Agreement* (1932), p. 255.

consolidated public spending of Uganda in 2016/17 (Shs 26.3 trillion, or US\$ 7.2 billion).³¹ Granting the DRC's claim would therefore mean that for two years, the entirety of Uganda's public spending would have to be turned over to the DRC, necessitating the shutdown of all public services, including medical care, education and welfare. The toll on the well-being of the Ugandan people would be enormous and raise the prospect of instability. Of course, this is not what the DRC is expressly seeking but the consequences are the same. Awarding the DRC's claim would deprive the Ugandan people of their means of existence and jeopardise Uganda's capacity to comply with its obligations under human rights law.

1.33 It also bears recalling that the DRC and Uganda are both recipients of Official Development Assistance ("ODA"). During the period 2010-2014, the DRC received a yearly average of US\$ 3.4 billion, while Uganda's yearly ODA was US\$ 1.66 billion.³² An important part of Uganda's ODA is dedicated to the implementation of an ambitious Peace, Recovery and Development Plan covering 55 districts and nine municipalities in northern Uganda.³³ The plan establishes a

³¹ Parliament of the Republic of Uganda, *Parliament Approves 2016/2017 National Budget*, *available at* http://www.parliament.go.ug/index.php/about-parliament/parliamentary-news/822-parliament-approves-2016-2017-national-budget (last accessed 15 Jan. 2018); details available at Ministry of Finance Planning and Economic Development of Uganda, *Uganda Budget Information*, *available at* http://www.budget.go.ug/ (last accessed 25 Jan. 2018).

³² Both figures in 2013 value: Organization for Economic Development and Cooperation, *Development Aid at a Glance Statistics by Region, 2. Africa, available at* https://www.oecd.org/dac/stats/documentupload/2%20Africa%20%20Development%20Aid%20at %20a%20Glance%202016.pdf (last accessed 15 Jan. 2018).

Republic of Uganda, Peace, Recovery and Development Plan for Northern Uganda (PRDP) (2007-2010), available at https://www.brookings.edu/wp-content/uploads/2016/07/Uganda_PRDP-2007.pdf (last accessed 15 Jan. 2018), p. vii. In 2008, Norway and Sweden concluded with the Government of Uganda an agreement of financial assistance directed at funding the Plan, and were followed by Ireland and Denmark. Certain 'special projects' also received the support of the World Bank and the European Union. See Government of Uganda, Norwegian Ministry of Foreign Affairs & Swedish International Development Cooperation Agency, Interim Joint Financing Arrangement between the Government of Uganda and the Signatory Development Partners Concerning Support to the Peace, Recovery and Development Plan for Northern Uganda (PRDP) (2007-2010) (18 Dec. 2008); and Republic of

national framework to address the socio-economic root causes of instability and conflict. Its scope and purpose go far beyond what most development plans encompass; it is in fact a comprehensive peace-building plan for a country afflicted by many years of strife.³⁴ This plan has been praised by the Security Council³⁵ and depends on the cooperation of several UN agencies that participate in implementing it, including the High Commissioner for Refugees, UNICEF, and the World Health Organization.

1.34 When deciding on the DRC's claims, Uganda respectfully urges the Court to be sensitive to these critical efforts to establish the foundations of long-term stability and peace in the northern areas of the country most affected by conflict, including regions bordering the DRC. Because money is fungible, any large amount awarded by the Court would, in practice, mean that aid destined for Uganda's people would end up in the DRC treasury (and with no means available to the Court to effectively control its spending).

.

Uganda, Peace, Recovery and Development Plan (PRDP 2) Grant Guidelines for Local Governments) (June 2012), pp. 2-3.

³⁴ Programme areas covered by the first stage of the Plan (July 2009-June 2012) related to immediate post-conflict and emergency activities (such as the facilitation of peace initiatives, the rationalisation of auxiliary forces, emergency assistance and IDP return). In its second phase (July 2012-June 2015), the programme developed under the Plan focused on economic recovery and mitigating potential conflict drivers (through, *inter alia*, enterprise development, land administration, community dispute resolution and reconciliation). Today, the third phase of the Plan (July 2015-June 2021) is being implemented.

³⁵ U.N. Security Council, *Statement by the President of the Security Council 6058th Meeting*, U.N. Doc. S/PRST/48 (22 Dec. 2008), p. 2 ("The Security Council welcomes the re-establishment of peace and security in northern Uganda. It encourages the Government of Uganda, with the support of international partners, to honour its commitment to accelerate reconciliation, recovery and development in that region through rapid implementation of its Peace, Recovery and Development Plan (PRDP) and relevant Agenda items in the FPA and to disburse anticipated financing for the PRDP without delay."), Annex 23.

1.35 As will be demonstrated in the balance of this Counter-Memorial, the DRC's claims are deeply flawed both in fact and in law. There is therefore no legal basis for the award of compensation the DRC seeks. Above and beyond these legal failings, Uganda respectfully suggests that the Court should bear in mind the historical and economic considerations recalled above, lest crude moralism, in the guise of international legality, again prove injurious to international peace and security.³⁶

IV. Structure of the Counter-Memorial

1.36 Uganda's Counter-Memorial consists of two volumes. Volume I contains the main text of the Counter-Memorial. Volumes II and III contain additional supporting material.

1.37 The main text of the Counter-Memorial consists of ten chapters, followed by Uganda's Submissions. After this Introduction, **Chapter 2** sets forth a concise history of the DRC and provides context for Uganda's intervention between 1998 and 2003. The purpose of this overview is to provide the background necessary to put the DRC's compensation claims in context. It addresses, among other things, the DRC's portrayal of Uganda as being solely responsible for the conflict between the Hema and Lendu ethnic groups in Ituri, and the DRC's contention that Uganda is responsible for nearly US\$ 5.7 billion in macroeconomic damages. History shows that conflict and chaos have long existed in the DRC, and that by the time Uganda's intervention began in 1998, the DRC economy was in a state of extended decline resulting from decades of mismanagement and poor governance.

-

³⁶ U.N. Security Council, *Statement by the President of the Security Council 6058th Meeting*, U.N. Doc. S/PRST/48 (22 Dec. 2008), Annex 23.

- 1.38 History also shows that there were a large number of foreign actors in the conflict in the DRC, and an even larger number of internal actors, including a dizzying array of internal armed groups. Uganda cannot be made responsible for virtually everything that happened during the conflict, as the DRC effectively seeks to do with the exorbitant claim it has presented to the Court.
- 1.39 Chapter 3 addresses, at a general level, systematic flaws in the DRC's approach to the evidence. The Court's jurisprudence makes clear that the DRC bears the burden of establishing the facts it asserts in support of its claims. Further, the DRC's burden can only be sustained by presenting convincing evidence that proves, with a high level of certainty, financially assessable harm. This chapter demonstrates how, rather than accept and carry this burden, the DRC has systematically failed to present evidence proving specific acts attributable to Uganda that resulted in specific harm, and the valuation of such harm. What "evidence" the DRC does submit often does not even support the claims advanced in the DRC Memorial and, with some regularity, actually conflicts with them. Rather than advance evidence concerning specific incidents of harm, the DRC has resorted to various types of broad and vague information—reports of international organisations, reports of non-governmental organisations ("NGOs") or materials collected by the DRC itself for purposes of this litigation—that do not prove the DRC's entitlement to the reparation it seeks.
- 1.40 **Chapter 4** addresses, again at a general level, systematic flaws in the DRC's approach to the law relevant to this proceeding. Although the DRC professes fidelity to the rules on State responsibility, it repeatedly ignores, misstates or misapplies the rules on both the attribution of specific actions to Uganda, and on the causal relationship between those actions and the harms the DRC alleges. The DRC's abandonment of these traditional rules shows that it is essentially asking the Court to decide the issue of reparation *ex aequo et bono*,

which it cannot do, or to impose punitive damages on Uganda, which the Court also cannot do. This chapter concludes by explaining that the DRC is impermissibly seeking compensation in amounts that exceed Uganda's payment capacity.

- 1.41 The general discussion of systematic flaws in the DRC's evidence and in its approach to the law is developed further in the context of the general heads of damages advanced by the DRC. Chapter 5 addresses the DRC's claims for compensation in respect of deaths allegedly caused by Uganda during the 1998-2003 conflict. It begins by recalling the standard methods and forms of evidence that are typically used in cases like this before international courts and tribunals, for purposes of underscoring the gap between those standard methods and the DRC's approach in this case. It then shows that rather than trying to make the particularised evidentiary showings the Court indicated that it would expect at this phase, the DRC bases is claims relating to loss of life largely on information of a highly general character. This general information is then supplemented by a series of unfounded "percentages", "distribution keys," and "multipliers" that together make the DRC's claim entirely speculative. The chapter concludes by showing that the DRC's efforts to quantify the amount of compensation due in respect of loss of life is both methodologically flawed and inconsistent with the prevailing economic realities in the DRC.
- 1.42 **Chapter 6** addresses the DRC's claims relating to personal injuries other than loss of life; that is, physical injuries, sexual violence, harm to child soldiers and displacements. The chapter begins by describing the standard methods and evidence used in these types of cases in international courts and tribunals, and shows how the DRC has failed to provide comparable evidence in this case. As was true with respect to its claims relating to loss of life, the DRC avoids making specific evidentiary showings establishing the existence of the injuries it alleges or

the link to Uganda. Instead, it adopts an approach based on highly general information that fails to meet the burden of proof the Court placed on the DRC in 2005. The chapter concludes by showing that the DRC's attempts to place a value on the personal injuries it claims are also deeply flawed.

- 1.43 Chapter 7 addresses the DRC's request for compensation in respect of property harm in Ituri, Kisangani and three other areas (Beni, Butembo and Gemena). The chapter demonstrates that this claim has no support in evidence showing with a high level of certainty—or indeed any level of certainty at all—either the existence of alleged property damage or that it resulted from specific wrongful acts attributable to Uganda. The chapter also shows that the DRC has equally failed to adduce any evidence reliably proving the valuation of the damages it claims. The only thing the DRC offers is a series of unverified tables of information that are not anchored to evidence. This makes it impossible to determine whether the compensation claimed corresponds to actual damages caused by Uganda.
- 1.44 **Chapter 8** addresses the DRC's claim relating to the alleged illegal exploitation of natural resources. This claim covers three categories of resources: mineral resources (gold, diamonds and coltan); wildlife; and deforestation. The chapter demonstrates that, in a vain attempt to circumvent its burden of proof, the DRC presents a series of unsustainable propositions that are built upon unconvincing evidence and speculation. As regards mineral resources, the DRC relies entirely on a disproven theory advanced by the first UN Panel of Experts. The chapter will show that the report on which the DRC bases it claim was widely criticised (including by the DRC itself) and subsequently retracted.
- 1.45 As regards wildlife, the DRC equally avoids any kind of particularised showing in favour of flawed wildlife surveys it says (but does not prove) were

conducted in its national parks that allegedly showed general population declines among various species of animals. The chapter shows the would-be evidence on which the DRC relies is unreliable and, indeed, contradicted by other sources the DRC cites, and also that the DRC's efforts to place a value on its wildlife is unfounded. As regards deforestation, the chapter demonstrates that the basis of the DRC's claim is the same report of the first UN Panel of Experts it relied upon in making its claim concerning mineral resources. Because that report was retracted, it cannot support the DRC's case.

- 1.46 **Chapter 9** addresses the DRC's claim relating to its alleged "macroeconomic injury". This claim, by itself, amounts to US\$ 5.7 billion, more than 40% of the total compensation the DRC claims. This chapter demonstrates that the claim is unsustainable because (1) it is at odds with international practice and case law; (2) it is purely speculative and incompatible with any notion of causality; (3) it cannot be legally justified under the rubric of *lucrum cessans* put forward by the DRC; and (4) its premise, as presented by the DRC, is inconsistent with the 2005 Judgment.
- 1.47 Without prejudice to the foregoing, the chapter also demonstrates that the methodology used by the experts on whom the DRC relies to quantify its alleged "macroeconomic injury" suffers from multiple fatal flaws. The DRC's economic experts relied on the writings of Professor Sir Paul Collier and Dr Anke Hoeffler from Oxford University. At Uganda's request, Professor Collier and Dr Hoeffler have reviewed DRC's report and concluded that "it is a misguided use of our approach, that the concept on which the authors base their estimation is flawed, and that their technical analysis is incorrect".
- 1.48 Finally, **Chapter 10** addresses the DRC's request that the Court order post-judgment interest and certain forms of non-compensatory reparation. The chapter

first addresses the issues of interest raised in the DRC Memorial and then explains that the DRC is not entitled to additional satisfaction in the form of an order that Uganda investigate and prosecute Ugandan military personnel, or in the form of an order that Uganda pay US\$ 125 million for "intangible harm". Lastly, Chapter 10 explains why the DRC is not entitled to its costs, including attorneys' fees.

1.49 This Counter-Memorial concludes with Uganda's Submissions.

CHAPTER 2

THE CONTEXT AND SCOPE OF UGANDA'S INTERVENION

- 2.1 This chapter sets forth a concise history of the DRC and provides context for Uganda's intervention between 1998 and 2003. The purpose of this brief historical review is not to challenge any of the Court's findings in the 2005 Judgment. It is merely to provide the background necessary to put the DRC's compensation claims in context.
- 2.2 For example, the DRC Memorial contends that Uganda is responsible for nearly US\$ 5.7 billion in macroeconomic damages allegedly resulting from its intervention. As more fully explained in Chapter 9, this aspect of the DRC's claim presumes that the DRC's economy would have grown from 1998 onwards. All available data show, however, that as of 1998 the DRC's economy was in a state of extended decline resulting from years of mismanagement and poor governance. The premise of the DRC's argument is therefore inconsistent with history.
- 2.3 The DRC Memorial also portrays Uganda as being solely responsible for the conflict between the Hema and Lendu ethnic groups in Ituri. Yet history shows that this conflict is long-standing. It has been ongoing since at least the colonial period and it continues to this day. It both pre-dates and post-dates Uganda's intervention.
- 2.4 The DRC's claims for damages allegedly occurring during the conflict in Ituri similarly presume that none of those damages would have occurred if Uganda had not intervened and/or had fulfilled its responsibilities as an occupying Power in that district. But here, too, the DRC's claim fails to take adequate account of the context. In the first instance, many of the problems in Ituri were also long-standing

and endemic; they existed wholly independent of Uganda's intervention. Moreover, Uganda's presence in Ituri (and indeed in the DRC as a whole) was of a limited nature. At the height of its deployment in the DRC, Uganda had no more than 10,000 troops in the country, and a lesser amount in Ituri.

- 2.5 History also shows that there was a large number of foreign actors in the conflict in the DRC, and an even larger number of internal actors, including a complex array of internal armed groups. As a matter of international law on reparation, Uganda is not responsible for everything that happened during the conflict, as the DRC effectively asserts with the excessive claim it has presented to the Court.
- 2.6 Uganda respectfully submits that its intervention and the DRC's claims for compensation cannot properly be evaluated without taking account of the fact that the DRC, including the eastern DRC, has long been characterised by chaos.

*

2.7 The remainder of this Chapter is organised as follows. **Section I** discusses certain critical aspects of DRC history leading up to the 1998-2003 conflict. **Section II** provides relevant context for Uganda's intervention in the DRC between 1998 and 2003.

I. The Historical Background to the 1998 Conflict

A. COLONISATION AND THE CREATION OF ETHNIC AND LAND CONFLICTS

2.8 The DRC has a long history of instability, misrule, violence and ethnic conflict that extends back to the colonial period.

- 2.9 The area of what would become the DRC first drew the attention of European colonisers, who sowed the seeds of conflict, more than 100 years ago. On 7 August 1884, King Leopold II of Belgium and Henry Morton Stanley, a Welsh-American explorer, sat down together in Oostende, Belgium to draw a preliminary sketch of what would become the Congo.³⁷ They marked off an area larger than Western Europe based only on the location of concessions and "stations" established by Stanley and his men, not any natural or historical considerations.³⁸ The area encompassed literally hundreds of ethnic groups.
- 2.10 King Leopold II established the so-called "Congo Free State" in 1885.³⁹ Unlike other European colonies, the Congo Free State was the King's personal property,⁴⁰ over which he ruled directly through a private entity known as the "International Association of the Congo".⁴¹ In order to exploit the country's vast natural wealth, including ivory, rubber and mineral resources, Leopold II legalised forced labour. He also created a personal army known as the "Force Publique" to compel people to work and pay taxes.⁴²
- 2.11 The Force Publique is known to history for its extreme brutality. Beatings, rape, torture, mutilations, murder and the burning of houses were common.⁴³ These

³⁷ David Van Reybrouck, Congo: The Epic History of a People (2015), pp. 58-59, Annex 89.

³⁸ *Ibid.*, p. 58.

³⁹ *Ibid.*, p. 57.

⁴⁰ *Ibid.*, pp. 57-58.

⁴¹ *Ibid.*, p. 58 (Translation by Counsel, original in French: "Association Internationale du Congo".).

⁴² Auguste Maurel, *Le Congo de la Colonisation Belge à l'Indépendance* (1992), pp. 28-30, Annex 72.

⁴³ Van Reybrouck, *Congo: The Epic History of a People* (2015), pp. 90-91, Annex 89; Maurel, *Le Congo de la Colonisation Belge à l'Indépendance* (1992), pp. 31-32, Annex 72.

excesses led to a number of bloody uprisings between 1895 and 1908, including in Kasai, Kwango, Uele and Katanga.⁴⁴

2.12 Ituri was one of the first areas in what is now the eastern DRC to come under the rule of the Congo Free State. During an 1899 expedition, H.M. Stanley encountered the Hema and the Lendu, whom he called the "Wahuma" and "Balegga", respectively. Stanley described the Hema as "fine-featured herdsmen", amiable, quiet, and friendly neighbours", with almost European features. In contrast, he described the Lendu as "the dark flat-nosed negroid tilling the land". Stanley's ill-informed generalisations about each group, which were widely disseminated in his best-selling books, informed Belgian colonial policies and left an enduring legacy of prejudice.

2.13 The widespread humanitarian abuses of the Congo Free State, described in literary works such as Joseph Conrad's *Heart of Darkness* and Mark Twain's *King Leopold Soliloquy*, caused an international outcry. In 1908, the Congo Free State disappeared as a separate State and its territory became a Belgian colony. Colonial authorities chose local leaders, frequently based on ethnic stereotypes, to

⁴⁴ Maurel, Le Congo de la Colonisation Belge à l'Indépendance (1992), p. 34, Annex 72.

⁴⁵ François Emizet Kisangani, *Guerres Civiles dans la République Démocratique du Congo 1960-2010* (2015), p. 288, Annex 90.

⁴⁶ Henry M. Stanley, *In Darkest Africa: or the Quest, Rescue and Retreat of Emin, Governor of Equatoria*, Vol. II (1890), p. 387, Annex 69.

⁴⁷ *Ibid.*, p. 403.

⁴⁸ *Ibid.*, p. 384.

⁴⁹ *Ibid.*, p. 388.

⁵⁰ Dan Fahey, Rift Valley Institute, "Ituri: Gold, Land, and Ethnicity in North-Eastern Congo", *Usalama Project: Understanding Congolese Armed Groups* (2013), p. 18, Annex 88; Johan Pottier, "Representations of Ethnicity in the Search for Peace: Ituri, Democratic Republic of Congo", *African Affairs* Vol. 109, No. 434 (27 Nov. 2009), pp. 24, 47, Annex 83.

administer their vast territory. Their decision to favour certain ethnic groups over others engendered conflict.⁵¹

2.14 In Ituri, for example, the colonial rulers perpetuated the myth of Hema superiority. A 1920 account illustrates the Europeans' stereotyped views of the two groups: "It is only since the arrival of the European that the Bahema, always ambitious and deceitful, has tried to dominate the Walendu in order to better exploit him." Europeans described the Lendu as "warlike" and "unruly", and noted that they "frequently tr[ied] to assert their independence... by defying Government forces". 53

2.15 Colonial authorities put Hema in leadership positions and gave them unique privileges. Lendu, on the other hand, were systematically excluded, and relegated to working the mines and plantations.⁵⁴ One result was the stratification of local

_

⁵¹ Maurel, *Le Congo de la Colonisation Belge à l'Indépendance* (1992), pp. 85-86, Annex 72; Fahey, "Ituri: Gold, Land, and Ethnicity in North-Eastern Congo" (2013), pp. 18, 22, Annex 88.

⁵² Pottier, "Representations of Ethnicity in the Search for Peace: Ituri, Democratic Republic of Congo" (2009), p. 43, Annex 83.

⁵³ Fahey, "Ituri: Gold, Land, and Ethnicity in North-Eastern Congo" (2013), p. 21, Annex 88.

⁵⁴ François Emizet Kisangani, *Guerres Civiles dans la République Démocratique du Congo 1960-2010* (2015), p. 289, Annex 90; U.N. Security Council, *Special Report on the events in Ituri, January 2002-December 2003*, U.N. Doc. S/2004/573 (16 July 2004), para. 14, DRCM Annex 1.6.

society along ethnic lines.⁵⁵ Another result was violence.⁵⁶ Uprisings occurred in Ituri in 1911, 1919, 1920 and 1929.⁵⁷

2.16 Nationally, tensions grew as the colonial administration encouraged greater European settlement.⁵⁸ Throughout the Belgian Congo, colonial authorities seized communal land to create space for the new settlers and introduced a new dual system of property rights.⁵⁹ For the most part, vacant land became State property for European *colons* to turn into plantations. Where land was already under the control of traditional authorities, the colonial administration institutionalised this control based on ethnicity. People who did not belong to the traditional authorities' ethnic group or who did not respect that authority were denied access to land.⁶⁰ Land rights became the source of persistent and pernicious inter-ethnic conflicts resulting in many tragedies.

_

⁵⁵ François Emizet Kisangani, *Guerres Civiles dans la République Démocratique du Congo 1960-2010* (2015), p. 289, Annex 90.

⁵⁶ Fahey, "Ituri: Gold, Land, and Ethnicity in North-Eastern Congo" (2013), p. 20. For example, in 1911, the Belgian district commissioner appointed a Hema chief named Bomera over all the populations in present-day Irumu territory, where the capital, Bunia, is located. His nomination caused an uprising. The Lendu revolted and killed him, along with 200 Hema villagers in December 1911. The *Force Publique* reacted brutally, and the colonial administration separated the Hema and the Lendu into separate, defined administrative territories. Although the nominal purpose was to stop ethnic hostilities, this only further exacerbated tensions between the groups, Annex 88; François Emizet Kisangani, *Guerres Civiles dans la République Démocratique du Congo 1960-2010* (2015), p. 288, Annex 90; Thierry Vircoulon, "L'Ituri ou La Guerre Au Pluriel", *Afrique Contemporaine*, Vol. 2005/3, No. 215 (2005), p. 138, Annex 82.

⁵⁷ François Emizet Kisangani, *Guerres Civiles dans la République Démocratique du Congo 1960-2010* (2015), pp. 288-289, Annex 90.

⁵⁸ Fahey, "Ituri: Gold, Land, and Ethnicity in North-Eastern Congo" (2013), p. 22, Annex 88.

⁵⁹ Koen Vlassenroot, "The Promise of Ethnic Conflict: Militarisation and Enclave-Formation in South Kivu" in CONFLICT AND ETHNICITY IN CENTRAL AFRICA (D. Goyvaerts, ed., 2000), pp. 62-63, Annex 74; François Emizet Kisangani, *Guerres Civiles dans la République Démocratique du Congo 1960-2010* (2015), p. 289, Annex 90.

⁶⁰ Vlassenroot, "The Promise of Ethnic Conflict: Militarisation and Enclave-Formation in South Kivu" (2000), p. 63, Annex 74.

2.17 In Ituri, the new system had a particularly significant impact on the Lendu. Thousands of hectares of communal land on which the Lendu had worked for centuries were confiscated in favour of Europeans and the Hema.⁶¹

B. POST-INDEPENDENCE AUTHORITARIAN RULE AND ECONOMIC DECLINE

- 2.18 The Congo's turbulent transition to independence, followed by four decades of poor governance, led to sharp economic decline, increased ethnic tensions and further conflict.
- 2.19 After World War II, as colonial territories across the globe began to declare independence, demands for Congolese independence grew.⁶² On 4 January 1959, widespread rioting broke out in Kinshasa.⁶³ The following week, Belgium promised independence "without harmful procrastination but also without undue haste".⁶⁴ Events forced Belgium's hands and, at a conference in January 1960, Belgium agreed that the Congo would become independent on 30 June 1960.⁶⁵
- 2.20 Congo was ill-prepared for independence. As of 1959, the Congolese people had no experience with self-rule, enjoyed few educational opportunities and occupied very few leadership positions in the colonial regime. There was no parliament and no culture of institutionalised deliberation or opposition.⁶⁶ There were only three Congolese managers in the civil service and no Congolese officers

⁶¹ François Emizet Kisangani, Guerres Civiles dans la République Démocratique du Congo 1960-2010 (2015), p. 289, Annex 90.

⁶² Van Reybrouck, Congo: The Epic History of a People (2015), pp. 233-234, Annex 89.

⁶³ *Ibid.*, pp. 248-249.

⁶⁴ *Ibid.*, p. 250.

⁶⁵ *Ibid.*, pp. 256, 259.

⁶⁶ *Ibid.*, p. 283.

in the army.⁶⁷ Moreover, the first public secondary schools had only been established in 1938, the first university in 1954 and the first law school in 1958.⁶⁸ At the time of independence, there were only 30 Congolese university graduates in the entire country.⁶⁹

2.21 Patrice Lumumba's *Mouvement National Congolais* won national elections held in late May 1960 in the run-up to independence⁷⁰ but large-scale civil strife quickly followed. Congolese soldiers in the Force Publique mutinied and rebellions broke out.⁷¹ Katanga and South Kasai, which together accounted for one quarter of Congo's territory, tried to secede.⁷² The ensuing fighting between the Congolese army and rebel forces led to massacres that claimed thousands of civilian lives.⁷³

2.22 Lumumba was assassinated in 1961 and the new country fell deeper into crisis over the next four years.⁷⁴ In 1965, Mobutu Sese Seko seized power in a coup d'état and began a 32-year reign.⁷⁵ In 1971, he renamed the country the Republic of Zaire. Like the colonial administration before him, Mobutu's reign was characterised by brutal authoritarianism and divide-and-rule tactics, the effect of

⁶⁷ BBC, *The Story of Africa, Independence, Case Study: Congo, available at* http://www.bbc.co.uk/worldservice/africa/features/storyofafrica/14chapter7.shtml (last accessed 15 Jan. 2018), Annex 101.

⁶⁸ Van Reybrouck, *Congo: the Epic History of a People* (2015), p. 218, Annex 89.

⁶⁹ BBC, *The Story of Africa, Independence, Case Study: Congo, available at* http://www.bbc.co.uk/worldservice/africa/features/storyofafrica/14chapter7.shtml (last accessed 15 Jan. 2018), Annex 101.

⁷¹ Georges Nzongola-Ntalaja, Washington Office on Africa, "Appendix One: Historical Background, From Leopold to Mobutu", *Zaire: A Nation Held Hostage* (1992), p. 8, Annex 73. ⁷² Van Reybrouck, *Congo: the Epic History of a People* (2015), p. 302, Annex 89.

⁷³ *Ibid*.

⁷⁴ Nzongola-Ntalaja, "Appendix One: Historical Background, From Leopold to Mobutu" (1992), p. 9, Annex 73.

⁷⁵ BBC, *The Story of Africa, Independence, Case Study: Congo, available at* http://www.bbc.co.uk/worldservice/africa/features/storyofafrica/14, Annex 101.

which was to exacerbate ethnic and land conflicts.⁷⁶

2.23 In Ituri, the Hema continued to occupy top administrative and political positions;⁷⁷ they dominated the administration, courts and police.⁷⁸ The ethnic violence continued. A year after independence, the provincial authorities, led by Hema, brutally repressed a Lendu rebellion resulting in heavy casualties.⁷⁹ Among other incidents, additional outbreaks of violence occurred in 1971, 1981 and 1992, as Hema landowners bribed Zairian security officials to attack Lendu communities over land and livestock disputes.⁸⁰

2.24 In the late 1960s and early 1970s, Mobutu passed two laws that had a major impact on land ownership and the economy, and continued to increase ethnic tensions. *First*, under a process known as "Zaireanization", Mobutu expropriated businesses and plantations owned by foreigners. ⁸¹ *Second*, the 1973 General Property Law declared all land to be State property. ⁸² In practice, this meant that Mobutu redistributed land and concessions to reward those loyal to him. ⁸³

⁷⁶ Claude Kabemba, U.N.H.C.R., Centre for Documentation and Research, *The Democratic Republic of Congo: From Independence to Africa's First World War*, WRITENET Paper No. 16/2000 (June 2001), p. 3, Annex 12.

⁷⁷ François Emizet Kisangani, *Guerres Civiles dans la République Démocratique du Congo 1960-2010* (2015), p. 290, Annex 90; Fahey, "Ituri: Gold, Land, and Ethnicity in North-Eastern Congo" (2013), p. 23, Annex 88.

⁷⁸ Fahey, "Ituri: Gold, Land, and Ethnicity in North-Eastern Congo" (2013), p. 28, Annex 88.

⁷⁹ François Emizet Kisangani, *Guerres Civiles dans la République Démocratique du Congo 1960-2010* (2015), p. 290, Annex 90.

⁸⁰ Vircoulon, "L'Ituri ou La Guerre Au Pluriel" (2013), p. 138, Annex 82; Jean-Pierre Bemba, *Le Choix de la Liberté* (2002), p. 98, DRCM Annex 2.13.

⁸¹ Van Reybrouck, Congo: the Epic History of a People (2015), p. 357, Annex 89.

⁸² Vlassenroot, "The Promise of Ethnic Conflict: Militarisation and Enclave-Formation in South Kivu" (2000), pp. 63-64, Annex 74.

⁸³ *Ibid.*, p. 64.

- 2.25 In Ituri, these new laws only further benefited the Hema, who had political ties to the Mobutu regime.⁸⁴ Hema acquired the majority of land concessions, displacing many Lendu.⁸⁵ Belgian property owners, whose property had been nationalised, handed their properties to Hema managers in the hope that they would be able return. (Their hope was in vain, as Hema registered the properties in their own names.)⁸⁶ The workers on these Hema-dominated lands were most often Lendu.
- 2.26 In response to the Lendu community's feeling of marginalisation and exclusion, Soma Mastaki, a Lendu leader, created the *Parti de libération des Walendu* ("PLW") in 1974.⁸⁷ This movement quickly turned to violence in which many Hema civilians were killed.⁸⁸
- 2.27 In addition to authoritarianism and ethnic favouritism, the Mobutu regime was characterised by gross mismanagement of the economy and corruption at every level. These internal factors were exacerbated by global economic factors. The 1970s oil crisis and a 40% drop in demand for copper in 1975 pushed the already bad economy into steep decline.⁸⁹
- 2.28 The mining of natural resources had long been a mainstay of the Congo's economy. But without investment, infrastructure decayed, equipment fell into

⁸⁴ Fahey, "Ituri: Gold, Land, and Ethnicity in North-Eastern Congo" (2013), pp. 27-28, Annex 88.

⁸⁵ François Emizet Kisangani, *Guerres Civiles dans la République Démocratique du Congo 1960-2010* (2015), pp. 290, 295, Annex 90.

⁸⁶ Vircoulon, "L'Ituri ou la Guerre au Pluriel" (2005), p. 131, Annex 82.

⁸⁷ François Emizet Kisangani, *Guerres Civiles dans la République Démocratique du Congo 1960-2010* (2015), p. 290, Annex 90; Fahey, "Ituri: Gold, Land, and Ethnicity in North-Eastern Congo" (2013), p. 28, Annex 88.

⁸⁸ *Ibid*.

⁸⁹ Van Reybrouck, Congo: the Epic History of a People (2015), p. 370, Annex 89.

disrepair and production fell. By the mid-1980s, for example, the production of copper was less than one tenth of its prior level. 90 By the mid-1990s, State-owned mining companies became insolvent. 91 As of 1995, formal mining had declined so much that agricultural production replaced it as the country's top export. 92

2.29 What was true of the DRC generally was true also in Ituri, where decaying infrastructure discouraged investment, mining equipment deteriorated and profits fell. 93 Many miners responded by turning to artisanal mining. 94 Although it was initially illegal, Mobutu legalised the practice in 1981. 95 Tens of thousands of people in Ituri and elsewhere started to exploit and sell minerals on their own wherever they could find a market, including in Uganda, Rwanda and Burundi. 96

2.30 Uganda's capital, Kampala, became one of the main transit points for the private trade in minerals beginning in the mid-1990s. ⁹⁷ This was due to a number of factors. Conflict in North and South Kivu provinces in the DRC, as well as

⁹⁰ G. Kiakwama & J. Chevallier, The World Bank, "Nonreformers: Democratic Republic of the Congo", *Aid and Reform in Africa: Lessons from Ten Case Studies* (S. Devarajan, D. Dollar, T. Holmgren, eds., 2001), p. 637, Annex 76.

⁹¹ E. F. Kisangani & F. Scott Bobb, *Historical Dictionary of the Democratic Republic of the Congo* (2010), pp. 355-357, Annex 84.

⁹² Ihid

⁹³ Fahey, "Ituri: Gold, Land, and Ethnicity in North-Eastern Congo" (2013), pp. 24-25, Annex 88.

⁹⁴ *Ibid*.

⁹⁵ *Ibid.*; F. Missier & O. Vallee, "Du Scandale Zaïrois au Congo Gemmocratique" in CHASSE AU DIAMANT AU CONGO/ZAIRE (L. Monnier, B. Jewsiewicki, G. de Villers eds., 2001), pp. 27-28, Annex 77.

⁹⁶ Fahey, "Ituri: Gold, Land, and Ethnicity in North-Eastern Congo" (2013), pp. 24-25, Annex 88; Sebastian Gatimu, Institute for Security Studies, *The true cost of mineral smuggling in the DRC*, *available at* https://issafrica.org/iss-today/the-true-cost-of-mineral-smuggling-in-the-drc (11 Jan. 2016), Annex 91.

⁹⁷ Fahey, "Ituri: Gold, Land, and Ethnicity in North-Eastern Congo" (2013), pp. 25-27, Annex 88.

Burundi and Rwanda, disrupted the usual trading routes. ⁹⁸ Uganda also had begun to liberalise its economy and pursue export-driven economic growth in response to pressure from the World Bank and the International Monetary Fund ("IMF"). In 1994, the government eliminated the Bank of Uganda's monopoly on the purchase of gold, abolished the gold export tax and reduced administrative burdens for trading companies. ⁹⁹ The result was a significant increase in private exports of Congolese minerals from Uganda starting around 1995. ¹⁰⁰

2.31 Two incidents known as the "pillages" weakened the DRC's economy even further and eroded mining companies' revenues.¹⁰¹ In September 1991, soldiers dissatisfied with their salaries began looting both private companies and public buildings in Kinshasa. The local population followed suit and looting spread to the rest of the country. Factories and businesses were stripped bare.¹⁰² In 1993, soldiers began a similar rampage in Kinshasa.¹⁰³

2.32 The general economic decline was so pronounced that, by 1996, the per capita GDP of what was then still Zaire was less than 40% of what it had been in 1958.¹⁰⁴ According to a World Bank report "[p]overty ha[d] become widespread, and social indicators, which used to compare favorably with those in the rest of

⁹⁸ Ihid

⁹⁹ *Ibid*.

¹⁰⁰ *Ibid*.

¹⁰¹ F. Missier & O. Vallee, "Du Scandale Zaïrois au Congo Gemmocratique" (2001), pp. 27-28, Annex 77.

 $^{^{102}}$ E. F. Kisangani & F. Scott Bobb, *Historical Dictionary of the Democratic Republic of the Congo* (2010), pp. 352, 425-426, Annex 84.

¹⁰³ *Ibid*.

¹⁰⁴ G. Kiakwama & J. Chevallier, "Nonreformers: Democratic Republic of the Congo" (2001), p. 637, Annex 76.

Sub-Saharan Africa, ha[d] steadily declined."¹⁰⁵ Further: "Without maintenance, infrastructure has deteriorated to such an extent that most regions are now completely isolated."¹⁰⁶ Steamboats had stopped operating and roads were overtaken by the jungle. ¹⁰⁷ Uncollected garbage piled up. Public schools ceased to operate. Poorly paid police and soldiers looted shops, held foreign journalists for cash ransoms and used military trucks to run taxi services. ¹⁰⁸ The government had completely withdrawn from providing healthcare and education, and the army was insufficiently armed and demoralised. ¹⁰⁹

- 2.33 The weakness of the central government allowed local strongmen to gain power and led to the formation of local militias.¹¹⁰ Increased violence and human rights violations came hand-in-hand with the growing poverty.¹¹¹
- 2.34 The Government of Zaire itself admitted that the situation was deteriorating rapidly in a 1995 study by its Ministry of National Planning and Reconstruction (*Ministère du Plan et Reconstruction National*), UNICEF, the UNDP and the

¹⁰⁵ *Ibid*.

¹⁰⁶ *Ibid*.

¹⁰⁷ Adam Hochschild, "Congo's Many Plunderers", *Economic & Political Weekly*, Vol. 36, No. 4 (27 Jan.-2 Feb. 2001), pp. 287-288, Annex 78.

¹⁰⁸ Van Reybrouck, *Congo: the Epic History of a People* (2015), pp. 370-371, Annex 89; Hochschild, "Congo's Many Plunderers" (2001), pp. 287-288, Annex 78.

¹⁰⁹ E. Pay & D. Goyvaerts, "Belgium, the Congo, Zaire, and Congo: A Short History of a Very Shaky Relationship", in CONFLICT AND ETHNICITY IN CENTRAL AFRICA (D. Goyvaerts ed., 2000), p. 30, Annex 75.

¹¹⁰ Vlassenroot, "The Promise of Ethnic Conflict: Militarisation and Enclave-Formation in South Kivu" (2000), p. 71, Annex 74.

¹¹¹ U.N. Human Rights, Office of the High Commissioner, Democratic Republic of the Congo, 1993-2003: Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003 (hereinafter "U.N. Mapping Report") (Aug. 2010), para. 130, Annex 25.

WHO. 112 The study found that:

- Child and adult mortality rates had greatly increased between 1984 and 1995;¹¹³
- GDP was decreasing by 10% every year, at the same time the population was growing by 3.1% per year; 114
- The national debt had reached US\$ 10 billion, nearly twice the country's GDP (approximately US\$ 5.5 billion);¹¹⁵
- Real annual income per person had decreased from US\$ 350 in 1959, to US\$ 240 in 1981, to just US\$ 100 in 1995;¹¹⁶
- 50% of the wealth was concentrated in the hands of five percent of the population, mostly in Kinshasa and Shaba;¹¹⁷
- In order to survive, the Congolese population had developed a vibrant informal economy that escaped taxes; 118 and
- Violence and juvenile delinquency were increasing rapidly. 119

¹¹² République du Zaire, Ministère du Plan et Reconstruction Nationale, *Enquête Nationale sur la Situation des Enfants et des Femmes au Zaire en 1995, Rapport Final* (Feb. 1996), p. 6, Annex 41.

¹¹³ *Ibid.*, pp. 59-60.

¹¹⁴ *Ibid.*, p. 6.

¹¹⁵ *Ibid*.

¹¹⁶ *Ibid*.

¹¹⁷ *Ibid*.

¹¹⁸ *Ibid.*, pp. 6-7.

¹¹⁹ *Ibid.*, p. 7.

C. THE INCREASE IN ETHNIC TENSIONS DURING THE 1990s

2.35 Several events in the 1990s contributed to heightening ethnic tensions within the DRC, further sowing the seeds of instability, violence and conflict. After the end of the Cold War, the pressure to democratise mounted. To alleviate this pressure, Mobutu nominally began the process of democratisation, yet at the same tried to sabotage it by using divide-and-rule tactics and stoking ethnic hostilities. One observer noted, "ethnicity proved to be the main instrument" to "preoccupy, destroy, or disorganise rivals." Youth militias proliferated. 121

2.36 In Ituri, both the Hema and the Lendu seized the opportunity to create political parties to help safeguard their interests. The Hema created the ETE (meaning "cattle" in Hema) party, while the Lendu created the party for Liberation of the Oppressed Race in Ituri ("LORI"). Both groups mobilised youth and encouraged violence.

2.37 Tensions were particularly high in the Djugu and Irumu regions of Ituri. In Djugu, Lendu leaders in the Walendu Pitsi *collectivité* claimed customary rights over land concessions held by Hema businessmen. ¹²³ At the same time, using their political connections, the Hema expanded their concessions and annexed land from neighbouring Lendu villages. ¹²⁴ The few disputes that appeared in front of the courts were decided in favour of the Hema. The Lendu did not have the financial

¹²⁰ Vlassenroot, "The Promise of Ethnic Conflict: Militarisation and Enclave-Formation in South Kivu" (2000), p. 71, Annex 74.

¹²¹ *Ibid*.

¹²² François Emizet Kisangani, Guerres Civiles dans la République Démocratique du Congo 1960-2010 (2015), p. 291, Annex 90.

¹²³ Fahey, "Ituri: Gold, Land, and Ethnicity in North-Eastern Congo" (2013), p. 29, Annex 88.

¹²⁴ *Ibid*.

means to contest the titles¹²⁵ but they refused to leave. Armed clashes with the police ensued. ¹²⁶ In one incident in Irumu, a dispute dating back to 1910 concerning ownership of the villages of Lagabo, Lapka and Nombe led to 270 deaths. ¹²⁷ In the chaos, the Mobutu battalion lost control and used heavy artillery against the Lendu, killing more than 300 civilians. ¹²⁸

D. THE IMPACT OF CIVIL WARS IN THE REGION

2.38 The 1994 genocide in Rwanda spawned even greater instability in the DRC, especially in the east.

2.39 Following the 6 April 1994 assassination of Rwandan President Habyarimana, a Hutu, elements of the Hutu-dominated *forces armèes rwandaises* ("FAR") and the extremist Hutu militia known as the "Interahamwe" slaughtered between 800,000 and 1 million Tutsi and moderate Hutu in just three months. ¹²⁹ In response, the Tutsi-led Rwandan Patriotic Front ("RPF") launched an offensive and took power in July 1994.

2.40 Approximately 1.5 million refugees, including the defeated FAR, Interahamwe and other "génocidaires" fled to the eastern part of Zaire. They took much of the Rwandan government's treasury and military arsenal with them, and

¹²⁵ Vircoulon, "L'Ituri ou la Guerre au Pluriel" (2005), p. 131, Annex 82.

¹²⁶ U.N. Mapping Report, para. 365, Annex 25.

¹²⁷ François Emizet Kisangani, Guerres Civiles dans la République Démocratique du Congo 1960-2010 (2015), p. 291, Annex 90.

¹²⁸ *Ibid*.

¹²⁹ Van Reybrouck, *Congo: the Epic History of a People* (2015), p. 414, Annex 89.

began to plan attacks against Rwanda. Mobutu and the rest of the international community largely turned a blind eye. 130

Zaire that were opposed to the regimes in neighbouring countries, including Angola, Burundi and Uganda. The DRC itself acknowledged in a document attached to its Application in this case that "[t]he massive influx of Rwandan Hutu refugees into the eastern provinces of the Congo in 1994... further exacerbated the security problem along the border between the Democratic Republic of the Congo and Rwanda". The DRC also emphasised that "[t]he actions of the Ugandan rebels (the Lord's Resistance Army) along the Congolese-Ugandan border [was] also a source of instability in the Great Lakes Region". 132

2.42 In 1996, the Alliance of Democratic Forces for the Liberation of Congo ("AFDL"), a coalition led by Laurent-Désiré Kabila, rebelled and ultimately ousted Mobutu with the backing of Burundi, Rwanda and Uganda. On 25 May 1997, Kabila declared himself President and renamed the country the Democratic Republic of the Congo. 134

¹³⁰ Van Reybrouck, Congo: the Epic History of a People (2015), pp. 415, 417, Annex 89.

¹³¹ Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda), White Paper Vols. I and II, Annexed to the Application instituting proceedings of the Government of the Democratic Republic of the Congo (hereinafter "DRC White Paper"), filed on 23 June 1999, pp. 133-134, para. 8 (Translation by U.N. Secretariat, original in French: "L'afflux massif des réfugiés Hutu rwandais dans les Provinces orientales du Congo en 1994... a davantage exacerbé le problème de sécurité à la frontière commune entre la République Démocratique du Congo et le Rwanda".).

¹³² DRC White Paper, p. 134, para. 8 (Translation by U.N. Secretariat, original in French: "Les actions de la rébellion ougandaise ("Armée du Seigneur") aux abords de la frontière congoloougandaise est également un facteur d'instabilité dans la région des Grands Lacs".).

¹³³ DRC White Paper, p. 134, para. 9.

¹³⁴ U.N. Mapping Report, para. 180, Annex 25.

- 2.43 President Kabila came to power promising to democratise the country and revive the economy. Within a few months, however, he lost both external and internal support. Among other things, his refusal to cooperate with the UN Secretary-General's investigation into human rights abuses turned his international backers against him.¹³⁵
- 2.44 Kabila's authoritarian measures also stirred internal dissent. On 22 March 1997, he announced a ban on all political parties until the end of the "war of liberation", and then suspended political activities of opposition parties for two years. ¹³⁶ The new regime's security forces targeted the leaders and activists of the main opposition parties, and committed a number of atrocities, such as the torture and killing of protesters, and the rape of opposition leaders' family members. ¹³⁷
- 2.45 By the time conflict erupted again in 1998, the legacy of colonial rule and four decades of bad governance left the Congolese people impoverished, disenfranchised and more divided along ethnic lines than ever.

II. Uganda's Role in the 1998 Conflict

A. THE PARTIES TO THE CONFLICT

2.46 Faced with criticism from all sides, President Kabila turned against his erstwhile allies, especially Rwanda, which had maintained a major presence in the

40

¹³⁵ *Ibid.*; U.N. Human Rights, Office of the High Commissioner, *Statement by Mrs Mary Robinson, U.N. High Commissioner for Human Rights, available at* http://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=3626&LangID=E (last accessed 16 Jan. 2018), Annex 7.

¹³⁶ François Ngolet, Crisis in the Congo (2011), pp. 6-7, Annex 86.

¹³⁷ U.N. Mapping Report, para. 302, Annex 25.

DRC following Kabila's rise to power. Senior Rwandan officials even held positions of power in the new Kabila administration. The Chief of Staff for the Congolese Army, for example, was a Rwandan general, James Kabarebe. In July 1998, Kabila summarily dismissed General Kabarebe and ordered all Rwandan soldiers to leave DRC territory. 138

2.47 On 2 August 1998, a coalition of Congolese rebel groups and Rwandan forces launched a rebellion intended to overthrow Kabila. The Kabila administration attempted to mobilise public support by inciting ethnic hostilities against the Rwandans, and "embarked on a campaign of hunting down Tutsis, Banyamulenge [Congolese Tutsis] and people of Rwandan origin in general." The head of President Kabila's cabinet, Mr Abdoulaye Yerodia Ndombasi, "stirred up hatred against the Tutsis, comparing them to a 'virus, a mosquito and filth that must be crushed with determination and resolve". 141

2.48 Unable to quell the rebellion alone, Kabila sought assistance from other neighbouring States. Angola, Chad, Libya, Namibia, Sudan and Zimbabwe all sent troops and provided assistance. The Court previously found that Uganda intervened on 7 August 1998. 142

2.49 Soon after the conflict erupted, the DRC was effectively divided into two zones. One, in the east, was administered by the rebel group *Rassemblement Congolais pour la Démocratie* ("RCD") and its armed wing, the *Armée nationale*

¹³⁸ *Ibid.*, para. 308.

¹³⁹ *Ibid.*, paras. 308-309.

¹⁴⁰ *Ibid.*, para. 312.

¹⁴¹ *Ibid.*, para. 313.

¹⁴² Armed Activities (2005), para. 149.

congolaise ("ANC"), with the assistance of Burundi, Rwanda and Uganda. The other zone, in the west, was controlled by the DRC government with the support of its external allies. 143

2.50 In addition to the presence in the DRC of these national armies, at least 21 major irregular armed groups, and a larger number of smaller irregular groups, were also embroiled in the conflict.¹⁴⁴

2.51 Ever-shifting alliances made the conflict highly complex and difficult to bring to a close. Kabila variously formed alliances with different rebel groups, including the Mayi-Mayi armed groups, the ex-FAR/Interahamwe, the Burundian Hutu armed group, the *Forces pour la défense de la démocratie* ("FDD"), and the *Armée de libération du Rwanda* ("ALiR"). In November 1998, Jean-Pierre Bemba created a new political and military movement, the MLC, which controlled most of Equateur Province. And in March 1999, the RCD split into two factions: the RCD-Goma and the RCD-ML. 147 Each had its own armed group (the ANC and the APC, respectively). There was still another rebel group called RCD-National or RCD-N.

¹⁴³ U.N. Mapping Report, para. 309, Annex 25.

¹⁴⁴ *Ibid.*, paras. 19-20, 38, note 36. Rebel groups included: the Rassemblement congolais pour la démocratie–Goma (RCD-G), the Mouvement national de libération du Congo (MLC), the Rassemblement congolais pour la démocratie/Kisangani–Mouvement de libération (RCD-K/ML), the Rassemblement congolais pour la démocratie–National (RCD-N), the Hema militia [Union des patriotes congolais (UPC) and Parti pour l'unité et la sauvegarde du Congo (PUSIC)], the Lendu/Ngiti militia [Front nationaliste and intégrationniste (FNI) and Forces de résistance patriotique en Ituri (FPRI)], the Forces armées populaires congolaises (FAPC), the Mayi-Mayi, the Mudundu-40, the Forces de Masunzu and the ex-Forces armées rwandaises and Interahamwe (ex-FAR /Interahamwe).

¹⁴⁵ U.N. Mapping Report, para. 310, Annex 25.

¹⁴⁶ *Ibid*.

¹⁴⁷ *Ibid*.

- 2.52 In its 2005 Judgment, the Court observed that "the actions of the various parties in the complex conflict in the DRC have contributed to the immense suffering faced by the Congolese population." While Uganda understands that "the widespread responsibility of the States of the region cannot excuse the unlawful military action of Uganda", it nevertheless remains true that Uganda was just one of a very large number of actors involved in the conflict.
- 2.53 A team deployed by the UN Office of the High Commissioner for Human Rights to map serious violations of international humanitarian law and international human rights that occurred in the DRC between 1993 and 2003 ("UN Mapping Report") found that *all* armed groups in the DRC were responsible for illegal acts, including the DRC and its allies.¹⁵⁰

2.54 Among other things, the UN Mapping Report found:

- The DRC security services and the Congolese army executed, tortured and raped civilians, recruited more than 4,000 child soldiers and specifically targeted humanitarian workers trying to rescue victims from bombardments;¹⁵¹
- The Zimbabwean army conducted indiscriminate attacks with heavy weapons that killed and wounded hundreds of civilians and caused thousands more to be displaced. They also destroyed healthcare institutions and places of worship;¹⁵²

¹⁴⁸ Armed Activities (2005), para. 221.

¹⁴⁹ *Ibid.*, para. 151.

¹⁵⁰ U.N. Mapping Report, para. 525, Annex 25.

¹⁵¹ *Ibid.*, paras. 312-313, 329, 334, 718.

¹⁵² *Ibid.*, para. 334.

- The Chadian army burned civilians alive on multiple occasions; 153 and
- The Angolan army pillaged homes, and killed and raped civilians on such a massive scale that the UN Mapping Report suggested that the Angolan military hierarchy condoned and planned the atrocities. 154
- 2.55 In addition to Uganda, the DRC also brought Applications to the Court instituting proceedings against Burundi and Rwanda alleging, *inter alia*, widespread humanitarian abuses. ¹⁵⁵ Both cases were, however, ultimately removed from the Court's General List because, unlike Uganda, neither Burundi nor Rwanda accepts the compulsory jurisdiction of the Court.
- 2.56 The UN Mapping Report documented a total of more than 339 serious violations of human rights and international humanitarian law in the territory of the DRC between August 1998 and June 2003. Yet only a small fraction of these were linked to Uganda in any way.
- 2.57 In this respect, it is important to note that, at the height of its deployment, the UPDF had no more than 10,000 troops in the DRC. By comparison, other countries and rebel groups had much larger forces. According to MONUC, there

¹⁵³ *Ibid.*, para. 382.

¹⁵⁴ *Ibid.*, para. 332.

¹⁵⁵ Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda), Application Instituting Proceedings, 1999, General List No. 117, filed on 23 June 1999; Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Burundi), Application Instituting Proceedings, 1999, General List No. 115, filed on 23 June 1999; DRC White Paper, p. 134, para. 8.

¹⁵⁶ *U.N. Mapping Report*, paras. 19, 21, Annex 25.

were approximately 23,400 Rwandan troops and 12,000 Zimbabwean troops, among others.¹⁵⁷

2.58 The roughly contemporaneous conflict between Eritrea and Ethiopia provides a useful contrast. During the war ensuing from Eritrea's invasion of Ethiopia in 1998, the two sides each deployed at least 300,000 soldiers. Each side ultimately was awarded approximately US\$ 170 million in compensation by the EECC for war-related harm caused to the other side. By contrast, the number of Ugandan soldiers deployed to the DRC were some 30 times less than the number of soldiers deployed by either Eritrea or Ethiopia.

2.59 Uganda reiterates that it does *not* raise these issues to dispute or otherwise minimise its responsibility for its own acts as found by the Court in 2005.¹⁵⁹ It is, however, important to note that other actors too were responsible for contributing to the conflict in the DRC and should thus bear responsibility for their own acts (even if they cannot be brought before this Court).

2.60 It is important to note too that even though the Court found Uganda responsible for certain acts committed by UPDF soldiers, it expressly found that Uganda did *not* have a policy of terror. The Court also specifically found that

¹⁵⁷ IRIN, *15,312 foreign forces withdrawn so far, says U.N.*, available at http://www.irinnews.org/fr/node/203505 (2 Oct. 2002), Annex 93.

¹⁵⁸ See, e.g., International Crisis Group, *Ethiopia and Eritrea: War or Peace?* ICG Africa Report No. 68 (24 Sept. 2003), p. 9. In its decision on compensation, the Eritrea-Ethiopia Claims Commission awarded a total of \$161,455,000 to Eritrea and a total of US\$ 174,036,520 to Ethiopia, Annex 55.

¹⁵⁹ *Armed Activities* (2005), para. 345.

¹⁶⁰ *Ibid.*, para. 212.

Uganda was not in control of, or responsible for, the conduct of other armed groups to which it was providing assistance, such as the MLC and RCD.¹⁶¹

2.61 Reports also indicate that on numerous occasions Uganda actively took steps to protect civilians from the consequences of hostilities. The UN Mapping Report, for example, indicated that Uganda (unlike Rwanda) warned the local population in Kisangani before the beginning of hostilities and, on multiple occasions, asked that certain civilian areas be evacuated. On repeated occasions in 2002 and 2003, UPDF troops also intervened in Ituri to stop rebel groups' violence directed at civilians. 163

B. UGANDA'S ROLE IN ITURI

2.62 In 2005, the Court found that Uganda was an occupying Power in Ituri and, as such, was under the obligation "to take all the measures in its power to restore, and ensure, as far as possible, public order and safety in the occupied area, while respecting, unless absolutely prevented, the laws in force in the DRC". ¹⁶⁴ The Court also concluded that Uganda failed to comply with those obligations. ¹⁶⁵

2.63 In evaluating conditions in Ituri, it is important to recall the complex, deeply rooted conflict that had afflicted the region for more than a century before 1998. Uganda found itself in an impossible situation. Many of the illegal acts that

¹⁶¹ *Ibid.*, paras. 160, 177.

¹⁶² *U.N. Mapping Report*, paras. 362-363, Annex 25.

¹⁶³ See, e.g., ibid., paras. 413, 422.

¹⁶⁴ Armed Activities (2005), para. 178.

¹⁶⁵ *Ibid.*, para. 345.

occurred in Ituri were beyond Uganda's—or indeed anybody's—power to control. Uganda neither created the conflict in Ituri, nor was capable of resolving it.

2.64 Given its limited resources, Uganda's footprint in the DRC remained limited. According to one expert, "[i]n most rural areas, the UPDF did not station troops, leaving ample political space for the formation and regulation of public affairs by local militia groups." These same factors, together with the equatorial terrain, made it difficult for the UPDF to keep track of militias. 167

2.65 Nevertheless, both Uganda and the RCD-ML took steps to mediate the conflict between the Hema and the Lendu and restore peace. Ultimately, the RCD-ML's attempts to organise inter-community meetings led to the signing of peace agreements in October 1999.¹⁶⁸ This initiative was successful in restoring calm in the north of Ituri, but tensions continued to break out between Hema and Lendu militias in the south.¹⁶⁹

2.66 In December, Ugandan President Yoweri Museveni invited 18 delegates, including Lendu and Hema representatives, to Kampala.¹⁷⁰ The talks led to the appointment of Ernest Uringi Padolo, a DRC national who, as a member of the

¹⁶⁶ Alex Veit, *Intervention as Indirect Rule: Civil War and Statebuilding in the Democratic Republic of Congo* (2010), p. 122, Annex 85.

¹⁶⁷ IRIN, Special Report on the Ituri Clashes Part II: The Ugandan position, available at http://www.irinnews.org/report/12700/drc-irin-special-report-ituri-clashes-part-two (3 Mar. 2000), Annex 92.

¹⁶⁸ U.N. Mapping Report, para. 369, Annex 25.

¹⁶⁹ *Ibid*.

¹⁷⁰ Ibid., p. 370; Veit, Intervention as Indirect Rule: Civil War and Statebuilding in the Democratic Republic of Congo (2010), pp. 114-115, Annex 85. IRIN, Special Report on the Ituri Clashes Part II: The Ugandan position, available at http://www.irinnews.org/report/12700/drc-irin-special-report-ituri-clashes-part-two (3 Mar. 2000), Annex 92.

Alur community, was seen as neutral in the conflict as governor.¹⁷¹ Based on complaints from residents of Ituri, Uganda also investigated and dismissed Ugandan soldiers for misconduct, replacing them with new troops.¹⁷² According to the UN Mapping Report: "These initiatives helped to restore calm to the district over the course of 2000".¹⁷³

2.67 As in other areas of the DRC, shifting alliances and splits within rebel groups protracted the conflict in Ituri. Internal divisions in the RCD-ML led to renewed hostilities, which Uganda unsuccessfully tried to mediate. ¹⁷⁴ Uganda also attempted to help unite the RCD-ML and MLC within a single movement, the *Front de Libération du Congo* ("FLC"), under Jean-Pierre Bemba's leadership. In his book (on which the DRC relies in its Memorial ¹⁷⁵), Bemba emphasised the limits of Uganda's power to stop the cycle of violence in Ituri. According to Bemba, "no political or administrative authority [was] capable of calming tensions on the ground and to reason with the extremists. ¹⁷⁶

2.68 The FLC's efforts to organise consultations with the traditional chiefs were somewhat successful. The parties signed a memorandum agreement in February 2001 providing for an immediate cessation of hostilities, the disarmament of the

¹⁷¹ U.N. Mapping Report, para. 370, Annex 25.

¹⁷² IRIN, Special Report on the Ituri Clashes Part II: The Ugandan position, available at http://www.irinnews.org/report/12700/drc-irin-special-report-ituri-clashes-part-two (3 Mar. 2000), Annex 92.

¹⁷³ U.N. Mapping Report, para. 370, Annex 25.

¹⁷⁴ *Ibid.*, para. 404.

¹⁷⁵ Memorial of the Democratic Republic of the Congo (2016) (hereinafter "DRCM"), paras. 2.47, 2.48, note 129; DRCM, paras. 2.51, 2.52, note 132; DRCM, paras. 2.53, 2.55, 2.85, 5.16.

¹⁷⁶ Bemba, *Le Choix de la Liberté* (2010), p. 100 (Translation by Counsel, original in French: "Pendant plus de deux mois, aucune autorité politico-administrative n'est en mesure de calmer sur terrain les tensions et ramener les extrémistes à la raison. Les commandants ougandais semblent débordés par le déferlement de violences et de massacres."), DRCM Annex 2.13.

militiamen and the dismantling of the training camps. According to the UN Mapping Report, "the number of violations decreased significantly" during the months that followed, though "inter-community tension" remained high and "the militias continued to arm themselves."

2.69 Unfortunately, Uganda's efforts to unite the RCD-ML and MLC and stem the violence were soon thwarted by the RCD-ML's alliance with the DRC government. The involvement of the DRC and Rwanda governments, which provided training and support to rebel groups, contributed to wide-spread abuses in Ituri. In reaction, Thomas Lubanga and Hema soldiers of the APC broke away from the APC/RCD-ML in February 2002 to form a new political and military Hema group, the *Union des patriotes congolais* ("UPC"). In response to this, the APC, supported by the Congolese government, encouraged members of the Lendu militias to join forces in the *Front National Intégrationiste* ("FNI") and the *Forces de résistance patriotique en Ituri* ("FRPI"). At first, the UPC allied with Uganda but, in late 2002, it formed an alliance with Rwanda and cut ties with Uganda.

-

¹⁷⁷ U.N. Mapping Report, para. 408, Annex 25.

¹⁷⁸ Ibid., paras. 395, 409; Veit, Intervention as Indirect Rule: Civil War and Statebuilding in the Democratic Republic of Congo (2010), p. 116, Annex 85.

¹⁷⁹ U.N. Security Council, *Special Report on the events in Ituri, January 2002 - December 2003*, U.N. Doc. S/2004/573 (16 July 2004), paras. 2-4, DRCM Annex 1.6; Veit, *Intervention as Indirect Rule: Civil War and Statebuilding in the Democratic Republic of Congo* (2010), pp. 116-119, Annex 85

¹⁸⁰ U.N. Mapping Report, para. 409, Annex 25.

¹⁸¹ *Ibid*.

¹⁸² *Ibid.*, para. 418.

- 2.70 On many occasions, UPDF soldiers tried to protect the victims of mass attacks. ¹⁸³ In 2002, UPDF troops intervened in Mabanga, in the Djugu region of Ituri, to provide cover for the flight of non-natives who were targeted by Hema-Gegere militiamen. ¹⁸⁴ And on several occasions in 2003, UPDF soldiers in Kilo and Bunia intervened to stop the FNI rebel group's violence directed at civilians. ¹⁸⁵
- 2.71 Unable to control the various competing militias in Ituri, Uganda faced a difficult choice: violate its undertakings under the Lusaka process, increase troop levels and wade deeper into the turbulent waters of the conflict, or withdraw altogether.
- 2.72 Uganda initially opted for the latter. When in April 2001 President Museveni announced that Ugandan would withdraw its troops from the DRC immediately, ahead of the schedule set forth in the Lusaka and related agreements, the UN Secretary-General intervened and specifically asked Ugandan troops to stay in the DRC and "adhere to the agreed timetable for orderly withdrawal". ¹⁸⁶ Uganda's presence was thus recognised as being, on balance, in the interests of peace and stability in the region, and certainly better than any alternative.
- 2.73 Consistent with its Lusaka undertakings, Uganda began the process of withdrawing from the conflict by participating in the Inter-Congolese dialogue,

¹⁸³ IRIN, Special Report on the Ituri Clashes Part II: The Ugandan position, available at http://www.irinnews.org/report/12700/drc-irin-special-report-ituri-clashes-part-two (3 Mar. 2000), Annex 92.

¹⁸⁴ U.N. Mapping Report, para. 413, Annex 25.

¹⁸⁵ *Ibid.*, paras. 421-422.

¹⁸⁶ Armed Activities (2005), para. 97; Letter from Kofi Annan, U.N. Secretary General to Yoweri Kaguta Museveni, President and Minister of Defence, Republic of Uganda (4 May 2001), Annex 36.

starting on 25 February 2002 in Sun City, South Africa. ¹⁸⁷ Uganda and the DRC then concluded a final peace agreement in Luanda on 6 September 2002. ¹⁸⁸ Uganda fully withdrew its troops by 2 June 2003. ¹⁸⁹

C. THE POST-WAR SITUATION

- 2.74 After Uganda's withdrawal, the violence in the eastern DRC continued as it had even before 1998.¹⁹⁰ To this day, rebel groups in Ituri continue to attack civilians.¹⁹¹
- 2.75 When the UPDF left Ituri, thousands of civilians, fearing for their safety, followed the UPDF troops to Uganda. 192 Some settled in Uganda. Others returned home after fighting briefly subsided, only to come back to Uganda when fighting erupted again. 193

¹⁸⁷ U.N. Mapping Report, para. 396, Annex 25.

¹⁸⁸ *Ibid.*, para. 397.

¹⁸⁹ Armed Activities (2005), para. 264.

¹⁹⁰ François Emizet Kisangani, Guerres Civiles dans la République Démocratique du Congo 1960-2010 (2015), p. 301, Annex 90; U.N. Mapping Report, paras. 423-429, Annex 25.

¹⁹¹ Laurent Oussou, M.O.N.U.S.C.O., La Force de la MONUSCO Invite les Communautés en Ituri à Dialoguer pour la Paix, available at https://monusco.unmissions.org/la-force-de-la-monusco-invite-les-communaut%C3%A9s-en-ituri-%C3%A0-dialoguer-pour-la-paix (11 Aug. 2017), p. 2, Annex 100; U.N. Office for the Coordination of Humanitarian Affairs, DR Congo: Weekly Humanitarian Update (19-23 June 2017), available at https://reliefweb.int/report/democratic-republic-congo/dr-congo-weekly-humanitarian-update-19-23-june-2017 (23 June 2017), Annex 30; U.N. Security Council, 7998th Meeting, Security Council Members Stress Need for Democratic Republic of Congo to Hold Fair, Free, Inclusive Elections without Further Delay, U.N. Doc. SC/12907 (11 July 2017), Annex 32.

¹⁹² U.N. Mapping Report, para. 423, Annex 25; M. Mutuli, ed. V. Tan, U.N.H.C.R., *Uganda counts close to 20,000 new Congolese refugees from Ituri region, available at* http://www.unhcr.org/en-us/news/latest/2003/5/3ec7977f4/uganda-counts-close-20000-new-congolese-refugees-ituri-region.html (19 May 2003), Annex 94.

¹⁹³ M. Mutuli, ed. V. Tan, U.N.H.C.R., *Congolese march to Uganda: "Soldiers before us, death behind us"*, available at http://www.unhcr.org/en-us/news/latest/2003/5/3ecb770f9/congolese-

2.76 Since 2003, Uganda has been the primary host country for refugees from the DRC.¹⁹⁴ As of late 2017, there are more than 236,500 Congolese refugees remaining in Uganda.¹⁹⁵ Uganda's refugee and asylum policies are widely recognised as being among the most progressive in the world.¹⁹⁶ Uganda provides all refugees, including those from the DRC, land to farm and access to the same public services as Ugandan nationals, including education. Refugees also have the right to work and to establish their own businesses, and enjoy freedom of movement.¹⁹⁷

2.77 The UN Secretary-General stated in June 2017 that "Uganda has had an exemplary refugee policy in the past and, even today faced with the largest refugee in-flow of the past year, Uganda remains a symbol of the integrity of the refugee protection regime." ¹⁹⁸ He called on the international community to support Uganda

march-uganda-soldiers-death-behind.html (21 May 2003), Annex 95; D. Nthengwe, ed. L. Dobbs, U.N.H.C.R., 30,000 Congolese flee to escape fresh conflict in Ituri district, available at http://www.unhcr.org/en-us/news/latest/2009/4/49db6d312/30000-congolese-flee-escape-fresh-conflict-ituri-district.html (7 Apr. 2009), Annex 24.

¹⁹⁴ U.N.H.C.R., *U.N.H.C.R. Global Appeal 2004, Uganda, available at* http://www.unhcr.org/3fc7548c0.html (31 Dec. 2003), p. 113, Annex 17.

¹⁹⁵ U.N.H.C.R., *U.N.H.C.R. warns of worsening displacement in Democratic Republic of Congo, available at* http://www.unhcr.org/en-us/news/briefing/2017/10/59eefe3e4/unhcr-warns-worsening-displacement-democratic-republic-congo.html?query=uganda (24 Oct. 2017), Annex 34.

¹⁹⁷ Charles Yaxley, U.N.H.C.R., *Uganda hosts record 500,000 refugees and asylum-seekers*, *available at* http://www.unhcr.org/567414b26.html (18 Dec. 2015), Annex 29; Catherine Wachiaya, U.N.H.C.R., *Eager refugees cram crowded classrooms in Ungandan school*, *available at*http://www.unhcr.org/afr/news/stories/2017/9/59b686104/eager-refugees-cram-crowded-classrooms-ugandan-school.html (11 Sept. 2017), Annex 33.

¹⁹⁸ U.N. Secretary-General, *The Secretary-General's opening remarks to the Uganda Solidarity Summit on Refugees*, *available at* https://www.un.org/sg/en/content/sg/statement/2017-06-23/secretary-generals-opening-remarks-uganda-solidarity-summit-refugees (23 June 2017), Annex 31.

"because the circumstances in which these sacrifices are being made are extremely challenging." ¹⁹⁹

2.78 Since the end of the conflict, Uganda has also tried to promote peace in the DRC and in the region more generally. For example, Uganda played an active role in facilitating talks between the Government of the DRC and the M-23 rebel group, which resulted in a December 2013 agreement to end hostilities between them.

2.79 The UN Security Council recognized Uganda's role in a Statement on 14 November 2013 by the President of the Security Council²⁰⁰, which reads in part: "The Council commends the efforts of President Museveni and Defense Minister Kiyonga in facilitating the conclusion of these talks."²⁰¹ The UN Security Council further echoed these views in Resolution 2147 (2014). Mary Robinson, Special Envoy of the UN Secretary-General to the Great Lakes Region, and other UN officials, also commended Ugandan President Museveni and his Defense Minister, Crispus Kiyonga, for their "patient and determined leadership" in facilitating that agreement.²⁰²

2.80 Even the DRC government itself has expressly recognised Uganda's contributions to stabilisation efforts in the region. At a ministerial meeting in Johannesburg in 2012, for example, the DRC Minister of Justice and Human Rights

¹⁹⁹ *Ibid*.

²⁰⁰ U.N. Security Council, 7150th meeting, *The extension of the Mandate U.N. Stabilization Mission in the Democratic Republic of the Congo (MONUSCO)*, U.N. Doc. S/RES/2147 (2014) (28 Mar. 2014), p. 2, Annex 28.

²⁰¹ U.N. Security Council, *Statement by the President of the Security Council 7058th Meeting*, U.N. Doc. S/PRST/2013/17 (14 Nov. 2013), Annex 27.

²⁰² U.N. News Centre, *DR Congo: U.N. envoy welcomes end of M23 rebellion, commitment to peace talks*, available at *http://www.un.org/apps/news/story.asp?NewsID=46423#.Wl6eR6inGbh* (5 Nov. 2013), Annex 26.

praised Uganda's efforts and "expressed the gratitude of the Congolese Government for the positive role played by Uganda in the stabilization of the Great Lakes region". ²⁰³

*

2.81 Instability and violence have been a feature of life in the DRC since colonial times. The significant problems the DRC faces did not start in 1998 at the time of Uganda's intervention and they did not end in 2003 at the time of its withdrawal. Even during the period of the conflict, Uganda was just one of a large number of international and national actors. The DRC therefore cannot hope to ascribe responsibility to Uganda for everything that happened during the conflict, let alone before and after the conflict, as it effectively tries to do with the exorbitant compensation claim presented in its Memorial.

²⁰³ Republic of Uganda and Democratic Republic of the Congo, *Minutes of the Ministerial Meeting* (13-14 Sept. 2012), p. 2, UM Annex 7.

CHAPTER 3

SYSTEMATIC FLAWS IN THE DRC'S APPROACH TO EVIDENCE

- 3.1 The Court stated in paragraph 260 of the 2005 Judgment that at this reparations phase the DRC would have to: (1) "prove" (2) the "exact injury" that was suffered (3) "as a result of" (4) "specific actions of Uganda" constituting international wrongful acts for which it is responsible. 204 The DRC Memorial fails to take any of these elements seriously. It fails to sustain its burden of presenting evidence making any of the required showings with a high degree of certainty. Indeed, the evidence it offers does not prove the damages it claims to any degree of certainty, much less to a high degree of certainty. It establishes neither the exact injury allegedly suffered nor the existence of a causal connection to specific actions of Uganda.
- 3.2 Rather than come forward with the requisite evidence, the DRC essentially invokes the Court's findings in the 2005 Judgment as, by themselves, proving that Uganda must pay compensation in the excessive amount requested (US \$13.4 billion). This approach is plainly inconsistent with the express wording of paragraph 260 of the 2005 Judgment. It is also inconsistent with the DRC's own previous position. In the 2005 Judgment, the Court observed: "The DRC acknowledges that 'for purposes of determining the extent of reparation it must specify the nature of the injury and establish the causal link with the initial wrongful act". ²⁰⁵

²⁰⁴Armed Activities (2005), para. 260.

²⁰⁵ *Ibid.*, para. 258.

- 3.3 The DRC knows well what the Court decided in the 2005 Judgment and what it did not. Noting the DRCs' repeated assertion that it was seeking a judgment "of principle" at the merits phase, the DRC's Judge *ad hoc*, Judge Verhoeven, characterised the Court's Judgment as in the nature of a "declaratory" decision, ²⁰⁶ meaning that it only generally passed upon the DRC's claim that Uganda acted wrongfully in certain categories, without addressing the specific unlawful conduct of Uganda within those categories.
- 3.4 Thus, as Judge Verhoeven observed, "it is only in a subsequent phase of the proceedings, once there has been a finding of unlawful conduct, that the Court is called upon to decide the form and extent of the reparation, failing agreement thereon between the parties". He continued that in "the present case the existence of the injuries is beyond doubt. What is distinctive here however is that the Court has treated them by category, as it were, without ruling on each injurious 'incident'". ²⁰⁸
- 3.5 Judge Verhoeven recognised that such detailed rulings would be necessary at the reparations phase.

"In reality, the form and amount of reparation will not be the only questions to be decided by the Court if the Parties fail to agree on them; it will also be for the Court to establish, in regard to those "incidents" falling within the category on which the Court has ruled, the causal nexus between an injury suffered

²⁰⁶ Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Declaration of Judge ad hoc Verhoeven, I.C.J. Reports 2005 (hereinafter "Declaration of Judge ad hoc Verhoeven"), para. 2.

²⁰⁷ Declaration of ad hoc Judge Verhoeven, para. 2.

²⁰⁸ *Ibid.*, para. 2(a).

and an act by the Respondent engaging its responsibility". 209

He also recognised that securing such rulings would be no easy task: "[I]n the context of an armed conflict the causal connection between the injury and the violation of the law will often be difficult to prove, at least under the standards traditionally applied for this purpose".²¹⁰

- 3.6 Uganda wishes to make clear that it is not arguing that the DRC must relitigate the findings made in 2005. The point is, however, that those findings were made at a very *general* level; the Court had before it broad evidence that the violations occurred, sufficient to establish that Uganda committed certain categories of wrongful acts, over a general period of time, in certain general areas of the DRC. Those findings were not *specific* to any particular incident involving injury that occurred as a result of Uganda's unlawful acts, including the scope and valuation of such injury.
- 3.7 This is clear from the text of the 2005 Judgment itself, in which the Court expressly stated that it was not making any findings of fact with respect to specific incidents of harm: "In reaching its decision on the DRC claim, it is not necessary for the Court to make findings of fact with regard to each individual incident alleged".²¹¹
- 3.8 As Judge Verhoeven recognised, it is therefore incumbent on the DRC at this phase of the proceedings to present evidence with respect to specific "incidents" falling within each category of wrongful acts on which the Court ruled

²⁰⁹ *Ibid*.

²¹⁰ *Ibid.*, para. 5.

²¹¹ Armed Activities (2005), para. 239.

in 2005. Just as was required of the applicant States in the *Corfu Channel* and *Diallo* cases (discussed below), the DRC must prove, with convincing evidence, the specific harm that the DRC suffered as a result of specific wrongful acts of Uganda, as well as the valuation of that harm.

- 3.9 The DRC Memorial fails in this task. Although it pursues different tactics, in most instances the DRC adopts the view that it is enough to provide a few "illustrations" of circumstances where harm allegedly occurred, in combination with various numbers appearing in a few reports by international organisations or NGOs, which it then combines with arbitrary "multipliers", "distribution keys" and "percentages", to come up with extraordinarily inflated compensation claims.
- 3.10 In fact, the DRC is remarkably candid in acknowledging that it makes no meaningful effort to prove the exact injury suffered as a result of specific incidents of internationally wrongful actions of Uganda. It states, for example, that it will not "individualize and identify each specific injury caused during" the war.²¹² Likewise, it states that "acts of damage will not be distinguished based on the rule of international law that was violated".²¹³
- 3.11 Rather than present evidence to the Court *now* demonstrating the exact nature of harm to persons or property, and the connection of such harm to wrongful acts by Uganda, the DRC proposes that it simply be given a large sum of money, which will then be distributed *later* to persons through "a fund/commission" that is "charged with establishing a procedure by which the victims will be able to

²¹² DRCM, para. 2.07.

²¹³ DRCM, para. 2.05 (Translation by Counsel, original in French: "les dommages ne seront pas distingués en fonction de la règle de droit international qui a été violée".).

present their individual claims for restitution, reviewing these claims and distributing the sums due as compensation". 214

3.12 Uganda considers this is an admission that the DRC's current claims bear no real relationship with the specific persons or property that purportedly suffered harm. Uganda respectfully submits that the Court should not countenance this "cart-before-the horse" approach, which is incompatible with the Court's express determination in 2005 as to what the DRC would have to prove at this reparation phase.

*

3.13 The balance of this Chapter will expose the systemic flaws that characterise the DRC's approach to evidence throughout its Memorial. Section I begins by demonstrating that the DRC bears the burden of proof on its claims for reparation. Section II then shows that the DRC must carry that burden by presenting convincing evidence proving, with a high level of certainty, (1) that financially assessable injury occurred as the result of the violations of international law committed by Uganda, and (2) the valuation of such injury. Finally, Section III demonstrates that the DRC does not prove its damages systematically and that the principal types of evidence on which it relies are deeply flawed. As such, the DRC has not carried its burden of proof.

_

²¹⁴ DRCM, para. 7.51 (Translation by Counsel, original in French: "chargée de la mise sur pied de la procédure par laquelle les victimes pourront présenter leurs demandes de réparation individuelles, de l'examen de ces demandes et de la répartition des sommes dues à titre d'indemnisation".).

I. The DRC Bears the Burden of Proof

3.14 A fundamental principle of international procedural law—one that the Court has repeatedly endorsed—is that the party claiming certain facts bears the burden of establishing them through sufficient evidence (*onus probandi incumbit actori*). In *Temple of Preah Vihear*, the Court stated that the "burden of proof in respect of [facts and contentions which are asserted or put forward by one Party or the other] will of course lie on the Party asserting or putting them forward". More recently, in *Pulp Mills on the River Uruguay*, the Court reiterated that "in accordance with the well-established principle of *onus probandi incumbit actori*, it is the duty of the party which asserts certain facts to establish the existence of such facts. This principle has been consistently upheld by the Court". ²¹⁶

3.15 These findings were made in the context of deciding facts at the merits stage, yet the same principle holds true with respect to proving facts at the

²¹⁵ Temple of Preah Vihear (Cambodia v. Thailand), Judgment, I.C.J. Reports 1962, p. 16.

²¹⁶ Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010, para. 162. See also Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America) Merits, Judgment, I.C.J. Reports 1986 (hereinafter "Nicaragua v. United States of America (Merits, 1986)"), para. 101 ("[I]t is the litigant seeking to establish a fact who bears the burden of proving it".); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (hereinafter "Bosnia and Herzegovina v. Serbia and Montenegro (2007)"), para. 204 ("On the burden or onus of proof, it is well established in general that the applicant must establish its case and that a party asserting a fact must establish it".); Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment, I.C.J. Reports 2008, para. 45 ("It is a general principle of law, confirmed by the jurisprudence of this Court, that a party which advances a point of fact in support of its claim must establish that fact".); Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, I.C.J. Reports 2009, para. 68 ("As the Court has said on a number of occasions, the party asserting a fact as a basis of its claim must establish it".); Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Judgment, I.C.J. Reports 2012 (hereinafter "Diallo (2012)"), para. 15 ("As a general rule, it is for the party which alleges a fact in support of its claims to prove the existence of that fact".); Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece), Judgment, I.C.J. Reports 2011, para. 72 ("[I]n general, it is the duty of the party that asserts certain facts to establish the existence of such facts".).

reparations stage. At the reparation phase, there are various types of facts that were not at issue in the merits stage but that must be determined to support a claim for reparation. These include the location and time of an incident during which harm occurred, the number persons who died or were injured as a result of that incident (or the property harmed), and the connection between that incident and the acts of the respondent State that were in violation of international law. Likewise, to the extent that national law might be relevant for demonstrating a particular proposition, such as the amount typically paid for a wrongful death in a particular country (the DRC has cited to its national case law for this purpose), establishing the content of that national law is an issue of fact that must be proven.²¹⁷

3.16 Thus, in the *Corfu Channel* case, the Court stated that a reparation phase was necessary because "the United Kingdom Government had not submitted its evidence" with regard to the various sums claimed and Albania had not yet responded.²¹⁸ Consequently, at the reparation phase, the Court expected the United Kingdom to submit evidence in support of the three heads of damages it claimed: (1) claims in respect of deaths and injuries of naval personnel; (2) damage to the destroyer *Volage*; and (3) loss of the destroyer *Saumarez*.²¹⁹

3.17 For each of these claims, the United Kingdom provided sworn affidavits and documentary evidence directly supporting the sums requested. Notably, it did *not* pursue reparation for more speculative or indirect harms. For example, it made

²¹⁷ Certain German Interests in Polish Upper Silesia, Merits Judgment, 1926, P.C.I.J. Series A, No. 7, p. 19 ("From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States".).

61

²¹⁸ Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania), Compensation Judgment, I.C.J. Reports 1949 (hereinafter "Corfu Channel (Compensation, 1949)"), p. 245.

²¹⁹ Corfu Channel (Compensation, 1949), pp. 248-250.

no claims for: sailors who were killed but had no dependents; the cost of training other sailors to replace those killed; the loss of clothing and personal effects; the loss of the use of the *Saumarez* during the period necessary to replace it; or the loss of the use of *Volage* during its repairs.²²⁰

3.18 In the *Diallo* case, notwithstanding its findings on the merits that international law had been violated, the Court framed the applicant State's burden at the reparations phase in terms of proving, for each "head of damage", the facts establishing three elements: (1) whether there exists specific injury falling under that head of damage; (2) whether such injury is attributable to the respondent State; and (3) the valuation of such injury.

3.19 The Court stated in *Diallo* that "the starting point in the Court's inquiry will be the evidence adduced by Guinea to support its claim under each head of damage...". As to "each head of damage, the Court will consider whether an injury is established. It will then 'ascertain whether, and to what extent, the injury asserted by the Applicant is the consequence of wrongful conduct by the Respondent'. ... If the existence of injury and causation is established, the Court will then determine the valuation". 222

3.20 This is not to say that an applicant State must again prove the facts that established the respondent State's responsibility at the merits phase. But it must prove the facts that establish an entitlement to the specific reparation sought by the

²²⁰ Observations submitted under the Order of the Court of 9th April 1949, by the Government of the United Kingdom of Great Britain and Northern Ireland, in *Corfu Channel* (Compensation, 1949), p. 392.

²²¹ Diallo (2012), para. 16.

²²² Diallo (2012), para. 14 quoting to Bosnia and Herzegovina v. Serbia and Montenegro (2007).

applicant, notably with respect to the existence, causation and valuation of particular injuries.

- 3.21 If the applicant State, for example, asserts that a general violation of international law resulted in compensatory harm valued at US\$ five million, it need not again prove that the general violation occurred or that the respondent State bears responsibility for it. What it must do is present facts proving (1) the specific injury that occurred; (2) that the specific injury resulted from wrongful conduct attributable to respondent State; and (3) that the specific injury is properly valued at US\$ five million. It is precisely for these reasons that the Court stated in its 2005 Judgment that the DRC must "prove the exact injury that was suffered as a result of specific actions of Uganda constituting international wrongful acts for which it is responsible". 223
- 3.22 The consequence of failing to discharge this burden at the reparation phase is that the applicant State cannot receive a decision in its favor. ²²⁴ For example, the Court determined in the case concerning the *Genocide Convention (Bosnia v. Serbia)* that Serbia violated its obligation of prevention under the Genocide Convention. At the same time, it did not find proven that Serbia's wrongful conduct resulted in injury.
- 3.23 The Court stated: "Since it now has to rule on the claim for reparation, it must ascertain *whether, and to what extent*, the injury asserted by the Applicant is the consequence of wrongful conduct by the Respondent with the consequence that

²²³ Armed Activities (2005), para. 260.

²²⁴ Nicaragua v. United States of America (Merits, 1986), para. 101 ("it is the litigant seeking to establish a fact who bears the burden of proving it; and in cases where evidence may not be forthcoming, a submission may in the judgment be rejected as unproved").

the Respondent should be required to make reparation for it...". The Court determined that there did not exist the degree of certainty needed to establish that the harm would have been averted if Serbia had complied with its obligation. Bosnia was therefore not entitled to any financial compensation for the wrongful act. It was only entitled to reparation in the form of satisfaction. 226

3.24 In that instance, the issue concerned an inability to prove a sufficient causal nexus between the wrongful act and the alleged harm. Nevertheless, the principle remains the same for all aspects of what must be proven at the reparation phase. Notwithstanding having prevailed on the merits, the applicant State still bears the burden of proving the facts showing *whether and to what extent* the alleged injury is the consequence of the respondent State's wrongful conduct, and its valuation.

3.25 Failure to do so does not alter the determinations on the merits. It means only that the applicant State failed to produce the evidence necessary to satisfy the Court as to the existence of a specific injury, the existence of a causal connection between that injury and the actions of the respondent State, and the valuation of the injury.

II. To Sustain Its Burden, the DRC Must Present Convincing Evidence Proving Financially Assessable Harm with a High Level of Certainty

3.26 The prior section showed that the DRC bears the burden of proving that specific injury occurred as a result of the violations of international law committed by Uganda, as well as the valuation of such harm. This section will demonstrate that to meet this burden, the DRC must present to the Court convincing evidence

64

-

²²⁵ Bosnia and Herzegovina v. Serbia and Montenegro (2007), para. 462 (emphasis added).

²²⁶ *Ibid.*, para. 463.

that establishes, with a high level of certainty, the three key elements at issue in this phase of the case: (1) the existence of specific harm; (2) the causal nexus between Uganda's wrongful act and that harm; and (3) the valuation of such harm.²²⁷ These three requirements are addressed in turn below.

A. THE REQUIREMENT TO PRESENT CONVINCING EVIDENCE PROVING SPECIFIC HARM WITH A HIGH LEVEL OF CERTAINTY

3.27 The Court's jurisprudence indicates that charges of "exceptional gravity" require a "special degree of certainty" and that evidence must "suffice to constitute decisive legal proof" or "conclusive evidence". ²²⁹ In *Genocide Convention (Bosnia v. Serbia)*, the Court stated:

"The Court has long recognized that claims against a State involving charges of exceptional gravity must be proved by evidence that is *fully conclusive*. ... The Court requires that it be *fully convinced* that the allegations made in the proceedings ... have been *clearly established*. The same standard applies to the proof of attribution for such acts". ²³⁰

3.28 Even in situations not involving charges of exceptional gravity, the Court has stated that it "requires proof at a *high level of certainty* appropriate to the seriousness of the allegation".²³¹

²²⁷ Armed Activities (2005), para. 260.

²²⁸ Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania), Merits Judgment, I.C.J. Reports 1949 (hereinafter "Corfu Channel (Merits, 1949)"), p. 17.

²²⁹ Corfu Channel (Merits, 1949), pp. 16-17.

²³⁰ Bosnia and Herzegovina v. Serbia and Montenegro (2007), para. 209 (emphasis added).

²³¹ Bosnia and Herzegovina v. Serbia and Montenegro (2007), para. 210 (emphasis added) (indicating the appropriate standard in assessing whether Serbia had violated its obligation to prevent genocide and to extradite persons charged with genocide).

3.29 At the merits stage of this case, the Court likewise proceeded on the basis that allegations of exceptional gravity must be proven with convincing evidence. The Court declined to reach findings when "it has not been presented with evidence that can safely be relied on in a court of law to prove" the allegation, ²³² or when the evidence was not "convincing," "probative," or "sufficient". ²³⁵

3.30 Although the present proceedings concern reparation, not the merits, many of the DRC's allegations—such as the number of persons allegedly killed as the result of Uganda's wrongful acts—nevertheless constitute assertions of "exceptional gravity". There is, for example, exceptional gravity in alleging that Uganda is responsible for the deaths of 180,000 people, rather than, say, 100 people. The DRC must therefore be expected to establish these new facts with a high level of certainty through convincing evidence.

.

²³² Armed Activities (2005), para. 130 (declining to find proven "that there was an agreement between the DRC and the Sudan to participate in or support military action against Uganda; or that any action by the Sudan (of itself factually uncertain) was of such a character as to justify Uganda's claim that it was acting in self-defence".).

²³³ *Ibid.*, para. 91 ("The Court makes no findings as to the responsibility of each of the Parties for any violations of the Lusaka Agreement. It confines itself to stating that it has not received convincing evidence that Ugandan forces were present at Mobenzene, Bururu, Bomongo and Moboza in the period under consideration by the Court for purposes of responding to the final submissions of the DRC".).

²³⁴ *Ibid.*, para. 123 ("The Court has next examined the evidence advanced to support the assertion that the Sudan was supporting anti-Ugandan groups which were based in the DRC, namely FUNA, UNRF II and NALU. This consists of a Ugandan political report of 1998 which itself offers no evidence, and an address by President Museveni of 2000. These documents do not constitute probative evidence of the points claimed".).

²³⁵ *Ibid.*, para. 173 ("In order to reach a conclusion as to whether a State, the military forces of which are present on the territory of another State as a result of an intervention, is an 'occupying Power' in the meaning of the term as understood in the *jus in bello*, the Court must examine whether there is sufficient evidence to demonstrate that the said authority was in fact established and exercised by the intervening State in the areas in question".).

3.31 In its prior cases involving reparation, the Court has always insisted that States fulfill their obligation to prove specific harm, causation and valuation through convincing evidence. It has also not countenanced extravagant and unsustainable claims. The Court's approach to evidence at the reparation phase in the *Corfu Channel* case is instructive. Although Albania did not appear in the case, the Court stated that it was required to decide whether the U.K. submissions on reparation were "well founded in fact and law". The Court observed that this approach that "does not compel the Court to examine their accuracy in all their details; for this might in certain unopposed cases prove impossible in practice. It is sufficient for the Court to convince itself by such methods as it considers suitable that the submissions are well founded". In determining the United Kingdom's claims were "well-founded" and "proved", the Court had before it detailed evidence from the United Kingdom speaking directly to the compensation claimed.

3.32 With respect to death and injury of naval personnel, the United Kingdom submitted a sworn affidavit and list prepared by the U.K. Ministry of Pensions specifically identifying the individual sailors killed, along with information regarding the exact pensions and awards paid to their dependents, the costs of administering those pensions and awards, costs of medical and surgical treatment

²³⁶ Corfu Channel (Compensation, 1949), p. 248.

²³⁷ *Ibid*.

²³⁸ *Ibid.*, pp. 249-250.

²³⁹ The Court also benefited from an experts' report of 1 Dec. 1949 in Annex 2 of the Compensation Judgment. *See Corfu Channel* (Compensation, 1949), p. 258.

in the case of disabled seamen, and an allowance to cover the probability of future increases of individual pensions.²⁴⁰

- 3.33 With respect to damage to the U.K. destroyer *Volage*, the United Kingdom submitted both an initial estimate of the cost of repairing *Volage* ²⁴¹ and a sworn affidavit from the Civil Assistant to the Director of Dockyards of the Admiralty detailing the specific costs of labor, materials, contract supplies and other charges actually incurred for the repairs. ²⁴²
- 3.34 With respect to the loss of the U.K. destroyer *Saumarez*, the Court was provided a sworn affidavit and a detailed report as to the specific damage by an official of the U.K. Naval Construction Department as the Admiralty.²⁴³
- 3.35 The Court also had a sworn affidavit from an official of the Material Finance Branch of the Admiralty showing the specific value of stores and equipment lost on both destroyers.²⁴⁴ For both vessels, the U.K. also provided

²⁴⁰ United Kingdom Memorial, in *Corfu Channel* (Compensation, 1949), Annex 12. *See also* Observations submitted under the Order of the Court of 9th April 1949, by the Government of the United Kingdom of Great Britain and Northern Ireland, in *Corfu Channel* (Compensation, 1949), pp. 392-397.

²⁴¹ United Kingdom Memorial, in *Corfu Channel* (Compensation, 1949), Annex 14.

²⁴² Observations submitted under the Order of the Court of 9th April 1949, by the Government of the United Kingdom of Great Britain and Northern Ireland, in *Corfu Channel* (Compensation, 1949), pp. 393, 398.

²⁴³ United Kingdom Memorial in *Corfu Channel* (Compensation, 1949), Annex 10. *See also* Observations submitted under the Order of the Court of 9th April 1949, by the Government of the United Kingdom of Great Britain and Northern Ireland, in *Corfu Channel* (Compensation, 1949), pp. 393, 399.

²⁴⁴ Observations submitted under the Order of the Court of 9th April 1949, by the Government of the United Kingdom of Great Britain and Northern Ireland, in *Corfu Channel* (Compensation, 1949), pp. 393, 398-99.

photographs taken shortly after the October 1946 explosions showing the damage to the vessels and the mines that caused the damage.²⁴⁵

3.36 Likewise, in the *Diallo* case, the Court required convincing evidence of the specific harm to support the Republic of Guinea's request for damages. In that instance, the Court's task was more complex than in *Corfu Channel* because the respondent, the DRC, contested the extent of the specific injury (for example, what items existed in Mr Diallo's apartment), whether the specific harm was the result of the DRC's unlawful acts (for example, whether Mr Diallo was prevented from transferring such items back to Guinea), and the valuation of such harm (for example, the value of the items).

3.37 In *Diallo*, with the shoe on the other foot, the DRC repeatedly and unequivocally insisted on the need for convincing evidence of specific harm.²⁴⁶ Notwithstanding its prior general finding of liability against the DRC, the Court agreed and declined to award compensation in many instances where Guinea failed

-

²⁴⁵ United Kingdom Memorial, in *Corfu Channel* (Compensation, 1949), Annex 8.

²⁴⁶ See, e.g., Counter-Memorial of the Democratic Republic of the Congo, Question of Compensation Owed to Guinea by the DRC, in *Diallo* (2012), para. 2.36 ("[T]he Applicant must either produce documentary evidence in support of its financial claims or withdraw those claims for lack of evidence".); *Ibid.*, para. 2.35 ("[I]n the present case, Guinea has failed to produce any evidence attesting to the existence of Mr. Diallo's alleged professional income or to his loss of earnings in respect of that income".); *Ibid.*, para. 2.42 ("It is thus now for Guinea, at the present stage of the proceedings, to provide the Court with evidence under three heads: (1) credible and convincing evidence of the genuine, rather than imaginary, existence of Mr. Diallo's personal belongings; (2) evidence of the real, rather than hypothetical, loss of those belongings following his expulsion; and (3) credible and irrefutable proof of their financial value".); *Ibid.*, para. 2.60 ("[I]t fails to produce to the Court two certificates of registration — the only documents of title recognized under Congolese law—in respect of these two plots of land, in order to prove their existence".); *Ibid.*, para. 2.64 ("Guinea has not justified to the satisfaction of the Court, through probative documents filed by it, the amount of the compensation".).

to present convincing evidence concerning the specific extent of the alleged harm, whether such harm was attributable to the DRC or the valuation of such harm.

3.38 Guinea advanced two general heads of damage for the relevant violation of international law with respect to a specific, identified individual, Mr Diallo, who had been wrongfully expelled from the DRC: material damage (loss of personal property, bank assets and earnings) and non-material damage (which Guinea referred to as "mental and moral damage" and the DRC referred to as "non-pecuniary injury"). With respect to material damage, Guinea sought US\$ 550,000 for the loss of certain high value items and furnishings in Mr Diallo's apartment, as well as the loss of bank account assets. It also sought roughly US\$ 6.5 million for loss of earnings during Mr Diallo's detention and subsequent expulsion. The DRC contested the high amounts sought, arguing they were unsupported by convincing evidence. The Court agreed.

3.39 For the alleged loss of items and furnishings in the apartment, Guinea presented an inventory that specifically listed some furnishings and other items, but without any evidence as to what happened to them after Mr Diallo's expulsion.²⁴⁸ Consequently, the DRC argued that no compensation should be awarded. The Court largely agreed, finding that "taken as a whole, Guinea has failed to prove the extent of the loss of Mr Diallo's personal property listed on the inventory and the extent to which any such loss was caused by the DRC's unlawful conduct".²⁴⁹

²⁴⁷ Diallo (2012), para. 18.

²⁴⁸ *Ibid.*, para. 31.

²⁴⁹ *Ibid*.

3.40 Moreover, even assuming that Guinea could establish "that the personal property on the inventory was lost and that any such loss was caused by the DRC's unlawful conduct, Guinea offers no evidence regarding the value of the items on the inventory (either with respect to individual items or in the aggregate)". The Court did, however, award US\$ 10,000 for loss of such personal property, explaining that regardless of the amount or value of such property, Mr Diallo would have incurred costs in moving his personal property back to Guinea after his unlawful expulsion. ²⁵¹

3.41 With respect to the high value items, which were not listed in the inventory, the DRC argued that no evidence had been presented in support of Guinea's request for compensation. Here, too, the Court agreed, stating that "Guinea has put forward no evidence whatsoever that Mr Diallo owned these items at the time of his expulsion, that they were in his apartment if he did own them, or that they were lost as a result of his treatment by the DRC". ²⁵² As such, no compensation was awarded.

3.42 As for the alleged loss of bank assets, the DRC again argued that no compensation could be awarded due to a lack of evidence providing any specifics about the alleged accounts. Here, once again, the Court agreed, finding:

"Guinea offers no details and no evidence to support its claim. There is no information about the total sum held in bank accounts, the amount of any particular account or the name(s) of the bank(s) in which the account(s) were held. Further, there is no evidence demonstrating that the unlawful detentions and

²⁵⁰ *Ibid.*, para. 32.

²⁵¹ *Ibid.*, paras. 33, 36, 55, 60(2).

²⁵² *Ibid.*, para. 34.

expulsion of Mr. Diallo caused the loss of any assets held in the accounts". ²⁵³

Accordingly, no compensation was awarded.

3.43 The Court likewise accepted the DRC's position that no compensation

should be awarded for Mr Diallo's alleged loss of earnings, finding that "Guinea

offers no evidence to support the claim. There are no bank account or tax records.

There are no accounting records [of companies] showing [they] had made such

payments [to Mr Diallo that were disrupted]". 254

3.44 The situation with respect to non-material damage was different because

facts proved at the merits stage showed specific harm to a particular individual.

The Court had before it direct evidence that Mr Diallo was detained for 66 days

(from 5 November 1995 until 10 January 1996) and again for 6 days (25 to 31

January 1996), before being expelled by the DRC on 31 January 1996. Moreover,

the fact that such harm was the result of the DRC's violation of international law

was uncontested at the reparation phase. Consequently, based on the proven

existence of specific harm at a particular time and in a particular place to an

identified person, the Court found that "the DRC's wrongful conduct caused Mr

Diallo significant psychological suffering and loss of reputation". 255 Although

Guinea sought US\$ 250,000 for such harm, the Court awarded US\$ 85,000.256

3.45 Thus, although the Court at the merits stage had found the DRC liable for

violating international law in its detention and expulsion of Mr Diallo, that alone

²⁵³ *Ibid.*, para. 41.

²⁵⁴ *Ibid*.

²⁵⁵ Diallo (2012), para. 21.

²⁵⁶ *Ibid.*, paras. 25, 61(1).

neither constituted evidence as to the specific harm resulting from such violation, nor evidence of the valuation of such harm. The Court still expected Guinea to produce convincing evidence concerning the extent of the alleged harm, the connection of that harm to the DRC's wrongful act and the valuation of such harm.

3.46 Having appeared as respondent in the *Diallo* case, and having itself insisted on these evidentiary requirements in those proceedings, the DRC know them well. Its failure to satisfy them in this case (as will be shown in subsequent chapters of this Counter-Memorial) is thus particularly curious.

B. THE REQUIREMENT THAT THE HARM BE FINANCIALLY ASSESSABLE

3.47 The DRC Memorial principally advances claims for monetary compensation. Under the rules relating to State responsibility for internationally wrongful acts, obtaining compensation for a harm requires that the harm be financially assessable. Article 36 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts ("Articles on State Responsibility") provides, in paragraph 1, that reparation for damage caused may be in the form of compensation and then, in paragraph 2, provides: "The compensation shall cover any *financially assessable* damage including loss of profits insofar as it is established".²⁵⁷

3.48 One element of this rule is that the alleged harm must be capable of being quantified in financial terms. The ILC's commentary states: "The scope of this

²⁵⁷ International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001) (hereinafter "ARSIWA"), Art. 36(2).

obligation is delimited by the phrase 'any financially assessable damage', that is, any damage which is capable of being evaluated in financial terms". ²⁵⁸

3.49 Another element of this rule is that a State cannot advance a claim that, in essence, seeks compensation for abstract and unspecified damages. It must target its compensation request to specific damage to persons or property. Hence, the ILC's commentary also states: "The qualification 'financially assessable' is intended to exclude compensation for what is sometimes referred to as 'moral damage' to a State, i.e., the affront or injury caused by a violation of rights not associated with actual damage to property or persons: this is the subject matter of satisfaction, dealt with in article 37". ²⁵⁹

3.50 The approach to evidence the DRC takes in its Memorial is not oriented toward financially assessable harm. While it refers to harm to persons, property, mineral resources, animals and the economy in general, the DRC makes little attempt to focus its evidence on any specific aspects of such harms (as discussed in greater detail in Section C below and in the following chapters). Persons on whose behalf the DRC's claim is purportedly based are not identified with any degree of specificity, and there is no evidence with respect to their location, age, income and so on. Property on whose behalf the DRC's claim is based is also not identified in any degree of specificity, including its location, date of harm, extent of harm, book value or liquidation value.

3.51 Instead, while paying lip service to such financially assessable harms, the DRC's claims are actually based on highly-generalised "evidence" that invites the

²⁵⁸ ARSIWA, Art. 36, cmt. 5.

²⁵⁹ ARSIWA, Art. 36, cmt. 1.

awarding of lump-sum amounts,²⁶⁰ an approach that cannot be viewed as assessing "actual damage to property or persons". As such, the evidence the DRC presents demonstrates that its claims are, in reality, a massive claim for moral damage to the DRC itself. But, as stated, this type of claim is not financially assessable and should be addressed through satisfaction, not compensation.

C. THE DISTINCTION BETWEEN TRADITIONAL INTER-STATE CLAIMS PROCEEDINGS AND SPECIALISED TECHNIQUES OF CONTEMPORARY MASS CLAIMS PROGRAMS

- 3.52 The DRC cannot avoid its obligation to present convincing evidence of financially assessable harm through a crude resort to lump-sum amounts that are characteristic of mass claims programs. In a mass-claim setting, States may agree to approach the award of damages for injuries sustained in a very different manner from that followed by international courts and tribunals, including through the use of a claims commission mandated to process claims through expedited procedures, which may involve specialised techniques such as data-matching, statistical sampling and regression analysis.
- 3.53 In such instances, fixed levels of compensation are utilised for particular categories of claims, which requires at the outset: (1) defining the class of claimants entitled to receive compensation; (2) establishing a level of fixed-amount compensation for that class with respect to a specific type of injury; (3) developing the evidentiary threshold necessary for an individual to prove membership in the class; (4) designing claims forms to be completed by or on behalf of each individual

_

²⁶⁰ DRCM, para. 1.18. *See also* DRCM, para. 6.76 ("In this respect, there is nothing preventing the Court from fixing a lump sum, which covers both compensation for the various damages suffered and the exemplary satisfaction which is required".) (Translation by Counsel, original in French: "A cet égard, rien n'interdit à la Cour de fixer une somme globale qui recouvre à la fois l'indemnisation des différents dommages subis et la satisfaction exemplaire qui est requise".).

along with the necessary evidence; and (5) establishing a sampling mechanism to verify the submitted evidence, thereby avoiding the examination of the evidence submitted for every claim.

- 3.54 When this is done, claims forms, sampling techniques and regression analysis are used as a surrogate for traditional international law and procedure. Yet, while such mass claims techniques can allow for the expedited processing of claims based on a minimal evidentiary showing, they typically require a very extensive administrative structure to process the claims. They also typically result in levels of fixed-amount compensation that are lower than would likely be the case if actual damages were assessed.²⁶¹
- 3.55 The UNCC established by the UN Security Council²⁶² to address the injuries resulting from Iraq's invasion of Kuwait in 1990-1991 is a good example of such a commission. The UNCC operated for approximately 15 years, employing

_

²⁶¹ See generally M. Frigessi di Rattalma & T. Treves, The United Nations Compensation Commission: A Handbook (1999); Hans Van Houtte, "Mass Property Claim Resolution in a Post-War Society: The Commission for Real Property Claims in Bosnia and Herzegovina", in INSTITUTIONAL AND PROCEDURAL ASPECTS OF MASS CLAIMS SETTLEMENT SYSTEMS (Permanent Court of Arbitration ed., 2000); Redressing Injustices Through Mass Claims Processes: Innovative Responses to Unique Challenges (Permanent Court of Arbitration ed., 2006); H. Holtzmann & E. Kristjánsdóttir, International Mass Claims Processes (2007); H. Van Houtte, et al., Post-War Restoration of Property Rights Under International Law, Vol. I: Institutional Features and Substantive Law (2008); H. Van Houtte, et al., Post-War Restoration of Property Rights Under International Law, Vol. 2: Procedural Aspects (2008); Roger P. Alford, "The Claims Resolution Tribunal" in The Rules, Practice, And Jurisprudence Of International Courts And Tribunals (Giorgetti ed., 2012); L. Brilmayer et al., International Claims Commissions: Righting Wrongs After Conflict (2017).

²⁶² See U.N. Security Council, 2981st Meeting, Resolution 687 (1991), U.N. Doc. S/RES/687, (8 Apr 1991), para. 16, Annex 1.

(at its height) roughly 300 lawyers, accountants, loss adjusters and information technology specialists to dispose of a total of about 2.7 million claims.²⁶³

3.56 To do its work, the UNCC adopted a highly complex system in which claims were divided into categories, with certain fixed amounts to be used for the expedited processing of claims on the basis of minimal evidence, and with higher amounts awarded for less expedited claims based on greater evidence. ²⁶⁴ Individual claimants presented claims to the UNCC through their governments (or through international organisations in the case of individuals who were not in a position to have their claims filed by governments). Payments were sent by the UNCC to the governments (or international organisations) that originally submitted the claims, which were then responsible for distribution of the compensation to successful claimants.

3.57 While such an approach has its merits,²⁶⁵ it is not appropriate in the context of a traditional State-State proceeding like this one where mass claims procedures

-

²⁶³ See United Nations Compensation Commission, *Home, available at* http://www.uncc.ch/home (last accessed 22 Jan. 2018).

²⁶⁴ For Category A claims (individuals who had to depart from Kuwait or Iraq), successful claims were set at a maximum of US\$ 4,000 for individuals and US\$ 8,000 for families, so long as recovery was not sought in any other category. For Category B claims (individuals who suffered serious personal injury or whose spouse, child or parent died as a result of Iraq's invasion and occupation of Kuwait), successful claims were set at US \$2,500 for individuals and up to US\$ 10,000 for families. Category C claims covered individual claims below US\$ 100,000 with fixed amounts for twenty-one types of losses, including: departure from Iraq or Kuwait; personal injury; mental pain and anguish; loss of personal property; loss of bank accounts, stocks and other securities; loss of income; loss of real property; and individual business losses. Category D claims were similar to Category C but for individual claims above US\$ 100,000. Category E claims were for claims of corporations, other private entities and public sector enterprises. Category F claims were claims of governments and international organisations for various types of damages.

²⁶⁵ Other mass claims programs that, to one degree or another, have utilised such techniques include: Commission for Real Property Claims for Displaced Persons and Refugees in Bosnia and Herzegovina; House and Property Claims Commission in Kosovo; German Forced Labor Compensation Program; International Commission on Holocaust Era Insurance Claims; Claims Resolution Tribunal for Dormant Accounts; and Holocaust Victim Assets Program.

do not operate. The DRC has alleged a large amount of harm resulting from Uganda's conduct but that alone does not create a basis for using rough approximations, speculative estimates and lump-sum amounts as the DRC does. The traditional approach of requiring convincing evidence with a high level of certainty as to the existence of harm resulting from Uganda's unlawful acts, as well as the valuation of such harm, must still apply.

3.58 A more relevant precedent in this regard is the EECC, which operated from 2001 to 2009 and addressed largely inter-State claims arising from the high-intensity armed conflict between Eritrea and Ethiopia between 1998 and 2000. 266 Although the EECC's precise mandate must be borne in mind when considering it as a precedent, the Commission was confronted, like the Court now, with violations of international law during an armed conflict between two African States. The conflict between Eritrea and Ethiopia involved fighting along three different fronts in both States, the occupation of territory throughout the war, the internment of thousands of civilians and prisoners of war, and the displacement or expulsion of thousands of civilians.

3.59 In reaching its conclusions, the EECC did not use fragmentary and uncorroborated evidence; nor did it resort to "multipliers", "distribution keys" and "percentages" of the kind the DRC proposes in its Memorial. Rather, the Commission closely analysed and relied upon considerable amounts of well-grounded and corroborated evidence, including: documentary evidence; medical and hospital records; receipts of expenditures; photographs and satellite imagery; and signed and sworn declarations. Such evidence was then corroborated in some

²⁶⁶ The preliminary decisions and the awards of the Commission are collected in U.N. Codification Division Publications, *Reports of International Arbitral Awards, Volume XXVI*, *available at* http://legal.un.org/riaa/vol 26.shtml (last accessed 22 Jan. 2018).

instances by government publications and publications by international organisations.

3.60 Both Eritrea and Ethiopia advanced claims seeking billions of dollars for damages allegedly occurring during the nearly three-year war. Ethiopia, which ultimately prevailed on its claim that Eritrea started the war by unlawfully invading it, claimed damages totaling approximately US\$ 14.3 billion. Eritrea sought damages of US\$ 6 billion. After carefully assessing the evidence, the Commission awarded a total of US\$ 161,455,000 to Eritrea²⁶⁷ and US\$ 174,036,520 to Ethiopia.

3.61 Other traditional inter-State tribunals have also addressed large numbers of claims arising in the context of chaotic conditions, such as those before the Iran-U.S. Claims Tribunal created in the aftermath of Iran's 1979 revolution. Despite the difficulties in proving thousands of claims for damages relating to the loss of property or breach of contract that occurred in the wake of the Iranian revolution, the Iran-U.S. Claims Tribunal received and carefully reviewed a wide range of evidence specific to the alleged harms, and their valuation, including documentary evidence (such as financial records, titles to property, sales invoices or contemporary memoranda), affidavits, expert reports and photographs.²⁶⁸

3.62 The DRC has made no effort to present analogous evidence in this case. Instead, as discussed in the next section, the "evidence" on which it attempts to rely is irredeemably flawed.

²⁶⁸ George H. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* (1996), pp. 343-359; Charles N. Brower & Jason D. Brueschke, *The Iran-United States Claims Tribunal* (1998), pp. 183-198.

²⁶⁷ A small number of claims filed directly by wealthy individuals were also awarded, totaling US\$ 2,065,865.

III. The DRC Relies upon Evidence That Is Deeply Flawed and Not Convincing

- A. THE DRC SYSTEMATICALLY FAILS TO PRESENT EVIDENCE RELATED TO SPECIFIC HARMS CAUSED BY UGANDA AND THE VALUATION OF SUCH HARMS
- 3.63 Uganda will discuss specific flaws in the DRC's evidence in subsequent chapters of this Counter-Memorial dealing with particular categories of damage claimed. For present purposes, Uganda will confine itself to showing more generally that the DRC has not provided to the Court the types of evidence normally expected in an inter-State proceeding to prove: (1) the existence of the harm alleged; (2) the connection of the harm to Uganda's wrongful actions; and (3) the valuation of that harm.
- 3.64 The DRC Memorial does not purport to assess the specific harm it suffered on an incident-by-incident or locality-by-locality basis, in which it demonstrates particular fatalities or injuries, or specific property losses, shown to be the result of specific unlawful acts by Uganda. Had the DRC done so, it would be expected to have presented to the Court: death certificates or medical, clinical or hospital records for those killed or injured; lists of deceased, indicating their age, occupation and surviving family members; contemporaneous documentation as to the existence of property; receipts establishing the value of such property when acquired; invoices for the restoration or reconstruction of property; other documentary evidence that should be available even in times of war; sworn statements by victims or their families; and sworn statements by public officials (such as mayors of towns, church leaders or others) in a position to speak to harms within the community.
- 3.65 Although not arising in the context of an inter-State claim, the order of the International Criminal Court ("ICC") on reparations in the *Katanga* case usefully

demonstrates the types of evidence that should be available for personal and property harm occurring in the eastern DRC even in times of armed conflict. Various types of evidence were presented to and used by the ICC Chamber in awarding compensation with respect to a specified group of 341 individuals for the 2003 attack by the Nationalist and Integrationist Front and the Front for Patriotic Resistance of Ituri on the village of Bogoro in the eastern DRC. These included: death certificates; medical reports; medical certificates from NGOs; hospital records; forensic reports; certificates of family relationship (attestation de lien de parenté); or signed residence and habitation certificates ("residence certificates") bearing the DRC official seal.²⁶⁹

- 3.66 The DRC presents no analogous evidence to this Court.
- 3.67 Instead of attempting to make a systematic presentation of evidence, the DRC takes an different approach: it arbitrarily selects uncorroborated numbers from a few reports (that typically do not address wrongful acts of Uganda) and combines those numbers with invented "percentages", "distribution keys" and "multipliers" to produce compensation claims in amounts that can only be characterised as contrived.
- 3.68 For example, as discussed in detail in Chapter 5, to determine the number of deaths "caused by Uganda's invasion", the DRC cites to the uncorroborated and much-criticised reports of an NGO for the proposition that there were 3.9 million more deaths in the DRC between 1998 and 2004 than there would have been in the

_

²⁶⁹ Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07-3728, Order for Reparations pursuant to Article 75 of the Statute (ICC Trial Chamber II, 24 Mar. 2017). Much of the evidence is recounted in Annex II to the order. See Version publique expurgée de l'Annexe II, en Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07-3728 (3 Aug. 2017).

absence of the conflict. Next, without supporting evidence, the DRC discounts that number to 400,000 to reach the number of deaths allegedly due to violence. And then, again without any supporting evidence, the DRC applies a "distribution key" of 45% to apportion responsibility for 180,000 civilian deaths to Uganda.

- 3.69 That is not all. The DRC goes on to divide this number, again without any basis in evidence, into 40,000 persons who were allegedly victims of "deliberate" violence and 140,000 persons who were not victims of such violence. And then it arbitrarily proposes that to calculate the quantum of compensation due the number in the first group be multiplied by US\$ 34,000 (a number purportedly derived from DRC national cases on compensation for deaths), while the second group be multiplied by US\$ 18,913 (a number purportedly derived from lost future income of every person in the group).
- 3.70 At every step of the way, the DRC's numbers are driven not by evidence, let alone evidence of specific harms to specific persons that occurred at particular times and places due to the actions of Uganda, but rather speculation built atop guesswork.
- 3.71 In an effort to make it appear that its speculations are grounded in reality, the DRC points to information concerning a few, frequently uncorroborated incidents that allegedly occurred in certain times and places for "illustrative purposes". To do this, the DRC draws principally upon general reports issued by the UN or NGOs, along with a collection of "summary tables" prepared by the DRC ostensibly based on "claims forms" gathered by the DRC years after the Court's 2005 Judgment. To be clear, this information regarding specific incidents is not being used to support a compensation claim with respect to those specific incidents but rather simply "illustrate" the harm that the DRC says occurred on a much more massive scale.

- 3.72 The DRC itself concedes that this approach is not systematic in nature. It admits that these general reports "do not go into a degree of detail that allows them to establish the injuries suffered from an individual standpoint", and that its investigations on the ground "were limited and did not allow [the investigators] to map the damage suffered in that context exhaustively". ²⁷⁰ Yet, at the same time, these handful of "illustrations" are somehow supposed to buttress the DRC's arbitrary and excessive numbers, manipulated through unexplained "percentages", "distribution keys" and "multipliers", so as to come up with billions of dollars of alleged harm caused by Uganda.
- 3.73 As explained, history shows that it is entirely possible to make serious, substantiated evidentiary showings before international courts or tribunals. This has happened, for example, before the EECC and ICC (the latter involving a case from the eastern DRC). While it is understandable that there might be some gaps in the ability to produce such evidence, such as perhaps a lack of evidence about the specific number of deaths that occurred in a particular town or village, or the age of certain victims. Yet, in this instance, the DRC essentially provides no documentary or other evidence of the type normally expected. Instead of *gaps*, there is simply a *void*.
- 3.74 As a result, the DRC not only fails to establish the existence of its injury with a high degree of certainty, it fails to do so with any degree of certainty. The result is a series of claims that are wholly unsubstantiated.

83

-

²⁷⁰ DRCM, para. 1.39 (Translation by Counsel, original in French: "ils n'entrent pour autant pas dans un degré de détails tels qu'ils permettent d'établir les préjudices subis sur un plan individuel"; "étaient limités et ne leur ont pas permis de dresser une cartographie exhaustive des dommages subis dans ce contexte".).

- B. THE DRC'S SYSTEMATIC FAILURE TO PRESENT EVIDENCE THAT CONNECTS TO AND SUPPORTS ASSERTIONS CONTAINED IN ITS MEMORIAL
- 3.75 As indicated in the prior-subsection, the DRC does not present evidence related to specific harms allegedly caused by Uganda or their valuation. Rather, it attempts to support its claims through much more general information. A recurring flaw in the DRC's approach is its failure to connect the claims advanced in the text of the Memorial with the general information contained in the annexes to the Memorial. This problem manifests itself in various ways.
- 3.76 *First*, assertions are often made in the text of the Memorial that are sourced to "evidence" contained in an annex. Yet when the annex is read, there is nothing that supports the assertion made in the Memorial.²⁷¹
- 3.77 *Second*, assertions are often made in the Memorial that purportedly are supported by a number of annexes. Yet when those annexes are read together, they often contradict each other, and contradict the assertion made in the Memorial.²⁷²
- 3.78 *Third*, in trying to support its assertions, the DRC often cites to one type of evidence but does not grapple with other types of evidence that it has submitted, or that is available to it, that contradicts its assertions.²⁷³ Indeed, the DRC often relies on a particular piece of information, such as a report by an organisation, as though it is the final word on a particular matter. Yet, in many instances, there is subsequent information, such as a later report by the same or another organisation, that corrects or refutes the earlier information. The DRC invariably fails to note the

²⁷¹ See, e.g., Chapter 5, Section II(A).

²⁷² See, e.g., Chapter 6, Section II(A).

²⁷³ See, e.g., Chapter 7, Section II(A).

existence of such subsequent information, let alone explain why its reliance on the earlier information remains credible.

C. Defects in the Main Types of General Information Presented by the DRC

3.79 As discussed above, rather than systematically present evidence in support of its compensation claims, the DRC pursues an alternative strategy. It pretends to base its claims on credible sources, such as various United Nations reports, the report of the Judicial Commission of Inquiry into Allegations into Illegal Exploitation of Natural Resources and Other Forms of Wealth in The Democratic Republic of Congo 2001 ("Porter Commission"),²⁷⁴ and its own investigation of victims' losses.²⁷⁵ Yet those sources are cited only for "illustrative" purposes; they themselves do not support—and indeed often contradict—the extraordinarily high numbers claimed by the DRC. Instead of relying upon those sources, the DRC either presents no evidence directly supporting the numbers on which it actually bases its claims, or relies on uncorroborated and partisan sources for its calculations.²⁷⁶

3.80 As a general matter, the relatively few reports of international organisations or NGOs cited by the DRC often provide no detail as to the specific harms that occurred in particular places and at particular times. Nor are they specific as to whether any particular harm is attributable to the actions of Uganda, nor probative as to the alleged harm's valuation. Such reports do provide some general

85

²⁷⁴ Republic of Uganda, *Judicial Commission of Inquiry into Allegations into Illegal Exploitation of Natural Resources and Other Forms of Wealth in the Democratic Republic of the Congo 2001, Final Report* (hereinafter "Porter Commission, Final Report" (Nov. 2002), p. 53, Annex 52.

²⁷⁵ DRCM, paras. 1.27-1.37.

²⁷⁶ *Ibid.*, para. 2.07.

information which may have been pertinent at the merits stage. But such information does not constitute evidence of the kind needed at this reparation phase, showing, for example: the numbers of persons killed, injured or otherwise harmed; whether such harm was the result of conduct by Uganda (as opposed to one of the other belligerents in the war); the average earnings of such persons and their life expectancy; average property damage in the affected areas; average property values; etc.

3.81 As such, the reports relied on by the DRC do not provide convincing evidence as to the existence of specific harms on the scale claimed by the DRC, or whether such harms were the result of Uganda's actions. Moreover, such information provides no evidence of valuation, leaving the DRC instead to present to the Court rather extraordinary numbers, "multipliers", "distribution keys" and "percentages" that appear to have been selected at random.

3.82 In some limited instances, the reports and other information submitted by the DRC do identify specific harm. In theory, such information might be used to prove compensation with respect to the specific incident addressed. Yet, as demonstrated below and in subsequent chapters, such information typically does not serve even that limited purpose because of the method of its collection, the time lag in its creation after the injury occurred, the connection of it to one of the Court's liability findings, the lack of any corroboration from other sources of evidence or subsequent refutation by other credible sources. ²⁷⁷ In any event, such information is too scant to support the exorbitant levels of compensation the DRC seeks.

 $^{^{\}rm 277}$ See Armed Activities (2005), para. 61.

- 3.83 The DRC uses three main types of information to support its damages claims: (1) reports by UN agencies; (2) reports by NGOs; and (3) materials compiled by the DRC for purposes of these proceedings long after the events at issue. The DRC characterises its reliance on these sources as being both "inductive" (through "investigations conducted on the ground after the end of the conflict") and "deductive" (through more general reports "published during or after the war"). ²⁷⁸
- 3.84 The inadequacy of these sources will be addressed in relation to specific types of harm alleged in subsequent chapters. The following discussion is intended to indicate generally why these sources should not be viewed as either inductively or deductively supporting the DRC's claims.

1. United Nations Reports

- 3.85 The first main type of information that the DRC seeks to use in support of its claims are reports issued by the UN. In most instances, the DRC's reliance on UN reports is solely for "illustrative" purposes. They are used as a means of demonstrating that *some* harms occurred in *some* locations, not to support that such harms were the result of a violation of international law by Uganda, or to support the magnitude of that harm or its valuation.
- 3.86 The DRC uses UN reports to directly support only a small portion of its claims, notably for loss of life or injuries in Kisangani and Ituri, or for the number of allegedly damaged schools and houses. When doing so, the DRC typically seizes upon the highest numbers in these reports, even though they are uncorroborated

²⁷⁸ DRCM, para. 1.38 (Translation by Counsel; original in French: "enquêtes réalisées sur le terrain après la fin du conflit"; "publiées pendant ou après la guerre".).

and sometimes even contradicted by other credible sources, while ignoring lower numbers that do not fit the DRC's narrative.

3.87 This Court has previously treated even UN reports with caution, recognising that their probative value may differ depending, in particular, on two factors: (1) the underlying evidence used to prepare them; and (2) whether they are corroborated.

3.88 With respect to underlying evidence, the Court refused in its 2005 Judgment to rely, for example, on passages from the Secretary-General's 4 September 2000 report on the UN Mission in the DRC ("MONUC") because of the report's "reliance on second-hand reports".²⁷⁹

3.89 Reliance on reports that are merely derivative of other information is problematic because they typically are not themselves attesting to accuracy of the original information; they are simply repeating or synthesising that information without testing its accuracy. As the Court explained in *Croatia v. Serbia*, derivative "[e]vidence of this kind and other documentary material (such as press articles and extracts from books) are merely of a secondary nature and may only be used to confirm the existence of facts established by other evidence...". ²⁸⁰ Likewise, the Court in *Nicaragua v. United States* cautioned: "Widespread reports of a fact may prove on closer examination to derive from a single source, and such reports,

-

²⁷⁹ Armed Activities (2005), para. 159.

²⁸⁰ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), I.C.J. Reports 2015 (hereinafter "Croatia v. Serbia (2015)"), para. 239 citing to Nicaragua v. United States of America (Merits, 1986), para. 62.

however numerous, will in such case have no greater value as evidence than the original source". ²⁸¹

- 3.90 Despite these admonitions, the DRC cites UN reports without any consideration as to the underlying source of information upon which the report is based, such as whether it draws upon media accounts or information obtained from an NGO.
- 3.91 With respect to corroboration, the Court noted in the 2005 Judgment that it would "take into consideration evidence contained in certain United Nations documents to the extent that they are of probative value and are corroborated, if necessary, by other credible sources". ²⁸² Indeed, the Court emphasised that it "will treat with caution evidentiary materials ... emanating from a single source". ²⁸³ This approach is consistent with the Court's use of other types of evidence, where a single, uncorroborated source is approached with skepticism. ²⁸⁴
- 3.92 Here, too, the DRC typically cites to UN reports without any consideration as to whether the information contained in them is corroborated (or contradicted) by any other source.

(a) UN Mapping Report

3.93 One UN report that features in the DRC Memorial is the "Report of the Mapping Exercise of the Office of the UN High Commissioner for Human Rights"

²⁸¹ Nicaragua v. United States of America (Merits, 1986), para. 63.

²⁸² Armed Activities (2005), para. 205 (emphasis added).

²⁸³ *Ibid.*, para. 61.

²⁸⁴ Croatia v. Serbia (2015), paras. 344-345.

("UN Mapping Report").²⁸⁵ On close inspection, however, the DRC relies on this report very little for the actual numbers it presents concerning the scope and valuation of the damages it claims. Rather, the report is used mostly to provide vignettes of a few incidents where specific harm allegedly occurred. The DRC's unwillingness to rely on the UN Mapping Report to directly support its claims stems from the fact that that report provides no evidence corroborating the DRC's numbers. Indeed, it fundamentally contradicts the DRC's claims.

3.94 Published in August 2010, the UN Mapping Report is the result of an effort to "map" the most serious violations of human rights and international humanitarian law committed within the territory of the DRC between March 1993 and June 2003. More than twenty UN human rights officers were deployed across the DRC between October 2008 and May 2009 to gather documents and information from witnesses. ²⁸⁶ This UN Mapping Team reviewed 1,500 documents from many different sources, including the United Nations, the DRC government and NGOs. ²⁸⁷ The team also met with more than 200 NGO representatives and DRC authorities. ²⁸⁸

3.95 *All* of the sources cited in the DRC Memorial were considered by the UN Mapping Team, except only for materials that the DRC prepared for purposes of litigation.²⁸⁹ The UN Mapping Team assessed the reliability of the information it obtained through "a two-stage process involving evaluation of the reliability and credibility of the source, and then the validity and veracity of the information

²⁸⁵ U.N. Mapping Report, Annex 25.

²⁸⁶ *Ibid.*, para. 3.

²⁸⁷ *Ibid.*, para. 14.

²⁸⁸ *Ibid.*, paras. 11-12.

²⁸⁹ *Ibid.*, Annex II, pp. 510-534.

itself". 290 The report also "identif[ies] the armed group[s] to which the alleged perpetrator[s] belong[ed]". 291

3.96 In *some* instances, the UN Mapping Report identifies Ugandan military forces as the perpetrator of a violation of human rights or international humanitarian law. Yet, in most instances, the report does not make any such identification. When the UN Mapping Report does not identify Uganda as the perpetrator, this is significant: it shows that the UN Mapping Team, in most instances, based on all the information available to it, was unable to verify that the incident at issue was attributable to acts of Uganda.

3.97 In *some* instances, the UN Mapping Report also identifies a specific (or estimated) number of persons who were killed or injured as a result of Ugandan action. Yet, in most instances, the report does not provide any such specificity. Again, it is significant that the report lacks such specificity, for it shows that the UN Mapping Team in most instances, based on all the information available to it, was unable to verify such numbers through what it regarded as credible evidence.

3.98 Notably, although the UN Mapping Report sought to determine the loss of life in this time-period from violations of international law, the DRC does not rely on the UN Mapping Report for its calculation of damages for loss of life. The reason is simple: the UN Mapping Report disproves the DRC's claims. For example, the DRC claims that Uganda is responsible for causing the deaths of 180,000 civilians in the DRC. Yet, based on its investigation, the UN Mapping Team could only attribute a miniscule fraction of this number to Uganda.

²⁹⁰ *Ibid.*, para. 7.

²⁹¹ *Ibid.*, para. 8.

3.99 Rather than rely on the UN Mapping Report's conclusions to support its overall claim concerning the loss of life, the DRC uses those conclusions in direct support of just two types of damages it claims: loss of life and injury in Kisangani, and harm to child soldiers. Yet, even here, the DRC's use of the UN Mapping Report is often misleading and must be approached with caution.

3.100 For example, in the 2005 Judgment, the Court found that Uganda unlawfully "trained child soldiers". To calculate the number of such child soldiers (which the DRC claims is 2,500), the DRC cites the UN Mapping Report's statement that "in 2001, the MLC admitted to having 1,800 [child soldiers] within its ranks". In other words, the DRC is claiming that simply by pointing to the number of child soldiers nominally in the ranks of the MLC, that proves how many child soldiers were trained by Uganda.

3.101 Yet evidence of the presence of child soldiers in the MLC (even if accepted) is not proof of their training by Uganda. Further, even if it is assumed that the MLC trained that number of child soldiers, such training cannot be attributed to Uganda, given the Court's 2005 finding that Uganda did *not* exercise effective control over the MLC.²⁹⁴ The UN Mapping Report therefore provides no evidence as to the number of child soldiers that Uganda trained.

²⁹² Armed Activities (2005), para. 345(3).

²⁹³ U.N. Mapping Report, para. 697.

²⁹⁴ Armed Activities (2005), para. 160.

(b) Other UN Reports

3.102 The other UN reports on which the DRC relies²⁹⁵ all preceded the 2010 UN Mapping Report and must be evaluated in the context of the latter. Simply put, the UN Mapping Team carefully reviewed²⁹⁶ all of these earlier UN reports, including

²⁹⁵ See U.N. Economic and Social Council, Report on the situation of human rights in the Democratic Republic of the Congo, submitted by the Special Rapporteur, Mr. Roberto Garretón, in accordance with Commission on Human Rights resolution 1999/56, U.N. Doc. E/CN.4/2000/42 (18 Jan. 2000), DRCM, Annex 1.5; U.N. Security Council, Special Report on the events in Ituri, January 2002-December 2003, U.N. Doc. S/2004/573 (16 July 2004), DRCM Annex 1.6; U.N. Security Council, Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of Democratic Republic of the Congo, U.N. Doc. S/2001/357 (12 Apr. 2001), (hereinafter "U.N. Panel of Experts, first report of 12 Apr. 2001"), Annex 11; U.N. Security Council, Final report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, U.N. Doc. S/2002/1146 (16 Oct. 2002) (hereinafter "U.N. Panel of Experts, report of 16 Oct. 2002"), Annex 15; U.N. Security Council, Letter dated 15 Oct. 2003 from the Chairman of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo addressed to the Secretary-General, U.N. Doc. S/2003/1027 (23 Oct. 2003), Annex 19; U.N. Security Council, Addendum to the report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, U.N. Doc. S/2001/1072 (13 Nov. 2001) (hereinafter "U.N. Panel of Experts, Addendum to the first report of 12 April 2001"), Annex 13; U.N. General Assembly, Report of the Special Rapporteur on the situation of human rights in the Democratic Republic of Congo, U.N. Doc A/55/403 (20 Sept. 2000), DRCM Annex 3.1; U.N. Security Council, Special report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC), U.N. Doc. S/2002/1005 (10 Sept. 2002), DRCM Annex 3.2; U.N. Security Council, Sixth report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC), U. N. Doc. S/2001/128 (12 Feb. 2001), DRCM Annex 3.4; U.N. Security Council, Second special report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC), U.N. Doc. S/2003/566 (27 May 2003), DRCM Annex 3.6; U.N. General Assembly, Question of the violation of human rights and the fundamental freedoms in any part of the world, with particular reference to colonial and dependent countries and territories, U.N. Doc. A/54/361 (17 Sept. 1999), DRCM Annex 4.12; Organization of African Unity, Report of the Secretary-General on the Situation in the Democratic Republic of Congo (6-10 July 1999), DRCM Annex 4.16 U.N. Security Council, Third report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC), U.N. Doc. S/2000/566 (12 June 2000), DRCM Annex 4.22; U.N. Economic and Social Council, Report on the situation of human rights in the Democratic Republic of the Congo, submitted by the Special Rapporteur, Mr. Roberto Garretón, in accordance with Commission on Human Rights resolution 2000/15, U.N. Doc. E/CN.4/2001/40 (1 Feb. 2001), DRCM Annex 4.23 U.N. Security Council, Report of the inter-agency assessment mission to Kisangani, U.N. Doc. S/2000/1153 (4 Dec. 2000), DRCM Annex 4.24.

²⁹⁶ U.N. Mapping Report, Annex II pp. 510-534.

MONUC reports, reports of the UN Special Rapporteur on the situation of human rights in the DRC and the report of the Inter-Agency Assessment Mission to Kisangani, and only adopted information that it found to give rise to a reasonable suspicion that an incident had occurred.

3.103 As stated, the Court has ruled that it "will treat with caution evidentiary materials... emanating from a single source". ²⁹⁷ Instead of analysing the underlying information used for each of these reports, or analysing these reports collectively so as to see what evidence is independently corroborated, the DRC consistently chooses the highest number it can find in any of these UN reports. As a consequence, it fails to consider whether the numbers it chooses are contradicted by later reports.

3.104 The DRC, for example, alleges that Uganda caused 60,000 deaths in Ituri.²⁹⁸ It bases this claim on the 2003 Second special report of the Secretary-General on MONUC, which states: "Since the first major onslaught of violence in June 1999, the death toll has been estimated at more than 60,000".²⁹⁹ Quite apart from the fact that the report never identifies Uganda as responsible for these deaths, the report does not state either the source(s) on which this assertion is based or the methodology for calculating the number stated. The number could therefore be based on media reports, reports of NGOs or extrapolations of some kind from disparate second-hand estimates.

_

²⁹⁷ Armed Activities (2005), para. 61.

²⁹⁸ DRCM, para. 3.23.

²⁹⁹ U.N. Security Council, Second special report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo, U.N. Doc. S/2003/566 (27 May 2003), DRCM Annex 3.6.

3.105 Equally telling is the fact that since the issuance of the 2003 Second special report, *no other source* has corroborated the stated number of deaths. In fact, subsequent reports have estimated the number of deaths at a much lower level. For example, the MONUC Special Report on the Events in Ituri, which was published a year later in 2004, not only did not mention the number 60,000 but quoted estimates amounting to less than half that level.³⁰⁰

3.106 Perhaps most important, the 2010 UN Mapping Report, which benefited not just from prior UN reports but also from the deployment of the UN Mapping Team to the region, also never refers to 60,000 deaths but instead found there to be a reasonable suspicion that there were "hundreds of deaths" in Ituri.³⁰¹

3.107 The DRC Memorial thus selects the highest number it can find to support its claims concerning the loss of life. This number, moreover, emanates from a single source that provides no information concerning the provenance of such information and is not only uncorroborated but actually contradicted by subsequent sources.

-

³⁰⁰ The report refers to a Congolese government estimate of 20,000 deaths between 1999 and 2001 and another estimate of 8,000 deaths between 2002 and 2003. U.N. Security Council, *Special Report on the events in Ituri, January 2002- December 2003*, U.N. Doc. S/2004/573 (16 July 2004), pp. 56, 16, DRCM, Annex 1.6.

³⁰¹ U.N. Mapping Report, para. 366. Another example is the DRC's reliance on the UN Secretary General's sixth report on MONUC of 2001 to calculate the number of child soldiers Uganda is responsible for, specifically the following statement: "As the present report was being finalized, information was received that 600 children would be transferred to the custody of humanitarian organization next week". DRCM, para. 3.35. The UN Mapping Report, which analysed the UN Secretary General's sixth report on MONUC, was unable to verify the number and concluded instead that "at least 163...children were sent to Uganda to undergo military training at a UPDF camp in Kyankwanzi before finally being repatriated to Ituri by UNICEF in February 2001". U.N. Mapping Report, para. 429. The number of 600 children appears only in the UN Secretary General's sixth report on MONUC of 2001.

3.108 Similarly, for its natural resources claims, the DRC relies on the initial reports of a five-person "panel of experts" appointed in 2000 by the UN Secretary-General to investigate allegations concerning the illegal exploitation of gold, diamonds, coltan and other resources in the DRC. ³⁰² Yet the DRC makes no effort to analyse the information upon which those reports were based or to determine whether they were independently corroborated.

3.109 Had the DRC done so, it would have found that the Panel's initial reports were severely criticised by other independent sources,³⁰³ including the Porter Commission convened by Uganda.³⁰⁴ Indeed, controversy over the panel resulted in it being reconstituted with new members for an extended mandate so as to verify the earlier findings.³⁰⁵ In a subsequent "addendum" to the earlier report, the reconstituted panel reversed several of the initial panel's earlier findings.³⁰⁶ Thus, the DRC is pressing upon this Court findings that it must know were later retracted.

.

³⁰² Ultimately, five reports were issued as U.N. Security Council. See, e.g., U.N. Panel of Experts, first report of 12 Apr. 2001, Annex 11; U.N. Panel of Experts, report of 16 Oct. 2002, Annex 15; U.N. Security Council, Letter dated 15 October 2003 from the Chairman of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo addressed to the Secretary-General, U.N. Doc. S/2003/1027 (23 Oct. 2003) (hereinafter "U.N. Panel of Experts, final report of 23 Oct. 2003"), Annex 19; UN. Security Council, Letter dated 17 June 2003 from the Chairman of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo addressed to the Secretary-General U.N. Doc. S/2002/1146/Add.1 (20 June 2003).

³⁰³ See U.N. Panel of Experts, report of 23 Oct. 2003, para. 9 ("As Council members are aware, the publication of the annexes in the Panel's last report (S/2002/1146) created strong reactions by entities named therein".), Annex 19.

³⁰⁴ Porter Commission, Final Report, Annex 52.

³⁰⁵ On 24 January 2003, the Security Council, by resolution 1457 (2003), renewed the mandate of the Panel of Experts for another six months, requesting it to verify, reinforce and update its earlier findings and, as necessary, revise the lists attached to its previous reports. U.N. Security Council, 4691st Meeting, *Resolution 1457 (2003)*, U.N. Doc. S/RES/1457 (24 Jan. 2003), p. 2, Annex 16.

³⁰⁶ U.N. Panel of Experts, Addendum to the first report of 12 April 2001, Annex 13. *See* Porter Commission, Final Report, pp. 161, 168, Annex 52.

3.110 In reviewing the DRC's claims regarding natural resources at the merits stage, the Court found more credible the report of the Porter Commission, ³⁰⁷ a source upon which the DRC only very selectively relies (often extracting information out of context and ignoring other information that contradicts its position) in advancing its natural resources claims. The Porter Commission was particularly critical of the UN Panel's methodology and findings, determining that the Panel had relied on "inflammatory figure[s]" and failed to deal with "suspicions of exaggeration by informants". ³⁰⁸

3.111 Importantly, the Porter Commission found that the UN Panel had wrongly attributed smuggling by private actors and rebels to Uganda,³⁰⁹ had made serious allegations based on hearsay evidence from a single uncorroborated witness without further investigation,³¹⁰ and had criticised acts that were entirely legal, were recognised by the DRC government and complied with all the regulations in effect.³¹¹ The Porter Commission also criticised the UN Panel for making allegations against Uganda that the Panel was unable to confirm, and for failing to respond to (or ignoring) Uganda's comments and information responding to the Panel's first report.³¹²

³⁰⁷ Armed Activities (2005), para. 61 ("The Court moreover notes that evidence obtained by examination of persons directly involved, and who were subsequently cross-examined by judges skilled in examination and experienced in assessing large amounts of factual information, some of it of a technical nature, merits special attention. The Court thus will give appropriate consideration to the Report of the Porter Commission, which gathered evidence in this manner. The Court further notes that, since its publication, there has been no challenge to the credibility of this Report, which has been accepted by both Parties".).

³⁰⁸ Porter Commission, Final Report, p. 161, Annex 52.

³⁰⁹ *Ibid.*, pp. 163-164, 167.

³¹⁰ *Ibid.*, p. 166.

³¹¹ *Ibid.*, pp. 158, 168.

³¹² *Ibid.*, pp. 156-157.

2. NGO Reports

3.112 The second main type of information that the DRC seeks to use in support of its claims are reports by NGOs, both those located outside the DRC (such as Human Rights Watch) or those located within the DRC (such as the Groupe Lotus). As with UN reports, these reports lack probative value when they are based on second-hand information and when they are uncorroborated. Moreover, such reports typically use poorly-sourced information for advocacy purposes, not for the purpose of providing evidence sufficient to support a finding before a court of law. Thus, in its 2005 Judgment, the Court refused to rely on reports by the International Crisis Group and Human Rights Watch because they were uncorroborated and because they were not, in fact, saying what the DRC was alleging. 313

3.113 The evidence cited by the DRC to support its claim for damages relating to loss of life, for example, consists primarily of reports from an NGO, the International Rescue Committee ("IRC"). Based very loosely on IRC reports, which were conducted as part of an advocacy campaign to draw attention to the DRC, the DRC contends that Uganda is responsible for 180,000 civilian deaths. Had the DRC analysed the IRC reports with care, it would have revealed doubts about relying upon them. Among many other things, neither the underlying information nor the reports themselves sought to identify perpetrators of the deaths.

-

³¹³ Armed Activities (2005), para. 159. Other courts and tribunals are similarly cautious. The Eritrea Ethiopia Claims Commission, for example, appears to have been very careful with respect to reports and other documents issued by non-governmental organisations, perhaps due to a concern that they were based on incomplete information or information derivative of unsubstantiated claims being made by one or the other government.

³¹⁴ DRCM, para. 2.64. As discussed in Chapter IV of this Counter-Memorial, the IRC estimated that 3.9 million people had died in the DRC between 1998 and 2007 and that "less than 10 percent of all deaths were due to violence". International Rescue Committee, Burnet Institute, *Mortality in the Democratic Republic of Congo: An Ongoing Crisis* (2007), p. ii, Annex 60. Without any explanation, the DRC argues that it is "reasonable" to use "a minimum estimate of 400,000 victims, one tenth the IRC's figure", and picks an arbitrary and unexplained "distribution key of 45%" so as to assert that Uganda was responsible for 180,000 deaths. DRCM, paras. 2.70-2.71.

Indeed, the IRC never attributed even a single loss of life to Uganda, even as it did note some data on violent deaths caused by others.³¹⁵

3.114 Moreover, as discussed in greater detail in Chapter 5, the IRC's methodology and calculations have been severely criticised by a number of academics and independent organisations. The Health and Nutrition Tracking Service ("HNTS"), an interagency initiative hosted by the WHO, ³¹⁶ concluded that the IRC's number of deaths were "difficult to substantiate". ³¹⁷ The Human Security Report Project ("HSRP"), an independent research center affiliated with Simon Fraser University in Vancouver, Canada, similarly criticised the IRC's methods in its 2009-2010 report. ³¹⁸ And, on the DRC's own admission, the results of the IRC's studies were refuted by André Lambert and Louis Lohlé-Tart, two demographers who work for the Association for the Development of Applied Research, a Belgian organisation. ³¹⁹ In their estimation, the number of deaths attributable to the conflict

³¹⁵ See, e.g., International Rescue Committee, "Mortality in Eastern DRC: Results from Five Mortality surveys by the IRC" (May 2000), p. 11, Annex 50; International Rescue Committee, "Mortality in the DRC: Results from a Nationwide Survey" (2003), p. 6, Annex 54.

³¹⁶ The Health and Nutrition Tracking Service (HNTS), an interagency initiative hosted by WHO, was created in response to a request made by the United Nations Emergency Relief Coordinator as part of the Humanitarian Reform process. Established in late 2007 by the Inter-Agency Standing Committee (IASC), HNTS aims to provide impartial, credible and timely information on mortality and nutrition rates in populations affected by crises and emergencies, especially the least funded and publicised ones, using standardised data collection and analysis methods wherever possible. The HNTS has two main functions: (1) Offering operational support to humanitarian staff in the field by peer-reviewing guidelines and other documents, participating in assessment missions, advising on the design of surveys, and providing technical advice to various agencies; and (2) Developing standards for data collection and measurement through its Expert Reference Group, collecting, analysing and disseminating data, and providing independent technical advice on various issues related to method development and validation studies.

³¹⁷ Health and Nutrition Tracking Service (HNTS), *Peer Review Report: Re-Examining mortality from the conflict in the Democratic Republic of Congo*, 1998-2006 (2009), p. 21, Annex 63.

³¹⁸ Human Security Report Project, "Part II, The Shrinking Costs of War", in *Human Security Report 2009/2010*, p. 128. Annex 64.

³¹⁹ DRCM, para. 2.68.

could be no higher than 200,000—just 5% of the IRC number—though these demographers regarded even that number as too high.³²⁰

3.115 The DRC also relies on a number of reports by NGOs local to the DRC, such as the Groupe Lotus, *Groupe Justice et libération*, and *Collectif des organisations et associations des jeunes du Sud-Kivu en RDC* ("COJESKI"). These local NGOs provide numbers of casualties without explaining their sources or methodology, and without providing any underlying evidence or means of verification.

3.116 These NGO reports are also not corroborated. As with the earlier UN reports, the UN Mapping Team took account of these NGO reports when producing the 2010 UN Mapping Report, but did not accept the numbers cited by these NGOs. The DRC nevertheless seeks to reply upon them to calculate its damages.³²¹

3.117 For example, the DRC seeks to ascribe to Uganda responsibility for 100 civilian deaths resulting from the August 1999 confrontations in Kisangani. The DRC bases this number on statements by two Congolese NGOs: the Groupe Lotus and COJESKI.³²² The Groupe Lotus makes two statements in this regard: "*If we* are *to believe* the humanitarian organization sources, 63 civilians allegedly died," and "other sources, on the other hand, provide a provisional assessment of at least 100 civilians killed".³²³ Thus, the Groupe Lotus itself is not asserting that such information is correct and is not providing any indication about who or what

³²⁰ See infra Chapter 5.

³²¹ U.N. Mapping Report, Annex II, pp. 510-534, Annex 25.

³²² DRCM, para. 4.27.

³²³ Groupe Lotus, Report on "Les conséquences de la contraction des alliances et factions rebelles au nord-est de la RDC – La guerre de Kisangani", Sept. 1999 (emphasis added) (op. cit.), DRCM Annex 4.18.

calculated these numbers and on what basis. As for COJESKI, it claims that 175 persons were killed but does not identify the names of any of those killed, the locations of killings or the perpetrators. Nor does it explain its methodology or whether it verified the numbers.³²⁴

3.118 In contrast, the UN Mapping Report, which had full access to these NGO reports as well as its own on-the-ground investigation, concluded that these same incidents "allegedly caused the deaths of over 30 civilians". But rather than cite to the UN Mapping Report, the DRC chooses a higher number from an NGO that is unsubstantiated, is uncorroborated and conflicts with other reports.

3. *Materials Collected by the DRC for Purposes of Litigation*

3.119 The third main type of information that the DRC seeks to use to support its claims are materials prepared by the DRC itself for the purposes of the reparation phase of this litigation. There are both general flaws with such information and flaws specific to the particular materials prepared by the DRC.

3.120 As a general matter, this type of information must be viewed as having little probative value. Not only is such evidence prepared by a self-interested party, it lacks any of the indicia of clear and convincing evidence. By way of example, the only evidence of material damages allegedly suffered by the Congolese army is a summary list of military items, with nominal values, allegedly destroyed in military confrontations.³²⁶ No underlying data or other corroborating evidence as to either

³²⁴ COJESKI, Dans les provinces occupées de la République Démocratique du Congo: les violations massives des droits de l'homme et du droit international humanitaire au seuil du paroxysme (Oct. 1999), p. 58, DRCM Annex 4.17.

³²⁵ U.N. Mapping Report, para. 361, Annex 25.

³²⁶ "Evaluation des dégâts militaires dans les rangs des FARDO par l'armée ougandaise et alliés" (31 Aug. 2016), DRCM Annex 7.4.

the extent or valuation of the alleged damages is provided. Moreover, this list was prepared not by an independent expert or other third-party but by a high-ranking officer of the Congolese army on 31 August 2016—about two weeks before the DRC's submission of its Memorial on damages.

3.121 The Court has been quite cautious in relying upon such self-serving information. Indeed, at the merits phase of this case, the Court indicated that it "will treat with caution evidentiary materials specially prepared for this case...". ³²⁷ Among other things, the Court noted that "a member of the government of a State engaged in litigation before this Court—and especially litigation relating to armed conflict—will probably tend to identify himself with the interest of his country". ³²⁸ Also, the Court emphasised that it preferred "contemporaneous evidence from persons with direct knowledge" rather than documents prepared long after the events in question by persons not involved in those events.

3.122 In addition to these general flaws, there are also flaws specific to the particular materials the DRC presents. For present purposes, Uganda will focus on one particular kind of material for purposes of demonstrating the gravity of these flaws: lists created by the DRC that are purportedly based on information contained in "claims forms" completed by victims sometime after 2005. (Uganda will address, where relevant, the specific flaws in other materials prepared by the DRC in subsequent chapters of this Counter-Memorial.)

³²⁷ Armed Activities (2005), para. 61.

³²⁸ Ibid., para. 65 citing to Nicaragua v. United States of America (Merits, 1986), para. 70.

³²⁹ Armed Activities (2005), para. 61.

3.123 The annexes to the DRC Memorial contain several lists that purport to be based on "claims forms" completed by victims.³³⁰ As was the case for the UN reports and NGO reports discussed above, the DRC does not actually use these lists as a means of systematically and directly supporting its claims for compensation but instead uses them solely for "illustrative" purposes.³³¹

3.124 The DRC Memorial asserts³³² that sometime after 2005 the DRC created a "Commission of Experts" that engaged in "extensive data collection," which included developing a "victim identification form" and dispatching "teams" to various locations to gather signed "claims forms" from victims setting out the injury they allegedly suffered. The DRC claims that nearly 10,000 forms were gathered and those "forms are annexed to this Memorial".³³³

³³⁰ "Tableau de Synthèse Effectif Décès", DRCM Annex 2.1; "Rapport Fréquence Type Lésions de 1998 à 2003", DRCM Annex 2.2; "Tableau de Synthèse Effectif Fuite", DRCM Annex 2.3; "Tableau de Synthèse Effectif Perte Biens", DRCM Annex 2.4; "Tableau Synthèse du Dépouillement Manuel des Fiches Individuelles de Victimes de la Guerre de Six Jours à Kisangani du 5 au 10 juin 2000 Entre les Forces Armées Ougandaises et Celles du Rwanda", DRCM Annex 4.8.

³³¹ DRCM, para. 4.16 ("[T]he DRC will use, for the purposes of illustration and not an effort to be exhaustive, the results of the work of the Commission of Experts created for the purpose of these proceedings".) (Translation by Counsel, original in French: "la RDC utilisera, à titre illustratif et non exhaustif, les résultats des travaux des commissions d'experts créées aux fins de la présente procedure."); DRCM, para. 4.59 ("[A]n impressive amount of documentation has been gathered, on the basis of the forms completed by the victims, which has been processed in the form of lists or data sheets. It includes, for illustrative purposes and not for the purpose of being exhaustive, information regarding the victims and the various types of damages which they suffered".) (Translation by Counsel, original in French: "A ainsi été rassemblée une documentation imposante, sur la base des formulaires remplis par les victimes, qui a été traitée sous forms de listes ou de fiches. Elle rassemble, à titre illustratif et non exhaustif, des renseignements sur les victimes et les divers types de dommages qu'elles ont subis.").

³³² *Ibid.*, paras. 1.30-1.35. Two ministerial decrees relating to this Commission of Experts appear as Annexes 1.1 and 1.2 of the DRC Memorial.

³³³ *Ibid.*, para. 1.35 (Translation by Counsel, original in French: "Ces fiches sont annexées au présent mémoire.").

3.125 The entirety of the DRC's presentation drawing on the "claims forms" is deeply, indeed irretrievably, problematic.

3.126 *First*, although the DRC says otherwise, no "claims forms" are in fact annexed to the Memorial. Nor is there, as the DRC says, any "[s]oftware for examining individual victim records (only in digital form)".³³⁴ The Court cannot be expected to rely on information, or any lists derived from that information, as evidence if the information itself has not been presented to the Court.

3.127 Assuming that these claims forms are similar to those the DRC provided to Uganda during the course of bilateral settlement negotiations, the reason for the DRC holding them back is understandable. The claims forms that Uganda has seen were typically not signed or witnessed; they often referred to harm caused by actors other than Uganda; they rarely indicated any valuation of the alleged harm; they included multiple forms filled out by the same person; and they were accompanied by no supporting documentation. If the DRC had presented them to the Court, they would be demonstrably unreliable.

3.128 *Second*, the "claims forms" were apparently collected years after the events in question—and the DRC's lists derived from them even later.³³⁵ Indeed, the DRC itself admits that the "work of gathering information from the victims was

³³⁴ *Ibid.*, para. 1.27 (Translation by Counsel, original in French: "[1]ogiciel permettant de consulter les fiches individuelles des victims (uniquement en format électronique)".). The DRC's claimed software for examining claims forms is just a folder entitled (Pièce 1.3 format électronique), Annex 1.3, that contains folders with summary tables on deaths, injuries, displacement, and property damages in Ituri, Kisangani, Beni, Butembo, and Gemena. The summary tables in those folders are the same as those stated in other Annexes (for example Annexes 2.4bis, 2.4quater, 2.4ter relating to property damages in Beni, Gemena and Butembo and Annexes in the folder titled "Dommage Perte Biens", or Property loss in Annex 1.3.) Such duplications only add confusion to already confusing and confused claims.

³³⁵ *Ibid.*, paras. 1.28-1.35.

conducted several years after the end of the war and proved to be particularly difficult and delicate" because victims had "difficulty... in recalling specific circumstances" and "finding official documents". In this respect, Uganda recalls that, at the merits phase, the Court did not find probative the testimonials of certain DRC nationals because they were prepared "more than three years after the alleged events and some 20 months after" the DRC lodged its Application with the Court, and were not signed. The same conclusion applies *a fortiori* to the various lists the DRC presents that purport to be based on the claims forms.

3.129 *Third*, the DRC has failed to explain in any detail its methodology for collecting the alleged "claims forms". The concern is obvious: when a government official approaches someone and indicates that an international court may render compensation in his/her favor provided that he/she fills out a form, there are reasonable doubts as to whether objective information is actually being gathered.

3.130 The EECC was extremely cautious in giving weight to claims forms prepared specifically for those proceedings, especially claims forms that were not tailored to the underlying liability findings.³³⁸ For example, the Commission stated that

³³⁶ *Ibid.*, para. 1.33 (Translation by Counsel, original in French: "Ce travail de collecte des informations auprès des victimes elles-mêmes, réalisé plusieurs années après la fin de la guerre, s'est révélé particulièrement difficile et délicat. Plusieurs éléments ont rendu complexe la récolte de preuves sur le terrain, comme:- le faible niveau d'instruction de la majorité des victimes;- la difficulté pour ces dernières de se remémorer les circonstances précises d'événements à la fois profondément traumatisants et parfois déjà anciens;- les difficultés de retrouver les documents officiels comme les pièces d'identités, certificats de décès, etc. pour toute la période de guerre qui s'est caractérisée par une désorganisation profonde de tous les services administratifs et publics".).

³³⁷ Armed Activities (2005), para. 64.

³³⁸ The preliminary decisions and the awards of the Commission are collected in U.N. Codification Division Publications, *Reports of International Arbitral Awards, Volume XXVI*, *available at* http://legal.un.org/riaa/vol_26.shtml (last accessed 22 Jan. 2018).

"the claims forms process that Eritrea designed and implemented for these property claims has significant weaknesses. Inspection of the forms confirms that they are not correlated to the Commission's findings of liability, and that they address significant elements of damages for which the Commission did not find liability. Some questions are phrased in ways that may have invited inflated damage claims or otherwise elicited unreliable information".³³⁹

3.131 Further, the EECC stated that the "process for determining these property loss claims also seems to have been largely divorced from any underlying evidence. Persons who filled out claims forms were not required to provide any supporting evidence or documentation, and any narrative information they did offer apparently was not considered in assessing the amounts claims".³⁴⁰

3.132 As discussed more fully in Chapters 5 to 9, the DRC relies on lists derived from these "claims forms", even though such forms appear to suffer from exactly the same kinds of problems: they are not obviously related to the underlying liability findings of the Court; they were filled out for the purpose of supporting this litigation; they do not appear to have included supporting evidence; and they are being used to support claims that appear to have no connection to the information contained in the form.

3.133 If one reviews the lists ostensibly based on the claims forms presented by the DRC, the problems only deepen. For example, with respect to deaths, the DRC provides three lists of persons allegedly killed: (1) a DRC Commission of Experts

³³⁹ Eritrea's Damages Claims, Final Award, Eritrea-Ethiopia Claims Commission, Decision of 17 August 2009, reprinted in 26 U.N.R.I.A.A. 505 (2009) (hereinafter "Eritrea's Damages Claims (Final Award, 2009)"), para. 66.

³⁴⁰ *Ibid.*, para. 67.

list (Annex 4.5a); (2) a list of unknown provenance entitled "List of the Victims of Various Wars in Kisangani (14-17 August 1999, 5 May 2000, and 5-10 June 2000)" (Annex 4.6); (3) and a list of claims forms (Annex 4.7a). None of these lists indicate that Uganda was responsible for the acts that lead to any of the deaths nominally recorded. And none of these lists indicates anything about the age of the deceased or whether he or she was a wage-earner.

3.134 The DRC notably did not use any of these lists when calculating its damages for loss of life. This suggests one of two possibilities, neither of which helps the DRC: either the DRC itself does not find its lists reliable or it finds the lists reliable but is unhappy that they do not support the exorbitant damages that it claims.

3.135 Consider as well the DRC's list with respect to looting in the Ituri region. Here, the DRC relies on "a detailed list of the property looted" that it says was "prepared on the basis of the data sheets put together by the DRC". 341 Although the DRC asserts that the detailed list of looted property is attached in an annex to Chapter 3 of the Memorial, 342 in fact there is no such annex to that chapter. The reference instead appears to be to Annex 1.3, which contains a file entitled "Victimes PerteBien_ITURI". That file does list persons who allegedly suffered property damages, describes property allegedly damaged and assigns values to that property, 343 but the list is not supported by any underlying evidence as to the occurrence of the harm or its valuation.

DRCM, para. 3.48 (Translation by Counsel, original in French: "[U]ne liste détaillée des biens pillés relevant de différentes catégories (bétail, véhicules, marchandises, etc.), établie sur la base desdites fiches".).

³⁴² *Ibid.*, para. 3.48.

^{343 &}quot;Evaluation Pertes des Biens" in Victimes PerteBien ITURI, DRCM Annex 1.3.

3.136 In fact, the values assigned on the list to particular types of property is typically the same no matter where in the DRC the alleged property harm occurred. For example, the value of a vehicle is indicated as an even US\$ 10,000 across nearly all times and all places. This suggests that these numbers were not based on particularised claims forms but were arbitrarily selected by the DRC itself. There is equally no evidence showing that the listed property was looted by UPDF soldiers or as a result of Uganda's failure to comply with its obligations as an occupying Power.

3.137 The lists prepared by the DRC purportedly based on the claims forms also often provide no means for linking a listed entry to a particular claims form. Out of the DRC's claimed 4,164 victims of deaths in the lists contained in Annex 4.7, the vast majority (3,827) are not even identified by name; they are simply mentioned as "non signalé".³⁴⁴ But, as the EECC held, "[t]here can be no assessment in a claim involving huge numbers of hypothetical victims".³⁴⁵

*

3.138 In conclusion, the Court was clear in its 2005 Judgment that, at this reparation phase, it would be incumbent upon the DRC to *prove* the *exact injury* that it suffered *as a result* of *specific actions of Uganda* that were internationally wrongful. This chapter has explained why, as a general matter, the DRC has failed to present any such evidence.

^{344 &}quot;Evaluation Décès", DRCM Annex 4.7.a.

³⁴⁵ Ethiopia's Damages Claims, Final Award, Eritrea-Ethiopia Claims Commission, Decision of 17 August 2009, reprinted in 26 U.N.R.I.A.A. 631 (2009) (hereinafter "Ethiopia's Damages Claims (Final Award, 2009)"), para. 64.

- 3.139 Although it pursues different tactics, in most instances, rather than prove exact injury relating to specific incidents, the DRC simply provides a few "illustrations" of incidents where harm allegedly occurred, based on various types of evidence that are deeply flawed. The DRC then plucks large numbers from a few reports, which themselves are flawed, and manipulates those numbers using arbitrary "multipliers", "distribution keys" or "percentages" to come up with compensation claims that can only be characterised as excessive in the extreme.
- 3.140 Uganda respectfully submits that the DRC's casual approach to proving its claims should not be countenanced. The DRC bears the burden of proving its claims for reparation. It must carry that burden by presenting convincing evidence that establishes, with a high level of certainty, that specific financially assessable harm occurred as the result of particular wrongful actions of Uganda, as well as the valuation of such harm. The DRC Memorial fails to make those showings.

CHAPTER 4

SYSTEMATIC FLAWS IN THE DRC'S APPROACH TO THE LAW

- 4.1 The previous chapter demonstrated the systematic flaws in the DRC's approach to evidence. This chapter demonstrates the legal flaws that pervade the DRC Memorial.
- 4.2 **Section I** demonstrates how the DRC has ignored, misstated or misapplied the rules on both the attribution of specific actions to Uganda, and the causal relationship between those actions and the harms allegedly suffered by the DRC. **Section II** shows that the DRC is essentially asking the Court to decide the issue of compensation *ex aequo et bono*, which it cannot do. **Section III** explains that the DRC is effectively asking the Court to impose punitive damages on Uganda, which it also cannot do. Finally, **Section IV** demonstrates that the DRC is impermissibly seeking compensation in amounts that exceed Uganda's payment capacity.

I. The DRC Ignores the Requirements to Prove Specific Actions of Uganda and the Existence of a Causal Connection between Those Actions and the Harm It Alleges

4.3 Uganda has recalled that the Court made clear in the 2005 Judgment that, during the present phase of the proceedings, "[t]he DRC would... be given the opportunity to demonstrate and prove the *exact* injury that was suffered *as a result of specific actions of Uganda* constituting internationally wrongful acts for which it is responsible".³⁴⁶

³⁴⁶ Armed Activities (2005), para. 260 (emphasis added).

- 4.4 It therefore falls to the DRC now to "demonstrate and prove" the "specific actions of Uganda" constituting internationally wrongful acts. Assuming it does that, the DRC must then also demonstrate and prove the existence of a causal nexus between those specific actions and the "exact injury" the DRC claims to have suffered, including the valuation of the harm.
- 4.5 In other words, even if the DRC establishes the existence of harm, such harm is only compensable in these proceedings if the DRC proves that it is the "result" of "specific actions" of Uganda falling within the ambit of the internationally wrongful acts identified in the 2005 Judgment, and also proves the valuation of such harm.

A. THE DRC MUST PROVE THE SPECIFIC ACTIONS OF UGANDA FALLING WITHIN THE SCOPE OF THE COURT'S GENERAL FINDINGS IN 2005

- 4.6 The starting point for the DRC in advancing its compensation claims should have been to identify, for each claim, the relevant internationally wrongful act for which the Court deemed Uganda responsible in the 2005 Judgment. In most instances, however, the DRC Memorial fails to specify the general finding from the 2005 Judgment upon which it bases its claims. It largely ignores the Court's previous conclusions concerning the internationally wrongful acts for which Uganda was found responsible.
- 4.7 The DRC also ignores the Court's general findings concerning acts for which Uganda is *not* responsible. Such findings are as much *res judicata* as the findings against Uganda.³⁴⁷ Yet, as discussed below, the DRC seeks to circumvent

112

³⁴⁷ See Armed Activities (2005), para. 260 citing to Nicaragua v. United States of America (Merits, 1986).

them by adopting an impermissibly lax approach to the requirement to prove specific actions attributable to Uganda.

- 4.8 The Court identified four general categories of conduct constituting internationally wrongful acts for which Uganda was responsible in the 2005 Judgment. Those four categories must serve as the general template within which specific actions of Uganda remain to be proven.
- 4.9 *First*, the Court made a general finding that Ugandan armed forces themselves committed acts that caused harm in the DRC. The Court found that, to an unspecified degree, Ugandan forces committed acts of killing, torture and other forms of inhumane treatment of the Congolese civilian population; destroyed villages and civilian buildings; failed to distinguish between civilian and military targets and to protect the civilian population in fighting with other combatants; trained child soldiers; and incited ethnic conflict.³⁴⁸ The Court also found that, again to an unspecified degree, Ugandan forces committed acts of looting, plundering and exploitation of Congolese natural resources.³⁴⁹ Unlike the other three categories of acts discussed below, these acts resulted in injuries directly inflicted by Ugandan organs.
- 4.10 The DRC is, of course, entitled to pursue claims within the scope of this general finding. To do so successfully, however, it must now prove *specific* actions of Ugandan armed forces that took the form of killings, torture, destruction of property, etc. by, for example, producing evidence concerning particular incidents that occurred in particular and at particular times.

113

³⁴⁸ Armed Activities (2005), para. 345 (3).

³⁴⁹ *Ibid.*, para. 345 (4).

- 4.11 *Second*, the 2005 Judgment included a general legal finding that Uganda wrongfully extended military, logistic and economic support to irregular forces operating in the DRC.³⁵⁰ At the same time, the Court explicitly stated that those forces "were not under the control of Uganda"³⁵¹ and therefore their conduct was not attributable to Uganda. Thus, while the DRC may pursue claims within the scope of this general finding, it now bears the burden of proving *specific* actions of Uganda that took the form of assistance to irregular forces.
- 4.12 The DRC's reparation cannot be measured based on injuries inflicted by the rebel groups themselves, over whom Uganda did not exercise effective control. As just stated, the Court declined to find the conduct of the irregular forces that Uganda supported attributable to Uganda. To now find Uganda nevertheless responsible to make reparation for the conduct of those forces would effectively overturn this express finding. Moreover, the Court has explained that the "effective control" test requires showing such control "in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or group of persons having committed the violations". 352
- 4.13 *Third*, the Court issued a general legal finding in 2005 that Uganda failed, as an occupying Power in Ituri, to take measures to ensure respect for human rights and international humanitarian law,³⁵³ and to prevent acts of looting, plundering and exploitation of Congolese natural resources.³⁵⁴ Here, too, Uganda's internationally wrongful acts did not result in any direct harm in the DRC. Rather,

³⁵⁰ *Ibid.*, para. 345 (1).

³⁵¹ *Ibid.*, para. 247, referring to para. 160. See also Armed Activities (2005), para. 177.

³⁵² Bosnia and Herzegovina v. Serbia and Montenegro (2007), para. 400.

³⁵³ *Armed Activities* (2005), para. 345 (3).

³⁵⁴ *Ibid.*, para. 345 (4).

Uganda's wrongful acts consisted of a failure to exercise due diligence to prevent such harm by others. To successfully pursue claims within the scope of this general finding, the DRC must now prove *specific* measures that Uganda failed to take as an occupying Power in Ituri.

4.14 The reparation due to the DRC for Uganda's failure to exercise due diligence cannot be measured by pointing to injuries materially inflicted by others in the occupied territory. The Court explained in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case that it is necessary to establish "from the case as a whole and with a sufficient degree of certainty that the [harm] would in fact have been averted if the Respondent had acted in compliance with its legal obligations". 355

4.15 Fourth, in 2005 the Court found generally that Uganda was responsible for engaging in military activities in the DRC without the DRC's consent in violation of the principles of non-use of force in international relations and non-intervention.³⁵⁶ To successfully pursue claims within the scope of this general finding, the DRC must prove *specific* actions of Uganda (such as the use of artillery against DRC military forces in a particular location) that violated these principles.

4.16 It is not enough for the DRC simply to rely on the Court's general *jus ad bellum* finding as a basis to seek compensation for any harm that occurred during the war. Permitting such an approach would fly in the face of the Court's express admonition in the 2005 Judgment that the DRC must prove the "specific actions of

³⁵⁵ Bosnia and Herzegovina v. Serbia and Montenegro (2007), para. 462.

³⁵⁶ *Armed Activities* (2005), para. 345 (1).

Uganda". As with all other categories of wrongful acts, the DRC must now identify particularised actions of Uganda within the scope of the Court's general finding.

4.17 Needless to say, conduct for which the Court did *not* find Uganda responsible in 2005 cannot serve as a basis for compensation in this reparation phase. In particular, conduct by rebel groups occurring outside Ituri is neither directly attributable to Uganda nor a basis for asserting that Uganda failed in a duty to prevent such conduct. The Court explicitly stated that "with regard to the illegal activities of such groups outside of Ituri, it cannot conclude that Uganda was in breach of its duty of vigilance".³⁵⁷

B. THE DRC MUST ALSO PROVE THE CAUSAL NEXUS BETWEEN EACH SPECIFIC ACTION OF UGANDA AND THE HARM IT ALLEGES

4.18 To sustain its reparation claim, the DRC must not only prove "specific actions of Uganda" falling within the general categories of wrongful acts identified by the Court in 2005, but also must prove that the injuries claimed were suffered "as a result of" those actions. In other words, the DRC must prove a causal connection between the two.

1. The Requirement of a Direct and Certain Causal Nexus

4.19 It is a basic tenet of the rules on State responsibility that a State has a duty to make reparation only if a duly established injury is the result of an internationally wrongful act. Article 31 of the Articles on State Responsibility, entitled "Reparation," codifies this requirement in the following terms: "1. The responsible State is under an obligation to make full reparation for the injury *caused* by the

³⁵⁷ *Ibid.*, para. 247.

internationally wrongful act. 2. Injury includes any damage, whether material or moral, *caused* by the internationally wrongful act of a State". ³⁵⁸

- 4.20 Commenting on Article 31, the ILC stated that paragraph 2 "is used to make clear that the subject matter of reparation is, globally, the injury resulting from and ascribable to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act". 359
- 4.21 Said differently, and to use the words of the Court, to trigger the duty to make reparation, there must exist "a sufficiently *direct and certain causal nexus* between the wrongful act... and the injury suffered". ³⁶⁰ The Court explained in the *Diallo* case:

"As to each head of damage, the Court will consider whether an injury is established. It will then 'ascertain whether, and to what extent, the injury asserted by the Applicant is the consequence of wrongful conduct by the Respondent', taking into account 'whether there is a sufficiently direct and certain causal nexus between the wrongful act ... and the injury suffered by the Applicant.' ... If the existence of injury and causation is established, the Court will then determine the valuation". 361

4.22 Only if such causal nexus is established can the claimed injury be legally deemed the "consequence" or result, of the wrongful conduct. Indeed, some

³⁵⁸ U.N. General Assembly, *Responsibility of States for internationally wrongful acts*, U.N. Doc. A/RES/56/83 (28 Jan. 2002), Art. 31 (emphasis added), Annex 14.

³⁵⁹ Vincent Kangulumba Mbambi, *Indemnisation des victimes des accidents de la circulation et assurance de responsabilité civile automobile* (2002), p. 92, para. 9 (emphasis added).

³⁶⁰ Bosnia and Herzegovina v. Serbia and Montenegro (2007), p. 234, para. 462.

³⁶¹ Diallo (2012), para. 14.

³⁶² *Ibid*.

authors consider the causation requirement to inhere in the very notion of "injury" in international law because, even if real, an injury is not claimable unless it can be considered the consequence of the wrongful act.³⁶³

4.23 In international practice, the requirement of a "sufficiently direct and certain causal nexus" is often expressed by stating that the wrongful act must be the "proximate cause" of the injury. The proximate cause requirement can be found in the case law of many international courts and tribunals, including the Venezuelan Mixed Claims Commissions, 364 the General Claims Commission established between Mexico and the United States, 365 and the U.S.-Germany Mixed Claims Commission established after the First World War. 366 The requirement is also

³⁶³ J. J. Combacau & S. Sur, *Droit international public* (1995), p. 539.

³⁶⁴ See Company General of the Orinoco Case, 10 RIAA 184 (31 July 1905), p. 282 ("They are not a proximate result of the primary act for which it is held responsible in damages".); Heirs of Jules Brun Case, 10 RIAA 24 (31 July 1905), p. 40 ("[T]he bullet wound thus inflicted was the proximate cause of the death of Jules Brun".); Heirs of Jean Maninat Case, 10 RIAA 55 (31 July 1905), p. 81 ("natural and proximate cause of a subsequently developed condition and therefore render the defendant liable for that condition".); Davis Case (on merits), 9 RIAA 460 (1903), p. 463 ("this negligence was directly and proximately contributory to the injuries complained of".); Valentiner Case, 9 RIAA 403 (1903), p. 403 ("the loss of the crop was a natural and proximate consequence of said illegal draft".). See also the US-Venezuela Commission: Dix Case, 9 RIAA 119 (1903-1905), p. 121 ("Governments, like individuals, are responsible only for the proximate and natural consequences of their acts".); Monnot Case, 9 RIAA 232 (1903-1905), p. 233 ("He is entitled to compensation for the proximate and direct consequences of the wrongful seizure of his property".).

³⁶⁵ Armando Cobos Lopez (United Mexican States) v. United States of America, 4 RIAA 20 (2 Mar. 1926), p. 20.

³⁶⁶ See United States v. Germany, U.S.-Germany Mixed Claims Commission, Administrative Decision No. II, Award, 7 RIAA 1 (1 Nov. 1923), pp. 29-30; United States Steel Products Company (United States) v. Germany, Costa Rica Union Mining Company (United States) v. Germany, and South Porto Rico Sugar Company (United States) v. Germany (War-Risk Insurance Premium) 7 RIAA 44 (1 Nov. 1923), pp. 44-63, passim; Eastern Steamship Lines, Inc. (United States) v. Germany (War-Risk Insurance Premium Claim), 7 RIAA 71 (11 Mar. 1924); Provident Mutual Life Insurance Company and Others (United States) v. Germany (Life Insurance Claim), 7 RIAA 91 (18 Sep. 1924), pp. 112-113, p. 116; Eisenbach Brothers and Company (United States) v. Germany, 7 RIAA 199 (13 May 1925), p. 202-203; Standard Oil Company of New York (United States) v. Germany, Sun Oil Company (United States) v. Germany, and Pierce Oil Company (United States) v. Germany, 7 RIAA 301 (21 Apr. 1926), p. 307; Harriss, Irby & Vose (United States) v. Germany, 8 RIAA 17 (31 Aug. 1926), p. 20; S. Stanwood Menken, Administrator of the Estate of Alice E. Tesson, Deceased, and Others (United States) v. Germany, and Andrew C. McGowin, Administrator

applied in contemporary practice by the Iran-U.S. Claims Tribunal,³⁶⁷ investment tribunals established under ICSID,³⁶⁸ the European Court of Human Rights,³⁶⁹ the Inter-American Court of Human Rights³⁷⁰ and the ICC.³⁷¹ Notably, both the

-

of the Estate of Frank B. Tesson, Deceased, and Others (United States) v. Germany, 8 RIAA 24 (31 Aug. 1926), p. 25; Rosa Vollweiler (United States) v. Germany, 8 RIAA 45 (8 Mar. 1928), p. 50; James A. Beha, Superintendent of Insurance of the State of New York, as Liquidator of Norske Lloyd Insurance Company, Limited, for American Policyholders (United States) v. Germany, 8 RIAA 55 (12 Apr. 1928), p. 56; George Achelis, Julie Achelis Spies, John Achelis, Estate of Annie Achelis Vietor, Deceased, and Estate of Fritz Achelis, Deceased, Heirs and Legatees of the Estate of Thomas Achelis, Deceased (United States) v. Germany, 8 RIAA 59 (25 Apr. 1928), p. 63.

³⁶⁷ See Hoffland Honey co. v. Natl. Iranian Oil Co., Case No. 495, Iran Award 22-495-2 (Iran-U.S.C.1.Trib.), 2 Iran-U.S.C.T.R. 41 (26 Jan. 1983), p. 41.

³⁶⁸ See Biwater Gauff (Tanzania) v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award (24 July 2008) (Born, Landau, Hanotiau), p. 233, Section 787; Joseph Charles Lemire v. Ukraine, ICSID Case No. ARB/06/18, Award (28 March 2011) (Fernández-Armesto, Paulsson, Voss), p. 50, Section 163; LG&E Energy Corp., LG&E Capital Corp. LG&E International, Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Award (25 July 2007) (de Maekelt, Rezek, Jan van den Berg), p. 14, Section 50.

³⁶⁹ Case of Paulet v. The United Kingdom (app. no. 6219/08), Judgment (ECtHR 13 May 2014), Section 73: ("However, in the absence of a proximate causal link between the procedural violation found and financial loss sustained by the applicant by reason of the confiscation order, the Court cannot make an award to the applicant under this head".). In Case of Iglesias Gil and A.U.I. v. Spain (app. no. 56673/00), Final Judgment (ECtHR 29 July 2003), Section 70, the ECtHR considers a causal nexus to be "too remote", as opposed to proximate.

³⁷⁰ Case of Aloeboetoe et al. v. Suriname, Judgment, Reparations and Costs (IACtHR 10 Sept. 1993), p. 12, Section 48.

³⁷¹ Case of the Prosecutor v. Ahmad Al Faqi Al Mahdi, Case No. ICC-01/12-01/15, Reparations Order (ICC Trial Chamber 17 Aug. 2017), para. 74.

UNCC³⁷² and EECC³⁷³ adhered to the proximate cause requirement when deciding war reparations claims.

4.24 The proximate cause requirement excludes from the obligation to make reparation any injury that is indirect,³⁷⁴ consequential or too remote from the wrongful act.³⁷⁵ Likewise, if the damage is not "foreseeable"³⁷⁶ in the normal course of events, it is deemed to be too remote from the wrongful act and therefore

³⁷² U.N. Security Council, 2981st meeting, *Resolution 687 (1991)*, U.N. Doc. S/RES/687 (1991) (8 Apr. 1991), p. 7, para. 16, Annex 1 affirms the responsibility of Iraq for "any direct loss, damage – including environmental damage and the depletion of natural resources – or injury (…) as a result of its unlawful invasion and occupation of Kuwait". The "direct loss" requirement was considered to be equivalent to the usual "proximate cause" theory:

[&]quot;The causal link is presumed to exist when, under the natural course of events, the damage could have been foreseen. Predictability prevails in judicial practice. By now the most commonly used test in damages claims seems to be whether the act of a State was the 'proximate cause' of the loss suffered, or whether that act was too remote to create liability". E. Lauterpacht et al., eds, INTERNATIONAL LAW REPORTS, Vol. 117 (2000).

See also U.N. Compensation Commission, Report and Recommendations Made by the Panel of Commissioners Concerning the First Instalment of Individual Claims for Damages up to \$100,000 (Category "C" Claims), U.N. Doc. S/AC.26/1994/3 (21 Dec. 1994), pp. 22-23, Annex 5; U.N. Security Council, Report and Recommendations Made by the Panel of Commissioners Concerning the Seventh Instalment of Individual Claims for Damages up to \$100,000 (Category "C" Claims), U.N. Doc. S/AC.26/1999/11 (24 Jun. 1999), p. 17, Section 29, Annex 8.

³⁷³ Preliminary decision n°7, Guidance Regarding Jus ad Bellum Liability, Eritrea-Ethiopia Claims Commission, reprinted in 26 U.N.R.I.A.A. 631 (2009), p. 507.

³⁷⁴ "The Geneva Arbitration" (the "*Alabama*" case), in John B. Moore, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY (1898), p. 641 (1872).

³⁷⁵ See "Report of the Commission to the General Assembly on the work of its fifty-third session", in *Yearbook of the International Law Commission*, Vol. II, Part 2, Doc. No. A/CN.4/SER/A/2001/Add.1 (2001), p. 93.

³⁷⁶ Responsabilité de l'Allemagne a Raison des Dommages Causés dans les Colonies Portugaises du Sud de l'Afrique, 2 RIAA 1011 (1949), p. 1031.

not caused by it. (Drawing from French and Belgian law, Congolese law is no different in that regard than international law.³⁷⁷)

4.25 Simply put, the injury to be made whole by the State responsible for an internationally wrongful act must be "ascribable"³⁷⁸ to that act. That is only true if such act is the proximate—i.e., the direct and certain—cause of that injury. States do not bear responsibility for "any and all consequences flowing from an internationally wrongful act".³⁷⁹

2. The Causal Nexus Requirement Applies to Violations of Obligations of Due Diligence

4.26 The causality principles just stated are fully applicable to harms stemming from the breach of a due diligence obligation.

4.27 As stated, the Court squarely confronted this issue after it found that the Federal Republic of Yugoslavia was responsible under Article 1 of the Genocide Convention for failing to exercise due diligence to prevent the Bosnian Serb Army from committing atrocities in Srebrenica. Although the Court concluded that a violation had occurred, it declined Bosnia's request for compensation. The Court ruled:

"[T]he Respondent did have significant means of influencing the Bosnian Serb military and political authorities which it could, and therefore should, have employed in an attempt to prevent the atrocities, but it has not been shown that, in the specific context of these events, those means would have sufficed to

³⁷⁷ Vincent Kangulumba Mbambi, *Indemnisation des victimes des accidents de la circulation et assurance de responsabilité civile automobile* (2002), p. 352.

³⁷⁸ ARSIWA (2001), Art. 31, cmt. 9.

³⁷⁹ *Ibid*.

achieve the result which the Respondent should have sought. Since the Court cannot therefore regard as proven a causal nexus between the Respondent's violation of its obligation of prevention and the damage resulting from the genocide at Srebrenica, financial compensation is not the appropriate form of reparation for the breach of the obligation to prevent genocide". 380

- 4.28 Thus, even when a due diligence obligation is shown to have been breached, the applicant State must still show that the harm at issue "would in fact have been averted if the Respondent had acted in compliance with its legal obligations". In the absence of such a showing, no compensation can be awarded. In such cases, as in *Bosnia v. Serbia*, satisfaction is the appropriate form of reparation.
 - 3. The Causal Nexus Requirement Also Applies to Violations of the Principles Against the Use of Force and Non-intervention
- 4.29 These same causality principles are also fully applicable to harms stemming from the breach of the principles of non-use of force and non-intervention in international relations. This is confirmed by State practice, jurisprudence and doctrine.³⁸¹
- 4.30 The required causal nexus is *not* established based solely on a finding that the injury would not have occurred absent the illegal use of force. The UNCC, for example, ruled:

"For a direct link to exist, the Panel initially holds that it is not sufficient that a loss would not have occurred had the invasion and occupation [of Kuwait by Iraq] not taken place. With such a 'but for' test,

-

³⁸⁰ Bosnia and Herzegovina v. Serbia and Montenegro (2007), para. 438.

³⁸¹ See generally Pierre d'Argent, Les réparations de guerre en droit international public (Oct. 2002), pp. 644-659.

sometimes also referred to as factual causation, any loss that could be traced back through a causal chain to the invasion and occupation would be compensable. This would be a wider standard than the one laid down in resolution 687 according to which only losses resulting directly from the invasion and occupation are compensable, and a 'but for' test could at best serve as a rule of exclusion". 382

4.31 The same approach has been followed by other international courts and tribunals. Addressing Eritrea's responsibility for its violations of *jus ad bellum*, the EECC determined that

"the necessary connection is best characterized through the commonly used nomenclature of 'proximate cause.' In assessing whether this test is met, and whether the chain of causation is sufficiently close in a particular situation, the Commission will give weight to whether particular damage reasonably should have been foreseeable to an actor committing the international delict in question. The element of foreseeability, although not without its own difficulties, provides some discipline predictability assessing proximity. and in Accordingly, it will be given considerable weight in assessing whether particular damages compensable".383

4.32 Applying these principles, the UNCC excluded for lack of a sufficiently direct causal link all claims relating to losses incurred as a result of the embargo imposed by the UN Security Council or, more generally, losses "due to the chaotic

³⁸² E. Lauterpacht et al., eds, INTERNATIONAL LAW REPORTS, Vol. 117 (2000), Section 214.

³⁸³ Preliminary decision n°7, Guidance Regarding Jus ad Bellum Liability, Eritrea-Ethiopia Claims Commission, reprinted in 26 U.N.R.I.A.A. 631 (2009), para. 13.

economic situation following Iraq's unlawful invasion and occupation of Kuwait". 384

4.33 Likewise, the EECC rejected the claims of both parties relating to compensation for alleged macroeconomic damages resulting from "general disruption of the civilian economy in wartime"³⁸⁵ or "the generalized decline in economic conditions".³⁸⁶ It held that a State's international responsibility does *not* extend "to all of the losses and disruptions accompanying an international conflict"³⁸⁷ because "[a] breach of the *jus ad bellum*... does not create liability for all that comes after".³⁸⁸

4.34 Consequently, to assess whether an injury is, legally speaking, the result of an illegal use of force or intervention, it is not enough to say that the injury would not have occurred had a use of force not taken place. To satisfy the causal nexus requirement, the claimant State must establish a direct and certain causal link between the use of force or intervention and the harm allegedly suffered.³⁸⁹

³⁸⁴ See U.N. Security Council, Compensation Commission, Governing Council, 8th Session, Compensation for Business Losses Resulting from Iraq's Unlawful Invasion and Occupation of Kuwait where the Trade Embargo and Related Measures Were also a Cause, Decision taken by the Governing Council of the United Nations Compensation Commission at its 31st meeting, held in Geneva on 18 December 1992 U.N. Doc. S/AC.26/1992/15 (4 Jan. 1993), para. 5, Annex 4. See also para. 3 and 9, together with U.N. Security Council, Decision taken by the Governing Council of the United Nations Compensation Commission during the resumed Fourth Session, at the 23rd meeting, held on 6th March 1992, U.N. Doc. S/AC.26/1992/9 (6 Mar. 1992), para. 6, Annex 3.

³⁸⁵ Ethiopia's Damages Claims (Final Award, 2009), para. 395.

³⁸⁶ Eritrea's Damages Claims (Final Award, 2009), para. 207.

³⁸⁷ Ethiopia's Damages Claims (Final Award, 2009), para. 289.

³⁸⁸ *Ibid.*, para. 289.

³⁸⁹ See Différend Società Mineraria et Metallurgica di Pertusola — Décisions nos 47, 95 et 121, 13 RI.AA 174 (11 May 1950 and 3 Mar. 1952), p.186:

[&]quot;Le dommage, pour pouvoir donner naissance à l'obligation de le réparer, ne doit pas avoir comme cause uniquement l'état de guerre, mais encore un fait dû à cet état et qui a atteint

4.35 Likewise, where a violation of the principle of non-intervention arises from activities such as the logistical or financial support afforded to irregular forces operating in another country, it is not sufficient to conclude that in the absence of that support certain injuries would not have occurred. In order for such injuries to be compensable by the responsible State, it must be established that the logistical or financial support in question is the direct and certain cause of any injury claimed.

C. THE DRC MEMORIAL FAILS TO PROVE EITHER SPECIFIC ACTIONS OF UGANDA FALLING WITHIN THE SCOPE OF THE COURT'S GENERAL FINDINGS OR THE REQUIRED CAUSAL NEXUS

- 4.36 The DRC Memorial does not make any significant effort to make the showings required of it by the 2005 Judgment; namely, (1) to prove specific acts attributable to Uganda that fall within one of the general findings from the 2005 Judgment, (2) to identify a specific harm to the DRC, and then (3) to prove a sufficiently direct and certain causal nexus between the two.
- 4.37 To the contrary, the DRC Memorial does little more than try to prove the existence of certain categories of harm in general, and then assumes (without proving) the connection of that harm to a wrongful act attributable to Uganda. Proceeding in this way may allow the DRC to maximise its claims and minimise its evidentiary showing but, Uganda respectfully submits, does little to assist the Court with the weighty task before it.

un bien en Italie soumis à restitution au sens de l'article 78, par. 4 a, *in principio* [of the 1947 Peace Treaty with Italy]. Il ne suffit pas, d'après l'analyse grammaticale, d'un lien de causalité indirect entre le dommage qu'a valu au ressortissant des Puissances Alliées ou Associées la propriété d'un bien en Italie, et l'état de guerre qui a existé entre l'Italie et les Puissances Alliées et Associées; il faut, bien plus, un lien de causalité direct entre le dommage et un fait dommageable dû à la guerre et qui a frappé le bien".

4.38 Several excerpts will serve to expose the pervasive flaws in the DRC's approach to proving specific actions of Uganda, specific harm and the causal nexus between the two. At paragraph 1.25 of the DRC Memorial, for example, the DRC asserts that "all of the damage caused by Uganda's wrongful behaviour actually stems from the invasion of Congolese territory that began in August 1998 and the support that State gave from that date to irregular groups", and insists that "all of the damage was indeed the consequence of Uganda's wrongful behaviour, whether such consequence is immediate or results from an uninterrupted chain of events" 390.

4.39 The DRC reiterates this approach later in the Memorial:

"First of all, acts of damage will not be distinguished based on the rule of international law that was violated, be it for the most part the prohibition of the use of force in international relations, violation of the laws of armed conflict or international human rights law. In practice, moreover, all human and material damage in question is the result of the invasion of the DRC by Ugandan forces, be it in the short term (because it was caused upon the arrival of Ugandan troops) or the longer term (whenever it is the result of the repression of acts of resistance or more generally of atrocities that took place after the invasion phase strictly defined)". ³⁹¹

-

³⁹⁰ DRCM, para. 1.25 (Translation by Counsel, original in French: "l'ensemble des dommages causés par le comportement illicite de l'Ouganda découle en réalité de l'invasion du territoire congolais qui a débuté au mois d'août 1998 ainsi que du soutien que cet Etat a apporté dès cette date à des groupes irréguliers. Il n'existe aucune raison —et ceci rejoint les principes juridiques rappelés plus haut— de distinguer les dommages en fonction de la règle juridique qui a été violée, même si les spécificités de certaines d'entre elles peuvent parfois être prises en compte pour mesurer la gravité du dommage. Ce qui importe, dans l'ensemble, c'est de démontrer que l'ensemble de ces dommages ont bien été la conséquence du comportement illicite de l'Ouganda, que cette conséquence soit immédiate ou résulte d'une chaîne ininterrompue d'événements".).

³⁹¹ DRCM, para. 2.05 (Translation by Counsel, original in French: "En premier lieu, les dommages ne seront pas distingués en fonction de la règle de droit international qui a été violée, qu'il s'agisse essentiellement de l'interdiction du recours à la force dans les relations internationales, de la

4.40 Addressing the injuries inflicted by irregular forces supported by Uganda, the DRC adds again:

"The determining criterion is, in fact, not the intrinsic lawfulness of each of these acts, much less their attribution to Uganda. It lies in the acknowledgment that the harmful act would not have been caused without the support of Uganda, which was explicitly established by the Court as illicit, to its irregular forces". 392

4.41 These excerpts make clear that the DRC eschews the burden of proving specific Ugandan actions, specific harm and the causal nexus between them. It prefers to assume that unspecified harm occurred during the war and that some proportion of that harm would not have occurred "but for" the actions of Uganda. According to the DRC, a percentage of each and every injury that occurred in the DRC during the conflict is automatically traceable back, through an uninterrupted causal chain, to Uganda.

4.42 The DRC sometimes claims full compensation for alleged injuries and sometimes only a percentage thereof. For instance, it claims that Uganda is responsible for 45% of what it contends were the total number of violent deaths

violation du droit des conflits armés ou encore du droit international des droits humains. En pratique, tous les dégâts humains et matériels dont il sera question résultent d'ailleurs de l'invasion de la RDC par les forces ougandaises, que ce soit à court (parce qu'ils ont été occasionné lors de l'arrivée des troupes ougandaises) ou à plus long terme (lorsqu'ils résultent de la répression des actes de résistance ou plus généralement d'exactions qui ont eu lieu après la phase de l'invasion stricto sensu)".).

³⁹² *Ibid.*, para. 2.06 (Translation by Counsel, original in French: "Le critère déterminant n'est en effet pas celui de la licéité intrinsèque de chacun de ces actes, ni encore moins celui de leur attribution à l'Ouganda. Il réside dans le constat que cet acte dommageable n'aurait pas été causé sans le soutien de l'Ouganda, explicitement établi par la Cour comme illicite celui-là, à ces forces irrégulières".).

during the conflict³⁹³ and of the alleged macroeconomic damages it suffered.³⁹⁴ With respect to its claims concerning harms to wildlife, the percentage of responsibility the DRC attempts to apportion to Uganda varies from 50% to 90%.³⁹⁵

4.43 By such apportionment, the DRC seems to recognise that "other actors are responsible for [the] outbreak"³⁹⁶ of the conflict and that certain losses allegedly resulted from a "plurality of causes".³⁹⁷ Such apportionments are, however, not applied consistently and appear to be grounded in little more than conjecture.

4.44 More fundamentally, the DRC's crude efforts at "apportionment" are an attempt to mask the fundamental flaws in its approach—namely, its failure to prove specific Ugandan acts, specific harm and the existence of a causal nexus tying the two together—in the guise of "reasonableness". In the absence of genuine proof of specific acts, harm and causation, however, Uganda cannot even be considered as one of a plurality of causes that resulted in compensable harm.

-

³⁹³ *Ibid.*, para. 2.71.

³⁹⁴ *Ibid.*, para. 6.32. *See* below on the alleged macroeconomic damage as a non-compensable head of damage under international law.

³⁹⁵ See ibid., paras. 5.151, 5.161, 5.165, 5.167, 5.169, 5.171.

³⁹⁶ *Ibid.*, para. 2.71 (Translation by Counsel, original in French: "d'autres acteurs sont responsables de son déclenchement".).

³⁹⁷ *Ibid.*, para. 1.24 (Translation by Counsel, original in French: "pluralité des causes".). On plurality of causes and apportionment, *see* P. d'Argent, "Reparation, cessation, assurances and guarantees of non-repetition in situations of shared responsibility" in PRINCIPLES OF SHARED RESPONSIBILITY IN INTERNATIONAL LAW: AN APPRAISAL OF THE STATE OF THE ART (A. Nolkaemper & I. Plakokefalos eds., 2014), pp. 208-250.

D. THE PROPER APPROACH TO ATTRIBUTION AND CAUSALITY

4.45 The DRC's claims must be approached by applying the proximate cause standard to the four general categories of acts for which the Court found Uganda responsible in the 2005 Judgment: (1) acts of Ugandan military forces that directly harmed persons or property; (2) Ugandan support to (but not effective control over) rebel groups; (3) lack of due diligence in Ituri; and (4) acts in violation of use of force and non-intervention norms. The following paragraphs deals with each of these four categories in turn.

1. Acts of the Ugandan Military That Directly Caused Harm

- 4.46 Uganda does not dispute that it is, in principle, responsible for the injuries directly inflicted by members of its armed forces; such injuries do not raise complex questions of causality. Nevertheless, it remains for the DRC to prove the existence of such injuries and that they were inflicted by members of the Ugandan military.
- 4.47 The DRC Memorial fails to make these showings. As discussed in the remaining chapters of this Counter-Memorial, even those of the DRC's claims that relate to harms directly inflicted by Ugandan military forces invariably fail to satisfy basic evidentiary requirements, including proof of the dates the alleged incidents occurred, the identity of the victims, the number of victims and/or facts establishing Uganda's responsibility.

2. Uganda's Support to Rebel Groups

4.48 The DRC Memorial proceeds on the basis that because of Uganda's support to certain rebel groups in the DRC, Uganda must pay compensation for any harm inflicted by those groups. The DRC bases its claim on the "but for" test quoted

above. According to the DRC, without Uganda's support, the harms inflicted by the rebel groups would not have occurred.

4.49 Even assuming the DRC Memorial duly established "the exact injury" inflicted by rebel groups (which it does not), it would also have to demonstrate and prove that injury "was suffered as a result of" Uganda's illegal support for those groups. It is not enough to assert *in abstracto* that without Uganda's support no injury by rebel groups would have occurred. The "but for" approach the DRC urges on the Court is far too indirect and uncertain to meet the requirement to establish "a sufficiently direct and certain causal nexus between the wrongful act ... and the injury suffered" set out in the jurisprudence.

4.50 The loose "but for" test the DRC suggests would also effectively upset matters that were decided with the force of *res judicata* in 2005. As stated, the 2005 Judgment makes clear that Uganda did not create the MLC⁴⁰⁰ and that it enjoyed a large degree of autonomy in the conduct of its operations. Indeed, the Court not only determined that Uganda did not control the MLC but also that it "could [not] control" it.⁴⁰¹ To now find Uganda nevertheless responsible to make reparation for the conduct of the MLC would effectively attribute to Uganda conduct that the Court expressly declined to so attribute in 2005.

4.51 The DRC's argument that the harms caused by the MLC would not have occurred but for assistance from Uganda is also belied by the facts. The MLC

³⁹⁸ Armed Activities (2005), para. 260.

³⁹⁹ Bosnia and Herzegovina v. Serbia and Montenegro (2007), para. 462. Those exact words were reproduced in *Diallo* (2012), para. 14.

⁴⁰⁰ Armed Activities (2005), para. 160.

⁴⁰¹ *Ibid*.

leader, Jean Pierre Bemba, himself declared that "it was he who was in control of the military venture and not Uganda". 402 Moreover, the modus operandi of MLC/ALC actions was fairly rudimentary, using machetes and small calibre weapons that did not require outside support. The MLC/ALC also largely drew largely from the ranks of soldiers who defected from the Zairian-Congolese armed forces with their weapons and equipment. 403 It also used military hardware and stockpiles abandoned by fleeing Congolese soldiers, as the DRC itself admits. 404

4.52 Thus, in addition to being legally insufficient to show the required causal nexus, the DRC's contention that the harms inflicted by rebel groups like the MLC would not have occurred but for Uganda's assistance raises serious questions of fact, none of which the DRC makes any effort to answer.

4.53 Analogous points may be made with respect to other rebel groups. Nowhere in the 2005 Judgment did the Court find that any irregular forces, including the RCD (or the RCD-Mouvement de libération (ML), rival to the pro-Rwandan wing RCD-Goma), were acting under the instructions or effective control by Uganda.

3. *Uganda's Violations of Its Due Diligence Obligations*

The 2005 Judgment ruled that Uganda was an occupying Power in Ituri from 18 June 1999 onwards, 405 and that Uganda was responsible for its "lack of vigilance in preventing violations of human rights and international humanitarian

⁴⁰² *Ibid.*, para. 158.

⁴⁰³ See U.N. Mapping Report, para. 381, Annex 25.

⁴⁰⁴ DRCM, paras. 2.51, 2.53.

⁴⁰⁵ Armed Activities (2005), para. 175.

law by other actors present in the occupied territory, including rebel groups acting on their own account". 406

4.55 As stated, the causal nexus between a wrongful omission and an injury "could be considered established only if the Court were able to conclude from the case as a whole and with a sufficient degree of certainty that the [harm] would in fact have been averted if the Respondent had acted in compliance with its legal obligations". ⁴⁰⁷ It therefore falls to the DRC to establish to a high level of certainty that the injuries inflicted by other actors in Ituri would in fact have been averted if Uganda had acted in compliance with its obligation "to protect the inhabitants of the occupied territory against acts of violence". ⁴⁰⁸ The DRC Memorial not only fails to meet this burden, it does not even attempt to do so.

4.56 Moreover, in light of: (1) the size of Ituri (65,658 km², roughly the size of Sri Lanka and more than twice the size of Belgium); (2) its population (between 3.3 and 5.5 million inhabitants scattered in remote villages and divided between 18 ethnic groups);⁴⁰⁹ (3) the density of the equatorial forest that covers most of the landscape; (4) the long-standing ethnic conflict between the Lendu and Hema tribes (which the DRC government itself cannot stop to this day)⁴¹⁰; (5) the cruel group

⁴⁰⁶ *Ibid.*, para. 179.

⁴⁰⁷ Bosnia and Herzegovina v. Serbia and Montenegro (2007), para. 462.

⁴⁰⁸ Armed Activities (2005), para. 178.

⁴⁰⁹ See DRCM, para. 3.04 quoting to U.N. Security Council, Special Report on the events in Ituri, January 2002- December 2003, U.N. Doc. S/2004/573 (16 July 2004). DRCM, Annex 1.6.

⁴¹⁰ Laurent Oussou, M.O.N.U.S.C.O., *La Force de la MONUSCO Invite les Communautés en Ituri à Dialoguer pour la Paix, available at* https://monusco.unmissions.org/la-force-de-la-monusco-invite-les-communaut%C3%A9s-en-ituri-%C3%A0-dialoguer-pour-la-paix (11 Aug. 2017), p. 2, Annex 100; U.N. Office for the Coordination of Humanitarian Affairs, *DR Congo: Weekly Humanitarian Update (19-23 June 2017), available at* https://reliefweb.int/report/democratic-republic-congo/dr-congo-weekly-humanitarian-update-19-23-june-2017 (23 June 2017), Annex 30; U.N. Security Council, 7998th Meeting, *Security Council Members Stress Need for*

culture prevailing within armed militias like the Mai-Mai; and (6) the modest size of the Ugandan deployment during the conflict ("10,000 soldiers 'at the height of the deployment'" Uganda could not possibly have prevented all the claimed injuries caused by other actors in Ituri. Even if it entirely fulfilled its obligation of due diligence, Uganda was not and could not have been omnipresent in Ituri.

4.57 The fact that the Court previously made a general determination that Uganda failed to comply with its obligations of vigilance and prevention as an occupying Power does not relieve the DRC of its burden at this stage to prove specific harms inflicted by other actors in Ituri, prove specific measures that Uganda failed to take as an occupying Power, and prove the causal nexus between such omissions and the harms. The DRC Memorial fails to establish any of these elements (or the valuation of the harm).

4. Uganda's Violations of Use of Force and Non-intervention Norms

4.58 The DRC contends that Uganda's violations of the principles relating to the use of force and non-intervention make it responsible for everything that happened in the DRC after Uganda's intervention began. Uganda disagrees and considers that the Court should follow the EECC's approach and "determine what injury was proximately caused by [Uganda's] delict, informed by judgments regarding the consequences that should have been reasonably foreseeable to [Uganda's] military and civilian leaders at the time of its unlawful action". In making that determination, the EECC made clear that it did "not believe that a State's international responsibility in a case such as this extends to all of the losses and

-

Democratic Republic of Congo to Hold Fair, Free, Inclusive Elections without Further Delay, U.N. Doc. SC/12907 (11 July 2017), Annex 32.

⁴¹¹ Armed Activities (2005), para. 170.

⁴¹² Ethiopia's Damages (Final Award, 2009), para. 284.

disruptions accompanying an international conflict. A breach of the *jus ad bellum* by a State does not create liability for all that comes after. Instead, there must be a sufficient causal connection".⁴¹³

4.59 The Court must therefore determine whether the DRC has presented evidence that allows it to "weigh whether particular consequences were, or should have been foreseen by [Uganda's] leaders in the exercise of reasonable judgment at the time of" Uganda's delict, recognising that "if a party is deemed to foresee too wide a range of possible results of its action, reaching too far into the future, or too far from the battlefield, foreseeability loses its meaning as a tool to assess proximate cause". The DRC has failed to present evidence that meets this standard.

4.60 Like its claims concerning Uganda's support for certain rebel groups, this aspect of the DRC's claims invariably relies upon the generalised assertion that "but for" Uganda's use of force and intervention, exceptionally broad and variegated harms across a wide swath of the DRC and occurring over a period of several years would not have occurred. Such an approach does not allow the Court to connect Uganda's violations to any particular harms on the basis that the latter were, or should have been, foreseen by Uganda's leaders in the exercise of reasonable judgment at the time of Uganda's actions.

4.61 The single most significant aspect of the DRC's claims that rests solely on the violation of use of force and non-intervention norms is its claim for macroeconomic damages. That claim is discussed in detail in Chapter 9. For present purposes, Uganda notes that the EECC declined to award compensation for

⁴¹³ *Ibid.*, para. 289.

⁴¹⁴ *Ibid.*, para. 290

macro-economic damages allegedly resulting from a *jus ad bellum* violation, observing: "Since at least the *Alabama* arbitration, panels have rejected claims for damages to generalized economic interests of the victorious State or its nationals, or to its expenses in waging war". 415

II. The DRC Essentially Asks the Court to Decide the Issue of Compensation Ex Aequo et Bono, Which It Cannot Do

4.62 Rather than try to make the evidentiary showings required of it by the 2005 Judgment and international law more generally, the DRC resorts to highly subjective methodologies that can only be viewed as, in effect, requesting the Court to decide this case *ex aequo et bono*. But the Court is, of course, precluded from doing so unless both Parties agree.

A. THE DRC DISREGARDS INTERNATIONAL LAW REGARDING REPARATIONS FOR INTER-STATE CLAIMS

4.63 The DRC portrays its methodology for assessing compensation as based on traditional rules of State responsibility, 416 such as those reflected in the ILC Articles on State Responsibility. Nothing could be further from the truth.

4.64 A telling example of the extent to which the DRC abandons the law in its Memorial is its claims relating to harm caused by rebel groups supported by Uganda. As discussed, the conduct of the rebel groups cannot be attributed to Uganda unless the well-established "effective control test", consistently

⁴¹⁵ *Ibid.*, para. 286.

⁴¹⁶ DRCM, para. 1.18.

maintained by the Court, 417 has been met. Had the DRC truly based its claims on the law—rather than its subjective belief as to what is reasonable, equitable or just—it would at least have tried to demonstrate the specific harms inflicted by specific rebel groups "acting on the instructions of, or under the direction or control of, [Uganda] in carrying out the conduct". But it makes no such effort. To the contrary, it simply asserts that Uganda must pay compensation for all damage caused by those groups because "such damage is the logical result of that illicit support, such that it could not have been caused without such support". 419

4.65 The DRC also deviates from the law when it invites the Court to determine a total amount for compensation, such as a "lump sum" amount, that has no direct relationship to the actual harm suffered. The DRC attempts to justify this proposition based on the complexity of the case and the multitude of internationally wrongful acts. Referring to its Memorial on the merits, the DRC contends that a lump sum payment is "both necessary and desirable". The DRC's use of the word "desirable" ("souhaitable") is telling and confirms the non-legal character of the DRC's approach.

-

⁴¹⁷ Nicaragua v. United States of America (Merits, 1986), para. 115; Bosnia and Herzegovina v. Serbia and Montenegro (2007), para. 406.

⁴¹⁸ "Report of the Commission to the General Assembly on the work of its fifty-third session", in *Yearbook of the International Law Commission*, Vol. II, Part 2, Doc No. A/CN.4/SER/A/2001/Add.1 (2001), Art. 8.

⁴¹⁹ DRCM, para. 1.24 (Translation by Counsel, original in French: "ces dommages découlent logiquement de ce soutien illicite, en ce sens qu'ils n'auraient pas pu être causés sans ce soutien".).

⁴²⁰ *Ibid.*, para. 1.11 (Translation by Counsel, original in French: "rien n'interdit à la Cour de fixer une somme globale".). *See also ibid.*, para. 1.18.

⁴²¹ *Ibid.*, para. 1.11 (Translation by Counsel, original in French: "nécessaire et souhaitable").

⁴²² *Ibid*.

4.66 Likewise, the DRC asserts that "in its assessment of the compensation of damage caused to persons following the breaches of international law for which Uganda was responsible on Congolese territory between 1998 and 2003, the DRC was also largely guided by the guidelines given by the United Nations General Assembly in 2005", ⁴²³ relating to the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* ("Basic Principles and Guidelines"). ⁴²⁴ Here, too, however, the reference does not go beyond lip service.

4.67 It should first be noted that the *Basic Principles and Guidelines* are specifically addressed to States for national implementation. They do not purport to be articulating legal standards to be applied by international courts or tribunals. By their terms, they

"Recommend[] that States take the Basic Principles and Guidelines into account, promote respect thereof and bring them to the attention of members of the executive bodies of government, in particular law enforcement officials and military and security forces, legislative bodies, the judiciary, victims and their representatives, human rights defenders and lawyers, the media and the public in general". 425

⁴²³ DRCM, para. 7.05 (Translation by Counsel, original in French: "dans son évaluation de l'indemnisation des dommages causés aux personnes à la suite des violations du droit international dont l'Ouganda s'est rendu responsable sur le territoire du Congo entre 1998 et 2003, la RDC a également été largement guidée par les lignes dégagées par l'Assemblée générale des Nations Unies en 2005").

⁴²⁴ U.N. General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, U.N. Doc. A/RES/60/147 (21 Mar. 2006), Annex 21

⁴²⁵ *Ihid*

4.68 More importantly, the *Basic Principles and Guidelines* clearly require an approach to reparation that is case-specific and grounded in the application of traditional legal rules concerning claims, not in abstract concepts of justice, let alone *ex aequo et bono*. This is clearly signalled in its Preamble:

"Emphasizing that the Basic Principles and Guidelines contained herein do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law which are complementary though different as to their norms". 426

Thus, the *Basic Principles and Guidelines* were conceived as a recapitulation of *legal* obligations and implementation mechanisms for States to pursue on the right to a remedy and reparation for victims of specific international obligations.

4.69 The case-specific focus of the *Basic Principles and Guidelines* is equally clear:

"In accordance with domestic law and international law, and taking account of individual circumstances, victims of gross violations of international human rights law and serious violations of international humanitarian law should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation, as laid out in principles 19 to 23, which include the following forms: restitution, compensation, rehabilitation, satisfaction and

⁴²⁶ *Ibid.*, note 78, Preamble, para. 7 (emphasis added).

guarantees of non-repetition". 427

- 4.70 Likewise, with regard to compensation, the *Basic Principles and Guidelines* insist on the fact that it "should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case".⁴²⁸
- 4.71 This is not the approach the DRC takes. In dealing with the harm caused to persons, for example, the DRC admits that, because of the "impossibility" of establishing the specifics relating to each victim, it has been "compelled to assess the amount of compensation due for each category of damage caused to persons on a lump-sum basis, which aims to cover all the elements of injury identified by the General Assembly in the abovementioned Principles". ⁴²⁹
- 4.72 Thus, while purporting to respect the *Basic Principles and Guidelines*, the DRC actually goes down a different path. *First*, as discussed in the next subsection, the DRC seemingly pulls estimates out of thin air as to the number of persons affected, an approach that entirely fails to identify victims with any level of specificity.
- 4.73 *Second*, rather than consider anything specific to those persons (approximate number of adults versus number of children, approximate life expectancy, approximate income, etc.), the DRC simply adopts an amount of compensation per person based on the compensation it says (but does not prove) is

⁴²⁷ Ibid., para. 18 (emphasis added).

⁴²⁸ *Ibid.*, para. 20 (emphasis added).

⁴²⁹ DRCM, para. 7.07 (Translation by Counsel, original in French: "amenée à chiffrer le montant des indemnisations dues pour chaque catégorie de dommages causés aux personnes sur une base forfaitaire, laquelle a vocation à couvrir l'ensemble des éléments de préjudice identifiés par l'Assemblée générale dans les Principes susmentionnés".).

awarded by DRC national courts in similar circumstances. The DRC says, for example, that for harm inflicted by acts of deliberate violence directed against civil populations, compensation should be based "on the jurisprudence of Congolese courts that had judged and sentenced those responsible for serious violations of human rights and international humanitarian law in eastern Congo". ⁴³⁰

4.74 Those national court decisions, however, typically did not take into account individual circumstances of the case. In a Judgment 18 February 2007 of the High Court of Kinshasa/Kalumu (uncovered by Uganda but *not* produced by the DRC), for example, the Court issued a decision requiring the DRC to pay an entire class of plaintiffs the following fixed amounts of compensation: US\$ 200 for the victim of assault and battery; US\$ 500 for the victims of extortion; US\$ 600 for the victims of looting; US\$ 2,000 for the victims of arbitrary arrest, illegal detention and torture; US\$ 5,000 for the victims of rape; and US\$ 30,000 for the deceased victim of rape.⁴³¹

4.75 In fact, the DRC national court decisions often do not even differentiate among types of harm, be it material or non-material; they simply award a number without regard to the specific conduct by the perpetrator or the specific injuries of the victims. Thus, in the *Kakado case*, which involved multiple crimes (including murder, rape, looting and damage to property, as well as leading an insurrectional movement), the defendant was condemned to pay US\$ 2,000,000 "for

⁴³⁰ DRCM, para. 7.08 (Translation by Counsel, original in French: "sur la jurisprudence des juridictions congolaises qui ont été amenées à juger et à condamner les responsables de violations graves des droits de l'homme et du droit international humanitaire dans l'est du Congo".).

⁴³¹ Waka-Lifumba (MP et PC. c. Botuli), RP 134/2007 (Tribunal Militaire de Garnison de Mbandaka, 18 Feb. 2007), Annex 44. For another similar example, see also Maniraguha et Sibomana (MP et PC (400) c. Jean Bosco Maniraguha alias Kazungu et consorts), RP 275/09, 521/10 RMP 581/07 and 1573/KMC/10 (Tribunal Militaire de Garnison de Bukavu, 16 Aug. 2011), Annex 47.

compensation for the damages suffered", 432 an approach that lumped all types of harm, material and non-material, together under one single, all-encompassing category.

4.76 Such general, undifferentiated schemes for compensation are inconsistent with the central rule of the *Basic Principles and Guidelines*, according to which the reparation must be calculated in view of "the circumstances of each case". Of course, the same amount of moral damages for a particular type of injury might be awarded across a class of similarly-situated individuals, but amounts for material harm that fail to differentiate among victims defy the requirements of the *Basic Principles and Guidelines*, and are inconsistent with traditional rules of international law regarding compensation for harm.

4.77 Others have analysed DRC court decisions and concluded that they do not result from the application of traditional legal rules, and certainly not of the kind found in either the rules on State responsibility or the *Basic Principles and Guidelines*. For example, in a 2014 report on these national court decisions, the well-known NGO Lawyers without Borders (*Avocats sans frontières*) stressed "the absence of transparency in the compensation of victims of bodily harm," ⁴³³ and the lack of specific criteria in the assessment of bodily harm, on the one hand, and the attribution of compensation for all damages combined, on the other hand.⁴³⁴

⁴³² Kakado (MP et PC c. Kakado Barnaba), RP 071/09, 009/010 and RP 074/010 (Tribunal Militaire de Garnison de Bunia, 9 July 2010), p. 174, Annex 46 (Translation by Counsel, original in French: "au titre du dédommagement pour tout préjudice subi".). The same formulation can also be found in: Basele et consorts (MP et PC c. Basele Lutula alias Colonel Thom's et consorts), RP 167/09 and RMP 944/MBM/09 (Tribunal Militaire de Garnison de Kisangani, 3 June 2009), Annex 45.

⁴³³ Martin Ekofo Inganya, Avocats sans frontières, *La réparation des crimes internationaux en droit congolais* (2014), p. 77 (Translation by Counsel, original in French: "Absence de transparence dans l'indemnisation des victimes de dommages corporels".), Annex 67.

⁴³⁴ *Ibid.*, p. 79.

Concerning the absence of specific criteria, the report gives the example of a case in which the tribunal indiscriminately granted US\$ 15,000 to any rights-holder of a deceased victim without taking any specifics into consideration. 435

4.78 Likewise, a report on the judicial response to sexual abuses in the period 2010-2011 published by the DRC's Ministry of Justice and Human Rights, stressed that a number of DRC national court decisions do not indicate the basis for their assessment of the reparation due to the victims and "have recourse to equity for damages that can be assessed in an objective way". 436 Moreover, the report stated: "The judge gives the impression that any victim categorised following the infraction has suffered the same harm, which does not yet seem obvious". 437

4.79 Given this indiscriminate approach, it comes as no surprise that DRC national courts at times expressly characterise what they are doing as deciding the case, in whole or in part, *ex aequo et bono*. In a 2010 judgment in the *Kakado* case, ⁴³⁸ for example, the Bunia Military Tribunal expressly stated that it was deciding the case *ex aequo et bono* when ordering the defendant to pay US\$2 million to twelve victims. ⁴³⁹ The same express reliance on *ex aequo et bono*

⁴³⁵ *Ibid*.

⁴³⁶ Ministère de la Justice et des Droits Humains, République Démocratique du Congo, & PNUD, Monitoring judiciaire 2010-2011, Rapport sur les données relatives à la réponse judiciaire aux cas de violences sexuelles à l'Est de la République démocratique du Congo, p. 55 (emphasis added) (Translation by Counsel, original in French: "recourent à l'équité alors qu'il s'agit de dommages qui peuvent être évalués de manière objective".), Annex 65.

⁴³⁷ *Ibid.*, p. 56. (Translation by Counsel, original in French: "Le juge donne l'impression que toutes les victimes catégorisées suivant les infractions dont elles ont été victimes ont subi un même préjudice, ce qui ne semble pourtant pas évident".).

⁴³⁸ Kakado (MP et PC c. Kakado Barnaba), RP 071/09, 009/010 and RP 074/010 (Tribunal Militaire de Garnison de Bunia, 9 July 2010), p. 174, Annex 46. The Judgment reads: "En conséquence, le Tribunal condamne, ex aequo et bono, seul, le prévenu KAKADO BARNABA YONGA TSHOPENA à payer au titre du dédommagement pour tout préjudice subi comme suit".

⁴³⁹ *Ibid*.

grounded the 2006 decision of Mbandaka's Military Tribunal in the *Songo Mboyo* case, which involved rape and death resulting from rape, 440 and the 2012 decision of Bukavu's Military Tribunal in the *Mupoke* case, which involved murder, injuries, rape and looting. 441

4.80 Reliance on *ex aequo et bono* is not unique to DRC military tribunals. For example, the High Court of Kalamu expressly refers to *ex aequo et bono* on three occasions in the course of its decision in the *Kambanguistes* case, concerning compensation for damages to the property of the Church.⁴⁴²

4.81 In a 2013 report on compensation awarded by DRC courts to the victims of sexual violence, the International Federation for Human Rights ("FIDH", by its French acronym) noted:

"The Congolese magistrates do not assess individual harm to determine the amount of compensation to be paid to the victims of sexual violence and the amount ordered is rarely justified. As a matter of fact, judges usually decide 'ex aequo et bono'. Hence, for instance, judges can decide to grant 10000 dollars for deceased victims of rape and 5000 dollars for the survivor victims of rape, without justifying the

réparation des crimes internationaux en droit congolais (Dec. 2014), pp. 82-83, Annex 67.

⁴⁴¹ Mupoke, also known as Kabala et consorts (MP et 107 PC c. Kabala Mandumba et consorts; MP et PC c. Kabala Mandumba), RP 708/12 (Tribunal Militaire de Garnison de Bukavu, 15 Oct. 2012), p. 222: "Le Tribunal, comme leurs conseils, estimera leurs dommages-intérêts ex aequo et bono", Annex 49.

⁴⁴⁰ Songo Mboyo (MP et PC c. Bokila et consorts), RP 084/2005 (Tribunal Militaire de Garnison de Mbandaka, 12 Apr. 2006) Annex 43. The appeal Judgment confirmed the conviction and increased the amounts of compensation. Songo Mboyo (MP et PC c. Bokila et consorts), RPA 014/2006 (Cour Militaire de l'Équateur, 7 June 2006), cited in Martin Ekofo Inganya, Avocats sans Frontières, La

⁴⁴² Kimbanguistes (MP et PC Kumba et consorts- MP et PC c. Mputu Muteba et consorts, RP 11.154/11.155/11.156 (Tribunal de Grande Instance de Kinshasa/ Kalamu, 17 Dec. 2011), Annex 48.

amount nor assessing possible damages for each victim". 443

- 4.82 The DRC's reliance on its national court decisions relating to the award of compensation is thus effectively an admission that it is asking this Court, like DRC courts, to decide this case *ex aequo et bono*.
- 4.83 The DRC's reliance on its national court decisions is dubious for a further reason: there is no evidence that the compensation nominally awarded in those decisions was ever paid. Although the DRC itself was a defendant in many of the cases and, as sovereign, was in a position to enforce judicial decisions against individual respondents in others, the FIDH report notes:

"If the criminal proceedings lead to a conviction, the judge can order financial compensation measures, which will have to be paid to the victim by the convicted individual, by the State, or by both. But a judgment ordering financial compensation measures is only the beginning of a new and long fight, still vain so far, to actually obtain the due compensation. To date, none of the decisions ordering financial compensation measure has been enforced. The FIDH has not met a single victim of sexual violence who has received the compensation ordered by the judge". 444

⁴⁴³ Fédération internationale des ligues des droits de l'homme, *Les Victimes de Crimes Sexuels Obtiennent Rarement Justice et Jamais Réparation: Changer la Donne Pour Combattre l'impunité* (Oct. 2013), p. 61 (Translation by Counsel, original in French: "Les magistrats congolais n'évaluent pas les dommages individuels pour déterminer le montant de l'indemnité à verser aux victimes de violences sexuelles, et le montant alloué est rarement justifié. En ce sens, les juges décident généralement 'ex aequo et bono'. Ainsi, par exemple, des juges peuvent décider d'attribuer 10 000 dollars pour les victimes de viol décédées et 5 000 dollars pour les victimes survivantes de viol, sans justifier le montant ni évaluer les dommages possibles pour chaque victime".).

⁴⁴⁴ Fédération internationale des ligues des droits de l'homme, Les Victimes de Crimes Sexuels Obtiennent Rarement Justice et Jamais Réparation: Changer la Donne Pour Combattre l'impunité (Oct. 2013), p. 59 (emphasis added) (Translation by Counsel, original in French: "Si la procédure pénale aboutit à une condamnation, le juge peut ordonner des réparations financières, qui devront

4.84 A March 2017 report by Impunity Watch confirms that virtually all victims who have been awarded damages by Congolese courts and tribunals are still awaiting to be paid. Given that the great majority of the convicted are insolvent, effective compensation depends almost exclusively on the willingness and the ability of the DRC to pay (in cases when the State was indeed condemned *in solidum*). 445 To date, only the victims of the *Songo Mboyo case* have been effectively compensated by the State, although the significance of this exception is minimised by the fact that the payment was made more than eight years after the tribunal's decision. 446

B. THE DRC'S CLAIMS SYSTEMATICALLY RELY ON UNEXPLAINED PERCENTAGES, DISCOUNTS OR MULTIPLIERS THAT ARE ASSERTED TO BE "REASONABLE" OR "EQUITABLE"

4.85 Rather than base its claims on international law rules regarding reparation for inter-State claims, the DRC develops its own subjective methodologies that deviate so far from standard practices that they effectively invite the Court to issue a decision *ex aequo et bono*.

4.86 One aspect of this is the use of unexplained percentages as discounts or multipliers that have no basis in law. In the context of its claim concerning deaths, for example, the DRC states that it "believes that it is reasonable to consider that Uganda may be required to remedy only 45% of the damages ... caused by both the wrongful behaviour of Uganda and by other States and groups that were not

être versées à la victime soit par l'individu condamné, soit par l'Etat, soit par les deux. Mais un jugement ordonnant des réparations ne représente que le début d'un nouveau et long combat, resté vain jusqu'ici, pour obtenir effectivement la réparation due".).

Gentil Kasongo Safari, Impunity Watch, "Justice Transitionelle en République Démocratique du Congo: Avancées, Obstacles... et Opportunités", *Great Lake Dispatches*, No. 5 (Mar. 2017), p. 39.
 Ibid

supported by Uganda".⁴⁴⁷ Similarly, concerning the exploitation of the DRC's natural resources, and specifically the losses of animal species in Garamba National Park, the DRC asserts that "it is reasonable and fair to estimate that *50% of this total damage* was caused by the unlawful acts of Uganda".⁴⁴⁸

4.87 Another aspect of the DRC's subjective methodology, which often operates in conjunction with the unexplained percentages (as may also be seen in the examples cited above) arises from its repeated effort to assert that certain estimates or amounts are "reasonable", "fair" or "equitable". Reasonability and equity, of course, play a role in the context of legal reasoning when invoked and applied within the confines of the law (*infra legum*), notably when quantifying a non-material injury after it has been duly established. He are guranteed by But such concepts cannot be invoked or applied so as to operate outside the law (*praetor legum*), the manner in which the DRC does so in its Memorial.

4.88 Thus, with respect to compensation for deaths, for example, the DRC states that it "believes it is reasonable, in this context, to build on a minimum estimate of 400,000 victims, one tenth the IRC's figure that is the result of studies published in scientific journals of the highest calibre, including *The Lancet*". ⁴⁵⁰ Then, after

⁴⁴⁷ DRCM, para. 1.24 (emphasis added) (Translation by Counsel, original in French: "estime raisonnable de considérer que l'Ouganda ne peut être tenu de réparer que 45% des dommages correspondant à cette dernière catégorie... causés à la fois par le comportement illicite de l'Ouganda et par celui d'autres Etats ou de groupes qui n'ont pas été soutenus par l'Ouganda".).

⁴⁴⁸ *Ibid.*, para. 5.167 (emphasis added) (Translation by Counsel, original in French: "il est raisonnable et équitable de considérer que 50% de ce préjudice total a été causé par les faits illicites de l'Ouganda".).

⁴⁴⁹ *Diallo* (2012), para. 24 ("Quantification of compensation for non-material injury necessarily rests on equitable considerations".). *A contrario*, the quantification of material injury may not rest on equitable considerations, but only on duly established factual elements.

⁴⁵⁰ DRCM, para. 2.70 (emphasis added) (Translation by Counsel, original in French: "estime raisonnable, dans le présent contexte, de tabler sur une estimation minimale de 400.000 victimes,

applying the so-called "reasonable" 45% discount, the DRC puts forward the number of "180,000 deaths that can *be reasonably considered* a consequence of the invasion of a substantial portion of Congolese territory by Uganda". ⁴⁵¹

4.89 With respect to its nominal estimate of the number of rapes, the DRC says "it may *reasonably be believed* that the actual number of rapes for which Uganda is responsible in the regions in question in this chapter is a number five times higher than those that were declared, i.e., 60 cases".⁴⁵²

4.90 And with respect to the number of child soldiers allegedly recruited and trained by Uganda:

"Even if it is, here again, very difficult to quantify exactly the scale of the phenomenon of child soldiers during the conflict in Ituri, the data summarized above *seem to provide reasonable bases* for such an assessment. The Democratic Republic of the Congo, therefore, *estimates* the number of child soldiers recruited and trained by the various actors in the conflict in Ituri from 2000 to 2003 to be 2,500. It is this figure that shall be used as the basis for its claim for reparation submitted for this category of damages within these proceedings". ⁴⁵³

soit 10 fois moins que le chiffre de l'*IRC* qui résulte d'études publiées dans les revues scientifiques les plus renommées, spécialement *The Lancet*".) *See also ibid.*, para. 3.23.

⁴⁵¹ *Ibid.*, para. 2.71 (emphasis added) (Translation by Counsel, original in French: "180.000 décès dont on peut raisonnablement considérer qu'ils sont une conséquence de l'invasion d'une partie substantielle du territoire congolais par l'Ouganda".).

⁴⁵² *Ibid.*, para. 2.79 (emphasis added) (Translation by Counsel, original in French: "on peut raisonnablement estimer que le nombre réel de viols dont l'Ouganda est responsable dans les régions dont il est question dans le présent chapitre se monte à un nombre cinq fois plus élevé que ceux qui ont été déclarés, soit 60 cas".).

⁴⁵³ *Ibid.*, para. 3.36 (emphasis added) (Translation by Counsel, original in French: "Même s'il est, ici encore, très difficile de quantifier exactement l'ampleur du phénomène des enfants soldats durant le conflit en Ituri, les données reprises ci-dessus paraissent fournir des bases raisonnables pour une

4.91 Similar uses of "reasonable" or "equitable" estimates may be found with respect to the number of health centres and hospitals allegedly damaged, 454 administrative buildings allegedly destroyed 455 and other harm. 456 This heavy reliance on such concepts *praetor legum* is especially apparent in Chapter 7 of the DRC Memorial, where it systematically grasps for such standards in explaining why its subjective calculations, untethered to evidence, should be accepted for losses of human lives, 457 injuries and mutilations, 458 sexual abuses, 459 enrolment and use of child soldiers, 460 and displaced persons. 461

4.92 One can certainly challenge whether the use of such percentages or estimates is in fact "reasonable". There is nothing reasonable in applying the same percentage indiscriminately to a broad category of harms with no distinctions as to place, time or manner. In any event, the critical point is that the DRC's methodology is plainly not grounded in the law.

4.93 To the contrary, it substitutes reasoning that can only be regarded as *ex aequo et bono* for reasoning based on the rules of international law relating to State responsibility. The well-settled law of inter-State claims does not allow the use of

telle évaluation. La République démocratique du Congo estime donc sur cette base que le nombre d'enfants soldats recrutés et entraînés par les différents protagonistes du conflit en Ituri entre 2000 et 2003 se monte à 2.500. C'est ce chiffre qui sera donc retenu comme base de sa demande de réparation pour cette catégorie de dommages dans le cadre de la présente procédure".).

⁴⁵⁴ *Ibid.*, para. 3.45(b).

⁴⁵⁵ *Ibid.*, para. 3.45(c).

⁴⁵⁶ See, e.g., ibid., paras. 4.28, 4.29, 4.43.

⁴⁵⁷ *Ibid.*, para. 7.12.

⁴⁵⁸ *Ibid.*, para. 7.17.

⁴⁵⁹ *Ibid.*, para. 7.24.

⁴⁶⁰ *Ibid.*, para. 7.27.

⁴⁶¹ *Ibid.*, para. 7.31.

crude figures and guesswork affixed with the labels "reasonable" or "equitable". Rather, it requires reliance on facts that establish specificity, proximity and discrimination with respect to victims, perpetrators and harm, none of which the DRC does.

C. THE COURT LACKS POWER TO DECIDE THIS CASE EX AEQUO ET BONO

4.94 As is well known, paragraph 2 of Article 38 of the Statute confers upon the Court the power to decide a case *ex aequo et bono* if—and only if—the parties agree. In such cases, the Court "acts in this capacity at the express wish of the parties". 462

4.95 The Court has repeatedly underscored that in the absence of an express request from the parties, it cannot decide *ex aequo et bono* and is bound to apply international law.⁴⁶³ The following quotations are just some examples:

"[S]uch power [to decide ex aequo et bono], which would be of an absolutely exceptional character, could only be derived from a clear and explicit provision to that effect";⁴⁶⁴

⁴⁶² Hersch Lauterpacht, The Function of Law in the International Community (2011), p. 325.

limits of positive right; in applying them the judge does not become free to decide *ex aequo et bono*. This arises from the fact that Article 38 of the Statute demands a formal agreement between the Parties, if the Court wishes to have the faculty to decide according to the principles of justice and

⁴⁶³ See, e.g., A. Pellet, "Article 38" in THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE (A. Zimmerman et al. eds., 2012), p. 731; Leon Trakman, "Ex Aequo et Bono: Demystifying and Ancient Concept", Chicago Journal of International Law, Vol. 8, No. 2 (2008), p. 625. See also Case Concerning the Continental Shelf (Tunisian/Libyan Arab Jamahiriya) (Tunisia v. Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982, p. 157. See also ibid., p. 161.

⁴⁶⁴ Case of the free zones of Upper Savoy and the District of Gex (Second Phase), Order, 1930, P.C.I.J. Series A, No. 24, p. 10. The absolute character of this requirement has equally been stressed by arbitral tribunals. See, e.g., Cases of Dual Nationality —Decision No. 22, 14 RIAA 27 (8 May 1954), p. 33 ("It is only in default of rules of law which are applicable that it can make laws ex aequo et bono. But, this is not the case. It must be said that it is within the jurisdiction of the doctrine and the decisions of the Court that the application of the general principles does not exceed the

"The Court can take ... a decision [ex aequo et bono] only on condition that the Parties agree (Art. 38, para. 2 of the Statute), and the Court is then freed from the strict application of legal rules in order to bring about an appropriate settlement"; 465

"The Chamber is however bound by its Statute, and required by the Parties, not to take a decision *ex aequo et bono*, but to achieve a result on the basis of law";⁴⁶⁶

"It is clear that the Chamber cannot decide *ex aequo et bono* in this case. Since the Parties have not entrusted it with the task of carrying out an adjustment of their respective interests, it must also dismiss any possibility of resorting to equity *contra legem*"; 467

"This reference [in the Special Agreement] to the rules of international law and to the 'first paragraph' of Article 38 obviously excludes the possibility of any decision *ex aequo et bono*". 468

4.96 The DRC Memorial tries to make it seem that Uganda has agreed to the application of the principles of "reasonableness" and "equity" by invoking the

equity".). See also Arbitral award relating to the question of the boundaries between Brazil and French Guyana, 28 RIAA 349 (1 Dec. 1900), p. 357.

⁴⁶⁵ Case Concerning the Continental Shelf (Tunisian/Libyan Arab Jamahiriya) (Tunisia v. Libyan Arab Jamahiriya), Judgment, Dissenting Opinion of Judge Oda, I.C.J. Reports 1982, para. 71. See also South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa), Second Phase, Judgment, I.C.J. Reports 1966, para. 90; Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985, para. 45.

⁴⁶⁶ Case Concerning Delimitation of the Maritime Boundary in the Gulf Maine Area (Canada/United States of America), Judgment, I.C.J. Reports 1984, para. 59.

⁴⁶⁷ Case Concerning the Frontier Dispute (Burkina Faso/ Republic of Mali), Judgment, I.C.J. Reports 1986, para. 28.

⁴⁶⁸ Case Concerning the Land, Island and Maritime Frontier Dispute (El Salvador/ Honduras), Judgment, I.C.J. Reports 1992, para. 47.

DRC's pleadings on the merits and the legal principles nominally espoused therein. 469 It contends:

"Uganda has never, in the context of this proceeding, questioned these legal principles. It could even be said that it has implicitly accepted them in light of its tacit acquiescence, whereas the DRC has expressed and restated its position in its memorial and reply, and in its conclusions as well". ⁴⁷⁰

4.97 This is wishful thinking. Uganda never agreed to apply principles of reparation that depart from the law. On the contrary, in 2002 Uganda clearly rejected the DRC's views on compensation, noting that there was "a fundamental confusion in the *Memorial* between the proof of violations of legal obligations and the issue of quantum of damage (or compensation)". ⁴⁷¹ Uganda still rejects such views. There is no agreement between the Parties that the Court may apply the extra-legal principles the DRC advocates.

4.98 The DRC Memorial prudently avoids mention of Article 38, paragraph 2 of the Statute. But that does not change the reality that the DRC is effectively inviting the Court to decide the issue of reparation *ex aequo et bono*. Its reliance on arbitrary percentages, discounts and multipliers, the many references to "reasonable" or "equitable" considerations as justifications and the heavy reliance on DRC national court decisions that are themselves issued *ex aequo et bono*, all point to an effort

⁴⁶⁹ Reply of the Democratic Republic of the Congo, (29 May 2002), paras. 1.59.-1.60; DRCM, para. 1.18.

⁴⁷⁰ DRCM, para. 1.23 (Translation by Counsel, original in French: "l'Ouganda n'a, dans le cadre de la présente procédure, jamais remis en cause ces principes juridiques. On pourrait même considérer qu'il les a implicitement acceptés au vu de son silence circonstancié, la RDC exprimant et réitérant au contraire sa position dans le corps de son mémoire et de sa réplique, ainsi d'ailleurs que dans ses conclusions".).

⁴⁷¹ Rejoinder submitted by the Republic of Uganda, (6 Dec. 2002), in *Armed Activities* (2005), paras. 30-31.

to extract a decision *ex aequo et bono*. The very fact that the DRC tries (and fails) to prove the existence of an agreement with Uganda on the principles to be applied demonstrates that the DRC knows that, in substance, it is asking the Court to decide this case in a manner antithetical to the rule of law.

III. The DRC Essentially Asks the Court to Award Punitive Damages, Which It Also Cannot Do

4.99 The DRC's claims are so poorly grounded in evidence and law that they must be deemed a prayer to award damages *ex aequo et bono*. Alternatively, the DRC's claims might equally be viewed as a request for the Court to award punitive damages against Uganda. Rather than prove compensatory damages for injury actually incurred, the DRC seems to be asking the Court to punish Uganda for the internationally wrongful acts that were proven at the merits phase.

4.100 There is no legal basis that might entitle the DRC to an award of punitive damages. It is generally accepted that "punitive damages appear unacceptable in international law for a variety of theoretical and practical reasons".⁴⁷²

4.101 *First*, State practice does not indicate widespread acceptance of a rule of customary international law in support of punitive damages. Indeed, disputes settled by States that provide for reparation do not characterise such reparation as punitive in nature.

⁴⁷² Stephan Wittich, "Punitive Damages", in THE LAW OF INTERNATIONAL RESPONSIBILITY (J. Crawford et al. eds., 2010), p. 668. *See also ibid.*, p. 674 ("In conclusion, it may be stated that, as practice reveals, there is no clear authority for punitive damages in international law, and this scarcity of practice evidences that, at present, punitive damages are certainly not a generally accepted remedy in international law".). UM Annex 31.

4.102 *Second*, there is no consistency among the major legal systems of the world in support of a general principle of law permitting the award of punitive damages. While punitive damages are a feature of some systems of national law (notably in common law countries), most States (notably civil law countries) do *not* allow for punitive damages or severely restrict their availability.

4.103 *Third*, even if such a principle existed across the legal systems of the world (*quod non*), the structure of the international legal system weighs against elevating such a principle to the international realm. The imposition of punitive damages upon a State would, among other things, be contrary to the principle of sovereign equality and the unwillingness to view States as engaging in crimes.

4.104 *Fourth*, international courts and tribunals, when applying international law, have not regarded themselves as free to award punitive damages, as is recognised by most writers.⁴⁷³ In the *Lusitania* cases, the leading precedent in this respect, the US-Germany Claims Commission clearly rejected the notion of punitive damages in international law.⁴⁷⁴ The following are the most relevant passages:

"In our opinion the words exemplary, vindictive, or punitive as applied to damages are misnomers. The fundamental concept of 'damages' is satisfaction, reparation for a loss suffered; a judicially ascertained compensation for wrong". 475

"That one injured is under the rules of international law, entitled to be compensated for an injury

⁴⁷³ UM Annex 31, p. 671 ("The majority of writers, therefore, take the more convincing view that the lack of jurisdiction of courts and tribunals to award punitive damages followed from the widespread opinion that they are not a suitable remedy in international law".).

⁴⁷⁴ Mixed Claims Commission (United States and Germany), 7 RIAA 1 (1 Nov. 1923 - 30 Oct. 1939), pp. 32-44.

⁴⁷⁵ *Ibid.*, p. 39.

inflicted resulting in mental suffering, injury to his feelings, humiliation, shame, degradation, loss of social position or injury to his credit or to his reputation, there can be no doubt, and such compensation should be commensurate to the injury. Such damages are very real, and the mere fact that they are difficult to measure or estimate by money standards makes them none the less real and affords no reason why the injured person should not be compensated therefor as compensatory damages, *but not as a penalty*".⁴⁷⁶

4.105 The Claims Commission's rejection of punitive damages referenced, in part, the sovereignty of States:

"The industry of counsel has failed to point us to any money award by an international arbitral tribunal where exemplary, punitive, or vindictive damages have been assessed against one sovereign nation in favor of another presenting a claim in behalf of its nationals". 477

4.106 The same is true of the more contemporary jurisprudence. In *Corfu Channel*, for example, this Court recognised the "grave omissions" of Albania⁴⁷⁸ but nevertheless approached the matter of compensation without reference to punitive damages. Likewise, decisions concerning serious violations of international law by other tribunals, such as the International Tribunal for the Law of the Sea ("excessive [use of] force")⁴⁷⁹, the EECC (violation of UN Charter Article 2(4))⁴⁸⁰, the Inter-American Court of Human Rights (serious violations of

⁴⁷⁶ *Ibid.*, p. 40 (emphasis added).

⁴⁷⁷ *Ibid*.

⁴⁷⁸ Corfu Channel (Merits, 1949), p. 23.

⁴⁷⁹ The M/V "Saiga" (No. 2) Case (Saint Vincent and the Grenadines v. Guinea), Judgment of 1 July 1999, ITLOS Reports 1999, para. 159.

⁴⁸⁰ Eritrea's Damages Claims (Final Award, 2009), paras. 271-276 et seq.

human rights)⁴⁸¹ and the European Court of Human Rights (same)⁴⁸², have consistently adhered to the traditional forms of reparation.⁴⁸³ Indeed, there "is not a single case in contemporary practice in which an international court or tribunal has awarded punitive damages".⁴⁸⁴

4.107 A debate on this point surfaced at the ILC in the course of its work on the responsibility of States for internationally wrongful acts, a debate that was linked to the question of whether States could commit crimes. The first Special Rapporteur, Ambassador F.V. Garcia Amador, had noted that "the existence of 'damages of a punitive character' implies the imputation of responsibility of a criminal nature". As is well known, the *de lege ferenda* notion of "State crime" was introduced into the Commission's work by Professor Roberto Ago and then developed by Professor Gaetano Arangio-Ruiz who, in spite of the quasi-unanimous case law excluding punitive damages from the reparation due in inter-State disputes, proposed to include a mention of "nominal or punitive damages" in

⁴⁸¹ See, e.g., Case of Velásquez-Rodríguez v. Honduras, Judgment, (IACHR 21 July 1989), Series C, No. 7 (Compensation), para. 38 ("this principle is not applicable in international law at this time".).

⁴⁸² See, e.g., Case of B.B. v. The United Kingdom (app no. 53760/00), Judgment (ECtHR 10 Feb. 2004), p. 9, para. 36 ("The Court recalls that it does not award aggravated or punitive damages").

⁴⁸³ Investor-State case law likewise has eschewed the award of punitive damages. *See, e.g., CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award (12 May 2005) (Orrego Vicuña, Lalonde, Rezek), para. 404; *Ioannis Kardassopoulos and Ron Fuchs v. Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award (3 March 2010) (Fortier, Orrego Vicuña, Lowe), paras. 508, 513, 655.

⁴⁸⁴ Stephan Wittich, "Punitive Damages", in THE LAW OF INTERNATIONAL RESPONSIBILITY (J. Crawford et al. eds., 2010), p. 671, UM Annex 31. *See also* Christine Gray, *Judicial Remedies in International Law* (1987), p. 28.

⁴⁸⁵ F. V. Garcia Amador, "International Responsibility", in *Yearbook of the International Law Commission*, Vol. II, Part I, Doc. No. A/CN.4/96 (1956).

the draft.⁴⁸⁶ This proposal was rejected by the ILC which, however, mentioned, among the possible forms of satisfaction "damages reflecting the gravity of the infringement".⁴⁸⁷

4.108 Eventually, the final rapporteur, Professor James Crawford, asked "whether penalties or punitive damages can be provided for at least in the case of gross or egregious breaches" of international law. Albeit with some caution, Professor Crawford seemed ready to reintroduce the idea of "punitive damages" or "damages reflecting the gravity of the breach"—both expressions being in square brackets—in his proposed Article 51 on the "Consequences of serious breaches of obligations to the international community as a whole".

4.109 These proposals, however, were discarded by the ILC, and reference to such damages (along with the notion of "State crime") was deleted from the final version of the Commission's Articles on State Responsibility. In the commentary to the Articles, the ILC stated unambiguously that "the award of punitive damages is not recognised in international law even in relation to serious breaches of obligations arising under peremptory norms".⁴⁹⁰

⁴⁸⁶ G. Arangio-Ruiz, "Second Report on State Responsibility", in *Yearbook of the International Law Commission*, Vol. II, Part I, Doc. No. A/CN.4/425 & Corr.1 and Add.1 & Corr.1 (1989), paras. 139-147, 191.

⁴⁸⁷ "2288th meeting Monday, 20 July 1992, at 10 a.m.", in *Yearbook of the International Law Commission*, Vol. I, Summary records of the meetings of the forty-fourth session 4 May-24 July 1992 (1992), para. 5.

⁴⁸⁸ J. Crawford, "Third report on State responsibility", in *Yearbook of the International Law Commission*, Vol. II, Part I (2000), para. 380.

⁴⁸⁹ *Ibid.*, para. 412.

⁴⁹⁰ ARSIWA, Vol. II, Part 2 (2001), Art. 39, cmt. 5. See also James Crawford, James Crawford, The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries (2002), p. 19 ("punitive damages were omitted, and deliberately so"); ibid., p. 36 (noting "the unwillingness to introduce into the field of State responsibility anything punitive in

4.110 As discussed above, and demonstrated further in the remaining chapters of this Counter-memorial, the DRC's claims are not grounded in evidence or in law. To the extent that its claims are best conceived as a request for this Court to award punitive damages against Uganda, they are inconsistent with international law.

IV. The DRC Cannot Obtain Compensation That Exceeds the Payment Capacity of Uganda

4.111 Chapter 1 of this Counter-Memorial discussed the extraordinary amount of "war reparations" the DRC seeks from the Court. The amount the DRC seeks dwarfs the amount that Uganda spends annually to maintain critical societal functions, such as education and healthcare. When discussing relevant principles of international law concerning compensation in its own Memorial⁴⁹¹ in this reparation phase, Uganda noted that such principles preclude requiring a responsible State to pay compensation that exceeds its financial capacity, especially if it would cause serious injury to the paying State's population.⁴⁹² Compensation must be commensurate with a State's ability to pay and cannot have the effect of depriving the people of the responsible State of their means of

character"); James Crawford, *State Responsibility: The General Part* (2013), p. 526 ("the overwhelmingly negative reaction to the ILC's modest proposal for 'damages reflecting the gravity of the breach' shows that the idea of punitive damages under international law is currently unsustainable".).

⁴⁹¹ UM, paras. 2.55-2.69 et seq.

⁴⁹² Ethiopia's Damages Claims (Final Award, 2009), para. 22; Eritrea's Damages Claims (Final Award, 2009), para. 22. See also William Bishop, "State Responsibility", 2 Recueil des Cours 384 (1965), p. 403. Vol. II, UM Annex 22; Richard Falk, "Reparations, International Law, and Global Justice", in The Handbook of Reparations (P. de Greiff ed., 2006), p. 492. Vol. II, UM Annex 28; Christian Tomuschat, "Reparations in Favour of Individual Victims of Gross Violations of Human Rights and International Humanitarian Law", in Promoting Justice, Human Rights and Conflict Resolution Through International Law, Liber Amicorum Lucius Caflisch (M. Kohen ed., 2007), pp. 581 et seq. Vol. II, UM Annex 30.

subsistence.⁴⁹³ The magnitude of the DRC's claims—totaling some US\$ 13.5 billion—is plainly not commensurate with Uganda's ability to pay and would inflict serious harm upon Uganda and its people.

4.112 The EECC paid heed to this rule when considering the massive claims pursued by both countries in that proceeding. Ethiopia claimed nearly US\$ 14.3 billion for damages resulting from Eritrea's violations of both *jus ad bellum* and *jus in bello*. For its part, Eritrea claimed approximately US\$ 6 billion from Ethiopia for damages resulting from breaches of *jus in bello*. 494

4.113 The EECC expressed concern about the magnitude of these claims, calling them "huge, both absolutely and in relation to the economic capacity of the country against which they were directed". It observed further that claims of such magnitude raise "serious questions involving the intersection of the law of State responsibility with fundamental human rights norms" that required limiting compensation so as to avoid imposing crippling burdens upon the paying State. According to the Commission:

"Both Ethiopia and Eritrea are parties to the International Covenant on Economic, Social and Cultural Rights ('ICESCR') and the International Covenant on Civil and Political Rights. Both Covenants provide in Article I(2) that '[i]n no case may a people be deprived of its own means of

⁴⁹⁴ Ethiopia's Damages Claims (Final Award, 2009), paras. 18-19; Eritrea's Damages Claims (Final Award, 2009), para. 18.

⁴⁹³ Ethiopia's Damages Claims (Final Award, 2009), para. 19; Eritrea's Damages Claims (Final Award, 2009), para. 19.

⁴⁹⁵ Ethiopia's Damages Claims (Final Award, 2009), para. 18; Eritrea's Damages Claims (Final Award, 2009), para. 18.

⁴⁹⁶ Ethiopia's Damages Claims (Final Award, 2009), para. 19; Eritrea's Damages Claims (Final Award, 2009), para. 19.

subsistence.' During the hearings, it was noted that early drafts of the International Law Commission's ('ILC') Draft Articles on State Responsibility included this qualification, but that it was not retained in the Articles as adopted. That does not alter the fundamental human rights law rule of common Article I(2) in the Covenants, which unquestionably applies to the Parties.

Similarly, Article 2(1) of the ICESCR obliges both Parties to take steps to achieve the 'full realization' of rights recognized by that instrument. The Commission is mindful that in its General Comments, the Committee on Economic, Social and Cultural Rights has identified a range of steps to be taken by States where necessary, inter alia, to improve access to health care, education ... and resources to improve the conditions of subsistence. These General Comments have been endorsed and taken as guides to action by many interested observers and the United Nations' development agencies". 497

"Awards of compensation of the magnitude sought by each Party would impose crippling burdens upon the economies and populations of the other, notwithstanding the obligations both have accepted under the Covenants". 498

4.114 Ethiopia argued that the EECC need not be concerned about these impacts because the obligation to pay would fall on the Government of Eritrea, not its people. The Commission rejected the argument, stating: "Huge awards of compensation by their nature would require large diversions of national resources

⁴⁹⁷ Ethiopia's Damages Claims (Final Award, 2009), para. 20; Eritrea's Damages Claims (Final Award, 2009), para. 20.

⁴⁹⁸ Ethiopia's Damages Claims (Final Award, 2009), paras. 19-21; Eritrea's Damages Claims (Final Award, 2009), paras. 19-21 (emphasis added).

from the paying country—and its citizens needing health care, education, and other public services—to the recipient country". 499

4.115 Even though Eritrea was found responsible for violating both *jus ad bellum* and *jus in bello*, the EECC nevertheless held that an award of compensation should be limited to ensure that the financial burden imposed on Eritrea "would not be so excessive, given [its] economic condition and its capacity to pay, as seriously to damage [its] ability to meet its people's basic needs". ⁵⁰⁰

4.116 In reaching this conclusion, the EECC gave significant weight to Eritrea's ranking among countries in the world in terms of development in the UN Human Development Report.⁵⁰¹ The Commission observed that its decision in this respect was based on the "prevailing practice of States in the years since the Treaty of Versailles [which] has been to give very significant weight to the needs of the affected population in determining amounts sought as post-war reparations".⁵⁰²

4.117 Like Eritrea and Ethiopia, Uganda is a developing country that, while it has had some success with respect to economic development, still faces serious challenges in, among other things, reducing poverty, increasing life expectancy and providing universal education. It is essential to the future of Uganda, the Ugandan people and Uganda's relations with its neighbors that any award of compensation to the DRC not exceed the payment capacity of Uganda or cause serious injury to Uganda's population.

⁴⁹⁹ Ethiopia's Damages Claims (Final Award, 2009), para. 21; Eritrea's Damages Claims (Final Award, 2009), para. 21.

⁵⁰⁰ Ethiopia's Damages Claims (Final Award, 2009), para. 313.

⁵⁰¹ *Ibid.*, para. 18.

⁵⁰² *Ibid.*, para. 21; *Eritrea's Damages Claims* (Final Award, 2009), para. 21.

CHAPTER 5

THE DRC'S CLAIMS RELATING TO LOSS OF LIFE ARE METHODOLIGICALLY FLAWED AND UNSUPPORTED BY EVIDENCE

- 5.1 The DRC seeks **US\$ 4,045,646,000** in compensation for the deaths of 182,000 persons it alleges were caused by Uganda. This compensation, according to the DRC, covers material injury primarily reflecting the loss of income to the families of the deceased and moral injury resulting from conditions in which the nominal alleged acts were perpetrated. 504
- 5.2 The claimed amount is divided between US\$ 1.36 billion for 40,000 deaths resulting from what the DRC claims was "deliberate violence" against the civil population in Ituri⁵⁰⁵ and approximately US\$ 2.69 billion for 142,000 deaths resulting from acts "other than deliberate violence" in Ituri, Kisangani and other areas.⁵⁰⁶
- 5.3 The quantum sought for deaths resulting from "deliberate violence" is allegedly based on the amount of compensation Congolese courts award families of persons killed in the commission of serious crimes against international law. ⁵⁰⁷ According to the DRC, such compensation ranges from US\$ 5,000 to US\$ 100,000, with the average sum ostensibly being US\$ 34,000. ⁵⁰⁸ This figure is then multiplied

⁵⁰³ DRCM, paras. 7.15, 2.71, 7.64.

⁵⁰⁴ *Ibid.*, para. 7.11.

⁵⁰⁵ *Ibid.*, para. 7.15.

⁵⁰⁶ *Ibid.*, para. 7.15 (Translation by Counsel, original in French: "autres que des actes de violence délibérés.").

⁵⁰⁷ *Ibid.*, para. 7.12.

⁵⁰⁸ *Ibid*.

by the alleged number of victims of deliberate violence (40,000) for a total of US\$1.36 billion.⁵⁰⁹

- 5.4 The DRC assesses the quantum claimed for deaths resulting from "other than deliberate violence" based on the alleged future income that a victim would have earned if he or she had lived to reach the normal life expectancy. ⁵¹⁰ This future income claimed is based on two variables that are multiplied together: 25.11 (the average years of life allegedly lost) and US\$ 753.20 (the DRC's alleged GDP per inhabitant in 2015). The total claimed per individual is thus US\$ 18,913. ⁵¹¹
- 5.5 The DRC then multiplies this figure by the alleged number of deaths resulting from non-deliberate violence:
 - 20,000 persons who allegedly lost their lives in Ituri due to Uganda's failure to comply with its obligations as an occupying Power (20,000 x US\$ 18,913 = US\$ 378,260,000);
 - 920 persons killed during fighting between Ugandan and Rwandan armed forces in Kisangani in 1999 and 2000 (920 x US\$ 18,913 = US\$ 17,399,960);
 - 119,080 persons allegedly killed during fighting in other parts of the DRC between 1998 and 2003 (119,080 x US\$ 18,913 = US\$ 2,252,160,040);
 - 2,000 soldiers and officers of the Congolese armed forces ("FAC") (2,000 x US\$ 18,913 = US\$ 37,826,000). 512

⁵⁰⁹ *Ibid.*, para. 7.13.

⁵¹⁰ *Ibid.*, para. 7.09.

⁵¹¹ *Ibid.*, para. 7.09.

⁵¹² *Ibid.*, para. 7.15.

The total amount of compensation for this category is, as stated, approximately US\$ 2.69 billion.⁵¹³

5.6 For the reasons explained below, these claims are both methodologically flawed and unsupported by the evidence. Indeed, they are entirely speculative. The DRC therefore fails to meet the burden the Court placed on it in 2005 to "prove" the "exact injury" that was suffered "as a result" of "specific actions of Uganda" constituting international wrongful acts for which it is responsible. 514 Consequently, there is no basis for the award of compensation the DRC seeks for the alleged loss of life.

*

5.7 **Section I** of this Chapter will briefly review the standard methods and evidence for proving the existence and valuation of deaths in international practice and jurisprudence. **Section II** demonstrates that the DRC's claims concerning the number of deaths allegedly resulting from Uganda's actions are unsupported by the evidence; indeed, they are entirely speculative. **Section III** discusses the methodological flaws in the DRC's attempts to place a valuation on the deaths it claims.

I. The DRC's Claims Are Not Based on the Standard Method or Evidence for Proving the Existence and Valuation of Deaths

5.8 Before turning to the DRC's request for compensation relating to loss of life, Uganda considers it helpful briefly to recall the standard methods for proving the existence and valuation of deaths that have long been employed by States and

⁵¹³ *Ibid*.

⁵¹⁴ See Chapter 3.

international courts and tribunals. Doing so helps put into perspective the DRC's wholesale failure to meet its burden of proving its claims concerning the loss of life allegedly caused by Uganda.

- 5.9 A survey of that practice⁵¹⁵ indicates that the method for proving compensation for death entails several elements. These include: (1) the identification of the persons who are alleged to have died, including their name, location and date of death; (2) a determination of which victims were gainfully employed, recognising that if the decedent was not employed (such as a child or elderly person), recovery typically is not awarded for material loss; (3) for victims who were gainfully employed, information concerning their earnings, typically established either through evidence specific to the victim or, at least, the class of persons who are employed in the victim's occupation; and (4) information concerning the loss of earnings to the victim's estate based on his/her life expectancy, which might be established through use of actuarial or other tables specific to the victim's locality.
- 5.10 These elements are typically proven through various forms of documentary evidence contemporaneous with the alleged deaths, supplemented by sworn affidavits from persons who observed the killings or local leaders familiar with the incidents at issue. As Uganda will show below, the DRC has entirely failed to present any such evidence.

-

⁵¹⁵ See generally Edwin M. Borchard, The Diplomatic Protection of Citizens Abroad or the Law of International Claims (1916); Jackson H. Ralston, The Law and Procedure of International Tribunals (1926); Marjorie M. Whiteman, Damages in International Law (1937); A. H. Feller, The Mexican Claims Commissions, 1923-1934: A Study in the Law and Procedure of International Tribunals (1935); Green H. Hackworth, ed., Digest of International Law, Vol. 5 (1943); Richard B. Lilich, ed., International Law of State Responsibility for Injuries to Aliens (1983); Christine Gray, Judicial Remedies in International Law (1987).

5.11 The evidentiary void with which the Court is presented in this case stands in stark contrast, for example, with the evidentiary showing made before the ICC on reparations in the *Katanga* case. That case concerned massacre of at least 200 civilians in Bogoro village in the Ituri region of the DRC in 2003.⁵¹⁶ Notwithstanding the remoteness and poverty of the area, as well as the lapse of time between the commission of the crimes and the reparations phase (which was commenced in 2015), claimants were nevertheless able to present various forms of hard evidence, including: (1) death certificates signed by a civil status registrar in the DRC; (2) certificates of family relationship (to establish the familial connection between the claimant and the decedent); and (3) in cases where certificates of family relationship were not available, other information sufficient to establish the existence of a familial relationship (e.g., showing that the surnames on claimants' voter cards matched those on a death certificate).

5.12 As discussed in Chapter 3, similar victim-specific evidentiary showings were made before the Court during the reparations phase in the *Corfu Channel* case (which concerned, in part, the deaths of U.K. soldiers).⁵¹⁷ The practice of regional human rights courts⁵¹⁸ and claims settlement agreements negotiated between States also reflect a similar victim-specific approach.⁵¹⁹ Alternative techniques may be possible for addressing mass claims for deaths before complex claims commissions

⁵¹⁶ Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07-3728, Order for Reparations pursuant to Article 75 of the Statute (ICC Trial Chamber II, 24 Mar. 2017).

⁵¹⁷ Corfu Channel (Compensation, 1949).

⁵¹⁸ See Dinah Shelton, Remedies in International Human Rights Law (2015), pp. 315-375.

⁵¹⁹ See generally Richard B. Lillich, International Claims: Postwar British Practice (1967); Burns H. Weston, International Claims: Postwar French Practice (1971); Burns H. Weston et al., International Claims: Their Settlement by Lump Sum Agreements, 1975-1995 (1999).

but, as explained in Chapter 3, those techniques are not appropriate in the context of traditional inter-State litigation.

- 5.13 Uganda understands that there may be difficulties in trying to gather evidence of harms that occurred in remote areas during an armed conflict. Yet, as elaborated below, the fact remains that the DRC has simply provided *no* evidence of the type normally expected to prove the existence and valuation of specific harm in the form of deaths. There are not just *gaps* in the evidence, there is a *void*.
- 5.14 This void is all the more conspicuous in that the DRC itself claims that it collected evidence of the sort normally expected. Specifically, at paragraph 1.32 of its Memorial, the DRC states that in the process of gathering information to support its claims, it "gathered other items of evidence, such as documentary films, photographs, objects or vestiges of war (such as shrapnel and ammunition), local and international NGO reports, filmed eyewitness accounts of victims, death certificates and other legal or medical documents". ⁵²⁰ For reasons the DRC does not explain, no such information was presented with the Memorial, however.

II. The DRC Has Failed to Prove the Extent of the Injury It Claims concerning the Alleged Loss of Life

5.15 The DRC's claim for compensation relating to deaths must, of course, be viewed against the backdrop of what the Court decided—and what it did not decide—in its Judgment on the merits.

⁵²⁰ DRCM, para. 1.35 (Translation by Counsel, original in French: "récolté d'autres éléments de preuve, tels des films documentaires, des photographies, des objets ou vestiges de la guerre (comme des éclats d'obus, des munitions) ... des rapports d'ONG locales et internationales, des témoignages filmés de victimes, des certificats de décès ou d'autres documents médicaux ou judiciaires".).

5.16 In the 2005 Judgment, the Court found that Uganda violated the principle of non-use of force in international relations and the principle of non-intervention. The Court did not, however, indicate that such violations resulted in any of the deaths the DRC now claims.

5.17 The Court also found that Uganda violated its obligations under international human rights and humanitarian law by the conduct of its armed forces. The relevant harm identified in the Court's *disposif* were "acts of killing... of the Congolese civilian population". The Court further identified a failure "to distinguish between civilian and military targets and to protect the civilian population in fighting with other combatants", and found that Uganda "incited ethnic conflict", and "failed to take measures to put an end to the conflict", the *dispositif* to the 2005 Judgment, but did not identify any specific deaths resulting from those violations. 524

5.18 In addition, the Court found that Uganda failed, as an occupying Power in Ituri, to take measures to respect and ensure respect for human rights and international humanitarian law.⁵²⁵ Again, in the *dispositif*, the Court did not indicate any deaths resulting from such conduct.

5.19 The Court's findings that Uganda violated its obligations under international human rights and humanitarian law in the form of acts of killing were made only at a very general level. It made no specific determinations with respect

⁵²¹ *Armed Activities* (2005), para. 345(1).

⁵²² *Ibid.*, para. 345(3).

⁵²³ *Ibid*.

⁵²⁴ *Ibid*.

⁵²⁵ *Ibid.*, para. 345(1).

to particular losses of life. To the contrary, it expressly placed the burden on the DRC at this subsequent phase to prove the exact injury that was suffered as a result of the "specific actions of Uganda". ⁵²⁶ The DRC has, however, entirely failed to meet this burden. Indeed, it makes no serious effort to do so.

5.20 The DRC Memorial includes citations to a number of sources that suggest that some deaths occurred at some times in some places. It also cites to the claims forms its investigators prepared for purposes of this litigation. But the DRC does not rely on those sources to establish the number of deaths that allegedly occurred as a result of Uganda's actions. Instead, they are invoked only for purposes of "illustrating" the injuries allegedly suffered.

5.21 Rather than attempt to identify specific deaths that occurred at specific times in specific places, the DRC adopts an approach that, it says, "consists of resorting to scientific works of an epidemiological or demographic nature that studied the excessive mortalities caused by the conflict". The specific flaws in the DRC's "epidemiological" and "demographic" approach are exposed in detail below. The critical point now is that the DRC expressly eschews the particularised showing the Court said that it would expect of it (and which is required by the relevant practice and jurisprudence) in favour of a highly general, population-based approach. This by itself warrants the rejection of this aspect of the DRC's claim. Moreover, even taken on its own terms, the DRC's argument fails to support its claims concerning the alleged loss of life.

⁵²⁶ *Ibid.*, para. 260.

⁵²⁷ DRCM, para. 2.62 (Translation by Counsel, original in French: "qui consiste à faire appel aux travaux scientifiques de type épidémiologique ou démographique qui ont étudié la surmortalité causée par le conflit".).

- A. THE DRC'S CLAIM THAT UGANDA CAUSED 182,000 DEATHS IN THE DRC IS SPECULATIVE AND UNSUPPORTED
- 5.22 The point of departure for the DRC's claims is that the total number of civilian deaths that were caused by Uganda's intervention is 180,000.⁵²⁸
- 5.23 The DRC purports to calculate this number in two steps, each of which is speculative and disproved by other evidence:
 - *First*, the DRC cites to a series of four mortality surveys conducted by the International Rescue Committee ("IRC") between 2000 and 2004 in which the IRC estimated that there were 3.9 million more deaths than expected in the DRC between 1998 and 2003.⁵²⁹ This figure includes deaths from all causes; "less than 10 percent of [these] deaths were due to violence, with most attributed to easily preventable and treatable conditions such as malaria, diarrhea, pneumonia and malnutrition".⁵³⁰

Relying on the IRC's estimates, the DRC submits: "Given the carefulness that has to be observed in a legal proceeding", it "believes it is reasonable, in this context, to build [its claim for losses of life] on a minimum estimate of 400,000 victims, 10 times less than the IRC's figure". ⁵³¹

⁵²⁸ *Ibid.*, para. 2.71 (Translation by Counsel, original in French: "l'ensemble des décès qui ont été causés par l'invasion ougandaise".).

⁵²⁹ *Ibid.*, para. 2.64. The fourth IRC study covered the period between January 2003 and April 2004. It thus covers a period of 11 months *after* Uganda left the DRC in June 2003. *Armed Activities* (2005), para. 254. Five hundred thousand excess deaths were postulated in this time-period. (Burnet Institute, International Rescue Committee, *Mortality in the Democratic Republic of the Congo: Results from a Nationwide Survey* (2004), Annex 56). Even taken on its own terms, the DRC's figure of 3.9 million excess deaths would have to be corrected to take account of this problem.

DRCM, para. 2.64; International Rescue Committee, Burnet Institute, *Mortality in the Democratic Republic of Congo: An Ongoing Crisis* (2007), p. ii, Annex 60.

DRCM, para. 2.70 (Translation by Counsel, original in French: "Au vu de la prudence qu'il convient d'observer dans le cadre d'une procédure judiciaire, la RDC estime raisonnable, dans le

• *Second*, the DRC picks what it calls "a distribution key" of 45% to apportion the number of deaths from this total for which Uganda is allegedly responsible. It thus multiplies the aggregate number of nominal civilian deaths (400,000) by 0.45, for a total of 180,000 deaths which, the DRC contends, "can be reasonably considered a consequence of the invasion by Uganda". ⁵³²

Both steps are ill-conceived.

1. The DRC's Reliance on the IRC's Retrospective Mortality Surveys Is Misplaced

5.24 The DRC's reliance on the IRC's mortality surveys to establish the number of excess deaths that occurred in the DRC between 1998 and 2004 is misplaced. In the first instance, commentators have observed that the IRC's studies were undertaken for advocacy purposes; they were intended to draw the attention of the international community to the crisis in the DRC.⁵³³ As a result, their scientific validity has not surprisingly been the subject of substantial criticism.

_

présent contexte, de tabler sur une estimation minimale de 400.000 victimes, soit 10 fois moins que le chiffre de l'IRC.").

⁵³² *Ibid.*, para. 2.71. As a threshold matter, despite the professed "carefulness that has to be observed in a legal proceeding", the DRC gets its math wrong. The DRC computes its "minimum estimate" of "400,000 deaths" based on one tenth of the IRC's figure. However, the IRC's figure is 3,900,000. Therefore, one tenth of 3,900,000 is 390,000 not 400,000 (Translation by Counsel, original in French: "dont on peut raisonnablement considérer qu'ils sont une conséquence de l'invasion d'une partie substantielle du territoire congolais par l'Ouganda.").

Moreover, The DRC's use of 10% in calculating alleged deaths is also arbitrary. The IRC only stated that "less than 10 percent" of 3.9 million people allegedly died due to violence. "Less than 10%" is not 10%; it is anywhere below 10%. Moreover, as will be shown in text, the percentage of deaths resulting from violence reflected in the IRC's four studies was 4.2%, not 10%. *See infra* para. 5.46.

⁵³³ See, e.g., Human Security Report Project, "Part II, The Shrinking Costs of War", Human Security Report (2009-2010) pp. 24-25; A. Lambert, L. Lohlé-Tart, La surmortalité au Congo (RDC) durant les troubles de 1998-2004: une estimation des décès en surnombre, scientifiquement fondée à partir des méthodes de la démographie (Oct. 2008), p. 1, Annex 62; Health and Nutrition

- 5.25 Indeed, the DRC itself admits this in its Memorial when it acknowledges that two Belgian demographers from the Association for the Development of Applied Research to Social Studies, André Lambert and Louis Lohlé-Tart, conducted their own 2008 study, in which "they arrived at a figure of 200,000 [deaths] due to the unrest, thus roughly dividing the initial [IRC] number by 20". ⁵³⁴ In fact, Lambert and Lohlé-Tart concluded that even this 200,000 figure was likely significantly overstated. ⁵³⁵
- 5.26 To understand the flaws in the IRC's work and the reasons the DRC's reliance on it is misplaced, it is necessary to understand what the IRC did. The IRC estimated the crude death rate ("CDR") during the conflict by surveying a sampling of households in selected areas of the DRC. Respondents were asked about the size and composition of their households, and whether there had been any deaths in the household during the survey period (1998-2000 for the first study; 2000-2001 for the second study; 2002 for the third study; and 2003-2004 for the fourth study). The IRC then compared its estimate of the CDR during the conflict to a hypothetical pre-war death rate to calculate the number of excess deaths during the conflict.
- 5.27 The Court does not need to take Uganda's word for it that the IRC's work was flawed. It can start with the words of the IRC itself. The IRC itself acknowledged that its mortality surveys had methodological weaknesses that likely

Tracking Service (HNTS), Peer Review Report: Re-Examining mortality from the conflict in the Democratic Republic of Congo, 1998-2006 (2009), p. 3, Annex 63.

⁵³⁴ DRCM, para. 2.68 (Translation by Counsel, original in French: "ils aboutissent à un chiffre de 200.000 morts dus aux troubles, divisant ainsi grossièrement le nombre initial par 20.").

⁵³⁵ A. Lambert, L. Lohlé-Tart, La surmortalité au Congo (RDC) durant les troubles de 1998-2004: une estimation des décès en surnombre, scientifiquement fondée à partir des méthodes de la démographie (Oct. 2008), p. 17, Annex 62.

inflated the number of deaths estimated. In its first study, for example, the IRC acknowledged the following limitation, among others:

"There was 'no follow-up or confirmation of the information provided by interviewees', which had 'two problematic aspects: people may have lied to interviewers or may have been mistaken about the cause, month or age of reported decedents". 536

5.28 Still other limitations were listed in a synopsis of the studies published in the journal *Lancet*:

- Although information about the cause of death was sought, "formal verbal autopsies were not done". 537 Additionally, "no independent confirmation of cause of death from health facilities or other sources was sought". 538
- "Inaccurate government census data" received from the DRC "might have resulted in selection bias".⁵³⁹

"a method used to ascertain the cause of a death based on an interview with next of kin or other caregivers. The interview is done using a standardized questionnaire that elicits information on signs, symptoms, medical history and circumstances preceding death. The cause of death, or the sequence of causes that led to death, are assigned based on the data collected using the [verbal autopsy] questionnaire and any other available information."

World Health Organization, Verbal Autopsy Standards: 2012 WHO Verbal Autopsy Instrument (2012), Annex 96.

⁵³⁶ See Les Roberts, IRC Health Unit, Mortality in eastern Democratic Republic of the Congo: Results from 11 Surveys (2001). p. 15, Annex 51.

⁵³⁷ According to the World Health Organization, a verbal autopsy is:

⁵³⁸ B. Coghlan, R. Brennan, et al., "Mortality in the Democratic Republic of Congo: a Nationwide Survey", *The Lancet*, Vol. 367, No. 9504 (7 Jan. 2006), p. 50, Annex 58.

⁵³⁹ *Ibid*. The existence of selection bias means that the sample obtained is not represented of the population the survey intended to analyse.

- Violence-related mortality was overstated for areas with higher-thanaverage pre-war mortality rates.⁵⁴⁰ This especially affected the results for the eastern areas of the DRC, which had been adversely affected by the aftermath of the 1994 genocide in Rwanda and the civil war leading to the overthrow of Mobutu even before the outbreak of conflict in 1998.⁵⁴¹
- 5.29 In fact, the IRC's team leader for the first two studies, Dr Les Roberts, acknowledged that his team disregarded "standard academic protocols" and described the survey procedures they employed as "kind of bad science". 542
- 5.30 The IRC report has also been the subject of substantial criticism by reputable experts other than Lambert and Lohlé-Tart. The Health and Nutrition Tracking Service ("HNTS") is an inter-agency initiative hosted by the WHO that "aims to provide impartial, credible and timely information on mortality and nutrition rates in populations affected by crises and emergencies". ⁵⁴³ In 2006, it conducted a review of the IRC studies and concluded that its estimates of the number of excess deaths were "difficult to substantiate". ⁵⁴⁴
- 5.31 The HNTS expressed particular skepticism about the notional pre-war mortality rate selected by the IRC. (Because the IRC's methodology involved comparing the pre-war CDR to the death rate during the conflict, any errors in the estimation of the pre-conflict CDR have a significant effect on the calculations. In

⁵⁴⁰ *Ibid*.

⁵⁴¹ *Ibid*.

⁵⁴² Human Security Report Project, "Part II, The Shrinking Costs of War", *Human Security Report* (2009-2010), Annex 64.

⁵⁴³ Health and Nutrition Tracking Service (HNTS), Peer Review Report: Re-examining mortality from the conflict in the Democratic Republic of Congo, 1998-2006 (2009), cover page, Annex 63.

⁵⁴⁴*Ibid.*, p. 21.

short, the lower the pre-war CDR, the higher the resulting estimate of deaths during the conflict. Conversely, the higher the pre-war CDR, the lower the number of excess deaths).

5.32 The IRC based its calculations on an assumed pre-war CDR of 1.5 deaths per 1,000 people per month, a figure equal to the average CDR for sub-Saharan African countries. The HNTS did not consider the IRC's reliance on the average sub-Saharan CDR justifiable. It stated:

"Choosing the average Sub-Saharan rate for comparison is also problematic because it assumes that the demographic regime in DRC was an 'average African' before the war broke out. In fact, several different demographic patterns may be identified in Africa, each with its own characteristics. For example, countries with very high prevalence of HIV/AIDS have different mortality patterns than those with low prevalence. DRC in 1998 was a country that had for many years undergone a profound crisis of governance, which may well have affected mortality patterns". 545

5.33 The HNTS also observed that the IRC's calculations assumed a sudden and sharp increase in mortality above the pre-war baseline at the start of the conflict in the DRC, an assumption that significantly affected the resulting estimates. According to the HNTS,

"[T]he underlying assumption of IRC that mortality increased suddenly in 1998 following the outbreak of the war is probably not warranted. According to IRC the predominant direct cause of mortality is not violence, but rather disease, and one would assume that much of the increase then would be gradual,

⁵⁴⁵ *Ibid.*, p. 8.

reflecting worsening conditions because of the war". 546

5.34 Still further, the HNTS criticised the IRC's studies because they failed to take account of the age distribution of the population of the DRC. The HNTS wrote:

"The Crude Death Rate is not a good measure to compare mortality across countries or across time, because the rate depends on the age distribution of the population. With equal age specific rates, an old population will normally have a much higher CDR than a population with a high proportion of young. Thus, the CDR is influenced by the age distribution and by extension by the fertility rate. Similarly, populations that have their age distributions distorted, for example due to conflict or migration, may have quite different CDRs than populations without such distortions, but with the same underlying mortality. Therefore, comparing CDRs with a 'baseline' is in principle foolhardy without age standardizing so that the baseline CDR can be expressed in terms of the age distribution of the actual population". 547

- 5.35 Other independent organisations share the HNTS's concerns. The Human Security Report Project ("HSRP"), an independent research center affiliated with Simon Fraser University in Vancouver, Canada, reviewed the IRC studies in a 2010 report entitled "*The Causes of Peace and the Shrinking Costs of War*". The study included an extensive critique of the IRC's work.
- 5.36 At the most fundamental level, the HSRP questioned the validity of using retrospective mortality surveys like the IRC's to measure the number of excess

⁵⁴⁶ *Ibid.*, p. 9.

⁵⁴⁷ *Ibid.*, p. 8.

deaths during a conflict. According to the HSRP, retrospective mortality surveys are "subject to many sources of uncertainty and error" such that they "are simply too crude an instrument to detect the impact of most wars on nationwide mortality rates".⁵⁴⁸ It therefore concluded that "retrospective mortality surveys are rarely appropriate instruments for measuring excess death tolls in wars in poor countries, except in relatively rare circumstances—namely, very short wars".⁵⁴⁹

5.37 The HSRP also observed that international health organisations do *not* use such health surveys to measure excess war deaths, stating:

"The nationwide population health surveys undertaken by Demographic and Health Surveys (DHS, UNICEF (United Nations Children's Fund), and WHO (World Health Organization)) are not used by these organizations to produce such estimates [of excess war deaths]—we believe with good reason". 550

- 5.38 With respect to the specific studies undertaken by the IRC, the HSRP was equally critical. Echoing the HNTS study, the single largest problem the HSRP identified was the notional pre-war baseline CDR the IRC relied on to estimate the number of excess deaths during the conflict.
- 5.39 As stated, the IRC based its calculations on an assumed pre-war CDR equal to the average CDR for sub-Saharan African countries. The HSRP found this assumption unsustainable:

⁵⁴⁸ Human Security Report Project, "Part II, The Shrinking Costs of War", *Human Security Report* (2009-2010), p. 132, Annex 64.

⁵⁴⁹ *Ibid*.

⁵⁵⁰ *Ibid*.

"[T]he IRC never explains why it believes that the sub-Saharan African average is an appropriate measure of the pre-war mortality rate for a country that is far from average in sub-Saharan Africa.

...The DRC languishes at the bottom of most development indicators for sub-Saharan Africa. It suffered a devastating 20-year economic decline from the mid-1970s that reduced its GDP (gross domestic product) per capita from more than USD 300 to just a third of that figure by 1998. Foreign aid was withdrawn almost completely in the early 1990s, and Mobutu Sese Seko's hopelessly inept and corrupt government had collapsed in total disarray by 1997". ⁵⁵¹

5.40 The HSRP considered that a pre-war CDR of 2.0 per 1,000 per month (*vs.* the 1.5 per 1,000 per month used by the IRC) would likely be more accurate. Just making this one change to the IRC's calculations yielded "a massive reduction in the excess death tolls".⁵⁵² But even then, the HSRP was quick to add that this revised calculation was not intended to produce a "correct" estimate.⁵⁵³ To the contrary, it stated: "[W]e do not believe the data are reliable enough to permit this".⁵⁵⁴ The point of changing the pre-conflict CDR was simply "to show how a modest, but plausible, increase in a highly questionable baseline mortality rate can lead to a radically lower excess death toll".⁵⁵⁵

⁵⁵¹ *Ibid.*, p. 125.

⁵⁵² *Ibid.*, p. 130.

⁵⁵³ *Ibid*.

⁵⁵⁴ *Ibid*.

⁵⁵⁵ *Ibid*.

5.41 Indeed, the HSRP observed that the intrinsic uncertainties in determining the baseline mortality rate might render the

> "excess death tolls from low-intensity conflicts... undetectable. If the real excess death toll is less than the uncertainties in wartime and pre-war mortality trend data, then the impact of war deaths may be hidden by the imprecision of the very instruments that are being used to try and detect them". 556

5.42 The HSRP found other equally problematic errors in the IRC's methodology. In particular, with respect to the first two IRC studies (which covered the years 1998-2001 and accounted for 2.5 million of the estimated total of 3.9 million excess deaths between 1998 and 2004), the HSRP observed that (1) the IRC's survey sites were not randomly selected and therefore could not appropriately be used to estimate reliable, nationwide results;⁵⁵⁷ and (2) the IRC failed properly to extrapolate from the survey sites to the rest of the DRC as a whole. On this basis, too, it therefore concluded that the IRC survey results should "be rejected".558

⁵⁵⁶ *Ibid.*, p. 135.

⁵⁵⁷ In three of the eight areas selected for the first two surveys—Kisangani, Kabare, and Katana the IRC had deployed, or intended to deploy, humanitarian assistance programs. According to the HSRP, logically, these would have been areas of high mortality, since there would be little reason for the IRC to deploy assistance programs in areas with low mortality rates. The IRC's data were therefore skewed towards higher mortality levels and should not have been extrapolated to estimate the numbers for the country. Human Security Report Project, "Part II, The Shrinking Costs of War", Human Security Report (2009-2010), Annex 64.

⁵⁵⁸ Human Security Report Project, "Part II, The Shrinking Costs of War", Human Security Report (2009-2010), pp. 128, Annex 64.

- 5.43 A further review of the IRC's work confirms these critiques and raises concerns, in particular, about trying to derive any conclusions about the consequences of Uganda's actions in the DRC.
- 5.44 In its first and second studies, the IRC surveyed a total of only eight sites, the selection of which, as stated, the HSRP criticised as being non-random. Equally important, only one of the eight locations surveyed was within Uganda's sphere of operations: Kisangani (which was surveyed both times). Notably, Kisangani had the *lowest* reported mortality rate in the 2000 survey⁵⁵⁹ and the *second lowest* in the 2001 survey.⁵⁶⁰ (In contrast, the areas with the highest mortality rates in the surveys (Moba at 11.4/12.1⁵⁶¹ and Kalamie at 10.8⁵⁶²) were in the southern-most part of the eastern provinces and nowhere near Uganda's sphere of operations).
- 5.45 Even more importantly, *none* of the deaths in Kisangani reported in the first and second studies were attributed to violence. In other words, in the one area where Uganda was present, the IRC recorded no acts of killing—not a single one—in the first or second studies, whether committed by Uganda or anyone else. The IRC's studies plainly cannot form a basis in law, or even logic, to attribute responsibility to Uganda for any deaths.
- 5.46 Uganda notes also that the DRC's claims about the number of deaths generally attributable to violence are also overstated. According to the DRC, the

⁵⁵⁹ International Rescue Committee, *Mortality in Eastern DRC: Results from Five Mortality surveys by the IRC* (May 2000), p. 12, Annex 50.

⁵⁶⁰ Les Roberts, International Rescue Committee Health Unit, *Mortality in eastern Democratic Republic of the Congo: Results from 11 Surveys* (2001), pp. 21-22, Annex 51.

⁵⁶¹ *Ibid.*; International Rescue Committee, *Mortality in Eastern DRC: Results from Five Mortality surveys by the IRC* (May 2000), p. 12, Annex 50.

⁵⁶² Les Roberts, International Rescue Committee Health Unit, *Mortality in eastern Democratic Republic of the Congo: Results from 11 Surveys* (2001), pp. 21-22, Annex 51.

IRC concluded from its studies that less than 10% of deaths were due to violence. ⁵⁶³ This is a significant overstatement. The reported percentages of deaths from violence in the first four studies were 11.1%, 9.4%, 1.6% and 1.8%, respectively. ⁵⁶⁴ The percentage of deaths due to violence across all four studies was just 4.2%; ⁵⁶⁵ meaning that even accepting the very doubtful IRC estimate of 3.9 million excess deaths, only some 160,000 were caused by direct violence, not the 400,000 the DRC claims.

5.47 Equally important, *none* of the deaths from direct violence reported by the IRC—*not one*—are attributed to Uganda. Uganda has already discussed the first and second studies above. But it is true also of the third and fourth studies as well. There, too, *none* of the recorded violent deaths are linked to Uganda in any way. This is significant because some of the perpetrators are identified; they include the Interahamwe, the RCD and Rwanda, among others.

5.48 How the DRC thinks it reasonable to rely on studies that do not indicate that Uganda caused even a single violent death to justify a claim that it is actually responsible for the deaths of 180,000 DRC civilians is deeply unclear.

5.49 The DRC's attempt to rely on the IRC studies to determine the number of excess deaths caused by the conflict, let alone to rely on them to attribute

-

⁵⁶³ DRCM, paras. 266-267.

⁵⁶⁴ International Rescue Committee, *Mortality in the DRC: Results from a Nationwide Survey* (2003), p. 11, Annex 54; Burnet Institute, International Rescue Committee, *Mortality in the Democratic Republic of the Congo: Results from a Nationwide Survey* (2004), p. 15, Annex 56.

⁵⁶⁵ Uganda computed this average by calculating the total number of deaths and the total number of deaths resulting from violence recorded in the four IRC studies.

responsibility for 180,000 civilian deaths to Uganda, is therefore entirely unjustified.

- 2. The DRC's Claim that Uganda Is Responsible for 45% of the the Alleged Deaths that Occurred Throughout the DRC Is Wholly Arbitrary
- 5.50 The DRC's selection of a so-called "distribution key" of 45% to establish the proportion of excess deaths estimated by the IRC that "can be reasonably considered a consequence of the invasion by Uganda" is not just equally speculative, it is wholly arbitrary.
- 5.51 The DRC Memorial notably provides no evidence—or even a rational explanation—to justify the "distribution key" of 45%. The DRC literally makes no attempt to explain the figure other than the single, conclusory assertion that it takes into account the fact that "other actors bear responsibility in [the war's] outbreak". The DRC has, in effect, picked the number at random.
- 5.52 The DRC's speculative, unexplained approach is plainly at odds with the requirement to establish a sufficiently direct and certain causal nexus between the wrongful act and the injury.⁵⁶⁸ The EECC held that for claims "seeking many millions of dollars," quantification of injury "must be based on more than

-

⁵⁶⁶ DRCM, para. 2.71 (Translation by Counsel, original in French: "dont on peut raisonnablement considérer qu'ils sont une conséquence de l'invasion d'une partie substantielle du territoire congolais par l'Ouganda.").

⁵⁶⁷ *Ibid.*, (Translation by Counsel, original in French: "d'autres acteurs sont responsables de son déclenchement.").

⁵⁶⁸ See Chapter 4 of Uganda's Counter-Memorial.

subjective assertions of 'reasonableness'". ⁵⁶⁹ But that is exactly what the DRC does here.

5.53 Quite apart from this self-evident flaw, the "distribution key" the DRC proffers is, on its face, not credible. As explained in Chapter 2,⁵⁷⁰ the armies of at least eight other States (Angola, Burundi, Chad, DRC, Namibia, Sudan, Rwanda and Zimbabwe), and at least 21 major irregular armed groups (and an even larger number of smaller irregular armed groups) were involved in the conflict.

5.54 Moreover, Uganda's involvement in the conflict was comparatively limited. At the height of the deployment in the DRC, Uganda had no more than 10,000 troops present in the Congo. To attribute to Uganda responsibility for what is effectively one-half of all the violent deaths that allegedly occurred in the DRC is facially unfounded. Indeed, the 180,000 deaths that the DRC seeks to ascribe to Uganda would mean than each and every Ugandan soldier, including medics, cooks and religious personnel, was responsible for 18 Congolese deaths. The absurdity of the assertion speaks for itself.

5.55 In its 2005 Judgment, the Court underscored that "the actions of the various parties"—not just Uganda—"in the complex conflict in the DRC have contributed to the immense suffering faced by the Congolese population."⁵⁷¹ This includes the Government of the DRC, among many others. ⁵⁷² Ascribing responsibility for 45%

⁵⁶⁹ Ethiopia's Damages Claims (Final Award, 2009), para. 85.

⁵⁷⁰ See Chapter 2, Section II of Uganda's Counter-memorial.

⁵⁷¹ Armed Activities (2005), para. 221.

⁵⁷² The IRC states in its 2007 report, for example: "Deaths from violence accounted for just 0.4 percent of deaths nationally, including 0.6 percent of all mortality reported in the East and 0.3 percent in the West. Two of three deaths in the West appeared to be associated with the crackdown on opposition supporters in Kinshasa and Bas-Congo during March 2007. One was a boy of nine, the other a boy of 12. Of 11 deaths in the East, seven were in North Kivu. Perpetrators were

of the violent deaths in the DRC to Uganda would be incompatible with the Court's observations.

- 5.56 Neither the numbers the DRC attempts to derive from the IRC's advocacy-based—and widely criticised—report, nor its efforts to apportion responsibility to Uganda for 45% of the estimated deaths that occurred in the DRC afford any basis, let alone in a judicial proceeding, to ascribe international legal responsibility to Uganda for the loss of life occurring in the DRC between August 1998 and June 2003.
- 3. Other Sources, Including the DRC's Own "Evidence", Disprove the DRC's Claims concerning the Number of Deaths in the DRC
- 5.57 The wildly excessive nature of the DRC's claims concerning the number of deaths for which Uganda is responsible is still further belied by other sources of information, including the DRC's own evidence.
- 5.58 As discussed in Chapter 3, Section III(C)(3), the DRC claims to have conducted inquiries designed to establish the nature and extent of the harms caused by Uganda during the conflict. Among the sources of information gathered are some 10,000 individual claims forms that allegedly summarise "information gathered on the ground and contain[] the name of the victim, a state of the damages suffered and, in some cases, an approximate evaluation of the injury."⁵⁷³

identified in nine instances and included police, Mai Mai, Forces Démocratiques de Libération du Rwanda and the Congolese national army. There was only one violent death of a female; she was shot by police in Itebero province, North Kivu." International Rescue Committee, Burnet Institute, *Mortality in the Democratic Republic of Congo: An Ongoing Crisis* (2007), p. 12, Annex 60.

⁵⁷³ DRCM, para. 1.35 (Translation by Counsel, original in French: "les renseignements recueillis sur le terrain, avec le nom de la victime, l'indication des dommages subis ainsi, dans certains cas, qu'une évaluation approximative des préjudices.").

- 5.59 For reasons only the DRC knows, it chose not to submit any of these claims forms into evidence in these proceedings. It has merely submitted a series of unsworn and unsigned tables that purport to summarise the content of the claims forms. The DRC Memorial provides no information about how these tables were compiled.
- 5.60 The information ostensibly summarised in the DRC's tables does not constitute reliable evidence on which the Court may base any findings. It is, at best, an unverified (and unverifiable) compilation of the purported contents of the alleged source material, which has not been placed before the Court.
- 5.61 Further, even if these summary tables were accepted at face value (which they should not be), the fact would remain that they are largely devoid of the sort of information that would allow for firm legal conclusions. In many cases, the names of the alleged decedents are not provided, nor is there any indication of the circumstances of their death, including date of death, cause of death or the person(s) responsible.
- 5.62 In any event, what is particularly notable for current purposes is the extent to which the number of alleged deaths recorded in the DRC's summary tables diverges from the numbers claimed in the Memorial. A total of 5,893 deaths are nominally recorded in the summary tables.⁵⁷⁴ Uganda is not identified as the perpetrator of any of these. The DRC's own would-be evidence, which purports to be based on primary source material, thus refutes its exaggerated contentions about the number of deaths for which Uganda is responsible.

⁵⁷⁴ "Rapport Décès Effectif/Ville de 1998 à 2003" in file *Dommage Décès*, DRCM Annex 1.3.

5.63 Other neutral sources equally confirm the inflated nature of the DRC's claims. For example, the Uppsala Conflict Data Program ("UCDP"), housed at the Uppsala Universitet in Stockholm, Sweden, maintains a database concerning conflict-related casualties. According to the UCDP's website, it

"is the world's main provider of data on organized violence and the oldest ongoing data collection project for civil war, with a history of almost 40 years. ... UCDP produces high-quality data, which are systematically collected, have global coverage, are comparable across cases and countries, and have long time series which are updated annually." 575

5.64 The UCDP database covers battle-related deaths⁵⁷⁶ and one-sided violent incidents.⁵⁷⁷ Its sources are news agencies, research reports, monographs, and documents of international and multinational agencies and NGOs.⁵⁷⁸ Documents of actors themselves (such as warring parties) are also used when available. UCDP relies on the Factiva database to obtain news sources, then relies on bulletins, journals and books such as the Africa Research Bulletin as well as online databases provided by NGO's and inter-governmental organisations to supplement and

⁵⁷⁵ Uppsala University, Department of Peace and Research, *About UCDP*, *available at* http://pcr.uu.se/research/ucdp/about-ucdp/ (last accessed 25 Jan. 2018), Annex 104.

⁵⁷⁶ UCPD defines "battle-related deaths as deaths resulting from the use of force in a "conflict dyad", meaning two armed and opposing actors engaged with each other. Battle-related deaths include civilian deaths as a result of crossfire, indiscriminate bombings, etc. Uppsala University, Department of Peace and Research, *Definitions: Battle Related Deaths, available at* http://www.pcr.uu.se/research/ucdp/definitions/ (last accessed 24 Jan. 2018), Annex 102.

⁵⁷⁷ UCPD defines "one-sided violence" as the use of armed force by the government of a state or by a formally organised group against civilians which results in at least 25 deaths in a year. Uppsala University, Department of Peace and Research, *One-sided Violence*, *available at* http://pcr.uu.se/research/ucdp/definitions/#One-sided_violence (last accessed 26 Jan. 2018), Annex 105.

⁵⁷⁸ Uppsala University, Department of Peace and Research, *FAQ*, *How Are UCDP Data Collected?*, *available at* http://pcr.uu.se/research/ucdp/faq/#How_are_UCDP_data_collected_ (last accessed 26 Jan. 2018), Annex 106.

corroborate their news sources. If an event or report is not fully verified, UCDP will contact regional and local experts to validate various aspects of the incident.

- 5.65 Among many other conflicts, the UCDP database includes information concerning the conflict in the DRC. Uganda has examined the database with great care. The results are revealing. They show that the UCDP's "best estimates" of the deaths resulting from the conflict between August 1998 and June 2003 are:
 - 29,376 total civilian and rebel deaths;⁵⁷⁹
 - 211 of these 29,376 (i.e., 0.7%) deaths are linked to Uganda; and
 - 310 reported civilian and rebel deaths are linked to Uganda-affiliated groups, such as the RCD-ML, RCD-N and the FLC.
- 5.66 By way of comparison, the database shows 9,420 civilian and rebel deaths linked to the DRC military. 580
- 5.67 Limiting the search results only to civilian deaths yields figures that are significantly lower still. For the period between August 1998 and June 2003, they show "best estimates" of:⁵⁸¹
 - 13,593 civilian deaths;

⁵⁷⁹ Uppsala University, Department of Peace and Research, *DR Congo, Zaire, available at* http://ucdp.uu.se/#/country/490 (last accessed 26 Jan. 2018)._The data, accessible through the download list, have three columns: best, highest, and lowest. The highest estimate for this time period was 51,109 deaths, the lowest estimate for this time period was 28,197 deaths.

⁵⁸⁰ All calculated using the "best estimate" column.

Using the same date range as above, the data were cleaned to reflect only incidents where civilians had been killed by armed groups (i.e. one-sided violent incidents). These calculations were computed using the "best estimate" column.

- 32 of these civilian deaths (i.e., 0.2%) are linked to Uganda; and
- 240 additional reported civilian deaths are linked to Uganda-affiliated groups.
- 5.68 Again by way of comparison, the UPCD database links 1,429 civilian deaths to the DRC military. 582
- 5.69 The Armed Conflict Location and Event Data Project ("ACLED"), housed at the University of Sussex in the United Kingdom, maintains a similar database. ACLED focuses on developing States, with a particular concentration on Africa. According to the ACLED website, it uses daily local, regional, national and continental media, NGO and humanitarian agency reporting and supplementary Africa-focused news reports as source materials. Its data are coded by experienced researchers who collect information primarily from these sources. The data are then reviewed by two additional coders.
- 5.70 As it did with the UCDP database, Uganda has carefully examined the ACLED database. It reflects:⁵⁸³
 - 23,791 total reported fatalities (civilian and military);
 - 3,295 of these total fatalities (i.e., 14%) are linked to Uganda; and
 - 2,559 reported fatalities are linked to Uganda-affiliated groups (the MLC and the FLC).⁵⁸⁴

⁵⁸² All calculated using the "best estimate" column.

⁵⁸³ Armed Conflict Location & Event Data Project (ACLED), *Democratic Republic of the Congo*, *available at* https://www.acleddata.com/tag/democratic-republic-of-congo/ (last accessed 26 Jan. 2018). The data used were from incidents beginning in August 1998 through June 2003.

⁵⁸⁴ Affiliated groups include the MLC and the FLC.

- 5.71 With respect to civilian deaths, 585 the ACLED data indicate:
 - 8,012 reported civilian fatalities;
 - 117 of these 8,038 civilian fatalities (i.e., 1.5%) were caused by one-sided violence perpetrated by Uganda; and
 - 170 reported civilian fatalities were caused by one-sided violence perpetrated by Uganda-affiliated groups.⁵⁸⁶
- 5.72 Uganda has also similarly examined the UN Mapping Report prepared under the auspices of the UN's Office of the High Commissioner on Human Rights for purposes of documenting serious violations of human rights occurring in the DRC between March 1993 and June 2003. The report's findings were based on interviews with "several hundred interlocutors, both Congolese and foreign, who witnessed atrocities in the country" 387, and a review of

"[o]ver 1,500 documents on this subject, some of them confidential... from many sources, including the United Nations, the Congolese Government, Congolese human rights organisations, major international human rights organisations, the national and international media and various NGOs (notably unions, religious groups, aid agencies and victims' associations). In addition, different national and international experts were consulted in order to open up new avenues of research, corroborate some of the information obtained and streamline the overall analysis of the situation." 588

 $^{^{585}}$ This does not include battles that resulted in civilian deaths, only events where Congolese civilians were the sole recipient of violence.

⁵⁸⁶ Affiliated groups include the MLC and the FLC.

⁵⁸⁷ U.N. Mapping Report, p. 1, Annex 25.

⁵⁸⁸ *Ibid.*, para. 14.

5.73 This information then "was verified in order to corroborate or invalidate that information with the aid of independent sources, while also obtaining new information on previously undocumented violations." The UN Mapping Report, in short, constitutes a compilation and distillation of all previous information the authors considered credible enough to warrant mention.

5.74 A note of caution is necessary in considering the UN Mapping Team's findings, however:

"Since the primary objective of the Mapping Exercise was to 'gather basic information on incidents uncovered', the level of evidence required was naturally lesser than would be expected from a case brought before a criminal court. The question was therefore not one of being satisfied beyond reasonable doubt that a violation was committed, but rather of reasonably suspecting that the incident did occur." ⁵⁹⁰

In other words, the standard of proof the UN Mapping Team adopted in recording incidents was lower than the standard applied in this Court to prove facts to a high degree of certainty. ⁵⁹¹

5.75 Uganda has located every instance where the UN Mapping Report links, whether directly or indirectly, one or more deaths to Uganda in the period between 7 August 1998 and 2 June 2003. This includes circumstances in which individuals

⁵⁸⁹ *Ihid*

⁵⁹⁰ *Ibid.*, para. 7 ("Reasonable suspicion [was] defined as 'necessitating a reliable body of material consistent with other verified circumstances tending to show that an incident or event did happen.' Assessing the reliability of the information obtained was a two-stage process involving evaluation of the reliability and credibility of the source, and then the validity and veracity of the information itself".).

⁵⁹¹ See Chapter 3, Section II(A).

were killed in confrontations between Uganda and other armed groups, and in which individuals were killed by other actors with the nominal assistance of Uganda. A compilation of all such instances is appended to this Memorial as Annex 110.⁵⁹²

- 5.76 Adding these reported deaths together, the UN Mapping Report suggests the total number of deaths for which there is even a "reasonable suspicion" to believe they resulted from conduct in which Uganda was involved is approximately 2,291.⁵⁹³
- 5.77 These figures, whether from UPCD, ACLED or the UN Mapping Report, are all substantially more than an order of magnitude *less* than the numbers the DRC claims.
- 5.78 In considering the significance of these figures, it bears emphasis that the DRC itself argues that international reports, including the UN Mapping Report, provide the correct order of magnitude for assessing the scope of the harms it allegedly suffered.

⁵⁹² Calculated Number of Civilian Deaths between 7 August 1998 and 2 June 2003 (Source: U.N. Mapping Report), Annex 110. Uganda has excluded from this list certain incidents alleged to have occurred in early August 1998 in the vicinity of Kinshasa. These have been excluded because the Court held in 2005 with the force of res judicata that Uganda did not participate in the events of early August near Kinshasa. Armed Activities (2005), para. 254. Uganda has also excluded from this list one incident that is alleged to have occurred after 2 June 2003, the date on which the Court previously determined that Uganda's intervention ended.

⁵⁹³ The UN Mapping Report does not always provide specific numbers. When its refers to "several" people reportedly having been killed, Uganda has used the number four as an approximation for the term "several". When it refers to "at least" a certain number of being allegedly being killed, Uganda has used that number. When it refers to the number of people killed as being "between" two specific numbers, Uganda has used the average of those two numbers.

5.79 In explaining its own methodology—that is, its use of claims forms and other data "based on research on the ground" together with "information from reports drafted by various, mostly international actors who had access to the areas affected during the critical period" the DRC revealingly states:

"The international reports, for their part, obviously did not have the same objective [as the claims forms]. Their purpose was to give a general overview of the material and human damage caused by the conflict. Even though they provide invaluable information on a series of particular events, they do not go into a degree of detail that allows them to establish the injuries suffered from an individual standpoint following those events. The general overviews that they present are invaluable nonetheless because they give orders of magnitude for the damage resulting from the violations by Uganda of its international obligations". 595

5.80 The DRC's presentation of a claim for deaths that vastly exceed the numbers reflected in the very international reports that it argues give the correct "orders of magnitude for the damage resulting from the violations by Uganda of its international obligations" flatly contradicts its own reasoning.

5.81 The DRC itself says:

⁵⁹⁴ DRCM, para. 1.36 (Translation by Counsel, original in French: "renseignements à partir de rapports élaborés par divers acteurs, principalement internationaux, qui avaient accès aux zones concernées pendant la période critique.").

⁵⁹⁵ *Ibid.*, para. 1.39 (Translation by Counsel, original in French: "Les rapports internationaux, pour leur part, ne visaient à l'évidence pas le même objectif. Ils avaient pour fonction de faire un bilan général des dégâts matériels et humains occasionnés par le conflit. S'ils fournissent des informations précieuses sur une série d'événements particuliers, ils n'entrent pour autant pas dans un degré de détails tels qu'ils permettent d'établir les préjudices subis sur un plan individuel à la suite de ces événements. Les bilans d'ensemble qu'ils présentent sont néanmoins précieux, car ils donnent des ordres de grandeur des dommages résultant des manquements par l'Ouganda à ses obligations internationales".).

"The thousands of cases recorded [in the claims forms] are only examples illustrating the reality and extent of the damage suffered on the ground. They must be read alongside the figures stemming from the various reports whose purpose is more general and comprehensive." ⁵⁹⁶

- 5.82 Doing exactly what the DRC says "must" be done and reading the claims forms "alongside" the UCPD and ACLED databases, as well as the UN Mapping Report, the conclusion is clear: the DRC's claim that Uganda is responsible for 180,000 civilian deaths during the conflict is unfounded and excessive in the extreme.
- 5.83 The data available from the UPCD and ACLED databases suggest that the DRC's attempt to attribute responsibility for 45% of the claimed civilian deaths to Uganda is also wildly off the mark. The percentages of civilian deaths for which Uganda is identified as responsible in those databases ranges between 0.2% and 1.5%. None of these figures even approximates the DRC's arbitrarily selected "distribution key".
- B. THE FLAWED NATURE OF THE DRC'S CLAIMS ARE HIGHLIGHTED BY THE WAY IN WHICH IT ATTEMPTS TO ALLOCATE THE NUMBER OF DEATHS BY REGION.
 - 5.84 The arbitrariness of the DRC's claim that Uganda is responsible for 180,000 civilian deaths is further highlighted by how the DRC attempts to apportion this number among different locations: (1) Ituri (60,000 deaths); (2) Kisangani (920 deaths); and (3) locations other than Ituri and Kisangani (119,080).

-

⁵⁹⁶ *Ibid.*, para. 1.40 (Translation by Counsel, original in French: "Ils doivent être mis en relation avec les chiffres résultant des différents rapports qui ont une vocation plus générale et globalisante".).

1. Locations Other than Ituri and Kisangani

- 5.85 Because the DRC claims that nearly two-thirds of the civilian deaths for which Uganda is allegedly responsible occurred in locations other than Ituri and Kisangani—and because its approach to these locations starkly highlight the excessive and unfounded nature of the DRC's contentions—Uganda will begin with this aspect of the DRC's claims.
- 5.86 As stated, the DRC claims that Uganda caused the death of 119,080 civilians in locations other than Ituri and Kisangani. The manner in which the DRC arrives at this figure is revealing. It simply subtracts the number of civilian deaths the DRC alleges Uganda caused in Ituri (60,000) and Kisangani (920) from the total number of deaths the DRC seeks to ascribe to Uganda (180,000).
- 5.87 In other words, it does not select the 119,080 figure as the result of a careful evidentiary process but instead as a result of a simple arithmetic exercise. Since it claims Uganda is responsible for 180,000 total civilian deaths, and since it claims that Uganda is responsible for 60,920 civilian deaths in Ituri and Kisangani, that must, in the DRC's view, mean that Uganda is responsible for nearly 120,000 deaths elsewhere.
- 5.88 This reverse-engineered assertion does not come close to satisfying the requirement to prove by convincing evidence the exact injury caused as a result of the specific actions of Uganda. To the contrary, it is premised entirely on speculative and arbitrary assertions (namely, that the conflict resulted in 400,000 violent deaths, for which Uganda bears 45% responsibility) that Uganda has refuted already above.

5.89 Moreover, the large number of deaths claimed in locations other than Ituri and Kisangani is, on its face, not credible. The DRC admits that the most serious violence and fighting occurred in Ituri and Kisangani. It further admits that in other locations UPDF forces were advancing "without any resistance", and that the UPDF's "taking" of some places "was not marked by violent confrontations and therefore did not result in extensive loss of life" or, in some places, any loss of life at all. To argue nevertheless that Uganda caused twice as many deaths outside Ituri and Kisangani as it did in those locations defies credulity.

5.90 The exorbitant nature of the DRC's claim that Uganda caused the 119,080 civilian deaths outside Ituri and Kisangani is further highlighted by the DRC's own evidence. As stated, the tables included with the DRC Memorial purporting to summarise the contents of the claims forms it gathered allegedly reflect a total of 5,893 deaths. Of the deaths claimed, only 684 (11.6%) allegedly occurred outside Ituri and Kisangani: four in Gemena, 37 in Butembo and 643 in Beni. Again, Uganda is not even nominally identified as being responsible for any of these deaths.

5.91 Notably, with respect to 561 of these 684 alleged deaths, the decedent is not even identified. Rather, his/her identity is indicated with only the notation "non"

⁵⁹⁷ *Ibid.*, para. 0.17.

⁵⁹⁸ *Ibid.*, para. 2.17 (Translation by Counsel, original in French: "ne se sont pas traduites par des affrontements violents, et n'ont donc pas occasionné de dommages étendus en termes de pertes de vies humaines.").

⁵⁹⁹ See, e.g., Ibid., paras. 2.17, 2.19, 2.43.

^{600 &}quot;Rapport Décès Effectif/Ville de 1998 à 2003" in file Dommages Décès, DRCM Annex 1.3.

^{601 &}quot;Rapport Décès Effectif/Ville de 1998 à 2003" in file Dommages Décès, DRCM Annex 1.3.

signalé". 602 With respect to the remaining 134 decedents, there is no evidence (1) showing their age and the date of death, or (2) indicating the cause of death. Without such basic information, the DRC cannot hope to discharge its burden to prove with convincing evidence the existence and extent of the injury for which it claims compensation.

5.92 The unsupported nature of the 119,080 deaths claimed for locations other than Ituri and Kisangani is still further highlighted by the UN Mapping Report.

5.93 The DRC Memorial cites, "for illustrative purposes", a number of international and NGO reports that refer to instances of deaths allegedly caused by Uganda or rebel groups it supported in areas outside Ituri and Kisangani. Uganda will not burden the Court by discussing each of those reports and the alleged incidents reported in them. The UN Mapping Report was, as stated, based on a review of the existing information conducted in 2008-2009. The UN Mapping Team had available to it all of the individual reports the DRC cites. As such, the information on deaths contained in the UN Mapping Report incorporates such information from other sources that the Mapping team considered sufficient to give rise to a "reasonable suspicion" that certain incidents took place.

5.94 A careful examination of the UN Mapping Report thoroughly undermines the DRC's claim that Uganda is responsible for 119,000 civilian deaths outside Ituri and Kisangani. To the contrary, the UN Mapping Report suggests that, outside Ituri and Kisangani, there is a reasonable suspicion that:

195

⁶⁰² "Evaluation Décès" in file *Victimes_Décès_BENI*, DRCM Annex 1.3 (549 instances); "Evaluation Décès" in file *Victimes_Décès_BUTEMBO*, DRCM Annex 1.3 (9 instances); "Evaluation Décès" in file *Victimes_Décès_GEMENA*, DRCM Annex 1.3 (3 instances).

- Approximately 49 deaths were caused solely by Uganda; 603
- Another 100 deaths were caused by Uganda and militia/rebels during joint operations;⁶⁰⁴ and
- Approximately 147 deaths were caused in fighting between militia/rebels with UPDF participation, on the one hand, and other militia/rebels with Rwandan or Congolese participation on the other hand.⁶⁰⁵
- 5.95 Even if the UN Mapping Report were accepted at face value—which, due to the relatively low standard of proof employed, Uganda submits that it should not be—the total number of deaths for which Uganda is responsible outside Ituri and Kisangani would be no more than 296.

2. Ituri

5.96 The DRC alleges that Uganda is responsible for 60,000 civilian deaths in Ituri. To support this claim, the DRC cites to the second special report of the UN Secretary-General on MONUC, which states: "Since the first major onslaught of violence in June 1999, the death toll has been estimated at more than 60,000."

⁶⁰³ Calculated Number of Civilian Deaths between 7 August 1998 and 2 June 2003 (Source: U.N. Mapping Report), Annex 110; U.N. Mapping Report, para. 347 (9), para. 348 (36), para. 349 (4), Annex 25

⁶⁰⁴ Calculated Number of Civilian Deaths between 7 August 1998 and 2 June 2003 (Source: U.N. Mapping Report), Annex 110; U.N. Mapping Report, para. 402 (100), Annex 25.

⁶⁰⁵ Calculated Number of Civilian Deaths between 7 August 1998 and 2 June 2003 (Source: U.N. Mapping Report), Annex 110; U.N. Mapping Report, para. 346 (24), para. 381 (7), para. 381 (24), para. 383 (15), para. 385 (1), para. 392 (48), para. 443 (25), Annex 25.

⁶⁰⁶ DRCM, para. 3.23.

⁶⁰⁷ U.N. Security Council, Second special report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC), U.N. Doc. S/2003/566 (27 May 2003), Annex 3.6, para. 10; DRCM, para. 3.22 (Translation by Counsel, original in French: "[d]epuis la première grande explosion de violence en juin 1999, il y a eu selon les estimations plus de 60 000 morts.").

On this basis—and this basis alone—the DRC submits: "It is thus the number of 60,000 killed that the Democratic Republic of Congo will use as the basis for this part of the claim". 608

5.97 The DRC then asserts that out of these 60,000 civilians who allegedly died, "40,000 persons were victims of deliberate violence directed against civilian populations" and "20,000 represents the portion of the inhabitants of Ituri who lost their lives under other circumstances related to the conflicts between 1998 and 2003."

5.98 Neither of these two allegations is supported by evidence of any kind, much less convincing evidence proving them with a high degree of certainty.

5.99 There is literally *nothing* in the second special report of the Secretary-General that directly or indirectly supports the conclusion that Uganda is responsible for 60,000 deaths in Ituri. In the first instance, the report does not, on its face, purport to be a definitive assertion of fact. To the contrary, the relevant statement is preceded by the qualifier that "the death toll has been *estimated* at" the cited figure. The factual basis of this "estimate" is not stated. One thing is clear,

-

⁶⁰⁸ DRCM, para. 3.23 (Translation by Counsel, original in French: "C'est donc le nombre de 60.000 tués que la République démocratique du Congo retiendra comme base de cette partie de sa réclamation".).

⁶⁰⁹ *Ibid.* (Translation by Counsel, original in French: "les deux tiers (soit 40.000 personnes) ont été victimes de violences délibérées dirigées contre les populations civiles. Le tiers restant (soit 20.000 personnes) représente quant à lui la partie des habitants de l'Ituri qui ont perdu la vie dans d'autres circonstances liées aux conflits qui ont déchiré cette région entre 1998 et 2003".).

⁶¹⁰ U.N. Security Council, Second special report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo, U.N. Doc. S/2003/566 (27 May 2003), para. 10, DRCM Annex 3.6.

however: the statement does not purport to ascribe responsibility for those deaths to Uganda.

5.100 This is significant because other portions of the second special report do explicitly identify the parties responsible for violence. In the paragraph immediately preceding the stated estimate of total deaths, for example, there is reference to the fact

"that massacres of both Lendu and Hema have been perpetrated in Ituri since February 2003. From 17 January to 6 March, in an attempt to take over full control of the Ituri region, a militia group known as the Union of Congolese Patriots (UPC) engaged in large-scale military operations in four localities, resulting in killings, destruction of property and the displacement of a large number of people." 611

Uganda is not mentioned.

5.101 Moreover, later in the report, there is actually an indirect reference to Uganda's role in containing the violence. The Report observes that when Uganda left, the violence grew worse:

"Immediately after the departure of UPDF from Bunia, Hema- and Lendu-based militia groups sought to establish control over the town, resulting in violent clashes, often near United Nations premises. The clashes were accompanied by widespread looting, including of the premises of the Office for the Coordination of Humanitarian Affairs." 612

-

⁶¹¹ *Ibid.*, para. 9.

⁶¹² *Ibid.*, para. 16.

5.102 The DRC equally fails to submit any evidence supporting the allegation that 40,000 persons were victims of deliberate violence and 20,000 persons lost their lives as a result of acts "other than deliberate violence". This distinction appears to be wholly arbitrary, as it does not even purport to be based on sources of any kind.

5.103 The arbitrary and speculative nature of the DRC's claim that Uganda is responsible for 60,000 deaths in Ituri is further highlighted by other material that the DRC invokes for "illustrative purposes", without actually relying on them to establish the extent of the alleged injury.

5.104 In its Annex on Loss of Life in Ituri (*Victimes_Decès_Ituri*), a table purporting to summarise the claims forms gathered by the DRC government, lists only 4,164 deaths.⁶¹³ This number differs from the number of deaths the DRC claims (60,000) by more than an order of magnitude. But even this significantly lower number lacks any credible basis.

5.105 *First*, as stated, the DRC has failed to submit its claims forms into evidence. There is therefore no basis on which either Uganda or the Court can even attempt to verify the correctness of the information ostensibly summarised.

5.106 *Second*, even if the claims forms had been produced, there is also reason to believe that they lack probative value. They were gathered years after the events in question, they were gathered for the purpose of litigation (with the ultimate objective of compensation) and the DRC admits that they are often based on

DRC Memorial.

_

^{613 &}quot;Evaluation Décès" in file *Victimes_Décès_ITURI*, p. 115, DRCM Annex 1.3. This number is contradicted by the DRC's own document which lists 4,502 as the number of victims in Ituri without identifying them. *See* "Tableau de Synthèse Effectif Décès" in file *Tableau Synthèse Effectif Deces_1998_à_2003*, p. 4, DRCM Annex 1.3. This document only includes the number of persons allegedly killed in different areas in Ituri. No evidence underlying the numbers is offered in the

second-hand reports, which in some cases come from partisan sources or persons who did not have clear memory about the events they reported.

5.107 The evidentiary shortcomings of the claims forms are also reflected in the summaries contained in the annex. Out of the 4,164 victims claimed in Ituri, 3,827 are not even identified.⁶¹⁴ Here again, they are simply listed as "non signalé". Yet as the EECC held: "There can be no assessment in a claim involving huge numbers of hypothetical victims." The compensation requested for those alleged victims in the Annex is thus wholly speculative.

5.108 In addition to 3,827 unidentified victims, the DRC also lists in the Annex a large number of alleged decedents (337) with names but without any information about: (1) the cause of their death, (2) the alleged victims' age, or (3) his/her date of death. Without this evidence, it is impossible to establish that Uganda is responsible for the alleged deaths.

5.109 The DRC also cites, again "for illustrative purposes", a number international and NGO reports that refer to instances of deaths allegedly resulting from the actions of the UPDF in Ituri. As in the case of areas other than Ituri and Kisangani, Uganda will not burden the Court by examining each of the cited reports, all of which were available to the UN Mapping Team when it performed its work in 2008-2009. The UN Mapping Report reflects all incidents the team concluded there was a "reasonable suspicion" to believe took place.

5.110 A close review of the UN Mapping Report suggests that:

⁶¹⁴ "Evaluation Décès" in file Victimes Décès ITURI, DRCM Annex 1.3.

⁶¹⁵ Ethiopia's Damages Claims (Final Award, 2009), para. 64.

^{616 &}quot;Evaluation Décès" in file Victimes Décès ITURI, DRCM Annex 1.3.

- Approximately 100 deaths were caused solely by Uganda in Ituri;⁶¹⁷
- Another 988 deaths were caused by Uganda and militia/rebels during joint operations;⁶¹⁸ and
- Approximately 335 deaths were caused in fighting between militia/rebels with UPDF participation, on the one hand, and other militia/rebels with the Rwandan or Congolese participation, on the other hand.⁶¹⁹
- 5.111 Thus, even if the alleged incidents mentioned in the UN Mapping Report are established, the total number of deaths in Ituri for which Uganda could be deemed responsible is some 1,423.
- 5.112 Uganda recognises, of course, that in Ituri it is not only responsible for losses of life in which the UPDF was directly involved. The Court found in the 2005 Judgment that Uganda failed to fulfill its duties of due diligence as an occupying Power in Ituri to prevent the act of others. But the DRC cannot use that finding to ascribe responsibility to Uganda for any and all deaths caused by others in Ituri. Such deaths could only be attributed to Uganda if the DRC were to show with "a sufficient degree of certainty that [those killings] would in fact have been averted if [Uganda] had acted in compliance with its legal obligations" of an occupying Power. The DRC Memorial does not, however, make any effort to come forward with evidence sufficient to make that showing.

⁶¹⁷ U.N. Mapping Report, para. 405 (100), Annex 25.

⁶¹⁸ *Ibid.*, para. 366 (25), 370 (10), para. 405 (105), para. 405 (25), para. 407 (225), para. 408 (6), para. 408 (35), para. 408 (400), para. 409 (27), para. 411 (80), para. 417 (50).

⁶¹⁹ *Ibid.*, para. 369 (250), para. 412 (50), para. 421 (35), Annex 25.

⁶²⁰ See Chapter 4.

⁶²¹ Bosnia and Herzegovina v. Serbia and Montenegro (2007), para. 462.

5.113 Uganda also recognises that the Court found in the 2005 Judgment found that there was "persuasive evidence that the UPDF incited ethnic conflicts and took no action to prevent such conflicts in Ituri district." But here, too, this general finding, made without reference to any specific evidence in the text of the Judgment, is insufficient to ascribe responsibility to Uganda for any acts of killing that resulted from ethnic violence between the Hema and the Lendu.

5.114 Consistent with its burden at this phase of the proceedings, the DRC must come forward with evidence concerning specific acts of incitement by Uganda the resulted in specific, identified deaths. The DRC has not just failed to meet this burden, it has made absolutely no effort to do so. The Court's prior general findings therefore affords no basis on which to ascribe responsibility to Uganda for any number of deaths resulting from ethnic violence.

5.115 Accordingly, the DRC's claim that Uganda is responsible for 60,000 deaths in Ituri is entirely baseless.

3. Kisangani

5.116 The DRC claims that Uganda caused 920 deaths in Kisangani. 623

5.117 This claim, too, is without merit because not all the deaths that occurred in Kisangani can be attributed to Uganda. The evidence the DRC submits in support of its claim is also speculative and lacks credibility.

⁶²² Armed Activities (2005), para. 209.

⁶²³ DRCM, para. 4.64.

5.118 With respect to the issue of attribution, the DRC seeks to ascribe responsibility to Uganda for deaths caused by the DRC on the flawed theory that Uganda provided "political and military assistance" to the rebel group that "operated directly under [Uganda's] command."⁶²⁴ Yet the Court previously made no finding that the RCD was under Uganda's effective control. Nor was it established that it was an organ of Uganda. The RCD's conduct is therefore not attributable to Uganda.

5.119 The DRC also impermissibly seeks to ascribe to Uganda responsibility for all deaths caused by Rwanda and other rebel groups *not* supported by Uganda on the equally flawed theory that those deaths would not have occurred "but for" Uganda's intervention in the DRC.⁶²⁵ For the reasons explained in Chapter 4,⁶²⁶ this theory of causation is too speculative; the notional causal link is simply too attenuated to justify Uganda's responsibility for deaths caused by Rwanda and the rebel groups supported by Rwanda.

5.120 Turning to the DRC's evidence, that evidence does not convincingly support the conclusion that Uganda caused 920 deaths in Kisangani with a high degree of certainty.

5.121 For the period between August 1998 and May 1999, the DRC claims Uganda is responsible for 26 deaths caused during fighting in August-September

⁶²⁴ *Ibid.*, paras. 4.09, 4.11, 4.13 (Translation by Counsel, original in French: "[o]nt opéré directement sous leur commandement.").

⁶²⁵ *Ibid.*, para. 4.14.

⁶²⁶ See Chapter 4, Section I(D).

1998 and an airstrike in January 1999.⁶²⁷ The DRC derives this number from the reports of the Groupe Lotus, *Groupe Justice et Liberation* and COJESKI, which were prepared many months after the events in question.⁶²⁸ Even setting that threshold problem aside, these reports still do not support the DRC's claim.

5.122 As regards the fighting in August-September 1998, the Groupe Lotus reports that 10 civilians were killed.⁶²⁹ According to the Groupe Lotus, however, those deaths were caused by "rebels" in confrontations with the FAC, not by Uganda.⁶³⁰ There is therefore no factual basis to ascribe that alleged injury to Uganda. (It also bears note that, addressing the same event, the Groupe Lotus reported that the FAC killed many more civilians than the rebels did and—in contrast to the rebels—offered no apology to the local population and provided no compensation⁶³¹).

5.123 As regards the airstrike in January 1999, the DRC relies on reports by Groupe Justice et Libération⁶³² and COJESKI,⁶³³ which present conflicting numbers of persons killed (Groupe Justice et Libération refers to 10 deaths; COJESKI mentions 12). The DRC adds the two figures together and removes

⁶²⁷ DRCM, para. 4.20.

⁶²⁸ *Ibid*.

⁶²⁹ *Ihid*

⁶³⁰ Groupe Lotus, *Rapport du Groupe Lotus de Kisangani* (15 Oct. 1998), Sections 3.1, 3.2, DRCM Annex 4.15.

⁶³¹ Ihid

⁶³² Rapport du Groupe Justice et Libération, II (23 May 1999), p. 3, DRCM Annex 4.10 (b). Groupe Justice et Libération reports 10 deaths resulting from the air strike of the Congolese air force.

⁶³³ Communiqué du 02 Août 1998, Reproduit en Annexe 3 du Rapport du Groupe Lotus de Kisangani (15 Oct. 1998), DRCM Annex 4.11. COJESKI reports 12 deaths resulting from this incident.

duplicate names, and thus claims that Uganda is responsible for 16 deaths in the airstrike. 634

5.124 The reports cited are, however, of no assistance to the DRC because responsibility for the deaths caused by the airstrike cannot be ascirbed to Uganda. According to the UN Mapping Report's account of that incident, "on 10 January 1999, *a FAC plane* apparently indiscriminately bombarded the town of Kisangani, killing 12 civilians and wounding 27." It is therefore the DRC itself that is responsible for those deaths (assuming they actually happened), not Uganda.

(b) The August 1999 Confrontations

5.125 The DRC also seeks to ascribe approximately 100 civilian deaths to Uganda resulting from the August 1999 confrontations between the APR and UPDF in Kisangani. The DRC appears to have selected this number at random from different sources, which present conflicting and unconfirmed numbers.

5.126 For example, the DRC claims that Groupe Lotus found that 100 civilians were killed.⁶³⁶ In reality, however, Groupe Lotus itself expressed doubt about that number, which it could not verify. It stated: "*If we are to believe* the humanitarian organization sources, 63 civilians allegedly died. The *figure remains disputable*, all the same, to the extent that certain bodies of civilians were found dressed in

205

⁶³⁴ DRCM, para. 4.20.

⁶³⁵ U.N. Mapping Report, para. 360 ("During the period under consideration, FAC planes bombarded ANC/APR/UPDF positions in Orientale Province on several occasions. On 10 January 1999, a FAC plane apparently indiscriminately bombarded the town of Kisangani, killing 12 civilians and wounding 27".), Annex 25.

⁶³⁶ DRCM, para. 427.

military uniforms."⁶³⁷ Groupe Lotus then states that "other sources, on the other hand, provide a provisional assessment of at least 100 civilians killed."⁶³⁸ But Groupe Lotus does not specify what those sources are or give any indication of their reliability. Still less does it purport to verify that number itself.

5.127 The DRC also cites to a COJESKI report which stated that 175 persons were killed during this time period. The DRC itself admits, however, that the report does not distinguish between the deaths of soldiers and civilians. Moreover, the COJESKI report is unreliable because it does not identify any names of those killed, the locations of killings or perpetrators. Nor does the report explain the methodology underlying it or whether it verified the stated numbers. He forms that the methodology underlying it or whether it verified the stated numbers.

5.128 The DRC's selection of the 100 civilian deaths from those two uncorroborated sources is all the more inexplicable in light of the lower number stated in the UN Mapping Report. According to that report: "APR and UPDF soldiers are said to have used heavy weapons in areas with a dense civilian population as they fought to gain control of the town of Kisangani. The fighting allegedly caused the deaths of over 30 civilians and wounded over 100 of them.

-

⁶³⁷ Groupe Lotus, *Les conséquences de la contraction des alliances et factions rebelles au nord-est de la RDC – La guerre de Kisangani*, Sept. 1999 (op. cit.), Section II, para. 3.2 (Translation by Counsel, original in French: "A en croire les sources humanitaires, 63 personnes civiles auraient succombé. Le chiffre demeure tout de même discutable dans la mesure où certains corps des civils étaient retrouvés vêtus en uniforme militaire".), DRCM Annex 4.18.

⁶³⁸ Groupe Lotus, Les conséquences de la contraction des alliances et factions rebelles au nord-est de la RDC – La guerre de Kisangani, Sept. 1999 (op. cit.), DRCM Annex 4.18.

⁶³⁹ DRCM, para. 4.27 citing to COJESKI, Dans les provinces occupées de la République Démocratique du Congo: les violations massives des droits de l'homme et du droit international humanitaire au seuil du paroxysme (Oct. 1999), p. 58, DRCM Annex 4.17.

⁶⁴⁰ *Ibid*.

The APR fired on both military targets and private homes belonging to civilians suspected of supporting the Ugandans."⁶⁴¹

5.129 Accordingly, not only does the UN Mapping Report reveal a number that is lower than that claimed by the DRC, it also suggests that not all those deaths were caused by Uganda, especially given that Rwanda (unlike Uganda) targeted private homes.

(c) The May 2000 Confrontations

5.130 The DRC claims that Uganda caused 30 civilian deaths during fighting between the APR and UPDF on 5 May 2000.⁶⁴²

5.131 This number is derived from the lists of allegedly killed civilians that were prepared by Groupe Lotus and *Groupe Justice et Libération*.⁶⁴³ Those lists do not support the DRC's claim, however. Other than listing the names of people allegedly killed, they contain no evidence showing that those persons were actually killed or that they were killed by Uganda.

5.132 As is true in so many other instances, the number the DRC claims is refuted by the UN Mapping Report, which found there to be a reasonable suspicion that "over 24" deaths resulted from the 5 May 2000 confrontations between APR and UPDF. ⁶⁴⁴ But here, too, the UN Mapping Report does not state that all those deaths

⁶⁴¹ U.N. Mapping Report, para. 361, Annex 25.

⁶⁴² DRCM, para. 4.34.

⁶⁴³ Ibid.; Jean-Pierre Badidike, ed., Guerre et droits de l'homme en République démocratique du Congo, (2009), DRCM Annex 4.10. Pertes en vies humaines à Kisangani, les dommages résultant des incidents d'août 1998 à la fin mai 1999, DRCM Annex 4.1.

⁶⁴⁴ U.N. Mapping Report, para. 362. Annex 25.

were caused by Uganda. Indeed, it observes that, unlike Rwanda, Uganda "warned the population of the imminent bombardments and had asked for the evacuation of several areas located close to their targets." Thus, even if the figure of "over 24" deaths reported in the UN Mapping Report were accepted (*quod non*), not all of those deaths could be attributed to Uganda.

(d) The 5-11 June 2000 Confrontations

5.133 The DRC claims that Uganda is responsible for the deaths of 760 civilians during the fighting between the APR and UPDF that took place between 5 and 11 June 2000. As support, it cites to various sources that report widely different numbers of civilian deaths.⁶⁴⁶ From those various numbers, the DRC selects the number 760 seemingly at random.

5.134 The DRC claims that this number results from the investigations of the 2000 Inter-Agency Assessment Mission to Kisangani that was established at the request of the UN Security Council.⁶⁴⁷ However, the report of the Inter-Agency Assessment Mission merely states that "over 760 civilians died" during the conflict between Rwanda and Uganda. No evidence in support of this number is provided,

208

⁶⁴⁵ *Ibid.*, paras. 361-364.

⁶⁴⁶ DRCM, paras. 4.41-4.42 ("The third report of the Secretary General on MONUC mission, on 12 June 2000 estimates the number of civilians killed at that time at 150 ... the Special Rapporteur on the situation of human rights in the DRC, Roberto Garreton [] believes that '[i]n addition to casualties among the soldiers, about 1,000 Congolese civilians died... the inter-agency assessment mission created at the request of the Security Council ... indicate that ... "more than 760 civilians have been killed"".) (Translation by Counsel, original in French: "Le troisième rapport du Secrétaire général sur la MONUC, en date du 12 juin 2000, fixe le nombre de civils tués à cette occasion à 150 ... le rapporteur spécial sur la situation des droits humains en RDC, Roberto Garreton, estime quant à lui que, '[o]utre quelques combattants, près de 1000 Congolais ont trouvé la mort ... la mission d'évaluation inter-institutions créée à la demande du Conseil de sécurité des Nations Unies ... indique que ... "plus de 760 civils ont été tués"".).

⁶⁴⁷ *Ibid.*, para. 4.41.

nor is there any suggestion that Uganda is solely responsible for all of these alleged deaths. ⁶⁴⁸

5.135 The report of the Inter-Agency Assessment Mission also has to be read in light of subsequent findings set forth in the UN Mapping Report, which found there to be a reasonable suspicion that during 5-11 June 2000 the "two armies [of Rwanda and Uganda] killed between 244 and 760 civilians".⁶⁴⁹

5.136 This wide range calls into questions the number of deaths the DRC seeks to ascribe to Uganda. As in so many other instances, the DRC seems merely to have selected the highest possible number so as to maximise its claim.

5.137 Whatever the correct number is, not all the deaths can be attributed to Uganda. This is especially true in light of the observation in the UN Mapping Report that, unlike Rwanda, "the UPDF [during 5-11 June 2000] had taken steps to avoid civilians losses by ordering the evacuation of combat zones before the start of the hostilities and prohibiting access to three areas that were declared off-limits to non-combatants."

*

⁶⁴⁸ U.N. Security Council, *Report of the inter-agency assessment mission to Kisangani*, U.N. Doc. S/2000/1153 (4 Dec. 2000), paras. 14, 16, DRCM Annex 4.24.

⁶⁴⁹ U.N. Mapping Report, para. 363, Annex 25.

⁶⁵⁰ *Ibid.*, paras. 363-364 *citing to* Groupe Lotus, the DRC also claims that Uganda is responsible for four deaths of civilians killed by mines and explosives placed by Uganda during the war in Kisangani. DRCM, paras. 4.56-4.57. However, the Groupe Lotus does not support that claim because the report contains no information suggesting that mines and explosives were placed or left by Uganda. Annex 25.

5.138 The DRC also attempts to substantiate its claim that Uganda is responsible for 920 deaths in Kisangani by relying on various annexes containing summary tables of those killed.

5.139 The DRC refers, for example, to Annex 4.5(a), which allegedly summarises the work of its Commission of Experts established to identify the victims of Uganda's wrongful acts and the damages they suffered.⁶⁵¹ That annex contains a list of 922 persons allegedly killed by Uganda which, the DRC claims, is supported by "an impressive amount of documentation [that] has been gathered on the basis of the forms completed by the victims."⁶⁵²

5.140 In fact, however, the DRC has not adduced even a single document to support the contents of the table it presented in Annex 4.5(a). This table, like all the others the DRC has submitted, has no probative value. Moreover, even taking it at face value, it provides no information about the cause, date or place of death for many of the putative decedents listed.⁶⁵³

5.141 The DRC also refers to Annex 4.6, another summary table that lists 701 persons as allegedly being killed. The DRC, however, offers no explanation how or on what basis this list was created.⁶⁵⁴ It too is therefore without evidentiary value.

⁶⁵¹ DRCM, para. 4.60.

⁶⁵² *Ibid.*, paras. 4.59-4.60 (Translation by Counsel, original in French: "A ainsi été rassemblée une documentation imposante, sur la base des formulaires remplis par les victimes.").

⁶⁵³ See, e.g., République Démocratique du Congo, Commission d'Experts, Identification des victimes et évaluation du préjudice *personnes tuées*, pp. 4, 12, 16, 18, 19, 20-25, DRCM Annex 4.5(a).

⁶⁵⁴ DRCM, para. 4.61.

5.142 The DRC further seeks to rely on a "data file, composed of more than 10,000 handwritten data sheets covering the victims in all territory of the DRC" with "a financial assessment of damages." The information from this "data file" regarding Kisangani is reproduced in Annex 4.7(a), which lists 600 persons as allegedly killed by Uganda. Here again, the DRC provides no supporting evidence and offers no explanation how the damage was assessed. Moreover, 272 persons in this table are not even identified.

5.143 The DRC's claim that Uganda caused 920 deaths in Kisangani therefore remains unproven.

4. Congolese Soldiers

5.144 In addition to the 180,000 civilian deaths for which the DRC claims Uganda is responsible, it also contends that Uganda caused the death of 2,000 FAC soldiers.⁶⁵⁶

5.145 Uganda observes in the first instance that the Court made no finding in the *dispositif* of the 2005 Judgment or in its reasoning that Uganda was responsible for the deaths of any Congolese soldiers. The Court's findings related exclusively to civilian deaths. The DRC's claim in this respect therefore exceeds the scope of the 2005 Judgment *ratione materiae* and the DRC is precluded from seeking compensation for these alleged deaths.

⁶⁵⁵ *Ibid.*, para. 4.62 (Translation by Counsel, original in French: "une évaluation financière des dommages.").

⁶⁵⁶ *Ibid.*, paras. 7.14, 7.15.

⁶⁵⁷ *Armed Activities* (2005), para. 345(3).

5.146 Moreover, even if the DRC could recover for these alleged deaths (which it cannot), the claim is unsupported by evidence. Indeed, it is not entirely clear how the DRC arrives at the claimed total of 2,000 military deaths. The narrative portion of the DRC Memorial makes only a reference to the deaths of 1,000 soldiers in Equateur Province.⁶⁵⁸ The source cited, however, refers to the deaths of a lesser number: 800.⁶⁵⁹ On what basis the DRC purports to increase this number first to 1,000 (in Chapter 2) and then to 2,000 (in Chapter 7) is not explained.

5.147 Moreover, the incident the DRC refers to involved fighting between the FAC and the ALC (the armed wing of the MLC), not the UPDF. Yet, as Uganda has recalled elsewhere, the Court specifically declined to find the conduct of the MLC attributable to Uganda.⁶⁶⁰ The DRC therefore cannot claim compensation from Uganda for deaths caused by the ALC.

5.148 The only other information included with the DRC Memorial that Uganda has been able to locate that relates to the deaths of FAC soldiers is found in DRC Annex 7.4, at page 1 (which is *not* cited in the text of the Memorial). This is yet another unsigned summary table that was prepared under unknown circumstances by unknown individuals that purports to list, *inter alia*, losses of life suffered by the FAC in certain locations. The table purports to record 1,501 deaths, a number which is then increased without explanation to an "estimate" of 2,000. 661 Moreover, other than the title of the document, which refers to military damages allegedly

⁶⁵⁸ DRCM, para. 2.56.

⁶⁵⁹ See Ibid., para. 2.55.

⁶⁶⁰ See supra, paras. 5.111, 5.112.

⁶⁶¹ République Démocratique du Congo, Evaluation des dégâts militaires dans les rangs des FARDC par l'armée ougandaise et alliés (31 Aug. 2016), p. 1, DRCM Annex 7.4.

caused by "Uganda and allies" 662, there is nothing in the table that ties the claimed deaths to Uganda. More fundamentally still, this summary table does not constitute reliable evidence for all the reasons recalled elsewhere with respect to the DRC's other such tables. The DRC cannot claim compensation for these unproven deaths.

5.149 Accordingly, the DRC's claims concerning the number of deaths resulting from Uganda's intervention are entirely speculative and unproven.

III. The DRC's Valuation of the Injury Related to Loss of Life Is Methodologically Flawed

5.150 The DRC's valuation of the compensation it is due for the losses of life it alleges are equally speculative and unproven.

5.151 As stated in the introduction to this chapter, the DRC adopts a two-tier methodology for assessing compensation for the loss of life. It takes different approaches depending on whether the alleged deaths resulted from what the DRC terms "deliberate violence" or acts "other than deliberate violence".

5.152 The DRC assesses its compensation for loss of life resulting from deliberate violence based on compensation Congolese courts allegedly award families of persons killed by the Congolese government in the context of serious crimes against international law. 663 Such compensation, according to the DRC, varies from US\$ 5,000 to US\$ 100,000, with the average amount allegedly being US\$

⁶⁶² *Ibid*.

⁶⁶³ DRCM, para. 7.12.

34,000.⁶⁶⁴ The DRC then multiplies this number by the alleged number of victims of deliberate violence (40,000) to arrive at a compensation claim in the amount of US\$ 1.36 billion.⁶⁶⁵ This US\$ 34,000 multiplier is just as arbitrary and unproven as the DRC's claim concerning the number of alleged victims

5.153 Uganda observes in the first instance that the DRC cites no authority for the proposition that the appropriate measure of compensation in this Court should be determined by reference to the decisions of the claimant State's domestic courts. The only justification the DRC Memorial offers for using this approach is (as with so many other elements of its claim) the bare subjective assertion that it considers it "reasonable" to do so.⁶⁶⁶

5.154 Moreover, even if DRC municipal law were relevant to the issues now before the Court, the content of that law is an issue of fact that must be proven through evidence. The DRC has not done so, however. It has not adduced even a single judgment or other document from its domestic courts demonstrating the amount of compensation they awarded, still less has it produced information from which it can be concluded that the "average" award equates to the US\$ 34,000 that the DRC claims. There is no therefore no evidence before the Court proving either that the amount of compensation awarded by the Congolese courts range from US\$ 5,000 to US\$ 100,000, or that the average amount of such compensation is the US\$ 34,000 claimed.

⁶⁶⁴ *Ibid*.

⁶⁶⁵ *Ibid.*, para. 7.13.

⁶⁶⁶ *Ibid.*, para. 7.12.

⁶⁶⁷ Certain German interests in Polish Upper Silesia, Merits Judgment, 1926, P.C.I.J. Reports, Series A, No. 7, p. 19.

5.155 At the same time, the DRC itself revealingly underscores the apparent arbitrariness of the numbers on which it wishes to rely. The DRC Memorial admits that "the grounds" for compensation awarded by the Congolese courts "often remained brief" and that some judgments were "entirely unfounded or manifestly arbitrary." It is also ironic that the DRC relies on compensation its domestic courts awarded against the Congolese government, given that the government, according to the UN Mapping Report, has consistently refused to honor those judgments. 669

5.156 The DRC's quantification of the damages due loss of life resulting from acts other than deliberate violence is equally unsupported. The DRC purports to calculate the amount of compensation due based on the future income that a decedent would have received had he/she lived to the age of the average life expectancy in the DRC.⁶⁷⁰ According to the DRC, such future income for each victim is US\$ 18,913.⁶⁷¹

5.157 The DRC gets to this number by multiplying two variables: (1) the average years of life a victim lost (which it claims is 25.11 years), and (2) the average income expected for those years (for which the DRC uses its putative 2015 GDP per capita of US\$ 753.20).⁶⁷² Both variables in this formula are unfounded.

5.158 The DRC calculates the average years of life lost by alleged victims (25.11 years) by subtracting "the average age of victims, as determined based on the files

⁶⁶⁸ DRCM, para. 7.08 (Translation by Counsel, original in French: "totalement dépourvus de motivation ou manifestement arbitraire.").

⁶⁶⁹ U.N. Mapping Report, paras. 46-53, Annex 25.

⁶⁷⁰ DRCM, para. 7.09.

⁶⁷¹ *Ibid*.

⁶⁷² *Ibid*.

drawn up by the DRC's investigators" (allegedly 27)⁶⁷³ from the average "life expectancy in the DRC in 2003" (allegedly 52.11 years).

5.159 Uganda does not dispute that the life expectancy figure on which the DRC relies is generally accurate. According to publicly available information on the WHO website, the average life expectancy in the DRC between 2000 and 2003 increased from 51.3 years to 52.8 years.⁶⁷⁴

5.160 The claimed average age of the alleged victims (27 years) is, in contrast, deeply problematic. As stated, the DRC alleges that this number was "determined based on the files drawn up by the DRC's investigators."⁶⁷⁵ Yet the DRC offers no explanation as to exactly what files were used, how they were drawn up and how that nominal average was determined. There is therefore no basis to credit, much less verify, this assertion.⁶⁷⁶

5.161 The DRC's calculation is also based on a flawed assumption that all of the alleged victims, no matter what their age, their status within a family or their actual earning potential, would have be fully employed at all times up to the date of the deaths. This assertion is facially untenable for obvious reasons.

_

⁶⁷³ *Ihid*

⁶⁷⁴ World Health Organization, *Life expectancy, Data by country*, *available at* http://apps.who.int/gho/data/node.main.688?lang=en (6 June 2016), Annex 97. The data do not include information for the years prior to 2000.

⁶⁷⁵ DRCM, para. 7.09 (Translation by Counsel, original in French: "déterminé sur la base des fiches établies par les enquêteurs de la RDC.").

⁶⁷⁶ To the extent the DRC refers to claims forms and other materials summarised in its annexes on alleged loss of life, Uganda has demonstrated above that the DRC failed to identify a great number of the alleged victims and provided no evidence concerning the date of birth and date of death for a great number others. The DRC's summary tables therefore no basis for calculating the average the DRC claims.

- 5.162 As regards the second variable in the DRC's equation—the average income of an alleged victim—the DRC's use of its 2015 per capita GDP (allegedly US\$ 753.20) as a proxy for expected annual income is equally baseless. In the first instance, the DRC has got the number wrong. According to World Bank data not cited by the DRC, its GDP per capita in 2015 was US\$ 475 (expressed in current US dollars), nearly 37% less.
- 5.163 Moreover, it is plainly inappropriate to use a number from 2015 to calculate a figure applicable to the 1998-2003 time period. (According to the World Bank, the DRC GDP per capita was US\$ 139 in 1998 and US\$ 174 in 2003. Both figures are expressed in current US dollars).
- 5.164 At an even more fundamental level, GDP per capita cannot be used as a proxy for a person's expected income because it is not, nor does it reasonably approximate, average *individual* income. To the contrary, GDP per capita is nothing more than a ratio, or fraction. The bottom part of the fraction, the denominator, is the total population of the country; the top part of the fraction, the numerator, is total GDP.

5.165 An IMF official has usefully explained what GDP actually measures:

"GDP measures the monetary value of final goods and services—that is, those that are bought by the final user—produced in a country in a given period of time (say a quarter or a year). It counts all of the output generated within the borders of a country. GDP is composed of goods and services produced for sale in the market and also includes some

nonmarket production, such as defense or education services provided by the government". 677

5.166 Total GDP thus includes much more than just the income earned by individuals in the country. It also includes "all of the output generated within the borders of a country." It includes the value generated, and income earned, by business entities and even by the government. It also includes wealth generated within a country but that did not stay in the country, such as the profits of foreignowned businesses.

5.167 The Organization for Economic Co-operation and Development ("OECD") puts it this way:

"GDP per capita, by design an indicator of the total income generated by economic activity in a country, is often used as a measure of people's material well-being. However, not all of this income necessarily ends up in the purse of households. Some may be appropriated by government to build up sovereign wealth funds or to pay off debts, some may be appropriated by firms to build up balance sheets, and yet some may be appropriated by parent companies abroad repatriating profits from their affiliates." 678

5.168 Because GDP per capita includes many elements of income unrelated to *individual* income (such as government and business income), as well as funds repatriated to other countries, it substantially overstates any reasonable estimate of individual income. A firm of economic forecasters has explained: "GDP per capita is an important indicator of economic performance and a useful unit to make cross-

⁶⁷⁷ Tim Callen, International Monetary Fund, *Gross Domestic product: An Economy's All, available at* http://www.imf.org/external/pubs/ft/fandd/basics/gdp.htm (29 July 2017), Annex 99.

⁶⁷⁸ OECD Insights, Debate the Issues, *Statistical Insights: What does GDP per capita tell us about households' material well-being?*, *available at* http://oecdinsights.org/2016/10/06/gdp-per-capita-households-material-well-being (6 Oct. 2016), Annex 98.

county comparisons of average living standards and economic wellbeing. However, GDP per capita is not a measure of personal income". 679

5.169 A more appropriate measure of average individual earnings would be per capita income. Unfortunately, World Bank statistics are not available for the DRC. Although the Bank attempts to track per-capita household income for each country in its database of "World Development Indicators," the relevant fields are blank for the DRC. Data concerning per capita income in the DRC must therefore come from other sources.

5.170 Fortunately, there are a number of existing estimates of per capita income in the DRC, all of which are fairly consistent with one another—and inconsistent with the amount claimed in the DRC Memorial. The DRC itself has, in other settings, offered estimates of average individual income in the country. All of these estimates are significantly lower than what it now claims as a measure of annual income:

• In the context of explaining the burden faced by DRC citizens battling HIV and AIDS, a July 2006 report on poverty reduction prepared by the Government of the DRC states: "With annual incomes *just shy of US\$100 a year per capita*, the annual cost of anti-retroviral (ARV) treatment of US\$360 per person represents a burden, putting care out of

_

⁶⁷⁹ FocusEconomics, *What is GDP per capita?*, *available at* https://www.focus-economics.com/economic-indicator/gdp-per-capita (last accessed 24 Jan. 2018) (emphasis added), Annex 103.

⁶⁸⁰ The World Bank, *World Development Indicators*, available at http://databank.worldbank.org/data/reports.aspx?source=world-development-indicators (last accessed 31 Jan. 2018).

the reach of the majority of affected households and the family solidarity network."⁶⁸¹

Another DRC government report cited by the United Nations estimates that per capita income per day declined sharply from the 1970s to 2004, noting that it was US\$ 0.30 in 1998, and less than US\$ 0.20 (or US\$ 73 per year) in 2004.⁶⁸²

5.171 Reports by other credible authorities also include estimates of per capita income in the DRC that are approximately the same—and far lower than the US\$ 753 figure relied on by the DRC. In a 2007 report, for example, the UN Economic and Social Council ("ECOSOC") noted that "UNICEF, in its 2007 programme document for the DRC, *estimates annual per capita income at US \$120*."⁶⁸³

5.172 The DRC's claim that a victim's lost income would have averaged US\$ 753/year is therefore starkly at odds with figures published by the DRC itself and other bodies. The proposed figure is also impossible to square with the DRC government's repeated, detailed acknowledgements of the country's poverty and wide-spread unemployment. The DRC government's "Poverty Reduction and Growth Strategy Paper" from July 2006 includes a large number of facts that speak to the depth of the country's problems, including:

⁶⁸¹ Democratic Republic of the Congo, *Poverty Reduction and Growth Strategy Paper* (July 2006), para. 174 (emphasis added), Annex 59.

⁶⁸² U.N. Economic and Social Council, *Implementation of the International Covenant on Economic, Social and Cultural Rights: Combined second, third, fourth and fifth periodic reports submitted by States parties under articles 16 and 17 of the Covenant, Democratic Republic of the Congo, U.N. Doc. E/C.12/COD/5 (14 Aug. 2007)* (hereinafter, "ICESCR Report"), para. 111, Annex 22 *citing to* the DRC Ministry of Planning, "Poverty Reduction Strategy Document", (Feb. 2004), p. 11, point 2.2, section 23; p. 5, section 3.

⁶⁸³ ICESCR Report, para. 111 (emphasis added), Annex 22.

- "The human development indicators (education, health, access to socioeconomic goods and services) as well as indicators on the prevalence of HIV/AIDS, living conditions, and social protection, not only confirm the foregoing diagnosis [of extreme poverty], but also establish that poverty in the DRC is a generalised, chronic, mass phenomenon. The diagnosis further establishes that the individual and collective factors which explain poverty and the vulnerability of the people are, among others: (i) family structure; (ii) education level (of the head of household or parents); (iii) employment status; and (iv) the province of residence". 684
- "For the country as a whole, the incidence of poverty (71.34 percent) is extremely high by comparison with the other countries of central Africa. The same holds true regarding the depth (32.23 percent) and severity (18.02 percent) of poverty". 685
- 5.173 The Government of the DRC also issued a "Second Generation" report on poverty reduction in 2011, ⁶⁸⁶ which paints a similarly bleak picture:
 - "In the DRC, seven out of ten households are poor with a disparity between rural areas — where about eight out of ten households are poor

⁶⁸⁴ Democratic Republic of the Congo, *Poverty Reduction and Growth Strategy Paper*, (July 2006), para. 9, Annex 59.

⁶⁸⁵ *Ibid.*, para. 58.

⁶⁸⁶ République Démocratique du Congo, Document de la Stratégie de Croissance et de Réduction de la Pauvreté, Deuxième Génération, 2011-2015, Vol. I (Oct. 2011), para. 20 ("It should be noted that the analysis of the poverty profile made in this document is based on data obtained from the Survey 1-2-3 of 2005, excluding recent surveys".) (Translation by Counsel, original in French: "Il importe de préciser que cette analyse du profil de pauvreté faite dans ce document est basée sur les données de l'enquête 1-2-3 de 2005, en absence de nouvelles enquêtes".), Annex 42.

— and urban areas — where fewer than seven out of ten households are poor". 687

• "The issue of employment is a major concern of the growth and poverty reduction strategy in the DRC. Survey 1-2-3 of 2005 shows that most poor people are unemployed or under-employed. Besides, we deplore the high number of child laborers and a high rate of unemployment among the population range of 15-35 years". 688

(The DRC Memorial contends that decedents were, on average, 27 years old at time of death. This would place them within this bracket of the disproportionately unemployed.)

5.174 A 2007 ECOSOC report⁶⁸⁹ tells a similarly dire story concerning the extent of unemployment:

- "In 2000, 2% of the total population (4% of the workforce and 8% of the male workforce) was employed". 690
- "Employed workers represent 7%: this low proportion indicates the collapse of modern employment in the DRC. The employee portion of the workforce was 8% in 1958, falling to 2% in 1997". 691

⁶⁸⁷ *Ibid.*, para. 17 (Translation by Counsel, original in French: "En RDC, sept ménages sur dix sont pauvres avec une disparité entre milieu rural – où environ huit ménages sur dix sont pauvres – et milieu urbain — où moins de sept ménages sur dix sont pauvres".).

⁶⁸⁸ *Ibid.*, para. 238 (Translation by Counsel, original in French: "La question de l'emploi constitue, une préoccupation majeure de la stratégie de croissance et de réduction de la pauvreté en RDC. L'enquête 1-2-3 de 2005 montre que la plus part des pauvres sont au chômage ou en situation de sous-emploi. Par ailleurs, on déplore le nombre élevé d'enfants travailleurs et un taux élevé de chômage qui frappe la tranche de la population de 15-35 ans".).

⁶⁸⁹ ICESCR Report, Annex 22.

⁶⁹⁰ *Ibid.*, para. 58.

⁶⁹¹ *Ibid.*, para. 61.

5.175 Setting all of these issues aside, and assuming that all of the alleged decedents in the DRC were gainfully employed and that average income—*not* GDP per capita—were an appropriate starting point for assessing the amount of compensation due for a wrongful death, it would not be the ending point.

5.176 From a purely economic perspective, the objective of the damages calculation should be to place survivors in the same position that they would have been in, had the decedent's life not ended prematurely. Notably, this is exactly the approach the U.K. followed—and the Court accepted—in the *Corfu Channel* case. Economists who specialise in the valuation of human life have observed that, in valuing life from the perspective of a decedent's family, amounts that would have been spent on the decedent's *own consumption*, or otherwise would not have inured to the benefit of survivors, should be subtracted from his/her expected future income.⁶⁹² This ensures that survivors do not receive a "windfall" in the form of monies they would not have received had the decedent lived.

5.177 Economist Burton Weisbrod, for example, valued life on the basis of "expected earnings net of consumption, based on the notion that when an individual dies not only is productive contribution lost, but also claims on future

_

⁶⁹² Even some economists who would not deduct the decedent's own consumption for *all* valuation purposes may agree that it *should* be deducted if the objective is to quantify the economic impact of death on a person's household. Rashi Fein agreed that "the net figure (gross value less consumption) derived by Dublin and Lotka to indicate the money value of a man to his family is correct for their purposes... It is true that man consumes partly in order to maintain himself, and in this sense some of his consumption may be considered as a gross investment to take care of depreciation...". D. Rice, B. Cooper, "The Economic Value of Human Life", *American Journal of Public Health*, Vol. 57, No. 11 (Nov. 1967), p. 1959 *quoting and citing to* Rashi Fein, *Economics of Mental Illness* (New York, Basic Books, 1958). For Fein's own purposes, however, that deduction was inappropriate, as he was valuing the loss of the person "to society," not (as we are doing here) to his or her family, Annex 70.

consumption."⁶⁹³ And in another frequently cited work, economists Dublin and Lotka "defined the money value of man as the present value of his net future earnings, i.e., gross future earnings less that part which he consumes or spends on himself."⁶⁹⁴

5.178 As Uganda has emphasised throughout this Chapter, the DRC has presented no evidence proving with any degree of particularity the number of people who died as a result of Uganda's wrongful actions, or their identity, age at death, employment status or income (if any). Still less has the DRC provided any evidence from which even an approximation may be made of the portion of the earnings of a Congolese citizen that go towards supporting his/her own needs. There is therefore no basis quantifying the extent of the necessary deduction.

5.179 The only thing that may be concluded with certainty is that the figure for average annual income—which DRC reports suggest was approximately US\$ 73/year in 2004 and "just shy of" US\$ 100/year in 2006—must be reduced by some margin to yield a genuine measure of the value a decedent would have contributed to his/her family in the course of a year. Moreover, whatever unproven figure might be deemed more appropriate, the US\$ 753/year amount claimed by the DRC is plainly unsustainable.

7

-

⁶⁹³ Burton A. Weisbrod, *Economics of Public Health* (1961), as characterised by J. S. Landefeld, E. Seskin, "The Economic Value of Life: Linking Theory to Practice", *American Journal of Public Health*, Vol. 72, No. 6 (June 1982), p. 556, Annex 71.

⁶⁹⁴ D. Rice, B. Cooper, "The Economic Value of Human Life", *American Journal of Public Health*, Vol. 57, No. 11 (Nov. 1967), p. 1955, Annex 70, referring to Louis I. Dublin and Alfred J. Lotka, *The Money Value of a Man* (New York, Ronald Press, 1946), Chap. 2, pp. 6-21.

5.180 For all the reasons explained in this chapter, both the DRC's claims concerning the number of deaths resulting from Uganda's intervention and its attempts to place a value on each life lost are wholly speculative and unproven.

CHAPTER 6

THE DRC'S CLAIMS RELATING TO PERSONAL INJURIES OTHER THAN LOSS OF LIFE ARE UNSUPPORTED AND METHODOLOGICALLY FLAWED

- 6.1 The DRC seeks **US\$ 304,775,800** in compensation for personal injuries other than loss of life that it alleges were caused by Uganda. This amount includes:
 - US\$ 54,464,000 for physical injuries; 695
 - US\$ 33,458,000 for sexual violence; 696
 - US\$ 30,000,000 for the recruitment, training and use of child soldiers; ⁶⁹⁷ and
 - US\$ 186,853,800 for displaced persons. 698
- 6.2 Like the DRC's claims with respect to loss of life, these claims are both methodologically flawed and entirely speculative. The DRC has failed to prove specific acts attributable to Uganda that resulted in specific personal injuries, let alone proven the valuation of such injuries, just as it failed to do so with respect to loss of life. As such, the DRC has given the Court no basis on which to award it the compensation it seeks under this head of damages.
- 6.3 **Section I** of this Chapter will demonstrate that the DRC's claims are not based on the standard methods or evidence for proving personal injuries in international law. **Section II** shows that the DRC has not proven specific acts

⁶⁹⁵ DRCM, para. 7.21.

⁶⁹⁶ *Ibid.*, para. 7.25.

⁶⁹⁷ *Ibid.*, para. 7.28.

⁶⁹⁸ *Ibid.*, para. 7.32.

attributable to Uganda that resulted in specific personal injuries. Finally, **Section III** explains why the DRC's valuation of the alleged personal injuries is not based on evidence and methodologically flawed.

I. The DRC's Claims Are Not Based on Standard Methods or Evidence for Claiming Compensation for Personal Injuries

- As was true with respect to the DRC's claims concerning loss of life, it is important to underscore at the outset that the DRC's personal injury claims are not based on the standard methods for proving the existence and valuation of such injuries that have long been employed by States and international courts and tribunals.
- 6.5 A review of that practice indicates that the method for proving compensation claims for personal injury entails several elements, including: (1) identification of the persons who are alleged to have been injured; (2) details of the harm, such as the location and date of injury, and information concerning the nature of the injury; (3) evidence establishing a causal link between the injury and the conduct of the respondent; (4) determination of which victims were gainfully employed and, if so, the extent to which the injury resulted in a loss of earnings; and (5) the costs of care and other expenses stemming from the injury. 699

⁶⁹⁹ See generally Edwin M. Borchard, The Diplomatic Protection of Citizens Abroad or the Law of International Claims (1916); Jackson H. Ralston, The Law and Procedure of International Tribunals (1926); Marjorie M. Whiteman, Damages in International Law (1937); A. H. Feller, The Mexican Claims Commissions, 1923-1934: A Study in the Law and Procedure of International Tribunals (1935); Green H. Hackworth, ed., Digest of International Law, Vol. 5 (1943); Richard Lillich, ed., International Law of State Responsibility for Injuries to Aliens (1983); Christine Gray, Judicial Remedies in International Law (1987). See also Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Décision fixant le montant des réparations auxquelles Thomas Lubanga Dyilo est tenu (ICC Trial Chamber II, 15 Dec. 2017) (hereinafter "Lubanga, Reparations Decision (15 Dec. 2017)"), pp. 37, 40; Afro-Descendant Communities Displaced From the Cacarica River Basin (Operation Genesis) v. Colombia, Judgment, Preliminary Objections, Merits, Reparations,

- 6.6 These elements are typically proven through documentary evidence contemporaneous with the alleged injury, supplemented by sworn affidavits by persons who were injured or who treated the injuries, as well as local leaders familiar with the incidents at issue. Loss of earnings are typically established either through evidence specific to the victim's actual past earnings or through evidence specific to the class of persons employed in the victim's occupation. Costs of care and other expenses are established through clinical, hospital or other medical records, or affidavits by the victims or medical professionals.
- 6.7 This approach to methodology and evidence is readily observable in the Court's award of compensation for personal injuries in the *Corfu Channel* case, ⁷⁰⁰ as discussed in Chapter 3. So, too, can it be seen in the practice of regional human rights courts, ⁷⁰¹ the reparations decisions of the ICC, ⁷⁰² and in claims settlement agreements negotiated between States. ⁷⁰³
- 6.8 In cases of sexual violence and other personal injuries before the Inter-American Court of Human Rights, for example, victims have presented medical and psychological evaluations, 704 birth certificates, detailed affidavits, employment

and Costs (IACtHR, 20 Nov. 2013) (hereinafter "Afro-Descendant Communities Displaced (20 Nov. 2013)").

⁷⁰⁰ Corfu Channel (Compensation, 1949, p. 244).

⁷⁰¹ See Dinah Shelton, Remedies in International Human Rights Law (2015), pp. 315-375.

⁷⁰² Lubanga, Reparations Decision (15 Dec. 2017); *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07-3728, Order for Reparations pursuant to Article 75 of the Statute (ICC Trial Chamber II, 24 Mar. 2017).

⁷⁰³ See generally Richard Lillich, International Claims: Postwar British Practice (1967); Burns H. Weston, International Claims: Postwar French Practice (1971); B. Weston & R. Lillich, International Claims: Their Settlement by Lump Sum Agreement (1975); Burns H. Weston et al., International Claims: Their Settlement by Lump Sum Agreements, 1975-1995 (1999).

⁷⁰⁴ See, e.g., Case of Loayza-Tamayo v. Peru, Judgment, Reparations and Costs (IACtHR 27 Nov. 1998), paras. 29-32.

records, evidence of earnings (such as pay slips), documents pertaining to other expenses (such as medication) and other records. 705 Eritrea and Ethiopia presented similar evidence before the EECC, which concluded that detailed eyewitness accounts, corroborated by the testimony of doctors who personally treated victims of rape, were the most compelling. 706 At the same time, it dismissed claims of sexual violence that were "spare in their mention of or allusion to rape". 707

- 6.9 Victims of displacement and former child soldiers, including in the DRC, have also presented these types of evidence before other international courts. The 531 displaced victims in the Operation Genesis case at the Inter-American Court of Human Rights, for example, produced a large quantity of evidence showing the details of the harm they suffered and the causal connection to the wrongful conduct of the respondent State (Colombia). This evidence included:
 - Affidavits with concrete details about the circumstances of displacement and accommodation in shelters, including details about overcrowding, poor sleeping conditions, lack of privacy, and the lack of food and water;⁷⁰⁹
 - Statements by witnesses and demobilised paramilitaries to the Prosecutor's office⁷¹⁰ and court documents (such as a detention order

⁷¹⁰ *Ibid.*, para. 112, note 205.

⁷⁰⁵ Ibid., para. 41; Case of Molina-Theissen v. Guatemala, Judgment, Reparations and Costs (IACtHR 3 July 2004), paras. 52-53.

⁷⁰⁶ Eritrea's Central Front Claims, Partial Award, Eritrea-Ethiopia Claims Commission, Eritrea's Claims 2, 4, 6, 7, 8 & 22 (28 Apr. 2004), para. 80.

⁷⁰⁷ Ethiopia Western-Eastern Front Claims, Partial Award, Eritrea-Ethiopia Claims Commission, Ethiopia's Claims 1 & 3(19 Dec. 2005), para. 55.

⁷⁰⁸ Afro-Descendant Communities Displaced (20 Nov. 2013), paras. 411, 415, 417.

⁷⁰⁹ *Ibid.*, para. 118.

and other criminal court decisions⁷¹¹) to show that the operation was part of a strategy to occupy territories and "to cause terror in order to forcibly evict the non-combatant civilian population";⁷¹² and

• Detailed estimates of their lost earnings (as well as of lost property). 713

6.10 As discussed in Chapter 5, the ICC has assessed reparations in the specific context of armed conflict in the DRC, notably in its 2017 decisions in the *Katanga* and *Lubanga* cases. In *Katanga*, a number of applicants claiming damages for forcible displacement provided documentary evidence establishing the existence of the harm they alleged in the form of refugee cards or refugee family certificates (often from Uganda). Even then, however, the Chamber concluded that the causal link to Mr Katanga was not proven. 714 It was therefore "not in a position to connect that material and/or psychological harm" to the specific attack of which Katanga was convicted. 715

6.11 In the ICC's recent decision on reparations in the *Lubanga* case, which related to the recruitment of child soldiers in Ituri, many of the 473 claimants presented documents proving their identity,⁷¹⁶ and details of their experience, through signed declarations, collaborating witness testimony, photographs and

⁷¹¹ *Ibid.*, paras. 114, note 211, paras. 112, notes 206, 211.

⁷¹² *Ibid.*, para. 114.

⁷¹³ *Ibid.*, para. 466.

⁷¹⁴ Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07-3728, Order for Reparations pursuant to Article 75 of the Statute (ICC Trial Chamber II, 24 Mar. 2017), para. 111.

⁷¹⁵ *Ibid.*, para. 138. One applicant, Applicant a/0013/08, presented a hospital record showing his admission to a hospital, dated 26 February 2003, and a photo of himself with a bandage. *Ibid.*, Annex II, paras. 1961-1963. The date and place of the record showed that it was connected to the attack on Bogoro. Another applicant, Applicant a/1205/10, submitted a forensic report showing that she suffered a physical injury during the specific attack. *Ibid.*, paras. 2741-2743.

⁷¹⁶ These included Voter Identification Cards, Personal Tax Cards (Cartes d'impot personnel), and student IDs. *Lubanga*, Reparations Decision (15 Dec. 2017), para. 68.

certificates of demobilisation.⁷¹⁷ To prove the causal link to Mr Lubanga's conduct, claimants were required to demonstrate that they were recruited by, or participated in, the activities of the UPC or the FLPC between 1 September 2002 and 13 August 2003, and were less than 15 years old during that time period.⁷¹⁸ Many were able to provide the necessary evidence in the form of affidavits, witness statements, identification cards, photographs and certificates of demobilisation.⁷¹⁹

6.12 The DRC has entirely failed to provide any comparable evidence in this case. It has not provided documents (1) identifying the persons alleged to have been injured; (2) describing details of the injury; (3) establishing a causal link between the injury claimed and conduct attributable to Uganda; or (4) describing details of the loss of earnings or costs of care and other expenses. It eschews any effort at specificity, relying instead on very general assertions contained in uncorroborated sources, along with arbitrary multipliers and outright guesswork.

II. The DRC Has Failed to Prove the Extent Personal Injuries That Were Suffered as a Result of Specific Actions of Uganda

6.13 In the following sections, Uganda will show how the DRC has failed to prove specific acts attributable to Uganda that resulted in particular personal

⁷¹⁷ *Ibid.*, para. 44. A number of claimants presented pictures of themselves as children dressed in military uniforms or with tattoos showing membership to a militia, certificates of demobilisation from an armed group and declarations from village elders showing the link between the injury and the membership to the militia. *Ibid.*, paras. 44 and 62. The Congolese National Commission on Demobilization and Reinsertion (CONADER) and several NGOs provided certificates of demobilisation to demobilised child soldiers. *Ibid.*, para. 98. The Chamber was able to analyse the internal coherence of the claimants' declarations, and paid attention to their level of detail, including locations, dates, names, living conditions, and circumstances of recruitment and departure. *Ibid.*, paras. 63, 64.

⁷¹⁸ *Ibid.*, para. 66.

⁷¹⁹ *Ibid.*, paras. 42, 63-68.

injuries, which includes (A) physical injuries, (B) sexual violence, (C) child soldiers and (D) displacement. For each of these categories, Uganda notes that the DRC does not present any evidence, let alone convincing evidence, that systematically recounts incidents resulting in personal injuries that occurred in specific places and at specific times to specific persons, and involved Ugandan military forces or other actors whose conduct the DRC demonstrates to be attributable to Uganda. Nor does the DRC make any effort to provide any information as to the exact nature of the injuries allegedly suffered, other than breaking out general categories with respect to sexual violence, child soldiers and displacement.

6.14 Instead, as was the case with its claims concerning loss of life, the DRC pursues a strategy that essentially invokes the Court's general findings in the 2005 Judgment as, by themselves, the basis for proving the DRC's claims to reparation. The DRC offers only very general information, much of it of dubious credibility, with a few incidents noted for "illustrative" purposes, in the hope that the Court will engage in extrapolation to award it compensation on a massive scale. Yet, consistent with the established jurisprudence, the Court has already indicated that this is not enough. The DRC bears the burden at this phase "to demonstrate and prove the exact injury that was suffered as a result of specific actions of Uganda constituting internationally wrongful acts for which it is responsible." The DRC does not meet that burden.

_

 $^{^{720}}$ Armed Activities (2005), para. 260 (emphasis added).

A. THE DRC HAS FAILED TO PROVE THE NUMBER, NATURE AND EXTENT OF PHYSICAL INJURIES THAT WERE SUFFERED AS A RESULT OF SPECIFIC ACTIONS OF UGANDA

6.15 The DRC alleges that Uganda caused physical injuries to 32,140 people.⁷²¹ This includes an alleged 20,000 victims of "deliberate violence" in Ituri and an alleged 12,140 victims of acts "other than deliberate violence" in Ituri, Kisangani and other areas.⁷²²

6.16 The appropriate starting point for evaluating these claims must, of course, be what the Court did—and did not—find in its Judgment on the merits.

6.17 In the *dispositif* of the 2005 Judgment, the Court found that Uganda's armed forces violated human rights and international humanitarian law by committing "acts of... torture and other forms of inhumane treatment of the Congolese civilian population". The Court also found that Uganda's military "failed to distinguish between civilian and military targets and to protect the civilian population in fighting with other combatants" and "incited ethnic conflict." In addition, the Court also determined that Uganda failed, as an occupying Power in Ituri, to take measures to respect and ensure respect for human rights and international humanitarian law. Apart from these general findings, the Court did not explicitly mention physical injuries in the *dispositif*.

⁷²¹ DRCM, paras. 7.18-7.21 (Translation by Counsel, original in French: "attaques délibérées"; "en dehors des situations où les populations civiles ont été spécifiquement visées par des actes de violence".).

⁷²² *Ibid*.

⁷²³ *Armed Activities* (2005), para. 345(3).

⁷²⁴ *Ibid*.

⁷²⁵ *Ibid.*, para. 345(1).

6.18 At this stage, the DRC bears the burden to prove the exact injuries that were suffered as a result of specific actions of Uganda falling within the scope of these general findings. It has, however, failed to meet this burden in respect of the physical injuries claimed in (1) Ituri, (2) Kisangani and (3) other areas.

1. Ituri

- 6.19 The DRC claims that 30,000 persons suffered "serious injuries as a result of the breach by Uganda of its obligations as occupying Power of Ituri from 1998 to 2003". This number is not arrived at by presenting evidence on an incident-by-incident basis as to injuries committed to specific persons or groups of persons in specific locations in Ituri on specific dates within the relevant time-period. Nor does the DRC's approach provide any basis for discriminating among types of injuries, in terms of their severity or nature. On this basis alone, the Court should deny this aspect of the DRC's claim. Moreover, even taking it on its own terms, the DRC's methodology is deeply flawed.
- 6.20 According to the DRC Memorial, the 30,000 figure for "serious injuries" results from the following "conservative calculation method": 727
 - *First*, the DRC asserts that 60,000 people were killed in Ituri during the conflict;

⁷²⁶ DRCM, para. 3.28 (Translation by Counsel, original in French: "blessures graves en conséquence du manquement par l'Ouganda à ses obligations en tant que puissance occupante de l'Ituri entre 1998 et 2003".).

⁷²⁷ *Ibid.* (Translation by Counsel, original in French: "mode de calcul conservateur".).

- *Second*, the DRC then assumes that the number of persons injured in Ituri is "one-half" that number;⁷²⁸
- *Third*, the DRC states that it "believes" that out of the 30,000 persons nominally injured, 20,000 were "victims of violent acts deliberately directed against the civilian population" while another 10,000 "suffered injuries or mutilation in other circumstances related to the conflicts" in Ituri;⁷²⁹ and
- *Fourth*, the DRC hypothesises that out of the 20,000 victims of deliberate violence, 15,000 suffered serious injuries and 5,000 suffered minor injuries.⁷³⁰

None of these numbers is grounded in anything more than conjecture.

- 6.21 The DRC's starting premise—that Uganda caused the loss of life of 60,000 persons in Ituri—is entirely unsupported, as Uganda showed in Chapter 5.⁷³¹ The claim is based on a single UN report, which stated an uncorroborated *estimate* of the total death toll in Ituri without connecting any of those estimated deaths to Uganda.
- 6.22 The Court has previously treated UN reports with caution, recognising that their probative value differs depending on two factors in particular: (1) the

⁷²⁸ *Ibid.* (Translation by Counsel, original in French: "la moitié de celui des personnes qui ont perdu la vie dans la région dans la même période".).

⁷²⁹ *Ibid.*, para. 3.29 (Translation by Counsel, original in French: "Il apparaît logique, dans les circonstances de l'espèce, d'appliquer à ce nombre la même ventilation que celle retenue pour les vies humaines. En l'occurrence, la RDC estime donc que les deux tiers (soit 20,000 personnes) des blessés ou mutilés ont été victimes de violences délibérées dirigées contre les populations civiles. Le tiers restant (soit 10,000 personnes) représente quand à lui la parties des habitants de l'Ituri qui ont subi des blessures ou des mutilations dans d'autres circonstances liées aux conflits qui ont déchiré cette région entre 1998 et 2003".).

⁷³⁰ *Ibid.*, para. 7.18.

⁷³¹ See Chapter 5, Section II(B)(2).

underlying evidence used to prepare them; and (2) whether they are corroborated.⁷³² The UN report on which the DRC relies provides no underlying evidence to support its estimate of the total death toll, nor is its estimate corroborated by any other source. The report also does not state a link between Uganda and the number of deaths its estimates.⁷³³ In this respect, it is notable that the report did identify a number of *other* perpetrators of violence, but not Uganda. Indeed, it indirectly recognised Uganda's role in containing the violence.⁷³⁴

6.23 The second premise in the DRC's "conservative calculation method"—that the number of injured persons in Ituri can somehow be presumed to correspond to "one-half" the 60,000 people allegedly killed during the same period—is equally unfounded.

6.24 The DRC Memorial adduces literally no evidence supporting the postulated ratio between deaths and injuries in Ituri. The DRC attempts to justify it by claiming that it is "much lower than that noted in various recent conflicts." As examples, the DRC refers to a ratio of 1:8 among French soldiers killed and injured in Afghanistan from 2001 to 2012, and a ratio of 1:3 for American soldiers deployed in Vietnam. Even accepting those ratios as accurate, they are beside the point here. They relate to markedly different conflicts, concern deaths/injuries

⁷³² See Croatia v. Serbia (2015), para. 239 citing to Nicaragua v. United States of America (Merits, 1986), para. 62.

⁷³³ See Chapter 5, Section II(B)(2).

⁷³⁴ U.N. Security Council, *Second special report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo*, U.N. Doc. S/2003/566 (27 May 2003), para. 10, DRCM Annex 3.6; DRCM, para. 3.22.

⁷³⁵ DRCM, para. 3.28 (Translation by Counsel, original in French: "Le ratio entre morts et blessés retenu en l'espèce par la RDC dans ce contexte particulier est très inférieur à celui relevé dans divers conflits récents".).

⁷³⁶ *Ibid.*, para. 3.29, note 267.

of soldiers, not civilians, and have been challenged by other sources. Indeed, the significant difference between the ratios invoked (1:8 vs. 1:3) only underscores the need for caution in making generalisations. They do not suggest any kind of pattern that might be informative for any other conflict situation, let alone the situation in the DRC.

6.25 More fundamentally still, Uganda explained in Chapter 4 that the use of unexplained multipliers and ratios have no place in a legal proceeding.⁷³⁷ As the EECC concluded, the use of multipliers, and the "mechanical addition of multiple factors" has no precedent in international law and is "arbitrary and without legal foundation".⁷³⁸

6.26 The DRC's third premise—the division of the 30,000 alleged victims into two categories, 20,000 victims of deliberate violence and 10,000 victims of non-deliberate violence—is equally flawed. The DRC's only would-be justification for this division is that it "appears logical" because it made the same apportionment in pressing its claims concerning people allegedly killed in Ituri. Yet there is nothing logical about it at all. The DRC offered no evidence justifying the division in its claims relating to loss of life. Simply repeating it in the context of its claims concerning personal injuries does not somehow make it any more valid. In both places, the DRC merely assumes a conclusion it must prove.

6.27 Identical problems infect the DRC's final premise that out of 20,000 victims of deliberate violence, 15,000 people suffered serious injuries and 5,000 others

⁷³⁸ Ethiopia's Damages Claims (Final Award, 2009), paras. 62-63.

⁷³⁷ See Chapter 4, Section II(B).

⁷³⁹ DRCM, paras. 3.23, 3.29 (Translation by Counsel, original in French: "Il apparaît logique, dans les circonstances de l'espèce, d'appliquer à ce nombre la même ventilation que celle retenue pour les pertes de vies humaines".).

suffered minor injuries.⁷⁴⁰ The DRC offers no evidence of any kind to support these assertions. There is therefore no basis even to entertain them, must less credit them.

6.28 Far from being "conservative", the DRC's "calculation method" rests entirely on a collection of speculative assumptions piled atop each other. The DRC's numbers have no basis in convincing evidence that establishes with a high level of certainty, or indeed any level of certainty at all, the number of persons injured as a result of Uganda's wrongful conduct.

6.29 The DRC's own tables, ostensibly compiling the data reflected in its (unproduced) claims forms relating to injuries, sharply contradict its claim that 30,000 people suffered physical injuries as a result of Uganda's actions in Ituri.⁷⁴¹ One table entitled "*Rapport Fréquence Type Lésions de 1998 à 2003: Ituri*", included in Annex 1.3 to the DRC Memorial lists only 197 victims of physical injuries in Ituri.⁷⁴³ Still another table entitled "*Victimes Lésion Ituri*" lists 454 victims.⁷⁴⁴ Whichever number may be correct, if either is, the numbers reflected in the DRC's own claims forms differs radically from the claimed 30,000 victims.

6.30 Moreover, even the contradictory figures contained in the DRC's tables lack any credible basis for the reasons explained in Chapters 3 and 5. Although those tables purport to summarise the information contained in claims forms

⁷⁴¹ "Logiciel permettant de consulter les fiches individuelles des victimes (uniquement en format électronique)", DRCM Annex 1.3; DRCM, para. 1.35.

⁷⁴⁰ *Ibid.*, para. 7.18.

⁷⁴³ See "Rapport Fréquence Type Lésions de 1998 à 2003" file in *Liste Type Lésion et leur fréquence Ituri*, p. 1, DRCM, Annex 1.3. The total number, including aggravated and simple rape, is 513. Since the DRC deals with rape in a separate chapter, the basis for comparison here should be injuries other than those resulting from rape (513-316=197).

⁷⁴⁴ See "Evaluation Lésions" file in *Victimes Lésion Ituri*, p. 18, DRCM Annex 1.3.

gathered by the DRC for the purpose of this litigation, the DRC has failed to submit those forms into evidence. Accordingly, there is no basis to verify the accuracy of the information summarised.

6.31 Uganda observes further that even taken on their own terms, the summary tables on which the DRC relies show very little. In the case of the table entitled "Victimes Lésion Ituri", for example, 327 of the claimed 454 victims are not even identified. They are simply listed as "non signalé" ("unidentified"), "deuxième personne" ("second person"), or "troisieme personne" ("third person") based on the alleged declarations of others. In addition, the injuries suffered are not specified and the dates and locations of incidents are not provided. There is also no information concerning the identity of the alleged perpetrator; the tables thus do not even purport to establish a causal link between the injury alleged and Uganda.

6.32 Below, for example, is an excerpt from the table entitled "Victimes Lésion Ituri": 746

⁷⁴⁵ *Ibid*.

⁷⁴⁶ *Ibid.*, p. 1.

DECLARANT: ANGAIKA	ITURI_SUITE_CCF04032016_0055_007
N° VICTIME	EVALUATION CHIFFREE
1 NON SIGNALE	17500.0
2 NON SIGNALE	17500.0
3 NON SIGNALE	17500.0
4 NON SIGNALE	17500.0
5 NON SIGNALE	17500.0
6 NON SIGNALE	17500.0
7 NON SIGNALE	17500.0
8 NON SIGNALE	17500.0
9 NON SIGNALE	17500.0
10 NON SIGNALE	17500.0
11 NON SIGNALE	17500.0
12 NON SIGNALE	17500.0
13 NON SIGNALE	17500.0
14 NON SIGNALE	17500.0
15 NON SIGNALE	17500.0
16 NON SIGNALE	17500.0
17 NON SIGNALE	17500.0
18 NON SIGNALE	17500.0
19 NON SIGNALE	17500.0
20 NON SIGNALE	17500.0
21 NON SIGNALE	17500.0
22 NON SIGNALE	17500.0
23 NON SIGNALE	17500.0
24 NON SIGNALE	17500.0

It is useful to recall here once again the EECC's admonition: "There can be no such assessment in a claim involving huge numbers of hypothetical victims." ⁷⁴⁷

6.33 In an effort to ground its guesswork in reality, the DRC provides examples of injuries allegedly caused by the UPDF and various other actors in Ituri, based on several UN reports. ⁷⁴⁸ Uganda contests these allegations, but even if they were true, these examples do not support the DRC's claims. Rather, they underscore the extent to which the number of injuries the DRC claims is entirely unfounded.

⁷⁴⁷ Ethiopia's Damages Claims (Final Award, 2009), para. 64.

⁷⁴⁸ DRCM, paras. 3.25-3.28.

6.34 In the only two examples that contain specific numbers, the DRC Memorial states: "Mention is made, for example, of 30 civilians injured following the fighting conducted by the UPDF to take back the town of Bunia in March 2003, of 80 civilians seriously injured in the attack on the parish of Drodro and of the surrounding villages, on April 3, 2003". The DRC cites the MONUC Special Report on Events in Ituri as support. The statements contained in that report are, however, highly qualified. It notes that both incidents only "reportedly" involved the UPDF, that "[t]he situation was brought under control by UPDF on 8 March [2003]", and that the allegations had been rejected by the UPDF.

6.35 Consequently, with respect to Ituri, the DRC has not shown that (1) the claimed injuries actually occurred; (2) Ugandan soldiers directly caused the claimed injuries; (3) those injuries resulted from conduct that non-State actors carried out on the instructions of, or under the direction or control of Uganda; or (4) those injuries would in fact have been averted if Uganda had acted in compliance with its obligations as an occupying Power.⁷⁵³

⁷⁴⁹ *Ibid.*, para. 3.25 (Translation by Counsel, original in French: "Il est par exemple fait mention de 30 civils blessés à la suite des combats menés par l'UPDF pour reprendre la ville de Bunia en mars 2003, de 80 civils grièvement blessés dans l'attaque de la paroisse de Drodro et des villages environnants, le 3 avril 2003".).

⁷⁵⁰ U.N. Security Council, *Special Report on the events in Ituri, January 2002-December 2003*, U.N. Doc. S/2004/573 (16 July 2004), para. 73 and 75, DRCM Annex 1.6.

⁷⁵¹ *Ibid.*, para. 74.

⁷⁵² *Ibid.*, para. 76, DRCM Annex 1.6.

⁷⁵³ See Chapter 4, Section II(B)(2).

2. Kisangani

6.36 Relying on NGO and UN reports, the DRC alleges that Uganda caused physical injuries to 1,937 people in Kisangani. This claim is somewhat more focused temporally, in that the DRC identifies particular time periods when persons were allegedly injured: 37 in the period leading up to May 1999; 100 in August 1999; 100 in May 2000; and 1,700 in June 2000. The tast these mostly round numbers suggest, the DRC's claims still are not being advanced by systematically presenting evidence on an incident-by-incident basis as to injuries suffered by specific persons or groups of persons in specific places, on specific dates, as a result of specific acts attributable to Uganda. Rather, these numbers are entirely reliant on very general information in combination with unexplained and arbitrary assumptions. The Court can deny the DRC's claim for personal injuries in Kisangani on this basis alone. The claims also suffer from still other evidentiary and legal flaws as well.

6.37 First, the DRC claims that Uganda is responsible for injuries caused by rebel groups over which Uganda had no control and provides no evidence of a causal link between the injuries and any conduct by Uganda. With respect to the people allegedly injured in the period leading up to May 1999, for example, the DRC claims that Uganda is responsible for injuring 36 persons during confrontations between the RCD and the FAC in January 1999. The DRC seeks to ascribe to Uganda responsibility for these injuries on the flawed theory that Uganda was providing "political and military assistance" to the RCD which, it

⁷⁵⁴ DRCM, para. 4.65.

⁷⁵⁵ *Ibid.*, para. 4.64.

⁷⁵⁶ *Ibid.*, para. 4.21.

says, "'operated directly under [Uganda's] command.""⁷⁵⁷ As recalled in Chapter 4, however, the Court's 2005 Judgment did not find the acts of the RCD or any other rebel group attributable to Uganda. Responsibility for any injuries that may have been caused by the RCD therefore cannot, without more, be ascribed to Uganda.

6.38 Moreover, according to the UN Mapping Report, it was the DRC itself, not the RCD, that caused the alleged injuries in January 1999 by indiscriminately bombing Kisangani on 10 January 1999.⁷⁵⁹

6.39 *Second*, the DRC's sources do not actually say what the DRC says they do. As recalled in Chapter 3, the Court refused to rely on reports by the International Crisis Group and Human Rights Watch in its 2005 Judgment because, *inter alia*, they did not in fact say what the DRC was alleging.⁷⁶⁰ The same issue applies here.

6.40 The DRC claims, for example, that Uganda is responsible for wounding 100 people in May 2000. It bases its claims on reports by two Congolese NGOs, the Groupe Lotus and *Groupe Justice et Libération*, which provide lists of 79 and 32 names, respectively. 761 The DRC does not pick either number, or their average,

759 U.N. Mapping Report, para. 360, Annex 25.

⁷⁵⁷ *Ibid.*, paras. 4.09, 4.11, 4.13 (Translation by Counsel, original in French: "ont opéré directement sous leur commandement.").

⁷⁵⁸ See Chapter 4, Section (I)(A).

⁷⁶⁰ Armed Activities (2005), para. 159. Other courts and tribunals are similarly cautious. The EECC, for example, treated reports and other documents issued by non-governmental organisations with caution, perhaps due to a concern that they were based on incomplete information or information derivative of unsubstantiated claims being made by one or the other government. Sean D. Murphy et al., *Litigating War: Mass Civil Injury and the Eritrea-Ethiopia Claims Commission* (2013), p. 193.

⁷⁶¹ "Annexe 2 Blessés à Kisangani", pp. 3-13, DRCM, Annex 4.2 citing to Groupe Lotus, Les rivalités ougando-rwandaises à Kisangani: la prise en otage de la population civile (May 2000), DRCM Annex 4.19 (the DRC claims that the report identifies 80 people, but the report only provides

but instead appears to add them together and then round the number off, stating: "We can count here, in consideration of the likely duplicates, on a number of 100 victims." Yet the vast majority of the names on the two lists appear to overlap, a fact that calls into question the DRC's use of a number larger than that stated in either of the two reports. More importantly, neither report identifies Uganda as the perpetrator. They therefore do not support the DRC's allegation.

6.41 *Third*, the DRC's sources provide no underlying evidence and are uncorroborated. They have also been questioned by subsequent reports. The UN Mapping Report, which reviewed all the sources cited by the DRC, could not verify their numbers. It could only conclude that an "unknown number" of people were injured during the May 2000 confrontations between the UPDF and APR. ⁷⁶⁴

6.42 Citing the Report of the inter-agency assessment mission ("Inter-Agency Report") to Kisangani, the DRC also alleges that Uganda is responsible for wounding 1,700 people in Kisangani in June 2000. The But the report itself qualifies the number stated, noting that it was simply estimated. Moreover, the UN Mapping Report also reviewed the Inter-Agency Report, and did not agree with

⁷⁹ names) and Groupe Justice et Libération, "La Guerre des Alliés à Kisangani (du 5 mai au 10 juin 2000) et le droit à la paix," DRCM, Annex 4.10.d (The DRC lists 32 names that it claims come from an annex of this report, but does not provide the annex).

⁷⁶² DRCM, para. 4.35 (Translation by Counsel, original in French: "On peut ici tabler, en considération des probables doublons, sur un nombre de 100 victimes.").

⁷⁶³ Groupe Lotus, *Les rivalités ougando-rwandaises à Kisangani: la prise en otage de la population civile* (May 2000), DRCM Annex 4.19; Groupe Justice et Libération, "La Guerre des Alliés à Kisangani (du 5 mai au 10 juin 2000) et le droit à la paix", DRCM, Annex 4.10.d.

⁷⁶⁴ U.N. Mapping Report, para. 362, Annex 25.

⁷⁶⁵ DRCM, paras. 4.44-4.46.

⁷⁶⁶ U.N. Security Council, *Report of the inter-agency assessment mission to Kisangani*, U.N. Doc. S/2000/1153 (4 Dec. 2000), para. 16, DRCM Annex 4.24 (The original English version of the report contains the word "estimated" but the French does not).

that estimate. It concluded instead that "over 1,000" were wounded during the June 2000 confrontations between the UPDF and APR, again without indicating how many injuries were the result of actions attributable to Uganda. 767

6.43 Fourth, the sources the DRC cites fail to establish the requisite causal link to Uganda. None of the DRC's sources state that Uganda was responsible for *all* the injuries estimated. In fact, the UN Mapping Report observed that during the May 2000 confrontations, Uganda, unlike Rwanda, "warned the population of the imminent bombardments and had asked for the evacuation of several areas located close to their targets" before the May 2000 confrontations. And with respect to the events of June 2000, it observed that "[t]he UPDF had taken steps to avoid civilians losses by ordering the evacuation of combat zones before the start of hostilities and prohibiting access to three areas that were declared off-limits to noncombatants."

6.44 *Finally*, the DRC's own evidence contradicts the claimed number of 1,937 physical injuries in Kisangani. The DRC Memorial includes several lists of alleged victims ostensibly based on the purported claims forms. In the table entitled "Liste Type Lésion et leur Fréquence", the DRC provides a summary of alleged physical injuries in Kisangani between 1998 and 2003. The number of physical injuries (other than sexual violence) is 752. Even then, a number of the alleged victims are not identified and others who are named appear to present multiple

⁷⁶⁷ U.N. Mapping Report, para. 363, note 599, Annex 25.

⁷⁶⁸ *Ibid.*, para. 362.

⁷⁶⁹ *Ibid.*, para. 363.

⁷⁷⁰ DRCM, para. 4.65.

⁷⁷¹ "Rapport Fréquence Type Lésions de 1998 à 2003" in file *Liste Type Lésion et leur fréquence KISANGANI*, p. 1, DRCM, Annex 1.3.

claims without any indication of the basis on which they do so. An excerpt of this list appears below:⁷⁷²

DECLARANT: VERONIQUE SHAKO NSIMBA			CCF22082016_0018_008		
N° VICTIME			EVALUATION CHIFFRED		
1	VERONIQUE S	SHAKO NSIMBA		150.0	
2	VERONIQUE S	SHAKO NSIMBA		150.0	
3	VERONIQUE S	SHAKO NSIMBA		150.0	
			Total Partiel:	450.0	\$
DE	CLARANT:	WALALA BONGE	ELI	CCF22082016	_0029_014
N°	VICTIME			EVALUATIO	N CHIFFRE
1	NON SIGNALE	<u> </u>		250.0	
2	NON SIGNALE			250.0	
3	NON SIGNALE			250.0	
4	NON SIGNALE			250.0	
5	NON SIGNALE			250.0	
6	NON SIGNALE	B		250.0	
7	NON SIGNALE			250.0	
			Total Partiel:	1750.0	s

6.45 Another chart purporting to list injuries by location within Kisangani suggests a different number of people injured: 672.⁷⁷³ And there is still another number (684) in a third chart.⁷⁷⁴ None of the numbers match and all are less than half the number actually claimed in the DRC Memorial.

⁷⁷² "Evaluation Lésions" in *Victimes Lesion KISANGANI*, p. 40, DRCM, Annex 1.3.

^{773 &}quot;Tableau de Synthèse Evaluation Lésions" in file *Tableau Synthèse Effectif Lesions_1998_a_2003*, p. 1, DRCM, Annex 1.3.

^{774 &}quot;Evaluation Lésions" in file Victimes Lésion KISINGANI, p. 42, DRCM, Annex 1.3.

6.46 The DRC has therefore failed to demonstrate and prove the exact physical injuries that were suffered in Kisangani as a result of specific actions of Uganda constituting internationally wrongful acts for which it is responsible.

3. Other Locations (Beni, Butembo and Gemena)

6.47 The DRC claims that in locations other than Ituri and Kisangani it is "possible to establish with certainty" that Uganda caused injuries to "203 [persons] (130 for Beni, 68 for Butembo and 5 for Gemena)." In reality, the DRC's numbers are anything but certain, and this claim must be denied due to a lack of proof.

6.48 To begin with, Annex 2.2 to the DRC Memorial indicates that the nominal number of injuries in Butembo is actually 54, not 68, as the DRC claims. The While this error may seem minor, the DRC's arithmetical errors are a recurring theme and raise doubts about the reliability of *any* of its figures.

6.49 In any event, the DRC's claim relating to physical injuries in Beni, Butembo and Gemena rests solely on tables contained in Annex 2.2 that purport to summarise the information contained in the (unproduced) claims forms. Like the DRC's other summary tables, Annex 2.2 is devoid of detail and no does not even

⁷⁷⁵ DRCM, para. 2.75.

⁷⁷⁶ The DRC lists both physical injuries and rapes in the same summary table. "Rapport Fréquence Type Lésions de 1998 à 2003," DRCM, Annex 2.2. The total number of alleged physical injuries and rapes amounts to 74, and the number of alleged rapes amounts to 20, so 74-20=54 alleged physical injuries. "Rapport Fréquence Type Lésions de 1998 à 2003", p. 19, DRCM, Annex 2.2.

purport to state the cause, type and seriousness of the injuries alleged.⁷⁷⁷ Many of the victims are also not identified, as in this excerpt from the list for Butembo:⁷⁷⁸

Année: 2000			
DECLARANT: AMBUMA KABWANA	BUTEMBO_CCF04032016_0022_004		
N° VICTIME	EVALUATION CHIFFREE		
1 AMBUMA KABWANA	13500.0		
	Total Partiel: 13500.0 \$		
DECLARANT: BAHATI MULONGO	BUTEMBO_CCF04032016_0006_011		
N° VICTIME	EVALUATION CHIFFREE		
1 NON SIGNALE	12500.0		
2 NON SIGNALE	12500.0		

6.50 There is thus no basis to verify the correctness of the information summarised in Annex 2.2.

*

- 6.51 For the reasons stated above, the DRC has failed to prove the "exact injury" relating to physical injuries resulting from Uganda's specific wrongful acts.
 - B. THE DRC HAS FAILED TO PROVE INCIDENTS OF SEXUAL VIOLENCE
 THAT WERE SUFFERED AS A RESULT OF SPECIFIC ACTIONS OF
 UGANDA
- 6.52 The DRC alleges that Uganda is responsible for the harm suffered by 1,730 alleged victims of sexual violence,⁷⁷⁹ including 1,100 victims of "aggravated"

^{777 &}quot;Rapport Fréquence Type Lésion de 1998 à 2003", DRCM, Annex 2.2.

⁷⁷⁸ *Ibid.*, p. 23.

⁷⁷⁹ DRCM, para. 7.24.

rape"⁷⁸⁰ and 630 victims of "simple rape."⁷⁸¹ (It defines "aggravated rape" as rape accompanied by other mistreatment, infection with a sexually transmitted disease or loss of pregnancy.⁷⁸²) Of these, 1,710 incidents of rape are alleged to have occurred in Ituri,⁷⁸³ 18 in Kisangani⁷⁸⁴ and 12 in areas other than Ituri and Kisangani.⁷⁸⁵

6.53 As a preliminary matter, Uganda notes that the Court did not make any findings of fact on sexual violence or, indeed, even mention it in the 2005 Judgment. The DRC, for its part, also made no mention of sexual violence during the oral proceedings at the merits phase. The DRC's failure to raise the issue in its oral proceedings, and the absence of any specific findings of fact on Uganda's liability for sexual violence in the Judgment, strongly suggest that this type of physical injury was not envisaged in the 2005 Judgment. The DRC should therefore be precluded from claiming compensation in respect of alleged incidents of rape at this stage.

6.54 The Court did make a general finding that Ugandan forces committed "acts of... torture and other forms of inhumane treatment of the Congolese civilian

⁷⁸⁰ *Ibid*. (Translation by Counsel, original in French: "viols aggravés".).

⁷⁸¹ *Ibid.* (Translation by Counsel, original in French: "viols simples".).

⁷⁸² *Ibid.*, para. 7.22.

⁷⁸³ *Ibid.*, para. 3.32.

⁷⁸⁴ *Ibid.*, para. 7.24. In another section of the Memorial, the DRC claims that Uganda is responsible for 13 cases of rape in Kisangani. *Ibid.*, para. 4.60(b).

⁷⁸⁵ *Ibid.* In another section of the Memorial, the DRC claims that Uganda is responsible for 60 cases of rape in other areas. *Ibid.*, para. 2.79.

population".⁷⁸⁶ While sexual violence is a form of "inhumane treatment"⁷⁸⁷ and "torture",⁷⁸⁸ it is a very serious allegation that should have been specifically raised and adjudicated at the merits phase.

6.55 Setting this threshold problem aside, the DRC's allegations of sexual violence suffer from the same evidentiary gaps and legal flaws as its claims with respect to loss of life and other physical injuries.

6.56 The DRC calculates the number of victims of rape in two steps. *First*, it retrieves a number from the unsigned, unverified tables it created for purposes of this litigation. *Second*, it reverts to its now-familiar technique of applying arbitrary multipliers, so as to increase the number determined in the first step by a factor of five. Neither the underlying numbers nor the multiplication by five can form the basis of a credible claim.

6.57 With respect to Ituri, the DRC states that "[t]he Congolese investigators were able to list only 342 cases of rape", which it says include "122 cases of rape and 220 cases of aggravated rape". The DRC contends these figures come "from

⁷⁸⁶ *Armed Activities* (2005), para. 345(3).

⁷⁸⁷ Prosecutor v. Tadić, ICTY Case No. IT-94-1-T, Opinion and Judgment (Trial Chamber, 7 May 1997); Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamera, Santigie Borbor Kanu, Case No. SCSL-04-16-A, Judgment (Appeals Chamber, 22 Feb. 2008), para. 202.

⁷⁸⁸ See Prosecutor v. Kvočka et al., ICTY Case No. IT-98-30/1-T, Judgment (Trial Chamber, 2 Nov. 2001); Prosecutor v. Delalić and Delić, ICTY Case No. IT-96-21-T, Judgment (Trial Chamber, 16 Nov. 1998), p. 172. Commonly called the Celebici case, this judgment held rapes to be acts of torture.

⁷⁸⁹ DRCM, para. 3.32 (Translation by Counsel, original in French: "122 cas de viols simples et 220 de cas viols aggravés".).

the use of the software package developed by the DRC for the purpose of these proceedings" and submitted in Annex 1.3.⁷⁹⁰

6.58 The DRC then speculates that "[i]n light of the general practice that consists of not reporting such acts, on the one hand, and, the significance of the use of rape as a weapon of war against the civilian populations in Ituri, on the other, the Democratic Republic of the Congo estimates that the real number of rapes for which Uganda is liable... is a figure that is five times higher than those that have been reported, that is, 1,710 cases." "It is this number," the DRC concludes, "that shall be used as the basis for the claim for reparation... for this category of damages". The DRC then claims that "the same breakdown as that resulting from the data files [prepared by the Congolese investigators] will be made, giving a projection of 610 cases of rape and 1,100 cases of aggravated rape."

6.59 In Kisangani, the DRC claims that Uganda is responsible for 18 cases of rape.⁷⁹⁴ For support, it relies on Annex 4.5(b) to the DRC Memorial, which contains a table of 15 alleged victims (not 18) prepared by the Commission of Experts for

⁷⁹⁰ *Ibid.*, para. 3.32, note 274 (Translation by Counsel, original in French: "résulte de l'utilisation du logiciel confectionné par la DRC aux fins de la présente procédure"); *Ibid.*, para. 7.24.

⁷⁹¹ *Ibid.*, para. 3.32. (Translation by Counsel, original in French: "Eu égard, d'une part, à la pratique générale qui consiste à ne pas déclarer de tels faits et, de l'autre, à l'importance du recours au viol comme arme de guerre contre les populations civiles en Ituri, la République démocratique du Congo estime que le nombre réel de viols dont l'Ouganda est responsable en raison des manquements à ses obligations en tant que puissance occupante de cette région entre 1998 et 2003 se monte à un nombre cinq fois plus élevé que ceux qui ont été déclarés, soit 1.710 cas".).

⁷⁹² *Ibid*. (Translation by Counsel, original in French: "C'est ce nombre qui sera retenu comme base de la demande de réparation présentée par la RDC pour cette catégorie de dommages".).

⁷⁹³ *Ibid*. (Translation by Counsel, original in French: "La même ventilation que celle résultant des fiches sera opérée, donnant une projection de 610 cas de viols simples et de 1.100 cas de viols aggravés".).

⁷⁹⁴ *Ibid.*, para. 7.24.

the purpose of this litigation.

6.60 For all other locations, the DRC again relies on the summary tables of the claims forms "prepared by the DRC's survey team" in Annex 2.2 for all injuries, including rapes. According to the DRC, these "allow the existence of only 12 rapes (2 cases recorded for Beni, 10 for Butembo)". ⁷⁹⁵ Below is the excerpt from Annex 2.2 from which the DRC derives its number of rapes for Beni (no other information or mention of rapes for Beni is offered):

ILLE: BENI	ELESIONS DE 1998 A 2003
FRACTURE BRAS	8
FRACTURE JAMBE	2
PREJUDICES CORPORELS GRAVES	98
PREJUDICES CORPORELS LEGERS	23
VIOL AGGRAVE	1
VIOL SIMPLE	1

The DRC further claims that "it may reasonably be believed that the actual number of rapes for which Uganda is responsible... is a number five times higher than those that were declared, i.e., 60 cases."

6.61 There is no support for any of the DRC's underlying numbers. As stated previously, Annexes 1.3, 2.2 and 4.5 are merely lists without supporting evidence

⁷⁹⁵ *Ibid.*, para. 2.79, referring to "Rapport Fréquence Type Lésion de 1998 à 2003", DRCM, Annex 2.2 (Translation by Counsel, original in French: "Celles-ci ne permettent de prouver... que l'existence de 12 viols (2 cas recensés pour Beni ,10 pour Butembo)".).

⁷⁹⁶ *Ibid.*, para. 2.79 (Translation by Counsel, original in French: "on peut raisonnablement estimer que le nombre réel de viols dont l'Ouganda est responsable dans les régions dont il est question dans le présent chapitre se monte à un nombre cinq fois plus élevé que ceux qui ont été déclarés, soit 60 cas".).

that shows the identity of the victims, the circumstances of the incidents or the identity of the alleged perpetrators. There is therefore no credible basis for these numbers, or for the apportionment between "aggravated rape" and "non-aggravated rape."

6.62 Indeed, in Annex 1.3, the numbers are not even what the DRC claims (122 cases of rape and 220 cases of aggravated rape):⁷⁹⁷

(ILLE: ITURI	
AMPUTATION D UN BRAS	3
COUPS D ECLATS DANS LE CORP	S 3
FRACTURE BRAS	3
FRACTURE JAMBE	4
PREJUDICES CORPORELS GRAVE	S 114
PREJUDICES CORPORELS LEGER	S 70
VIOL AGGRAVE	201
VIOL SIMPLE	115

6.63 And, once again, most of the victims are not even named:⁷⁹⁸

 797 *Ibid.*, para. 3.32; "Rapport Frequence Type Lesions de 1998 à 2003" in Liste Type Lesion et leur Frequence Ituri, DRCM, Annex 1.3.

254

_

⁷⁹⁸ "Evaluation Lésions" in *Victimes Lésions Ituri*, p. 4, DRCM, Annex 1.3.

```
165 NON SIGNALE
                                                           17500.0
166 NON SIGNALE
                                                           17500.0
167 NON SIGNALE
                                                            17500.0
168 NON SIGNALE
                                                           17500.0
169 NON SIGNALE
                                                           17500.0
170 NON SIGNALE
                                                           17500.0
171 NON SIGNALE
                                                            17500.0
172 NON SIGNALE
                                                           17500.0
173 NON SIGNALE
                                                           17500.0
174 NON SIGNALE
                                                           17500.0
175 NON SIGNALE
                                                           17500.0
176 NON SIGNALE
                                                           17500.0
177 NON SIGNALE
                                                           17500.0
178 NON SIGNALE
                                                           17500.0
179 NON SIGNALE
                                                           17500.0
180 NON SIGNALE
                                                            17500.0
181 NON SIGNALE
                                                           17500.0
182 NON SIGNALE
                                                           17500.0
183 NON SIGNALE
                                                           17500.0
184 NON SIGNALE
                                                           17500.0
185 NON SIGNALE
                                                            17500.0
186 NON SIGNALE
                                                            17500.0
                                        Total Partiel:
                                                          3255000.0
DECLARANT: ANGAIKA MBADO
                                                     ITURI_SUITE_CCF04032016_0056_014
N° VICTIME
                                                       EVALUATION CHIFFREE
 1 NON SIGNALE
                                                            12500.0
 2 NON SIGNALE
                                                           12500.0
 3 NON SIGNALE
                                                           12500.0
 4 NON SIGNALE
                                                           12500.0
 5 NON SIGNALE
                                                           12500.0
 6 NON SIGNALE
                                                           12500.0
 7 NON SIGNALE
                                                           12500.0
 8 NON SIGNALE
                                                           12500.0
 9 NON SIGNALE
                                                           12500.0
 10 NON SIGNALE
                                                            12500.0
 11 NON SIGNALE
                                                           12500.0
 12 NON SIGNALE
                                                           12500.0
 13 NON SIGNALE
                                                           12500.0
 14 NON SIGNALE
                                                           12500.0
 15 NON SIGNALE
                                                           12500.0
 16 NON SIGNALE
                                                           12500.0
 17 NON SIGNALE
                                                           12500.0
 18 NON SIGNALE
                                                           12500.0
 19 NON SIGNALE
                                                            12500.0
20 NON SIGNALE
                                                            12500.0
21 NON SIGNALE
                                                            12500.0
```

6.64 In Annex 4.5.b, most of the ostensible cases listed are attributed to no particular perpetrator or to vague "military persons" as in the excerpts below:⁷⁹⁹

423	TASILE Jeanne	F	-	Viol
424	LOLEKA OWENE Marie	F	Buta, vers 1948	Blessures légères nus
425	LUFIMBO LUKELWA Bernard	M	Bahusi, le 02/01/1950	Eclats d'obus
426	KIBANGULA MWENYI PORI	M	Wamaza, le 31/12/1943	Blessé par balle
427	WAMAMA Hélène	F	-	Blessée grave
428	YATUMBO Héritier	M	-	Blessée grave
429	ВАОМВО	F	-1	Viol

519	LOTIKA BOLUNGA	F	Yakusu, le 04/02/1984	Violée par les militaires
520	LOTIKA	F	Basoko, le 29/12/1962	Fracturée au bras et violée par les militaires

Ugandan soldiers are listed in only four cases but no further details are given and no supporting evidence is provided. There is therefore no basis for concluding that the listed victims sustained injuries as a result of Uganda's wrongful acts.

6.65 The DRC's resort to the multiplier of five is mere conjecture and has no basis in fact or law. The DRC Memorial offers no credible reason for picking the number five, other than the general assertion that sexual violence was underreported. Just like its percentages and multipliers for loss of life and physical

⁷⁹⁹ République Démocratique du Congo, Commission d'Experts, *Identification des victimes et évaluation des dommages: blessures, lésions corporelles, viols et autres*, pp. 30-31, DRCM, Annex 4.5.b.

injuries, this multiplier appears to have been chosen at random. Such arbitrary inflation of claims is not based on evidence and has no place in a court of law.

6.66 The DRC's "projection" that the total number of rapes in Ituri, which is the result of its multiplication (342 rape cases x = 1,710), follows the "same breakdown" between cases of "aggravated rape" and "simple rape" so equally unfounded. The DRC simply states that "[t]he same breakdown as that resulting from the data files [prepared by the Congolese investigators] will be made, giving a projection of 610 cases of rape and 1,100 cases of aggravated rape." It provides no reason or explanation for this assertion, which is nothing more than conjecture.

6.67 The DRC has therefore failed to demonstrate and prove the exact physical injuries from sexual violence that were suffered as a result of specific internationally wrongful actions of Uganda.

C. THE DRC HAS FAILED TO PROVE INJURY WITH RESPECT TO CHILD SOLDIERS THAT WAS SUFFERED AS A RESULT OF SPECIFIC ACTIONS OF UGANDA

6.68 The DRC claims compensation for the recruitment and training of 2,500 child soldiers in Ituri, which it contends were "recruited and trained by the *various actors* in the conflict in Ituri". 802

6.69 In the *dispositif* of the 2005 Judgment, the Court found generally that Uganda's armed forces "trained child soldiers". 803 It also made the general findings

⁸⁰⁰ DRCM, para. 3.32 (Translation by Counsel, original in French: "la même ventilation".).

⁸⁰¹ *Ibid.*, para. 3.32.

⁸⁰² *Ibid.*, para. 3.36 (emphasis added) (Translation by Counsel, original in French: "recrutés et entraînés par les différents protagonistes du conflit en Ituri".).

⁸⁰³ *Armed Activities* (2005), para. 345(3).

described above regarding violations of human rights and international humanitarian law,⁸⁰⁴ including Uganda's failure as an occupying Power in Ituri district "to take measures to respect and ensure respect for human rights and international humanitarian law".⁸⁰⁵

6.70 As with all other injuries, it is the DRC's burden at this phase to prove the exact injury relating to child soldiers that was suffered as a result of specific actions of Uganda, through convincing evidence with respect to specific incidents that occurred in specific places and at specific times. Because this aspect of the DRC's claim is limited to Ituri, the DRC must either prove that Uganda was directly involved in the recruitment, training or use of child soldiers, or that the recruitment, training or use of child soldiers by others "would in fact have been averted if the Respondent had acted in compliance with its legal obligations". Box

6.71 Uganda recalled in Chapter 4 that the Court dealt with the issue of a State's breach of its due diligence obligations in the *Genocide (Bosnia v. Serbia)* case. The Court ruled there:

"[T]he Respondent did have significant means of influencing the Bosnian Serb military and political authorities which it could, and therefore should, have employed in an attempt to prevent the atrocities, but it has not been shown that, in the specific context of these events, those means would have sufficed to achieve the result which the Respondent should have sought. Since the Court cannot therefore regard as

⁸⁰⁵ *Ibid.*, para. 345(3).

⁸⁰⁴ *Ibid.*, para. 345(1).

⁸⁰⁶ See Chapter 3.

⁸⁰⁷ Bosnia and Herzegovina v. Serbia and Montenegro (2007), para. 462. See also, Chapter 4, Section IV(A).

proven a causal nexus between the Respondent's violation of its obligation of prevention and the damage resulting from the genocide at Srebrenica, financial compensation is not the appropriate form of reparation for the breach of the obligation to prevent genocide." 808

6.72 The DRC bases its claim that Uganda is responsible for 2,500 child soldiers on three sources: the UN Secretary-General's Sixth Report on MONUC, the ICC's judgment in the *Lubanga* case and the UN Mapping Report. Specifically, the DRC first quotes the UN Secretary-General's Sixth Report on MONUC, which states: "As the present report was being finalized, *information was received* that 600 children would be transferred [from Uganda] to the custody of humanitarian organization next week'."809 It next misleadingly cites to the ICC's *Lubanga* Judgment to suggest that the Trial Chamber ruled that 700 child soldiers were recruited with Uganda's support and were transferred for training to Uganda. 810 Lastly, the DRC also cites to the UN Mapping Report, which states that "[i]n 2001, the MLC admitted to having 1,800 [child soldiers] within its ranks'."811

6.73 The DRC does not explain how it arrived at the number 2,500 from these sources. It appears that it may be the sum of the numbers indicated from the *Lubanga* Judgment (700) and the UN Mapping Report (1,800). In any event, the numbers in the three sources on which the DRC relies cannot form the basis of a

⁸⁰⁸ Bosnia and Herzegovina v. Serbia and Montenegro (2007), para. 462.

⁸⁰⁹ DRCM, para. 3.35 (Translation by Counsel, original in French: "Au moment où on mettait la dernière main au présent rapport, on a appris que 600 de ces enfants seraient transférés à la garde d'organisations humanitaires la semaine prochaine".); U.N. Security Council, *Sixth report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC)*, U. N. Doc. S/2001/128 (12 Feb. 2001), para. 66, DRCM, Annex 3.4.

⁸¹⁰ DRCM, para. 3.35.

⁸¹¹ *Ibid.*, para. 3.35 (Translation by Counsel, original in French: "En 2001, le MLC aurait reconnu avoir 1800 EAFGA dans ses rangs.").

claim against Uganda. They have been disproven (in the case of the Sixth Report on MONUC), mischaracterised by the DRC (in the case of the *Lubanga* Judgment) or are insufficiently connected to Uganda (in the case of the UN Mapping Report).

6.74 The DRC's reliance on the UN Secretary-General's Sixth Report on MONUC is hard to understand given that the DRC itself admits (albeit in footnote) that the report was later corrected by the UN Mapping Report. Specifically, at footnote 278 to paragraph 3.35 of the DRC Memorial, the DRC acknowledges that the UN Mapping Report "indicates what actually occurred in February 2001 (that is, the repatriation of only 163 children and not of the 600 initially anticipated)."812 (Uganda notes that this is the only number of child soldiers connected to the UPDF in the UN Mapping Report.813)

6.75 The DRC mischaracterises the *Lubanga* judgment by paraphrasing the testimony of a witness (witness P-0116) and presenting it as a determination made by the Trial Chamber.⁸¹⁴ Witness P-0116 was not an eye-witness to the events at issue but was "told" by unspecified persons that "about 700 youths" had been taken to Uganda.⁸¹⁵ The witness further testified that some, but not all, the "700 youths"

_

⁸¹² *Ibid.*, para. 3.35, note 278 (Translation by Counsel, original in French: "signale ce qui s'est effectivement passé en février 2001 (soit le rapatriement de 163 enfants seulement, et non des 600 initialement prévus)".).

⁸¹³ In contrast, there is ample evidence that the Congolese military recruited, trained and involved many more children in its armed activities: "By 2003, the UN estimated that 10% of the FAC was made up of [child soldiers] and the [Congolese] Minister of Human Rights admitted that there were 3,000 [child soldiers] waiting to be demobilised within the FAC." *U.N. Mapping Report*, para. 693, Annex 25.

⁸¹⁴ DRCM, para. 3.35 quoting to Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Judgment (ICC Trial Chamber I, 14 Mar. 2012), para. 1033.

⁸¹⁵ Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Judgment (ICC Trial Chamber I, 14 Mar. 2012), para.1033.

were children.⁸¹⁶ The Trial Chamber did not adopt the witness's testimony as proven fact, stating that "it is unnecessary for the Chamber to reach a precise determination of their individual ages because this incident falls outside the period of the charges and is relevant only for general contextual and background purposes."⁸¹⁷

6.76 The DRC also cites to the UN Mapping Report for the proposition that "[i]n 2001, the MLC admitted to having 1,800 [child soldiers] within its ranks'."⁸¹⁸ The UN Mapping Report, however, does not link the MLC's alleged actions to Uganda. There is no evidence either in the UN Mapping Report or presented by the DRC demonstrating that the child soldiers in question were recruited by Uganda or trained in UPDF training camps.

6.77 Moreover, as stated, the DRC's claim is expressly limited to the recruitment, training and use of child soldiers in Ituri. Yet the MLC was primarily active in Equateur Province, which was not under Uganda's control.⁸¹⁹ The allegation concerning the MLC is therefore irrelevant to the DRC claim as presented in its Memorial.

6.78 Further, even if these allegations were tied to Ituri (*quod non*), the DRC would still have to show that the MLC's use of child soldiers would in fact have

⁸¹⁶ *Ibid.*, para.1032. The Court noted that "P-0116 gave evidence that the children concerned were predominantly Hema, and a number of them were under the age of 15." This suggests that not all the 700 youths were under the age of 15.

⁸¹⁷ *Ibid.*, para. 1043.

⁸¹⁸ DRCM, para. 3.35 (Translation by Counsel, original in French: "En 2001, le MLC aurait reconnu avoir 1800 EAFGA dans ses rangs".).

⁸¹⁹ See U.N. Mapping Report, Annex 25, para. 310; Armed Activities (2005).

been prevented had Uganda complied with its obligations as an occupying Power. The DRC does not even attempt to make such a showing.

- 6.79 The mere fact that Uganda provided support to the MLC is, of course, not enough to attribute responsibility to Uganda for its actions. Indeed, the Court specifically declined to find the MLC's actions attributable to Uganda in the 2005 Judgment. To hold Uganda responsible for its acts now would violate the principle of *res judicata*, especially without a showing that Uganda directly controlled the MLC's decision to utilise child soldiers, or that the children were recruited or trained in areas under Uganda's control, or that their recruitment and training would have been prevented had Uganda complied with its obligations as an occupying Power.
- 6.80 The DRC Memorial therefore fails to sustain its allegation that Uganda is responsible for the recruitment, training and use of 2,500 child soldiers.
 - D. THE DRC HAS FAILED TO PROVE INJURY WITH RESPECT TO
 DISPLACED PERSONS THAT WAS SUFFERED AS A RESULT OF SPECIFIC
 ACTIONS OF UGANDA
- 6.81 The DRC claims that Uganda is responsible for the displacement of 668,538 persons. 820 Six hundred thousand of the displacements are alleged to have occurred in Ituri; 68,000 are alleged to have occurred in Kisangani and the remaining 538 are alleged to have occurred in other locations.
- 6.82 The DRC's numbers concerning displacement are not arrived at by presenting evidence on an incident-by-incident basis with respect to specific persons or groups of persons in specific towns or villages on specific dates within

_

⁸²⁰ DRCM, paras. 7.30-7.32.

the relevant time-period. This failure to engage on the specific circumstances of displacement is fatal to the DRC's claim, as there is no evidence indicating whether such displacement occurred due to deliberate efforts attributable to Uganda to make the civilians flee, nor is there any evidence indicating that such displacement was a direct result of Uganda's violation of the *jus ad bellum*. As such, on this basis alone, the Court should deny the DRC's claim for personal injury from displacements.

6.83 Even so, Uganda will critique the methodology that the DRC presses upon the Court. Uganda will show in the sections that follow that the DRC has failed to discharge its burden at this stage to prove the exact injury relating to displacements that was suffered as a result of specific actions attributable to Uganda.

1. Ituri

6.84 With respect to Ituri, the DRC alleges that Uganda is responsible for the displacement of 600,000 persons who fled from deliberate violence "as a result of the non-performance by Uganda of its obligations as the occupying Power of Ituri from 1998 to 2003." This contention is based on the UN Secretary General's Second special report on MONUC, which refers to an estimate by the UN Office for the Coordination of Humanitarian Affairs ("OCHA") that "between 500,000 and 600,000" persons were internally displaced in Ituri. PRC's reliance on this source is inapposite for several reasons.

⁸²¹ DRCM, para. 3.41 (Translation by Counsel, original in French: "en conséquence du manquement par l'Ouganda à ses obligations en tant que puissance occupante de l'Ituri entre 1998 et 2003.").

⁸²² Ibid., para. 3.41, note 293 citing to Second report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo, S/2003/566 (27 May 2003), para. 10, DRCM, Annex 3.6.

6.85 *First*, OCHA's estimate is simply that: an estimate. Moreover, the vast difference between the two numbers stated—100,000—shows a considerable amount of uncertainty. The DRC provides no explanation as to why it picked the higher of the two as the basis for its claim. Its seemingly arbitrary selection of the highest possible estimate is inconsistent with its professed "desire to comply with the requirements of seriousness and rigour that characterize the legal proceeding". 823 Nor is it consistent with the requirement that the DRC show the exact injury suffered as a result of specific wrongful acts of Uganda.

6.86 Second, there is nothing in the UN Secretary-General's Report showing that the stated numbers of persons fled "deliberate violence", or that the displacement would have been avoided had Uganda complied with its obligations as an occupying Power in Ituri. The report simply estimates the total number of internally displaced people in the region, regardless of the cause of their displacement. OCHA and the UN Secretary-General do not indicate the circumstances of the displacements, how long they lasted, when and if those who were displaced were able to return to their homes, or what damages they suffered as a result.

6.87 The DRC also provides nothing to show a causal link between the injury claimed and Uganda's wrongful conduct. Still less does it show that, in the specific context of these events, Uganda's exercise of its due diligence obligations would

Thid page 2.75 (Translation by Counsel original in French: "dar

⁸²³ *Ibid.*, para. 2.75 (Translation by Counsel, original in French: "dans un souci de rigueur et de mesure.").

⁸²⁴ See Second report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo, S/2003/566 (27 May 2003), para. 10, DRCM, Annex 3.6.

have sufficed to prevent the alleged displacement.⁸²⁵ It therefore cannot use the report to support its claim.

2. Kisangani

6.88 The DRC next claims that Uganda is responsible for the displacement of 68,000 persons "who fled their homes for shorter periods" in Kisangani. The sole basis for this claim is the statement by the UN Inter-Agency Commission that during fighting between Rwanda and Uganda in June 2000 in Kisangani, some "65,000 residents fled to seek refuge in the nearby forest" and that "[a]round 3,000 internally displaced people were housed in a camp at Katele". There are several reasons to believe that these numbers are inflated and that such displacements cannot be attributed to Uganda.

6.89 As Uganda has recalled elsewhere, the Court stated in the 2005 Judgment that it would "take into consideration evidence contained in certain United Nations documents to the extent that they are of probative value and are corroborated, if necessary, by other credible sources." The Court also stated that it "will treat with caution evidentiary materials... emanating from a single source." Yet the Inter-Agency Commission does not provide any supporting evidence or methodology to explain its estimates. The Inter-Agency Report also does not

265

⁸²⁵ See Bosnia and Herzegovina v. Serbia and Montenegro (2007), para. 438. See also Chapter 4, Section I(D).

⁸²⁶ DRCM, para. 7.31 (Translation by Counsel, original in French: "qui ont fui leur domicile pour des périodes plus brèves".).

⁸²⁷ *Ibid.*, para. 4.47 (Translation by Counsel, original in French: "65 000 habitants de Kisangani à se refugier dans la forêt proche. Environ 3000 personnes déaplacées ont été logées dans un camp à Katele".) *citing to* U.N. Security Council, *Report of the inter-agency assessment mission to Kisangani*, U.N. Doc. S/2000/1153 (4 Dec. 2000), para. 57, DRCM, Annex 4.24.

⁸²⁸ *Armed Activities* (2005), para. 205.

⁸²⁹ *Ibid.*, para. 61.

indicate how long the displacement lasted, when and if those who were displaced were able to return to their homes, or what damages they suffered as a result.

- 6.90 Moreover, the UN Mapping Report, after reviewing various sources, including the Inter-Agency Report, declined to adopt this number, and made a much more conservative and qualified estimate that the June 2000 confrontations in Kisangani caused "thousands of people to be displaced."⁸³⁰ "Thousands" plainly implies a number less than ten thousand and likely much less than that. One would expect an estimate of 30,000, for example, to be described as "tens of thousands", not "thousands". The use of this term thus indicates that the UN Mapping Team did not agree with the 68,000 number stated in the Inter-Agency Report.
- 6.91 Accordingly, the DRC Memorial does not provide any convincing evidence that Uganda caused the displacement of 68,000 persons in Kisangani.

3. Other Locations (Beni, Butembo and Gemena)

- 6.92 The DRC claims that in locations other than Ituri and Kisangani, Uganda is responsible for the displacement of 538 persons: 433 in Beni, 93 in Butembo and 12 in Gemena. This claim is based on "the forms prepared by [the DRC's] survey commission". 832
- 6.93 As stated, the DRC has failed to submit any of those forms, or any other supporting materials, into evidence. There is therefore no basis to determine whether the DRC's claim is based on convincing evidence that establishes with the

_

⁸³⁰ U.N. Mapping Report, para. 363, Annex 25.

⁸³¹ DRCM, para. 2.83.

⁸³² *Ibid.*, para. 2.83 (Translation by Counsel, original in French: "les fiches établies par sa Commission d'enquête".).

high level of certainty the existence of the claimed injury or a causal link between the injury and Uganda's wrongful conduct.

6.94 The DRC offers only Annex 2.3, which is simply an unsigned list that does not provide any details as to the identities of the victims, the circumstances and causes of their displacement, and the damages they suffered.

*

6.95 The DRC has thus failed to provide convincing evidence that Uganda is responsible for the displacement of 668,538 persons.⁸³³

6.96 The exaggerated nature of the DRC's claim that Uganda is responsible for the displacement of 668,538 people can also be seen by viewing the claim in broader context. The UNHCR estimates that today there are a total of "621,711 refugees from the DRC in more than 11 other African countries". 834 The contention that Uganda is alone responsible for the displacement of more people than the total number of Congolese refugees in Africa today (given that violence and conflict throughout the country to this day) is absurd.

III. The DRC's Valuation for Personal Injuries Is Methodologically Flawed

6.97 The DRC's valuation of the personal injury claims described above is equally unsupported by evidence and at odds with valuation methodologies used in inter-State claims. In the following sections, Uganda will (A) summarise the

_

⁸³³ *Ibid.*, paras. 7.30-7.31.

⁸³⁴ U.N.H.C.R., U.N.H.C.R. warns of worsening displacement in Democratic Republic of Congo (24 Oct. 2017), p. 3, Annex 34.

DRC's approach to valuation for each category of personal injury and (B) demonstrate how the DRC's approach is both unsupported and flawed.

A. THE DRC'S VALUATION OF PERSONAL INJURIES

1. Physical Injuries

6.98 The DRC claims US\$ 54,464,000 in compensation⁸³⁵ for physical injuries it alleges to have been caused by Uganda. The DRC evaluates damages for physical injuries based on alleged compensation awards rendered by DRC municipal courts for three categories of injuries: (1) serious injuries caused by deliberate violence; (2) minor injuries caused by deliberate violence; and (3) injuries caused by non-deliberate violence.

6.99 For serious injuries caused by deliberate violence, the DRC seeks US\$ 3,500 per victim, which allegedly represents the "average" amount of compensation "granted by the Congolese courts to injured or mutilated people in the context of the perpetrations of serious crimes against international law." (The DRC asserts that the "range" of these awards was "from US\$ 550 to US\$ 5,000." (37)

⁸³⁵ DRCM, para, 7.21.

⁸³⁶ *Ibid.*, para. 7.17 (Translation by Counsel, original in French: "octroyées par les juridictions congolaises aux personnes blessées ou mutilées dans le contexte de la perpétration de crimes graves de droit international."). The total amount of compensation claimed by the DRC for this category of damage is US\$ 52,500,000 (US\$ 3,500 x 15,000 of alleged victims who suffered serious injuries caused by deliberate violence in Ituri. DRCM, para. 7.18).

⁸³⁷ *Ibid.* (Translation by Counsel, original in French: "s'échelonnent entre 550 et 5000 dollars des Etats-Unis".).

6.100 For minor injuries caused by deliberate violence, the DRC seeks US\$ 150 per victim, which, it says, is "the average sum" of compensation awarded by the Congolese courts. 838

6.101 And for any injuries caused by non-deliberate violence, the DRC uses "the minimum sum of US\$ 100" per victim reflecting the compensation granted by "ordinary Congolese courts as reparation to victims of accidental injuries."⁸³⁹

6.102 The DRC multiplies these nominal average amounts by the number of alleged victims:

- US\$ 52,500,000 for serious injuries caused by deliberate violence to an alleged 15,000 victims in Ituri (15,000 x US\$ 3,500);⁸⁴⁰
- US\$ 750,000 for minor injuries caused by deliberate violence to 5,000 alleged victims in Ituri (5,000 x US\$ 150);⁸⁴¹ and
- US\$ 1,214,000 for injuries not caused by deliberate violence to 12,140 alleged victims (10,000 in Ituri; 1,937 in Kisangani; and 203 in locations other than Ituri and Kisangani) (12,140 x US\$ 100).842

⁸³⁸ *Ibid*. The total amount of compensation claimed by the DRC for this category of damage is US\$ 750,000 (US\$ 150 x 5,000 of alleged victims who suffered minor injuries caused by deliberate violence in Ituri.).

⁸³⁹ *Ibid.*, para. 7.19 (Translation by Counsel, original in French: "par les juridictions ordinaires congolaises à titre de répérations aux victimes de blessures ou mutilations accidentelles".). The total amount of compensation claimed by the DRC for this category of damage is US\$ 1,214,000 (US\$ 100 x 12,140 of alleged victims who suffered injuries caused by non-deliberate violence in Ituri (10,000), Kisangani (1,937) and locations other than Ituri and Kisangani (203).).

⁸⁴⁰ *Ibid.*, para. 7.18.

⁸⁴¹ *Ibid*.

⁸⁴² *Ibid.*, para. 7.20.

6.103 The claimed compensation, according to the DRC, covers both material injury, which includes "the cost of care, the loss of income, due to temporary or permanent physical disabilities resulting from the injuries, and the loss of opportunities" and moral injury, which includes "the trauma resulting from the atrocities, the anguish caused by the acts, the suffering resulting from difficulty accessing care, the distress resulting from the lack of intervention by the authorities in place and of legal proceedings against the perpetrators, the permanent deterioration of the quality of life of mutilation victims, and the irreparable damage to their image and self-esteem." 843

2. Sexual Violence

6.104 As stated, the DRC seeks US\$ 33,458,000 in compensation for the harm suffered by victims of sexual violence allegedly perpetrated by Uganda. 844

6.105 As with physical injuries, the DRC assesses compensation for sexual violence based on alleged compensation awards granted by Congolese courts. According to the DRC, damages for aggravated rape "range between US\$ 10,000 and 750,000, with an average award of US\$ 23,200", and damages for non-aggravated rape "ranged between US\$ 700 and 50,000, with an average of US\$

⁸⁴³ *Ibid.*, para. 7.16 (Translation by Counsel, original in French: "Le préjudice matériel comprend le coût des soins, les pertes de revenus du fait des incapacités physiques temporaires ou permanentes résultant des blessures, les pertes de chances. On peut retenir au titre du préjudice moral le traumatisme résultant des atrocités commises, l'angoisse que les faits se reproduisent, les souffrances résultant des difficultés d'accès aux soins, la détresse résultant de l'absence d'intervention des autorités en place et de l'absence de poursuite des auteurs des faits, la dégradation permanente de la qualité de la vie des victimes de mutilations, de même que l'atteinte irrémédiable à leur image et à leur estime de soi".).

⁸⁴⁴ *Ibid.*, para. 7.25.

12,600."845 The DRC multiplies these average amounts by the number of alleged victims of sexual violence:

- US\$ 25,520,000 for 1,100 victims of aggravated rape (US\$ 23,200 x 1,100); 846
- US\$ 7,938,000 for 630 victims of non-aggravated rape (US\$ 12,600 x 630).⁸⁴⁷

6.106 Here, too, the claimed compensation, according to the DRC, covers the material loss, which includes "the cost of care that had to be provided to the victims," and moral injury, which reflects "the ostracism to which the victims are subjected", diminished chances of finding a husband, "persistent pain", "infection with sexually transmitted diseases", and loss of a child while being pregnant. 848

⁸⁴⁵ *Ibid.*, para. 7.23 (Translation by Counsel, original in French: "Les montants des indemnisations octroyées par les juridictions congolaises aux personnes qui ont été victimes de viols simples dans le contexte de la perpétration de crimes graves de droit international s'échelonnent entre 700 et 50.000 dollars des Etats-Unis, la somme moyenne étant de 12.600 dollars des Etats-Unis. Les sommes retenues pour des viols aggravés par les mêmes tribunaux s'échelonnent entre 10.000 et 750.000 dollars des Etats-Unis, avec une moyenne de 23.200 dollars des Etats-Unis.").

⁸⁴⁶ *Ibid.*, para. 7.24.

⁸⁴⁷ *Ibid*.

⁸⁴⁸ *Ibid.*, para. 7.22 (Translation by Counsel, original in French: "Le prejudice matériel comprend pour l'essentiel le coût des soins qui ont dû être prodigués aux victimes. Le préjudice moral subi par les victimes de tels faits s'avère particulièrement significatif. Il est la conséquence du caractère humiliant du crime de viol, de l'ostracisme dont sont frappées les victimes de la part des membres de la famille ou de la société en général. Lorsque ce risque se concrétise, il peut donner lieu à des difficultés au sein du ménage ou à la répudiation de la femme. De même, les jeunes filles violées alors qu'elles n'étaient encore mariées voient leurs chances de trouver un époux diminuer. Il convient finalement de prendre en compte des circonstances plus spécifiques —mais loin d'être exceptionnelles—, particulièrement lorsque le viol s'accompagne d'autres mauvais traitements (viol aggravé), de la persistance de douleurs, d'une infection par maladie sexuellement transmissible, ou lorsque la femme violée a perdu l'enfant qu'elle portait ou qu'elle se retrouve enceinte de son agresseur.").

3. Child Soldiers

6.107 The DRC claims US\$ 30 million in compensation for the recruitment and training of child soldiers. He DRC calculates this amount by taking US\$ 12,000, the allegedly average sum Congolese courts have awarded to victims in analogous circumstances, and multiplying that sum by 2,500, the number of alleged victims in this category (2,500 x US\$ 12,000). Uganda notes that in addition to the other problems with the effort at valuation discussed below, the DRC Memorial nowhere bothers to explain what "acts that have caused harm similar to that suffered by the child soldiers" were used as a reference point to assess injury to child soldiers and why that comparator is relevant to assessing injuries to child soldiers.)

6.108 Like physical injuries and sexual violence, the DRC contends that this compensation reflects both the material injury, which includes the deprivation of access to education and loss of opportunities as well as the loss of contributions children make to their family (domestic chores, shepherding), and the moral injury, which relates to the trauma resulting from taking these children away from their families and exposing them to mistreatment and the violence of war. 853

4. Displacement

6.109 Finally, the DRC claims US\$ 186,853,800 in compensation for damage allegedly suffered by 668,538 displaced persons.⁸⁵⁴ This amount includes US\$ 180

⁸⁴⁹ *Ibid.*, para. 7.28.

⁸⁵⁰ *Ibid.*, para. 7.27.

⁸⁵¹ *Ibid.*, para. 7.28.

⁸⁵² *Ibid.*, para. 7.27 (Translation by Counsel, original in French: "actes qui ont engendrés des prejudices similaires à ceux subis par les enfants soldats".).

⁸⁵³ *Ibid.*, para. 7.26.

⁸⁵⁴ *Ibid.*, paras. 7.30-7.32.

million for persons who had to flee from deliberate violence against civilian populations⁸⁵⁵ and US\$ 6,853,800 for persons who left their homes for short periods to escape armed conflict.⁸⁵⁶

6.110 To assess compensation for damage suffered by persons displaced as a result of deliberate violence, the DRC claims it is "reasonable to allocate the sum of US\$ 300" for each victim in this category. This sum is then multiplied by 600,000, the alleged number of victims fleeing deliberate violence. The total claimed amount for this category of damages is thus US\$ 180 million (600,000 x US\$ 300). This compensation is limited to Ituri and is said to cover both the material injury resulting from the suspension of professional activities of allegedly displaced persons during the entire period of their hiding, and the moral harm they suffered from the atrocities committed against the other members of their group, the fear of repetition of such acts, the distress due to the non-intervention by local authorities and non-prosecution of perpetrators. The sum of the sum of

6.111 To assess compensation for damage suffered by persons displaced *not* as a result of deliberate violence, the DRC claims it is "reasonable to allocate the sum of US\$ 100" for each victim in this category. 859 This sum is then multiplied by 68,538, the alleged number of victims in this category (68,000 in Kisangani and 538 in other regions in eastern DRC). 860 The total claimed amount for this category

855 *Ibid.*, para. 7.30.

⁸⁵⁶ *Ibid.*, para. 7.31.

⁸⁵⁷ *Ibid.*, para. 7.30 (Translation by Counsel, original in French: "La République démocratique du Congo estime raisonnable de retenir la somme de 300 dollars".).

⁸⁵⁸ *Ibid*.

⁸⁵⁹ *Ibid.*, para. 7.31 (Translation by Counsel, original in French: "la République démocratique du Congo estime raisonnable de retenir la somme de 100 dollars".).

⁸⁶⁰ *Ibid*.

of damages is thus US\$ 6,853,800 (68,538 x US\$ 100).⁸⁶¹ This compensation is also claimed to cover both the material injury, which is allegedly the same as that suffered by persons fleeing deliberate violence, and the moral injury, which is "limited to the anguish connected with abandoning one's home and the fear of returning to find it destroyed, damaged or ransacked."⁸⁶²

B. THE DRC'S APPROACH TO VALUATION OF PERSONAL INJURY DAMAGES IS
UNSUPPORTED BY EVIDENCE AND METHODOLOGICALLY FLAWED

6.112 The DRC's approach to the valuation of compensation for personal injuries is unsupported by evidence and methodologically flawed. To begin with, as recalled in Chapter 5,⁸⁶³ the DRC cites no authority for the proposition that the measure of compensation for personal injuries in this Court should be determined by reference to decisions rendered by a claimant State's municipal courts. As was true in the case of its claims in respect of loss of life, the only justification the DRC Memorial offers for using this approach is its subjective assertion that it considers it "reasonable" to do so.⁸⁶⁴

6.113 Furthermore, even if the DRC's damages under international law could be measured by reference to the *quanta* awarded by a DRC domestic court (*quod non*), the content of its national law is a matter of fact that it must prove. 865 The DRC fails to present any such evidence, however. Even though it nominally bases its valuations for physical injuries, sexual violence and child soldiers based on

⁸⁶¹ *Ibid*.

⁸⁶² *Ibid*. (Translation by Counsel, original in French: "limité pour sa part à l'angoisse liée à l'abandon de son domicile et à la crainte de le retrouver détruit, endommagé ou pillé".).

⁸⁶³ Chapter 5, Section III.

⁸⁶⁴ DRCM, para. 7.17.

⁸⁶⁵ See Chapter 3, Section I.

Congolese case law, the DRC does not provide a single judgment or other document demonstrating the amount of compensation its domestic courts awarded. Moreover, the DRC itself admits that "the grounds" for compensation awarded by the Congolese courts "often remained brief" and that there were judgments "entirely unfounded or manifestly arbitrary."

6.114 A 2011 report by the Congolese Ministry of Justice and Human Rights and the UN Development Program ("UNDP") highlights a number of issues with Congolese courts' assessment of reparations in sexual violence cases in particular. Many judgments do not clearly indicate the basis for the amount of compensation, or explain the type of harm suffered, its extent or gravity. R67 Other judgments provide *ex aequo et bono* compensation even though the damages can be evaluated in an objective manner, for example when there are health issues as a result of sexual violence that can be evaluated by a medical professional. R68 Other judges simply have considered the amount requested by the victim to be "exaggerated"

⁸⁶⁶ DRCM, para. 7.08 (Translation by Counsel, original in French: "totalement dépourvus de motivation ou manifestement arbitraire".).

⁸⁶⁷ Ministère de la Justice et des Droits Humains, République Démocratique du Congo, & PNUD, Monitoring judiciaire 2010-2011, Rapport sur les données relatives à la réponse judiciaire aux cas de violences sexuelles à l'Est de la République démocratique du Congo (2010-2011), p. 55, Annex 65.

⁸⁶⁸ Ministère de la Justice et des Droits Humains, République Démocratique du Congo, & PNUD, Monitoring judiciaire 2010-2011, Rapport sur les données relatives à la réponse judiciaire aux cas de violences sexuelles à l'Est de la République démocratique du Congo (2010-2011), p. 56, Annex 65 citing to the Congolese Criminal Code, Art. 14 ("The Public Ministry officer or judge systematically must require a doctor and psychologist, in order to evaluate the state of the victim of sexual violence and to determine appropriate treatment and in order to evaluate the extent of the harm suffered and its subsequent aggravation") (Translation by Counsel, original in French: "l'officier du Ministère Public ou le juge requièrent d'office un médecin et un psychologue, afin d'apprécier l'état de la victime des violences sexuelles et de déterminer les soins appropriés ainsi que d'évaluer l'importance du préjudice subi par celle-ci et son aggravation ultérieure".).

and granted lesser amounts of compensation *ex aequo et bono* without any reasoning or justification. 869

6.115 With respect to its claims for displacement, the DRC offers literally nothing to support the numbers it claims. Damages are quantified based solely on what the DRC "deems" to be "reasonable". 870 Why should US\$ 300 should be the measure of damages for persons displaced as a result of deliberate violence and US\$ 100 for other displaced persons? The DRC does not explain. This is all the more curious in that the DRC asserts that the compensation claimed covers elements such as the "cost of care", "loss of income" and "loss of opportunities". Assuming that were true, the DRC should be able to justify the amounts claimed with something more than its own assertions of "reasonableness".

6.116 Uganda respectfully submits that the DRC's claim for compensation relating to persons allegedly displaced by the conflict should also be viewed in light of the fact that, rather than fleeing from Ugandan forces, many Congolese have sought refuge in Uganda. As stated in Chapter 2, Uganda has been the primary host country for Congolese refugees since the conflict.⁸⁷¹ Today, there are more than 236,500 Congolese refugees living in Uganda.⁸⁷² Moreover, Uganda's refugee and asylum policies are widely recognised as being among the most progressive in the world.⁸⁷³ Uganda provides all refugees, including those from the DRC, with land

_

⁸⁶⁹ Ministère de la Justice et des Droits Humains, République Démocratique du Congo, & PNUD, Monitoring judiciaire 2010-2011, Rapport sur les données relatives à la réponse judiciaire aux cas de violences sexuelles à l'Est de la République démocratique du Congo (2010-2011), p. 56, Annex 65

⁸⁷⁰ DRCM, paras. 7.30-7.31 (Translation by Counsel, original in French: "estime raisonnable".).

⁸⁷¹ U.N.H.C.R., U.N.H.C.R. Global Appeal 2004, Uganda (31 Dec. 2003), p. 113, Annex 17.

⁸⁷² U.N.H.C.R., *U.N.H.C.R.* warns of worsening displacement in Democratic Republic of Congo (24 Oct. 2017), Annex 34.

⁸⁷³ See Chapter 2, Section II(C).

to farm and access to the same services as Ugandan nationals, including education.⁸⁷⁴

6.117 Finally, with respect to all the amounts requested for all types of personal injuries it alleges, the DRC makes absolutely effort to evaluate those injuries based on victim-specific factors, as the Court's consistent jurisprudence, including the 2005 Judgment, require it to do. Although it claims that the compensation claimed covers various elements, such as the "cost of care", "loss of income", "loss of opportunities" and "the trauma resulting from the atrocities", the DRC offers no evidence of any kind on the exact nature of the injury and its consequences, such as through medical and mental health records, invoices or receipts concerning costs of care, or information on lost income.

6.118 Although, as stated, Uganda understands that there may be difficulties gathering evidence of harms that occurred in the context of an armed conflict, the *Lubanga* and *Katanga* reparations cases demonstrate that it is possible, at the very least, to present some supporting evidence regarding injuries suffered during an armed conflict, including in the DRC. Yet the DRC Memorial conspicuously provides *no* evidence of the type presented by the victims in the *Lubanga* and *Katanga* cases, or by Ethiopia and Eritrea before the EECC. There are no primary documents or witness statements attesting to facts based on first-hand information. As was true with respect to the DRC's claims in respect of loss of life, there are not just gaps in the DRC's evidence, there is a complete void.

*

⁸⁷⁴ Charles Yaxley, U.N.H.C.R., *Uganda hosts record 500,000 refugees and asylum-seekers* (18 Dec. 2015), Annex 29.

6.119 For the foregoing reasons, both the DRC's claims concerning the number of personal injuries resulting from Uganda's intervention and its attempts to place a value on those injuries are wholly speculative and unproven.

CHAPTER 7

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

- 7.1 The DRC seeks **US\$ 239,971,970**⁸⁷⁵ in compensation for property damages allegedly caused by Uganda. This amount includes:
 - US\$ 41,524,613 for Ituri;⁸⁷⁶
 - US\$ 17,323,998 for Kisangani;877
 - US\$ 5,526,527 for Beni;⁸⁷⁸
 - US\$ 2,680,000 for Butembo;⁸⁷⁹
 - US\$ 97.550 for Gemena;⁸⁸⁰
 - US\$ 97,412,090 for the National Electricity Company; 881 and
 - US\$ 69,417,192 for material damages to the Congolese Army. 882
- 7.2 As was true with respect to its claims discussed in the previous chapters, the DRC fails to sustain its burden of proving these property claims with

⁸⁷⁵ DRCM, para. 7.64. Uganda notes that the DRC failed to properly add the subheads of damages it claims. The sum of the individual heads of damages that the DRC claims for the different regions, the National Electricity Company and the Congolese Army is in fact US\$ 233,981,970, not the US\$ 239,971,970 stated.

⁸⁷⁶ *Ibid.*, para. 7.44.

⁸⁷⁷ *Ibid.*, para. 7.46.

⁸⁷⁸ *Ibid*.

⁸⁷⁹ *Ibid*.

⁸⁸⁰ *Ibid*.

⁸⁸¹ *Ibid.*, para. 7.47.

⁸⁸² *Ibid.*, para. 7.48.

convincing evidence that shows, with a high degree of certainty, the exact injury suffered as a result of specific internationally wrongful acts of Uganda, or the valuation of the alleged injury.⁸⁸³

7.3 **Section I** of this Chapter discusses the standard techniques for proving and placing a value on property damages in international law (which the DRC Memorial declines to follow). **Section II** then demonstrates that the DRC's property claims are unsupported by evidence and methodologically flawed.

I. The DRC's Claims Are Not Based on the Standard Method or Evidence for Proving the Existence and Valuation of Property Damage

- 7.4 This chapter principally focuses on the systematic legal and factual problems with the DRC's claims for property damage. At the outset, however, it is important to note that the DRC's claims are not based on the standard method or evidence for proving the existence and valuation of property damage that have long been employed by States and international courts and tribunals.
- 7.5 A survey of that practice indicates that proving compensation for property damage entails several elements, including: (1) identification of the specific property alleged to have been damaged, its location and the date of damage; (2) information as to the nature of the damage, such as whether the property was damaged in whole or in part; and (3) the fair market value, replacement value or liquidation value of the property.⁸⁸⁴

⁸⁸³ See Chapter 3 and Chapter 4.

⁸⁸⁴ See generally Edwin Borchard, Diplomatic Protection of Citizens Abroad or the Law of International Claims (1916); Jackson H. Ralston, The Law and Procedure of International Tribunals (1926); Marjorie M. Whiteman, Damages in International Law (1937)); A. H. Feller, The

7.6 Such elements typically are proven through a range of documentary evidence typically available with respect to property, such as receipts, detailed inventories, title documents, insurance records, government surveys and tax records, as well as evidence as to the property loss, such as insurance claims, tax adjustments, replacement estimates, or receipts for replacement or reconstruction of the property. In addition to documentary evidence, sworn affidavits of the property owner typically would set forth the specific circumstances of the property loss. In calculating the value of the property, evidence may be presented that establishes: (1) the capital value of the lost property; (2) compensation for loss of profits (*lucrum cessans*), if relevant; and (3) incidental expenses associated with the loss of property.

7.7 This approach can be seen in the Court's award of compensation for property damage in the *Corfu Channel*⁸⁸⁵ and *Diallo*⁸⁸⁶ cases, as discussed in Chapter 3, and in the pleadings before the Court in cases such as *Elettronica Sicula S.p.A. (ELSI)*.⁸⁸⁷ So, too, can it be seen in the practice of regional human rights courts⁸⁸⁸ and in claims settlement agreements negotiated between States.⁸⁸⁹ In recent years, the methodology and evidence necessary to establish property loss

Mexican Claims Commissions, 1923-1934: A Study in the Law and Procedure of International Tribunals (1935); Green Hackworth, ed., Digest of International Law, Vol. 5 (1943); Richard B. Lillich, ed., International Law of State Responsibility for Injuries to Aliens (1983); Christine D. Gray, Judicial Remedies in International Law (1987); Richard B. Lilich, ed., The Valuation of Nationalized Property in International Law (1972).

⁸⁸⁵ Corfu Channel (Compensation, 1949).

⁸⁸⁶ Diallo (2012).

⁸⁸⁷ Case Concerning Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy), Judgment, I.C.J. Reports 1989, p. 15.

⁸⁸⁸ See Dinah Shelton, Remedies in International Human Rights Law (2015), pp. 315-375.

⁸⁸⁹ See generally Richard B. Lilich, International Claims: Postwar British Practice (1967); Burns H. Weston, International Claims: Postwar French Practice (1971); B. Weston & R. Lillich, International Claims: Their Settlement by Lump Sum Agreement (1975); Burns H. Weston et al., International Claims: Their Settlement by Lump Sum Agreements, 1975-1995 (1999).

has been extensively developed through the jurisprudence of the Iran-U.S. Claims Tribunal⁸⁹⁰ and in myriad cases before *ad hoc* investor-State arbitral tribunals.⁸⁹¹

7.8 Alternative techniques may be possible for addressing mass claims for property damage before complex claims commissions but, as explained in Chapter 3, those techniques are not appropriate in the context of inter-State litigation before an international court. Uganda is mindful that gathering evidence of property damage that occurred in remote areas during an armed conflict is not without its difficulties. Yet the central point is that the DRC has provided absolutely *no* evidence of the type normally expected to prove the existence and valuation of specific harm in the form of property damage.

II. The DRC Has Failed to Prove the Extent of the Property Damages It Claims, and Its Valuation of Those Damages Is Methodologically Flawed

- 7.9 Before turning to the specifics of the DRC's claims concerning property damage, it is useful to recall the relevant findings in the Court's 2005 Judgment on the merits.
- 7.10 In 2005, the Court found that Uganda had violated the principles of non-use of force in international relations and non-intervention. 892 The Court did not,

⁸⁹⁰ See generally George H. Aldrich, The Jurisprudence of the Iran-United States Claims Tribunal (Oct. 1996); Charles Nelson Brower, The Iran-United States Claims Tribunal (12 Feb. 1998); Richard B. Lillich et al., Richard B. Lillich et al., The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility (1998).

⁸⁹¹ See generally Borzu Sabahi, Compensation and Restitution in Investor-State Arbitration: Principles and Practice (2011); Muthucumaraswamy Sornarajah, The International Law of Foreign Investment, (2017).

⁸⁹² *Armed Activities* (2005), para. 345(1).

however, indicate that those violations resulted in any of the property losses now claimed by the DRC.

7.11 The Court also found that the conduct of Uganda's armed forces violated its obligations under human rights law and international humanitarian law. 893 In that context, the *disposif* of the 2005 Judgment held that Uganda "destroyed villages and civilian buildings". While the Court also found that Uganda failed "to distinguish between civilian and military targets and to protect the civilian population in fighting with other combatants," "incited ethnic conflict" and "failed to take measures to put an end to the conflict," the Court's *dispositif* does not identify any specific property harm resulting from those violations. The *dispositif* to the 2005 Judgment thus contains no express finding that Uganda's armed forces caused harm to the property of the DRC's National Electricity Company or other State companies, or Congolese armed forces.

7.12 Finally, the Court found that Uganda failed, as an occupying Power in Ituri district, to take measures to respect and ensure respect for human rights and international humanitarian law.⁸⁹⁴ Here again, the *dispositif* does not identify specific types of property harm that resulted from such conduct, such as looting (even though elsewhere in the *dispositif* the Court expressly identified "looting" in the context of the exploitation of natural resources).⁸⁹⁵

7.13 In the text of the 2005 Judgment, the basis for the Court's finding concerning "destroyed villages and civilian buildings" appears to have been four

⁸⁹³ *Ibid.*, para. 345(2).

⁸⁹⁴ *Ibid.*, para. 345(3).

⁸⁹⁵ *Ibid.*, para. 345(4).

UN reports and a resolution of the UN Security Council, ⁸⁹⁶ three of which were focused on Beni, Kisangani or Ituri, and two of which addressed conduct by both Rwanda and Uganda. The Court's references to those reports mention only property damage and destruction of houses, villages and localities but, again, make no reference to other kinds of property harm, such as to the property of the DRC's National Electricity Company, other State companies or Congolese armed forces.

7.14 With respect to Uganda's failure to protect the civilian population and to distinguish between combatants and non-combatants, the text of the 2005 Judgment cites to two UN reports. With respect to property harm, the Court noted that one report (concerning Kisangani) suggested that, as a result of the conduct of both Rwanda and Uganda, more than 4,000 houses were partially damaged, destroyed or made uninhabitable; 69 schools shelled; other public buildings badly damaged; and medical facilities and the cathedral damaged. ⁸⁹⁷ A second report (concerning Ituri) stated that houses and shops were looted and houses were shelled as a result of conduct by both the UPC and Uganda. ⁸⁹⁸ The Court thus identified only two localities relevant to this aspect of its findings.

7.15 With respect to property loss from the incitement of ethnic conflict, the text of the 2005 Judgment cites to three UN reports, which were said to be corroborated by a Human Rights Watch report. With respect to property harm, the Court only noted that one of those reports identified Uganda as encouraging and supporting the seizure of land by the Hema.⁸⁹⁹

896 *Ibid.*, para. 206.

⁸⁹⁷ *Ibid.*, para. 208.

⁸⁹⁸ Ibid.

⁸⁹⁹ *Ibid.*, para. 209.

7.16 The findings by the Court concerning property damages were therefore very *general* in nature. Consequently, they cannot form a basis for identifying or valuing *specific* damages attributable to Uganda. Uganda has previously recalled that in 2005 the Court expressly placed the burden on the DRC to prove the exact injury suffered as a result of the specific actions of Uganda constituting internationally wrongful acts for which it is responsible. As demonstrated below, the DRC Memorial does not meet this with respect to any of the alleged property damages, whether in Ituri, Kisangani or any other areas.

A. ITURI

7.17 The DRC claims US\$ 41,524,613 in compensation for property damages caused "by the various protagonists" in Ituri during its occupation by Uganda.⁹⁰⁰ The claimed amount includes:

- US\$ 12,956,200 for destruction of houses;
- US\$ 21,250,000 for destruction of infrastructure; and
- US\$ 7,318,413 for looting. 901

There is no basis to award the compensation the DRC seeks.

7.18 As discussed below, the DRC does not even attempt to prove that any of the claimed damages were directly caused by Uganda. Instead, it seeks to ascribe to Uganda responsibility for damages caused by "the various protagonists" in Ituri based on the bare allegation that those damages would not have occurred had

⁹⁰⁰ DRCM, para. 3.45 (Translation by Counsel, original in French: "par les différents protagonistes".).

⁹⁰¹ *Ibid.*, para. 7.43.

Uganda fulfilled its duties as an occupying Power. Yet the DRC offers no evidence proving specific measures that Uganda failed to take in Ituri or establishing a direct causal link between the failure to take such measures and particular damages.

7.19 Nor has the DRC adduced any evidence reliably proving the valuation of such damages. None of the claimed amounts has support in credible, still less convincing, evidence. The only thing the DRC Memorial offers are summary tables untethered to evidence of any kind. This makes it impossible to determine with any level of certainty that the compensation claimed corresponds to actual damages.

1. Houses

7.20 The DRC contends that the number of houses damaged "as a result of the non-performance by Uganda of its obligations as the occupying Power of Ituri, between 1998 and 2003, is a total of 8,693". 902 It further asserts that "one can reasonably estimate that those houses can be distinguished pursuant to the following distribution allocation: 5% for luxury houses, 15 % for medium houses and 80% for simple houses". 903

7.21 Based on this ostensible "distribution allocation", the DRC seeks compensation for damages allegedly caused to:

• 435 luxury houses;

⁹⁰² *Ibid.*, para. 3.45(c) (Translation by Counsel, original in French: "en conséquence du manquement par l'Ouganda à ses obligations en tant que puissance occupante de l'Ituri, entre 1998 et 2003, se monte à 8.693.").

⁹⁰³ *Ibid.*, para. 7.35 (Translation by Counsel, original in French: "on peut raisonnablement estimer que les habitations peuvent être distinguées en fonction de la clé de répartition suivante: 5% d'habitations de luxe, 15% d'habitations intermédiaires, et 80% d'habitations légères".).

- 1,304 medium houses; and
- 6,954 small/simple houses.⁹⁰⁴

7.22 To quantify these ostensible damages, the DRC applies a three-tier scale allegedly "created on the basis of the cost to rebuild the houses", which the DRC claims to be:

- US\$ 10,000 for a luxury house;
- US\$ 5,000 for a medium house; and
- US\$ 300 for a small/simple house. 905

7.23 The DRC then multiplies the number of damaged houses by their nominal rebuilding costs:

- US\$ 4,350,000 for luxury houses (435 x US\$ 10,000);
- US\$ 6,520,000 for medium houses (1304 x US\$ 5,000); and
- US\$ 2,086,200 for small/simple houses (6,954 x US\$ 300). 906

The total compensation claimed under this head of damages is thus US\$ 12,956,200.907

⁹⁰⁴ *Ibid.*, paras. 7.35, 3.45(c).

⁹⁰⁵ *Ibid.*, para. 7.35 (Translation by Counsel, original in French: "établi sur la base de la valeur de reconstruction des habitations en cause.").

⁹⁰⁶ *Ibid.*, para. 7.36.

⁹⁰⁷ *Ibid.*, para. 7.37.

7.24 At each step of the way, the numbers on which the DRC bases its calculations are essentially made up; they are not based on any serious evidence. As such, the claim is unfounded.

7.25 As regards the *extent* of damages, the DRC submits no reliable evidence to support its contention that 8,693 houses were damaged in Ituri. The number appears wholly arbitrary. So, too, does the "distribution allocation" of houses into the categories of "luxury", "medium" and "small/simple."

7.26 The DRC relies entirely on Annex 1.3 to the Memorial to support these numbers. 908 That annex, however, is nothing more than a summary table entitled "Valuation of property damages in Ituri" ostensibly based on "the investigations conducted by the DRC". 909

7.27 This table contains no evidence on which the Court can rely. No building is identified, even with respect to a general location. No type of damage, whether partial or total, is indicated. (Apparently, all houses were either completely unharmed or completely destroyed, with nothing in between.) Nor is the day, month or even year of the damage indicated.

7.28 Equally important, there is also no proof that any of this alleged damage was caused by the UPDF or resulted from Uganda's failure to exercise due diligence as an occupying Power. The DRC appears simply to assume that any damage to houses occurring in Ituri at unspecified times and locations is attributable to Uganda. Annex 1.3 therefore affords no basis to prove with any

⁹⁰⁸ *Ibid.*, para. 3.45(c), notes 313-316.

⁹⁰⁹ *Ibid.*, para. 3.45(c) (Translation by Counsel, original in French: "les enquêtes diligentées par la RDC".); "Evaluation Pertes des Biens" in file *Victimes PerteBien ITURI*, DRCM Annex 1.3.

degree of confidence, much less certainty, the extent of damages that may have been caused by Uganda's wrongful acts.

- 7.29 As regards the *valuation* of damages, the DRC has equally failed to adduce any evidence showing that the putative three-tier scale for rebuilding costs reflects actual rebuilding costs. No documents or, indeed, evidence of any kind is offered to establish the costs of rebuilding even a single house. Simply put, the alleged repair/rebuilding costs appear entirely arbitrary.
- 7.30 The credibility of this aspect of the DRC's claims is further undermined by simple arithmetic errors that have the effect of inflating the quantum of damages sought. In many instances, the DRC erroneously multiplies its own figures, as illustrated in the examples excerpted from the DRC's tables below.

VICT	ME: NESTOR WINGI NZILA	COPIE DE ITUR	COPIE DE ITURI_SUITE5_CCF07032016_040	
N°	LIBELLE BIEN	PRIX UNITAIRE	QUANTITE	PRIX TOTAL
1	CHAINE MUSICALE	150.0	1	150.0
2	CHAISE	20.0	12	240.0
3	COUSSIN	10.0	24	240.0
4	FRIGO	2000.0	1	2000.0
5	HABITATION MOYENNE	5000.0	2	12000.0

910

⁹¹⁰ "Evaluation Pertes des Biens" in file *Victimes_PerteBien_ITURI*, p. 137, DRCM Annex 1.3.

VICTIME :	ARIMARI TUKU ISAAC	COPIE DE ITURI	_SUITE5_CCF07032016_0	32
N°	LIBELLE BIEN	PRIX UNITAIRE	QUANTITE	PRIX TOTAL
1	CHEVRE	40.0	15	600.0
2	COCHON	80.0	4	320.0
3	HABITATION DE LUXE	10000.0	2	30000.0
4	VACHE	4000.0	2	8000.0
			Total Partiel:	38920.0\$

911

VIC	TIME :	LUMUMBA KOLIRA GABRIEL	ITURI_SUITE7_CCF08032016_0001_011		
N°		LIBELLE BIEN	PRIX UNITAIRE	QUANTITE	PRIX TOTAL
1		ARGENT EN ESPECE	770.0	1	770.0
2		CANARD	15.0	5	75.0
3		CHAT	10.0	1	10.0
4		CHEVRE	50.0	4	200.0
5		CHIEN	20.0	2	40.0
6		COCHON	80.0	3	240.0
7		HABITATION DE LUXE	10000.0	2	60000.0
8		MACHINE A COUDRE	150.0	2	300.0
9		PIED DE CAFE	50.0	10000	500000.0
10		POULE	5.0	9	45.0
11		VACHE	300.0	7	2100.0
-			11,000	Total Partiel:	563780.0 <i>s</i>

912

- 7.31 In an effort to provide additional support for its claims concerning property loss, the DRC Memorial also points to several incidents allegedly involving Ugandan forces. It does this not for purposes of proving specific property losses attributable to Uganda and the quantification of those loss, but rather for purposes of "illustrating" that some harm occurred. Yet, even here, the DRC's assertions frequently lack credibility.
- 7.32 For example, in paragraph 3.42 of its Memorial, the DRC lists incidents of property destruction in Ituri, some of which include specific numbers of allegedly

⁹¹¹ *Ibid.*, p. 9.

⁹¹² *Ibid.*, p. 99.

damaged houses. Paragraph 3.42(j) asserts that "from the locality of Zumbe, which was attacked on October 15 and 16, 2002 by Hema militiamen accompanied by Ugandan soldiers, 'the attackers burned all the surrounding villages;' at that time, 'more than 500 buildings, including health centers and schools' were destroyed". The DRC cites the UN Mapping Report for support. But that report neither mentions Uganda in the context of the mentioned incident nor ascribes any of the resulting damages to Uganda. To the contrary, the UN Mapping Report expressly links the damages to UPC militiamen, *not* Uganda:

"Between 15 and 16 October 2002, UPC militiamen killed at least 180 people, including civilians, in Zumbe in the Walendu Tatsi community. The militiamen also raped at least 50 women. Most of the victims were killed with machetes or spears. Some were shot dead. Some survived but were badly mutilated. Having looted large amounts of property and stolen 1,500 head of cattle, the UPC troops set fire to the village, destroying more than 500 buildings, including health centres and schools. Zumbe was an FRPI fiefdom". 914

7.33 Even if the DRC had correctly cited to this incident, it would still be of no assistance to the DRC. The Court previously made clear that the conduct of rebel groups is, without more, not attributable to Uganda. While damages caused by rebels in Ituri that was the direct result of Uganda's failure to take specific measures

_

⁹¹³ DRCM, para. 3.42(j) (Translation by Counsel, original in French: "à partir de la localité de Zumbe, attaquée les 15 et 16 octobre 2002 par des milices hema accompagnées de soldats ougandais, 'les attaquants ont incendié tous les villages voisins'; à cette occasion, 'plus de 500 édifices, parmi lesquels des centres sanitaires et des écoles' ont été détruits".) (emphasis added).

⁹¹⁴ U.N. Mapping Report, para. 414 (emphasis added), Annex 25.

as an occupying Power might be compensable, the DRC presents no evidence in support of any such failure in relation to the alleged harm to houses in Ituri. 915

7.34 In conclusion, because the DRC has failed to prove the exact damage to houses in Ituri that was suffered as a result of specific actions of Uganda constituting internationally wrongful acts, there is no basis to award compensation to the DRC for this head of damages.

2. Infrastructure

7.35 The DRC also seeks compensation for damages to infrastructure in Ituri. Specifically, it claims US\$ 21,250,000 in compensation for the alleged destruction of 200 schools, 50 health facilities and 50 office buildings. The amount of compensation claimed is based on the putative "average cost" of those facilities, which the DRC says "may be estimated" at US\$ 75,000 for an educational facility, US\$ 75,000 for a health facility and US\$ 50,000 for an office building. There is

⁹¹⁵ For the same reasons, the DRC's other *illustrative* incidents related to damages caused by rebels in Ituri cannot form a basis of compensation even if the DRC had elected to use them for that purpose. This specifically relates to illustrative incidents mentioned in paragraphs 3.42 (b), (c), (f), (h), (i), (j), (k), (l) of the DRC Memorial, which mention damages that rebels caused to houses, schools, health care facilities and administrative buildings. It also bears emphasis no damage resulting from those illustrative incidents is ascribed to Uganda's wrongful actions or omissions to take specific measures as an occupying Power in Ituri.

⁹¹⁶ DRCM, paras. 7.39-7.42.

⁹¹⁷ *Ibid.*, para. 7.39. As regards schools, the DRC claims that "overall, the average cost of an educational facility may be estimated at US\$ 75,000" (Translation by Counsel, original in French: "Globalement, la valeur moyenne d'une infrastructure d'enseignement peut être estimée à 75.000 dollars des Etats-Unis".). The total amount of compensation claimed by the DRC for this item "is thus 200 x US\$ 75,000; that is, US\$ 15,000,000 (fifteen million United States dollars)" (Translation by Counsel, original in French: "est donc de 200 x 75.000 dollars, soit 15.000.000 (quinze millions) dollars des Etats-Unis".).

In regards to health facilities, the DRC claims that "the average cost of a health facility may be estimated at US\$ 75,000" (Translation by Counsel, original in French: "Globalement, la valeur moyenne d'une infrastructure de santé peut être estimée à 75.000 dollars des Etats-Unis".). The total amount of compensation claimed by the DRC for this item "is thus 50 x US\$ 75,000; that is,

no basis on which the Court can award the compensation claimed because the DRC has offered *no* evidence as to the existence or valuation of the alleged damages, nor has it made any effort to prove that the damages directly resulted from Uganda's wrongful acts.

7.36 The DRC's assertions concerning the *extent* of the damages (i.e., the number of schools, health facilities and office buildings destroyed) are unfounded.

7.37 As regards **educational facilities**, the DRC cites to the 2003 Second Special Report on the MONUC (the "2003 Second Special Report") as support for the assertion that Uganda is responsible for the destruction of 200 schools. That report, however, does not support the DRC's claim. It does nothing more than observe generally, without referring to any evidence, that during the entire armed conflict in the DRC, 200 schools were damaged. It says nothing about the damage having been caused by UPDF soldiers or having resulted from Uganda's failure to perform its obligations as the occupying Power.

US\$ 3,750,000 (three million seven hundred fifty thousand United States dollars)" (Translation by Counsel, original in French: "est donc de 50 x 75.000 dollars, soit 3.750.000 (trois millions sept cent cinquante mille) dollars des Etats-Unis".); DRCM, para. 7.40.

In regards to office buildings, the DRC claims that "overall, the average cost of an office building may be estimated at US\$ 50,000." (Translation by Counsel, original in French: "Globalement, la valeur moyenne d'une infrastructure administrative peut être estimée à 50.000 dollars des Etats-Unis".). The total amount of compensation claimed by the DRC for this item "is thus 50 x US\$ 50,000; that is, US\$ 2,500,000 (two million five hundred thousand United States dollars)" (Translation by Counsel, original in French: "est donc de 50 x 50.000 dollars, soit 2.500.000 (deux millions cinq cent mille) dollars des Etats-Unis".); DRCM, para. 7.41.

⁹¹⁸ *Ibid.*, para. 3.45(a).

7.38 The DRC also fails to show that the number it selects from the 2003 Second Special Report is corroborated by other credible sources. 919 Notably, the UN Mapping Report, which examined the 2003 Second Special Report (among many other sources), does not mention any number of destroyed schools, let alone that Uganda is responsible for the destruction any school.

7.39 Here again, the number on which the DRC bases its claims is contradicted by its own "investigations". Annex 1.3 to the DRC Memorial lists only 18 schools and 12 kindergartens ("*jardin scolaire*") as having been damaged. ⁹²⁰ But even these vastly smaller numbers as presented in the table on "*Evaluation Pertes des Biens*" are facially unfounded; no underlying documentation is presented to support the listed information. There is also no indication of the location of the schools, their size or other relevant information.

7.40 Moreover, even if the numbers were somehow supported (*quod non*), the DRC offers no evidence proving that the table reflects damage causally linked to Uganda's wrongful conduct. No supporting information is adduced with respect to when the damage occurred, who caused it, the extent of the damage or the cost of repair or reconstruction.

7.41 As regards the alleged number of damaged **health facilities**, the DRC does not go beyond the bare assertion that "on the basis of the data that it has available to it, the [DRC] estimates that it is reasonable to use the number of 50 dispensaries

⁹¹⁹ Armed Activities (2005), para. 205 (evidence contained in United Nations documents may be taken into account "to the extent that they are of probative value and are corroborated, if necessary, by other credible sources".).

^{920 &}quot;Evaluation Pertes des Biens" in file Victimes PerteBien ITURI, DRCM Annex 1.3.

and hospitals". 921 The DRC, however, presents no evidence on which this Court can conclude that 50 healthcare facilities in fact were destroyed, or that their destruction directly resulted from specific wrongful conduct attributable to Uganda. Here, once more, the DRC Memorial contains no documentation or other information establishing when the damage occurred, who caused it, the extent of the damage or the cost of repair/reconstruction

7.42 To the contrary, the information the DRC does offer shows a different picture. The table on "Valuation of property damages in Ituri" included in Annex 1.3 refers to the destruction of just seven hospitals and one dispensary. 922 Even then, the eight healthcare facilities are not identified, the extent of their damages (whether minimal, partial or total) is not indicated, and the causal link to the specific acts of is not established. Moreover, even if, *quod non*, it was accepted as reliable and true, the summary table does not afford a basis for compensation.

7.43 With respect to the alleged destruction of 50 **administrative buildings** ("offices, lodgings of public officials, prisons, etc."),⁹²³ the DRC's claim is equally baseless. The DRC itself states that "the data sheets prepared by the investigators of the DRC" list only "twelve specific cases of destruction".⁹²⁴ But, the DRC contends, this is allegedly only "a fraction of the damages that were actually

⁹²¹ DRCM, para. 3.45 (b) (Translation by Counsel, original in French: "sur la base des données dont elle dispose, la République démocratique du Congo estime raisonnable de retenir le nombre de 50 dispensaires et hôpitaux".).

⁹²² "Evaluation Pertes des Biens" in file *Victimes_PerteBien_ITURI*, pp. 41-42, 58, DRCM Annex 1.3.

⁹²³ DRCM, para. 3.45(c) (Translation by Counsel, original in French: "bureaux, logements de fonctionnaires, prisons, etc.".).

⁹²⁴ *Ibid.* (Translation by Counsel, original in French: "les fiches établies par les enquêteurs de la RDC"; "[d]ouze cas spécifiques de destruction".).

experienced". 925 The DRC therefore "deems it reasonable to use... the number of 50 administrative buildings destroyed in the Ituri region from 1998 to 2003". 926

7.44 As with the other elements of the DRC's claims, such subjective assertions of reasonableness cannot form a basis for the award of damages. 927 The DRC has entirely failed to meet the burden the Court imposed on it in 2005: to prove the exact injury directly caused by specific wrongful conduct attributable to Uganda. As elsewhere, the DRC offers no documentation showing when this property damage occurred, who caused it, the extent of the damage or the cost of repair/reconstruction.

7.45 The DRC has not only failed to prove that Uganda is responsible for the destruction of 200 schools, 50 health facilities and 50 office buildings; it has also failed to prove the reliability of its ostensible "valuation methodology".

7.46 The DRC provides no explanation, much less evidence, to support the alleged "average costs" for the damages claimed—US\$ 75,000 for an educational facility, the same US\$ 75,000 for a health facility and US\$ 50,000 for an office building. Again, these numbers appear to have been selected at random for the purpose of this litigation. They do not even purport to be grounded in the actual repair or reconstruction costs for the allegedly damaged schools, health facilities and office buildings.

⁹²⁵ *Ibid.* (Translation by Counsel, original in French: "une fraction des dommages de cet ordre qui ont été réellement subis".).

⁹²⁶ *Ibid.* (Translation by Counsel, original in French: "La RDC estime raisonnable de retenir ... le nombre de 50 bâtiments administratifs détruits dans la région de l'Ituri entre 1998 et 2003".).

⁹²⁷ *Ibid*.

7.47 This is all the more remarkable in that such information is entirely within the DRC's control. The DRC could have and should have surveyed such damage and prepared detailed estimates as to the specific costs of repairing or reconstructing such buildings. If any such repairs or reconstruction had actually been done, the DRC can also be expected to have documentary evidence proving costs incurred. Yet the DRC provides no such evidence. Instead, it invites the Court simply to assume the nature and scope of such damage, and a connection to the specific acts of Uganda.

7.48 The DRC has failed to prove the exact damage to infrastructure in Ituri that was suffered as a result of specific actions of Uganda constituting internationally wrongful acts. There is, therefore, no basis to award the compensation the DRC seeks under this head of damages.

3. Movable Property

7.49 The DRC claims US\$ 7,318,413 in compensation for property allegedly looted as a result of Uganda's non-compliance with its obligations as an occupying Power in Ituri. The claimed amount, the DRC contends, is supported by "a detailed list of the property looted" prepared on the basis of "worksheets created by the DRC's investigators". 930

929 H : 1 2 49

⁹²⁸ *Ibid.*, para. 7.43.

⁹²⁹ *Ibid.*, para. 3.48 (Translation by Counsel, original in French: "une liste détaillée des biens pillés... est reprise en annexe du présent chapitre".).

⁹³⁰ *Ibid.*, para. 7.43 (Translation by Counsel, original in French: "fiches établies par les enquêteurs de la RDC".).

- 7.50 The DRC states that this "detailed list" is "attached in the annex to [Chapter 3]" of the Memorial. 931 There is, however, no such annex to that chapter. The DRC appears to be referring instead to Annex 1.3, which contains a file entitled "Evaluation Pertes des Biens", and consists of a summary table purportedly listing: (1) the victims of looting; (2) the property looted; and (3) its value. 932
- 7.51 Here as elsewhere, however, the DRC offers no supporting evidence showing that the property listed in its summary table was actually looted, or that it was looted by UPDF soldiers or as a result of Uganda's non-performance of its obligations as an occupying Power. For this reason alone, the DRC cannot recover the compensation it seeks.
- 7.52 This element of the DRC's claim must be rejected for another reason as well: the DRC's valuation of the property listed in the summary table appears wholly arbitrary. The DRC has not adduced even a single document proving the ownership and value of any of the allegedly looted property. Nor has the DRC explained the basis for the nominal values it assigns to the various items of property listed in the summary table.
- 7.53 In nearly one thousand instances of alleged looting listed in the table "Victimes_PerteBien_ITURI", the DRC does not even identify the affected property. Instead, it uses vague descriptions such as "various property items" ("divers biens"), "merchandise", "furniture" or "kitchen utensils", without particularising actual items of property. 933

⁹³¹ *Ibid.*, para. 3.48.

^{932 &}quot;Evaluation Pertes des Biens" in file Victimes PerteBien ITURI, DRCM Annex 1.3.

⁹³³ "Evaluation Pertes des Biens" in file *Victimes_PerteBien_ITURI*, DRCM Annex 1.3 (Translation by Counsel, original in French: "marchandise"; "meuble"; "ustensils de cuisine"). There are for

7.54 For each of these unspecified property items, the DRC also assigns, without proof, markedly high monetary values, ranging from US\$ 10,000 to over US\$ 1,000,000 in the case of "various property items". The DRC claims more than US\$ 2 million in compensation for the ostensible looting of "various property items" alone. 934

7.55 DRC's "detailed list of the property looted" also reveals a notable uniformity in the values of property items that defies credibility. There are, for example, more than 400 instances of property generically described as "furniture", which allegedly belonged to different victims from different locations. Nevertheless, in each and every one of these cases, the furniture is uniformly valued at an identical price (US\$ 5,000). 935 The DRC similarly places a uniform value on other property items, without regard to location or the identity of the alleged victim. 936 These include vehicles valued at US\$ 10,000 in nearly all instances and

_

example, 82 instances of "marchandise;" 463 instances of "meuble;" and 43 instances of "divers biens"

⁹³⁴ In this category, many claims range between US\$ 10,000 and US\$ 100,000; others between US\$ 100,000 and US\$ 1,000,000; one is above US\$ 1,000,000. Yet none of those claims is accompanied by any explanation and proof as to the actual extent of damages directly caused by Uganda's wrongful acts and the method of their valuation. *See, e.g.,* "Evaluation Pertes des Biens" in file *Victimes_PerteBien_ITURI*, pp. 49, 60, 169, DRCM Annex 1.3.

⁹³⁵ In some instances, furniture ("meuble") is valued at US\$ 5,000, US\$ 8,000 and US\$ 10,000. But those "valuations" strain credulity. For example, at page 15 of the summary valuation table, the DRC alleges that some unspecified furniture was allegedly destroyed as a result of alleged destruction of a small/simple house ("habitation legère"). The damage to "furniture", the DRC claims, is "assessed" to be US\$ 10,000. On its face, it is implausible that small/simple house, valued at US\$ 300, could have been furnished with items exceeding the value of the house in more than 30 times. *See* "Evaluation Pertes des Biens" in file *Victimes_PerteBien_ITURI*, p. 15, DRCM Annex 1.3.

^{936 &}quot;Evaluation Pertes des Biens" in file *Victimes_PerteBien_ITURI*, DRCM Annex 1.3. It bears emphasis that unspecified property generically stated as "merchandise" is valued in all instances at the same price of US\$ 1,000; cows ("vache") are uniformly valued at US\$ 300 per one animal in more than 300 instances; vehicles ("véhicule") in nearly all cases are valued at US\$ 10,000 per item regardless of their condition and location; bicycles ("vélo") at US\$ 100 per bicycle; televisions ("télévision") are valued at US\$ 250 in all cases; goats ("chevre") are valued at US\$ 100 in more than 500 instances; and utensils ("ustencils de cuisine") are valued at US\$ \$200 in nearly all cases.

televisions, uniformly valued at US\$ 250.⁹³⁷ In other words, the DRC's valuations numbers are not based on particularised information and do not reflect actual damages; they appear instead to have been selected at random by the DRC for use in this litigation.

7.56 All of this results in exorbitant and arbitrary claims. Just for allegedly looted "furniture", for example, the DRC claims compensation totaling US\$ 2 million. Instead of being supported by evidence and based on credible valuation methodologies, the DRC's claim for compensation for looting is an edifice of speculation built on a foundation of conjecture. Indeed, the DRC's claim is so arbitrary and so speculative, that it nowhere takes the trouble to explain how it arrived at the figure for the total amount of compensation it seeks for looting (US\$ 7,318,413). Uganda has diligently searched and searched again for the basis on which this amount was calculated but it is nowhere to be found in the DRC Memorial or its annexes.

7.57 Because the DRC has failed to prove the exact damage for looted property in Ituri suffered as a result of specific actions of Uganda constituting internationally wrongful acts, there is no basis for the award compensation the DRC seeks under this head of damages.

B. KISANGANI

7.58 The DRC claims US\$ 17,323,998 in compensation for property damage allegedly suffered in Kisangani. This amount, according to the DRC, covers six categories: damage to houses; looting or destruction of personal property; destruction of educational and medical institutions; damage to places of worship;

^{937 &}quot;Evaluation Pertes des Biens" in file Victimes PerteBien ITURI, DRCM Annex 1.3.

damage to public companies; and damage to private companies.⁹³⁸ The DRC Memorial nowhere explains what portion of the total sought is apportioned among these six categories, a failure that makes it impossible to determine how and on what basis the DRC arrives at the total amount claimed (US\$ 17,323,998).

7.59 To this unexplained sum, the DRC also adds nearly US\$ 100 million (US\$ 97,412,090, to be precise) for damages allegedly caused to the National Electricity Company. 939

7.60 As will be demonstrated below, the DRC has failed to prove any property damage in Kisangani that was directly caused by Uganda's specific actions constituting internationally wrongful acts. It has equally failed to prove the value of any such property loss.

1. Houses

7.61 The DRC does not specify the amount of compensation it seeks for damages allegedly caused to houses in Kisangani. Nor can the amount sought be inferred from the materials annexed to the DRC Memorial. Indeed, those materials offer conflicting accounts of the number of houses allegedly damaged, indicate no clear valuation methodology and fail to show that any of the putative damages resulted from specific wrongful acts of Uganda.

7.62 The DRC Memorial asserts that, in Kisangani, Uganda caused damages to "100 [houses] in August 1999, 100 in May 2000, and 4,083 in June 2000, that is, *a*

301

⁹³⁸ DRCM, para. 4.71.

⁹³⁹ *Ibid.*, para. 7.47.

rounded total of 4,300 damaged houses". 940 This claim has no support in the cited sources, however.

7.63 With respect to the damage or destruction of "100 houses in August 1999 and 100 in May 2000," the sole basis for alleging that such property loss was caused by Uganda is Annex 4.3 of the Memorial. In that annex, the DRC provides excerpts selectively clipped from reports by the DRC-based NGOs Groupe Lotus and Groupe Justice et Libération. ⁹⁴¹

7.64 Yet the excerpts contained in Annex 4.3 do not state the number of houses damaged in August 1999 and mention only 21 houses allegedly damaged in May 2000. At best, the DRC's own evidence therefore only supports a total number of 21 houses during the relevant period, not 200 as the DRC claims in its Memorial. It is unclear on what basis the DRC selected 200 as the appropriate figure.

7.65 Moreover, the annexed excerpts of the cited NGO reports did not even purport ascribe responsibility for the damage to those 21 houses to Uganda. Rather, the reports expressly refer to damages caused by Rwandan and Burundian troops,

⁹⁴⁰ *Ibid.*, para. 4.68 (Translation by Counsel, original in French: "100 en août 1999, 100 en mai 2000 et 4083 en juin 2000 soit un total arrondi de 4.300 logements endommagés") (emphasis added). The nominal total of houses damaged is, of course, 4,283, not 4,300. Here, as elsewhere, the DRC simply rounds numbers up when it suits its convenience.

⁹⁴¹ See, e.g., Atteintes aux biens à Kisangani, pp. 3-4, DRCM Annex 4.3.

as well as Congolese rebels, ⁹⁴² and stress the role of "the DRC [g]overnment ... i[n] favoring ... the violation of [the] rights" of the Kisangani population. ⁹⁴³

7.66 With respect to the damage allegedly caused to 4,083 houses in June 2000, the DRC mistakenly relies on the UN Inter-Agency Report. That report notably does not attribute responsibility for the stated damages to Uganda; it merely makes general observations on the damages caused during military confrontations.

7.67 The DRC also fails to show that the number it selects from the UN Inter-Agency Report is corroborated by other, credible sources. He is telling that the Groupe Lotus—the DRC's preferred source when it yields higher numbers—stated that in June 2000 456 houses—roughly 1/10th the number claimed by the DRC—were damaged. Even then, the Groupe Lotus does not ascribe responsibility for those damages to Uganda. He is selects from the UN Inter-Agency 944 In this respect, it is telling that the Groupe Lotus higher numbers—stated that in June 2000 456 houses—roughly 1/10th the number claimed by the DRC—were damaged. Even then, the Groupe Lotus does not ascribe responsibility for those damages to Uganda.

7.68 The DRC's claim that Uganda caused damage to 4,300 houses in Kisangani is also refuted by other materials annexed to the DRC Memorial. For example, the

_

⁹⁴² See, e.g., Groupe Lotus, Les conséquences de la contraction des alliances et factions rebelles au nord-est de la RDC – La guerre de Kisangani, Sept. 1999, p. 7, DRCM Annex 4.18; Groupe Lotus, Les rivalités Ougando-Rwandaises à Kisangani (Mai 2000), p. 3, DRCM Annex 4.19; Groupe Lotus, Rapport sur la guerre de six jours à Kisangani (Juillet 2000), p. 4, DRCM Annex 4.20; Conseil de sécurité, Rapport de la mission d'évaluation interinstitutions qui s'est rendue à Kisangani en application du paragraphe 14 de la résolution 1304 du Conseil de sécurité, U.N. Doc. S/2000/1153 (4 Dec. 2000), p. 9, DRCM Annex 4.24.

⁹⁴³ Groupe Lotus, *Rapport du Groupe Lotus de Kisangani* (15 Oct. 1998), p. 11, Annex 4.15 (Translation by Counsel, original in French: "le Gouvernement de la RDC... favorise... les violations de ces droits".).

⁹⁴⁴ Armed Activities (2005), para. 205 (evidence contained in United Nations documents may be taken into account "to the extent that they are of probative value and are corroborated, if necessary, by other credible sources".).

⁹⁴⁵ Groupe Lotus, *Rapport sur la guerre de six jours à Kisangani* (Juillet 2000), p. 5, DRCM Annex 4.20 (367 partially affected houses plus 89 deeply affected houses).

table entitled "Liste des biens perdus de 1998 à 2003" included with Annex 1.3⁹⁴⁶ ostensibly summarises the types of property damaged in Kisangani. That table lists a total of 1,341 houses—not 4,300.⁹⁴⁷ But even this smaller number is contradicted by still another table included with Annex 1.3, "Evaluation pertes des biens".⁹⁴⁸ This table suggests an even lower number: 1,130 houses.⁹⁴⁹

7.69 The credibility of any of the numbers presented in the DRC's tables is called into question by the absence of any specificity. As was true in the case of the DRC's claim for alleged damages to houses in Ituri, not a single house is identified with specificity: there is no evidence as to location, size or time period when the harm occurred. There is also no justification given for the breakdown of the allegedly damaged houses into the three different categories (luxury, medium and small/simple). In addition, no information is provided as to: the condition of the property before the alleged damage; the extent of actual damage; and the existence of a causal connection to Uganda's specific wrongful acts.

7.70 With respect to the quantum of compensation sought, the DRC Memorial vaguely alludes to "the amounts emerging" from Annex 2.4 and 4.3.950 Yet, despite Uganda's best efforts, it has not been able to discern any comprehensible amounts "emerging" from those annexes. Annex 2.4 contains only summary tables synthesising alleged damages occurring in Beni, Butembo and Gemena, *not*

⁹⁴⁶ "Liste Biens Perdus de 1998 à 2003" in file *Liste Biens Perdus et leurs fréquences KISANGANI*, DRCM Annex 1.3.

⁹⁴⁷ *Ibid.*, pp. 3-4, DRCM Annex 1.3 ("Habitation de Luxe": 63; "Habitation Légère": 220; "Habitation Moyenne": 1058; Total: 1,341.).

^{948 &}quot;Evaluation Pertes des Biens" in file Victimes PerteBien KISANGANI, DRCM Annex 1.3.

⁹⁴⁹ Listes numérisées pour Kisangani, *Évaluation pertes des biens*, DRCM Annex 4.7.d ("Habitation de Luxe": 56; "Habitation Légère": 113; "Habitation Moyenne": 927; Total: 1,130.)

⁹⁵⁰ DRCM, para. 7.45 (Translation by Counsel, original in French: "les montants qui en résultent".).

Kisangani. And for its part, Annex 4.3 is merely a collection of uncorroborated excerpts clipped form reports by Groupe Lotus and Groupe Justice et Libération that do not set out any valuation methodology or undertake any assessment of compensation.

7.71 Although not cited in the DRC Memorial, the only place where an attempt at valuation appears to have been made is at Annex 4.7.d. This annex consists of an unsigned and unsworn summary table, devoid of any underlying evidence, entitled "Evaluation pertes des biens", which lists alleged damages to various categories of property. 951 This table mentions a total of 1,130 houses multiplied by the following "valuation" scale: US\$ 10,000 for luxury houses; US\$ 5000 for medium houses and US\$ 1000/500/400/300/150 for small/simple houses.

7.72 Annex 4.7.d. does not indicate what the claimed valuation amounts represent or how they were derived. Given the similarity (indeed, virtual identity) of these amounts to those used for houses in Ituri, they appear to be "reconstruction costs". Uganda respectfully submits that it is facially implausible that reconstruction costs would remain the same regardless of the extent of damage and location. (The DRC also appears to have applied the same reconstruction costs for houses allegedly damaged in Beni, Butembo, and Gemena.) The similarity with the claim in respect of houses in Ituri does not end there. As in Ituri, the ostenisble "reconstruction costs" in Kisangani are entirely without evidentiary support.

7.73 The wholesale lack of evidence and the confusion arising from the disparate and contradictory numbers as to allegedly damaged houses suggested by the DRC's own sources may explain why the DRC Memorial makes no effort to state a clear,

⁹⁵¹ Listes numérisées pour Kisangani, Évaluation pertes des biens, DRCM Annex 4.7.d.

comprehensible and defensible amount of compensation sought under this head of damages.

7.74 In any event, the DRC's failure to prove the exact damage to houses in Kisangani suffered as a result of specific actions of Uganda constituting internationally wrongful acts means that there is no basis to award it compensation under this head of damages.

2. Movable Property

7.75 The DRC has also not expressly stated the amount of compensation it seeks for alleged acts of looting and destruction of movable property in Kisangani. Nor has it offered any credible basis for assessing compensation.

7.76 The DRC states that "the number of incidents of [looted or destroyed property] used... as the basis of its claim for reparation for this category of damages is equivalent to that of the residences that were destroyed or damaged...that is, a total of 4,300". This claim cannot be accepted for at least three reasons.

7.77 First, the underlying premise is unfounded. As shown above, the DRC has failed to prove that Uganda actually damaged or destroyed 4,300 residences in Kisangani. Second, there is no logical—or even rational—reason to believe that the numbers of instances of looting can simply be equated to the ostensible number of houses damaged. Third, in any event, the DRC adduces no evidence to back its claim; it offers only unsupported assertion.

_

⁹⁵² DRCM, para. 4.69 (Translation by Counsel, original in French: "Le nombre d'incidents de cet ordre retenu par la RDC comme base de sa demande de réparation pour cette catégorie de dommage est équivalent à celui des habitations détruites ou endommagées... soit 4.300 au total".).

7.78 For all three reasons, this aspect of the DRC's claim is entirely speculative and cannot form a credible basis for compensation.

7.79 This aspect of the DRC's claims is also plainly contradicted by the summary table entitled "Evaluation pertes des biens" included with Annex 1.3 to the DRC Memorial. That table, which purports to comprehensively set out all damages Uganda allegedly caused in Kisangani, lists 2,396 alleged victims of looting and destruction of movable property, not 4,300.953

7.80 But if 2,396 incidents of looting is the actual basis for this elusive aspect of the DRC's compensation claim, it, too, is unproven. The summary table suffers from the same defects as all the other Congolese tables discussed above (and below). It contains no evidence as to the owner of the property allegedly damaged, the extent of the putative damage, the value assigned to property or any direct causal link to Uganda's wrongful acts. 954 Nor does the table even purport to articulate the total amount of compensation sought under this head of damages.

7.81 The information presented in this table is further contradicted by another summary table entitled "*Identification des victims et évaluation des dommages: Pertes des biens (Kisangani)*". 955 presented in Annex 4.5.c of the DRC Memorial but not cited by the DRC in the text of its Memorial. Prepared by the Congolese Commission of Experts, the table in Annex 4.5.c lists a yet even lower number of victims who allegedly sustained property damages (1,807 persons) and "values"

⁹⁵³ See "Evaluation Pertes des Biens" in file Victimes PerteBien_KISANGANI, DRCM Annex 1.3.

⁹⁵⁴ Here again, it bears emphasis that unspecified property generically stated as clothes (suitcase) ("habits (valise)") is valued in nearly instances at the same price of US\$ 200; televisions are uniformly valued at US\$ 250 in all instances; vehicles in nearly all cases are valued at US\$ 10,000 per item regardless of its condition and location; and bicycles – US\$ 100 per bicycle.

⁹⁵⁵ République Démocratique du Congo, Commission d'Experts, *Identification Des Victimes et Evaluation des Dommages: Pertes des biens*, DRCM Annex 4.5.c.

those damages at US\$ 144,560,000.956 Yet the basis for this amount is unclear because no value is stated, let alone proven, for nearly all property items summarily listed.

7.82 Perhaps recognising the arbitrariness of this "valuation", the DRC then slashes the amount from the US\$ 144,560,000 stated in Annex 4.5.c to the much lower lump sum of US\$ 80,000.957 But this lump sum nowhere appears to figure into any of the DRC's calculations. It is thus unclear whether the DRC actually claims this amount. Even if does, it cannot be accepted for the lack of foundation.

7.83 Because the DRC has failed to prove the exact damage for looting and destruction of movable property in Kisangani that was suffered as a result of specific actions of Uganda constituting internationally wrongful acts, it follows that there is no basis to award compensation for this head of damages.

3. Educational and Medical Institutions

7.84 The DRC also seeks compensation for the harm allegedly caused to educational and medical institutions in Kisangani. Here again, the amount of compensation is not stated. Nor can an exact number be inferred from the materials the DRC submits. There is therefore no basis for an award of compensation under this head of damages.

⁹⁵⁷ *Ibid.*, p.1 (where the Congolese Commission of Experts states: "Montant unitaire forfaitaire d'indemnisation: 80.000 \$US".).

308

⁹⁵⁶ *Ibid.*, p. 215.

⁹⁵⁸ DRCM, para. 4.73.

7.85 As regards **educational institutions**, the DRC says it seeks compensation for damage to 69 schools allegedly caused by Uganda. Even if, *quod non*, that number had any support in credible evidence, the DRC has made no effort to quantify its ostensible damages. The DRC's failure to identify the location, size, date of harm or exact damage for any of the allegedly damaged schools, let alone prove that the damage directly flowed from Uganda's wrongful acts, makes assessment of compensation impossible. 960

7.86 With respect to the assertions that are made, the DRC contradicts itself multiple times. To see how, the Court need look no further than the materials apparently prepared by the DRC's investigators. One of them is DRC Memorial Annex 4.5.f entitled "Identification des victimes et évaluation des dommages: associations sans but lucratif (Kisangani)". P61 That annex lists only eight (not 69) schools and describes the damage allegedly suffered mostly as loss of "personal and miscellaneous items" ("effets personnels et divers"), not destruction or serious harm. But then, five of the eight schools are inexplicably omitted from another of the DRC's annexes, the purportedly comprehensive Annex 4.7.d entitled "Evaluation Pertes des Biens". P62

⁹⁵⁹ *Ibid*.

⁹⁶⁰ The U.N. Inter-Agency Report does not ascribe those damages to Uganda but instead merely makes broad observations on the damages caused during military confrontations. Conseil de sécurité, *Rapport de la mission d'évaluation interinstitutions qui s'est rendue à Kisangani en application du paragraphe 14 de la résolution 1304 du Conseil de sécurité*, U.N. Doc. S/2000/1153 (4 Dec. 2000), DRCM Annex 4.24. In addition, the numbers included in the report are not supported by any evidence or corroborated by other sources.

⁹⁶¹ République Démocratique du Congo, Commission d'Experts, *Identification Des Victimes et Evaluation des Dommages: ASBL et Autres Identités*, DRCM Annex 4.5.f.

⁹⁶² Listes numérisées pour Kisangani, Évaluation pertes des biens, DRCM Annex 4.7.d.

7.87 Similar contradictions also pervade the DRC's valuations of the damage allegedly caused to these schools. The amount of compensation sought for schools listed in Annex 4.5.f inexplicably increases when those schools are moved to Annex 4.7.d. This is shown in the table below:

School	US\$ in Annex 4.5.f	US\$ in Annex 4.7.d
Complexe Scolaire Okapi	5,000 (p. 3)	9,610 (p. 80)
Complexe Scolaire Odilo	1,500 (p. 3)	1,630 (p. 80)
Complexe Scolaire Home Feyen	6,000 (p. 3)	35,315 (p. 80)
Complexe Educatif de Likunde	4,500 (p. 3)	7,625 (pp. 79-80)

The DRC's cavalier treatment of such data not only calls into question the accuracy of these summary tables, but also the accuracy of all of the tables the DRC has presented to the Court.

7.88 With respect to these particular tables, there is certainly no *prima facie* basis for selecting one set of conflicting numbers over the other. Moreover, there is no basis for doing so based on supporting materials the DRC presents to the Court because there are no such materials. There is simply no evidence proving that the alleged damages actually occurred, that they occurred as a result of Uganda's specific wrongful actions or that the valuations stated are accurate and reflect actual damages.

7.89 As regards **medical institutions**, the DRC claims that Uganda's "fighting" caused damage to 13 hospitals in Kisangani. The claim rests solely on unsupported and uncorroborated statements clipped from a single NGO source:

⁹⁶³ DRCM, para. 4.74 (Translation by Counsel, original in French: "combats".).

Groupe Lotus. ⁹⁶⁴ Aside from lacking meaningful probative value, the statements by Groupe Lotus actually lend no support to the DRC's claim in this respect. Taken at face value, the Groupe Lotus refers to just two incidents, which actually have nothing to do with damages caused by "fighting". One allegedly involved "5 rebels, including 3 Tutsis and two Ugandans" who allegedly took unspecified medications and US\$ 200 from one hospital. ⁹⁶⁵ Another allegedly involved "Ugandan soldiers" who took unspecified medications and 300 Congolese Francs at another hospital. ⁹⁶⁶

7.90 Such incidents, even if true and attributable to Uganda, reflect relatively insubstantial harm to property. Whether the DRC actually relies on those incidents in calculating its claim for compensation is unclear, as the DRC has not articulated any compensation amount or the basis for any such amount.

7.91 The DRC has entirely failed to prove the exact damage to educational and health institutions in Kisangani that was suffered as a result of specific actions of Uganda constituting internationally wrongful acts. Accordingly, there is no basis to award it compensation for this head of damages.

4. Places of Worship

7.92 The DRC also seeks compensation for damage allegedly caused to places of worship in Kisangani. But here, once more, it fails to specify the quantum it seeks. 967

⁹⁶⁴ Administrations publiques et cultes à Kisangani, DRCM Annex 4.4, pp. 5-7.

⁹⁶⁵ *Ibid.*, p. 6 (Translation by Counsel, original in French: "5 rebelles dont 3 Tutsi et deux Ougandais".)

⁹⁶⁶ *Ibid.*, p. 7 (Translation by Counsel, original in French: "militaires Ougandais".).

⁹⁶⁷ DRCM, para. 4.75.

7.93 The evidence the DRC submits to the Court reveals that only one religious institution, the Archdiocese of Kisangani, submitted any materials purporting to justify a claim for compensation (in the amount of US\$ 4,811,713). 968 If this is the amount the DRC uses as the basis for its unspecified claim, it cannot be accepted.

7.94 The material ostensibly submitted by the Archdiocese of Kisangani consists only of an unsigned list of estimated repair works prepared under unknown circumstances on an unknown date. 969 Even if this document could be accepted as genuine and reliable, which it cannot be, there is nothing showing that the estimated repair works correspond either to the actual costs of repair or, more importantly, to the damages directly caused by Uganda as opposed to other actors.

7.95 Aside from being unfounded, the stated sum is also facially speculative. Nearly US\$ 2 million of this amount relates to unexplained and unproven entries such as 5% for "Technical expertise fees," 10% for "unexpected physical events" and "50% for increase due to the uncertainty of prices after the crisis," 972

⁹⁶⁸ *Ibid.*, referring to Annex 4.28 (République Démocratique du Congo, Archidiocèse de Kisangani, *Travaux de Réparation des Dégâts Causés Par la Guerre*, B.P. 505 (5-10 June 2000)). In Administrations publiques et cultes à Kisangani, DRCM Annex 4.4, the DRC also listed some entities without any explanation or evidence as to the nature, extent, time and cause of their putative damages.

⁹⁶⁹ See République Démocratique du Congo, Archidiocèse de Kisangani, *Travaux de Réparation des Dégâts Causés Par la Guerre*, B.P. 505 (5-10 June 2000), DRCM Annex 4.28. "Travaux de réparation des dégâts causés par la guerre du 5 au 10 juin 2000".

⁹⁷⁰ *Ibid.*, p. 2 (Translation by Counsel, original in French: "Frais d'expertise Technique 5%".).

⁹⁷¹ *Ibid.*, (Translation by Counsel, original in French: "Imprévus physiques (10%)".).

⁹⁷² *Ibid.*, (Translation by Counsel, original in French: "Majoration incertitude liée à l'incertitude prix 50%".).

which cannot possibly have any direct causal connection to Uganda's actions. 973 These items make the claim even more arbitrary and causally remote.

Finally, the claimed amount is also mathematically flawed. This is apparent 7.96 from the excerpt from the first page of the report setting out the calculation of repair costs for Cathédrale Notre Dame du Très Saint Rosaire, 974 as shown below:

	ARCHIDIOCESE DE KISANGANI TRAVAUX DE REPARATION DES DEGATS CAUSES PAR LA DU 5 AU 10 JUIN 2000	GUERRE
N°	SITE	MONTANT
1	CATHEDRALE NOTRE DAME DU TRES SAINT ROSAIF	Œ
	- Total travaux	153 269,81
-	- Expertise Technique 5%	7 663,49
•	- Imprévus physique 10%	15 326,96
	- S/Total Cathédral prix avanr crise du 5 juin 2000	191 587,27
	- Majoration incertitude liée à l'incertitude prix 50 %	95 793,63
	S/Total CATHEDRALE prix majorés	287 380,90

The sum stated in the fourth line item (US\$ 191,587.27) can only be reached by double-counting the speculative 10% related to "unexpected physical events" stated in the third line (US\$ 15,326.96). 975 The issue here is not so much about the

⁹⁷³ The calculations set out on pages 1 and 2 of the report in Annex 4.28 reveal that the alleged repair costs for Cathédrale Notre Dame Du Très Saint Rosaire and "Sites 2 à 17" are US\$ 287,380.90 and US\$ 2,742,019.57, respectively. To those basis amounts, which add up to US\$ 2.895,288, the report applies unexplained 5% of expert fees, 10% of unexpected physical events, and 50% of uncertain prices after the crisis. This inflates the claim by US\$ 1,916,425. *Ibid.*, pp.1-2.

⁹⁷⁴ *Ibid.*, p. 1.

⁹⁷⁵ Ibid., (Translation by Counsel, original in French: "Imprévus physiques".). Specifically, it is mathematically impossible to get to 191,587.27 without adding twice 15.326.96 (153,269.81 + 7.663.49 + 15.326.96 + 15.326.96 = 191.587.27). The misconceived amount of 191.587.27 is then multiplied by the arbitrary and speculative factor of "50% for increase due to the uncertainty of

size of the amount (which itself is doubtful), but about the obviously flawed calculation, which once again illustrates the problems pervading the DRC's calculation of all its damages, thus calling into question the credibility of the amounts the DRC has put before the Court.

7.97 Because the DRC has failed to prove the exact damage to houses of worship in Kisangani, including to the Archdiocese of Kisangani, that was suffered as a result of specific actions of Uganda constituting internationally wrongful acts, there is no basis to award compensation for this head of damages.

5. Public Companies

7.98 The DRC further seeks compensation on behalf of three public companies that allegedly suffered damage in Kisangani: the National Electricity Company, Air Traffic Control and the Central Bank of the Congo. 976 According to the DRC Memorial, each of these entities prepared a "detailed assessment" that forms the basis of the DRC's compensation claims. 977 Uganda will address each of these claims in turn.

7.99 On behalf of the **National Electricity Company** (*Société Nationale d'Électricité* ("SNEL")), a Congolese public company, the DRC claims compensation in the amount of US\$ 97,412,090.⁹⁷⁸ This claim for nearly US\$ 100

prices after the crisis." The result is not just an arbitrary, but also mathematically flawed, amount of US\$ 287,380.90.

⁹⁷⁶ DRCM, para. 4.72. Although the DRC alleges that "some 25 public institutions suffered damages in Kisangani", none of those institutions are identified except for SNEL, CBC and Air Traffic Control. (Translation by Counsel, original in French: "quelque 25 administrations publiques ont subi des dommages à Kisangani".).

⁹⁷⁷ *Ibid.*, para. 7.47 (Translation by Counsel, original in French: "évaluation détaillée".).

⁹⁷⁸ *Ibid.*; Société nationale d'électricité (SNEL), *Réclamation*, N/Réf/DG/2016/4208 (9 juin 2016), p. 4, DRCM Annex 4.26.

million is based solely on an unsigned report that SNEL prepared on 31 May 2016 in response to a request from the Congolese Ministry of Justice, just a few months before the filing of the DRC Memorial . The Court has, however, routinely disregarded such unsigned materials prepared by interested persons for purposes of litigation years after alleged events in question. 979

7.100 Moreover, the SNEL's report is devoid of evidentiary support. Aside from four pages of conclusory statements under the headings "introduction," "status of data collection," "difficulties encountered," "guiding principles for valuing wealth" and "methods of valuation", the report consists only of summary tables purporting to list damages to various SNEL centres.⁹⁸⁰

7.101 Among the basic questions left unanswered in the SNEL report are when the alleged damages occurred and who caused them. The closest the SNEL report gets to answering these basic questions are two conclusory statements. One appears in the transmittal note to the DRC Minister of Justice, where the SNEL Director for Distribution in the Provinces says that SNEL has received feedback from SNEL entities on "the effects of Uganda's armed activities on Congolese territory during the period 1998-2003". ⁹⁸¹ The other appears in the Introduction to the report, which contends that SNEL has conducted an inventory of all damage caused on the SNEL

⁹⁷⁹ Armed Activities (2005), paras. 64, 125.

⁹⁸⁰ Société nationale d'électricité (SNEL), *Réclamation*, N/Réf/DG/2016/4208 (9 juin 2016), pp.1-3, DRCM Annex 4.26 (Translation by Counsel, original in French: "Introduction"; "état d'avancement de la récolte des données"; "Difficultés rencontrées"; "Principes directeurs de valorisation de patrimoine"; "Méthodologie de valorisation".

⁹⁸¹ *Ibid.*, p. 1 (Translation by Counsel, original in French: "les effets des activités armées de l'Ouganda sur le territoire Congolais au cours de la période 1998-2003.").

electrical distribution network following "the occupation of a part of Congolese territory by the Ugandan army." 982

7.102 In the rest of the report, however, SNEL notably eschews any specificity as to time, place or origin of the damage, making it impossible to establish with any level of certainty whether damages in fact occurred, whether claims as to the extent of the damages are accurate or whether the damages were the direct result of specific wrongful actions by Uganda.

7.103 Moreover, there is no corroborating documentation for the assertions set forth in the report. For example, there are no internal communications within SNEL (such as between its headquarters and its local entities), nor communications between SNEL and DRC government agencies, let alone communications contemporaneous with the alleged damage. Such evidence should exist from the normal course of day-to-day operations; no State entity experiences a loss of US\$ 97 million and fails to record the matter at the time of the loss. The utter absence of supporting documentation casts serious doubt upon the existence of the damage.

7.104 The SNEL's valuation methodology also does not inspire confidence. The 2016 SNEL report is apparently based on an earlier report the SNEL prepared in 2008.⁹⁸³ But this earlier report is not submitted into evidence. However, the SNEL admits that there were shortcomings in the 2008 report, which were carried over into the 2016 report, infecting it beyond repair. The SNEL admits, for example, that there are no materials supporting "the value of the relevant assets" ⁹⁸⁴ listed in

⁹⁸² *Ibid*.

⁹⁸³ *Ibid.*, p. 2 (Translation by Counsel, original in French: "L'absence des valorisations des immobilisations concernés [sic]".).

⁹⁸⁴ *Ibid.*, p. 4.

the 2008 report, and that some values in that earlier report have no support in market prices or methodology, and are thus open to challenge. Nonetheless, those unproven valuations were taken as final for the assessment of damages in the 2016 report. 86

7.105 The 2016 SNEL Report further admits that the absence of documents confirming property titles for a great number of property items made it impossible to estimate some damages. The acknowledged evidentiary gaps in the 2016 report appear to have been filled in with guesswork and speculation. Finally, unable to establish the actual costs of the allegedly damaged property, the 2016 SNEL Report adopts current replacement costs. But even those costs are not corroborated by documentary evidence.

7.106 Such a weak foundation simply cannot support the weight of a nearly US\$ 100 million claim.

7.107 The arbitrariness of this number is further underscored by its constituent elements. The single largest element of the SNEL claim concerns "*Dégâts et forfait humains*" ("human damage and loss"), which the SNEL claims to be US\$ 27,163,539.⁹⁸⁹ This claim is based on nothing more than vague, sometimes inscrutable, assertions presented in a summary table that, like the report, is unsigned.⁹⁹⁰ Some assertions in the table are also incomplete. For example, the

⁹⁸⁵ *Ibid*.

⁹⁸⁶ *Ibid.*, p. 3.

⁹⁸⁷ *Ibid.*, p. 5.

⁹⁸⁸ *Ibid.*, p. 3-4.

⁹⁸⁹ *Ibid.*, p. 4. The actual number claimed is "US\$ 27 163 539,11".

⁹⁹⁰ *Ibid.*, p. 5, containing "Tableau Récapitulatif des Dégâts Causés par l'occupation de l'armée Ougandaise", which lists without any specificity such general entries as "certain agents died because

table states that "before the conflict the centre had had ... agents,... were transferred ... agents were dead". ⁹⁹¹ (The ellipses appear to indicate places where numbers were supposed to be filled in by the SNEL.) Other elements stated in the table are entirely unintelligible; for example, the phrase: "project no agent except the agents of the project". ⁹⁹²

7.108 The most that could be gleaned from the summary table is that, at unknown times, for unknown reasons, 42 unidentified SNEL employees were transferred out of unspecified localities and about 13 unidentified employees died under unknown circumstances. Such an obscure and limited set of "facts" cannot possibly justify a claim exceeding US\$ 27 million. Moreover, aside from failing to prove that any damage actually occurred, the DRC has utterly failed to present any evidence, let alone convincing evidence, directly linking the alleged damages to specific wrongful actions attributable to Uganda.

7.109 The same is true with respect to the other six elements of the claim on behalf of SNEL, which total approximately US\$ 70 million. 993 All of those elements are associated with cryptic abbreviations for unexplained and undocumented equipment. This is illustrated in table 7.1 entitled "Evaluation of electromechanical"

.

of lack of medical assistance and others were transferred"; "some agents left during the conflict and others were transferred to Kisangani" (Translation by Counsel, original in French: "certains agents décédés suite au non accès aux soins et d'autres en mutation" "Quelques agents partis pendant les hostilités et d'autres mutés vers Kisangani".).

⁹⁹¹ *Ibid*. (Translation by Counsel, original in French: "Avant les hostilités, le centre avait avait [sic] ... agents... ont été mutés... agents étaient morts".).

⁹⁹² Ibid. (Translation by Counsel, original in French: "Projet pas d'agent sauf les agents du projet".).

⁹⁹³ These elements include: Looting of Thermic or Hydroelectric Centrals (US\$ 23,900,759.86); Destruction of MT/MT stations and MT/BT booths (US\$ 9,245,787.20); Damages caused to the MT, BT and EP networks (US\$ 15,864,152.44); Lost profits on sales (US\$ 6,543,952); Damages caused to SNEL's administrative buildings and residence (US\$ 12,255,899.51); Other damages (US\$ 2,438,000).

equipment of thermal power plants," which is presented on page 6 of the 2016 SNEL report:

1.	7. Evaluation du coût de réparation des patrimoines (équipements et infrastructures) victimes des dégâts dus à l'occupation de l'armée ougandaise Evaluation des équipements électromécaniques des centrales thermiques										
n	Centrales	Qté	Caractéristiques groupes électrogènes	Valeurs installation	TOTAL						
	thermique/ Localité	(Pce)		Groupe électrogène	Auxiliaires	VALEUR (USD)					
	1	2	3	4	5	6= (4)+(5)					
	Basankusu	2	DEUTZ 118 kVA-0,4KV ABC-220 kVA-0,4 kV	115.000,00 835.296,00	270 000,00	1.220.296,00					
	Bumba	2	ABC-675 kVA-0,4 kV ABC-400 kVA-0,4 KV	1.281.420,00 759.360,00	270.000,00	2.310.780,00					
	Gemena	3	3 X ABC-550 KVA-0,4kV	3.076.425,00	310.000,00	3.386.425,00					
	Libenge	2	2 X ABC- 550 KVA- 0,4kV	2.088.240,00	270.000,00	2.358.240,00					
	Lisala	3	2 X ABC-550kVA-0,4kV	2.088.240,00	273.000,00	2.361.240,00					
	Kisangani	3	AGO 3,2 MW-6,6 kV	5.360.387,94	1.450.000,00	6.810.387,94					
	Zongo	1	Volvo-Penta150kVA-0,4kV	56.857,92	17.800,00	74.657,92					
	Yakoma	2	CUMINS-160 kVA-0,4kV Perkins-450kVA-0,4kV	62.700,00 127.237,00	11.700,00	201.637,00					
	Buta	2	ABC - 750 kVA-0,4 kV ABC - 220 kVA-0,4 KV	2.847.600,00 835.296,00	270.000,00	3.952.896,00					
	Butembo	2	ABC -250 kVA-0,4 kV DEUTZ- 400 kVA-0,4 KV	942.200,00 115.000,00	85	1.224.200,00					
	Gbadolite		-	-	-						
2.	TOTAL			20.591.359,86	3.309.500,00	23.900.759,86					

7.110 As can be seen, the DRC bases a claim to nearly US\$ 24 million on nothing more than one unsigned and unsupported table, which simply lists a number of

locations and a number of values of electrical equipment without no information about the alleged date, extent or other circumstances of the harm to that equipment. 994

7.111 The SNEL Report also claims "lost profits" ("Manque à gagner sur les ventes") in the amount of US\$ 6,543,953, based on a table that appears on page 14. This aspect of the claim is equally hopeless. It is based on an alleged loss of revenues ("recettes") from the loss of two hydroelectric plants located in Kisangani and Gbadolite. The lost revenues claimed cover a period of eight years, from 1998 to 2005. In a "Commentary" that appears directly below the table, the authors of the report explain that this eight-year period "correspond[s] to the period of war".

7.112 To determine how much revenue was lost at the two plants during each of these eight years, the authors of the report decided to estimate lost revenues during the years 2004, 2005 and 2007, and then to calculate an average across those three years (which is applied retroactively across all eight years). For each of those three years, global revenues ("recettes globales") for all of SNEL and estimated revenues ("recettes estimées") for the Kisangani and Gbadolite plants are listed. The "Commentary" explains that the estimated revenues for Kisangani and Gbadolite for each of the three years were derived by assuming that Kisangani generated 65%

⁹⁹⁴ Similarly unsigned and unsupported tables form the sole basis for the other categories of the SNEL's claim: the claim to "Destruction of MT/MT stations and MT/BT booths" ("Destruction des postes MT/MT et cabines MT/BT") is the amount of US\$ 9,245,787.20 is based on the summary table at page 4; the claim to "Damages caused to the MT, BT and EP networks" ("Dégâts subis par les réseaux MT, BP et EP") in the amount of US\$ 15,864,152.44 rests solely on the summary table on page 4; the claim to "Lost profits on sales" ("Manque a gagner sur les ventes") in the amount of US\$ 6,543,952 is based on the summary table 7.9 on page 14; finally, the all-catch claim under the category "Other damages" ("Autres prejudices") in the amount of US\$ 2,438,000 rests on the summary table 7.8 on page 13. See Société nationale d'électricité (SNEL), *Réclamation*, N/Réf/DG/2016/4208 (9 juin 2016), DRCM Annex 4.26.

of global revenues while Gbadolite generated 2% of global revenues (to determine these percentages, the Commentary says is relied upon 2013-2015 data).

7.113 Yet nowhere does the report establish that these hydroelectric plants were in fact damaged, in whole or in part. Further, no information is provided as to when such damage occurred and by whom it was caused. Indeed, the implausible and unsubstantiated assumption appears to be that Ugandan armed forces completely destroyed both plants as of 1 January 1998, before the date of Uganda's intervention.

7.114 Any calculation of lost profits should have been based on revenues made *before* the events of 1998—information that should be readily available to SNEL—not on revenues dating to after the withdrawal of Ugandan armed forces. Furthermore, and despite the fact that the DRC itself acknowledged during the merits phase of this case that such withdrawal was completed by 2 June 2003, 995 the SNEL claims to be entitled to eight years of lost profits because the armed conflict supposedly lasted for the period 1998 to 2005. The SNEL report is so fundamentally flawed and misguided that it cannot serve as proof of any lost profits.

7.115 Whether the claim on behalf of SNEL is taken as a whole, or viewed in its constituent elements, the conclusion is the same: the DRC has failed to show with any level of certainty that the damages claimed actually occurred, that they were directly caused by Uganda or that the valuation of those damages is grounded in evidence and based on sound methodologies.

⁹⁹⁵ Armed Activities (2005), para. 167.

7.116 The DRC's compensation claims for the other two State entities fare no better. On behalf of the **Air Traffic Control** ("ATC"), the DRC claims US\$ 19,353,000.⁹⁹⁶ This claim rests solely on the following undated, unsigned, summary table apparently prepared for purposes of this litigation:

		ENERGIE		NAVAIDS		TELECOMMUNICA	TION	BALISAGE LUMINEUX	
_	Secteur — Entité aéro		cút USD)		cont USD)		Cold USD)	(Cout U	
	Isiro	a) G/E 3 x 150 Kva (Mercedes) : 1 x 5 Kva (Deutz) b) Hydrophone	168 000	a) NDB AEROCOM 100 x LA TVOR WILCOX 585B; DME AEROCOM 5350/100 W	850 000	Emetteur/Récepteur VHF 7070/20 W ; -HF 1311/1 Kw (Air-sal, Sol-sal)		a) Balisage : -Feux latéraux 2 000 plate, seul & fin de plate : 95 feux H.I. Bidirectionnel : Feux des voies de circulation & tamas : 34 Feux H.I. Omnidirectionnel : 5 (RCC, cábles, télécommande :	000
- 1			1				- 1	- PAPI (VASI) : 04	
							800 000	2.004	5 000
	ST		178 000		850 000	W. H. Walantana	1 500 000	a) Balisage + Rampe 2 000	
	Kisangani/Bangboka	a) G/E 2 x 285 Kva (Dautz) : 3 x 20 Kva/ASI (ABC)	300 000	a) TVOR RN100 PHILIPS ; DME PHILIPS	800 000	Emetteur/Récepteur VHF 1 x 7070/20 W, 3 X 7070/200 W; -HF 3 X 10V4/1Kw (Air-sol, Sol-sol)	1500000	a) baladje **Harberger September piste, seulis & fin de piste type ADB Bidirectionnel H.L. : 320 ; - Feux des voles de circulation & raquette de retournement : 56 Feux.	
				b) OLS	1 000 000			b) - Equipements connexes : 5 06 RCC : PAPI 13 et 31 : 08	5 000
		71		c) NDB	50 000			200	5 000
	ST	a) G/E 2 x 163 Kva	300 000 80 000	a) TVOR RN100	1 850 000 800 000		1 500 000		0 000
	Gloadolite	(MWN).		x 50 W ; DME PHILIPS				d'Approche – Feux Istéraux piste, seuil & fin de piste : 124 Feux H.I. Bidiroctionnel ; - Feux des voies de circulation : 38 feux Omnidirectionnel H.I. de 45 W.	
		b) G/E 1 x 250 Kva Nobresk (Mercedes)	80 000	b) ILS (NX250/100) c) NDB NAUTEL	1 000 000			b) Equipements connexes : 06 50 RCC : PAPI ou VASI : 04	00 000
			160 000		2 800 000				00 00
4.	ST- Buta	a) G/E 3 x 150 Kva (Mercedes)	180 000	a) NDB AEROCOM 100XLA/100W; VOR WILCOX 485B/200W	50 000			a) Balisage : Feux latéraux 20i piste, seuil & fin piste : 78 Feux H./.Bidirectionnel ; - Feux des voies de circulatien ; 28 Feux bleus Omnidirectionnel H.S. de 45 W	00 00
				b) Locator 35 000				b) Equipements connexes : PAPI ou VASI : 04 VASI à deux barres/piste	5.00
_	ST		180 000		85 000			20	005 0
5.	Bunia	a) G/E1 x 25 Kva (Deutz)	30 000	a) NDB AEROCOM 100XLA/100W; TVOR RN 100W PHILIPS				a) Balisage: -Feux latéraux 2 0 piste, seull & fin piste: 70 feux H.I./Bidirectionnell; - Feux des voies de dirculation: 36 Feux F.I.	000 00
								b) Equipements connexes : PAPI ou VASI : 04 (08)	5 00
-	ST		30 000		100 000		2 333 333		520 0
60	ST/G-		848 000 19 353 000 \$		5 685 000		2 511 11	10	SEU !

996 Régie des voies aériennes (RVA), Réclamation, DRCM Annex 4.27.

7.117 This table cannot take the place of actual evidence showing that the ATC suffered the claimed damages, that those damages were directly caused by the specific wrongful acts attributable to Uganda and that the alleged values correspond to the actual values of items claimed. Without such evidence, the claim fails for lack of proof.

7.118 Nor is there any evidence proving the claim for US\$ 4,830 on behalf of the **Central Bank of the Congo**. 997 To support this claim, the DRC relies on Annex 4.7.c. That annex consists not only of an unsigned summary table, but also one that inexplicably relates to alleged damages caused to displaced persons, not the Central Bank.

7.119 It appears that the DRC meant to refer instead to the summary table entitled "Valuation of property damages" contained in Annex 4.7.d. As best Uganda has been able to determine, that is the only place where the Central Bank's damages purport to be summarised. They are listed in US\$ as: "cash money -- 2630," one "stereo -- 650," one "radio – 1300," one "television – 250". 998 The sum of these figures is consistent with the amount the DRC seeks on behalf of the Central Bank (US\$ 4,830). 999

7.120 Assuming that is correct, this aspect of the DRC's claim is still unfounded. As with all of the DRC's other unsigned summary tables, there is no reliable evidence to support the DRC's assertions concerning the existence of the damages

⁹⁹⁷ DRCM, para. 4.72.

⁹⁹⁸ Listes numérisées pour Kisangani, Évaluation pertes des biens, p. 36, DRCM Annex 4.7.d (Translation by Counsel, original in French: "argent en espèce—2630", "chaine musicale—650", "radio 1300", "television 250".).

⁹⁹⁹ *Ibid*.

claimed. Still less is there evidence directly connecting the alleged damages to the wrongful actions of Uganda. This claim too therefore also fails for lack of proof. 1000

6. Private Companies

7.121 The DRC also seeks compensation for damage to private companies in Kisangani. It does not, however, articulate either the basis of the claim or the specific amount sought. The DRC merely asserts that it has "been able to count 23 such cases of damage for the 1999 war, 13 for the 2000 war, and approximately 10 for June 2000". It then adds that because damages to private companies are "variable in nature and scale, they cannot be generalized". The DRC promises to define the quantum claimed in Chapter 7, 1004 but that promise is never fulfilled.

7.122 As stated, the DRC Memorial contends that Uganda caused damage to approximately 46 private companies. ¹⁰⁰⁵ But different numbers are presented in the annexes prepared by the DRC's "investigators". Only nine companies are

¹⁰⁰⁰ The claim also appears to be spurious. Elsewhere, the DRC uniformly "valued" radios at US\$ 50 each regardless of the place and time of alleged damages. *See, e.g.*, "Evaluation Pertes des Biens", in file *Victimes_PerteBien_KISANGANI*, p. 1, DRCM Annex 1.3. By contrast, the claim for a radio in the case of the Central Bank is in the amount of US\$ 1300, which is also nearly six times more expensive than the TV valued at US\$ 250!

¹⁰⁰¹ DRCM, para. 4.70.

¹⁰⁰² *Ibid.* (Translation by Counsel, original in French: "On a pu en compter 23 pour la guerre de 1999, 13 pour celle de mai 2000 et une dizaine pour juin 2000".).

¹⁰⁰³ *Ibid.* (Translation by Counsel, original in French: "de nature et d'ampleur variable, ils ne peuvent être globalisés ici".).

¹⁰⁰⁴ *Ibid.*, para. 4.76.

¹⁰⁰⁵ *Ibid.*, para. 4.70. The DRC allegedly found 23 for the 1999 war, 13 for the May 2000 war and 10 for June 2000 (Translation by Counsel, original in French: "On retrouve enfin les dommages subis par les entreprises privées. On a pu en compter 23 pour la guerre de 1999, 13 pour celle de mai 2000 et une dizaine pour juin 2000".). Atteintes aux biens à Kisangani, DRCM Annex 4.3 and Administrations publiques et cultes à Kisangani, DRCM Annex 4.4 are a nothing more than a collection of snippets plucked from unsupported and uncorroborated reports by the Congolese NGOs, Groupe Lotus and COJESKI, which, moreover, do not even directly implicate Uganda in causing the alleged damages.

mentioned in the table labeled "Identification of private companies and valuation of their damages", which appears in Annex 4.5.e. 1006 and not even all those are listed in Annex 4.7.d ("Valuation of property damages") and Annex 1.3 ("Victimes_PerteBien_Kisangani"), 1007 which contain identical summary tables purporting to represent all alleged damages in Kisangani. 1008

7.123 Examining Annexes 4.5.e and 4.7.d side-by-side further reveals that the descriptions and "valuations" of damages for the companies listed in one annex are not the same as those contained in the other. For example, Annex 4.5.e lists damages to Ets Hotel Kisangani as US\$ 18,830, but in Annex 4.7.d the claim for the same hotel is just US\$ 8,364. 1009

7.124 It is difficult, if not impossible, to makes sense out of the DRC's claims given these contradictions. It is also impossible to reconcile these contradictions by reference to any actual evidence. Here, as in so many places, the DRC's claims are presented in the form of summary tables unanchored to any underlying evidence. Instead, Uganda and the Court are expected to simply take the conflicting

¹⁰⁰⁶ This annex contains only a summary table with some incomplete entries, which is divorced from any evidence as to whether the claimed damages allegedly amounting to US\$ 2,104,203 were actually sustained as a direct result of the specific wrongful actions attributable to Uganda. Indeed, as shown in para. 7.105 of Uganda's Counter-Memorial, the largest component of damages in this table consisting of SOTEXKI's claim to US\$ 1,642,224 relates to damages admittedly caused by actors other than Uganda.

¹⁰⁰⁷ It bears emphasis that Listes numérisées pour Kisangani, Évaluation pertes des biens, DRCM Annex 4.7.d and "Evaluation Pertes des Biens" in file Victimes_PerteBien_KISANGANI, DRCM Annex 1.3 consist of the same summary tables. The unexplained multiplicities of the same summary tables for alleged damages not only in regard to Kisangani, but also Ituri, Gemena, Beni and Butembo, only exacerbates the confusion of already confused claims.

¹⁰⁰⁸ For example, Hotel Masudin with an unfounded claim of US\$ 4,452 is mentioned in République Démocratique du Congo, Commission d'Experts, *Identification Des Victimes et Evaluation des Dommages: Sociétés Commerciales et Etablissements Privés*, DRCM Annex 4.5.e but not in Listes numérisées pour Kisangani, *Évaluation pertes des biens*, DRCM Annex 4.7.d.

¹⁰⁰⁹ For the differences in the description of alleged damages, *see* pages 48, 105, in "Listes numérisées pour Kisangani", *Évaluation pertes des biens*, DRCM Annex 4.7.d.

tables by themselves as proof that the damage occurred, that it is attributable to Uganda and that the valuations stated are correct.

7.125 Based on Uganda's review of the DRC's materials, it appears that only one company, *Société Textile de Kisangani* ("SOTEXKI") submitted any materials purporting to support a claim for damages. All those materials do, however, is highlight the arbitrariness of the claim.

7.126 Relying on reports prepared by the DRC's law enforcement agents, ¹⁰¹⁰ SOTEXKI claims compensation in the amount of US\$ 1,642,224. ¹⁰¹¹ The claim, however, fails for at least three reasons.

7.127 *First*, there is nothing in these reports that provides any convincing evidence that the alleged damages are attributable to Uganda. Following investigations conducted shortly after the events causing the alleged damage, Congolese police inspectors recorded in their reports that the damages in August 1999 were caused by "unknown (men in military uniform)" who were "Ugandan and Rwandan allies of the Rassemblement Congolais pour la Démocratie (RCD)," and that damages during the five years of war to the company's Yacht Club and hangar were caused by "AFDL" ("Alliance des forces démocratiques pour la libération du Congo") and "Ugandan and Rwandan

_

¹⁰¹⁰ Société textile de Kisangani (SOTEXKI), *Réclamation*, N/Réf:DG/ADM/KIN?009/2016, (2 mai 2016), p. 2, DRCM Annex 4.25. ("Parquet près le Tribunal de Grande Instance de Kisangani, Commission Gouvernementale d'identification des victimes".).

DRCM, para. 4.69 and Société textile de Kisangani (SOTEXKI), *Réclamation*, N/Réf:DG/ADM/KIN?009/2016, (2 mai 2016), Annex 4.25.

¹⁰¹² Société textile de Kisangani (SOTEXKI), *Réclamation*, N/Réf:DG/ADM/KIN?009/2016, (2 mai 2016), p. 6, Annex 4.25 (Translation by Counsel, original in French: "Inconnus (Hommes en Uniforme Militaire)".).

¹⁰¹³ *Ibid*. (Translation by Counsel, original in French: "alliés rwandais et ougandais du Rassemblement Congolais pour la Démocratie (RCD)".).

allies". ¹⁰¹⁴ In other words, nowhere in their contemporaneous reports did the Congolese law enforcement officers ascribe responsibility for any of the damage to Uganda. ¹⁰¹⁵ At best, there are vague references to "Ugandan allies" among other actors. The required causal link between Uganda's unlawful acts and the alleged damages is thus missing.

7.128 *Second*, the alleged damages lack sufficient proof. SOTEXKI puts forward only a series of summary tables listing property items and their values. This is not adequate. As the Court made clear in *Diallo*, the list of property is, on its own, insufficient to prove the value of the listed property. Sufficient proof, the Court held, would require the submission of invoices, receipts, insurance documents or other similar documents showing the value of the listed property. ¹⁰¹⁶ SOTEXKI offers no such evidence here.

7.129 *Third*, SOTEXKI's allegation that its damages total US\$ 1,642,224 is unsupported by the very materials on which it purports to rely. The sum of the valuations stated in the summary tables is not US\$ 1,642,224 but actually more

¹⁰¹⁴ *Ibid.* ("Translation by Counsel, original in French: "alliés rwandais et ougandais".).

¹⁰¹⁵ It is surprising how in light of these official findings SOTEXKI's representatives alleged in the unsigned DRC's claims forms that damages were caused by "Ugandan and Rwandan armies." This attempt must be rejected and those forms must be treated for what they are: post-fact statements made by persons interested in the outcome of litigation. Other documents, the DRC attached, observe that SOTEXKI was the object of lootings "orchestrated by the Rwandan, Burundian and Congolese military" (Translation by Counsel, original in French: "orchestrés par les militaires Rwandais, Burundais et Congolais".) Groupe Lotus, *Les conséquences de la contraction des alliances et factions rebelles au nord-est de la RDC – La guerre de Kisangani*, Sept. 1999, Annex 4 18

¹⁰¹⁶ *Diallo* (2012), paras. 32, 34-36.

than 20% less: US\$ 1,292,224.91. Nothing in the materials the DRC offers explains this US\$ 350,000 difference.

7.130 The DRC's claim on behalf of SOTEXKI thus not only lacks foundation, it also is devoid of credibility.

*

7.131 For all these reasons, the DRC's claim for US\$ 17,323,998 in alleged property damages in Kisangani lacks foundation and there is no basis to award the DRC the seeks.

C. Areas Other Than Ituri and Kisangan (Beni, Butembo and Gemena)

7.132 The DRC also claims US\$ 8,304,077 in compensation for alleged property losses in Beni, Butembo and Gemena. The amount sought is apportioned as follows:

- US\$ 5,526,527 for Beni;
- US\$ 2,680,000 for Butembo; and
- US\$ 97,550 for Gemena. 1019

¹⁰¹⁷ Société textile de Kisangani (SOTEXKI), *Réclamation*, N/Réf:DG/ADM/KIN?009/2016, (2 mai 2016), pp. 35, 44, 49-50, DRCM Annex 4.25. (Damages caused between 15 and 17 August 1999 (US\$ 1,056,776.14), p. 35; damages caused during the six-day war (US\$ 46,533.77), p. 44; damages caused during the five-year war to the company's hangar (US\$ 123,188), p. 49; and damages caused during the five-year war to the Yacht Club (US\$ 65,727), p. 50. The sum of these damages is US\$ 1,292,224.91.).

¹⁰¹⁸ DRCM, para. 2.85.

¹⁰¹⁹ *Ibid.*, paras. 2.87 and 7.46. In addition, para. 2.87 of DRC Memorial also refers to 43 incidents in Maboya and Loya, but the DRC does not present claims for damages in those areas.

7.133 According to the DRC, these amounts "emerge" from "detailed lists" created by the DRC's investigators and contained in Annex 2.4. 1020 Yet that annex contains neither the stated numbers nor "detailed lists" supporting them. 1021 Their provenance and foundation are unknown.

7.134 In fact, the numbers stated in the DRC Memorial are contradicted by those presented in Annex 2.4. Moreover, the numbers stated in Annex 2.4 are themselves contradicted by the numbers stated in other annexes created by the DRC's investigators. This is shown in the table on the next page:

¹⁰²⁰ *Ibid.*, paras. 7.45 and 2.85.

^{1021 &}quot;Evaluation des pertes des biens à Beni, Butembo et Gemena de 1998 à 2003", DRCM Annex 2.4 only consists of a series of cryptic summary tables entitled "Tableau de Synthèse Effectif Perte Biens" and "Tableau de Synthèse Evaluation Perte Biens," respectively. Those tables, as their titles suggest, purport to "synthèsise" the instances and valuations of alleged property damages listed in other summary tables, which are also prepared by the Congolese investigators and included with Evaluation des pertes des biens à Beni, Butembo et Gemena de 1998 à 2004: Détail évaluation perte des biens à Beni de 1998 à 2003, DRCM Annex 2.4bis, Evaluation des pertes des biens à Beni, Butembo et Gemena de 1998 à 2005: Détail évaluation perte des biens à Beni, Butembo et Gemena de 1998 à 2003, DRCM Annex 2.4ter, and Evaluation des pertes des biens à Beni, Butembo et Gemena de 1998 à 2003: Détail évaluation perte des biens à Gemena de 1998 à 2003, DRCM Annex 2.4quater, DRCM Annex 2.4quater ("Evaluation Pertes des Biens").

¹⁰²² These include Evaluation des pertes des biens à Beni, Butembo et Gemena de 1998 à 2004: Détail évaluation perte des biens à Beni de 1998 à 2003, DRCM Annex 2.4bis with a summary table entitled "Liste des Biens Perdus de 1998 à 2003" in Beni; Evaluation des pertes des biens à Beni, Butembo et Gemena de 1998 à 2005: Détail évaluation perte des biens à Butembo de 1998 à 2003, DRCM Annex 2.4ter with a summary table entitled "Liste des Biens Perdus de 1998 à 2003" in Butembo; and Evaluation des pertes des biens à Beni, Butembo et Gemena de 1998 à 2003: Détail évaluation perte des biens à Gemena de 1998 à 2003, DRCM Annex 2.4quater with a summary table entitled "Liste des Biens Perdus de 1998 à 2003" in Gemena. The same summary tables with the same information are then restated in Annex 1.3 in the folder "Dommage Perte Biens" in file Victimes_PerteBien_BENI, DRCM Annex 1.3; "Dommage Perte Biens" in file Victimes_PerteBien_BUTEMBO, DRCM Annex 1.3; "Dommage Perte Biens" in file Victimes PerteBien_BUTEMBO, DRCM Annex 1.3.

Butembo	Gemena
US\$ 2,680,000 (DRCM, para.	US\$ 97,550 (DRCM, para.
7.46)	7.46)
T100 (440 404 (4 2 4)	1100 WC 4007005E777 (A
US\$ 6,449,424 (Annex 2.4)	US\$ "6.4827985E7" (Annex 2.4)
	,
US\$ 65,130,030 (Annex 2.4ter "Evaluation Pertes des Biens)	US\$ "6.477755E7" (Annex 2.4quater "Evaluation Pertes des Biens")
	US\$ 2,680,000 (DRCM, para. 7.46) US\$ 6,449,424 (Annex 2.4) US\$ 65,130,030 (Annex 2.4ter "Evaluation Pertes des

7.135 Whatever the actual number is, the materials nominally prepared by the DRC's investigators do not constitute convincing evidence. This is because they suffer from the same infirmities as the materials relating to Ituri and Kisangani: they are nothing more than unsigned, undated and unsupported summary tables listing various property items and assigning to them arbitrary values. Here as elsewhere the DRC offers absolutely no supporting evidence, let alone convincing evidence, that makes it possible to establish with any level of certainty that the property listed in summary tables was actually damaged, that such damage directly resulted from the specific wrongful acts attributable to Uganda and that the

_

¹⁰²³ These include Evaluation des pertes des biens à Beni, Butembo et Gemena de 1998 à 2004: Détail évaluation perte des biens à Beni de 1998 à 2003, DRCM Annex 2.4bis with a summary table listing property losses in Beni; Evaluation des pertes des biens à Beni, Butembo et Gemena de 1998 à 2005: Détail évaluation perte des biens à Butembo de 1998 à 2003, DRCM Annex 2.4ter with a summary table listing property losses in Butembo; and Evaluation des pertes des biens à Beni, Butembo et Gemena de 1998 à 2003: Détail évaluation perte des biens à Gemena de 1998 à 2003, DRCM Annex 2.4quater with a summary table listing property losses in Gemena. The same summary tables with the same information are then restated in Annex 1.3 in the folder Dommage Perte Biens.

valuations assigned are accurate. For this reason alone, the DRC cannot recover the compensation it seeks.

7.136 The compensation the DRC claims cannot be awarded for yet another reason: the DRC has not adduced even a single document that proves the ownership and actual value of any of the allegedly damaged property. Nor has the DRC explained the basis for the values assigned to property items allegedly damaged in Beni, Butembo and Gemena. Indeed, they are strikingly similar to the values assigned to property allegedly damaged in Ituri and Kisangani. The uniformity in the alleged property values, without regard to location, extent of damages or the identity of alleged victims, suggest that the DRC's "valuation" numbers are not based on particularised information and do not reflect actual damages.

_

¹⁰²⁴ The DRC again presents uniform prices regardless of location, extent of damages and the identity of victims. For example, in Beni, Butembo and Gemena, a pig is uniformly valued at US\$ 80; a cow at US\$ 300; a bicycle at US\$ 100. See "Evaluation Pertes des Biens" in file Victimes PerteBien BENI, DRCM Annex 1.3; "Evaluation Pertes des Biens" in file Victimes_PerteBien_BUTEMBO, DRCM Annex 1.3; "Evaluation Pertes des Biens" in file Victimes PerteBien GEMENA, DRCM Annex 1.3, respectively. Even unspecified items generically described as clothes (suitcase), and kitchen utensils are uniformly valued at US\$ 200. Ibid. In addition, in Butembo, the tables show the existence of 18 diamonds valued at US\$ 1,000 apiece; and 12 diamonds in Beni valued at US\$ 25,000 apiece. See "Evaluation Pertes des Biens" in file Victimes PerteBien BENI, DRCM Annex 1.3; "Evaluation Pertes des Biens" in file Victimes PerteBien BUTEMBO, DRCM Annex 1.3. There is however no evidence of possession of diamonds by the alleged victims nor any documents confirming the assigned values. It is also worth noting that the DRC present uniform values for diamonds which are notable for their value variation subject to different factors. Finally, it also bears emphasis noting that categories of property damages as stated in the tables "Evaluation Pertes des Biens" often do no correspond to the same categories "synthesised" in Annex 2.4. See "Evaluation des pertes des biens à Beni, Butembo et Gemena de 1998 à 2003", DRCM Annex 2.4, Evaluation des pertes des biens à Beni, Butembo et Gemena de 1998 à 2004: Détail évaluation perte des biens à Beni de 1998 à 2003, DRCM Annex 2.4bis and Evaluation des pertes des biens à Beni, Butembo et Gemena de 1998 à 2005: Détail évaluation perte des biens à Butembo de 1998 à 2003, DRCM Annex 2.4ter.

7.137 The DRC's claim is so arbitrary and speculative, that the DRC has even failed to explain how it arrived at the figures for the total amount of compensation it seeks for Beni, Butembo and Gemena.

7.138 As was true with respect to Ituri and Kisangani, the DRC has failed to prove the exact property damage in Beni, Butembo and Gemena suffered as a result of specific actions of Uganda constituting internationally wrongful acts. As a result, there is no legal basis to award it compensation for this head of damages.

D. THE CONGOLESE ARMY

7.139 The DRC also seeks US\$ 69,417,192 in compensation for "material damages" the Congolese army allegedly suffered "in combat with the UPDF and rebel movements supported by it". 1025

7.140 This claim founders in the first instance on the absence of any connection to the Court's findings in the 2005 Judgment. As a matter of law, the DRC cannot seek damages beyond the scope of what was decided at the merits phase by seeking damages for claims that were never presented at that phase.

7.141 The Court's 2005 Judgment is confined to the DRC's claims advanced in its Application, as elaborated in the written and oral proceedings, and its final submissions. At no time during the merits phase did the DRC raise any issue concerning material damage allegedly suffered by the Congolese army. Nor did the Court make any such finding in the *dispositif* or text of the 2005 Judgment.

332

¹⁰²⁵ DRCM, para.7.48 (Translation by Counsel, original in French "dommages matériels subis par les forces armées congolaises... dans le cadre des combats qui l'ont opposée à l'UPDF et aux mouvements rebelles soutenus par cette dernière".).

7.142 Just as claims falling outside the jurisdiction of the Court cannot be pursued at the merits phase, ¹⁰²⁶ claims not presented to the Court at the merits phase cannot serve as a basis for an award of damages in this phase. ¹⁰²⁷ Accordingly, the DRC cannot at this phase advance claims beyond the scope of what was proven to the Court at the merits phase.

7.143 Moreover, even if the DRC could overcome this threshold problem (*quod non*), this aspect of its claim would still fail for lack of proof. The DRC's claim rests solely on two summary tables prepared by a high-ranking officer of the Congolese Army on 31 August 2016—that is, just two weeks before the DRC submitted its Memorial to the Court. The Court has, however, routinely disregarded materials prepared by interested persons for purposes of litigation years after alleged events in question. ¹⁰²⁸

7.144 And even if the two summary tables included in Annex 7.4 of the DRC Memorial were accepted as genuine and reliable (which they should not be), they do nothing other than underscore the speculative and arbitrary nature of the DRC's claim. The two tables are reproduced below. The first lists the alleged damages and purports to quantify them based on the values alleged in the second table. Nothing in either table has any support in genuine evidence, however.

¹⁰²⁶ Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgement, I.C.J. Reports 1985, p. 23, para. 19 ("The Court must not exceed the jurisdiction conferred upon it by the Parties...".).

¹⁰²⁷ Case Concerning the Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v. Spain) Second Phase, Judgement, I.C.J. Reports 1970, p. 37, para. 49 (the Court concluded that a certain matter raised by the applicant State went beyond the claim as originally formulated, such that the Court "will not pursue its examination of this point any further".). See also Chapter 3 above for further discussion.

¹⁰²⁸ Armed Activities (2005), paras. 64, 125.

Nº Périodes et régions		Pertes subies		§	Valeur unitaire		Evaluation chiffré	
HONA S		En homm	es dans les rang	s des FAC				
1 Pont de Télé (24 septembre 1998)		159	tués	2.45	\$	18'913.00	\$	3'007'167.0
2 Mindemb	oo (octobre-décembre 1998)	202 tués		2.48	S	18'913.00	\$	3'820'426.0
3 Mozamb	oli (novembre-décembre 1998)	40 tués		2.50	\$	18'913.00	\$	756'520.0
4 Pima (ma	ai 1999)	pertes importantes		2.51				
5 Libanda	(juin 1999)	plusieurs diz	aines de victimes	2.52				
6 Libenge ((août 2000)	300	tués	2.54	S	18'913.00	\$	5'673'900.0
7 Ubangi (a	août 2000)	800	tués	2.55	\$	18'913.00	S	15'130'400.0
	Total des décès répertoriés	1501	tués				\$	28'388'413.0
9	Estimation du nombre total	2000	tués				\$	37'826'000.0
		En a	rmement et mun	itions				
1 Mai 1998 à Pima		2	mortiers de 82 m	m	S	5'432.00	\$	10'864.
		4	mortiers de 60 m	m	\$	5'432.00	\$	21'728.
		1	canon de 75 mm		\$	13'000.00	\$	13'000.0
		4	mitrailleuses		\$	400.00	\$	1'600.0
		10	plusieurs lance-ro	quettes (estimation)	\$	900.00	\$	9'000.0
2 En noven	abre et décembre 1998 à Mindembo	1	char de combat		\$	60'000.00	\$	60'000.0
		1 camion+ munitions détruits		\$	40'000.00	\$	40'000.0	
3 Juin - Juil	llet 1998 à Gbadolite	400	tonnes de matérie	l et de munitions détruits	\$	30'000.00	\$	12'000'000.0
4 3 décemb	ore 1998 à Mindembo	1	char et un camior	chargé de munitions	\$	110'000.00	\$	110'000.0
5 9 août 20	000 à Ubangi	8	camions		\$	20'000.00	\$	160'000.0
		2	de l'artillerie lourd	le (canons 75 mm)	\$	13'000.00	\$	26'000.0
		100	kalachs		\$	400.00	\$	40'000.0
		500	fulils d'assaut AK	M	\$	500.00	\$	250'000.0
		800	tonnes de munitio	n			S	8,000,000°0
		2	bateaux				\$	48'350'000.0
		5	jeeps/blindés		\$	65'000.00	\$	325'000.0
							\$	69'417'192.0

 $^{^{1029}}$ "Evaluation des dégâts militaires dans les rangs des FARDO par l'armée ougandaise et alliés" (31 Aug. 2016), p. 1, DRCM Annex 7.4.

Evaluation des dégâts militaires dans les rangs des FARDC par l'armée ougandaise et alliés

COUT MATERIELS MILITAIRES

N° Serie	Designation	U/M	P.U EN \$	Observation
	1. ARMEMENT			
1	Fusil assaut Inf (AKM)	Pièce	500	
2	Mi Sec (RPD) 7,62 mm	Pièce	400	
3	PKM (S)	Pièce	1700	
4	Mi 12,7 mm	Pièce		
5	Mi 14,5 mm	Pièce		
6	Lance roquette portable RPG 7	Pièce	900	
7	Mortier 60mm	Pièce	5432	
8	Mortier 82mm	Pièce		
9	Mortier 120 mm	Pièce	13500*	
10	Canon 75 mm	Pièce		
11	Char T55	Pièce	60000	
12	Véhicule Blindé BMP-1	Pièce	65000	
13	Char T64	Pièce	390.000	
14	Veh Blindé Praga	Pièce	190.000	
15	BTR 60	Pièce	480.000	
	2. BATEAU	Pièce	24175000	Cfr EM Log
	3. MUNITION ET BOMBE			
1	Cart 7,62 X39mm ball	Coup	0.28	
2	Cart 7,62 X54mm ball	Соир	0,32	
3	Cart 12,7x 108 mm API	Coup	6,5	
4	Cart 14,5x114 mm API	Coup	0.53	
5	Obus 100mm HEAT	Coup	398	
6	Obus 100 mm HE	Coup	355	
7	Roq 40mm RPG 7	Coup	215	
8	Roq 107 mm	Coup	83,95	
9	Bombes 60mm HE	Coup	1,9	
10	Bombes 82 mm HE	Coup	90	
11	Bombes 120 mm HE	Coup	110	

1030

7.145 In support of the alleged damages, the DRC relies on just a single source: "The Choice of Liberty", a book authored by the MLC leader J. Bemba. ¹⁰³¹ It is perhaps ironic that the DRC could not come up with any better source than extracts

¹⁰³⁰ *Ibid.*, p. 2.

¹⁰³¹ See DRCM, paras. 2.48, 2.51, 2.53, and 2.55 citing to Bemba's "Choice of Liberty" as the sole support for damages the Congolese Army allegedly sustained in Mindembo, Pimu, Gbadolite, and Ubangi, respectively.

of a book in which Mr Bemba boasts about the results his group achieved under his command in battles with the Congolese Army. ¹⁰³² It is even more ironic that the DRC cannot corroborate any of those damages by contemporaneous documentary materials from the FAC. In fact, the DRC resorts to outright speculation by making up numbers to "concretise" Bemba's general allegations.

7.146 For example, the DRC quotes Bemba's book for the proposition that the Congolese Army "abandoned ... hundreds of ammunition boxes" after fighting with the MLC near Ubangi ¹⁰³³ Based on that one vague allegation, the DRC claims damages to 800 tons of ammunition. ¹⁰³⁴ There is no proof that this is the amount of ammunition that the Congolese Army actually lost. ¹⁰³⁵

7.147 In any event, it does not matter what damages to the FAC the DRC seeks to extract from Mr Bemba's book. Mr Bemba said nothing about any specific damages having been caused by UPDF soldiers. To the contrary, he insisted that it was he who was in control of the military ventures, not Uganda. ¹⁰³⁶ Moreover, as

_

¹⁰³² *Ibid.*, *citing to* Bemba's "Choice of Liberty" as the sole support for damages the Congolese Army allegedly sustained in Mindembo, Pimu, Gbadolite, and Ubangi, respectively.

¹⁰³³ DRCM, para. 2.55.

^{1034 &}quot;Evaluation des dégâts militaires dans les rangs des FARDO par l'armée ougandaise et alliés" (31 Aug. 2016), DRCM Annex 7.4. See also the excerpt from Bemba's book, quoted in para. 2.55 of the DRC Memorial, mentioning that the Congolese Army abandoned heavy artillery equipment and light weapons, without referring to any specific number. However, the DRC claims, without any evidence, damages to 600 units of weapons. See also para. 2.51 of the DRC Memorial quoting to Bemba's book that the Congolese Army "abandoned... several rocket launchers." (Translation by Counsel, original in French: "abandonment... du materiel d'artillerie lourde".). On that shaky foundation, the DRC claims damages to 10 rocket launchers. DRCM, para. 2.55, 2.51.

¹⁰³⁵ See, e.g., DRCM, para. 2.55 quoting to Jean-Pierre Bemba, Le choix de la Liberté (2002), DRCM Annex 2.13.

¹⁰³⁶ See the DRCM, paras. 2.48, 2.51, 2.53, and 2.55 citing to Jean-Pierre Bemba, Le choix de la Liberté (2002), DRCM Annex 2.13 as the sole support for damages the Congolese Army allegedly sustained in Mindembo, Pimu, Gbadolite, and Ubangi, respectively. See also the Court's finding that: "[T]he pages cited by the DRC in Mr Bemba's book do not in fact support the claim of "the creation" of the MLC by Uganda, and cover the later period of March-July 1999. The Court has

previously noted, the Court made clear that the MLC's conduct is not attributable to Uganda. 1037

7.148 The DRC equally fails to adduce any evidence supporting its valuation of the alleged damages. The values assigned to weapons and military equipment listed in the summary table have no documentary support. 1038

7.149 Unlike in the *Corfu Channel* case, where the material damages to the U.K.'s military vessels were proven by convincing contemporaneous evidence, including documentary materials and photographs, and where the valuation of damages was based on a credible and sound methodology, ¹⁰³⁹ the DRC's claim is founded on speculation atop speculation.

7.150 Because the DRC has failed to prove the exact damage that the Congolese Army suffered as a result of specific actions of Uganda constituting internationally wrongful acts, there is no basis to award compensation on this account.

noted the description in Mr Bemba's book of the training of his men by Ugandan military instructors and finds that this accords with statements he made at that time, as recorded in the ICG report of 20 August 1999. The Court has equally noted Mr Bemba's insistence, in November 1999, that, while he was receiving support, it was he who was in control of the military venture and not Uganda. The Court is equally of the view that the Harare Disengagement Plan merely sought to identify locations of the various parties, without passing on their relationships to each other." *Armed Activities* (2005), para. 158.

¹⁰³⁷ Armed Activities (2005), para. 160.

¹⁰³⁸ See Table 2 in "Evaluation des dégâts militaires dans les rangs des FARDO par l'armée ougandaise et alliés" (31 Aug. 2016), DRCM Annex 7.4. Moreover, this table does not provide values to four types of weapons ("Mi 12.7 mm," "Mi 14.5 mm," "Mortier 82 mm," and "Canon 75 mm"). It thus unclear on what basis the DRC assessed damages for those elements of its claim. For example, the DRC values two 82mm mortars at US\$ 5,432 apiece, without even explaining the source of the alleged valuation amount. The same is true in regard to the DRC's valuation of 75 mm cannons valued at US\$ 13,000 apiece. See Table 1 of "Evaluation des dégâts militaires dans les rangs des FARDO par l'armée ougandaise et alliés" (31 Aug. 2016), Annex 7.4.

¹⁰³⁹ Corfu Channel (Compensation, 1949).

7.151 For all the foregoing reasons, the DRC is not entitled to the compensation it seeks for alleged damages caused to property.

CHAPTER 8

THE DRC'S CLAIMS RELATING TO NATURAL RESOURCES ARE UNSUPPORTED BY ITS EVIDENCE AND METHODOLOGICALLY **FLAWED**

- 8.1 The DRC seeks US\$ 3,478,494,205 in compensation for damages allegedly caused to Congolese natural resources by Uganda. 1040 This amount includes:
 - US\$ 685,513,737 for the alleged exploitation of gold, diamonds and coltan;
 - US\$ 2,692,980,468 for alleged damages to wildlife; and
 - US\$ 100,000,000 for alleged deforestation. 1041
- 8.2 As was true of its other claims discussed in the previous chapters, the DRC fails to prove any of these claims: it presents no convincing evidence showing with a high degree of certainty the exact injury suffered as a result of specific wrongful acts of Uganda, or the valuation of the alleged injury.
- 8.3 **Section I** of this Chapter discusses the standard techniques for proving and valuing damages of this kind in international law (which techniques the DRC Memorial declines to follow). Section II then demonstrates that the DRC's claims relating to natural resources are unsupported by evidence and methodologically flawed.

¹⁰⁴⁰ DRCM, para. 5.190.

¹⁰⁴¹ Ibid., para. 5.190. The DRC has also reserved its right to make additional claims in regard to the alleged mining of gold and diamonds as well as deforestation. This reservation of rights is untenable for the reasons explained in the sections addressing the DRC's unsustainable claims of damages to the alleged mining of natural resources and deforestation.

I. The DRC's Claims Are Not Based on Standard Methods for Proving the Existence and Valuation of the Damages It Claims

- 8.4 This chapter principally focuses on the systematic legal and factual problems with the DRC's claims concerning the alleged exploitation of natural resources. At the outset, however, it is important to note that the DRC's claims are not based on the standard methods or the kinds of evidence that would normally be expected for proving the existence and valuation of harms like those the DRC alleges.
- 8.5 A survey of relevant practice relating to pillage, plunder or spoliation 1042 indicates that the method for proving compensation for the exploitation of natural resources entails several elements, including: (1) identification of the specific place or places where the exploitation occurred, such as specific mines, oil wells, quarries, forests or rivers where the extraction of the resources occurred; (2) identification of the specific time period during which the exploitation occurred; (3) determination of at least the approximate amount of resources extracted; and (4) valuation of those resources.

_

¹⁰⁴² Methodology and evidentiary standards for proving pillage, plunder, and spoliation may be found in a range of jurisprudence before international criminal tribunals and mixed claims commissions from Nuremberg to the present, including situations where natural resources have been seized. See, e.g., Polish Forestry, Case No. 7150, The United Nations War Crimes Commission, History of the United Nations War Crimes Commission and the Development of the Laws of War (1948), p. 485 (finding liability of German troops for over-exploitation of forests in occupied Poland). See generally Michael A. Lundberg, "The Plunder of Natural Resources during War: A War Crime?", Georgetown Journal of International Law, Vol. 39 (2007-2008); Daniëlla Dam-de Jong, International Law and Governance of Natural Resources in Conflict and Post-Conflict Situations (2015); F. Ortino & N. M. Tabari, "International Dispute Settlement: The Settlement of Disputes Concerning Natural Resources — Applicable Law and Standards of Review," in RESEARCH HANDBOOK ON INTERNATIONAL LAW AND NATURAL RESOURCES (E. Morgera & K. Kulovesi, eds. 2016), p. 496.

8.6 Such elements should be proven through a range of documentary evidence typically available with respect to the relevant sector of natural resources. If a State seeks to prove that gold was unlawfully exploited from a specific mine, for example, it should produce reports, business records and other documents generated in the regular course of operations of that mine during the years leading up to its seizure. The seizure of the mine would then be proven through either contemporaneous accounts or sworn affidavits by persons with direct knowledge. Valuation of the harm from lost resources might be proven based on prior years of extraction of the resource from that location, discounted by the costs of extraction and taking into account any changed circumstances (such as damage to the mine from the armed conflict). If the gold mine is owned and operated by a private company, not the State, the State must establish that the company has been continuously of its nationality from the date of the injury until at least the presentation of the State's claim. Once such specifics are proven, if the exploitation occurred within occupied territory, the occupying Power is entitled to establish that the alleged exploitation was consistent with the laws of war relating to usufruct.

8.7 Alternative techniques are possible for addressing mass claims for property damage before complex claims commissions, but as explained in Chapter 3, those techniques are not appropriate in the context of inter-State litigation before the Court. Even before those commissions, the evidentiary standards for claims relating to exploitation of natural resources typically are quite high, as may be seen with respect to the "Category E1" claims before the UNCC concerning Kuwait's oil sector.¹⁰⁴³

¹⁰⁴³ See U.N. Security Council, Report and Recommendations Made by the Panel of Commissioners Concerning the Second Instalment of "E1" Claims, U.N. Doc. S/AC.26/1999/10 (24 June 1999), paras. 30-32, Annex 9. See generally C. Payne & P. Sand eds., Gulf War Reparations and the UN Compensation Commission: Environmental Liability (2011).

8.8 As Uganda has indicated in previous chapters, it is mindful of the difficulties that may be associated with gathering evidence of exploitation of natural resources during an armed conflict. Yet the fact remains that the DRC has provided *no* evidence of the type normally expected to prove the existence and valuation of specific harm in the form of exploitation of natural resources.

8.9 As will be shown below, rather than follow the standard approach for proving the alleged injury and its valuation, the DRC cobbles its claims together primarily from unsupported allegations and misconstrued data selectively extracted from the widely criticised UN Panel reports. 1044 Relying exclusively on the UN Panel's first report of 12 April 2001 ("UN Panel's first report"), for example, the DRC erroneously contends that the difference between the production and export of mineral resources in Uganda during 1998-2003 somehow shows Uganda's illegal exploitation of the Congolese mineral resources. 1045 The DRC puts this flawed proposition forward knowing full well that it was abandoned in the UN Panel's final report of 23 October 2003, which does not contain even a hint that Uganda's export of minerals during the relevant period was connected to illegal exploitation of Congolese natural resources. (This claim was also refuted in the Porter Commission Final Report). 1046 Likewise, the DRC grounds its compensation claim for deforestation entirely on the misconceived DARA-Forest "Case Study" set out in the UN Panel's first report, which was also abandoned in the UN Panel's final report. 1047 Many of the DRC's other claims related to natural resources are

¹⁰⁴⁴ U.N. Panel of Experts, first report of 12 Apr. 2001, Annex 11; U.N. Panel of Experts, Addendum to the first report of 12 April 2001, Annex 13; U.N. Panel of Experts, report of 16 Oct. 2002, Annex 15.

¹⁰⁴⁵ See paras. 8.47-8.94.

¹⁰⁴⁶ See paras. 8.68-8.71.

¹⁰⁴⁷ See paras. 8.153-8.164.

similarly based on allegations plucked from UN Panel reports and misleadingly presented as established fact (which they are not). 1048

- 8.10 Because nearly the whole of the DRC's case on natural resources hinges on the UN Panel reports, it is useful here to recall generally their limitations. (Specific problems with the reports will be addressed in connection with particular aspects of the DRC's claims addressed below).
- 8.11 The UN Panels were established at the behest of the UN Security Council to suggest solutions to the illegal exploitation of natural resources in the DRC. The UN Panel reports were not designed to establish responsibility for violations of international law, the purpose for which the DRC is now trying to use them. Instead, the Panels were essentially political organs, vested only with responsibility to suggest political solutions for the problems on the ground. The Security Council understood that any report would not reach the high standards required for judicial purposes, noting that the UN Panels were not judicial organs vested with the power or capability to collect and evaluate evidence. 1049
- 8.12 Even once their limited purpose is understood, the UN Panel reports, and especially the first report on which the DRC primarily relies, are deeply flawed.

¹⁰⁴⁸ DRCM, paras. 5.07, 5.08, 5.28, 5.30, 5.33, 5.37, 5.40, 5.41, 5.86-5.88, 5.90, 5.95, 5.104, 5.114, 5.115, 5.127, 5.174-5.176, 5.182.

¹⁰⁴⁹ The President of the Security Council, commenting on the work of the First Panel, stated: "I want to repeat something that other speakers have noted... Our goal is not to punish or apportion blame; our goal, is and must remain, the successful implementation of the Lusaka Ceasefire Agreement and the relevant Security Council resolutions." The Permanent Representative of the United Kingdom, in a similar vein, observed: "We must engage with each other and try to achieve greater clarity, but we also need to focus on the primary goal here, which is not to punish or narrowly to assign blame, but to tackle the problem in the interests of promoting the wider peace process and alleviating the suffering of the Congolese people." For the full discussion with all supporting documents, *see* Rejoinder submitted by the Republic of Uganda (6 Dec. 2002), in *Armed Activities* (2005), paras. 332-338.

The Panel's first report was criticised as biased and lacking in credibility, so much so that the failures of the first UN Panel required the appointment of a second Panel. The new Panel admitted that the report of 12 April 2001 was defective and that it could not correct all the problems in the report. Some of the defects in the first report thus continued to infect subsequent reports. This led to the preparation of a third report that still failed to make meaningful improvements on its predecessors. During an open debate before the Security Council, members made clear that they did not consider *any* of the reports sufficient to warrant action by the Security Council. In the UN Panel reports could not justify *political* action, *a fortiori* they cannot meet the higher standards of evidence to sustain *legal* action against a State.

8.13 Notably, in the past, the DRC itself admitted that the UN Panel reports (especially the UN Panel's first report on which it so heavily relies) lacked credibility. In debates before the Security Council, the DRC attacked portions of the reports alleging improper conduct on the part of the DRC government. It emphasised three major flaws in the reports: (1) the reports make accusations without an understanding of the factual context; (2) the reports make accusations that are not based on evidence; and (3) the reports fail to understand the difference between what is legal and what is illegal. ¹⁰⁵¹

8.14 The DRC was far from being the only State to recognise the inadequacy of the UN Panel reports. A host of other States also criticised them, pointing out, among other flaws, the failure: to distinguish between fact and hearsay; to support allegations with evidence; to seek corroborating evidence; to interview relevant witnesses; to inspect relevant documents; to identify sources; to understand the

¹⁰⁵⁰ For the full discussion with all supporting documents, *see* Rejoinder submitted by the Republic of Uganda (6 Dec. 2002), in *Armed Activities* (2005), paras. 339-375.

344

¹⁰⁵¹ *Ibid.*, paras. 340-344.

context of events; to distinguish between legal and illegal activity; to provide an opportunity to those accused to explain or otherwise respond to allegations; and to satisfy basic standards of impartiality. ¹⁰⁵²

8.15 Given these widely recognised issues, it is not surprising that, in its 2005 Judgment, the Court did not rely on the UN Panel reports in reaching its findings concerning the illegal exploitation of natural resources. Instead, the Court drew its conclusions primarily from Uganda's Porter Commission Report. ¹⁰⁵³ As the Court explained, "evidence obtained by examination of persons directly involved, and who were subsequently cross-examined by judges skilled in examination and experienced in assessing large amounts of factual information, some of it of a technical nature, merits special attention." ¹⁰⁵⁴

II. The DRC Has Failed to Prove the Extent of the Harms to Natural Resources It Claims, and Its Valuation of Those Harms Is Methodologically Flawed

8.16 Before turning to the specifics of the DRC's reparation claims relating to natural resources, it is useful to briefly recall the relevant findings in the Court's 2005 Judgment.

8.17 Relying primarily on the Porter Commission Report, the Court reached two findings against Uganda. ¹⁰⁵⁵ *First*, the Court found "that officers and soldiers of the UPDF, including the most high-ranking officers, were involved in the looting, plundering and exploitation of the DRC's natural resources and that the military

¹⁰⁵² *Ibid.*, paras. 340-375.

¹⁰⁵³ Porter Commission, Final Report, Annex 52.

¹⁰⁵⁴ Armed Activities (2005), para. 61.

¹⁰⁵⁵ *Ibid.*, paras. 237-250.

authorities did not take any measures to put an end to these acts". ¹⁰⁵⁶ This finding was primarily based on references to parts of the Porter Commission Report addressing misconduct of some UPDF soldiers and officers who were taking advantage of their positions in the DRC with an aim of profiting for themselves. ¹⁰⁵⁷ Second, the Court found that "Uganda violated its duty of vigilance in Ituri by not taking adequate measures to ensure that its military forces did not engage in the looting, plundering and exploitation of the DRC's natural resources". ¹⁰⁵⁸

8.18 On that basis, the Court held in its *dispositif* that Uganda violated its obligations under international law "by acts of looting, plundering and exploitation of Congolese natural resources committed by members of the Ugandan armed forces in the territory of the Democratic Republic of the Congo and by its failure to comply with its obligations as an occupying Power in Ituri district to prevent acts of looting, plundering and exploitation of Congolese natural resources". ¹⁰⁵⁹ The Court's decision was clearly limited to the period of time that Ugandan forces were present in the DRC, and outside Ituri, and limited to acts committed directly by Ugandan forces.

8.19 It is equally important to recall what the Court did *not* find in its 2005 Judgment. *First*, contrary to the DRC's contentions, the Court did not find that there was "a governmental policy of Uganda directed at the exploitation of natural resources of the DRC or that Uganda's military intervention was carried out in

¹⁰⁵⁶ *Ibid.*, para. 242.

¹⁰⁵⁷ See ibid., paras. 238-242 referring to the following sections of the Porter Commission, Final Report: 13.1, 13.2, 13.4, 14.4, 14.5, 15.7, 18.5.1, 20.3, 21.3, 21.3.4, Annex 52.

¹⁰⁵⁸ Armed Activities (2005), para. 246.

¹⁰⁵⁹ *Ibid.*, para. 345(4).

order to obtain access to Congolese resources."¹⁰⁶⁰ *Second*, the Court did not find that Uganda was responsible for looting, plundering and exploitation of Congolese natural resources committed by rebel groups outside of Ituri. ¹⁰⁶¹

8.20 The Court also did not make any findings concerning specific types of natural resources or specific locations. Rather, it only determined, as a general matter, that looting, plundering and exploitation of natural resources had occurred to an unspecified degree. Indeed, the Court expressly stated that it was "not necessary for the Court to make findings of fact with regard to each individual incident alleged." ¹⁰⁶²

8.21 It, therefore, now falls to the DRC to prove the exact injury suffered as a result of the specific actions of Uganda constituting internationally wrongful acts for which it is responsible. As demonstrated below, the DRC Memorial does not meet this burden with respect to any aspect of its claims. The DRC has presented a series of unsustainable propositions, built upon unconvincing evidence or speculation, in order to advance highly inflated claims. There is therefore no credible basis for awarding the compensation the DRC seeks.

¹⁰⁶⁰ Armed Activities (2005), para. 242.

¹⁰⁶¹ *Ibid.*, para. 247 ("As for the claim that Uganda also failed to prevent the looting, plundering and illegal exploitation of the DRC's natural resources by rebel groups, the Court has already found that the latter were not under the control of Uganda (*see* paragraph 160 above). Thus, with regard to the illegal activities of such groups outside of Ituri, it cannot conclude that Uganda was in breach of its duty of vigilance".).

¹⁰⁶² *Ibid.*, para. 237.

¹⁰⁶³ See Chapter 3 and Chapter 4 of Uganda's Counter-Memorial.

A. MINERAL RESOURCES

- 8.22 The DRC claims US\$ 685,513,737 for the alleged exploitation of mineral resources. This amount includes:
 - US\$ 675,541,972 for the exploitation of gold;
 - US\$ 7,055,885 for the exploitation of diamonds; and
 - US\$ 2,915,880 for the exploitation of coltan; 1064

The DRC, however, offers no evidence proving the existence, causation or valuation of the claimed harms.

- 1. The DRC Has Failed to Prove the Existence of the Alleged Harms Relating to Mineral Resources
- 8.23 The DRC presents its claims for the alleged illegal exploitation of mineral resources in three simplistic steps:
 - 1. It starts by asserting that UPDF troops were present in some locations in the DRC and assumes that they were in those locations at all times between 1998 and 2003;
 - 2. It then refers to several incidents allegedly involving elements of the UPDF;
 - 3. From this weak foundation, it then leaps to misconstrued economic data plucked from the UN Panel's discredited first report to argue that the difference between the allegedly low production in, and high export

¹⁰⁶⁴ DRCM, para. 5.190.

volume of mineral resources from, Uganda between 1998 and 2003 somehow both proves that Uganda illegally exploited Congolese mineral resources and shows the extent of that alleged exploitation.

8.24 The DRC's claims suffer from a series of fatal flaws: some do not even fall within the scope of the Court's findings in 2005; virtually all are not based upon proof of specific acts attributable to Uganda that resulted in the unlawful exploitation of mineral resources; and where some evidence is presented for a very few internationally wrongful acts ascribable to Uganda, the DRC fails to specify and prove the exact injury. None of those flaws can be cured by resorting to the "economic data" just mentioned, as the DRC tries to do. Uganda addresses each of these failings in turn.

(a) The DRC Cannot Seek Compensation Based on Claims Falling Outside the Scope of the Court's Findings on Natural Resources

8.25 The DRC can claim compensation only for injury caused by actions that fall within the scope of the Court's findings on natural resources in 2005. ¹⁰⁶⁵ The DRC has, however, disregarded this requirement in several respects.

8.26 For example, the DRC claims that Uganda exploited gold in Bondo, a locality in the Bas-Uele Districts in Equator Province. ¹⁰⁶⁶ The claim is based on the following statement from the UN Panel' first report:

"In the Bondo locality within the Equateur Province, young men from 12 to 18 years were recruited by Jean-Pierre Bemba [the MLC leader]. The Ugandan

-

¹⁰⁶⁵ See Chapter 3, Section II(A).

¹⁰⁶⁶ DRCM, paras. 5.36-5.38.

allies trained the recruits and shared with them the idea that the Ugandan army was an "army of development" that aimed at improving ordinary people's living conditions. After the one-hour morning "physical training" session, they were sent to gold mines to dig on behalf of the Ugandans and Mr Bemba." ¹⁰⁶⁷

8.27 Aside from being unsupported and uncorroborated, this statement is also too vague to convincingly link the exploitation of gold in Bondo to Uganda. The Porter Commission concluded as much by stating:

"The UPDF officers and men this Commission interviewed have admitted that Jean-Pierre Bemba was an ally and that they trained the rebels under his command, but denied that they trained young men recruited by him to mine gold diamonds or coltan. Jean-Pierre Bemba has also denied the allegation. Since the names of the alleged eyewitnesses who gave information to the original Panel were not disclosed, this Commission is unable to investigate the matter further, concludes that there it is unable to find evidence to support this allegation". 1068

8.28 At best, the statement the DRC cites from the UN Panel's first report suggests that MLC rebels were exploiting gold. But the DRC cannot press this claim because it is contrary to the Court's express finding in the 2005 Judgment that Uganda was not responsible for acts of looting, plundering and exploitation committed by rebel groups outside Ituri. 1069 Wrongful conduct for which the Court

¹⁰⁶⁷ *Ibid.*, para. 5.37 (Translation by Counsel, original in French: "Dans la localité de Bondo, province de l'Equateur, des jeunes de 12 à 18 ans étaient recrutés par Jean-Pierre Bemba. Les alliés ougandais entraînaient les recrues et leur inculquaient l'idée que l'armée ougandaise était une 'armée de développement' dont l'objectif était d'améliorer les conditions de vie de la population. Après la séance 'd'exercice physique' d'une heure le matin, ils étaient envoyés dans les mines d'or afin d'extraire le minerai pour le compte des Ougandais et M. Bemba".).

¹⁰⁶⁸ Porter Commission, Final Report, p. 71 (emphasis added), Annex 52.

¹⁰⁶⁹ Armed Activities (2005), para. 247 ("As for the claim that Uganda also failed to prevent the looting, plundering and illegal exploitation of the DRC's natural resources by rebel groups, the

did not find Uganda responsible in 2005 plainly cannot serve as a basis for compensation. 1070

8.29 The same is true with respect to the DRC's new sweeping allegations that "the unofficial trade in gold [was] likely facilitated by the lax enforcement of regulations at the Uganda-Congo border posts" and by the lack of requirement for Ugandan companies "to inquire about the origin of the gold that they bought". To prop up those allegations, the DRC also claims that two private companies in Uganda, Uganda Commercial Impex, Ltd. and Machanga, Ltd. "declared to Human Rights Watch researchers that the gold they traded came from the Congo (and more specifically from Ituri)". 1072

8.30 Here again, the DRC disregards the fact that the Court made no findings that Uganda was internationally responsible for "the lax enforcement" of regulations or not imposing on private companies the requirement to enquire about the origin of gold. Nor did the Court find Uganda internationally responsible for "the unofficial trade in gold" carried out by private persons. ¹⁰⁷³ Res judicata bars

_

Court has already found that the latter were not under the control of Uganda (*see* paragraph 160 above). Thus, with regard to the illegal activities of such groups outside of Ituri, it cannot conclude that Uganda was in breach of its duty of vigilance".).

¹⁰⁷⁰ Even if, *quod non*, the DRC could prove that UPDF forces exploited gold in the mines in the Bondo area, the DRC still fails to adduce any evidence on the levels of exploitation in that locality.

¹⁰⁷¹ DRCM, para. 5.48 *citing to* Human Rights Watch, *The Curse of Gold, Democratic Republic of the Congo* (2005), Annex 57.

¹⁰⁷² DRCM, para. 551 (Translation by Counsel, original in French: "ont déclaré aux chercheurs de *Human Rights Watch* que l'or dont ils faisaient commerce provenait du Congo (et plus spécifiquement d'Ituri)".).

¹⁰⁷³ Indeed, as the Porter Commission concluded, Uganda cannot be blamed that gold was smuggled because of an "inefficient Customs Service and a porous border. It is not the only country in Africa with these problems." Porter Commission, p. 109, Annex 52. The Porter Commission also found that the UN Panel of Experts wrongly attributed smuggling by private actors and rebels to Uganda. *See* Porter Commission, Final Report, pp. 163-164; 167, Annex 52.

the DRC from claiming compensation based on allegations unrelated to acts for which Uganda was found responsible in 2005.

8.31 Equally of no help is the DRC's reference to a 2005 Human Rights Watch report mentioning that two Ugandan private companies were trading gold from the Congo. Human Rights Watch explained that those companies were buying gold from private persons in the DRC and exporting it to Dubai, South Africa and Switzerland. It saw nothing illegal in those operations, concluding that those companies "do not operate illegally but rather benefit from the loose regulation of the gold trade". ¹⁰⁷⁴ Indeed, the DRC has failed to show any evidence connecting the operation of those companies, or any Ugandan company, to specific wrongful acts for which the Court found Uganda responsible in 2005.

8.32 The DRC also disregards the Court's findings on liability when it presents claims for the alleged destruction of the Gorumbwa mine and "theft of fuel and explosives" in unspecified locations of OKIMO mining company. The DRC may be entitled to pursue these claims but not under a heading related to the exploitation of natural resources. These claims are properly considered as being related to property damage, and even then could only serve as a basis for recovery if the DRC were to prove both the extent of the alleged property damage and directly connect them to specific wrongful actions attributable to Uganda (neither of which it does). 1076

¹⁰⁷⁴ Human Rights Watch, *The Curse of Gold, Democratic Republic of the Congo* (2005), p. 109 (emphasis added), Annex 57.

¹⁰⁷⁵ DRCM, paras. 5.28, 5.32 (Translation by Counsel, original in French: "vol de carburant et d'explosifs").

¹⁰⁷⁶ These claims still suffer from significant evidentiary shortcomings. For example, the DRC's allegation that UPDF soldiers destroyed the Gorumbwa mine rests on one illegible report of the OKIMO company to the Governor of the Province of Kibali-Ituri, dated 4 September 1999.

(b) The DRC Cannot Claim Compensation for Damages that Did Not Result from Uganda's Wrongful Acts

8.33 The Court indicated in the 2005 Judgment that, at this reparations stage, the DRC must prove "specific actions of Uganda" that resulted in "exact injury" to the DRC. Thus, even if the DRC could establish the existence of illegal exploitation of mineral resources, that injury would only be compensable if the DRC were to prove that the injury was the "result" of specific actions of Uganda falling within the scope of the internationally wrongful acts identified in the 2005 Judgment. ¹⁰⁷⁷

8.34 Yet the DRC offers virtually no evidence as to specific instances or specific places where acts of illegal exploitation by Uganda ostensibly occurred. Nor has the DRC made any effort to identify specific time-periods during which any such illegal exploitation took place. The DRC simply assumes that any exploitation of natural resources in the DRC must be attributable to Uganda. In fact, the DRC's assumption is even more brazen. As discussed in greater detail below, the DRC's claims rest entirely on an assumption that evidence of exports of minerals *from Uganda* demonstrates unlawful exploitation by Uganda in the DRC. Yet there are myriad reasons why exports of minerals from Uganda, even if proven, may have nothing to do with illegal exploitation by Uganda in the DRC. That is why it is critical for the DRC to prove specific incidents of illegal exploitation in the DRC, so that the Court can be confident that it was a specific act of Uganda that resulted in specific illegal exploitation in the DRC, rather legal exploitation within or

However, the report makes no mention of UPDF soldiers. Further, even if the DRC could prove that the mine was indeed destroyed by UPDF soldiers, it would have to provide documentary evidence showing the extent of destruction and valuation of damages. See DRCM, para. 5.28; Rapport de la société OKIMO au Gouverneur de la Province de Kibali-Ituri (4 Sept. 1999), DRCM Annex 5.5.

¹⁰⁷⁷ See Chapter 4, Section I(B).

outside the DRC, or illegal exploitation within the DRC by some actor other than Uganda.

8.35 The DRC alleges, for example, that in Ituri FNI militiamen took control of the Adidi mine from the UPC in March 2003 and collected taxes from gold panners at a rate of about US\$ 1 per person. Because this allegation does not implicate UPDF soldiers, the DRC's claim would appear to rest on an alleged failure to fulfill Uganda's obligations as an occupying Power in Ituri to prevent acts of exploitation of Congolese natural resources by others.

8.36 As explained in Chapter 4, however, the compensation due for Uganda's failure to exercise its obligations as an occupying Power cannot simply be measured by pointing to injuries materially inflicted by others. The causal nexus between a wrongful omission and injury "could be considered established only if the Court were able to conclude from the case as a whole and with a sufficient degree of certainty that the [harm] would in fact have been averted if the Respondent had acted in compliance with its legal obligations." The DRC has, however, failed to adduce any evidence showing that what happened at the Adidi mine (or any other mine in Ituri for that matter) would in fact have been averted if Uganda had acted in compliance with its obligation of due diligence.

8.37 The DRC Memorial also fails to establish a direct causal link between the alleged exploitation of coltan and wrongful acts for which Uganda is

¹⁰⁷⁸ DRCM, para. 5.22. The DRC also alleged that the FNI militiamen ultimately destroyed "numerous pieces of infrastructure, as well as the Adidi mine itself." *Ibid.* (Translation by Counsel, original in French: "de nombreuses infrastructures, ainsi que de la mine d'Adidi elle-même".).

¹⁰⁷⁹ Bosnia and Herzegovina v. Serbia and Montenegro (2007), para. 462.

responsible. ¹⁰⁸⁰ For example, the DRC cites to the UN Panel's report of 16 October 2002 alleging, without any supporting evidence, that coltan was exploited in Orientale Province by various armed groups under the protection of UPDF. ¹⁰⁸¹ The UN Panel used a company called La Conmet as a "Case Study" purportedly showing the exploitation of coltan by Uganda. The allegation was that a UPDF officer owned La Conmet, a company that received "full exoneration" from the Commissioner General for RCD–Kisangani for all its activities, and was selling coltan abroad at US\$ 17 per kilogram without paying fiscal and customs duties. ¹⁰⁸²

8.38 The DRC's reliance on the La Conmet "case study" as proof of harm caused by Uganda is misplaced. The Porter Commission found it "not supported by credible evidence." In fact, the Commission obtained corroborated evidence confirming that no Ugandan, let alone a UPDF officer, had any ownership interest in La Conmet. The Porter Commission also disproved that La Conmet illegally exploited coltan:

"According to the evidence available, La Conmet exported only one consignment of coltan from Democratic Republic of Congo to Ulba, Kazakhstan in October 2000. The commission has in its possession receipts for taxes paid by the company to the Congolese authorities in respect of that export.

 $^{^{1080}}$ Coltan is a short description for columbite-tantalite and know industrially as tantalite, from which the elements *niobium* and *tantalum* are extracted.

¹⁰⁸¹ DRCM, para. 5.86-5.87 *citing to* the U.N. Panel of Experts, report of 16 Oct. 2002, paras. 108-111, Annex 15.

¹⁰⁸² *Ibid*.

¹⁰⁸³ Porter Commission, Final Report, p. 183, Annex 52.

¹⁰⁸⁴ *Ibid*.

Therefore it is not correct that the company was exempt from paying fiscal and customs duties." ¹⁰⁸⁵

8.39 The DRC's other claims relating to the alleged exploitation of coltan also fail for want of a causal link. Citing the Porter Commission's observation that "there undoubtedly was coltan from the Congo transiting through Uganda", for example, the DRC concludes that the mere fact of coltan transiting through Uganda conclusively proves that Uganda illegally exploited coltan. ¹⁰⁸⁶ This conclusion is wrong on its face. It also has no support in the Porter Commission Report. The Porter Commission's finding about La Conmet exporting coltan after the payment of fiscal and custom duties to the Congolese authorities indicates that, to the extent that coltan from the DRC may have transited Uganda, it did so in the normal course of trade.

8.40 This is also confirmed by another example related to the export of coltan by a Thai company, Dara Forêt/DARA-Forest. The Porter Commission found that "Dara Forêt has been exporting coltan for which [it] has a licence, which [the company's owner] has produced to this Commission. It does not appear to be forged. The mineral has been sent in transit through Uganda. Mr Kotiram [the owner of Dara Forêt] has produced before this Commission Customs documents which have been verified for this Commission by [Uganda Revenue Authority]". 1087

8.41 The mere transit of goods from the DRC through Uganda does not demonstrate any form of illegal exploitation by Uganda. Entities operating in the eastern DRC were unable to import or export goods through Kinshasa due to the

¹⁰⁸⁵ *Ibid*.

¹⁰⁸⁶ DRCM, para. 5.88 citing to the Porter Commission, Final Report, p.111, Annex 52.

¹⁰⁸⁷ Porter Commission, Final Report, p. 61, Annex 52.

lack of transportation infrastructure. Transit continued to be possible through Uganda, as has long been the case. Prohibiting such transit would have had an adverse impact on the people of eastern Congo. This was confirmed in the UN Panel's report of 16 October 2002, which advised against closing the border between the DRC and Uganda and imposing an embargo on cross-border trade. 1088

8.42 The DRC's claim would only be tenable if it could present convincing evidence showing that specific amounts of coltan transited through Uganda as a result of specific wrongful actions attributable to Uganda. The DRC presents no such evidence. Indeed, it presents no evidence at all justifying compensation for the exploitation of coltan. ¹⁰⁸⁹

(c) In the Few Instances Where There Is Evidence of Specific Acts Attributable to Uganda, the DRC Has Failed to Prove Its Exact Injury

8.43 In a very few instances, the DRC provides some evidence, primarily from the Porter Commission Report, of specific acts attributable to Uganda resulting in unlawful exploitation of mineral resources. Yet even if this evidence is regarded as convincing, the DRC eschews any effort to prove the exact injury resulting from those acts. ¹⁰⁹⁰

¹⁰⁸⁸ U.N. Panel of Experts, report of 16 Oct. 2002, p. 29, para. 155, Annex 15.

¹⁰⁸⁹ The DRC also cites to uncorroborated sources alleging that in clashes with UPDF local militiamen recovered coltan from UPDF soldiers. For example, the DRC cites to one report by a Congolese NGO in support of an allegation that the Mai Mai intercepted from a UPDF convoy "a package of at least 5000kg of coltan". DRCM, para. 2.27. However, the source on which the DRC relies says nothing about "a package of at least 5000kg of coltan". The DRC appears simply to have made this up. See DRCM, para. 5.89 citing to Société civile Grand Nord, Point de vue de la Société civile du Grand Nord sur les interventions militaires de l'Ouganda en RDC, (Extraits), DRCM Annex 2.7.

¹⁰⁹⁰ See Chapter 3, Section III.

8.44 The DRC cites to the Porter Commission's finding that some UPDF soldiers took for private gain "contributions of gold from miners to allow them to mine." The Commission also addressed the operations of the Victoria Company, registered in Goma (DRC), which was authorised by rebels to purchase gold and diamonds, and was paying taxes to the MLC. Although the Victoria Company had no "Ugandans living in Uganda as shareholders", and "Uganda as a state [was] not involved" in its activities, one high-ranking UPDF officer, according to the Porter Commission, appears to have "facilitated" the company's business operations in exchange for "security payments" with the aim of "profiting for himself". 1094

8.45 Although those actions may fall within the scope of the Court's general findings concerning Uganda's responsibility for the illegal exploitation of mineral resources, proving their occurrence does not automatically lead to monetary compensation. Just as was required of the applicant States in the *Corfu Channel* and *Diallo* cases, the DRC still must prove with convincing evidence the specific harm that the DRC suffered from those actions. The DRC Memorial entirely fails in that task. It does not present any evidence, let alone convincing evidence, proving the extent of injury resulting from those actions, or from any other alleged actions. ¹⁰⁹⁵ It does not provide any evidence as to the extraction of resources at

_

¹⁰⁹¹ DRCM, para. 5.35 citing to the Porter Commission, Final Report, p. 69, Annex 52.

¹⁰⁹² *Ibid.*, paras. 5.67-5.68 *citing to* the Porter Commission, Final Report, p. 119-120, Annex 52.

¹⁰⁹³ Porter Commission, Final Report, p. 164, Annex 52.

¹⁰⁹⁴ DRCM, para. 5.67-5.68 *citing to* the Porter Commission, Final Report, p. 119-122, Annex 52. Notably, the Porter Commission calls into doubt the DRC's allegation that the high-ranking UPDF officer in question was directly involved in the operations of the Victoria company and had interest in it as having "no conclusive evidence". Porter Commission, Final Report, p. 81, Annex 52.

¹⁰⁹⁵ For example, the DRC alleges based on uncorroborated sources that "the Ugandan soldiers requisitioned gold from the OKIMO company", DRCM, para. 5.32 (Translation by Counsel, original in French: "les militaires ougandais ont requisitionné l'or de la société OKIMO"). If the DRC could prove this allegation, it would still have to prove how much gold was in fact

such locations prior to the conflict to estimate exploitation during the conflict. Likewise, no attempt is made to determine through documentary evidence any net loss in value to the DRC or to any of its companies.

8.46 In short, even for the few instances where there is some evidence of illegal exploitation activities by individual members of the UPDF, the DRC has offered no evidence specifying and proving the exact injury resulting from such exploitation. It has therefore provided the Court no basis on which any award of monetary compensation may be made. 1096

(d) The "Economic Data" on which the DRC Relies Prove Nothing

8.47 In a vain attempt to skirt the requirements to prove the exact injury caused by specific internationally wrongful acts attributable to Uganda, ¹⁰⁹⁷ the DRC contends that the difference between the purported production and export of gold, diamonds, and coltan/niobium in Uganda between 1998 and 2003 can be used as a proxy for assessing the injury it allegedly suffered from the illegal exploitation of those minerals. ¹⁰⁹⁸

_

requisitioned. Yet the DRC offers no evidence about the specific place where some specific amount of gold was requisitioned. Another example is the DRC's reference to one illegible and uncorroborated report from the management of the OKIMO company alleging that on 23 May 2001 "the illegal gold panners" (Translation by Counsel, original in French: "les orpailleurs illégaux"), supervised by the Ugandan soldiers and by the RCD/ML coordinator, occupied the Durba mine and the facilities of the OKIMO company. DRCM, para. 5.29 citing to Lettre de Gaspard Lubenda Diemu au Monsieur le Secrétaire National (23 May 2001), DRCM Annex 5.7. Even if this allegation were borne out by requisite evidence, the DRC still fails to show the period during which that mine was illegally exploited; the extent of resources extracted during the relevant period, and what portion of gold, if any, was exploited by UPDF soldiers; the extraction of resources at such locations prior to the war enabling to estimate war-time exploitation.

¹⁰⁹⁶ *Diallo* (2012), paras. 32, 34-36 (The Court monetary compensation cannot be awarded unless a claimant proves the existence of specific injury); *Armed Activities* (2005), para. 260.

¹⁰⁹⁷ *Armed Activities* (2005), para. 260.

¹⁰⁹⁸ DRCM, paras. 5.54, 5.81-5.82, 5.91.

8.48 As a threshold matter, Uganda observes that the DRC's misguided attempt to use Uganda's purported export of minerals to prove the injury the DRC allegedly suffered effectively contradicts the Court's express finding in 2005 that there was no "governmental policy of Uganda directed at the exploitation of natural resources of the DRC or that Uganda's military intervention was carried out in order to obtain access to Congolese resources." But this is far from being the only reason why the DRC's claim must fail.

8.49 The DRC bases its claim entirely on the widely criticised (including by the DRC itself) first report of the UN Panel. ¹¹⁰⁰ In its first report, the original UN Panel erroneously sought to rely on economic data to confirm the illegal exploitation of the DRC's natural resources. ¹¹⁰¹ The Panel collected statistical information from inappropriate sources on purported production and export of gold, diamonds and coltan/niobium in Uganda during 1998-2003. Observing that the alleged levels of export of those minerals from Uganda exceeded the amount of domestic production, the Panel speculated: "The gap between production and export *could* originate from the exploitation of the natural resources of the Democratic Republic of the Congo." ¹¹⁰²

8.50 As the choice of the word "could" suggests, even the Panel was not prepared to go so far as to affirmatively conclude that the gap between production and export reflected Uganda's illegal exploitation of mineral resources in the DRC. The DRC nevertheless presents the first UN Panel's speculation as a proven fact

¹⁰⁹⁹ *Armed Activities* (2005), para. 242.

¹¹⁰⁰ See supra paras. 8.12-8.15.

¹¹⁰¹ U.N. Panel of Experts, first report of 12 April 2001, paras. 94-102, Annex 11.

¹¹⁰² *Ibid.*, para. 97 (emphasis added).

and presents the economic data from the first report without making any effort to understand what those data actually say (and do not say).

8.51 An important preliminary point is necessary. The economic data upon which the DRC relies are a hodgepodge of numbers that the first UN Panel cobbled together from a variety of sources, none of which were Uganda's official statistical data, including unconfirmed third-party data and incomplete data from some Ugandan agencies. That other data must be analysed in light of Uganda's official statistical information.

8.52 In Uganda, the centralised "source of official statistical information" is the Uganda Bureau of Statistics ("UBOS"). UBOS is "the principal data collecting and disseminating agency responsible for coordinating, monitoring and supervising the National Statistical System." UBOS is responsible for providing "central statistics information services", "promot[ing] standardization in the collection, analysis and publication of statistics to ensure uniformity and reliability of statistics", 1106 and "organiz[ing] and maintain[ing] a central depository of statistical reports." 1107

8.53 As regards statistical information about Uganda's exports, UBOS collects relevant export data from the Bank of Uganda, the Uganda Revenue Authority, the Ministry of Energy and Mineral Development and the Customs Authority. Because

¹¹⁰³ Uganda, Act 12, the Uganda Bureau of Statistics Act, published in *The Uganda Gazette*, No. 36, Vol. XCI, Acts Supplement No. 7 (11 June 1998), Part II(4)(2)(b), Annex 35.

¹¹⁰⁴ *Ibid.*, Part II(4)(1).

¹¹⁰⁵Ibid., Part II(4)(2)(a)(i).

¹¹⁰⁶ *Ibid.*, Part II(4)(2)(a)(ii).

¹¹⁰⁷ *Ibid.*, Part II(4)(3)(e).

data from these sources concern only some aspects of export, it falls to UBOS to analyse and reconcile them to capture a true picture of Uganda's actual exports.

8.54 After "appropriate processing and ascertaining its quality for accuracy," statistical information is then "released [by the UBOS] for general dissemination" in an annual publication of a Statistical Abstract. These publications have been readily available online since 2002 and contain data covering the years 1997-2016. Because collecting and monitoring statistical information is an ongoing process, data published in the Statistical Abstract may be subject to subsequent revisions to account for possible errors. 1110

8.55 The Statistical Abstracts annually include data on Uganda's external trade. These data are reflected in the annual publications in Section 4.2 entitled "External Trade", which is supplemented by a statistical Table 4.2.A entitled "Exports by quantity." This table lists commodities that are regularly exported. Those commodities that are not regularly exported and do not generate significant export revenue are not listed separately and may be grouped by general category. 1111

-

¹¹⁰⁸ *Ibid.*, Part III(20).

¹¹⁰⁹ See Uganda Bureau of Statistics, Statistical Abstracts, available at http://www.ubos.org/publications/statistical-abstract/ (last accessed 27 Jan. 2018).

¹¹¹⁰ As explained in the 2002 Statistical Abstract, "the Statistical Abstract is designed to serve as a convenient tool for statistical reference and a guide to other statistical publications and sources. Note however that, the contents being taken from the Bureau of Statistics and many other organizations are subject to errors arising from a number of factors including: sampling variability (for sample studies); reporting error in data for individual units; incomplete coverage; non-responses, imputation and processing errors." *See* Uganda Bureau of Statistics, *Statistical Abstracts* (2002, 2004, 2005), 2002 Statistical Abstract, p. 1, Annex 38.

¹¹¹¹ If a data user is interested in the details of specific commodities grouped in a general category, however, UBOS can provide those data upon request.

- 8.56 In the discussion below, Uganda will therefore refer to the official data provided in Table 4.2.A in Section 4.2 on "External Trade," which is published annually in the Statistical Abstracts. These data will be supplemented as necessary by other official data from the UBOS.
- 8.57 Uganda previously explained these facts when it circulated its observations to the Security Council on how the original UN Panel ignored official UBOS statistics, and how the Panel relied on unconfirmed third-party sources and misconstrued data from other Ugandan agencies. Notably, the reconstituted UN Panel accepted Uganda's explanations and, in its report of 16 October 2002, jettisoned the flawed proposition that the economic data mentioned in the first report reflected illegal exploitation. 1113
- 8.58 The DRC nevertheless persists in presenting the unsupported, unverified, uncorroborated and misconstrued data from the UN Panel's first report as the basis for its claim for compensation for the exploitation of gold, diamonds, and coltan/niobium.

i. "Economic Data" on Gold

8.59 To show the extent of its alleged injury for the unproven exploitation of gold, the DRC relies on "economic data" summarised in Table 1 found in the UN Panel's first report.¹¹¹⁴ This table is reproduced below:

¹¹¹² U.N. Security Council, The Response by the Government of the Republic of Uganda to The Addendum Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo (DRC), U.N. Doc. S/2001/1163 (4 Dec. 2001), p. 7-8, Annex 37.

¹¹¹³ *See supra* para. 8.9.

¹¹¹⁴ U.N. Panel of Experts, first report of 12 April 2001, pp. 19-20, Annex 11.

Table 1 Uganda: mineral exports and production, 1994-2000

Yea	r	Gold	Tin	Coltan	Cobalt
A.	Mineral exports ((tons)			
	1994	0.22		-	-
	1995	3.09	2	121	-
	1996	5.07	3.55		-
	1997	6.82	4.43	2.57	
	1998	5.03	· ·	18.57	-
	1999	11.45		69.5	67.48
	2000	10.83	-		275.98
В.	Mineral producti	on (tons)			
	1994	0.0016	3.704	0.435	
	1995	0.0015	4.289	1.824	
	1996	0.003	0.38	393	
	1997	0.0064	1.81	-	
	1998	0.0082	1.102	·	
	1999	0.0047	-	- ,	76.74
	2000	0.0044	_	-	287.51

Source: Uganda, Ministry of Energy and Mineral Development. 2000 data are from January to October.

8.60 The first UN Panel said it derived these data from a single source: Uganda's Ministry of Energy and Mineral Development. These data do not, however, reflect conclusive and comprehensive information on Uganda's exports. As explained below, they do not reflect *actual* exports. 1115

8.61 The DRC then supplements the data in Table 1 from the UN Panel's first report with data from the Ugandan Ministry of Energy and Mineral Development for the years 2001 to 2003 (which were not analysed by the original Panel of Experts). On this basis, the DRC claims:

_

¹¹¹⁵ See infra para. 8.63.

"According to these reports, Uganda exported 6.09 tons of gold, compared to its own production of 0.000142 tons, in 2001. In 2002, Uganda exported 7.589 tons of gold, compared to its own production of 0.002565 tons. In 2003, Uganda exported 4.16 tons of gold, compared to its own production of 0.040 tons.

. . .

According to the statistics of the Ugandan Ministry for Energy and Mineral Development, supplied to the Panel of Experts and supplemented by the annual reports of the ministry, Uganda exported 45.149 tons of gold from 1998 to 2003, compared to its own production of 0.06 tons. Exports that could not be justified by its own production therefore rose to 45.143 tons."¹¹¹⁶

8.62 Based only on these data, the DRC claims that 45.143 tons represents the *minimum* amount of DRC gold illegally exploited by Uganda. ¹¹¹⁷ The claim is misconceived, not least because it disregards statistical and regulatory factors that explain the apparent gap between Uganda's purported production and export of gold.

8.63 The reliance of the first UN Panel, and now the DRC, on export data from the Ministry of Energy and Mineral Development was a significant mistake. The

¹¹¹⁶ DRCM, paras. 5.42, 5.55 (Translation by Counsel, original in French: "Suivant les statistiques du ministère ougandais de l'Energie et du développement minérale, fournies au Groupe d'experts et complétées par les rapports annuels dudit ministère, l'Ouganda a exporté 45,149 tonnes d'or de 1998 à 2003, pour une production propre de 0,06 tonnes. L'exportation non justifiable par une production propre s'élève donc à 45,143 tonnes".) (Translation by Counsel, original in French: "En 2001, l'Ouganda exportait, selon ces rapports, 6,09 tonnes d'or pour une production propre de 0,000142 tonnes. En 2002, l'Ouganda exportait 7,589 tonnes d'or pour une production propre de 0,002565 tonnes. En 2003, l'Ouganda exportait 4,16 tonnes d'or pour une production propre de 0,040 tonnes".).

¹¹¹⁷ DRCM, 5.55. The DRC also makes an alternative claim that Uganda allegedly exploited 67 tons of gold from 1998-2000. As will be shown below at paras. 8.72 et seq., this claim has no basis.

Ministry of Energy's figures reflect *export permits* issued by the Ministry. They indicate the amount of gold for which permit-seekers sought *authorisation* to export from Uganda, not what they *actually* exported. The data therefore reflect numbers that are higher than the amount of gold actually exported.

8.64 Official UBOS data show that the amount of gold actually exported is much lower. Official statistical information published by the UBOS in the 2002, 2004, and 2005 Statistical Abstracts is summarised in the table below: 1118

TABLE 8.1: Ugai	TABLE 8.1: Uganda's Export of Gold and Gold Compounds by Quantity, 1997 – 2004				
YEAR	QUANTITY (kg)				
1997	1,381				
1998	665				
1999	4,231				
2000	5,297				
2001	6,161				
2002	7,117				
2003	3,478				
2004	5,465				

8.65 Uganda notes the data have subsequently been updated by UBOS to take account of better information. The most significant change is an *upward* adjustment for 1998 from 665 kg to 2,247 kg of gold exported. The updated data are reflected in the table on the next page:

¹¹¹⁸ This table combines data from Table 4.2A, Uganda Bureau of Statistics, *Statistical Abstracts* (2002, 2004, 2005), Annex 38.

¹¹¹⁹ Letter from Imelda Atai Musana, Executive Director, Uganda Bureau of Statistics to the Solicitor General, Ministry of Justice and Constitutional Affairs, UBOS/30/30 (26 Oct. 2017), Annex 39.

TABLE 8.2: Uganda's Export of Gold and Gold Compounds by Quantity, 1997 – 2004 (as updated by UBOS)				
YEAR	QUANTITY (kg)			
1997	2,035			
1998	2,247			
1999	4,231			
2000	5,926			
2001	6,158			
2002	7,086			
2003	3,275			
2004	5,277			
Total	36,235			

8.66 Uganda's official statistical information thus shows that between 1998 and 2003 Uganda did not export 45,149 kg of gold, as the DRC contends. Rather, it exported 28,923 kg of gold during that period. 1120

8.67 A regulatory factor contributed to the apparent difference between the alleged production and export figures. Uganda explained in Chapter 2 that it adopted trade liberalisation measures in the 1990s that, among other things, removed export duties. As a result, exporters no longer had an incentive to underreport exports. In addition, the reported figures for the production of gold in Uganda are understated. Many artisanal miners and other unlicensed small-scale producers did not report their production out of fear that they might be prosecuted for mining without licenses. Those producers then sold their unreported output to licensed export traders who reported those products as exports, making the export figures larger than the production figures. Thus, after the liberalisation of Uganda's trade policies a gap emerged between production and export figures. Exporters no

¹¹²⁰ Uganda Bureau of Statistics, *Statistical Abstracts* (2002, 2004, 2005), Annex 38.

longer had reason to avoid reporting the actual level of their activity, but many producers continued to avoid reporting their production.

8.68 Uganda presented these explanations in its responses to the reconstituted UN Panel charged with correcting the flaws of the original Panel's report. And, as stated, in its final report, the reconstituted Panel did not give credence to the ill-conceived speculation of the first Panel, based on erroneous data, that "the gap between production and export [in Uganda] *could* originate from the exploitation of the [Congolese] natural resources". The reconstituted Panel did not even suggest that Uganda's export of gold (or other minerals) was linked to its exploitation of natural resources in the DRC.

8.69 The arguments and economic data the DRC takes from the UN Panel's first report were also disproved by the Porter Commission. After carefully analysing economic data and examining persons involved under oath, the Porter commission reached several conclusions. It confirmed in the first instance that unreported artisanal production increased Uganda's gold exports above the reported production figures:

"[T]he figures for production in Uganda do not reflect true production, because artisanal miners do not declare production, whereas exporters do. Nevertheless there is widespread artisanal production in Uganda, since this would be the only source of gold production in Uganda, apart from the production from one mine in development." 1122

_

¹¹²¹ U.N. Panel of Experts, first report of 12 April 2001, para. 97 (emphasis added), Annex 11.

¹¹²² Porter Commission, Final Report, p. 109, Annex 52.

8.70 The Porter Commission also observed that gold was smuggled through the always-porous borders between the DRC and Uganda, circumventing Uganda's authorities. The Commission found that Uganda was not responsible for gold smuggling or preventing gold smuggling, and that Uganda derived no benefit from smuggled gold:

"With relation to the acquisition of proper statistics, the problem appears to be the recording of production. This Commission visited a gold exporter, and saw one transaction through from the visit of the client with unprocessed gold dust to the melting of the gold, and payment for it. The client was a businessman in Arua [the DRC], and he brought one large packet which was split up into many smaller packets, each of which belonged to an artisanal miner. Each one was painstakingly labelled with the name of the artisan, and they were all melted and assessed individually, and the payment for each man calculated.

In such circumstances it is impractical to expect the artisans to notify gold production and source, even where the law requires it. It is only the exporter who is required to fill in statistical forms for export. Production and, more importantly, source figures ought also to be required of whoever is the first person in Uganda to melt the gold down, because the gold dust brought contains many impurities. In that regard, it was quite clear from the visit that URA [Uganda Revenue Authority] has no hope of charging import duties, because the individual packets were so small (smaller than a matchbox, though heavy, and quite valuable) that they were easy to hide. For the same reason, it might be impractical to require source figures, because gold smuggled through the border would be unlikely to be declared as sourced from outside Uganda, so that it was not dutiable. This Commission was told that the sources were all within Uganda: but looking at some

of the names involved, and bearing in mind the fact that the client was from Arua, this was unlikely.

This Commission's observation of the practice and procedure of, at least, artisanal gold production was that it would be very difficult, if not impossible to control gold imports from across the border, or to produce production statistics of any kind. Therefore, even if the Uganda Government ought to have noticed that production figures did not match export figures, there was very little that could be done about it "1123"

The Commission also stated that:

"It is quite clear therefore that there is massive smuggling of gold, and that the figures from any source cannot be relied upon. One wonders how it can be suggested that Uganda must have realised what was going on with respect to Gold, *or how Uganda can be blamed for anything but an inefficient Customs Service and a porous border. It is not the only country in Africa with these problems.*" 1124

8.71 Consistent with the Porter Commission's findings, the Court in its 2005 Judgment made no finding that Uganda was responsible for gold smuggling. Nor did the Court find that Uganda derived any benefit from illegally exploited gold. Needless to say, the DRC offers no evidence connecting even a single gram of illegally exploited gold or smuggled gold to Uganda's export of gold. There is thus no basis for the DRC's claim that Uganda illegally exploited 45 tons of Congolese gold. 1125

¹¹²³ *Ibid.*, pp. 110-111 (emphasis added), Annex 52.

¹¹²⁴ *Ibid.*, p. 109 (emphasis added), Annex 52.

¹¹²⁵ DRCM, para. 5.55.

8.72 In addition to this so-called "minimum" claim, the DRC also makes an alternative claim that Uganda actually exported more than 67 tons of Congolese gold between 1998 and 2003. This claim is mistakenly premised on economic data from the COMTRADE database maintained by the Statistics Division of ECOSOC. The DRC found these data in the Porter Commission Report. The Porter Commission, for its part, obtained the COMTRADE data on Uganda's purported gold export in order to compare it with the data from the Ministry of Energy and Mineral Development cited in the First Panel Report. The Porter Commission also analysed COMTRADE data on gold purportedly imported by Uganda's trade partners. Ultimately, the Porter Commission found the COMTRADE data unhelpful in determining Uganda's actual gold exports. 1128

8.73 Undeterred, the DRC selectively cites to COMTRADE data appearing in the Porter Commission Report and argues:

"The COMTRADE figures presented by the Porter Commission are higher overall than those presented by the Panel of Experts. According to this source, 3 tons of gold were exported from Uganda in 1998 (which is less than the 5.03 tons mentioned by the Panel of Experts), but this figure then rose to 21 tons in 1999 (compared to 11.45 according to the Panel of Experts), and then to 43 tons in 2000 (compared to 10.83 according to the Panel of Experts), before dropping to zero in 2001 (a year for which the Panel of Experts does not have a figure). The Porter Commission's report does not have figures for 2002 and 2003." 1129

¹¹²⁶ Porter Commission, Final Report, p. 108, Annex 52.

¹¹²⁷ *Ibid.*, p. 109.

¹¹²⁸ *Ibid*

¹¹²⁹ DRCM, para. 5.45 (Translation by Counsel, original in French: "Les chiffres COMTRADE présentés par la Commission Porter sont globalement plus élevés que ceux du Groupe d'experts. Selon cette source, 3 tonnes d'or ont été exportées d'Ouganda en 1998 (soit moins que les 5,03 tonnes mentionnées par le Groupe d'experts), mais ce chiffre passe ensuite à 21 tonnes en 1999

8.74 On this basis, the DRC concludes:

"According to COMTRADE statistics presented by the Porter Commission, Uganda exported 3 tons of gold in 1998, 21 tons in 1999, 43 tons in 2000 and zero tons in 2001, which amounts to a *total of 67 tons* from 1998 to 2000. The Porter Commission has no figures for 2002 and 2003." ¹¹³⁰

8.75 The DRC thus claims in the alternative that Uganda should be held responsible for the unlawful exploitation of at least 67 tons of gold, and reserves its right to supplement its claim in light of COMTRADE statistics for 2002 and 2003.¹¹³¹

8.76 The DRC's passion for high numbers is clear. But the Porter Commission concluded that the COMTRADE data the DRC cites make no sense:

"What concerns this Commission is that the COMTRADE figures declared by Uganda Bureau of Statistics are 16, 35, and 43 million dollars for 1998, 1999, and 2000 respectively. These figures are far too high to be matched by likely artisanal production in the Democratic Republic of Congo even taken together with Uganda, and they are not matched by COMTRADE Partner Import figures which are 2, 4, and 14 million dollars only, (which are much more acceptable in relation to artisanal production." 1132

⁽contre 11,45 selon le Groupe d'experts), à 43 tonnes en 2000 (contre 10,83 selon le Groupe d'experts), puis à zéro en 2001 (année pour laquelle le Groupe d'experts ne présente pas de chiffre). Le rapport de la Commission Porter ne présente pas de chiffres pour 2002 et 2003".).

¹¹³⁰ *Ibid.*, para. 5.55 (emphasis added) (Translation by Counsel, original in French: "Suivant les statistiques COMTRADE présentées par la Commission Porter, l'Ouganda a exporté 3 tonnes d'or en 1998, 21 tonnes en 1999, 43 tonnes en 2000 et zéro tonnes en 2001, soit un total de 67 tonnes de 1998 à 2000. La Commission Porter ne présente aucun chiffre pour 2002 et 2003".).

¹¹³¹ *Ibid.*, para. 5.61.

¹¹³² Porter Commission, Final Report, p.110 (emphasis added), Annex 52.

As the Porter Commission made clear, 67 tons is too high a figure to be matched by artisanal production of gold in the DRC and Uganda (which was at the time the most prevalent method of gold mining). Moreover, the amount of gold purportedly exported by Uganda does not match the amount of gold reported as being imported from Uganda by its trade partners. The amount of gold purportedly imported from Uganda between 1998 and 2001 totals 20,000 kg, very close to the amount published in the UBOS Statistical Abstracts, as updated by the UBOS, 1133 for 1998-2001 (18,562 kg).

8.77 The DRC's claim that Uganda illegally exploited 67 tons of Congolese gold fails every bit as does its alternative claim that Uganda illegally exploited 45.143 tons of Congolese gold. The DRC has offered no legal basis for an award of monetary compensation for the exploitation of gold.

ii. "Economic Data" on Diamonds

8.78 In an attempt to show the extent of its alleged injury for the unproven exploitation of diamonds, the DRC relies on economic data summarised in what is labelled "Table 1" found in a report of the British All Party Parliamentary Group¹¹³⁴:

-

¹¹³³ *Letter* from Imelda Atai Musana, Executive Director, Uganda Bureau of Statistics to the Solicitor General, Ministry of Justice and Constitutional Affairs, UBOS/30/30 (26 Oct. 2017), Annex 39.

¹¹³⁴ The DRC annexes the wrong British All Party Parliamentary Group report to its Memorial as Annex 5.10. The correct report containing the table reproduced in paragraph 5.76 of the DRCM is annexed to this Counter-Memorial as Annex 53.

Table 1	Ugand	an Mineral Exp	ort and Don	nestic Productio	on (1994 – 2000)	
Year	Gold exports (tons)	Gold production (tons)	Coltan exports (tons)	Coltan production (tons)	Niobium exports (US\$)	Diamond exports (US\$)
1994	0.22	0.0016	19	0.435	ä	24 #
1995	3.09	0.0015	1.50	1.824	:=	15
1996	5.07	0.0030	X -5			
1997	6.82	0.0064	2.57	2	\$13,000	\$198,302
1998	5.03	0.0082	18.57	-	\$580,000	\$1,440,000
1999	11.45	0.0047	69.50	-	\$782,000	\$1,813,500
2000	10.83	0.0044		□	24	\$1,263,385
2001						\$2,539,000

Sources: Coltan and gold figures from Ugandan Ministry of Energy and Mineral Development; niobium figures from WTO aggregated data; diamond figures from the Diamond High Council (all figures appeared in the UN Panel of Inquiry Report April 2001, except for 2001 diamond figures which appeared in Dietrich, Christian (2002)). It should be noted that there is no production of niobium or diamonds in Uganda, therefore these are re-exports of minerals that are extracted elsewhere.

8.79 The DRC adds up the purported value of Uganda's diamond exports during 1998-2001 and, much like it did with gold, on that basis alone alleges that Uganda's illegal exploitation of diamonds in the DRC during the given period amounts to US\$ 7,055,885. 1135 The DRC also reserves its right to supplement this claim with the numbers corresponding to Uganda's diamond exports in 2002 and 2003 so as to cover the entire period of Uganda's presence in the DRC. 1136

8.80 This claim is every bit as misconceived as the DRC's claims concerning gold. The DRC reads too much into the numbers summarised in Table 1. The DRC presents a redacted version of this table in paragraph 5.76 of its Memorial. That redacted version does not, however, show the sources of the data underlying this element of its claim.

¹¹³⁵ DRCM, para. 5.81.

¹¹³⁶ *Ibid.*, 5.61.

8.81 Uganda has reproduced a complete version of the table provided above. As it indicates, the data concerning the purported value of diamonds exported from Uganda came primarily from a private institution, the Diamond High Council (currently restructured into Antwerp World Diamond Center). These data were originally presented in the UN Panel's first report and then reprinted in the British All Party Parliamentary Group report.

8.82 The DRC Memorial does not say whether, much less provide evidence that, the data from the Diamond High Council were independently verified, by the UN Panel, the British All Party Parliamentary Group or anyone else. Notably, both the Porter Commission and Uganda previously asked the UN Panel to share the data it obtained from the Diamond High Council. For unknown reasons, the Panel refused to do so. The DRC also fails to present any materials from the Diamond High Council corroborating the data on which the DRC relies. The DRC's whole compensation claim thus appears to rest solely on "evidentiary" material emanating from a single source and having no corroboration. It is considered at all, it must be treated with caution.

8.83 In fact, the reliability of these uncorroborated data has been called into question. 1140 After contacting the Diamond High Council to check the Council's

¹¹³⁷ U.N. Security Council, *The Response by the Government of the Republic of Uganda to The Addendum Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo (DRC)*, U.N. Doc. S/2001/1163 (4 Dec. 2001), pp. 5, 34-35, Annex 37.

¹¹³⁸ Armed Activities (2005), para. 61 ("The Court will treat with caution evidentiary materials specially prepared for this case and also materials emanating from a single source".). *Ibid.*, para. 159 ("The Court has not relied on various other items offered as evidence on this point by the DRC, finding them, uncorroborated, based on second-hand reports, or not in fact saying what they are alleged to say by the DRC, or even in some cases partisan".).

¹¹³⁹ *Ibid.*, para. 61.

¹¹⁴⁰ *Ibid*.

data as reported by the UN Panel, the Porter Commission found that the data are not based on legal export of diamonds from Uganda but rather are based upon the declared origin of imports after arriving in Belgium:

"This Commission has checked the original Panel's information with the Diamond High Council. It is revealed that, although much more care is now exercised by the Belgian Authorities, at the time in question, the source of diamonds was accepted upon the information of the importer, and Diamond High Council statistics (which the original Panel quoted as their source) relate to import to Belgium. Therefore, although the original Panel treat as suspicious the fact that, according to external statistics, Uganda was a diamond exporter, in fact that information was based upon the most unreliable figures.

. . .

[The Commission's] conclusions are undeniable: there are no import figures for diamonds, nor transit figures. Diamonds are therefore quite clearly being smuggled through Uganda, and declared as sourced in Uganda by the smugglers on arrival in Antwerp. This Commission has evidence of one such transaction, privately conducted. 1141 That being so,

_

¹¹⁴¹ The transaction in question was explained on pages 113-114 of the Porter Commission, Final Report as follows:

[&]quot;For example this Commission has traced a Police case in Uganda where one Khalil, who is mentioned in the original Panel Report, admitted to obtaining diamonds in the Democratic Republic of Congo in April 2000, flying them in to the Military Air Base, and ultimately sending a packet of them through associates to the International Airport, where the diamonds were exchanged (in the Gents toilet at the airport) for \$550,000 in cash with a courier from Belgium who caught the next flight back. This was hardly an honest exchange, particularly as there is no record of import, export or transit through Uganda. The reason the matter was reported to the Police in Uganda was because on the way back to Kampala, the car was stopped by armed men and the money stolen. The case is dealt with more particularly at Paragraph 21.3 below. The point is that the source of information in Belgium that the diamonds originally came from Uganda (which they did not) was the courier who had been involved in this shady deal. Had the original Panel known all this, perhaps they would not have been so hasty as to lay the blame at Uganda's door: and to establish the source of the information upon which they relied was only a telephone call

since no tax is paid in Uganda, it is difficult to understand the relevance of lower tax rates in Kampala, how the Ugandan Treasury benefits, and how the UPDF is able to use the proceeds for the continuation of the war, as the reconstituted Panel claim. Tax paid in the Democratic Republic of Congo would be paid to rebel authorities, who would be able to use the money for the continuation of the war. *This, however, would not be a matter to be laid at Uganda's door*, although it is true that there is cause to believe that some top Commanders were secretly profiting for themselves from 'Security Funding', a different matter. This point is a specific example of the unfortunate failure of the reconstituted Panel to carry out its mandate". 1142

- 8.84 The DRC Memorial omits another important detail. In reprinting the data reflected in Table 1, the British All Party Parliamentary Group expressly noted: "The Ugandan government has disputed these figures, which were originally shown in the first report of the UN Panel of Experts". 1143
- 8.85 There is good reason Uganda disputed those figures. According to official statistical information from UBOS, Uganda exported miniscule quantities of diamonds between 1998 and 2003. This is shown in the table on the next page:

away, for that is how this Commission established this information. There is no doubt that diamonds are being smuggled, and falsely declared as sourced in Uganda. Bearing in mind that a fortune can be carried in a pocket, it is difficult to see what Uganda as a State can do about this. Partner Countries must be aware that Uganda is not a diamond producing country, and yet are prepared to publish figures which deny that fact." Annex 52.

¹¹⁴² *Ibid.*, pp. 113, 162, Annex 52.

¹¹⁴³ U.K. All Party Parliamentary Group on the Great Lakes Region and Genocide Prevention, *Cursed by Riches: Who Benefits from Resource Exploitation in the Democratic Republic of the Congo?*, p. 18, note 54, Annex 53.

TABLE 8.3: Uganda's Export of Diamond, Diamond Dust and Diamond Powder by Quantity and Value in US\$, 1997 – 2004 ¹¹⁴⁴					
YEAR	QUANTITY (kg)	US\$			
1997	0	4,141			
1998	_	_			
1999	_	_			
2000	-	_			
2001	0	201			
2002	_	_			
2003	-	_			
2004	0	52			

8.86 The DRC's claim that Uganda illegally exploited Congolese diamonds in the amount of US\$ 7,055,885 therefore lacks foundation. Accordingly, the DRC has offered no legal basis upon which monetary compensation can be awarded for this unproven claim.

iii. Coltan/Niobium

8.87 To show the extent of its alleged injury for the exploitation of coltan/niobium, the DRC relies on "economic data" presented in the same Table 1 from the British All Party Parliamentary Group's report. That table repeats the data originally presented in the UN Panel's first report, which in turn is based on statistics apparently received from Uganda's Ministry of Energy and Mineral Development. For convenience, this table is reproduced below:

¹¹⁴⁴ Letter from Imelda Atai Musana, Executive Director, Uganda Bureau of Statistics to the Solicitor General, Ministry of Justice and Constitutional Affairs, UBOS/30/30 (26 Oct. 2017), Annex 39. Because diamonds are not consistently exported and do not generate significant export revenue they are not accorded a separate commodity line in Statistical Abstract. Therefore, export data on diamonds are maintained separately by the UBOS and are made available upon request. See supra para. 8.55.

Table 1	Ugand	an Mineral Exp	ort and Don	nestic Productio	on (1994 – 2000)	
Year	Gold exports (tons)	Gold production (tons)	Coltan exports (tons)	Coltan production (tons)	Niobium exports (US\$)	Diamond exports (US\$)
1994	0.22	0.0016	19	0.435	2	2
1995	3.09	0.0015		1.824	-	·=
1996	5.07	0.0030	X - 5			-
1997	6.82	0.0064	2.57	2	\$13,000	\$198,302
1998	5.03	0.0082	18.57	-	\$580,000	\$1,440,000
1999	11.45	0.0047	69.50	-	\$782,000	\$1,813,500
2000	10.83	0.0044		·	2	\$1,263,385
2001						\$2,539,000

Sources: Coltan and gold figures from Ugandan Ministry of Energy and Mineral Development; niobium figures from WTO aggregated data; diamond figures from the Diamond High Council (all figures appeared in the UN Panel of Inquiry Report April 2001, except for 2001 diamond figures which appeared in Dietrich, Christian (2002)). It should be noted that there is no production of niobium or diamonds in Uganda, therefore these are re-exports of minerals that are extracted elsewhere.

- 8.88 Relying only on this one table, the DRC claims that, for the period 1998-2000, Uganda illegally exploited 90,640 kg of Congolese coltan and US\$ 1,375,000 worth of Congolese niobium. 1145
- 8.89 Even if the DRC had proven to the Court specific incidents whereby acts attributable to Uganda resulted in the illegal exploitation of coltan/niobium in the DRC, *quod non*, ¹¹⁴⁶ these "economic data" are no help to the DRC in proving the extent of the harm.

¹¹⁴⁵ DRCM, para. 5.91. It also bears emphasis that being unable to connect exports of niobium to Uganda, the DRC even manages to add to Uganda what cannot be added under any circumstances. It adds value for 1997, which exceeds the *ratione temporis* scope of the 2005 Judgment, which is limited only to the period of 1998-2003. The question here is not so much about the amount of 13,000 which is meaningless in the context of the DRC multibillion doller claim. It is just that the DRC claim balloons to such astronomical amounts as a result of arithmetical flaws that go hand in

hand with legal flaws.

¹¹⁴⁶ As shown in DRCM, paras. 8.37-8.38, the DRC has even failed to establish that Uganda was engaged in illegal exploitation of coltan/niobium. The DRC's allegations are based on what was proven to have been legal exploitation of coltan by one company La Conmet.

8.90 As regards the data on coltan, this mineral does not even appear as an export commodity in the official statistical information maintained by UBOS. Instead, UBOS records export of niobium and tantalum (both of which are derived from coltan ore). The volume of those minerals exported during 1997-2004 is set out in the tables below:

TABLE 8.4: Uganda's Export of Niobium by Quantity and Value in US\$, 1997 – 2004					
YEAR	QUANTITY (kg)	US\$			
1997	_	_			
1998	11,060	231,265			
1999	802	6,632			
2000	_	_			
2001	4,038	19,398			
2002	_	_			
2003	_				
2004	_	_			

TABLE	TABLE 8.5: Uganda's Export of Tantalum by Quantity and Value in in US\$, 1997 – 2004					
YEAR	QUANTITY (kg)	US DOLLAR				
1997	_	_				
1998	5,767	289,253				
1999	_	_				
2000	_	_				
2001	1,550	8,500				
2002	_	_				
2003	_	_				
2004	_	_				

8.91 As regards the data on niobium, this table shows that the value of niobium exports for the years stated was US\$ 257,295, nearly five times less than the DRC's claim. Even if you add to that the value of exported tantalite (US\$ 297,753), the number would still be nearly three times lower than the DRC's claim.

8.92 The DRC fails to connect even these much smaller numbers to any specific incidents of alleged illegal exploitation of Congolese coltan/niobium by Uganda. In this respect, Uganda observes that the Porter Commission refuted the claim that Uganda's exports of niobium were connected to the illegal exploitation of DRC resources:

"The original Panel say that the pattern of Niobium Export appears to be the same: no production prior to 1997, followed by an increase in exports. In respect of all these minerals, due to the original Panel's recital of data source, this Commission communicated with WTO, who said that they did not keep such statistics, and referred this Commission to the UN COMTRADE Database. So there is some confusion there, as the figures are somewhat different. Uganda declares exports as from 1995, whilst Partner Imports start in 1998. This makes a nonsense of the original Panel's conclusion that Export started in 1997, to coincide with the start of the war. The original Panel's figures are much higher than those from the COMTRADE database, but the figures never exceed \$782,000 in a year from whatever source. This Commission does not think that the figures bear out the original Panel's conclusion, or that Niobium bears any real relation to the alleged illegal exploitation of the natural resources of the Democratic Republic of Congo."1147

- 8.93 The "economic data" on which the DRC relies thus cannot support the DRC's compensation claim for exploitation of coltan/niobium.
- 8.94 In conclusion, the DRC proves nothing by simply parroting the allegations and data from the UN Panel's first report that were later refuted and retracted. Nor does the DRC offer the Court any evidence connecting Uganda's export of gold,

¹¹⁴⁷ Porter Commission, Final Report, pp. 123-124, Annex 52.

diamonds and coltan to specific wrongful actions falling within the scope of the Court's 2005 Judgment.

8.95 Given the gravity of the DRC's allegations and the extraordinary amount of compensation it claims, something more than conjecture premised on unreliable economic data is required. The DRC's claims "require a degree of certainty that has not been reached here." Accordingly, there is no basis for the award of compensation that the DRC seeks.

2. The DRC's Valuation of Alleged Damages is Methodologically Flawed

8.96 The DRC's wholesale failure to prove the exact injury resulting from specific wrongful acts attributable to Uganda makes it unnecessary to discuss the valuation of that (unproven) injury. Uganda will therefore only briefly address one fundamental flaw underlying the DRC's efforts at valuation, if only to underscore the arbitrariness of its claims.

8.97 Aside from using incorrect economic data purporting to reflect Uganda's export of minerals as a proxy for proving specific acts of Ugandan exploitation and the extent of the alleged injury, 1150 the DRC seeks to value its damages based on the market value, in the form of export prices, of the nominally exploited

¹¹⁴⁸ Corfu Channel (Merits, 1949), p. 17.

¹¹⁴⁹ *Diallo* (2012), para. 14 ("If the existence of injury and causation is established, the Court will then determine the valuation".).

¹¹⁵⁰ See paras. 8.64-8.65, 8.84, 8.90.

¹¹⁵⁰ DRCM, paras. 5.91-5.92.

resources.¹¹⁵¹ This approach results in a vast overstatement of the DRC's alleged damages.

8.98 The DRC seeks damages for the alleged illegal *exploitation* of mineral resources. The measure of any loss to the DRC is *not* the commercial value of extracted and exported minerals. Instead, the measure should be the net loss in value to the State from the exploitation of those resources. If a mine were State-owned or owned by a DRC national, for example, the loss the DRC may claim would be the value of extracted minerals less the costs that would have been incurred extracting those minerals. If a mine were privately held by a foreign national, the DRC's claim would be limited to the loss of tax income, royalties or other fees that would otherwise have been paid to it. These elements of damages would, moreover, have to be proven through documentary or other competent evidence.

8.99 The DRC does not perform any of these analyses or produce any relevant evidence in purporting to assess its injury. To the contrary, it simply multiplies the amount of minerals alleged to have been illegally exploited (in the case of gold, for example, 45 tons) by what the DRC says was the average market price in the period between 1998 and 2004 (again in the case of gold US\$ 14,964.49 per kg). This effort at quantification is so obviously flawed and so obviously unfounded that no further comment by Uganda is necessary.

*

8.100 Because the DRC has not established the extent of the injury it allegedly suffered as a result of Uganda's illegal exploitation of mineral resources, and

-

¹¹⁵¹ Ibid.

because it has also failed to establish any genuine basis for placing a value on that (unproven) injury, there is no basis in law for the award of compensation the DRC seeks under this head of damages.

B. WILDLIFE

8.101 The DRC seeks US\$ 2,692,980,468¹¹⁵² for the injury allegedly caused by Uganda to the wildlife in four national parks: Virunga,¹¹⁵³ Garamba,¹¹⁵⁴ the Okapi Wildlife Reserve,¹¹⁵⁵ and Maiko.¹¹⁵⁶

8.102 The DRC arrives at the claimed amount by taking four misconceived steps, each of which is unanchored in any evidence showing specific acts attributable to Uganda, the exact injury resulting from such acts or its valuation:

- *First*, the DRC claims direct losses in the form of 54,892 animals of 16 different species that were allegedly killed in its national parks between 1998 and 2003/2004;
- *Second*, the DRC then fabricates a claim for indirect losses in the form of 463,792 first generation offspring that would have been born to the allegedly killed animals;
- *Third*, the DRC assigns monetary values to killed and unborn animals based on unreliable, inappropriate and arbitrary prices, including "black market" prices. In the case of elephants and rhinos, the DRC also

¹¹⁵² *Ibid.*, para. 5.172.

¹¹⁵³ *Ibid.*, para. 5.165.

¹¹⁵⁴ *Ibid.*, para. 5.167.

¹¹⁵⁵ *Ibid.*, para. 5.169.

¹¹⁵⁶ *Ibid.*, para. 5.171.

separately adds still further amounts based on "black market" prices for ivory and rhino horns; and

• Fourth, to "fully ensure the fair and reasonable nature of its claim", 1157 the DRC applies the arbitrary discount percentages shown in the table below to reflect the ostensible fact that Uganda was not the sole perpetrator of the injury for which it claims damages.

TABLE 8.6: The DRC's Discount Percentages for Each National Park						
National Park	Alleged injury (US\$)	Portion of Injury Ascribed to Uganda (US\$)				
Virunga	1,038,920,273 ¹¹⁵⁸	$x 80\% = 831,136,218^{1159}$				
Garamba	2,070,513,861 ¹¹⁶⁰	$\mathbf{x} \mathbf{50\%} = 1,035,256,930^{1161}$				
Okapi Wildlife Reserve	716,133,800 ¹¹⁶²	$\mathbf{x} \ \mathbf{90\%} = 644,520,420^{1163}$				
Maiko	366,133,800 ¹¹⁶⁴	$x 50\% = 183,066,900^{1165}$				
	Total:	US\$ 2,692,980,468				

8.103 The harms the DRC seeks to ascribe to Uganda are unfounded in the extreme and have no connection to specific wrongful acts attributable to Uganda. The DRC valuation of its alleged injury is also profoundly flawed.

¹¹⁵⁷ *Ibid.*, para. 5.164 (Translation by Counsel, original in French: "afin d'assurer pleinement le caractère équitable et raisonnable de sa demande".).

¹¹⁵⁸ *Ibid.*, para. 5.162.

¹¹⁵⁹ *Ibid.*, para. 5.165.

¹¹⁶⁰ *Ibid.*, para. 5.166.

¹¹⁶¹ *Ibid.*, para. 5.167.

¹¹⁶² *Ibid.*, para. 5.168.

¹¹⁶³ *Ibid.*, para. 5.169.

¹¹⁶⁴ *Ibid.*, para. 5.170.

¹¹⁶⁵ *Ibid.*, para. 5.171.

1. The DRC's Has Failed to Prove the Existence of the Injury to Wildlife It Seeks to Ascribe to Uganda

8.104 There is reason to doubt that the DRC's claims for the loss of wildlife fall within the scope of the Court's 2005 Judgment. At the merits phase, the DRC sought to ascribe to Uganda certain limited unproven acts concerning harm to wildlife: the killing of 4,000 elephants in the Garamba National Park, the possession of 800 kg of ivory and the deportation of 40 okapis in the Epulu park. \(^{1166}\) Yet the Court's 2005 Judgment, in both the text and \(^{dispositif}\), contains \(^{n0}\) findings that Uganda caused harm to wildlife in the DRC.

8.105 The DRC Memorial proceeds on the assumption that the Court's general findings relating to "natural resources" encompass its claims relating to wildlife, an assumption that may well be incorrect. The Court knows what it decided and what it did not, but Uganda submits that the Court's silence with respect to the DRC's allegations indicates that those allegations were found to be unproven.

8.106 Assuming *arguendo* that the Court's findings on the merits permit a claim for compensation relating to wildlife, the DRC's claims for reparation in this regard clearly exceed the scope of the Court's findings. As indicated above, at the merits phase the DRC only presented to the Court certain limited acts concerning harm to wildlife (the killing of 4,000 elephants, the possession of 800 kg of ivory and the deportation of 40 okapis). If the Court found on the merits that such exploitation occurred, then the DRC is limited in this phase to pursuing reparation for those limited acts. Instead, the DRC now pursues entirely new claims for harm to wildlife

386

¹¹⁶⁶ DRC's Reply on the Merits, in *Armed Activities* (2005), para. 4.32. Notably, having provided at the merits phase no evidence supporting those claims, the DRC does not pursue them in assessing losses.

that vastly exceed what it previously alleged and therefore what the Court addressed on the merits.

8.107 Assuming *arguendo* that the Court's findings on the merits permit the DRC to pursue unfettered reparations for whatever new allegations of harm to wildlife the DRC can imagine, the DRC must at this phase present convincing evidence showing with a high level of certainty specific wrongful acts attributable to Uganda that resulted in specific wildlife loss to the DRC, as well as the valuation of that loss. As discussed below, the DRC's claims do not satisfy these requirements.

(a) The Claimed Direct Losses to the Congolese Wildlife Have No Foundation

8.108 At the outset, Uganda notes that the DRC presents no evidence as to specific incidents or acts attributable to Uganda resulting in loss of wildlife in the DRC. The DRC does not present any evidence that on specific dates, in specific places, Ugandan military forces undertook specific actions that resulted in harm to DRC wildlife. There are no eyewitness accounts presented to the Court, no sworn declarations by others who might be knowledgeable about specific incidents, and no documentary or photographic information contemporaneous with any such incidents attesting to what happened, by whom and when. For this reason alone, the DRC's claims for compensation for loss of wildlife should be denied.

8.109 Rather than base its claims on evidence of specific incidents of harm, the DRC purports to measure its direct losses based on vague, general information

coming from one of its own institutions concerning 16 species of animals allegedly killed in Congolese national parks as a result of "the Ugandan invasion". 1167

8.110 The alleged losses are summarised in the table below: 1168

TABLE 8.7: The DRC's Alleged Losses of Wildlife						
Species/Parks	GARAMBA	VIRUNGA	MAIKO	OKAPI WILDLIFE RESERVE	Total	
ANTELOPES	5,000	20,000	1,000	1,000	27,000	
ELEPHANTS	5,000	1,229	2,000	2,000	10,229	
HIPPOPOTAMUSES	0	107	0	0	107	
BUFFALOES	0	9,048	0	0	9,048	
GIRAFFES	92	0	0	0	92	
OKAPIS	0	0	0	1,000	1,000	
RHINOCEROSES	21	0	0	0	21	
WARTHOGS	3,905	67	0	0	3,972	
BABOONS	0	96	0	0	96	
MONGOOSES	0	77	0	0	77	
CROCODILES	0	72	0	0	72	
HARTEBEESTS	17	0	0	0	17	
BUFFON'S KOBS	0	160	0	0	160	
WATERBUCKS	808	39	0	0	847	
BUSHBUCKS	135	19	0	0	154	
CHIMPANZEES	0	0	0	2,000	2,000	

8.111 Adding these numbers together shows that the DRC is alleging that 54,892 individual animals were killed as a result of Uganda's conduct. This loss, the DRC says, is established by a single source: the DRC's own Congolese Institute for Nature Conservation ("ICCN"), a public institution charged with managing national parks. The DRC Memorial does not, however, explain how and on what basis the ICCN collected and compiled this information.

¹¹⁶⁷ DRCM, paras. 5.93, 5.161, 5.166, 5.168, 5.170 (Translation by Counsel, original in French: "l'invasion ougandaise").

¹¹⁶⁸ The table is presented in DRCM, para. 5.138.

¹¹⁶⁹ DRCM, para. 5.101.

8.112 Nor can an explanation be found in the ICCN document entitled "Récapitulatif des espèces décimés sur les aires protégées de l'ICCN" included as Annex 1 inside Annex 5.13 to the DRC Memorial. This document consists only of an unsigned, undated two-page summary table to which no supporting evidence is attached.

8.113 The table itself consists of three columns. The first and second columns nominally state the numbers of animals found in the relevant Congolese national parks in 1998 and 2003/2004, respectively. The third column lists the numbers of allegedly killed animals. (It appears that the numbers in the third column are the difference between the numbers listed in the first and second columns.)¹¹⁷¹

8.114 With respect to Garamba National Park, for example, the table summarily lists 6,535 elephants in 1998 and just 1,535 in 2003/2004. On that basis—and that basis alone—the DRC alleges that 5,000 elephants were killed in that park as a result of Uganda's intervention. Using the same approach, the DRC concludes that 2,000 elephants were killed in Okapi Wildlife Reserve, 2,000 in Maiko National Park, and 1,229 in Virunga National Park. Adding these numbers together, the DRC makes the sweeping allegation that the total number of elephants

¹¹⁷⁰ Annex 1 titled "Récapitulatif des espèces décimés sur les aires protégées de l'ICCN" that contains the ICCN's undated document titled "Dégâts causés par les militaires Ougandais dans les aires protégées à l'Est de la DRC" which appears after page 20 in J. Okana, et al., Evaluation Des Dommages Causés à La Faune Congolaise Par L'Ouganda entre 1998 et 2003 (Sept. 2016) citing to Institut Congolais pour la Conservation de la Nature, Récapitulatif des espèces décimées sur les aires protégées de l'ICCN DRCM, Annex 5.13.

¹¹⁷¹ *Ibid*.

¹¹⁷² *Ibid*.

¹¹⁷³ *Ibid.*, pp. 22-23 (5000 elephants in 1998 minus 3000 elephants in 2003/2004).

¹¹⁷⁴ *Ibid*. (5897 elephants in 1998 minus 3897 elephants in 2003/2004).

¹¹⁷⁵ *Ibid.* (1250 elephants in 1998 minus 21 elephants in 2003/2004).

killed in all four national parks as a result of Uganda's conduct is 10,229 (5,000 + 2,000 + 2,000 + 1,229). The DRC uses exactly the same approach to calculate the nominal losses among other species of animals. ¹¹⁷⁶

8.115 Neither the ICCN nor the DRC have submitted *any* evidence proving the accuracy of any of these numbers. Indeed, as stated, the ICCN table contains no information about how it even established those numbers. Nor does it provide any contemporaneous inventories of animals from any of the national parks. Uganda cannot escape the conclusion that the DRC appears simply to have fabricated the numbers claimed for purposes of this litigation.

8.116 The DRC curiously attempts to validate its claim by reference to UNESCO data on animals in its national parks. That effort fails. The UNESCO data only highlight the significantly inflated nature of the DRC's claims. As just noted, the DRC alleges that 5,000 elephants were killed in Garamba National Park because there were ostensibly 6,535 elephants in 1998 and 1,535 elephants in 2003/2004. By contrast, UNESCO statistics suggest the following number of elephants in the same park: 5,878 in 1998; 5,983 in 2000; and 6,848 in 2004. In other words, they actually show a steady increase in the number of elephants during the conflict. (It also bears note that *none* of the UNESCO reports the DRC cites suggests that animals in Congolese national parks were killed as a result of Uganda's conduct).

8.117 Even setting these very fundamental flaws aside, and assuming the numbers of allegedly killed animals were accurate (which they are not), it would still be true that the DRC has offered no proof that the "missing" animals were in fact killed. It does not necessarily follow that because there were allegedly 6,535 elephants in

¹¹⁷⁶ *Ibid*.

¹¹⁷⁷ DRCM, para. 5.120.

Garamba National Park in 1998 and 1,535 elephants in 2003/2004, 5,000 elephants must have been killed. There are many other possible explanations, including migration, natural deaths caused by droughts and other factors, and predators. One cannot simply assume that all the animals were killed, as the DRC does.

8.118 Atop this unproven assumption, the DRC adds a further assumption that *all* of those animals were killed as a result of Uganda's invasion. The DRC offers no proof to support this assumption. Instead, it erroneously seeks to establish causation based on the following reasoning: because UPDF soldiers may have been present in a given location, losses in that location were necessarily caused by Uganda. But such reasoning is inconsistent with the requirement of proximate causation that operates even in the context of a *jus ad bellum* violation, as discussed in Chapter 4. 1179

8.119 With respect to the alleged losses in Maiko National Park, for example, the DRC starts with the allegation that:

"On August 21, 1998 RCD-ML rebel brigades, supported by the APR and UPDF, launched a ground operation along the length of the Lubutu axis, which is situated on the edge of the park. After this operation, the Ugandan troops arrived in Kisangani, on August 21 and 22, 1998."

8.120 On that scant basis, the DRC concludes:

-

 $^{{}^{1178}\,\}textit{Ibid. See}\,\,\text{paras.}\,\,5.161\text{-}5.165\,\,\text{(Virunga); paras.}\,\,5.168\text{-}5.169\,\,\text{(Okapi); paras.}\,\,5.170\text{-}5.171\,\,\text{(Maiko)}.$

¹¹⁷⁹ See Chapter 4, Section I(B).

¹¹⁸⁰ DRCM, para. 5.133 (Translation by Counsel, original in French: "Le 21 août 1998, les brigades rebelles du RCD-ML, appuyées par l'APR et l'UPDF, lancèrent une opération terrestre le long de l'axe Lubutu, qui se situe en lisière du parc. C'est après cette opération que les troupes ougandaises arrivèrent à Kisangani, les 21 et 22 août 1998".).

"The ICCN surveys come to an estimation of the number of animals killed at 1,000 antelopes and 2,000 elephants." 1181

8.121 A variation on this same faulty approach appears in the section on losses in Garamba Park. There, the DRC plucks two unsupported statements from the UN Panel's first report of 12 April 2001. One of these statements reads: "[I]n the area controlled by the Ugandan troops and Sudanese rebels, nearly 4,000 out of 12,000 elephants were killed in the Garamba Park in north-eastern Democratic Republic of the Congo between 1995 and 1999." Another statement reads: "[I]n August 2000, UPDF Colonel Mugeni and a crew of his soldiers were discovered with 800 kilograms of elephant tusks in their car near Garamba Park." Immediately thereafter, the DRC leaps to this conclusion concerning the extent of the damages allegedly caused by Uganda in Garamba Park:

"The ICCN's assessments outline the loss of 5,000 antelopes, 5,000 elephants, 92 giraffes, 21 white rhinoceroses, 3,905 warthogs, 17 hartebeests, 808 waterbucks, and 135 bushbucks". 1185

_

¹¹⁸¹ DRCM, para. 5.134 (Translation by Counsel, original in French: "Les recensements de l'ICCN mènent à estimer le nombre d'animaux tués à 1.000 antilopes et 2.000 éléphants".).

¹¹⁸² *Ibid*, paras. 5.113 -5.124.

¹¹⁸³ *Ibid*, para. 5.114 *citing to* U.N. Panel of Experts, first report of 12 April 2001, para. 61 (emphasis by the DRC) (Translation by Counsel, original in French: "dans le secteur contrôlé par les forces ougandaises et les rebelles soudanais, près de 4 000 éléphants sur une population de 12 000 ont été tués dans le parc de Garamba, dans le nord-est de la République démocratique du Congo, entre 1995 et 1999".), DRCM Annex 1.7.

¹¹⁸⁴ *Ibid*, para. 5.115 *citing to* U.N. Panel of Experts, first report of 12 April 2001, para. 62 (emphasis by the DRC) (Translation by Counsel, original in French: "en août 2000, le colonel Mugeni des Forces armées ougandaises et plusieurs de ses soldats ont été découverts avec 800 kilogrammes de défenses dans leur véhicule près du Parc de Garamba".), DRCM Annex 1.7.

¹¹⁸⁵ *Ibid*, para. 5.117 (Translation by Counsel, original in French: "Les évaluations de l'ICCN font état de la perte de 5.000 antilopes, 5.000 éléphants, 92 girafes, 21 rhinocéros blancs, 3905 phacochères, 17 bubales, 808 waterbuck et 135 guibs harnachés".).

8.122 That the conclusion does not follow from the predicate and that it lacks evidentiary support are not the only flaws in this argument. Another shortcoming is that the two statements pulled from the UN Panel report are unfounded and uncorroborated. Indeed, they were subsequently called into question by credible sources. The Porter Commission, for example, refuted the allegation of Ugandan poaching in Garamba National Park, stating:

"Paragraph 61 of the original Panel Report states that between 1995 and 1999, 30% of elephants were killed in Garambwa National Park in areas controlled by Ugandan troops and Sudanese rebels, and that there are similar problems in other parks. There is no evidence available as to who was responsible for this. There is however evidence that although there was a detachment at Durba, near the Park, its duties did not cover the Park. Congolese Security Reports [that were] produced complained of poaching by SPLA [Sudan People's Liberation Army] in Garambwa Park and there were other reports of trouble caused by the SPLA there. (Exh. FM/07/102). It should also be noted that the original Panel's allegation covers the period from 1995 to 1999. Ugandan troops did not reach the area until late 1998, and therefore could only have been involved in this allegation, if at all, for a very short time".1186

-

¹¹⁸⁶ Porter Commission, Final Report, p. 72 (emphasis added), Annex 52. As regards the UN Panel of Experts' allegation that a UPDF officer was found with 800 kg of ivory, the Porter Commission also found it as lacking any support: "The original Panel Report does not state the date on which [the UPDF officer] was found nor by whom he was found, nor to which department or officer of the Uganda Government Report was made." *Ibid*.

8.123 No less convincing a refutation of the same allegation comes from Dr Kes Hillman-Smith, the coordinator of the Garamba National Park project on protecting wildlife. Discussing elephant poaching, she observed:

"Since early 1997, Garamba National Park in the northeast of the Democratic Republic of Congo (DRC—previously Zaire) has been subjected to the effects of two wars within the country. ... The poaching there in recent years has been primarily for meat. Patrol monitoring indicates that 70–80% of the poaching gangs' members are Sudanese, usually 'SPLA deserters', using weapons from the ongoing war in adjacent southern Sudan. The others are local Congolese. The increase in poaching during the active phases of the two DRC wars, however, was not caused by influxes of Congolese poachers or the occupying military. The same poachers were there throughout, but the anti-poaching effort of guards was temporarily stopped or reduced and the general breakdown of law and order was exploited". 1188

8.124 There is no mention of Uganda killing elephants in Garamba. To be sure, this source does mention Uganda, but here is what it says:

"The Ugandan forces acted positively towards conservation efforts and prevented the sale of bushmeat; a small increase in poaching was checked". 1189

8.125 The lack of a genuine causal link between the damages claimed in Congolese national parks and Uganda's conduct is further underscored by the

¹¹⁸⁷ The goal of the project, which took place in the 1990s, was the conservation of the northern white rhinoceros in Garamba National Park. Kes Hillman-Smith lived in the park and worked there to protect wildlife for over twenty years.

¹¹⁸⁸ K. Hillman Smith, "Status of Northern White Rhinos and Elephants in Garamba National Park, Democratic Republic of Congo, During the Wars" *Pachyderm* No. 31 (July-Dec. 2001), p. 79, Annex 79.

¹¹⁸⁹ *Ibid*

DRC's arbitrary apportionment of damages. The DRC claims, without evidence or justification, that "at the minimum" Uganda is responsible for 50% of damages in Garamba National Park, 50% in Maiko National Park, 80% in Virunga National Park and 90% of damages in the Okapi Wildlife Reserve. 1190

8.126 To see how arbitrarily the DRC arrives at those percentages, the Court need look no further than the DRC's section on losses in the Okapi Wildlife Reserve (where, it says, 1,000 antelopes, 2,000 elephants, 1,000 okapis, and 2,000 chimpanzees were killed). ¹¹⁹¹ To prove "the causal link existing between the presence of the Ugandan army and the damage caused to the wildlife", ¹¹⁹² the DRC relies on a single quote from one UNESCO report:

"During the civil war, Epulu was the front line between the warring parties. The breakdown in law and order during the 90s provided the opportunity for thousands of itinerant miners, as well as elements from the Ugandan army, to enter the forests of eastern DRC to extract timber and mine for gold, diamonds and coltan. Temporary mining camps composed of miners, their families, hunters, itinerant traders and other hangers-on appeared all over the forest. The effects on wildlife were devastating as the

-

¹¹⁹⁰ DRCM, paras. 5.167, 5.171, 5.165, 5.169.

¹¹⁹¹ *Ibid.*, para. 5.125 et seq.

¹¹⁹² Ibid., para. 5.128 (emphasis added) (Translated by Counsel, original in French: "Durant la guerre civile, Epulu fut la ligne de front entre les parties belligérantes. L'état de non-droit que cela a engendré a fourni l'occasion à des milliers de mineurs itinérants, tout comme à des éléments de l'armée ougandaise, de pénétrer les forêts de l'est de la RDC pour l'exploitation du bois et des mines d'or, de diamant et de coltan. Les campements miniers itinérants composés de leurs familles, de commerçants itinérants et autres opportunistes sont apparus un peu partout dans la forêt. Les effets sur la faune furent dévastateurs, les campements miniers devenant autant de centres pour le commerce du gibier et de l'ivoire".).

mining camps became centers for the commercial bushmeat and ivory trades". 1193

8.127 On this basis, the DRC claims that Uganda is responsible for 90% of the alleged losses in the Okapi Wildlife Reserve. 1194 Even if the facts stated were true, the quoted statement does not begin to support the DRC's claims. Just because unspecified "elements from the Ugandan army" were allegedly present at an unknown time somewhere in the Okapi Wildlife Reserve, this does not mean that Uganda can be deemed responsible for damages caused by various "warring parties," "the breakdown in law and order during the 90s," "thousands of itinerant miners," "hunters," "itinerant traders" and "other hangers-on." This is especially so, given that the DRC has offered *no* evidence, let alone convincing evidence, linking any specific loss in the Okapi Wildlife Reserve, or any other Congolese national park, to specific wrongful acts attributable to Uganda.

8.128 In fact, an article co-published by Jean Joseph Mapilanga, a Congolese official from the ICCN, demonstrates that the UPDF contributed to preventing smuggling in the Okapi Wildlife Reserve. Starting in 2000, the UPDF, APC and the ICCN participated in a joint operation called "Operation Tango". A joint 34-man team comprised of UPDF and APC personnel confiscated weapons and ammunition from smugglers, ¹¹⁹⁵ and according to Mr Mapilanga, after five months

¹¹⁹³ UNESCO, *Le patrimoine mondial dans le bassin du Congo*, (emphasis by the DRC) Annex 5.16. DRCM, para. 5.128.

¹¹⁹⁴ DRCM, para. 5.169.

¹¹⁹⁵ L. Mubalama, J. J. Mapilanga, "Less Elephant Slaughter in the Okapi Faunal Reserve, Democratic Republic of Congo, with Operation Tango", *Pachyderm*, No. 31 (July- Dec. 2001), p. 39, Annex 80.

no new signs of poaching were found. 1196 In addition, the UPDF trained newly deployed park guards to deal with elephant poaching. 1197

8.129 It follows from the foregoing that the DRC's alleged direct losses to the Congolese wildlife are baseless.

(b) The Claimed Indirect Injury to Congolese Wildlife Is Without Foundation

8.130 The DRC also claims indirect losses to the Congolese wildlife. ¹¹⁹⁸ The DRC measures these losses by attempting to calculate the number of first generation offspring that would have been born to the 54,892 animals allegedly killed during the conflict. ¹¹⁹⁹ For the reasons explained above, the DRC has neither proved the number of animals killed nor a causal link to specific wrongful actions attributable to Uganda. Its claim for indirect losses must fail for this reason alone.

8.131 The claim fails for other reasons as well. It is, on its face, wildly speculative. Any effort to calculate the number of offspring that would have been born in a counter-factual scenario is, by definition, predicated on myriad unverifiable assumptions and guesswork that afford the Court no basis to make any sort of legal finding. Such harm is also too remote from the alleged direct injury to be a proper subject of reparation under international law.

8.132 Moreover, even taken on its own terms, the DRC's methodology for calculating the number of offspring that would have been born is irredeemably flawed. Citing to a single 1985 study on sex-ratios among animals, the DRC

¹¹⁹⁶ *Ibid*.

¹¹⁹⁷ *Ibid*.

¹¹⁹⁸ DRCM, para. 5.135.

¹¹⁹⁹ *Ibid.*, paras. 5.135-5.136.

mechanically applies these sex-ratios to the allegedly killed animals to estimate the numbers of females killed. ¹²⁰⁰ It then multiplies the number of allegedly killed females of each species by the number of offspring they would ostensibly have given birth to in the five years between 1998 and 2003. ¹²⁰¹ The numbers of offspring the DRC claims would have been born during this period is set out in Table 4 of the DRC Memorial and reproduced (as translated) below: ¹²⁰²

TABLE 8.8: Numbers of Offspring the DRC Claims Would Have Been Born						
Species/Dayles	Total					
Species/Parks	Female	Male	Young	Total		
ANTELOPES	18,765	8,235	187,650	214,650		
ELEPHANTS	5,115	5,114	25,575	35,803		
HIPPOPOTAMUSES	54	53	270	377		
BUFFALOES	4,913	4,135	24,565	33,613		
GIRAFFES	46	46	184	276		
OKAPIS	500	500	2,000	3,000		
RHINOCEROSES	11	10	22	43		
WARTHOGS	2,514	1,458	201,120	205,092		
BABOONS	48	48	96	192		
MONGOOSES	31	46	1,860	1,937		
CROCODILES	36	36	9,000	9,072		
HARTEBEESTS	10	7	100	117		
BUFFON'S KOBS	101	59	1,515	1,675		
WATERBUCKS	589	258	2,945	3,792		
BUSHBUCKS	89	65	890	1,044		
CHIMPANZEES	1,200	800	6,000	8,000		

¹²⁰⁰ *Ibid.*, para. 5.139.

¹²⁰¹ *Ibid.*, paras. 5.139-5.140.

¹²⁰² *Ibid.*, para. 5.141.

Putting these numbers together, the DRC claims that the number of first generation offspring that would have been born is 463,792.

8.133 In Uganda's view, the speculative and arbitrary nature of this claim speaks for itself. It can also be illustrated by the way the DRC calculates the number of unborn elephants.

8.134 As stated, the DRC asserts that the number of elephants killed in Garamba National Park was 5,000. To this unproven number, the DRC applies a nominal 50/50 sex-ratio among elephants 1203 to conclude that 2,500 of the 5,000 of elephants allegedly killed were female. 1204 An elephant, the DRC claims, gives birth to "one baby per year". 1205 Multiplying 2,500 by five (one baby for each of the five years of the conflict), the DRC says that the number of unborn elephants in Garamba National Park alone is 12,500. This calculation is profoundly misconceived on multiple levels.

8.135 The DRC has got its facts about elephant reproduction wrong. Elephants do not give birth to one baby a year. In fact, elephants have the longest gestation period of any mammal, close to two years. ¹²⁰⁶ Moreover, female elephants are mostly fertile between 25 and 45 years of age and have inter-birth intervals of between four to five years. ¹²⁰⁷ It is therefore biologically impossible that in five years 2,500

¹²⁰³ *Ibid*, para. 5.139. *See* Table No. 2 "Sex-ratio and rate of reproduction of the species".

¹²⁰⁴ *Ibid*, para. 5.140. *See* Table No. 3 "Number of males and females for each species, per park".

 $^{^{1205}}$ Ibid, para. 5.139. See Table No. 2 "Sex-ratio and rate of reproduction of the species".

¹²⁰⁶ Sarah C. P. Williams, "The Elephant in the Womb", *Science*, *available at* http://www.sciencemag.org/news/2012/06/elephant-womb (19 June 2012), Annex 87.

¹²⁰⁷ World Wildlife Fund, *African elephants*, *available at* http://wwf.panda.org/what_we_do/endangered_species/elephants/african_elephants/ (last accessed 29 Jan. 2018), Annex 107.

female elephants would have given birth to 12,500 baby elephants. (Aside from resting on erroneous scientific premises, the DRC's calculation also fails to account for inevitable losses associated with natural selection or other factors affecting mortality among baby elephants.)

8.136 Applying the same flawed approach to counting unborn elephants in the other three nationals parks, the DRC speculatively asserts that the total number of unborn elephants is 25,575. This speculative loss leads to speculative compensation. As discussed below, just for the alleged 25,575 "unborn" elephants, the DRC claims damages in the staggering amount of roughly US\$ 640 million. 1209

8.137 There is no basis in fact or law to award the compensation the DRC seeks for the alleged indirect harm to wildlife.

2. The DRC's Valuation of Alleged Damages is Methodologically Flawed

8.138 The DRC's failure to show exact losses suffered as a result of specific wrongful acts attributable to Uganda makes it unnecessary to discuss their valuation. Uganda will nevertheless briefly discuss the manner in which the DRC purports to place a value on alleged losses to Congolese wildlife for purposes of highlighting the arbitrary nature of the claim.

¹²⁰⁹ As will be explained below, the DRC arbitrarily claims that the price of a baby elephant is US\$ 25,000.

¹²¹⁰ *Diallo* (2012), para. 14 ("If the existence of injury and causation is established, the Court will then determine the valuation".).

¹²⁰⁸ DRCM, para. 5.141. *See* Table No. 4 "Number of animals including their offspring, per park" (12,500 unborn elephants in the Garamba Park, 3,075 in Virunga, 5,000 in Maiko, and 5,000 in Okapi Reserve).

8.139 The DRC seeks to quantify compensation by assigning values to animals that have no foundation in reliable, much less convincing, evidence. ¹²¹¹ Several examples will suffice to illustrate these problems.

8.140 The DRC contends that the monetary value of an elephant, for example, is US\$ 50,000. 1212 To support this contention, it refers only to the website of *African Sky Hunting*, which offers a "10 day elephant hunting" package in South Africa for US\$ 37,602. 1213 This online offer for an elephant safari in a different country says nothing about the value of an elephant in the Congo during an armed conflict. The DRC nevertheless takes the US\$ 37,602 figure as a baseline and then increases it to US\$ 50,000. It attempts to justify this saying that Congolese elephants are more threatened than elephants in South Africa. 1214 Such speculation built atop speculation cannot form a basis for placing a value on an injury in a court of law.

8.141 For chimpanzees and crocodiles, the DRC claims values of US\$ 50,000 and US\$ 15,000, respectively. These claims are based on "black market" prices for an Indonesian orangutan (in the case of chimpanzees) and a Chinese alligator (in

¹²¹¹ DRCM, 5.153. For the sake of completeness, it bears emphasis that the DRC suggested—but ultimately abandoned—an "alternative" option that damages to wildlife could have been assessed based on "the income [animals] may generate in connection with ecotourism". DRCM, paras. 5.145-151, 5.152. It is not surprising why the DRC abandoned this "valuation option". Damages to the DRC's ecotourism industry are transparently speculative, especially given that the DRC had (and has) *no* ecotourism infrastructure comparable to that of South Africa, Kenya, Tanzania and Zambia, the countries that the DRC uses as the yardstick for valuating future profits from "ecotourism". Nor has the DRC adduced any evidence about its ecotourism before 1998, any impacted wildlife locations that were utilised for ecotourism prior to the conflict, or specific damage caused to ecotourism by Uganda.

¹²¹² *Ibid.*, para. 5.159(3).

¹²¹³ J. Okana, et al., Evaluation Des Dommages Causés à La Faune Congolaise Par L'Ouganda entre 1998 et 2003 (Sept. 2016) citing to African Sky Hunting, Elephant, DRCM Annex 5.13.

¹²¹⁴ DRCM, para. 5.159(3).

¹²¹⁵ *Ibid.*, paras. 5.159(2) and 5.159(7).

the case of crocodiles) illegally traded in Asia, which the DRC plucks from a 2008 report "International Illegal Trade in Wildlife: Threats and U.S. Policy". 1216 The DRC's attempted "valuation" is fundamentally flawed. The 2008 report, prepared by the United States Congressional Research Service, was not intended to be a "price list". The purpose of the report was to discuss environmental and national security threats to the United States posed by international wildlife smuggling, and to suggest policy options to combat the international illegal trade in wildlife. 1217 In that context, by way of illustrating challenges facing the United States, the report mentioned some "black market" prices of illegally traded species. It is regrettable that the DRC relies on "black market" prices—for entirely different species, no less—as a measure of compensation, thereby implicitly recognising the validity of illegal trade in wildlife. 1218

8.142 The DRC's reliance on "black market" prices is also misplaced from a purely economic perspective. Black market transactions are secret. The available data are therefore not comprehensive and cannot reflect typical or average prices. Black-market transactions are also highly idiosyncratic. It is therefore inappropriate to apply monetary values of species individually sold on black markets to species allegedly killed during an armed conflict. Finally, black-market

.

¹²¹⁶ *Ibid.*, paras. 5.159(2) and 5.159(7). The DRC values a Congolese chimpanzee and crocodile at US\$ 50,000 and US\$ 15,000, respectively.

¹²¹⁷ L. Wyler, P. Sheikh, *International Trade in Wildlife: Threats and U.S. Policy*, CRS Report for Congress, RL34395 (22 Aug. 2008), p. 3, Annex 61.

¹²¹⁸ It also bears emphasis that the CRS's report has no reference to Congolese chimpanzees or crocodiles. The DRC's extrapolation of the "black market" prices of an orangutan and Chinese alligator to a Congolese chimpanzee and crocodile, respectively, is thus also wholly arbitrary. An orangutan belongs to a different family of primates than a Congolese chimpanzee. A West African crocodile and a Chinese alligator are completely different species. Moreover, orangutans and Chinese alligators are also listed as critically endangered species by the International Union for Conservation of Natura and Natural Resources. Moreover, contrary to the DRC's assertion, a chimpanzee and West African crocodile are not "species threatened with extinction." DRCM, para. 5.155.

transactions do not represent replacement costs; surely the DRC does not intend to replace the allegedly-killed animals by purchasing them on the black market.

8.143 To assess compensation for some other animals, the DRC picks and chooses prices of individual animals, sometimes of different species, traded live at auctions or online in third countries. This valuation methodology is also seriously flawed. The prices of animals traded in other countries are determined by factors specific to those markets. They are thus inappropriate for assessing losses allegedly sustained in the DRC during the conflict. It is also inappropriate to use the price of an animal sold at auctions or online and apply that price to animals in a herd because it overstates the value of an individual animal in a larger herd. Moreover, auction and online prices of individual animals reflect significant costs associated with capturing, breeding or raising an animal. The DRC thus cannot, for example, use the price of a South African antelope sold at an auction or online in South Africa to assess the losses from the antelopes allegedly killed in the Congo. The DRC thus cannot are the congo.

8.144 Another methodological problem in the DRC's use of auction and online prices is that it selects them from fragmentary and unreliable sources, and then increases those poorly sourced prices by adding speculative assumptions. This

¹²¹⁹ DRCM, para. 5.155. The DRC applies this approach to make up prices for hippopotami, giraffes, rhinoceroses, bushbucks, hartebeest, kobs, waterbucks, warthogs, baboons, and mongooses.

¹²²⁰ For example, the sources cited by the DRC explain that capturing a hippo to sell at an auction entails significant risks and monetary costs: the animal is not shot with tranquilisers, because it could run away into water and get drown; so the animal is separated from its herd, starved for many days, and then lured into a trap with food; then some time has to be allowed to bring the animal into marketable shape before it can be sold at an auction. Dennis Farrell, Associated Press, Billings Gazette, *African animal auction draws 2,000, available at* http://billingsgazette.com/news/world/african-animal-auction-draws/article_0d20dc22-69da-553c-a4bc-695919ec409b.html (22 June 2002), Annex 81.

¹²²¹ DRCM, para. 5.159(1).

invariably results in arbitrary prices. For example, the DRC claims that "the prices for an ordinary giraffe range from US\$ 1,300 to US\$ 80,000". 1222 And since, it says, Congolese giraffes are endangered, the price of one should be deemed the same as that for "seriously threatened *primates*, i.e. US\$ 50,000". 1223

8.145 The DRC's assertion that the price of an ordinary giraffe can reach US\$ 80,000 is based on an unsupported observation taken from a single website (www.exoticanimalsforsale.net) that purchasing a giraffe can require spending up to US \$80,000. This is hardly a convincing basis on which to base a compensation claim in a court of law. Nor does the DRC offer evidence or explanation as to why US\$ 50,000 reflects the value of "seriously threatened primates", or why that value can simply be assumed to apply equally to an endangered giraffe. 1224

_

¹²²² *Ibid*, para. 5.159(8) (emphasis added) (Translation by Counsel, original in French: "les prix pour une girafe ordinaire varient de 1.300 à 80.000 dollars des Etats-Unis").

¹²²³ *Ibid.* (emphasis added) (Translation by Counsel, original in French: "des primates gravement menacés, à savoir 50.000 dollars".).

¹²²⁴ The DRC extrapolates the same price to an okapi, stating that okapis and giraffes are "part of the same family" (Translation by Counsel, original in French: "font partie de la même famille".). Since the claimed price has no foundation, it also cannot be used to evaluate losses to okapis. DRCM, para. 5.159(9).

Yet another example of arbitrariness is the DRC's valuation of rhinoceroses at DRCM, para. 5.159(10). The DRC claims that its "assessment took into account the price of live animals sold in South Arica, which was US\$ 28,000 on average" (Translation by Counsel, original in French: "l'évaluation a eu égard au prix d'animaux vivants vendus en Afrique du Sud, qui était de 28.000 dollars des Etats-Unis en moyenne".). This price was then allegedly "reassessed with regard to the protection status of various populations of rhinoceroses" (Translation by Counsel, original in French: "Ce prix a ensuite été réévalué au regard du statut de protection des différentes populations de rhinocéros".) and "the price used for the rhinoceroses of the DRC has therefore been set at US\$ 50,000" (Translation by Counsel, original in French: "Le prix retenu pour les rhinocéros de la RDC a dès lors été fixé à 50.000 dollars des Etats-Unis".). However, the DRC mentions no source that was used to determine an average price of rhinos sold in South Africa. Nor does the DRC explain what criteria it applied to reassess the average price and increase it to US\$ 50,000.

The DRC also has offered no evidence showing that the price for a warthog is US\$ 5,055 or that the "average internet" price of a baboon is US\$ 2,000, or why the "average internet" price of a baboon should be the same for a mongoose, given that these are wholly different species. DRCM, para. 5.159(5)-5.159(6).

8.146 The speculative and arbitrary nature of the prices the DRC assigns to animals manifests itself in still other respects as well. For example, as stated, the DRC claims compensation not only for animals allegedly killed but also for their unborn first-generation offspring. This leads to double-counting because ordinarily the value of an animal captures its ability to produce offspring.

8.147 The double-recovery is even more alarming in light of how arbitrarily the DRC assigns values to unborn offspring. The DRC claims without support, for instance, that the price of one unborn elephant is US\$ 25,000 (one-half of the claimed price for an adult elephant, which itself is unfounded, as shown above). Multiplying that speculative price by a no-less-speculative number of unborn elephants, the DRC thus claims US\$ 639,375,000 in damages just for unborn elephants. 1226

8.148 For other baby animals, the DRC sometimes assigns the same price as for adult animals. For example, the DRC claims, again without support, that the price for a baby warthog should be the same as for an adult warthog: US\$ 5,055. 1227 Just for the first generation of unborn warthogs in Garamba Park alone, the DRC claims losses that total more than US\$ 1 *billion*. 1228

¹²²⁵ See supra para. 8.139.

¹²²⁶ With respect to elephants, the DRC actually engages in *triple*-recovery. In addition to claiming losses for allegedly killed adult elephants, assessed at US\$ 511,400,000, and unborn baby elephant, assessed at US\$ 639,375,000, the DRC also claims losses for ivory from all adult elephant, assessed at US\$ 664,820,000 based on "black market" prices (1,022,800 kg of ivory x US\$ 650/kg). DRCM, paras. 5.161, 5.166, 5.169, and 5.170 (valuation tables).

The DRC seeks the same *triple*-recovery with respect to rhinos: US\$ 1,050,000 for allegedly killed adult animals; US\$ 550,000 for allegedly unborn baby rhinos; and US\$ 787,500 for horns allegedly taken from adult animals. *See* DRCM, valuation table at paras. 5.166.

¹²²⁷ DRCM, para. 5.159(5).

¹²²⁸ *Ibid.*, para. 5.166.

8.149 The DRC's valuation of its claimed losses to Congolese wildlife is thus not only methodologically flawed; it is also speculative and leads to impermissible double-recovery.

*

8.150 Because the DRC has failed to prove, through convincing evidence showing with a high level of certainty, that Uganda's specific wrongful acts directly caused injury to the Congolese wildlife, there is no basis for the award of compensation for this claim.

C. Deforestation

8.151 The DRC seeks US\$ 100 million in compensation for deforestation allegedly caused by Uganda's exploitation and export of Congolese timber. ¹²²⁹ The claimed amount, according to the DRC, covers "the commercial value of the timber and the various taxes that would have been collected on it, and the injury to biodiversity and the habitat of the animal species." ¹²³⁰

8.152 The Court made no specific findings in the 2005 Judgment that Uganda caused deforestation by exploiting and exporting the Congolese timber. ¹²³¹ It is therefore unlikely that the Court's general legal findings concerning natural

-

¹²²⁹ *Ibid.*, paras. 5.173, 5.190.

¹²³⁰ *Ibid.*, para. 5.184 (Translation by Counsel, original in French: "la valeur commerciale du bois et les diverses taxes qui auraient dû être perçues sur celui-ci, mais aussi l'atteinte à la biodiversité et à l'habitat des espèces animales".).

¹²³¹ It also bears emphasis that the documents on which the Court relied to reach its general conclusion on illegal exploitation of natural resources did not link Uganda to deforestation or exploitation and export of the Congolese timber.

resources covered the exploitation of timber. As such, this claim should be denied as beyond the scope of the 2005 Judgment.

8.153 Even if the 2005 Judgment did encompass unlawful exploitation by Uganda in the form of deforestation, the amount claimed under this head of damages (US\$ 100,000,000) appears to come out of the ether. It is nowhere to be found in the materials the DRC submits to the Court. Nor does the DRC Memorial explain how it arrived at this number. There appears to be only one plausible explanation. Despite the professed "carefulness that has to be observed in a legal proceeding", the DRC simply rounded up the number from US\$ 94,888,800 (the amount claimed for the alleged illegal exports by the company DARA-Forest), because that is the *only* amount expressly stated in the DRC's assessment of its alleged damages from deforestation. ¹²³² On its face, the claim for US\$ 100,000,000 thus fails for lack of proof.

8.154 Assuming that the DRC's claim is really in the amount of US\$ 94,888,800, the claim is based entirely on the speculation that Uganda is responsible for the unlawful exploitation of $216,000 \text{ m}^3$ of Congolese timber. That claim is based on an allegation that a putative "Ugandan-Thai" logging company, the aforementioned DARA-Forest, was illegally exporting $48,000 \text{ m}^3$ of timber a year for four and half years $(4.5 \times 48,000 \text{ m}^3 = 216,000 \text{ m}^3)$. Yet, as discussed below, the evidence the DRC offers is flawed, uncorroborated and unconvincing. The valuation of this unproven harm the DRC advances is equally problematic.

407

¹²³² DRCM, para. 5.187.

1. The DRC's Has Failed to Prove Any Specific Acts Attributable to Uganda Resulting in Deforestation in the DRC

8.155 Assuming *arguendo* that the Court's 2005 Judgment encompasses unlawful exploitation by Uganda in the form of deforestation in the DRC, it remains incumbent on the DRC at this phase to come forward with convincing evidence showing with a high level of certainty the specific actions attributable to Uganda that took the form of exploitation of forests, and the causal connection between those actions and any harm to the DRC. The DRC Memorial does not make the required showing.

8.156 The DRC's claim is founded entirely on the DARA-Forest "Case study" contained in the UN Panel's first report. 1233 There, it was alleged that a "Ugandan-Thai forest company DARA-Forest" illegally exploited Congolese timber for export to Uganda. 1235 It was also alleged that:

"On the basis of eyewitness accounts, satellite images, key actors' acknowledgements and the Panel's own investigation, there is sufficient evidence to prove that timber extraction is directly related to the Ugandan presence in Orientale Province. This has reached alarming proportions and Ugandans (civilians, soldiers, and companies) are extensively involved in these activities. ... In May of 2000, the RCDML [sic] attributed a concession of 100,000 hectares to DARA-Forest. Since September

¹²³³ U.N. Panel of Experts, first report of 12 April 2001, paras. 47-54, Annex 11; DRCM, paras. 5.174-5.175.

¹²³⁴ *Ibid.*, para. 47, Annex 11.

¹²³⁵ *Ibid.*, para. 47-49.

1998, overall DARA-Forest has been exporting approximately 48,000 m³ of timber per year". 1236

8.157 Using these allegations as a jumping off point, the DRC speculates that "if we consider that the *illegal exports* of DARA-Forest continued for *four and a half years*, with the *annual volume of 48,000 m*³," Uganda should be responsible for unlawful exploitation of 216,000 m³ of Congolese timber. 1237

8.158 Each and every element of the claimed injury is flawed. As a threshold matter, the entire claim rests on a single, shaky foundation—the DARA-Forest "Case Study" set forth in the UN Panel's much-criticised first report. This case study was investigated "intensively" by the Porter Commission. The result of those investigations are detailed in the Porter Commission's Report, which the Court consistently cited as providing reliable evidence in the 2005 Judgment. In that Report, the Porter Commission denounced the DARA-Forest case study as fatally flawed:

"From the evidence, this Commission has come to the conclusion that the investigation by the original Panel of Dara Forêt was fundamentally flawed and [the Commission] is unable to find support for any single allegation made in this so-called Case Study." 1240

¹²³⁶ DRCM, para. 5.175 *citing to* the U.N. Panel of Experts, first report of 12 April 2001, para. 54, Annex 11.

¹²³⁷ *Ibid.*, para. 5.187 (Translation by Counsel, original in French: "Si l'on considère que les exportations illicites de DARA-Forest se sont poursuivies pendant 4 ans et demi, au volume annuel de 48.000 m3".).

¹²³⁸ Porter Commission, Final Report, p. 72, Annex 52.

¹²³⁹ Armed Activities (2005), paras. 61, 78, 237.

¹²⁴⁰ Porter Commission, Final Report, p. 62, Annex 52.

8.159 Starting with the general allegation that Uganda exploited and exported Congolese timber, the Porter Commission found it unproven:

"There is no evidence before this Commission that Uganda as a country or as a Government harvests timber in the Democratic Republic of Congo. This Commission doubts that the allegation in the Report is correct. Timber does come across the border as an import, and there is no doubt that timber is also smuggled through the porous borders. Such documentation as this Commission has seen indicates that timber cut in the Democratic Republic of Congo is dutiable there on export, and that such duties are levied by the rebel authorities and paid". 1241

8.160 Turning to allegations that timber exploitation was directly related to the Ugandan presence in Orientale Province and that Ugandan soldiers were involved in those activities, the Porter Commission also found they lacked proof. The Commission explained that "the UPDF presence in Orientale Province" only "provided the security and access to overseas markets denied to the Congolese for so long." Indeed, neither the UN Panel nor the DRC has offered any evidence linking the UPDF or individual soldiers to exploitation of timber.

8.161 It is true, as the Porter Commission observed, that "there [were] Ugandans who [went] over to the Congo and [bought] trees by negotiating with individual Congolese permit holders or Chiefs, and import[ed] the timber once cut to Uganda." But "this cross-border trade", the Commission explained, "has been

¹²⁴¹ *Ibid.*, p. 55 (emphasis added).

¹²⁴² *Ibid.*, pp. 61-62 (emphasis added).

¹²⁴³ *Ibid.*, p. 56.

carried on throughout living memory,"¹²⁴⁴ and the conduct of private individuals engaged in commercial activities cannot be attributed to Uganda.

8.162 Finally, as regards the specific allegation that DARA-Forest was a "Ugandan-Thai" company that annually exported approximately 48,000 m³ of timber, the Porter Commission refuted it as wholly unfounded:

"This Commission is extremely concerned at the approach of the original Panel to this subject. Nowhere in the whole of this [allegation] is the reliability of sources quoted, but, considering the emphasis put on these alleged events, the original Panel must have come to the conclusion that it was safe to rely on its undisclosed and apparently unevaluated sources. Yet the perception of those sources, and that of the original Panel, was quite clearly wrong. A short interview with Mr Kotiram [a key witness related to the operations of DARA-Forest] and his associates would have established the truth, but he was never approached, according to his evidence. This problem casts doubt on the original Panel's collection and reliance upon information given to it, not only in respect of Dara Forêt, but throughout the Report, given the emphasis placed upon this so-called Case Study."1245

8.163 In addition to being refuted by the Porter Commission, the allegation about the illegal exploitation and export of the Congolese timber by a putative "Ugandan-Thai" company was subsequently retracted by the UN Panel itself, after it "[took] a closer look at the legal status of DARA-Forest" and its operation in the DRC. 1246 The UN Panel's revised position on this matter is set out in the Addendum to the

¹²⁴⁴ *Ibid.*, p. 58.

¹²⁴⁵ Porter Commission, Final Report, p. 62, Annex 52.

¹²⁴⁶ U.N. Security Council, U.N. Panel of Experts, Addendum to the first report of 12 April 2001, para. 72, Annex 13.

report of 12 April 2001, which the DRC attaches as Annex 1.8 to its Memorial and quotes extensively in the chapter concerning damages to plant life. 1247 Yet the DRC somehow overlooks the fact that the passages it quotes from the Addendum support four important conclusions that are fatal to the DRC's arguments:

¹²⁴⁷ DRCM, para. 5.176:

"In fact, the civil servants appointed by the Government of Kinshasa are still fulfilling duties such as that of customs officer and tax collector in the regions held by the rebels. However, the taxes are not received by the Government of Kinshasa and are diverted by the rebels for their own use. This situation is acknowledged by the Congolese Government, which, in September of 2001, offered to pay 37 months of arrears in pay for these civil servants. The Government of Kinshasa also seems to have acknowledged the activities of commercial entities that operate in the regions in the hands of the rebels. One can cite, among other examples, the German company Somikivu, which operates in the east of the Democratic Republic of the Congo, but continues to pay taxes to the rebels and maintains an office in Kinshasa. Questioned on the legal status of the commercial entities that operate in the territories controlled or occupied by the rebels, the Congolese Minister of Justice told the Group of Experts at a meeting held in September of 2001 that none of the concessions had been revoked up until then, and that an assessment would be made on a case-by-case basis when the Government would resume control of the regions in which these entities were operating.

In order to have proof of this, the Group of Experts examined more closely the legal status of DARA-Forest, a Thai company operating in the province of North Kivu. DARA-Forest is a logging company registered in the Congo that belongs to five shareholders. The principal among them, Royal Star Holdings, belongs in part to the Managing Director of DARA-Forest, John Kortiram, as well as three other Congolese shareholders. In March 1998, DARA-Forest was registered in Kinshasa as a Congolese company, after which work began in preparation for the construction of a sawmill in Mangina, in the province of North Kivu. In June 1998, DARA-Forest was granted a forest concession of 35,000 hectares by the provincial authority of North Kivu, which grants concessions to companies after their registration with the central government. The same authority also granted DARA-Forest an operating license to buy timber from local loggers and to export it. Its exports, headed for the United States and China, began at the beginning of 1999, a few months after the beginning of the war.

DARA-Forest, which adhered to the all the regulations in force, currently pays its taxes to the same bank as before the region was taken over by the rebels. It also deals with the same civil servants of customs when it exports its products and imports production equipment. The Group of Experts also learned that the Congolese authorities of North Kivu carry out a verification every two months to ensure that DARA-Forest complies with the terms and conditions of the licenses that have been granted to it. Furthermore, on September 12, 2001, the Minister of Justice in Kinshasa granted DARA-Forest a certificate of registration, which seems to indicate clearly that the Government of the DRC acknowledges the company and accepts that it is operating in the zones held by the rebels".

- *First*, DARA-Forest was not a "Ugandan-Thai" company and did not have Ugandans, whether officials or private citizens, among its shareholders or in its management. The Addendum explains that DARA-Forest was "a *Thai-owned* [logging] company operating in North Kivu Province" and it was *registered in the Congo*. 1248 The "main shareholder" of the company was Royal Star Holdings which was "partly owned by the managing director of DARA-Forest, John Kotiram", 1249 a Thai national. 1250 In addition to Mr Kotiram, "there are three Congolese shareholders". 1251
- Second, DARA-Forest harvested timber pursuant to concessions granted by the Congolese authorities and all of its lumber was exported to countries other than Uganda. The Addendum states: "In June 1998, DARA-Forest was granted a 35,000-hectar logging concession from the North Kivu Provincial Authority, which grants these concessions following registration with the central Government. DARA-Forest also acquired an exploitation licence from the same authority to buy and export from local loggers. Its exports, which were to the United States and China, started early in 1999, months after the beginning of the war". 1252
- *Third*, after obtaining concessions in June 1998, DARA-Forest continued to exploit timber during the conflict pursuant to additional concessions granted by local Congolese authorities, which verified and confirmed that the company complied with the terms of the

¹²⁴⁸ DRCM, para. 5.176 (emphasis added); U.N. Panel of Experts, Addendum to the first report of 12 April 2001, para. 72, Annex 13.

¹²⁴⁹ DRCM, para. 5.176 (emphasis added); U.N. Panel of Experts, Addendum to the first report of 12 April 2001, para. 72, Annex 13.

¹²⁵⁰ Porter Commission, Final Report, pp. 56-58, Annex 52.

¹²⁵¹ DRCM, para. 5.176; U.N. Panel of Experts, Addendum to the first report of 12 April 2001, para. 72, Annex 13.

¹²⁵² DRCM, para. 5.176 (emphasis added); U.N. Panel of Experts, Addendum to the first report of 12 April 2001, paras. 71-73, Annex 13.

concessions. Moreover, the DRC central government granted the company a certificate of registration and accepted the company's operation in the zones held by rebels. The Addendum explains: "DARA-Forest, which the Panel has found to have *complied with all the regulations in effect*, currently *pays its taxes* at the same bank as it did before the area came under rebel control. It also deals with the same customs officials as it did before the rebels took control of the area when it exports its products and imports production equipment... [A] bimonthly check is conducted by the local Congolese authorities of North Kivu to ensure that DARA-Forest is complying with the terms of licenses granted to it. Furthermore, DARA-Forest was granted on 12 September 2001 a certificate of registration from the Minister of Justice in Kinshasa. This would appear to be a clear sign of recognition of the company and acceptance of its work in the rebel-held areas by the Government of the Democratic Republic of the Congo". 1253

• *Fourth*, the authors of the Addendum provided no support for the earlier allegations from the DARA-Forest "Case Study" that the volume of DARA-Forest's export in 1998-2001 was 48,000 m³/year or that the company continued to export timber at this volume for another 2.5 years. ¹²⁵⁴

8.164 The DRC's own evidence thus refutes the DRC's claim that Uganda unlawfully exploited 216,000 m³ of Congolese timber.

8.165 The striking aspect of this claim is not just that it lacks any foundation, or that the DRC erroneously sought to use a non-existant "Ugandan-Thai" logging company as a proxy for proving attribution and proximate cause, or that the DRC

¹²⁵³ DRCM, para. 5.176 (emphasis added); U.N. Panel of Experts, Addendum to the first report of 12 April 2001, paras. 71-73, Annex 13.

¹²⁵⁴ See U.N. Security Council, U.N. Panel of Experts, Addendum to the first report of 12 April 2001 paras. 71-74, Annex 13.

took the unproven number of 48,000 m³ as the actual annual export of timber, or even that the DRC assumed that this unproven export volume lasted for four and a half years. What is truly striking is that the DRC presented this claim to the Court based on allegations it knew were erroneous, refuted and retracted.

8.166 Although the DRC does not really discuss it when stating its deforestation claim, the DRC Memorial also includes as an annex a scientific study prepared in May 2015 by the Inventory and Forest Management Directorate at the DRC Ministry of Environment and Sustainable Development. The DRC Memorial limits itself to the following vague assertion:

"[This] scientific study showed that the massive deforestation in the eastern portion of the country is the most marked in the zones where the Ugandan armed forces operated. With regard to this report, the losses caused by the unlawful acts of Uganda measure in the several hundred thousands of hectares and several billions of dollars. The DRC reserves the right to supplement its claim with regard to this in the course of proceedings." 1257

8.167 This study is apparently a working paper ("document de travail"), the sole purpose of which was to compare the areas of the DRC covered with forest between

¹²⁵⁵ See DRCM, para. 5.187.

¹²⁵⁶ Direction des Inventaires et Aménagement Forestiers & Ministère d'Environnement et Développement Durable, *Protocole Méthodologique de l'Evaluation du Couvert Forestier National de Référence en République Démocratique du Congo* (May 2015), DRCM Annex 5.20.

¹²⁵⁷ DRCM, para. 5.188 (emphasis added) (Translation by Counsel, original in French: "une étude scientifique a fait apparaître que la déforestation massive à l'est du pays est la plus marquée dans les zones où ont opéré les forces armées ougandaises. Au regard de ce constat, les pertes causées par les faits illicites de l'Ouganda se chiffrent en plusieurs centaines de milliers d'hectares et plusieurs milliards de dollars. La RDC se réserve le droit de compléter sa demande à cet égard en cours d'instance".).

1990 and 2010. ¹²⁵⁸ The authors of the working paper were not tasked with looking into or establishing causes that could explain the changes in the forest canopy in Congolese territory. ¹²⁵⁹ The working paper mentions no fact or evidence showing any specific injury caused by wrongful conduct attributable to Uganda. Nor does this working paper provide any assessments or evaluation of the amount of timber exploited between 1990 and 2010. There is therefore no basis for the DRC's broad assertion that the working paper shows that "the losses caused by the unlawful acts of Uganda number in the several hundred thousands of hectares and several billions of dollars." ¹²⁶⁰

8.168 Still another very basic reason the DRC also cannot credibly rely on this working paper is that the period it covers (from 1990 to 2010) substantially exceeds the *ratione temporis* scope of the 2005 Judgment, wherein the Court's findings that Uganda had engaged in internationally wrongful conduct was expressly limited to the period between August 1998 and June 2003.

8.169 Accordingly, the DRC has not presented convincing evidence showing any specific action attributable to Uganda in the form of the exploitation of timber resources that resulted in harm to the DRC.

Direction des Inventaires et Aménagement Forestiers & Ministère d'Environnement et Développement Durable, Protocole Méthodologique de l'Evaluation du Couvert Forestier National de Référence en République Démocratique du Congo (May 2015), p. 6, DRCM Annex 5.20.

¹²⁵⁹ *Ibid*.

¹²⁶⁰ DRCM, para. 5.188 (emphasis added) (Translated by Counsel, original in French: "les pertes causées par les faits illicites de l'Ouganda se chiffrent en plusieurs centaines de milliers d'hectares et plusieurs milliards de dollars.").

The DRC's Valuation of Its Alleged Damages Is Methodologically Flawed 8.170 The DRC's failure to show any specific action attributable to Uganda resulting in harm to the DRC eliminates the need to address in detail the DRC's flawed approach to valuation for its unproven injury. As the Court held in *Diallo*, it is only if the existence of specific injury and direct causal link is established that valuation is warranted. 1261 Uganda will therefore only briefly address the DRC's valuation to underscore additional speculative elements of this wholly arbitrary claim.

8.171 The DRC's effort to place a value on the injury it alleges is set out in one paragraph:

> "If we estimate that the illegal exports of DARA-Forest continued for four and a half years, with an annual volume of 48,000 m³, these exports represent in total a market value of USD 94,888,800 (48,000 x 4.5 x 439.30) (ninety-four million, eight hundred eighty-eight thousand, eight hundred dollars)."1262

8.172 For the reasons explained above, there is no credible basis to conclude that there was exploitation of 48,000 m³ of timber for 4.5 years. Equally without foundation is the third element in the DRC's flawed calculation formula: the alleged average commercial value of timber (US\$ 439.30 m³). Any loss to the DRC is not the commercial value of timber but rather the DRC's loss of concession

2.

¹²⁶¹ Diallo (2012), para. 14.

¹²⁶² DRCM, para. 5.187 (Translation by Counsel, original in French: "Si l'on considère que les exportations illicites de DARA-Forest se sont poursuivies pendant 4 ans et demi, au volume annuel de 48.000 m3, ces exportations représentent au total une valeur marchande de (48.000 x 4.5 x 439,30) = 94.888.800 dollars des Etats-Unis (quatre vingt-quatorze millions huit cent quatre-vingthuit mille huit cent dollars)".).

payments for, and/or loss of taxes on, the exploitation of such timber. The DRC makes no effort to quantify such losses.

8.173 Had the DRC attempted to determine lost concession payments and taxes from DARA-Forest's operations (which, again, are not attributable to Uganda), it would have determined that no compensation was due. The DRC's own evidence shows that DARA-Forest "adhered to [] all the regulations in force," "compli[ed] with the terms and conditions of the licenses", "paid its taxes to the same bank as before the region was taken over by the rebels," and "the Government of the DRC acknowledge[d] the company and accept[ed] that it is operating in the zones held by the rebels." As a result, there is no basis for the DRC to claim even the loss of taxes.

8.174 Moreover, even if the price of wood exports were relevant to this analysis (quod non), the DRC's claim that the average price of wood exported from the Congo between 1998 and 2003 was US\$ 439.30/m³ is unsupported by reliable evidence. To support this assertion, the DRC presents a table at paragraph 5.186 of its Memorial, which appears to be based on data taken from the website of the International Tropical Timber Organization ("ITTO"). 1264 However, the table lists only prices for the 1998-2001 period. It has no data for 2002 and 2003. Without such evidence, the DRC cannot credibly claim that the average price of exportation of Congolese wood for the period of 1998-2003 was US\$ 439.30. In fact, Uganda examined ITTO's data for missing years and found that the prices for those years

-

¹²⁶³ DRCM, para. 5.176 (emphasis added) *citing to* U.N. Panel of Experts, Addendum to the first report of 12 April 2001, paras. 71-73, DRCM Annex 1.8.

¹²⁶⁴ DRCM, para. 5.186. See International Tropical Timber Organization, Biennial Review Statistics, available at http://www.itto.int/annual_review_output/?mode=searchdata (last accessed 29 Jan. 2018). Annex 108.

bring the average price for 1998-2003 down to US\$ 428.86.¹²⁶⁵ This difference may appear to be small, but it has a large effect on the overall calculation. It reduces the claimed amount by more than US\$ 2 million (to US\$ 92,648,400).

8.175 The difference of nearly US\$ 2 million is perhaps trivial to the DRC in the context of its multi-billion-dollar claim. Yet miscalculated millions balloon into billions.

8.176 Because the DRC has failed to prove, through convincing evidence showing with a high level of certainty that Uganda wrongfully exploited Congolese timber, resulting in harm to the DRC, there is no basis for the award of compensation.

*

8.177 As was the case with the other heads of damages it seeks, the DRC has eschewed any effort at proving by traditional means its claims concerning the unlawful exploitation of natural resources. It has instead developed a series of unsustainable propositions, built upon unconvincing evidence or speculation, so as to advance highly inflated claims, leaving the Court without any credible basis for awarding the DRC the compensation its seeks.

¹²⁶⁵ According to the ITTO, the prices of wood exported from the Congo for 2002 and 2003 were 367 and 448.99, respectively. *See* International Tropical Timber Organization, *Biennial Review Statistics*, *available at* http://www.itto.int/annual_review_output/?mode=searchdata (last accessed 29 Jan. 2018), Annex 108.

CHAPTER 9

MACROECONOMIC INJURY

- 9.1 In Chapter 6 of its Memorial, the DRC presents under the label "macroeconomic injury" the single largest category of alleged injury for which it seeks compensation. Under this heading, the DRC contends that it suffered US\$ 12,697,779,493.27 (i.e., roughly US\$ 12.7 *billion*) in delayed economic development as a result of the conflict. The DRC recognises, however, that this alleged injury cannot seriously be attributed solely to Uganda. It therefore asserts that Uganda is responsible for "only" 45% of the alleged damages; i.e., US\$ 5,714,000,775. This single claim represents more than 40% of the total compensation the DRC requests.
- 9.2 This Chapter will establish that none of the asserted amounts—whether US\$ 12.7 billion, US \$5.7 billion or any other amount—can be awarded. The DRC's claim concerning its alleged "macroeconomic injury" is both legally and economically flawed.
- 9.3 From a legal point of view, the DRC's macroeconomic damage claim is not compensable under international law. **Section I** of this chapter demonstrates that it is at odds with international practice and case law. **Section II** shows that it is purely speculative and incompatible with any notion of causality. **Section III** explains why it cannot be justified under the rubric of *lucrum cessans* as the DRC Memorial

¹²⁶⁶ At the negotiations stage, the DRC claimed it had suffered US \$16 billion in macroeconomic damages and, for the purposes of negotiations, it claimed from Uganda US\$ 12 billion.

attempts to do. And **Section IV** demonstrates that the premise of this aspect of the DRC's claim is inconsistent with the 2005 Judgment.

9.4 **Section V** of this chapter shows that from a factual, economic point of view the methodology the DRC uses to quantify its claim suffers from multiple fatal flaws.

I. Macroeconomic Injury Claims Like the DRC's Have Uniformly Been Rejected in Practice and Case-Law

9.5 The DRC Memorial premises its claim for macroeconomic injury on the contentions that conflict

"affects the path of the growth of the gross domestic product (GDP), which measures the creation of wealth produced by national and foreign economic agents on a given national territory. It disrupts the economic activity both in zones affected by military operations and in those not affected by them, as the economic actors present in the latter participate, despite everything, in the war effort, and the scope of their market is necessarily reduced.

• • •

[W]ar... disrupts all life in a country that loses all attractiveness and competitiveness, chases away and discourages present and potential investors, diverts tourists and reduces final household consumption, which is a significant component in the formation of a country's wealth. Furthermore, war leads to an increase in imports of consumer goods, and therefore a foreign currency shortage. This leads to or aggravates a trade deficit as, in contrast with this

growth in imports, exports suffer a sharp decline due to weak production". 1267

- 9.6 According to the DRC, Uganda is obligated to compensate it for this economic disruption because, under the ILC Articles on State Responsibility, a State responsible for an internationally wrongful act is required to "fully repair the injury caused by" that act. ¹²⁶⁸ And since, according to the DRC, this economic disruption would not have occurred but for Uganda's intervention, Uganda is obligated to pay the DRC compensation for it.
- 9.7 The DRC claim fails in the first instance because claims for macroeconomic injury like the DRC's have consistently, indeed uniformly, been rejected in practice and in the jurisprudence. In this respect, it is telling that the DRC Memorial does not cite even a single instance in which a decrease in the macroeconomic performance of a State has been considered as a compensable head of damage under international law.
- 9.8 Not even the Treaty of Versailles sought to impose responsibility on Germany to pay for the general economic disruption accompanying World War I.

¹²⁶⁷ DRCM, paras. 6.07, 6.09 (Translation by Counsel, original in French: "affecte ainsi la trajectoire de la croissance du produit intérieur brut (PIB) qui mesure la création des richesses produites par des agents économiques nationaux et étrangers sur un territoire national donné. Elle perturbe les activités économiques tant dans les zones affectées par les opérations militaires que dans celles qui ne sont pas touchées, car les acteurs économiques présents dans ces dernières participent malgré tout à l'effort de guerre, et l'étendue de leur marché est forcément réduite"; "La guerre ... désorganise toute la vie dans un pays qui perd toute attractivité et compétitivité, chasse et décourage les investisseurs présents et potentiels, détourne les touristes et réduit la consommation finale des ménages qui est une composante significative dans la formation de la richesse d'un pays. Par ailleurs, la guerre entraîne un accroissement des importations en biens de consommation et donc la pénurie des devises. Ceci entraîne ou aggrave le déficit de la balance commerciale car, en contraste avec cet accroissement des importations, les exportations accusent une forte baisse en raison de la faiblesse de la production.").

¹²⁶⁸ DRCM, para. 6.03 *citing to ARSIWA*, Art. 31(1)) (emphasis in original) (Translation by Counsel, original in French: "de réparer *intégralement* le préjudice causé".).

While actual damages to property and persons were computed to assess the amount of reparations Germany owed, the overall economic disruption that accompanied the war was not. Likewise, after World War II, none of the unilateral or conventional reparation schemes imposed on any of the Axis powers the duty to compensate even a very small part of the huge macroeconomic impact of the war.

- 9.9 The two world wars had a profound and enduring effect on the economies of the victorious nations. It therefore stands to reason that the victorious Powers did not consider it appropriate or, indeed, even possible to impose responsibility for their macroeconomic loss on the defeated States.
- 9.10 The practice of arbitral tribunals and claims commissions is to the same effect. Even when macroeconomic impacts of wars are more limited in scope than was the case during the two World Wars, compensatory claims related to macroeconomic injury have consistently been rejected.
- 9.11 Following the establishment of the UNCC in the aftermath the 1990 to 1991 Iraq-Kuwait war, the UNCC Governing Council explicitly excluded, for lack of a sufficiently direct causal link, all claims relating to losses incurred as a result of the embargo imposed by the UN Security Council or, more generally, losses "due to the chaotic economic situation following Iraq's unlawful invasion and occupation of Kuwait". 1270

-

¹²⁶⁹ Pierre d'Argent, Les Réparations de guerre en droit international public (Oct. 2002), p. 88.

¹²⁷⁰ See U.N. Security Council, Compensation for Business Losses Resulting from Iraq's Unlawful Invasion and Occupation of Kuwait where the Trade Embargo and Related Measures Were also a Cause, U.N. Doc. S/AC.26/1992/15 (4 Jan. 1993), para. 5, Annex 4. See also ibid., paras. 3, 9; U.N. Security Council, Decision taken by the Governing Council of the United Nations Compensation Commission during the resumed Fourth Session, at the 23rd meeting, held on 6th March 1992, U.N. Doc. S/AC.26/1992/9 (6 Mar. 1992), para. 6, Annex 3.

9.12 Likewise, the EECC easily rejected the claims of both States relating to compensation for alleged macroeconomic damages resulting from "general disruption of the civilian economy in wartime" or "the generalized decline in economic conditions". It held that a State's international responsibility does *not* extend "to all of the losses and disruptions accompanying an international conflict" because "[a] breach of the *jus ad bellum*... does not create liability for all that comes after" and breaches of the *jus in bello* do "not encompass protection of the economy writ large". I275

9.13 The EECC further observed that "[n]o system of legal liability can address all of the economic consequences of war." International law imposes no responsibility to compensate for "generalized economic and social consequences of war." After reviewing the relevant international jurisprudence, the Commission noted that *no* international tribunal has *ever* "found generalized conditions of war-related economic disruption and decline to constitute compensable elements of damage, even in the case of some types of injury bearing a relatively close connection to illegal conduct". 1278

¹²⁷¹ Ethiopia's Damages Claims (Final Award, 2009), para. 395.

¹²⁷² Eritrea's Damages Claims (Final Award, 2009), para. 207.

¹²⁷³ Ethiopia's Damages Claims (Final Award, 2009), para. 289.

¹²⁷⁴ *Ibid*.

¹²⁷⁵ Eritrea's Damages Claims (Final Award, 2009), para. 207.

¹²⁷⁶ Ethiopia's Damages Claims (Final Award, 2009), para. 395.

¹²⁷⁷ *Ibid.*, paras. 286, 395.

¹²⁷⁸ Ibid., para. 286; Eritrea's Damages Claims, para. 207; Alabama Claims, Protocol V, Record of the proceedings of the Tribunal of Arbitration at the fifth conference held at Geneva, in Switzerland, on the 19th of June, 1872, reprinted in J. C. Bancroft Davis, Report of the Agent of the United States Before the Tribunal of Arbitration at Geneva (1873) ("Alabama Claims"), p. 545; United States v. Germany, U.S.-Germany Mixed Claims Commission, Administrative Decision No. II, Award, 7 RIAA 1 (1 Nov.1923) ("Administrative Decision No. II"), pp. 23, 28 (The Commission established

9.14 The historical jurisprudence confirms the correctness of the EECC's ruling that compensation may not be awarded for the generalised economic consequences of war. Before the US-Germany Mixed Claims Commission, for example, a number of the claims pressed on behalf of American nationals were premised on the argument "in substance that… under Article 231 of the Treaty of Versailles [] Germany is… 'responsible for all damage or loss in consequence of the war, no matter what act or whose act was the immediate cause of the injury'". ¹²⁷⁹ The Commission's ruling was emphatic; it held:

"[T]he contention [is] rejected. ... Where the loss is far removed in causal sequence from the act complained of, it is not competent for this tribunal to seek to unravel a tangled network of causes and effects, or follow, through a baffling labyrinth of confused thought, numerous disconnected and collateral chains, in order to link Germany with a particular loss. ... The argument, pressed to its logical conclusion, would fix liability on Germany for all increased living costs, increased income and profits taxes, increased railroads fares and freights, increased ocean freights, losses suffered through the Russian Revolution—in a word, for all costs or consequences of the war, direct or remote to the extent that such costs were paid or losses suffered by American nationals. ... [I]t would follow that Germany is liable for all losses of every nature, no matter if the cause was entirely foreign to the war, wheresoever and howsoever suffered by American nationals since July 31, 1914. The mere statement of the extreme lengths to which the interpretation we

by the United States and Germany in the aftermath of the WWI rejected the claims that Germany was responsible "for all damage or loss in consequence of war".).

¹²⁷⁹ Administrative Decision No. II, p. 28.

are asked to adopt carries us demonstrates its unsoundness". 1280

9.15 For exactly the same reasons, the DRC's request for compensation for its alleged macroeconomic injury should be rejected as a matter of law. Uganda has no obligation to pay compensation under this alleged head of damages, regardless of the amount.

II. The Macroeconomic Injury Is Speculative and Causally Remote

9.16 As the quotation from the US-Germany Mixed Claims Commission cited just above indicates, the fundamental reason macroeconomic injury is not compensable under international law is that such injury is inherently speculative and the causal nexus between the breach of *jus ad bellum* and the macroeconomic loss is "not sufficiently direct" ¹²⁸¹ and "too remote". ¹²⁸²

9.17 The DRC's macroeconomic claim as presented shows just how speculative it is. By its own terms, the DRC's claim is based on "the probability of [a] correlation" between "six variables" which result in a "model". 1284 That model is then "estimate[d]... using two statistical methods (ordinary least squares (OLS) method) and the generalised method of moments (GMM), which enable evaluating the coefficients of the model in the form of elasticities, in order to measure the

¹²⁸⁰ *Ibid.*, pp. 28-30 (emphasis added).

¹²⁸¹ See U.N. Security Council, Compensation for Business Losses Resulting from Iraq's Unlawful Invasion and Occupation of Kuwait where the Trade Embargo and Related Measures Were also a Cause, U.N. Doc. S/AC.26/1992/15 (4 Jan. 1993), paras. 3, 9, Annex 4.

¹²⁸² Ethiopia's Damages Claims (Final Award, 2009), para. 402.

¹²⁸³ DRCM, para. 6.21 (Translation by Counsel, original in French: "la probabilité de cette corrélation"; "six variables".).

¹²⁸⁴ DRCM, para. 6.22 (Translation by Counsel, original in French: "modèle".).

sensitivity of economic growth following a change in one of the exogenous variables of the model."¹²⁸⁵

9.18 Uganda respectfully submits that no claim for compensation can be justified by recourse to probabilities, variables, statistical methods and cryptic formulas. In order to be compensable, a damage must be duly established and proven, not speculatively derived from statistics and probabilities.

9.19 The Court will not fail to notice that the DRC Memorial very generally refers to the alleged macroeconomic injury being "caused by the war of 1998 to 2003", 1286 without any further discussion. These general and unproved assertions of causality are insufficient to satisfy the relevant legal requirements. Indeed, the DRC effectively admits the point when it states, at paragraph 6.20, that the various variables on which it relies "neither establish[] nor prove[] a causal link between such [economic] impact and the conflict itself". This is why the DRC says, its "correlation analysis is supplemented by an actual econometric study". 1288 Yet this "econometric study" equally fails to address the issue of causality from any meaningful legal perspective.

¹²⁸⁵ DRCM, para. 6.22 (Translation by Counsel, original in French: "l'estimation du modèle au moyen de deux méthodes statistiques (la méthode des moindres carrés ordinaires (MCO) et la méthode du moment généralisé (GMM)) qui permettent d'évaluer les coefficients du modèle sous la forme des élasticités en vue de mesurer la sensibilité de la croissance économique par suite de la variation d'une des variables exogènes du modèle.").

¹²⁸⁶ DRCM, para. 6.11 (Translation by Counsel, original in French: "causé par la guerre de 1998 à 2003").

¹²⁸⁷ DRCM, para. 6.20 (Translation by Counsel, original in French: "n'établit ni ne prouve la causalité entre un tel impact et le conflit lui-même.").

¹²⁸⁸ *Ibid*. (Translation by Counsel, original in French: "l'analyse de la corrélation est complétée par l'étude économétrique proprement dite".).

9.20 As recalled in Chapter 4, under the rules on the international responsibility of States, the subject matter of the obligation to make reparation is limited to the "injury resulting from and ascribable to the wrongful act" not "any and all consequences flowing from an internationally wrongful act". The DRC's macroeconomic damages claim fails to establish the causal connection between Uganda's wrongful acts and the injury it claims.

III. Macroeconomic Injury Does Not Constitute Lucrum Cessans

9.21 The DRC argues that its alleged macroeconomic injury is compensable because it "constitutes a loss of profit" ("manque à gagner") in the nature of lucrum cessans. 1290 In fact, the notion of lucrum cessans is the only legal basis the DRC offers (albeit very briefly) to justify its macroeconomic injury claim.

9.22 The DRC's attempt to base its macroeconomic claim on the concept of *lucrum cessans* reflects a deep conceptual confusion. The notion of *lucrum cessans* or "loss of profits" within the meaning of Article 36, paragraph 2, of the Articles on State Responsibility does not and cannot encompass the macroeconomic injury the DRC claims. Indeed, the DRC's claim is irreconcilable with the very concept of loss of profits.

9.23 The ILC's Commentary to the Articles on State Responsibility makes clear that lost profits must relate to injured *income-producing assets* from which profits can be legitimately expected with a degree of certainty. ¹²⁹¹ In other words, international law requires that the asset that failed to produce an expected profit

¹²⁸⁹ ARSIWA, Art. 31, cmt. 9 (emphasis added).

¹²⁹⁰ DRCM, paras. 6.03-6.04.

¹²⁹¹ ARSIWA, Art. 36, cmt. 27-34.

must have been specifically designed to make profit and been hurt by such wrongful act (damnum emergens).

9.24 The economy of a nation is not such an asset. While States aspire to economic growth, it is never guaranteed and depends on multitude factors. Furthermore, it is not in the nature of each of the multiple assets that together constitute the wealth of a nation to produce income—some do, many do not; only taken as a whole do they reflect the wealth of a nation.

9.25 The DRC Memorial fails to identify even a single one of its assets that was designed to produce profits and affected by Uganda's intervention. Still less has it computed such lost profits with any degree of certainty.

9.26 The conceptual confusion that lies at the heart of the DRC's macroeconomic claim is further revealed by the fact that the DRC claims compensatory interest (at the rate of 6% from 28 September 2016) on the amount claimed. The ILC has indicated, however:

"If loss of profits are to be awarded, it is *inappropriate* to award interest under article 38 on the profit-earning capital over the same period of time, simply because the capital sum cannot be simultaneously earning interest and generating profits. The essential aim is to avoid double recovery while ensuring full reparation". ¹²⁹³

9.27 By claiming compensatory interest on the amount of its alleged macroeconomic injury, the DRC thus contradicts its own argument and reasoning,

¹²⁹² DRCM, paras. 7.61, 7.62, 7.89(b).

Bite141, paras. 7.01, 7.02, 7.09(0).

¹²⁹³ ARSIWA, Art. 36, para. 33 (emphasis added).

and exposes the fallacy of its attempt to equate macroeconomic injury with *lucrum* cessans.

IV. The DRC's Macroeconomic Injury Claim Is Inconsistent with the 2005 Judgment

9.28 Uganda has elsewhere recalled that pursuant to paragraph 260 of the 2005 Judgment, the DRC must now "demonstrate and prove the *exact injury* that was suffered as a result of *specific actions* of Uganda constituting *internationally wrongful acts for which it is responsible*". ¹²⁹⁴ In other words, each of the DRC's claims must meet three cumulative conditions: (1) they must concern an "exact injury" duly established; (2) such injury must result from "specific actions" of Uganda; and (3) such actions must constitute breaches of international law duly established by the Court for which Uganda was found responsible. The DRC's macroeconomic injury claim does not satisfy any of these three requirements:

- *First*, the macroeconomic injury claim fails to meet the "exact injury" requirement because it relates to a multitude of economic factors that the DRC itself describes as constituting a "more general" injury;
- Second, it disregards the requirement to show that the alleged injury is the "result" of "specific actions" of Uganda because it fails to identify any specific action for which Uganda bears international responsibility that could have caused such general macroeconomic injury, and because it fails to show the required causal nexus; and
- *Third*, the macroeconomic injury claim is explicitly premised on the existence of an alleged "war of aggression" for which the Court never found Uganda responsible.

-

¹²⁹⁴ Armed Activities (2005), para. 260 (emphasis added).

A. THE MACROECONOMIC INJURY CLAIM FAILS TO MEET THE 2005 JUDGMENT'S "EXACT INJURY" REQUIREMENT

9.29 Chapter 6 of the DRC Memorial begins with the following sentence:

"Above and beyond the specific injuries that have been described in the preceding sections, the invasion of the DRC by Uganda has also caused injuries that are more general." 1295

- 9.30 Thus, according to the DRC itself, its macroeconomic claim relates to "injuries that are more general", rather than injuries that are "specific". By its own admission then, the DRC cannot identify any specific or "exact injury" within the meaning of paragraph 260 of the 2005 Judgment.
- 9.31 The DRC itself writes that its macroeconomic claim concerns a multitude of economic factors: the "slowing, even a stoppage, of economic activity, in addition to the destruction of the economic fabric", 1296 and also the alleged impact of the war on "the gross domestic product (GDP), production in all sectors of national economic life, the balance of current payments (due to the change in balance of trade, withdrawals related to payments for arms imports and military equipment), the level of tourism and services, debt, monetary reserves, public finance, and gross investment." 1297

¹²⁹⁵ DRCM, para. 6.01 (Translation by Counsel, original in French: "Au-delà des préjudices spécifiques qui ont été décrits dans les chapitres précédents, l'invasion de la RDC par l'Ouganda a aussi causé des préjudices plus généraux.").

¹²⁹⁶ DRCM, para. 6.02 (Translation by Counsel, original in French: "ralentissement considérable, voire un arrêt, de l'activité économique, en plus de la destruction du tissu économique.").

¹²⁹⁷ DRCM, para. 6.06 (Translation by Counsel, original in French: "[le] produit intérieur brut (PIB), la production dans tous les secteurs de la vie économique nationale, la balance des paiements courants (en raison de la variation de la balance commerciale, des décaissements liés aux paiements des importations d'armes et d'équipements militaires), le niveau de tourisme et des services, l'endettement, les réserves monétaires, les finances publiques et l'investissement brut.").

9.32 In other words, the DRC admits that its alleged macroeconomic injury relates to a broad array of issues touching on the economic life of a nation; it is about an alleged economic downturn in all sectors of the economy. This, by itself, defeats the requirement of demonstrating and proving an "exact injury" suffered as a result of the specific internationally wrongful actions of Uganda.

9.33 To meet the "exact injury" requirement set out by the Court, the DRC would have to have proved and quantified the negative impact of specific wrongful actions of Uganda on each of the economic factors it cites: the GDP, the production in every specific sector, the balance of payments, tourism, services, debt, etc.—assuming, that is, that those elements could constitute an interest duly protected under international law (*quod non*). But the DRC Memorial does not do this. Instead, the DRC claim mixes all those elements together in one global head of damage labelled "macroeconomic injury", without establishing that each of its different constitutive elements is duly protected under international law.

9.34 The DRC argues, moreover, that

"the effects of armed conflicts ... continue, even when the events that caused them have ended. This is what is called 'hysteresis of armed conflicts,' which includes, for example, post-traumatic and physical disorders, permanent physical injuries, bullet and shell impacts, displaced persons, refugees, rape victims, child soldiers, etc." 1298

-

¹²⁹⁸ DRCM, para. 6.27 (Translation by Counsel, original in French: "les effets des conflits armés... se perpétuent dans le temps, quand bien même les évènements qui les ont causés disparaissent. C'est ce qu'on appelle des 'effets d'hystérèse des conflits armés', qui comprennent par exemple les troubles post-traumatiques et psychiques, les lésions corporelles permanentes, les impacts des balles et obus, les personnes déplacées, refugiées et victimes des viols, les enfants enrôlés de force dans les groupes armés, etc.").

9.35 In others words, when the DRC Memorial does try to add elements of specificity to its macroeconomic claim, it only reveals that the claim encompasses heads of damage that are also claimed elsewhere in its Memorial (i.e., physical injuries, rapes, displacements, child soldiers, etc.). The DRC thus effectively seeks double recovery for elements of the damages it claims in other parts of its Memorial under the guise of macroeconomic injury, which itself is not a compensable head of damages under international law.

B. THE DRC'S MACROECONOMIC INJURY CLAIM DISREGARDS THE REQUIREMENT THAT IT MUST "RESULT" FROM "SPECIFIC ACTIONS" OF UGANDA

9.36 Nowhere in its Memorial does the DRC identify any "specific actions" of Uganda deemed wrongful in the 2005 Judgment that caused, individually or cumulatively, the macroeconomic injury it alleges. The DRC therefore fails also to meet the second condition set out in the 2005 Judgment. Rather, as shown in subsection (3) immediately below, the DRC bases its macroeconomic injury claim on an alleged internationally wrongful act for which the Court never found Uganda responsible.

9.37 Still further, the DRC's macroeconomic claim entirely fails to meet the proximate cause requirement detailed in Chapter 4 of this Counter-Memorial. Indeed, as discussed above, it is precisely for lack of the requisite causal nexus that all previous claims of the sort the DRC asserts have been rejected. 1299

¹²⁹⁹ See Chapter 4, Section II(B).

C. THE DRC'S MACROECONOMIC INJURY CLAIM IS PREMISED ON UGANDA BEING RESPONSIBLE FOR A "WAR OF AGGRESSION", WHICH IT IS NOT

9.38 In making its "macroeconomic injury" claim, the DRC Memorial repeatedly refers to what it terms the "war of aggression" allegedly carried out by Uganda and for which it ostensibly bears responsibility under the 2005 Judgment. The DRC no doubt intends the use of those words to impress the Court in evaluating its staggeringly large macroeconomic claim. The DRC also explicitly premises its macroeconomic claim on the existence of this supposed "war of aggression". The Memorial states:

"The effects of an armed aggression are not limited to the battlefield alone. Use of large-scale force, such as that to which the DRC fell victim between 1998 and 2003 on the part of Uganda, at the same time causes a considerable slowing, even a stoppage, of economic activity, in addition to the destruction of the economic fabric. Over the course of a war of aggression, a number of units of production that support the economy and the growth of a State, are shut down. When the aggressor begins pillaging and destroying the units of production, when the population—an important factor in production—has to leave its living environment, it is obvious that the circular flow of income of a State will experience very serious disarray. 1301

¹³⁰⁰ DRCM, paras. 6.02, 6.20, 6.24, 6.31. *See also* para. 7.78 (Translation by Counsel, original in French: "L'Ouganda a délibérément mené une guerre d'agression contre un de ses voisins".).

¹³⁰¹ DRCM, para. 6.02 (emphasis added) (Translation by Counsel, original in French: "Les effets d'une agression armée ne se limitent pas seulement au champ de bataille. Un recours à la force de grande ampleur, comme celui dont a été victime la RDC entre 1998 et 2003 de la part de l'Ouganda, provoque en même temps un ralentissement considérable, voire un arrêt, de l'activité économique, en plus de la destruction du tissu économique. Au cours d'une guerre d'agression, nombre des unités de production qui soutiennent l'économie et la croissance d'un Etat, sont mises à l'arrêt. Lorsque l'agresseur se met à piller et à détruire les unités de production, lorsque la population – facteur

The macroeconomic injury resulting therefrom constitutes a loss of income, which calls for reparation. 1302

. . .

This is why the correlation analysis is supplemented by an actual econometric study, to assess the impact on the Congolese economy of the *war of aggression* carried out by Uganda. The loss of income endured by the Congolese economy can thus be calculated. 1303

9.39 However, while the Court did indeed characterise the "unlawful military intervention by Uganda" as a "grave violation" of Article 2(4) of the UN Charter, 1304 it is nowhere found that Uganda had waged a "war of aggression" against the DRC. Indeed, the Court clearly refrained from making a finding of "aggression" either in its reasoning or in the *dispositif*. The 2005 Judgment took note of the fact that the DRC claims against Uganda "begin with what it [i.e., the DRC] terms an aggression". 1305 Yet the Court declined to accept the DRC's characterisation and nowhere used the word "aggression" to qualify Uganda's conduct.

9.40 The DRC's use of the words "war of aggression" in Chapter 6 of its Memorial is therefore unjustified and inconsistent with the 2005 Judgment. Uganda

important de production – se trouve obligée de quitter son milieu de vie, il est évident que le circuit économique d'un Etat va connaître de très sérieuses désorganisations.").

¹³⁰² DRCM, para. 6.03 (emphasis added) (Translation by Counsel, original in French: "Le préjudice macro-économique qui en résulte constitue un manque à gagner qui appelle réparation.").

¹³⁰³ DRCM, para. 6.20 (emphasis added) (Translation by Counsel, original in French: "C'est pourquoi, l'analyse de la corrélation est complétée par l'étude économétrique proprement dite, pour évaluer l'impact sur l'économie congolaise de la guerre d'agression menée par l'Ouganda. Le manque à gagner enregistré par l'économie congolaise peut ainsi être calculé.").

¹³⁰⁴ *Armed Activities* (2005), para. 165.

¹³⁰⁵ *Ibid.*, para. 54.

considers the DRC's use of the phrase to be inconsistent with the Court's 2005 admonition to both Parties "that in the phase of the proceedings devoted to reparation, neither Party may call in question such findings in the present Judgment as have become *res judicata*". ¹³⁰⁶

9.41 In any event, the critical point for present purposes is that the DRC explicitly links its macroeconomic claim to a non-existent "war of aggression", not any "specific action" by Uganda. The Court should therefore reject it because, in addition to all the other flaws discussed above, it is based on a legal premise that is inconsistent with the 2005 Judgment.

V. The DRC Macroeconomic Injury Claim Is Economically and Methodologically Flawed in Any Event

9.42 Even setting aside the lack of legal foundation, the DRC's macroeconomic claim fails for the additional reason that the DRC's methodology is irreparably flawed.

9.43 The DRC's claim for macroeconomic injury relies on a study prepared by Justin Okana N'siawi Lebun, a professor of economics at the University of Kinshasa, and Gastonfils Lonzo Lubu, a doctoral candidate at the same university. Their study in turn relies heavily on the writings of Professor Sir Paul Collier and Dr Anke Hoeffler of Oxford University, who have published several studies on the economic consequences and cost of *civil* wars. The DRC acknowledges this reliance on Professor Collier and Dr Hoeffler in the text of its Memorial: "[T]he econometric analysis [carried out by the DRC] was based on the model of P. Collier

-

¹³⁰⁶ Ibid., para. 260 quoting to Nicaragua v. United States of America (Merits, 1986).

and A. Hoeffler. These two economists of the World Bank are specialised in the modeling of the impacts of war on the performance of economies affected". 1307

9.44 Uganda asked Professor Collier and Dr Hoeffler to assess the manner in which DRC's experts used and applied their research. Professor Collier and Dr Hoeffler agreed and prepared a brief report setting forth their views, which is annexed as Annex 109 to this Counter-Memorial. As the Court will read, Professor Collier and Dr Hoeffler roundly reject the analysis of the DRC's experts in all respects.

9.45 At the outset of their report, Professor Collier and Dr Hoeffler set forth their summary assessment of the expert report presented by the DRC. They state that it

"is a misguided use of our approach, that the concept on which the authors base their estimation is flawed, and that their technical analysis is incorrect. Consequently, in our view their results and conclusions should be disregarded." ¹³⁰⁸

9.46 Professor Collier and Dr Hoeffler detail the reasons for their criticism in their report. The gravamen of their criticism relates to the way Professor Lebun and Mr Lubu constructed the counterfactual on which their analysis is based. They write:

"Their analysis is deeply flawed. We detail some of the technical flaws in the following section, but the

¹³⁰⁸ Professor Sir Paul Collier and Dr Anke Hoeffler, Oxford University, *Assessment of the Impact of the Ugandan Military Involvement in the Democratic Republic of the Congo* (hereinafter "Collier & Hoeffler Report") (20 Oct. 2017), p. 1, Annex 109.

¹³⁰⁷ DRCM, para. 6.13 (Translation by Counsel, original in French: "l'analyse économétrique a été basée sur le modèle de P. Collier et A. Hoeffler. Ces deux économistes de la Banque Mondiale sont spécialisés dans la modélisation des impacts de la guerre sur la performance des économies affectées.").

overall flaw is more fundamental. Specifically, they calculate the losses by using a counterfactual of positive GDP growth from 1998 onwards (Lebun and Lubu, Graph 2, p 20). Given that the economy of DRC had been in almost continual decline for the 30 years prior to 1998, no times series methodology could plausibly generate such a counterfactual. Indeed, the most plausible path based on any such time series would have been a forecast of further decline, which is indeed what actually happened for the following three years.

Beginning in 2001, the economy started to recover. Lebun and Lubu (2016:18) acknowledge this turnaround but leave it unexplained. The most plausible explanation for this turnaround is the onset of the global commodity boom, or commodity super cycle, which Lebun and Lubu fail to take properly into account."¹³⁰⁹

9.47 According to Collier and Hoeffler: "The starting point of the analysis in Lebun and Lubu (2016) is a presentation of the data and a theoretical model. As it is common in the literature, they then test this model using statistical analysis." However, "[o]ne of the major problems with their implementation of this research method is that they do not actually test the model they specify." This defect is further explained in the following terms:

"The authors start with a standard Solow growth model which has been used in large-n studies to examine African countries' growth experience (Hoeffler 2002). However, they then augment the model in a non-standard way without discussing this extension of the model (p.8). They then proceed to estimate this extended model using data from the DRC. They start off with an Ordinary Least Squares

¹³⁰⁹ *Ibid.*, p. 5.

¹³¹⁰ *Ibid.*, p. 6.

(OLS) estimation which is not a suitable method for estimating these time series models, primarily because the error terms are serially correlated, and not taking this correlation into account will produce biased estimates. They do not explain this problem with the OLS method, but do present estimations based on the use of a Generalized Method of Moments (GMM) estimator. They justify the use of this method because "it makes it possible to evaluate the model's coefficient in the form of elasticities". This is factually incorrect. The logarithmic transformation of the model makes it possible to interpret the coefficients as elasticities. The GMM estimation technique is used in growth regressions in order to account for unobserved country effects and to address endogeneity issues. GMM is also not a time-series method and it is completely unclear how the authors implemented this panel data estimation method using data from only one country. The authors then continue with parametric and nonparametric validation (p.10). This part is very confusing and given that the previous GMM estimation cannot have produced sensible results. we do not further comment on these validation attempts. The coefficients from this unconvincing analysis are then used to calculate the damages on p.18. Given that the previous estimations are not do not trust these further convincing, calculations."1311

9.48 Collier and Hoeffler note still other methodological flaws:

• Lebun and Lubu "use estimation methods for largen samples but only use data from one country, the DRC." This is problematic because "African data are generally of poor quality (Jerven 2013) and that many of the data points are estimates themselves". Therefore, "the quality of the data should receive

440

¹³¹¹ *Ibid.*, p. 7 (emphases added).

some discussion. However, the data quality receives no debate." ¹³¹²

• "some of the text describing the methods used make it very difficult for the reader to follow what the authors have done and they do not cite other research correctly." Collier and Hoeffler "are aware that African researchers often have restricted access to recent publications, but the work cited by them is well established and available through open access sources by now. They quote old working papers rather than the published versions in scientific journals, suggesting that they did not check on whether the research is published in a peer reviewed journal." 1313

9.49 After recalling the dramatic and consistent decline of the Congolese economy from the first years of the Mobutu regime—national income per capita was US\$ 972 in 1965 (expressed in 2010 constant dollars); ¹³¹⁴ US\$ 333 in 1997; and US\$ 271 in 2001—followed by the gradual recovery due to the "unprecedented rise in global non-fuel commodity", ¹³¹⁵ Collier and Hoeffler

"postulate a simple counterfactual in which, in the absence of the unauthorised Ugandan military presence 1998-2001, this decline would have continued at its previous long term rate, until the onset of the global commodity super-cycle in 2001 began to lift the economy upwards. This

¹³¹² *Ibid.*, p. 6 (emphasis added).

¹³¹³ *Ibid.*, p. 7 (emphasis added).

¹³¹⁴ The Court will not fail to note that, while Collier and Hoeffler report statistics taken from the World Development Indicators in 2010 constant US\$, the various figures assembled by the DRC (notably at paragraph 6.18 of its Memorial) refer to several annual averages between 1960 and 2008, but with no indication about the reference year used to express each amount in US\$. However, the value of one US dollar in 1980 is not the same as the value of one US dollar ten or twenty years later. It is simply astonishing that nowhere in its Memorial does the DRC indicate which reference year it uses when it presents amounts labelled in US dollars.

¹³¹⁵ Collier & Hoeffler Report, pp. 5-6, Annex 109.

straightforward counterfactual path of the economy is shown by the downward sloping dashed line. Using this counterfactual, there are no identifiable economic costs associated with the military intervention. Actual GDP always exceeds the counterfactual GDP."1316

9.50 Overall, Collier and Hoeffler conclude that "the estimate by Lebun and Lubu (2016) are so seriously methodologically flawed that they cannot be taken seriously and should be disregarded." ¹³¹⁷

9.51 In addition to the methodological flaws that Collier and Hoeffler identified in the Lebun and Lubu report, the Court will note that the DRC's macroeconomic claim is expressly based on factual assumptions that do not remotely reflect the realities of the DRC economy, even in peacetime. According to the DRC Memorial:

"In peacetime, the companies of countries freely move their products throughout the territory according to the availability of the markets. In the absence of war, economies of energy are developed, as well as economies of scale, while markets between firms are explored and used, thus favoring inter-industry trade and intra-industry trade. The movement of people, goods and services takes place without constraints, and money circulates, in the form of financial flows, across all the national territory and within the entire national economy." 1318

¹³¹⁶ *Ibid.*, p. 6.

¹³¹⁷ *Ibid.*, p. 8.

¹³¹⁸ DRCM, para. 6.08 (Translation by Counsel, original in French: "En période de paix, les entreprises du pays écoulent librement leurs productions sur l'ensemble du territoire selon la disponibilité des débouchés. En l'absence de guerre, il se développe des économies d'énergies ainsi que des économies d'échelles, tandis que sont explorés et exploités des débouchés entre firmes, favorisant ainsi le commerce interbranches et le commerce intra-branches. La circulation des personnes, des biens et des services s'opère sans entraves et l'argent circule, sous forme de flux financiers, à travers tout le territoire national et au sein de l'ensemble de l'économie du pays.").

- 9.52 This ideal description of a peacetime economy bears no semblance to the situation in the DRC at any point in time, whether before, during or after the conflict. The DRC's vast territory is made up of impenetrable forests and, as recalled in Chapter 2, its roads and transport infrastructure have always been underdeveloped. Trade between regions is limited due to natural barriers, the huge distances and the lack of infrastructure. And corruption at all levels of government artificially increases transaction costs, limits investments and gravely impairs the economy.
- 9.53 The DRC argument concerning its alleged macroeconomic damages is, in short, based on a fiction that that does not correspond to the economic realities of the DRC.

*

9.54 For all the above reasons, Uganda respectfully submits that the DRC's macroeconomic claim should be rejected in its entirety.

¹³¹⁹ For an historical account of the difficult and slow development of transport infrastructure in the DRC. *See notably* David Van Reybrouck, *Congo: The Epic History of a People* (2015), Annex 89.

¹³²⁰ See Marie Chêne, Transparency International, U4 Expert Answer: Overview of corruption and anti-corruption in the Democratic Republic of Congo (DRC) (8 Oct. 2010).

CHAPTER 10

THE DRC IS NOT ENTITLED TO THE OTHER REPARATION IT SEEKS

- 10.1 In addition to its claims for compensation relating to harm to people (which are dealt with is in Chapters 5 and 6 of this Counter-Memorial), harm to property (Chapter 7), harm to natural resources (Chapter 8) and harm in the form of macroeconomic damages (Chapter 9), the DRC also requests that the Court order post-judgment interest and certain additional forms of reparation. Specifically, it requests:
 - (1) "[c]ompensatory interest... at the rate of 6% from and after the date of submission of this [M]emorial";
 - (2) "the sum of USD 125 million in satisfaction of all intangible harm resulting from violations of international law enumerated by the Court in its decision of December 19, 2005";
 - (3) "as an element of satisfaction, [an order] to institute investigations and criminal prosecutions against the officers and soldiers of the UPDF implicated in the violations of international humanitarian law or of international norms for protection of the rights of the individual committed in Congolese territory between 1998 and 2003";
 - (4) "in case of non-payment of the reparations granted by the Court at the date of the ruling, default interest accruing on the principal sum at the rate that the Court shall deem appropriate"; and

- (5) "[compensation] for all legal expenses incurred by the [the DRC] in this matter." 1321
- 10.2 Uganda has no objection to the Court issuing an order relating to post-judgment interest. The DRC's other requests for additional reparation are, however, misguided, inappropriate and legally unsustainable. They should therefore be rejected. The Court should deem its findings at the merits phase as appropriate satisfaction for Uganda's internationally wrongful acts.

I. The DRC Is Only Entitled to Simple Interest Calculated from the Date of a Judgment Ordering Payment of Compensation

10.3 The DRC claims two different types of interest. *First*, in the event of non-payment of such compensation as the Court may order in its judgment at this

19 décembre 2005;

- d. ... au titre de mesures de satisfaction, ... mettre en œuvre des enquêtes et des poursuites pénales à l'encontre des officiers et des soldats de l'UPDF impliqués dans les violations du droit international humanitaire ou des normes internationales de protection des droits de la personne commises en territoire congolais entre 1998 et 2003;
- e. en cas de non-paiement de l'indemnité octroyée par la Cour à la date du jugement, des intérêts moratoires courront sur la somme principale au taux que la Cour jugera approprié de fixer ;
- f. l'Ouganda est tenu de dédommager la RDC pour l'ensemble des frais de justice exposés par cette dernière dans le cadre de la présente affaire.")

¹³²¹ DRCM, para. 7.89 (b-f) (Translation by Counsel, original in French:

[&]quot;b. des intérêts compensatoires ... à concurrence de 6%, et ce à partir de la date du dépôt du présent mémoire;

c. ...la somme de 125 millions de dollars des Etats-Unis au titre de mesure de satisfaction pour l'ensemble des dommages immatériels résultant des violations du droit international constatées par la Cour dans son arrêt du

reparation phase, the DRC seeks simple interest at a rate that the Court shall deem appropriate.

10.4 Should the Court order Uganda to pay compensation to the DRC, Uganda accepts that it may also order that, if such compensation is not paid within a reasonable period of time, interest shall accrue upon the amount owed from the date of the Court's judgment until such date as the compensation is paid. Ordering such "post-judgment interest" or "default interest" would be consistent with the prior practice of the Court, and with the procedural rules of other international courts and tribunal applicable to inter-State proceedings.

10.5 At the same time, Uganda submits that what constitutes a "reasonable period of time" for the payment of any compensation must turn on the magnitude of the compensation; the larger the amount, the more time will be needed for the State making the payment to secure and transfer the funds.

10.6 With regard to the annual rate of interest, the DRC Memorial defers to the Court's judgment, suggesting that the "default interest [would accrue] on the principal sum at the rate that the Court shall deem appropriate". ¹³²³ Uganda agrees that, in this respect, the Court enjoys a margin of appreciation. Given contemporary

¹³²² In the *Diallo* case, the Court decided in its 19 June judgment that the amount awarded shall be paid by 31 August (approximately 60 business days) and "that, in case it has not been paid by this date, interest on the principal sum due... will accrue as from 1 September 2012 at an annual rate of 6 per cent". *Diallo* (2012), para. 61(5).

¹³²³ DRCM, para. 7.89(e) (Translation by Counsel, original in French: "des intérêts moratoires courront sur la somme principale au taux que la Cour jugera approprié de fixer".).

market conditions, however, Uganda urges the Court to set such interest at an annual rate no higher than 3%. 1324

10.7 Second, the DRC also seeks simple interest at an annual rate of 6% on any compensation the Court may order, to be calculated from the date of the filing of its Memorial on Reparation (28 September 2016) until the date of the Court's judgment. In contrast to the first request, ordering such "compensatory interest" in the circumstances of this case would not be consistent the prior practice of the Court or the rules applicable to inter-State compensation under international law. Such compensatory interest should therefore not be included in any judgment.

10.8 The DRC attempts to justify this aspect of its request for interest as follows:

"A considerable period of time will have elapsed between the time when these damages were incurred, the time when they were calculated, the time when this petition was formulated and finally the time when the victims will in fact be compensated. This passage of time necessarily entails a depreciation of the sums at issue, by reason of, inter alia, inflation (even if it has continued to experience a marked deceleration in the DRC in recent years). The grant of compensatory interest on the sums due from Uganda as compensation constitutes the most effective way to remedy this loss in value." 1325

interest rate on other loans – currently is below 2%.

¹³²⁴ For example, the London interbank offered rate (LIBOR) – the basic rate of interest used in lending between banks on the London interbank market and also used as a reference for setting the

¹³²⁵ DRCM, para. 7.56 (Translation by Counsel, original in French: "Une période de temps considérable se sera écoulée entre le moment où ces dommages sont survenus, le moment où ils ont été évalués, le moment où la présente demande est formulée, et enfin celui où les victimes seront effectivement indemnisées. Cet écoulement du temps entraîne forcément une dépréciation des sommes en cause, en raison entre autres de l'inflation (même si celle-ci a continu un ralentissement notable en RDC au cours des dernières années). L'octroi d'intérêts compensatoires sur les sommes

10.9 It adds further that in order to assure full reparation,

"interest must begin to accrue at the time of commission of the act that is unlawful under international law. It is indeed from that time that the victims' right to reparations for these acts attaches." 1326

10.10 Yet, in its final Submissions, the DRC does not provide a valuation of the harm as of the date that the harm occurred, to which a further amount of compensatory interest accrued from that date to the present is added. Rather, the DRC indicates a valuation of harm to it "as of the date of the filing of its Memorial" in this phase and then requests a supplemental amount of 6% interest calculated "from and after" that date. There is thus a disconnect between the reason the DRC offers for an award of interest and the request for interest it presents to the Court.

10.11 The explanation for this disconnect is that the DRC, by its own admission, has not attempted to place a value on the alleged harm as of the date it ostensibly occurred. The DRC acknowledges at paragraph 7.59 of its Memorial that its approach to placing a value on the alleged harms has no connection to the date on which the harm occurred. The quanta sought for physical harm to persons, for

dues par l'Ouganda à titre de mesures d'indemnisation constitue la manière la plus efficace de remédier à cette perte de valeur.") (emphasis added).

¹³²⁶ Ibid., para. 7.58 (Translation by Counsel, original in French: "[L]es intérêts doivent commencer à courir au moment de la commission du fait internationalement illicite. C'est en effet dès ce moment-là que s'ouvre le droit à réparation des victimes de ces faits"). (emphasis added). See also ibid. para. 7.60 (maintaining that "its basic position pursuant to which interest should begin to accrue from the date of the illicit act".) (Translation by Counsel, original in French: "[S]a position de principe selon laquelle les intérêts doivent commencer à courir à compter du fait illicite.") (emphasis added).

¹³²⁷ *Ibid.*, para. 7.89(b) (emphasis added) (Translation by Counsel, original in French: "à partir de la date du dépôt du présent mémoire".).

example, are anchored, in part, to judgments of DRC national courts rendered between 2009 and 2015. "Worksheets" that purportedly demonstrate property harm were created years after the Court's 2005 Judgment. Calculations of harm caused to natural resources are based on factors "between the [2005] decision of the Court and recent times". And the alleged "macro-economic harm was calculated" as of 2005. Hence, it is not possible for the DRC to seek interest on the valuation of the harm from the date that the alleged harm occurred to the present, since all the DRC's valuations (and the evidence upon which they are based) substantially post-date the harm's nominal occurrence.

10.12 As a result, the DRC has had to shift its approach. Because the DRC believes that it would have been within its rights to determine the valuation of the harm as of the date it occurred, it thinks it can alternatively request compensatory interest starting from any subsequent date when the valuation of the harm is determined by the DRC. Because its valuations are anchored in information post-dating the occurrence of the harm, but pre-dating the filing of its Memorial, the DRC's theory seems to be that it can seek interest starting from the date of the filing of its Memorial, since it is as of that date that the DRC placed a valuation on all the alleged harm.

10.13 The DRC points to no precedent for seeking compensatory interest that accrues from the date of the filing of a claimant's pleading until the date of a court's judgment, either as a matter of international or even national law. That alone is a strong basis for concluding that the DRC's approach is mistaken.

-

¹³²⁸ *Ibid.*, para. 7.59 (Translation by Counsel, original in French: "Le dommage macro-économique a quant à lui été évalué.").

¹³²⁹ *Ibid*.

10.14 Even more problematic is the flawed nature of the DRC's premise. The rules applicable to inter-State compensation do not provide for awarding compensatory interest based merely on the applicant's claims or on the fact that harm occurred at some time in the past. Rather, compensatory interest is properly applied only in circumstances where the Court determines that a fixed sum was due to the applicant as of a specified date in the past, thereby requiring an additional amount of compensatory interest so as to ensure full reparation in the present. No such circumstances exist in this case.

10.15 The PCIJ stated in its very first case, S.S. "Wimbledon":

"As regards the rate of interest, the Court considers that in the present financial situation of the world and having regard to the conditions prevailing for public loans, the 6 % claimed is fair; this interest, however, should run, not from the day of the arrival of the 'Wimbledon' at the entrance to the Kiel Canal, as claimed by the applicants, but *from the date of the present judgment, that is to say from the moment when the amount of the sum due has been fixed and the obligation to pay has been established.*" 1330

10.16 The Court did not view the calculation of interest as commencing on the date of the harm. Nor did the Court view the calculation of interest as commencing on the date that the three claimant States filed their pleadings with the Court. Rather, it found the date on which interest should commence to be the date of its own judgment, when the amount of compensation due from Germany was fixed and established.

¹³³⁰ S.S. "Wimbledon", Judgment, 1923, P.C.I.J., Series A, No. 1, p. 32 (emphasis added). See also Georges Pinson (France) v. United Mexican States, 5 RIAA 327 (19 Oct. 1928), p. 453, para. 71.

10.17 In light of precedents such as *S.S. "Wimbledon"*, Article 38 of the ILC Articles on State Responsibility, entitled "Interest", provides:

- "1. Interest on any principal sum due under this chapter [concerning 'Reparation for injury'] shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.
- 2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled."¹³³¹

10.18 The concept of "when the principal sum should have been paid" normally means the date on which an international court or tribunal provides a definitive quantification of the sum due. In some circumstances, the date when "a principal sum should have been paid" might pre-date a judgment if the sum "is quantified as at an earlier date than the date of the settlement of, or judgement or award concerning, the claim and to the extent that it is necessary to ensure full reparation". The principal example of such a circumstance is when one State owes to another State a quantified debt that is due to be paid on a specified date. A failure to pay the debt on time can result in compensatory interest (also conceived of as "moratory damages" for the late payment of the debt), to be calculated based on the date the debt was due.

10.19 Yet, even in that instance, international tribunals often have not used the date the debt came due as the basis for calculating interest. In the *Russian Indemnity*

¹³³¹ ARSIWA, Vol. II, Part 2 (2001), p. 107.

¹³³² *Ibid.*, Art. 38, Commentary, p. 107, para. (2).

Case, which was cited as an example by the ILC¹³³³ (and referred to by the DRC in its Memorial¹³³⁴), the tribunal noted:

"A considerable number of international arbitral awards have allowed that, even when it is a question of moratory interest-damages for deferred payments, there is no occasion to have it always run from the date of the damageable fact (United States v. Venezuela, Orinoco, award of The Hague of October 25, 1910, protocols, p. 59; United States v. Chile, May 15, 1863, award of His Majesty the King of the Belgians LEOPOLD I, LAFONTAINE, Pasicrisie, p. 36, column 2 and page 37, column 1; Germany v. Venezuela, Arrangement of May 7, 1903, RALSTON & DOYLE, Venezuelan Arbitrations, Washington, 1904, pp. 520 to 523; United States v. Venezuela, December 5, 1885, MOORE, Digest of International Arbitrations, p. 3545 and p. 3567, Vol. 4, etc.)."1335

10.20 Rather, in such instances, the date often used as the starting point for calculating interest was the date of the receipt of demand for the payment of the debt. The tribunal thus continued:

"[I]n principle the Imperial Ottoman Government was liable to the Imperial Russian Government for moratory indemnities from December 31, 1890/January 12, 1891, the date of the receipt of an explicit and regular demand for payment". 1336

10.21 In any event, such circumstances are plainly not present in this case. There is no basis for maintaining that an amount of compensation owed by Uganda to the

¹³³³ *Ibid.*, p. 109, note 619.

¹³³⁴ DRCM, para. 7.60.

¹³³⁵ Russian Claim for Interest Indemnities (Russia v. Turkey), P.C.A., Award (11 Nov. 1912), p. 12 (emphasis added). Unofficial translation provided by the P.C.A.

¹³³⁶ *Ibid.*, p. 16.

DRC was "fixed" as of any particular date in the past (including the date of the DRC Memorial) or that an obligation to pay such an amount was "established" as of any such date.

10.22 The concept of a "quantified" sum does not refer simply to any amount requested by a claimant State; it refers to an amount that is unequivocally due from one State to another, such as for repayment of a debt or a contract term that provides for liquidated damages. The DRC's assertions in its Memorial that it claims billions of dollars in compensation are not comparable to these concepts. Accordingly, there is no basis for awarding compensatory interest calculated from the time of the submission of the DRC Memorial.

10.23 Moreover, there are other problems with the DRC's request for such compensatory interest. *First*, fixing the starting point for calculating compensatory interest as the date when the applicant State's Memorial is filed makes the reparation turn on an arbitrary point in time in the process of inter-State dispute resolution. Doing so would require the Court to evaluate reparation by trying to turn back the clock in order to reconstitute the situation prevailing at the time the pleading was filed.

10.24 *Second*, the DRC's request is inappropriate because of the nature of the compensation it requests. The DRC generally seeks compensation based on present-day values, whether it be with respect to physical harm or property damage. The DRC's request is no more targeted at having the Court determine a valuation of the alleged harms as of September 2016 than it is at having the Court determine

¹³³⁷ As early as 1875, the Arbitral Tribunal in the case of the *Montijo* noted that "it seems open to question whether interest should accrue during the process of diplomatic negotiations, which are often protracted in their character". La Fontaine, *Pasicrisie Internationale (1794-1900): Stemae Montijo (Colombia v. USA)*, Arbitral Award (26 July 1875), p. 220.

a valuation as of September 2010 or September 2018. Yet, as the ILC points out in its commentary, "interest may not be allowed where the loss is assessed in current value terms as at the date of the award." ¹³³⁸ If the Court is awarding compensation based on a generalised present-day valuation, there is no basis for supplementing that valuation with compensatory interest.

10.25 Further, as demonstrated in Chapters 5-9 of this Counter-Memorial, the DRC's requests for compensation are so disassociated from actual injury, that it can be conceived of as essentially seeking a lump-sum amount, an approach which also warrants no supplemental compensatory interest.

10.26 International tribunals have excluded compensatory interest when the valuation of the harm is determined at the date of the award or judgment. As explained by the arbitral tribunal in *Concession of the Lighthouses of the Ottoman Empire*:

"If the Tribunal had adopted the method of fixing the amount of the debts, at the time of their origin, in the currencies of origin, and consequently of allowing the effect of the devaluations of those currencies to fall on the parties, there would have been some reason to allow the latter to benefit similarly from interest. If, on the other hand, the Tribunal had proceeded from the idea that Collas & Michel, the moneys owing to them having been paid immediately, had invested in gold the sums thus received in order to protect themselves against all risk of devaluation, the award of interest would have been illogical.

Nor is there in the system of compensation which the Tribunal finally adopted any reason to award interest in addition to the capital sums awarded. Indeed, the

¹³³⁸ ARSIWA, Vol. II, Part 2 (2001), p. 107, note 602.

basic idea of that system consists precisely in determining in a present-day currency the actual value which the debts had in the past in their currency of origin. In expressing this actual past value as exactly as possible in terms of present-day currency, the Tribunal deliberately excluded all the vicissitudes of the currencies of origin. It has, so to speak, thrown a bridge across the stirring period of the years which have clasped and placed itself consciously in the present. In these circumstances justice as well as logic require that no interest covering the past be awarded." 1339

10.27 In support of its request, the DRC mentions two investment arbitration awards involving economic harm where the tribunals determined the amount of economic loss as of the date of the harm and then calculated an amount of interest on that amount from that date to the date of its award, so as to reach a total amount owed to a private investor. Those awards obviously do not support a request for interest to be awarded from the date of the filing of a pleading in which the claimant asserts a valuation of its claim. Moreover, they were cases before *ad hoc* tribunals

.

¹³³⁹ Affaire relative à la concession des phares de l'Empire ottoman (Grèce, France), 12 RIAA 155 (24-27 July 1956), pp. 252-253 (Translation by Counsel, original in French: "Si le Tribunal avait adopté la méthode de fixer les montants des dettes, à l'époque de leur naissance, dans les monnaies d'origine et de faire retomber ensuite l'effet des dévaluations de ces monnaies sur les parties, il y aurait eu lieu de les faire bénéficier également de l'intérêt. Si, au contraire, le Tribunal était parti de l'idée que la Société, en cas de paiement immédiat de ses créances, aurait investi les sommes ainsi perçues en or pour se protéger contre tout risque de dévaluation, l'allocation d'intérêts aurait été illogique. Dans le système d'indemnisation que le Tribunal a fini par adopter, il n'y a pas non plus lieu d'allouer des intérêts en sus des sommes en capital accordées. En effet, l'idée fondamentale de ce système consiste précisément à fixer dans une monnaie présente la valeur réelle que les créances avaient dans le passé en leur monnaie d'origine. En exprimant la valeur réelle d'autrefois aussi exactement que possible dans la monnaie d'aujourd'hui, le Tribunal fait délibérément abstraction de toutes les vicissitudes des monnaies d'origine. Il a, pour ainsi dire, jeté un pont à travers toute la période mouvementée des années écoulées et s'est placé consciemment dans le présent. Dans ces conditions, la justice aussi bien que la logique commandent de ne pas allouer en plus d'intérêts couvrant le passé".). See also Pierre d'Argent, Les réparations de guerre en droit international public (Oct. 2002), pp. 710-711.

¹³⁴⁰ See note 671 of the DRCM: "See, e.g., Metalclad Corporation v. United Mexican States, ICSID Case No. ARB(AF)/97/1, 30 August 2000, para. 128 or Venezuela Holdings B.V. and others v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27, Award, 9 October 2014, para. 397."

convened under the auspices of ICSID to dispose of disputes between States, on the one hand, and private investors, on the other hand. As such, they have limited relevance in the context of an inter-State claim before an international court. Most importantly, such cases simply confirm the basic rule: only if the tribunal determines that a fixed sum was due to the claimant as of a specified date in the past should an additional amount of compensatory interest be awarded so as to ensure full reparation in the present.

10.28 *Third*, the DRC is seeking compensatory interest for harms to persons. Yet according to well-established case-law, "[n]o interest should be allowed, as such, upon claims for purely personal injuries, not involving the seizure of or injury to property." The United States-Germany Mixed Claims Commission clearly explained:

"There is no basis for awarding damages in the nature of interest where the loss is neither liquidated nor the amount thereof capable of being ascertained by computation merely. In claims of this class no such damages will be awarded, but when the amount of the loss shall have been fixed by this Commission the award made will bear interest from its date. To this class belong claims for losses based on personal injuries, death, maltreatment of prisoners of war, or acts injurious to health, capacity to work, or honor." 1342

10.29 In sum, in the circumstances of this case, the DRC is only entitled to interest in the event the Court issues a judgment ordering Uganda to pay a fixed sum of

¹³⁴¹ Mixed Claims Commission, H.M. Duffield Umpire, Christern & Co., Becker & Co., Max Fischbach, Richard Friedericy, Otto Kummerow, and A. Daumen cases (Germany v. Venezuela), 10 RIAA (1903), p. 366 (emphasis in the original).

¹³⁴² United States v. Germany, U.S.-Germany Mixed Claims Commission Administrative Decision No. III, 7 RIAA 64 (11 Dec. 1923), p. 65.

compensation to the DRC and Uganda fails to pay such compensation within a reasonable period of time. Were that to happen, the DRC would be entitled both to the fixed sum of compensation and to simple interest on that sum calculated from the date of the Court's judgment to the date of payment. As previously noted, Uganda respectfully submits that, having regard to prevailing global economic conditions, the annual rate of any such interest should be no more than 3%.

II. The DRC Is Not Entitled to the Additional Satisfaction It Seeks

10.30 The DRC claims that, regardless of the amount of any compensation that may be granted by the Court, "this means of compensation will not suffice to remedy the scope of damage and suffering that resulted from Uganda's breach of its international obligations". Consequently, the DRC seeks additional reparation in the form of satisfaction. To that end, it relies on Article 37 of the ILC Articles on State Responsibility, which reads: 1344

"Satisfaction

- 1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.
- 2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.

_

¹³⁴³ DRCM, para. 7.65 (Translation by Counsel, original in French: "ce mode de réparation ne suffira pas à remédier à l'ampleur des dégâts et des souffrances qui ont résulté de la violation par l'Ouganda de ses obligations internationales.").

¹³⁴⁴ *Ibid*.

3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State."1345

10.31 The DRC requests the Court to order two types of satisfaction. First, it seeks an order from the Court that Uganda commence, "as a measure of satisfaction, the institution of investigations and criminal prosecutions against the officers and soldiers of the UPDF implicated in the acts at issue." 1346

10.32 Second, the DRC also requests the Court to order Uganda to pay "the sum of US\$ 125 million in satisfaction of all intangible harm resulting from violations of international law enumerated by the Court in its decision of December 19, 2005". ¹³⁴⁷ This enormous monetary amount is composed of two elements: (1) US\$ 25 million "to allow for the creation of a fund for the purpose of promoting reconciliation between the Hema and the Lendu"; 1348 and (2) US\$ 100 million, "as an element of satisfaction, for the intangible harm suffered by the Congolese state and the Congolese people". 1349

10.33 Both of these requests are misguided, inappropriate and legally unsustainable. They should therefore be rejected. The ILC has observed that "one

¹³⁴⁵ ARSIWA.

¹³⁴⁶ *Ibid.*, para. 7.71 (Translation by Counsel, original in French: "au titre de mesures de satisfaction, la mise en œuvre d'enquêtes et de poursuites pénales à l'encontre des officiers et des soldats de l'UPDF impliqués dans les faits en cause.").

¹³⁴⁷ Ibid., para. 7.89 (Translation by Counsel, original in French: "la somme de 125 millions de dollars des Etats- Unis au titre de mesure de satisfaction pour l'ensemble des dommages immatériels résultant des violations du droit international constatées par la Cour dans son arrêt du 19 décembre 2005.").

¹³⁴⁸ *Ibid.*, para. 7.75 (Translation by Counsel, original in French: "pour permettre la création d'un fonds visant à favoriser la réconciliation entre les Hema et les Lendu.").

¹³⁴⁹ *Ibid.*, para. 7.83 (Translation by Counsel, original in French: "au titre de mesure de satisfaction, pour les dommages immatériels subis par l'Etat et la population congolaise".).

of the most common modalities of satisfaction provided in the case of moral or non-material injury to the State is a declaration of the wrongfulness of the act by a competent court or tribunal". ¹³⁵⁰ In fact, there are many instances in which courts and tribunals have considered that the declaration of wrongfulness alone was an appropriate measure of satisfaction, including in cases where use of force was involved. ¹³⁵¹ Uganda respectfully submits that the same approach to satisfaction should be followed by the Court in this case.

A. SATISFACTION IN THE FORM OF AN ORDER TO INVESTIGATE AND PROSECUTE UPDF OFFICERS AND SOLDIERS

10.34 In support of its claim for satisfaction in the form of an order to investigate and prosecute UPDF officers and soldiers, the DRC asserts that "following the massacres that occurred in Bunia in January 2001, the special rapporteur on the human rights situation in the DRC asked the Ugandan government and the FLC to [investigate the incident and bring those responsible to justice]". ¹³⁵² Claiming that it "does not have a single document or any information that would show that criminal investigations were undertaken", ¹³⁵³ the DRC asserts that "the institution

¹³⁵⁰ "Draft articles on Responsibility of States for Internationally Wrongful Acts", *Yearbook of the International Law Commission*, Vol. II, Part 2 (2001), Art. 37, Commentary, p. 106, para. (6).

¹³⁵¹ See, e.g., Affaire du Carthage (France v. Italie) 11 RIAA 449 (6 May 1913), pp. 460-461; Affaire du Manouba (France v. Italie) 11 RIAA 463 (6 May 1913), p. 475; Corfu Channel (Merits, 1949), p. 35.

DRCM, para. 7.68 (Translation by Counsel, original in French: "à la suite des massacres survenus à Bunia en janvier 2001, le rapporteur spécial sur la situation des droits de l'homme en RDC a-t-il demandé au Gouvernement ougandais et au FLC de 'lancer des enquêtes sur l'incident susmentionné afin d'identifier les responsables et de les traduire en justice".).

¹³⁵³ *Ibid.*, para. 7.69 (Translation by Counsel, original in French: "ne dispose à ce jour d'aucun document ou information qui attesterait que des enquêtes pénales auraient été diligentée".).

of such prosecutions emerges as a major element of the reparations due to the DRC for these acts as a measure to achieve satisfaction."¹³⁵⁴

10.35 There are several flaws with this request, any one of which is a basis for denying it. *First*, there is no factual foundation before the Court, either at the merits phase or now, supporting the contention that no UPDF officers or soldiers were investigated, disciplined or prosecuted with respect to the alleged events in Bunia in January 2001. As such, there is no evidentiary basis to conclude that such actions of investigation or prosecution did or did not take place.

10.36 Second, the reason why no such factual record is before the Court is that the DRC never made any claims at the merits stage that Uganda failed to pursue such actions, let alone failed to pursue such actions with respect to any specific UPDF officers or soldiers. Among other things, the DRC never raised at the merits phase the "request" by the special rapporteur, which itself is not legally binding. The DRC's request for satisfaction therefore has no direct connection with any specific liability finding concerning the conduct of particular officers or soldiers. The Court cannot issue an order that persons be investigated or prosecuted when the conduct of specific persons was not passed upon by the Court at the merits phase.

10.37 *Third*, in light of the first two points, it is clear that the DRC's request is really a new liability claim, one that was not brought at the merits phase and therefore is inadmissible at this phase. In essence, the DRC is now asking this Court to find that Uganda violated international law by failing to investigate and

¹³⁵⁴ *Ibid.*, para. 7.70 (Translation by Counsel, original in French: "la mise en œuvre de telles poursuites apparaît comme un élément majeur de la réparation due à la RDC pour ces faits, à titre

de mesure de satisfaction.").

prosecute UPDF officers or soldiers, a claim that might have been brought at the merits phase but was not. Had the DRC brought such a claim, and had it been successful in demonstrating a lack of investigation or prosecution by Uganda of specified individuals in violation of international law, then perhaps reparation for that violation might take the form of an order by the Court that those individuals be investigated and their cases be submitted to prosecution. Yet none of those prior steps was taken in this case. Although the DRC styles this as a request for a form of reparation, the absence of a factual or legal predicate at the merits phase for such "satisfaction" demonstrates that, in reality, it is a new claim in disguise that the Court cannot entertain at this late date.

10.38 After mentioning the request formulated by the special rapporteur on the human rights situation in the DRC, and deploring that there is nothing attesting that anything has been done "yet", the DRC states that "it is clear that said authorities are expected to conduct such prosecutions *pursuant to international law*". This statement effectively acknowledges that the DRC's request is actually a claim that Uganda's failure to prosecute was a violation of international law, not simply a request for a form of reparation. The DRC's request overlooks the distinction between primary rules the violation of which engage a State's international responsibility, ¹³⁵⁶ on the one hand, and secondary rules which cover the

-

¹³⁵⁵ *Ibid.*, para. 7.69 (Translation by Counsel, original in French: "[il] est manifeste que ce[s] [autorités] sont tenues de diligenter semblables poursuites en vertu du droit international.") (emphasis added).

¹³⁵⁶ Some treaties impose upon a State the obligation to submit to prosecution an alleged offenders located the State's territory, an obligation that in some instances can be avoided through extradition or surrender to an international tribunal. For a recent report on the obligation to "extradite or prosecute". See "Draft articles on Responsibility of States for Internationally Wrongful Acts", Yearbook of the International Law Commission, Vol. II, Part 2 (2001). (The obligation to extradite or prosecute (aut dedere aut judicare)). The DRC's claims at the merits phase, however, invoked no such obligations.

consequences that flow once State responsibility is engaged, on the other hand. ¹³⁵⁷ In suggesting that Uganda failed to investigate and prosecute even though its authorities were bound to do so under international law, the DRC is speaking (too late) to a primary rule, not to a matter of reparation.

B. SATISFACTION IN THE FORM OF AN ORDER TO PAY US\$ 125 MILLION FOR INTANGIBLE HARM

10.39 The DRC's second claim for satisfaction is in the form of an order from the Court that Uganda pay US\$ 125 million for "intangible harm". Specifically, the DRC requests "the sum of USD 125 million in satisfaction of all intangible harm resulting from violations of international law enumerated by the Court in its decision of December 19, 2005". 1358

10.40 A threshold problem with this request is that it covers a type of harm that is already encompassed in the DRC's other compensation claims, such that the awarding of satisfaction in this form would result in double-recovery. Thus, one portion of the "intangible harm" covered by the DRC's request is "for violations of international humanitarian law and international norms for the protection of the rights of the individual committed in the territory of Ituri", so as to establish a fund "for the purpose of promoting reconciliation between the Hema and the Lendu." ¹³⁵⁹

⁻

¹³⁵⁷ See "Draft articles on Responsibility of States for Internationally Wrongful Acts", *Yearbook of the International Law Commission*, Vol. II, Part 2 (2001), General Commentary, para. (1).

¹³⁵⁸ DRCM, para. 7.89(c) (Translation by Counsel, original in French: "la somme de 125 millions de dollars des Etats-Unis au titre de mesure de satisfaction pour l'ensemble des dommages immatériels résultant des violations du droit international constatées par la Cour dans son arrêt du 19 décembre 2005".).

¹³⁵⁹ *Ibid.*, para. 7.75 (Translation by Counsel, original in French: "pour les violations du droit international humanitaire ou des normes internationales de protection des droits de la personne commises sur le territoire de l'Ituri", "visant à favoriser la réconciliation entre les Hema et les Lendu".).

Another portion of the "intangible harm" covered by the DRC's request is "intangible harm suffered by the... Congolese people". 1360 Such "intangible harms" are no different from seeking compensation for moral injury to persons (and is to be distinguished from intangible injury to the DRC itself 1361). Yet moral injury suffered by DRC nationals is already encompassed in the DRC's compensation claims, as reflected in the repeated invocation of moral injury throughout the DRC's requests for compensation with respect to different categories of harm. 1362

10.41 It must also be noted that, while satisfaction in the form of a monetary payment is possible under the rules on State responsibility, in practice there is no example of an award of such satisfaction beyond a purely symbolic amount. In the *Arends case*, for example, the payment of US\$ 100 was indicated as a form of

-

¹³⁶⁰ *Ibid.*, para. 7.83 (Translation by Counsel, original in French: "les dommages immatériels subis par... la population congolaise".).

¹³⁶¹ G. Arangio-Ruiz, "Second Report on State Responsibility", in *Yearbook of the International Law Commission*, Vol. II, Part I, Doc. No. A/CN.4/425 & Corr.1 and Add.1 & Corr.1 (1989), p. 5, para. 13. *See also J. Crawford*, "Third report on State responsibility", in *Yearbook of the International Law Commission*, Vol. II, Part I, A/CN.4/507 and Add. 1-4 (2000), p. 54, para. 180.

¹³⁶² DRCM, para. 7.11 (Translation by Counsel, original in French: "La dimension de préjudice moral est, quant à elle, particulièrement importante dans les cas auxquels il vient d'être fait référence, au vu des conditions souvent atroces dans lesquelles les massacres des populations civiles ont été perpétrés".); ibid., para. 7.16 (Translation by Counsel, original in French: "On peut retenir au titre du préjudice moral le traumatisme résultant des atrocités commises, l'angoisse que les faits se reproduisent, les souffrances résultant des difficultés d'accès aux soins, la détresse résultant de l'absence d'intervention des autorités en place et de l'absence de poursuite des auteurs des faits, la dégradation permanente de la qualité de la vie des victimes de mutilations, de même que l'atteinte irrémédiable à leur image et à leur estime de soi".); ibid., para. 7.26 (Translation by Counsel, original in French: "Le préjudice moral résulte quant à lui des traumatismes résultant de l'arrachement de ces enfants à leur famille et de leur exposition à divers mauvais traitements ainsi qu'aux violences de la guerre"); ibid., para. 7.30 (Translation by Counsel, original in French: "Le préjudice moral consiste quant à lui dans le traumatisme résultant pour les déplacés des atrocités commises contre les autres membres de leur groupe, de l'angoisse que des faits du même ordre se reproduisent, ainsi que de la détresse résultant de l'absence d'intervention des autorités en place et de l'absence de poursuite des auteurs des faits.").

satisfaction.¹³⁶³ Similarly, satisfaction in the form of the payment of one shilling was awarded in the *Brower case*.¹³⁶⁴ Moreover, even examples of satisfaction the form of a symbolic payment are extremely rare, especially in modern practice. In his third report on State responsibility, Professor Crawford observed: "Although there have occasionally been examples of the award of nominal damages by international tribunals, in modern practice these are rare"¹³⁶⁵ and "[t]here seems to have been no case of the award of nominal damages by an international tribunal in a State-to-State case since the Tribunal awarded FF 1 to France in the *Lighthouses arbitration*".¹³⁶⁶ The same is true even with respect to a breach of international law in the form of the *jus ad bellum*.¹³⁶⁷

10.42 In addition to these general comments, there is another reason to deny the DRC's request for satisfaction in the form of an order that Uganda pay US\$ 25 million "to allow for the creation of a fund for the purpose of promoting

¹³⁶³ See, e.g., Mixed Claims Commission, Plumley Umpire, Arends Case (Netherlands v. Venezuela), 10 RIAA 729 (1903), pp. 729-730. More generally, G. Arangio-Ruiz, "Second Report on State Responsibility", in Yearbook of the International Law Commission, Vol. II, Part I, Doc. No. A/CN.4/425 & Corr.1 and Add.1 & Corr.1 (1989), prec. note 1361 pp. 34-35, paras. 114-118.

¹³⁶⁴ Arbitral Tribunal (Great Britain – United States) constituted under the Special Agreement of August 18, 1910, *Isaac M. Brower (United States) v. Great Britian (Fijian Land Claims)*, 6 RIAA 109 (14 Nov. 1923), p. 112.

¹³⁶⁵ Third report on State responsibility, by Mr James Crawford, Special Rapporteur, 15 March, 15 June, 10 and 18 July and 4 August 2000, *Yearbook of the International Law Commission 2000*, Vol. II, Part One, p. 55, para. 188.

¹³⁶⁶ Ibid., note 375; Affaire relative à la concession des phares de l'Empire ottoman (Grèce, France), 12 RIAA 155 (24-27 July 1956) (Sales No. 63.V.3), p. 126. The case of the Rainbow Warrior, isolated as it can be, is not a convincing precedent since the principle of a pecuniary satisfaction was accepted by France and the Tribunal and only to fix its amount; it decided to split the difference between the amount proposed by France and that claimed by New Zealand (Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair, 20 RIAA, (30 Apr. 1990), pp. 215-284).

¹³⁶⁷ Pierre d'Argent, *Les réparations de guerre en droit international public* (Oct. 2002), *op. cit.* note 1339, pp. 718.

reconciliation between the Hema and the Lendu."¹³⁶⁸ Simply put, ordering satisfaction of this kind would be wholly unprecedented in international law. ¹³⁶⁹

10.43 The only precedent the DRC cites for the creation of such a fund is the *Rainbow Warrior* case. Yet, in that case, the creation of a fund was not a measure ordered by the tribunal; it was a mere recommendation. Moreover, that recommendation was not part of the reparation decided by the tribunal. The tribunal first addressed reparation by declaring "that the condemnation of the French Republic for its breaches of its treaty obligations to New Zealand, made public by the decision of the Tribunal, constitutes in the circumstances appropriate satisfaction for the legal and moral damage caused to New Zealand". Then, only *after* this declaration, did the tribunal proceed to make its recommendation.

10.44 Issuing an order of the type requested by the DRC would place the Court outside its function as a Court of law granting reparation in accordance with the rules on State responsibility. Doing so would constitute an exercise of power *ex aequo et bono* and/or constitute a form of punitive damages, neither of which is appropriate in the context of this case. 1372

10.45 There are also other reasons to deny the DRC's request for satisfaction in the form of an order that Uganda pay US\$ 100 million "for the intangible harm

¹³⁶⁸ DRCM, para. 7.75 (Translation by Counsel, original French: "pour permettre la création d'un fonds visant à favoriser la réconciliation entre les Hema et les Lendu.").

¹³⁶⁹ Pierre d'Argent, Les réparations de guerre en droit international public (Oct. 2002), p.719-720.

¹³⁷⁰ Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair, 20 RIAA, (30 Apr. 1990), p. 274, paras. 126-127.

¹³⁷¹ *Ibid.*, p. 273, para. 123.

¹³⁷² See Chapter 4, Section I(D) and (E).

suffered by *the Congolese state* and the Congolese people". ¹³⁷³ In particular, it is inappropriate to order a monetary payment of such magnitude as a form of satisfaction for intangible harm to a State.

10.46 According to the ILC:

"[T]he injury for which a responsible State is obliged to make full reparation embraces 'any damage, whether material or moral, caused by the internationally wrongful act of a State'. Material and moral damage resulting from an internationally wrongful act will normally be financially assessable and hence covered by the remedy of compensation. Satisfaction, on the other hand, is the remedy for those injuries, not financially assessable, which amount to an affront to the State." 1374

The Commission then immediately recalls that "[t]hese injuries are frequently of a symbolic character, arising from the very fact of the breach of the obligation, irrespective of its material consequences for the State concerned." For that reason, the ILC was clear that such satisfaction was not intended to consist of large-scale monetary payments, which could only be viewed as punitive in nature:

"Excessive demands made under the guise of 'satisfaction' in the past¹³⁷⁶ suggest the need to impose some limit on the measures that can be sought by way of satisfaction to prevent abuses, inconsistent with the principle of the equality of

-

¹³⁷³ DRCM, para. 7.83 (emphasis added) (Translation by Counsel, original in French: "pour les dommages immatériels subis par l'Etat et la population congolaise".).

¹³⁷⁴ "Draft articles on Responsibility of States for Internationally Wrongful Acts", *Yearbook of the International Law Commission*, Vol. II, Part 2 (2001), Art. 37, Commentary, p. 106, para. (3).

¹³⁷⁵ *Ibid*.

¹³⁷⁶ *Ibid.*, note 600 in the original: "For example, the joint note presented to the Chinese Government in 1900 following the Boxer uprising and the demand by the Conference of Ambassadors against Greece in the Tellini affair in 1923: *see* C. Eagleton, op. cit. (footnote 582 above), pp. 187–188".

States. 1377 In particular, satisfaction is not intended to be punitive in character, nor does it include punitive damages. Paragraph 3 of article 37¹³⁷⁸ places limitations on the obligation to give satisfaction by setting out two criteria: first, the proportionality of satisfaction to the injury; and secondly, the requirement that satisfaction should not be humiliating to the responsible State. It is true that the term 'humiliating' is imprecise, but there are certainly historical examples of demands of this kind." 1379

10.47 In the present case, far from requesting an "award of symbolic damages for non-pecuniary injury", ¹³⁸⁰ the DRC is claiming an enormous monetary payment—US\$ 125 million—as satisfaction for intangible harm suffered by the DRC and its people. The Court should deny the DRC's request because it cannot be viewed as an appropriate form of satisfaction against a State. It is clearly intended to be punitive and humiliating in character, and is therefore not an acceptable form of satisfaction under international law.

III. The DRC Is Not Entitled to Its Costs, Including Attorneys' Fees

10.48 Finally, the DRC requests that "[o]ver and above the measures for compensation and satisfaction that have just been put forth, the Democratic Republic of Congo asks the Court to rule that the court costs incurred by the DRC

_

¹³⁷⁷ *Ibid.*, note 601 in the original: "The need to prevent the abuse of satisfaction was stressed by early writers such as J. C. Bluntschli, *Das moderne Völkerrecht der civilisirten Staten als Rechtsbuch dargestellt*, 3rd ed. (Nördlingen, Beck, 1878); French translation by M. C. Lardy, Le droit international codifié, 5th rev. ed. (Paris, Félix Alcan, 1895), pp. 268-269."

¹³⁷⁸ Art. 37 provides in paragraph 3: "Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State."

¹³⁷⁹ "Draft articles on Responsibility of States for Internationally Wrongful Acts", *Yearbook of the International Law Commission*, Vol. II, Part 2 (2001), Art. 37, Commentary, p. 107, para. (8).

¹³⁸⁰ *Ibid*, Art. 37, Commentary, p. 106, para. (5).

in the framework of the instant case be borne by Uganda."¹³⁸¹ This request should also be denied.

10.49 Granting the DRC's request would run against the presumption set forth in Article 64 of the Court's Statute, which provides that "[u]nless otherwise decided by the Court, each party shall bear its own costs". Granting it would also run contrary to the Court's and the PCIJ's practice; neither has *ever* ordered one party to pay the costs of the other. As the Court noted in its 1973 Advisory Opinion on the *Application for Review of Judgment No. 158 of the UNAT*, Article 64 reflects a "basic principle" of proceedings before international tribunals. The Court's position has been reaffirmed on several occasions. Notably, the DRC itself concedes that "such petitions are rarely presented to the Court." 1384

10.50 Rosenne explained that the Court's position "shows the correct approach as lying in the classic theory of international arbitration and the principle of the equality of the parties, according to which it is not appropriate to regard the parties as standing in some sort of plaintiff/defendant relationship". ¹³⁸⁵ In effect, contrary to what the DRC suggests, the principle enunciated in Article 64 of the Statute does not relate to the character or gravity of the case, but rather to the character of the

.

¹³⁸¹ DRCM, para. 7.85 (Translation by Counsel, original in French: "En sus des mesures d'indemnisation et de satisfaction qui viennent d'être exposées, la République démocratique du Congo demande à la Cour de dire et juger que les frais de procédure exposés par la RDC dans le cadre de la présente affaire doivent être supportés par l'Ouganda.").

¹³⁸² Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973 (12 July 1973), p. 212, para. 98.

¹³⁸³ Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Judgement, I.C.J. Reports (25 Mar. 1999), para. 18; Diallo (2012), paras. 58-60; Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Judgment, I.C.J. Reports 2015, para. 144.

¹³⁸⁴ DRCM, para. 7.86 (Translation by Counsel, original in French: "de telles demandes sont rarement présentées à la Cour".).

¹³⁸⁵ S. Rosenne & M. Shaw, Rosenne's Law and Practice of the International Court (2016), p. 1320.

parties (i.e., States) appearing before the Court as equal sovereigns, both seeking to advance their positions in the context of pacific dispute settlement. Only if the Court were faced with a serious abuse of process by one of the parties might there be a possibility of departing from the principle, ¹³⁸⁶ but such circumstances are not present here.

10.51 Awarding costs in this case is inappropriate for additional reasons as well. Throughout this Counter-Memorial, Uganda has demonstrated that the DRC's claims are unsustainable, built upon arbitrary and unreasonable assumptions, and grounded in neither law nor practice. It is the DRC that has pursued baseless reparations claims by failing to take seriously the core elements that the Court expressly called upon the DRC to prove at this stage; namely, the specific harms it suffered, the specific actions of Uganda that fall within the scope of the Court's general findings in 2005, the causal connection between those specific actions and the alleged injury, and the valuation of that injury.

10.52 The lack of seriousness in the DRC's approach is readily apparent in comparing the amount sought in the course of settlement negotiations with Uganda (approximately US\$ 25 billion) and the amount it now seeks before the Court (approximately US\$ 13.5 billion). Neither figure is grounded in law or fact, and the radical disparity between the two shows that it is the DRC that has been disingenuous in pursuing reparations, not Uganda.

10.53 Finally, Uganda observes that the DRC's request for costs is symptomatic of all its reparation claims, which in their totality represent a harsh and punitive claim that should not be countenanced. As discussed in Chapter 4, international

-

¹³⁸⁶ See Kolb, The International Court of Justice (2013), p. 1003.

law precludes requiring a State to make reparation that exceeds its financial capacity to pay, especially if it would cause serious injury to that State's population. The magnitude of the DRC's claims for reparation is not commensurate with Uganda's abilities and, if accepted, would inflict serious harm upon Uganda and its people. Uganda is thus fully justified in resisting the DRC's claims and there is no basis for awarding the DRC's costs, including attorneys' fees, against it.

*

10.54 For the reasons set forth above, there no justification in fact or law for granting the DRC the other forms of reparation it seeks, except only for its request that simple interest be awarded in the event Uganda fails to pay any compensation the Court may order within a reasonable period of time.

_

¹³⁸⁷ Ethiopia's Damages Claims (Final Award, 2009), para. 19; Eritrea's Damages Claims (Final Award, 2009), para. 19.

SUBMISSIONS

On the basis of the facts and law set forth in this Counter-Memorial,
Uganda respectfully requests the Court to adjudge and declare that:

- 1) the Court's formal findings of Uganda's international responsibility in the 2005 Judgment constitute an appropriate form of satisfaction, providing reparation for the injury suffered;
- 2) all other reparation sought by the DRC is denied; and
- 3) each Party shall bear its own costs of these proceedings.

Respectfully submitted,

Mr. William Byaruhanga, SC
Attorney General of the Republic of Uganda
AGENT OF THE REPUBLIC OF UGANDA
6 February 2018

CERTIFICATION

I certify that the Annexes are true copies of the documents referred to.

Mr. William Byaruhanga, SC
Attorney General of the Republic of Uganda
AGENT OF THE REPUBLIC OF UGANDA
6 February 2018

LIST OF ACRONYMS

A		
	ACLED	Armed Conflict Location and Event Data Project
	ADAR	Association for the Development of Applied Research
	AFDL	Alliance des forces démocratiques pour la libération du Congo (Alliance of Democratic Forces for the Liberation of Congo)
	ALC	Armée de Libération du Congo (Movement for the Liberation of the Congo)
	ALiR	Armée de Libération du Rwanda (Army for the Liberation of Rwanda)
	ANC	Armée Nationale Congolaise (Congolese National Army)
	APC	Action Permanente pour le Congo (Permanent Action for the Congo)
	APR	Alliance pour la République (Alliance for the Republic)
C		
	CDR	Crude Death Rate
	COJESKI	Collectif des organisations et associations des jeunes du Sud-Kivu en RDC (Collective of Youth Organisations and Associations of South Kivu in the DRC)
	COMTRADE	United Nations International Trade Statistics Database
D		
	DHS	Demographic and Health Surveys
E		
	ECOSOC	UN Economic and Social Council
	EECC	Eritrea-Ethiopia Claims Commission
F		
	FAC	Forces armées congolaises (Congolese Armed Forces)

Forces armées rwandaises (Rwandan Armed Forces)

FAR

FDD Forces pour la Défense de la Démocratie (Forces for the

Defense of Democracy)

FIDH International Federation for Human Rights

FLC Front de libération du Congo (Front for Congolese

National Liberation)

FNI Front national intégrationniste (Nationalist and

Integrationist Front)

FRPI Force de résistance patriotique de l'Ituri (Front for

Patriotic Resistance in Ituri)

 \mathbf{G}

GMM Generalized Method of Moments

H

HNTS Health and Nutrition Tracking Service

HSRP Human Security Report Project

I

ICCN Institut Congolais pour la Conservation de la Nature

(Congolese Institute for Nature Conservation)

ICESCR International Covenant on Economic, Social and

Cultural Rights

IMF International Monetary Fund

IRC International Rescue Committee

ITTO International Tropical Timber Organization

L

LORI Liberation of the Oppressed Race in Ituri

M

ML Mouvement de libération (Movement for the Liberation)

MLC Mouvement pour la libération du Congo (Movement for

the Liberation of the Congo)

MONUC Mission des Nations Unies en République démocratique

du Congo (United Nations Mission in the Democratic

Republic of Congo)

0

OCHA UN Office for the Coordination of Humanitarian Affairs

ODA Official Development Assistance

OECD Organization for Economic Co-operation and

Development

OLS Ordinary Least Squares

P

PLA Parti de libération des Walendu (Walendu Liberation

Party)

R

RCD Rassemblement congolais pour la démocratie (Rally for

Congolese Democracy)

RCD-Goma Rassemblement congolais pour la démocratie-Goma

(Rally for Congolese Democracy-Goma)

RCD-ML Rassemblement congolais pour la démocratie-

Mouvement de Libération (Rally for Congolese

Democracy-Liberation Movement)

RCD-N Rassemblement congolais pour la démocratie-National

(National Rally for Congolese Democracy)

RPF Rwandan Patriotic Front

S

SNEL Société nationale d'électricité (National Electricity

Company)

SOTEXKI Société Textile de Kisangani (Textile Company of

Kisangani)

SPLA Sudan People's Liberation Army

U

UBOS Uganda Bureau of Statistics

UCDP Uppsala Conflict Data Program

UNCC United Nations Compensation Commission

UNDP United Nations Development Program

UNESCO United Nations Educational, Scientific and Cultural

Organization

UNHCR United Nations High Commissioner for Refugees

UNICEF United Nations Children's Fund

UPC Union des patriotes congolais (Union of Congolese

Patriots)

UPDF Uganda's People's Defence Force

URA Uganda Revenue Authority

W

WHO World Health Organization

LIST OF ANNEXES

VOLUME II

UNITED NATIONS DOCUMENTS

Annex 1	U.N. Security Council, 2981st meeting, <i>Resolution 687</i> (1991), U.N. Doc. S/RES/687 (1991) (8 Apr. 1991)
Annex 2	U.N. Security Council, 3004th meeting, <i>Resolution 705 (1991)</i> (15 Aug. 1991)
Annex 3	U.N. Security Council, Decision taken by the Governing Council of the United Nations Compensation Commission during the resumed Fourth Session, at the 23rd meeting, held on 6th March 1992, U.N. Doc. S/AC.26/1992/9 (6 Mar. 1992)
Annex 4	U.N. Security Council, Compensation for Business Losses Resulting from Iraq's Unlawful Invasion and Occupation of Kuwait where the Trade Embargo and Related Measures Were also a Cause, U.N. Doc. S/AC.26/1992/15 (4 Jan. 1993)
Annex 5	U.N. Compensation Commission, Report and Recommendations Made by the Panel of Commissioners Concerning the First Instalment of Individual Claims for Damages up to \$100,000 (Category "C" Claims), U.N. Doc. S/ AC.26/1994/3 (21 Dec. 1994)
Annex 6	U.N. Security Council, 3519th meeting, <i>Resolution 986 (1995)</i> , U.N. Doc. S/RES/986 (14 Apr. 1995)
Annex 7	U.N. Human Rights, Office of the High Commissioner, Statement by Mrs. Mary Robinson, U.N. High Commissioner for Human Rights (19 Sept. 1997)
Annex 8	U.N. Security Council, Report and Recommendations Made by the Panel of Commissioners Concerning the Seventh Instalment of Individual Claims for Damages up to \$100,000 (Category "C" Claims), U.N. Doc. S/AC.26/1999/11 (24 June 1999)

Annex 9 U.N. Security Council, Report and Recommendations Made by the Panel of Commissioners Concerning the Second Instalment of "E1" Claims, U.N. Doc. S/AC.26/1999/10 (24 June 1999) Annex 10 U.N. Security Council, 4241st meeting, Resolution 1330 (2000), U.N. Doc. S/RES/1330 (2000) (5 Dec. 2000) Annex 11 U.N. Security Council, Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of Democratic Republic of the Congo, U.N. Doc. S/2001/357 (12 Apr. 2001) Annex 12 Claude Kabemba, U.N.H.C.R., Centre for Documentation and Research, The Democratic Republic of Congo: From *Independence to Africa's First World War*, WRITENET Paper No. 16/2000 (June 2001) Annex 13 U.N. Security Council, Addendum to the report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, U.N. Doc. S/2001/1072 (13 Nov. 2001) Annex 14 U.N. General Assembly, Responsibility of States for internationally wrongful acts, U.N. Doc. A/RES/56/83 (28) Jan. 2002) Annex 15 U.N. Security Council, Final report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, U.N. Doc. S/2002/1146 (16 Oct. 2002) Annex 16 U.N. Security Council, 4691st Meeting, Resolution 1457 (2003), U.N. Doc. S/RES/1457 (2003) (24 Jan. 2003) Annex 17 U.N.H.C.R., U.N.H.C.R. Global Appeal 2004, Uganda (31 Dec. 2003) Annex 18 U.N. Security Council, 4761th meeting, Resolution 1483 (2003), U.N. Doc. S/RES/1483 (22 May 2003) Annex 19 U.N. Security Council, Letter dated 15 Oct. 2003 from the Chairman of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the

Democratic Republic of the Congo addressed to the Secretary-General, U.N. Doc. S/2003/1027 (23 Oct. 2003)

- Annex 20 U.N. Security Council, 4987th meeting, *Resolution* 1546 (2004), U.N. Doc. S/RES/1546 (8 June 2004)
- Annex 21 U.N. General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, U.N. Doc. A/RES/60/147 (21 Mar. 2006)
- Annex 22 U.N. Economic and Social Council, Implementation of the International Covenant on Economic, Social and Cultural Rights: Combined second, third, fourth and fifth periodic reports submitted by States parties under articles 16 and 17 of the Covenant, Democratic Republic of the Congo, U.N. Doc. E/C.12/COD/5 (14 Aug. 2007)
- Annex 23 U.N. Security Council, 6058th meeting, Statement by the President of the Security Council, U.N. Doc. S/PRST/48 (22 Dec. 2008)
- Annex 24 D. Nthengwe, ed. L. Dobbs, U.N.H.C.R., 30,000 Congolese flee to escape fresh conflict in Ituri district (7 Apr. 2009)
- Annex 25
 U.N. Human Rights, Office of the High Commissioner,
 Democratic Republic of the Congo, 1993-2003: Report of the
 Mapping Exercise documenting the most serious violations of
 human rights and international humanitarian law committed
 within the territory of the Democratic Republic of the Congo
 between March 1993 and June 2003 (Aug. 2010)
- Annex 26 U.N. News Centre, DR Congo: U.N. envoy welcomes end of M23 rebellion, commitment to peace talks (5 Nov. 2013)
- Annex 27 U.N. Security Council, Statement by the President of the Security Council 7058th Meeting, U.N. Doc. S/PRST/2013/17 (14 Nov. 2013)
- Annex 28 U.N. Security Council, 7150th meeting, *The extension of the Mandate U.N. Stabilization Mission in the Democratic Republic of the Congo (M.O.N.U.S.C.O.)*, U.N. Doc. S/RES/2147 (2014) (28 Mar. 2014)

Annex 29 Charles Yaxley, U.N.H.C.R., Uganda hosts record 500,000 refugees and asylum-seekers (18 Dec. 2015) Annex 30 U.N. Office for the Coordination of Humanitarian Affairs, DR Congo: Weekly Humanitarian Update (19-23 June 2017) (23 June 2017) Annex 31 U.N. Secretary General, The Secretary-General's opening remarks to the Uganda Solidarity Summit on Refugees (23) June 2017) Annex 32 U.N. Security Council, 7998th Meeting, Security Council Members Stress Need for Democratic Republic of Congo to Hold Fair, Free, Inclusive Elections without Further Delay, U.N. Doc. SC/12907 (11 July 2017) Annex 33 Catherine Wachiaya, U.N.H.C.R., Eager refugees cram crowded classrooms in Ugandan school (11 Sept. 2017) Annex 34 U.N.H.C.R., U.N.H.C.R. warns of worsening displacement in Democratic Republic of Congo (24 Oct. 2017) UGANDA GOVERNMENT DOCUMENTS Annex 35 Uganda, Act 12, the Uganda Bureau of Statistics Act, published in *The Uganda Gazette*, No. 36, Vol. XCI, Acts Supplement No. 7 (11 June 1998) Annex 36 Letter from Kofi Annan, U.N. Secretary General to Yoweri Kaguta Museveni, President and Minister of Defence, Republic of Uganda (4 May 2001) Annex 37 U.N. Security Council, The Response by the Government of the Republic of Uganda to The Addendum Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo (DRC), U.N. Doc. S/2001/1163 (4) Dec. 2001) Annex 38 Uganda Bureau of Statistics, Statistical Abstracts (2002, 2004, 2005)

Annex 39 Letter from Imelda Atai Musana, Executive Director, Uganda Bureau of Statistics to the Solicitor General, Ministry of Justice and Constitutional Affairs, UBOS/30/30 (26 Oct. 2017) Annex 40 Uganda Bureau of Statistics, Exports and Imports (1981-2016) DRC GOVERNMENT DOCUMENTS Annex 41 République du Zaire, Ministère du Plan et Reconstruction Nationale, Enquête Nationale sur la Situation des Enfants et des Femmes au Zaire en 1995, Rapport Final (Feb. 1996) Annex 42 République Démocratique du Congo, Document de la Stratégie de Croissance et de Réduction de la Pauvreté, Deuxième Génération, 2011-2015, Vol. I (Oct. 2011) DRC CASE LAW Annex 43 Songo Mboyo (MP et PC c. Bokila et consorts), RP 084/2005 (Tribunal Militaire de Garnison de Mbandaka, 12 Apr. 2006) Annex 44 Waka-Lifumba (MP et PC. c. Botuli), RP 134/2007 (Tribunal Militaire de Garnison de Mbandaka, 18 Feb. 2007) Annex 45 Basele et consorts (MP et PC c. Basele Lutula alias Colonel Thom's et consorts), RP 167/09 and RMP 944/MBM/09 (Tribunal Militaire de Garnison de Kisangani, 3 June 2009) Annex 46 Kakado (MP et PC c. Kakado Barnaba), RP 071/09, 009/010 and RP 074/010 (Tribunal Militaire de Garnison de Bunia, 9 July 2010) Annex 47 Maniraguha et Sibomana (MP et PC (400) c. Jean Bosco Maniraguha alias Kazungu et consorts), RP 275/09, 521/10 RMP 581/07 and 1573/KMC/10 (Tribunal Militaire de Garnison de Bukavu, 16 Aug. 2011) Annex 48 Kimbanguistes (MP et PC Kumba et consorts- MP et PC c. Mputu Muteba et consorts, RP 11.154/11.155/ 11.156 (Tribunal de Grande Instance de Kinshasa/ Kalamu, 17 Dec. 2011)

Annex 49 Mupoke, also known as Kabala et consorts (MP et 107 PC c. Kabala Mandumba et consorts; MP et PC c. Kabala Mandumba), RP 708/12 (Tribunal Militaire de Garnison de Bukavu, 15 Oct. 2012)

VOLUME III

REPORTS			
Annex 50	International Rescue Committee, Mortality in Eastern DRC: Results from Five Mortality Surveys by the IRC (May 2000)		
Annex 51	Les Roberts, International Rescue Committee Health Unit, Mortality in Eastern Democratic Republic of the Congo: Results from 11 Surveys (2001)		
Annex 52	Republic of Uganda, Judicial Commission of Inquiry into Allegations into Illegal Exploitation of Natural Resources and Other Forms of Wealth in the Democratic Republic of the Congo 2001, Final Report (Nov. 2002)		
Annex 53	U.K. All Party Parliamentary Group on the Great Lakes Region and Genocide Prevention, <i>Cursed by Riches: Who Benefits from Resource Exploitation in the Democratic Republic of the Congo?</i> (Nov. 2002)		
Annex 54	International Rescue Committee, Mortality in the DRC: Results from a Nationwide Survey (2003)		
Annex 55	International Crisis Group, <i>Ethiopia and Eritrea: War or Peace?</i> , ICG Africa Report No. 68 (24 Sept. 2003)		
Annex 56	Burnet Institute, International Rescue Committee, Mortality in the Democratic Republic of the Congo: Results from a Nationwide Survey (2004)		
Annex 57	Human Rights Watch, <i>The Curse of Gold, Democratic Republic of the Congo</i> (2005) 484		

Annex 58 B. Coghlan, R. Brennan, et al., "Mortality in the Democratic Republic of Congo: a Nationwide Survey", *The Lancet*, Vol. 367, No. 9504 (7 Jan. 2006) Annex 59 Democratic Republic of the Congo, *Poverty Reduction* and Growth Strategy Paper (July 2006) Annex 60 International Rescue Committee, Burnet Institute, Mortality in the Democratic Republic of Congo: An Ongoing Crisis (2007) Annex 61 L. Wyler, P. Sheikh, International Trade in Wildlife: Threats and U.S. Policy, CRS Report for Congress, RL34395 (22 Aug. 2008) Annex 62 A. Lambert, L. Lohlé-Tart, *La surmortalité au Congo (RDC)* durant les troubles de 1998-2004: une estimation des décès en surnombre, scientifiquement fondée à partir des méthodes de la démographie (Oct. 2008) Annex 63 Health and Nutrition Tracking Service (HNTS), *Peer Review* Report: Re-examining mortality from the conflict in the Democratic Republic of Congo, 1998-2006 (2009) Annex 64 Human Security Report Project, "Part II, The Shrinking Costs of War", Human Security Report (2009-2010) Annex 65 Ministère de la Justice et des Droits Humains, République Démocratique du Congo, & PNUD, Monitoring judiciaire 2010-2011, Rapport sur les données relatives à la réponse judiciaire aux cas de violences sexuelles à l'Est de la République démocratique du Congo (2010-2011) Annex 66 Marie Chêne, Transparency International, *U4 Expert Answer:* Overview of corruption and anti-corruption in the Democratic Republic of Congo (DRC) (8 Oct. 2010) Annex 67 Martin Ekofo Inganya, Avocats sans frontières, La réparation des crimes internationaux en droit congolais (2014)

Annex 68 Jacques B. Mbokani, Open Society Initiative for Southern Africa (OSISA), La jurisprudence congolaise en matière de crimes de droit international. Une analyse des décisions des juridictions militaires congolaises en application du Statut de Rome (2016)

ARTICLES & BOOKS

- Annex 69 Henry M. Stanley, *In Darkest Africa: Or the quest, rescue and retreat of Emin, Governor of Equatoria*, Vol. II (1890)
- Annex 70 D. Rice, B. Cooper, "The Economic Value of Human Life",

 American Journal of Public Health, Vol. 57, No. 11 (Nov. 1967)
- Annex 71 J. S. Landefeld, E. Seskin, "The Economic Value of Life: Linking Theory to Practice", *American Journal of Public Health*, Vol. 72, No. 6 (June 1982)
- Annex 72 Auguste Maurel, Le Congo de la Colonisation Belge à l'Indépendance (1992)
- Annex 73 Georges Nzongola-Ntalaja, Washington Office on Africa, "Appendix One: Historical Background, From Leopold to Mobutu", *Zaire: A Nation Held Hostage* (1992)
- Annex 74 Koen Vlassenroot, "The Promise of Ethnic Conflict:
 Militarisation and Enclave-Formation in South Kivu" in
 Conflict and EthniCity in CEntral afriCa (D. Goyvaerts, ed.,
 2000)
- Annex 75 E. Pay & D. Goyvaerts, "Belgium, the Congo, Zaire, and Congo: A Short History of a Very Shaky Relationship" in ConfliCt and EthniCity in CEntral afriCa (D. Goyvaerts ed., 2000)
- Annex 76 G. Kiakwama & J. Chevallier, The World Bank, "Nonreformers: Democratic Republic of the Congo", *Aid and*

Annex 77	F. Missier & O. Vallee, "Du Scandale Zaïrois au Congo Gemmocratique" in ChassE au diamant au Congo/ZairE (L. Monnier, B. Jewsiewicki, G. de Villers eds., 2001)
Annex 78	Adam Hochschild, "Congo's Many Plunderers", <i>Economic & Political Weekly</i> , Vol. 36, No. 4 (27 Jan 2 Feb. 2001)
Annex 79	K. Hillman Smith, "Status of Northern White Rhinos and Elephants in Garamba National Park, Democratic Republic of Congo, During the Wars", <i>Pachyderm</i> No. 31 (July-Dec. 2001)
Annex 80	L. Mubalama, J. J. Mapilanga, "Less Elephant Slaughter in the Okapi Faunal Reserve, Democratic Republic of Congo, with Operation Tango", <i>Pachyderm</i> , No. 31 (July-Dec. 2001)
Annex 81	Dennis Farrell, Associated Press, Billings Gazette, <i>African animal auction draws 2,000</i> (22 June 2002)
Annex 82	Thierry Vircoulon, "L'Ituri ou La Guerre Au Pluriel", <i>Afrique Contemporaine</i> , Vol. 2005/3, No. 215 (2005)
Annex 83	Johan Pottier, "Representations of Ethnicity in the Search for Peace: Ituri, Democratic Republic of Congo", <i>African Affairs</i> Vol. 109, No. 434 (27 Nov. 2009)
Annex 84	E. Kisangani & F. Scott Bob, <i>Historical Dictionary of the Democratic Republic of the Congo</i> (2010)
Annex 85	Alex Veit, Intervention as Indirect Rule: Civil War and Statebuilding in the Democratic Republic of the Congo (2010)
Annex 86	François Ngolet, Crisis in the Congo (2011)
Annex 87	Sarah C. P. Williams, "The Elephant in the Womb", <i>Science</i> (19 June 2012)

Reform in Africa: Lessons from Ten Case Studies, (S. Devarajan, D. Dollar, T. Holmgren, eds., 2001)

Annex 88	Dan Fahey, Rift Valley Institute, "Ituri: Gold, Land, and Ethnicity in North-eastern Congo", <i>Usalama Project: Understanding Congolese Armed Groups</i> (2013)		
Annex 89	David Van Reybrouck, Congo: The Epic History of a People (2015)		
Annex 90	François Emizet Kisangani, Guerres Civiles dans la République Démocratique du Congo 1960-2010 (2015)		
Annex 91	Sebastian Gatimu, Institute for Security Studies, <i>The true cost of mineral smuggling in the DRC</i> (11 Jan. 2016)		
ONLINE SOURCES			
Annex 92	IRIN, Special Report on the Ituri Clashes Part II: The Ugandan position (3 Mar. 2000)		
Annex 93	IRIN, 15,312 foreign forces withdrawn so far, says U.N. (2 Oct. 2002)		
Annex 94	M. Mutuli, ed. V. Tan, U.N.H.C.R., <i>Uganda counts close to</i> 20,000 new Congolese refugees from Ituri region (19 May 2003)		
Annex 95	M. Mutuli, ed. V. Tan, U.N.H.C.R., Congolese march to Uganda: "Soldiers before us, death behind us" (21 May 2003)		
Annex 96	World Health Organization, Verbal Autopsy Standards: 2012 WHO Verbal Autopsy Instrument (2012)		
Annex 97	World Health Organization, <i>Life expectancy, Data by country</i> (6 June 2016)		
Annex 98	OECD Insights, Debate the Issues, <i>Statistical Insights: What does GDP per capita tell us about households' material well-being?</i> (6 Oct. 2016)		
Annex 99	Tim Callen, International Monetary Fund, <i>Gross Domestic</i> product: An Economy's All (29 July 2017)		

Annex 100	Laurent Oussou, M.O.N.U.S.C.O., La Force de la MONUSCO Invite les Communautés en Ituri à Dialoguer pour la Paix (11 Aug. 2017)		
Annex 101	BBC, The Story of Africa, Independence, Case Study: Congo		
Annex 102	Uppsala University, Department of Peace and Research,		
	Definitions: Battle Related Deaths		
Annex 103	FocusEconomics, What is GDP per capita?		
Annex 104	Uppsala University, Department of Peace and Research, <i>About UCDP</i>		
Annex 105	Uppsala University, Department of Peace and Research, One- sided Violence		
Annex 106	Uppsala University, Department of Peace and Research, FAQ, How Are UCDP Data Collected?		
Annex 107	World Wildlife Fund, African elephants		
Annex 108	International Tropical Timber Organization, <i>Biennial Review Statistics</i>		
MISCELLANEOUS			
Annex 109	Professor Sir Paul Collier and Dr Anke Hoeffler, Oxford University, Assessment of the Impact of the Ugandan Military Involvement in the Democratic Republic of the Congo (20 Oct. 2017)		
Annex 110	Calculated Number of Civilian Deaths between 7 August 1998 and 2 June 2003 (Source: U.N. Mapping Report)		