

INTERNATIONAL COURT OF JUSTICE

**CASE CONCERNING
ARMED ACTIVITIES ON THE TERRITORY OF THE CONGO**

DEMOCRATIC REPUBLIC OF THE CONGO

v.

UGANDA

**UGANDA'S OBSERVATIONS ON THE EXPERTS REPORT
DATED 19 DECEMBER 2020**

15 FEBRUARY 2021

Table of Contents

Introduction.....	1
I. Observations on the Urdal Report.....	5
II. Observations on the Guha-Sapir Report	11
A. Dr Guha-Sapir’s “Excess Deaths” Methodology Is Entirely Inapposite to These Judicial Proceedings	14
B. Properly Applied, Dr Guha-Sapir’s Methodology Would Suggest There Were No Excess Deaths During the Relevant Period.....	16
C. Dr Guha-Sapir’s BCDR Estimate Is Outdated.....	19
D. Dr Guha-Sapir’s Estimate of the PCDR Is Too High	21
E. The Experts’ Estimated Reparation for Indirect Deaths Improperly Assumes That Uganda Is Responsible for All the Deaths Attributable to the Conflict	25
F. The Experts’ Estimated Reparation for Indirect Deaths Is <i>Ultra Petita</i>	27
III. Observations on the Senogles Report	29
A. Injury to Persons	29
1. The UNCC Mass Claims Process Has No Application in This Case.....	33
2. The Senogles Report Misapprehends and Misapplies the UNCC’s Methodologies.....	41
B. Property Damage	49
1. Property Losses in Ituri.....	51
2. Property Losses in Areas Other than Ituri.....	65
IV. Observations on the Nest Report	81

A.	Parts of the Nest Report are <i>Ultra Petita</i>	82
B.	The Estimates Recommended in the Nest Report Are Unfounded and Arbitrary	83
1.	Quantity of Resources Produced and Their Geographic Distribution	85
2.	Annual Average Prices of Resources.....	87
3.	Proxy Taxes for Estimating the Exploitation Value	90

INTRODUCTION

1. Pursuant to the Court’s letter dated 21 December 2020 (no. 154286) transmitting the report prepared by the Court-appointed experts, as well as the Court’s letter dated 18 January 2021 (no. 154482) extending the applicable time-limit, Uganda respectfully submits these observations on the 19 December 2020 Experts Report on Reparations (“Experts Report”).

2. Uganda is grateful for the opportunity to present these observations. It is also grateful for the Court’s flexibility in adjusting the time-limit for this submission in light of the complexities introduced by the recent Presidential election in Uganda.

3. Insofar as the Experts Report actually “contains four reports, each one presenting an expert opinion regarding reparation estimates on the topics described in the Terms of Reference”, and insofar as “[e]ach report is distinct,”¹ Uganda will offer its specific observations on each of the four reports in the four sections that follow this Introduction. Uganda here offers only five brief comments of a general nature that relate to the content of the Experts Report as a whole.

4. *First*, Uganda notes that none of the four distinct expert reports that together comprise the Experts Report appear to take *any* account of the points detailed in Uganda’s February 2018 Counter-Memorial or in its January 2019 Comments on the DRC’s Responses to the Questions from the Court Dated 11 June 2018. As Uganda will detail more fully below, the Experts Report appears to take many, if not all, of the DRC’s allegations with respect to the existence and extent

¹ Experts Report on Reparations for The International Court of Justice: Case Concerning Armed Activities on the Territory of the Congo, The Democratic Republic of the Congo v. Uganda (19 December 2020) (hereinafter “Experts Report”), para. 8.

of damages at face value without regard to Uganda’s methodical dismantling of the DRC’s claims and evidence in its earlier pleadings. Indeed, there is not a single mention of Uganda’s written pleadings on reparation anywhere in the body of the Experts Report. In Uganda’s view, the experts’ failure to take account of its submissions in formulating their recommendations on reparation raise serious concerns regarding their thoroughness and their impartiality.

5. *Second*, the Introduction to the Experts Report purports to summarise the amount of reparation they recommend in Table A presented therein.² Uganda will show below why each of the component entries in that table is unsupported by reliable, competent, or often any, evidence. On its face, however, the exorbitant and—with respect, absurd—figures presented raise grave concerns about the rigour and objectivity with which the experts approached their mandate. Table A purports to summarise the amount of reparation the experts recommend at US\$ 74.966 billion dollars.³ Not only is this more than *five and a half times* the already extremely excessive amount the DRC itself seeks, and therefore *ultra petita*, it is substantially more than *400 times* the amounts of compensation the Eritrea-Ethiopia Claims Commission (“EECC”) awarded to each side in the context of a far more intense conflict occurring during roughly the same time period on the same continent.⁴

6. *Third*, as will be apparent from the analysis to follow, the Experts Report often admits that the DRC has provided no evidentiary basis for a category of claims, laments the lack of such evidence, and then simply conjures up a

² Experts Report, p. 4, Table A.

³ *Ibid.*

⁴ Counter-Memorial of Uganda on Reparation (6 Feb. 2018) (hereinafter “UCM”), para. 1.28.

proposed figure for compensation.⁵ The experts often appear essentially to approach their mandate as one in which they were charged with reaching decisions *ex aequo et bono*—an approach to decision-making beyond the mandate of the Court.

7. *Fourth*, Uganda considers that nothing contained in the Experts Report can vitiate the need for the Court to make its own findings of fact with respect to the existence, extent and valuation of the damages alleged by the DRC. As the Court itself noted in its 12 October 2020 Order appointing the experts, “it will be for the Court to determine what weight, if any, to be given to the assessments contained in the expert report”.⁶ The experts themselves recognise this essential point in the Introduction to their Report, where they state: “It remains for the Court to make its own legal findings on this matter and hence to derive its own computations of any awards of damages.”⁷ Uganda considers this proviso all the more critical in light of the many concerns about the accuracy and reliability of the Experts Report detailed below.

8. *Fifth*, and finally, in an effort to best assist the Court, Uganda has endeavoured to be as concise yet comprehensive as possible with these observations given the time available to it. Nevertheless, for the avoidance of doubt, Uganda submits these observations without prejudice to its right to raise

⁵ *See, e.g.*, Experts Report, para. 162 (noting “no practicable evidentiary basis on which to assess the claims put forward,” then noting “these unfortunate circumstances,” and finally using an unexplained and apparently arbitrary “evidentiary discount” to come up with an amount of compensation).

⁶ Court’s Order of 12 October 2020, p. 3.

⁷ Experts Report, para. 12.

further issues, questions, doubts or any other concerns about the Experts Report at the oral hearings in this case, currently scheduled to begin on 19 April 2021.⁸

⁸ For the record, Uganda also maintains in full its objections to the Court's decision to request expert opinions in the first place. For all the reasons previously expressed, Uganda considers that the decision to appoint experts in the context of this case was inappropriate and inconsistent with its rights under the Court's Statute and Rules, and under international law more generally.

I. OBSERVATIONS ON THE URDAL REPORT

9. The first of the four reports included in the Experts Report is entitled “Loss of Life: Conflict Deaths” and was prepared by Dr Henrik Urdal (“Urdal Report”). In his report, Dr Urdal attempts to estimate the number of “lives lost as a direct result of the armed conflict, and covers armed conflict events that took place in the [DRC] between 1 August 1998 and 2 June 2003.”⁹ He does so by examining what he terms “the authoritative conflict data collected by the Uppsala Conflict Data Program (UCDP),”¹⁰ a data programme hosted by the University of Uppsala Department of Peace and Conflict Research.

10. Uganda can be brief insofar as the Urdal Report is concerned. In it, Dr Urdal undertakes much the same exercise that Uganda itself conducted and presented to the Court in its Counter-Memorial. He also comes to much the same result. The Court may recall that in its 2018 Counter-Memorial, Uganda undertook to examine the UCDP database for purposes of consulting a neutral source to “confirm the inflated nature of the DRC’s claims”¹¹ concerning the alleged losses of life.

11. Based on that examination, Uganda determined that the UCDP data set suggests that the “best estimate” of the total number of deaths resulting from the conflict between August 1998 and June 2003 was 29,376, only 211 of which (0.7%) were linked to Uganda.¹² Importantly, these numbers include both civilian

⁹ Experts Report, para. 13.

¹⁰ *Ibid.*, para. 14.

¹¹ UCM, para. 5.63.

¹² *Ibid.*, para. 5.65.

and military deaths.¹³ (By way of comparison, the database suggests that there were 9,420 civilian and rebel deaths (i.e., 32%) linked to the DRC military.¹⁴)

12. When Uganda limited the results to *civilian deaths*, the subject of the Court’s Terms of Reference, the numbers were smaller still. Specifically, Uganda’s analysis of the UCDP data suggested that in total there were 13,593 civilian deaths during the relevant period, of which 32 (i.e., 0.2%) were linked to Uganda.¹⁵ (Again, by way of comparison, the UCPD database links 1,429 civilian deaths to the DRC military (i.e., 10.5%).¹⁶)

13. The Urdal Report comes to much the same conclusions as Uganda on the total number of deaths and the number of civilian deaths reflected in the UCDP data set. Dr Urdal concludes that it shows that “a total of **28,981** individuals lost their lives in armed conflict events in the Democratic Republic of the Congo during this time period.”¹⁷ “Out of this total number of direct deaths, 14,663 were civilians.”¹⁸

14. The differences between the numbers Uganda and Dr Urdal derived from the UCDP data set are comparatively modest: 29,376 total deaths (Uganda) vs. 28,981 (Dr Urdal); 13,593 total civilian deaths (Uganda) vs. 14,663 (Dr Urdal).

¹³ UCM, para. 5.65.

¹⁴ *Ibid.*, para. 5.66.

¹⁵ *Ibid.*, para. 5.67.

¹⁶ *Ibid.*, para. 5.68.

¹⁷ Experts Report, para. 14 (emphasis in original).

¹⁸ *Ibid.*

15. Uganda is unable to explain these slight differences. It may be that they result from updates to the UCDP data set during the intervening period or some other factor. In any event, these discrepancies (such as they are) are immaterial, particularly since Uganda and Dr Urdal agree on the number of deaths that the UCDP data suggest are linked to Uganda. Exactly like Uganda, Dr Urdal’s analysis of the UCDP database suggests that a total of 211 deaths, *among which were 32 civilians*, “are recorded as having involved troops of the Government of Uganda as one of the actors.”¹⁹

16. Aside from observing the consistency between its own and Dr Urdal’s analysis of the UCDP data, Uganda will confine itself to just four brief additional points for the Court’s consideration.

17. *First*, unlike Dr Urdal, Uganda also analysed another similar database: that maintained by the Armed Conflict Location and Event Data Project (“ACLED”), housed at the University of Sussex in the United Kingdom.²⁰ Although not identical to the numbers derived from UCDP, the results of Uganda’s examination of the ACLED database were again broadly similar. Focusing for present purposes only on civilian deaths, the ACLED database suggests that during the relevant period there were 8,012 civilian fatalities, of which 117 (1.5%) were caused by one-sided violence perpetrated by Uganda.²¹

18. *Second*, unlike Dr Urdal, Uganda also examined the UN Mapping Report prepared under the auspices of the UN’s Office of the High Commissioner for Human Rights for purposes of documenting serious violations of human rights

¹⁹ Experts Report, para. 39.

²⁰ UCM, paras. 5.69-5.71.

²¹ *Ibid.*, para. 5.71.

and international humanitarian law that took place in the DRC between March 1993 and June 2003.²² Here too, the numbers, at least in terms of scale, are broadly similar to those derived from the UCDP and ACLED databases.

19. Uganda located every instance where the UN Mapping Report links, whether directly or indirectly, one or more civilian deaths to Uganda in the period between 7 August 1998 and 2 June 2003, and included a compilation of all such instances to its Counter-Memorial as Annex 110.²³ Adding the reported figures together, the UN Mapping Report suggests that the total number of civilian deaths for which there is even a “reasonable suspicion” that they resulted from conduct in which Uganda may have been involved is approximately 2,300.²⁴

20. *Third*, taken together, the numbers from the UCDP and ACLED data, and from the UN Mapping Report, underscore the excessive and unreasonable nature of the DRC’s claims—a point the DRC inadvertently admits. Specifically, in its Memorial, the DRC argues that international reports, including the UN Mapping Report, are important because they provide the correct order of magnitude for assessing the scope of the harms it allegedly suffered. About such reports, it states:

“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.”²⁵

²² UCM, paras. 5.72-5.76.

²³ *Ibid.*, Annex 110.

²⁴ *Ibid.*, para. 5.76.

²⁵ Memorial of the Democratic Republic of Congo on Reparation (Sept. 2016) (hereinafter “DRCM”), para. 1.39 (Translation by Counsel, original in French: “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”) (emphasis added).

21. Viewing the results of the above analyses in light of the DRC's admonition only underscores just how inflated the DRC's claim that Uganda is responsible for 180,000 civilian deaths is.

22. *Fourth*, although Uganda and Dr Urdal largely agree on the number of civilian deaths suggested by the UCPD data set, they very much disagree on the implications for the reparations Uganda should pay. Dr Urdal calculates the quantum of reparation that he recommends Uganda pay by multiplying *the total number of civilian deaths in the DRC* during the relevant period (which he says is 14,663) by the relevant compensation figures suggested by Mr Senogles in his report *without regard to any attribution to Uganda*.²⁶ In other words, Mr Urdal recommends that Uganda pay for *each and every civilian death during the conflict* without regard to whether or not the relevant events are, to use his words, "recorded as having involved troops of the Government of Uganda as one of the actors."²⁷ Uganda considers this plainly untenable.

23. As it previously explained, and as the Court well knows in any event, the conflict in the DRC was extraordinarily complex and involved the armies of at least nine countries and 21 major irregular armed groups, not to mention a larger number of smaller irregular groups.²⁸ In its 2005 Judgment, the Court itself specifically 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

²⁶ In his report, Mr Senogles suggests US\$30,000/person for targeted deaths and US\$15,000/person for collateral victims. Experts Report, paras. 106, 109. Uganda submits that neither figure is appropriate to the circumstances of this case for the reasons explained in Section III below.

²⁷ *Ibid.*, para. 39.

²⁸ UCM, paras. 2.49-2.55.

population.”²⁹ In that context, the Court equally made clear that at this stage of the proceedings, the DRC would be required to “prove the exact injury that was suffered as a result of *specific actions of Uganda constituting internationally wrongful acts* for which it is responsible.”³⁰

24. In such circumstances, there is no plausible basis on which to recommend that Uganda pay for each and every civilian killed during the conflict no matter where, no matter when and no matter who was responsible for the death. At most, Uganda can only be responsible to pay reparation for the number of civilians reported killed in incidents in which it was alleged to be involved. And, as stated, Dr Urdal and Uganda agree on what the UCDP data set suggests that number to be:³¹

²⁹ *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. 221.

³⁰ *Ibid.*, para. 260.

³¹ Dr Urdal also indicates that the UCDP data set suggests that there were 5,769 civilian deaths in Ituri during the relevant period, including the 32 reported killed in incidents in which Uganda was involved. Experts Report, para. 29 & Table 1.2. Uganda recognises that, having been found an occupying power in Ituri, it was under an obligation of due diligence “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”. *Armed Activities (2005)*, para. 178. There is, however, nothing in the UCDP data set or the Urdal Report, or anywhere else in the record before the Court for that matter, on which a fact-finder could conclude that Uganda could have prevented these deaths.

II. OBSERVATIONS ON THE GUHA-SAPIR REPORT

25. The second of the four reports included in the Experts Report is entitled “Conflict Related Excess Deaths” and was prepared by Dr Debarati Guha-Sapir (“Guha-Sapir Report”). In her report, Dr Guha-Sapir offers an extraordinary estimate of the number of deaths that she says can be attributed to the conflict in the DRC between 1998 and 2003:³² 4,987,756.³³ Subtracting the number of *direct* deaths stated in Dr Urdal’s report (28,981) from this figure, she arrives at an estimate of 4,958,775 *indirect* deaths³⁴ attributable to the conflict.³⁵

26. In Table A in the Introduction to the Experts Report, this number is then multiplied by US\$ 15,000—the valuation for collateral deaths recommended

³² The Court defines “the relevant period” as “between 6 August 1998 and 2 June 2003”. The Court’s Order of 8 September 2020, para. 16(3). Throughout her report, however, Dr Guha-Sapir merely refers to the period between 1998 and 2003 without specifying the relevant months, raising the possibility that her estimate might include the entire years of 1998 and 2003. *See* Experts Report, paras. 55, 71, p. 28 Table 2.2, p. 29 Figure 2.3, p. 31 Figure 5. Indeed, at one point in her report, she suggests that she is making estimates for a full five-year period, which is not accurate because the relevant period is approximately two months shorter than a full five years. *See ibid.*, para. 63.

³³ *Ibid.*, para. 71.

³⁴ When comparing usage across the four individual reports, the Experts Report is inconsistent in its use of the terms “indirect deaths” and “excess deaths”. Uganda’s understanding is that “excess deaths” in the Experts Report refers to all the deaths attributable to the conflict, and thus equals the sum of “direct deaths” (also called “excess direct deaths”) and “indirect deaths” (also called “excess indirect deaths”) attributable to the conflict. This understanding would be consistent with Dr Guha-Sapir’s explanation of the three notions at paragraph 42 of her report, as well as her Table 2.2 and Figure 5. *See ibid.*, para. 42, p. 28 Table 2.2, p. 31 Figure 5. Nevertheless, paragraph 10 and Table A of the Experts Report employ the term “excess civilian deaths” to refer to Dr Guha-Sapir’s estimate of “excess indirect civilian [deaths]”. *Compare ibid.*, para. 10, p. 4 Table A, *with ibid.*, para. 71. These two notions (“excess civilian deaths” and “excess *indirect* civilian deaths”) are not the same, as Dr Urdal notes that there were 14,663 excess *direct* civilian deaths. *Ibid.*, para. 14.

³⁵ *Ibid.*, para. 71.

by Mr Senogles³⁶—to produce an astronomical estimate of more than US\$ 74 billion due as reparation for indirect deaths.³⁷

27. Uganda will show why the US\$ 15,000 figure Mr Senogles proposes is not appropriate in its observations on his report below. For present purposes, Uganda will focus on showing that Dr Guha-Sapir’s estimate for the number of deaths attributable to the conflict is wholly unreliable. Indeed, her estimate is more than 12 times greater than the one the DRC itself offers in its Memorial,³⁸ and almost 25 times greater than another, authoritative estimate for this statistic.³⁹

28. Dr Guha-Sapir’s exaggerated numbers are easily explained. Her entire analysis is premised on two highly uncertain variables for which she has chosen highly questionable values. In particular, under Dr Guha-Sapir’s “excess deaths” methodology, she purports to estimate the number of deaths attributable to the conflict by comparing figures for the nominal death rate during the conflict (referred to as the posterior crude death rate (“PCDR”)) with a hypothetical death

³⁶ *Ibid.*, paras. 71, 109.

³⁷ *Ibid.*, p. 4, Table A.

³⁸ DRCM, para. 2.70 (“Given the carefulness that has to be observed in a legal proceeding, the DRC 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*.”). It is true that Dr Guha-Sapir applies the DRC’s 10% coefficient in her Table 2.2 “[t]o make [her] estimates roughly comparable to those presented by Congo”. Experts Report, para. 65, p. 28 Table 2.2. But she did not apply the coefficient in presenting her concluding estimate 4,987,756 deaths attributable to the conflict. *Ibid.*, para. 71. Nor was the coefficient applied when calculating estimated reparations in Table A of the Experts Report. *Ibid.*, p. 4 Table A.

³⁹ 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) (DRCM Annex 2.19; UCM Annex 62) (“We can estimate at 200,000 the excess deaths in the half of the country which was subject to unrest.”) (Translation by Counsel, original in French: “[O]n peut estimer à 200 000 les morts en surnombre dans la moitié du pays qui a été soumise aux troubles.”); see DRCM, para. 2.68; UCM, para. 5.25.

rate for the same period had the conflict not occurred (referred to as the baseline crude death rate (“BCDR”)).⁴⁰ The theory is that the difference between the two crude death rates (“CDRs”) reveals the change in the death rate caused by the conflict.

29. Dr Guha-Sapir’s use and application of this methodology to estimate the number of deaths attributable to the conflict are problematic in myriad ways. The most critical such problems are detailed in the sections that follow. Specifically:

- Dr Guha-Sapir’s “excess deaths” methodology is entirely inapposite to the task before the Court;
- If Dr Guha-Sapir’s “excess deaths” methodology were applied properly using the most recent and authoritative CDR estimates from the United Nations, the results would suggest that there were, in fact, *no excess deaths* in the DRC from 1998 to 2003;
- Dr Guha-Sapir relied on an outdated UNICEF figure that has since been revised and superseded for her estimate of the BCDR;
- Dr Guha-Sapir’s estimate for the PCDR, which she derives from sample surveys, is more than *two times higher* than what the most recent UN statistics indicate;
- The amount of reparations recommend for indirect deaths in Table A of the Experts Report improperly assumes that Uganda is responsible for all the deaths attributable to the conflict; and

⁴⁰ Experts Report, para. 60.

- Awarding reparation for indirect deaths anywhere near the amount stated in the Experts Report would be *ultra petita*, as it would far exceed what was requested by the DRC.

A. Dr Guha-Sapir’s “Excess Deaths” Methodology Is Entirely Inapposite to These Judicial Proceedings

30. In its 2005 Judgment, the Court made clear that, in order to receive compensation, the DRC would be required 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”.⁴¹ In so requiring, the Court was merely echoing international practice. International courts and tribunals consistently require documentary evidence of alleged losses of life as a prerequisite for awarding compensation.⁴² The International Criminal Court, for example, relied on death certificates to establish losses of life in Ituri in the reparation phase of the *Katanga* case.⁴³ Consistent with this approach, the Terms of Reference in the present case make clear that the experts were to provide an estimate of deaths “[b]ased on the evidence available in the case file and documents publicly available, particularly the United Nations Reports mentioned in the 2005 Judgment”.⁴⁴

31. Dr Guha-Sapir does nothing of the sort. She does not “demonstrate” or “prove” any deaths. She does not directly rely on any death certificates or any

⁴¹ *Armed Activities* (2005), para. 260 (emphasis added).

⁴² See UCM, paras. 5.8-5.12.

⁴³ *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. 119.

⁴⁴ The Court’s Order of 8 September 2020, para. 16(2) (emphasis added).

other documentary evidence for that matter. Indeed, she rather conspicuously ignores *all* of the evidence the DRC submitted with its pleadings.

32. Rather than relying on evidence from the case file or the UN reports mentioned in the 2005 Judgment, Dr Guha-Sapir runs a statistical analysis based on estimates for the BCDR and the PCDR. These estimates are, however, fraught with uncertainties.

33. A key threshold problem is that the BCDR is impossible to ascertain. There is no way to know for sure what the CDR would have been during the relevant period had there been no conflict. Dr Guha-Sapir attempts to circumvent this problem by using the CDR from the year before the conflict as a proxy.⁴⁵ Specifically, she assumes that the CDR from 1998 to 2003 would have been the same as the CDR in 1997.⁴⁶ There are, however, numerous reasons why the hypothetical CDR from 1998 to 2003 in the absence of a conflict would have differed from the CDR in 1997. Indeed, as Dr Guha-Sapir has noted in her writings, “it is difficult to designate a point in time with which to compare the impact of conflict on mortality in countries such as Somalia and DRC which exist in a cycle of chronic emergency”.⁴⁷

34. Estimating the PCDR is equally problematic. There is simply no way of knowing for sure what the CDR was during the conflict period, given the

⁴⁵ Experts Report, para. 61.

⁴⁶ *Ibid.*

⁴⁷ R. Ratnayake, O. Degomme, C. Altare & D. Guha-Sapir, WHO Collaborating Centre for Research on Epidemiology of Disasters, “Methods and Tools to Evaluate Mortality in Conflicts: Critical Review, Case-Studies and Applications”, *CRED Occasional Paper No. 237*, 2008, p. 6; *see also* F. Checchi & L. Roberts, “Documenting Mortality in Crises: What Keeps Us from Doing Better?” *PLOS Med*, Vol. 5 No. 7, e146 (2008) (“Available pre-crisis mortality estimates come from census or national health surveys, but they are often imprecise at administrative levels below the national level, or may be outdated, especially in chronic crises.”).

dangerous situation on the ground and other limitations, including the remoteness of much of the DRC. Even Dr Guha-Sapir herself has elsewhere acknowledged this problem, writing in 2008 that death estimates are “highly controversial” and overestimates of deaths from armed conflicts are “common”.⁴⁸ Her way around this difficulty here is to rely on sample surveys. Yet as discussed more in Section II.D below, sample surveys—and particularly the ones relied on by Dr Guha-Sapir—are extremely unreliable.

35. For these reasons, among many others, commentators have widely criticised the “excess deaths” methodology to estimate the number of deaths attributable to a conflict. In her writings, Dr Guha-Sapir herself has emphasised the need for “[v]erifiable body counts from mortuaries and vital registration records” in producing reliable death estimates.⁴⁹ But this is not what she chose to do here.

B. Properly Applied, Dr Guha-Sapir’s Methodology Would Suggest There Were No Excess Deaths During the Relevant Period

36. Even if Dr Guha-Sapir’s methodology were not riddled with inherent limitations and could be used to estimate the number of “excess deaths” during the conflict, a proper application of her own approach here would suggest that there were no excess deaths in the DRC between 1998 and 2003.

37. The most authoritative estimates for annual CDRs are those made by the United Nations; specifically, the UN Population Division in its regularly revised set of official statistics published under the name World Population

⁴⁸ D. Guha-Sapir & F. Checchi, “Science and politics of disaster death tolls”, *British Medical Journal*, Vol. 362 (2018).

⁴⁹ *Ibid.*

Prospects.⁵⁰ The World Bank uses these estimates for its World Development Indicators,⁵¹ which Dr Guha-Sapir herself has relied on to estimate BCDRs in the past.⁵²

38. The most recent, 2019 revision of the UN Population Division’s statistics states the following figures for the CDR in the DRC in the years from 1997 to 2003:

Year	CDR (deaths per 1,000 individuals per year)	CDR (deaths per 1,000 individuals per month)
1997	16.633 ⁵³	1.386
1998	16.514 ⁵⁴	1.376
1999	16.288 ⁵⁵	1.357

⁵⁰ See United Nations, *Department of Economic and Social Affairs: Population Dynamics*, available at <https://population.un.org/wpp/> (last accessed 12 Feb. 2021).

⁵¹ See World Bank, *Death rate, crude (per 1,000 people) - Congo, Dem. Rep.*, available at <https://data.worldbank.org/indicator/SP.DYN.CDRT.IN?locations=CD> (last accessed 12 Feb. 2021).

⁵² P. Heudtlass, N. Speybroeck & D. Guha-Sapir, “Excess mortality in refugees, internally displaced persons and resident populations in complex humanitarian emergencies (1998-2012) - Insights from operational data, Conflict and Health”, *Conflict and Health*, Vol. 10 (2016).

⁵³ An Excel file with all the statistics for annual demographic indicators for the 2019 revision of *World Population Prospects* may be downloaded by clicking on the first link on this webpage: United Nations, *Department of Economic and Social Affairs, Population Division (2019), World Population Prospects 2019 – Special Aggregates, Online Edition. Rev. 1.*, available at <https://population.un.org/wpp/Download/SpecialAggregates/EconomicTrading/> (last accessed 12 Feb. 2021). The estimate of 16.633 for the CDR of the DRC in 1997 can be seen at cells L-49706, L-49916, L-50015, L-50170, L-50328, L-50353, and L-50471.

⁵⁴ *Ibid.* The estimate of 16.514 for the CDR of the DRC in 1998 can be seen at cells L-50761, L-50971, L-51070, L-51208, L-51383, L-51408, and L-51526.

⁵⁵ *Ibid.* The estimate of 16.288 for the CDR of the DRC in 1999 can be seen at cells L-51816, L-52026, L-52125, L-52280, L-52438, L-52463, and L-52581.

2000	15.955 ⁵⁶	1.329
2001	15.531 ⁵⁷	1.294
2002	15.052 ⁵⁸	1.254
2003	14.554 ⁵⁹	1.212

39. Applying Dr Guha-Sapir’s methodology, the BCDR would be the 1997 figure: 1.386 deaths per 1,000 individuals per month. The PCDR would be the weighted average of the CDRs from 1998 to 2003: 1.306 per month.⁶⁰ In other words, according to the most recent UN data, there were fewer deaths on average during the relevant period than during 1997. Indeed, the UN Population Division’s figures show that the CDR in the DRC decreased each and every year in the period from 1997 to 2003. This would mean, under Dr Guha-Sapir’s methodology, that there were no excess deaths attributable to the conflict.

40. To be clear, it is not Uganda’s position that the armed conflict actually caused a decrease in deaths in the DRC. The reason why the CDR decreased from 1997 to 2003 is likely unknowable and could be due to many other factors, such as improved access to food and medical supplies (due to the presence

⁵⁶ *Ibid.* The estimate of 15.955 for the CDR of the DRC in 2000 can be seen at cells L-52871, L-53081, L-53180, L-53335, L-53493, L-53518, and L-53636.

⁵⁷ *Ibid.* The estimate of 15.531 for the CDR of the DRC in 2001 can be seen at cells L-53926, L-54136, L-54235, L-54390, L-54548, L-54573, and L-54691.

⁵⁸ *Ibid.* The estimate of 15.052 for the CDR of the DRC in 2002 can be seen at cells L-54981, L-55191, L-55290, L-55445, L-55603, L-55628, and L-55746.

⁵⁹ *Ibid.* The estimate of 14.554 for the CDR of the DRC in 2003 can be seen at cells L-56036, L-56246, L-56345, L-56500, L-56658, L-56683, and L-56801.

⁶⁰ In calculating this average, Uganda took into account the fact that the CDRs for 1998 and 2003 should only be given partial weight, since the relevant period does not cover the entirety of both years.

of international or non-governmental relief organisations) or climate conditions that improved agriculture. Rather, the point is two-fold: (1) the fact that the CDR decreased during the conflict indicates that the number of deaths resulting therefrom was small; and (2) Dr Guha-Sapir’s methodology is highly unreliable and therefore cannot serve as the basis for any legal findings by the Court.

C. Dr Guha-Sapir’s BCDR Estimate Is Outdated

41. As stated, Dr Guha-Sapir uses the 1997 CDR in the DRC as the BCDR for her estimations. In choosing that figure, however, she does not rely on the United Nations’ most recent revision of its official CDR statistics, but rather on an outdated figure from UNICEF. In particular, she states:

“The CDR in DR Congo reported by UNICEF in 1997 was 14/1000 per annum translates [*sic*] to 1.2/1000/month was [*sic*] chosen as the baseline for this analysis.”⁶¹

42. In the footnote, she cites to the 1999 edition of UNICEF’s annual report, *The State of the World’s Children*.⁶² Each edition of the report publishes the estimated crude death rate for every country in the world two years earlier. Dr Guha-Sapir is correct that the 1999 report stated an estimate of the CDR in the DRC in 1997 of 14 deaths per 1,000 people per year.⁶³ But UNICEF, whose mandate is focused on children, does not measure this rate on its own. Rather, the annual reports make clear that the CDR estimates come directly from the official UN

⁶¹ Experts Report, para. 61. To be more precise, this figure should have been 1.167, as 14 divided by 12 equals 1.167, when rounded to the nearest thousandth.

⁶² *Ibid.*, para. 61, note 10.

⁶³ UNICEF, *The State of the World’s Children 1999*, p. 110.

statistics published by the UN Population Division.⁶⁴ In stating this, the annual reports also note: “These and other internationally produced estimates are revised periodically.”⁶⁵

43. That is exactly what happened here. In 1999, the UN Population Division’s estimate for the CDR in the DRC in 1997 may have been 14 deaths per 1,000 people per year.⁶⁶ But in its 2002 revision, the Division revised its estimate to 25.54 deaths.⁶⁷ Then in its 2004 revision, the Division revised its estimate again to 21.474 deaths.⁶⁸ And in its most recent revision in 2019, the UN Population Division estimated that the CDR in the DRC in 1997 was, as noted above in Section

⁶⁴ *Ibid.*, p. 92 (“Data for life expectancy, total fertility rates, crude birth and death rates, etc. are part of the regular work on estimates and projections undertaken by the United Nations Population Division.”).

⁶⁵ *Ibid.*

⁶⁶ It is not clear where UNICEF obtained this figure from, as the UN Population Division at the time appears to have only been reporting CDR estimates for five-year time periods, not specific years. In this respect, the 1998 revision of *World Population Prospects* estimated that the CDR for the DRC from 1995 to 2000 would be 14.707. A zip file for all the statistics for that revision may be downloaded here: United Nations, *Department of Economic and Social Affairs, Population Division (1998), World Population Prospects 1998*, available at <https://population.un.org/wpp/Download/Archive/CSV/> (last accessed 12 Feb. 2021). The estimate of 14.707 for the CDR of the DRC from 1995 to 2000 can be seen at cell P-1231 of the file named “WPP1998_Period_Indicators_Medium.csv”.

⁶⁷ A zip file with all the statistics for the 2002 revision of *World Population Prospects* may be downloaded here: United Nations, *Department of Economic and Social Affairs, Population Division (2002), World Population Prospects 2002*, available at <https://population.un.org/wpp/Download/Archive/Standard/> (last accessed 12 Feb. 2021). The estimate of 25.54 for the CDR of the DRC in 1997 can be seen at cell I-1234 of the Excel file named “Supplementary tabulation 1.xls”, which is located within the folder named “WPP2002_EXCEL_FILES”.

⁶⁸ A zip file with all the statistics for the 2004 revision of *World Population Prospects* may be downloaded here: United Nations, *Department of Economic and Social Affairs, Population Division (2004), World Population Prospects 2004*, available at <https://population.un.org/wpp/Download/Archive/Standard/> (last accessed 12 Feb. 2021). The estimate of 21.474 for the CDR of the DRC in 1997 can be seen at cell H-2657 of the Excel file named “WPP2004_SUP_F1_ANNUAL_DEMOGRAPHIC_INDICATORS.XLS”, which is located within the sub-folder named “Supplement” within the folder named “WPP2004_EXCEL_FILES”.

II.B, 16.633 deaths per 1,000 people per year,⁶⁹ or 1.386 per 1,000 people per month. This figure is substantially higher than the figure of 1.2 that Dr Guha Sapir used for her calculations, a fact that by itself renders her calculations meaningless.

D. Dr Guha-Sapir's Estimate of the PCDR Is Too High

44. Dr Guha-Sapir's estimate for the PCDR during the relevant period (2.929 deaths per 1,000 individuals per month⁷⁰) is even more unreliable than her estimate of the BCDR. In the first place, Uganda notes that it is more than two times higher than the UN Population Division's estimate cited above.⁷¹ Moreover, rather than rely on a UN estimate (albeit an outdated one) as she did for the BCDR, she took an altogether different approach for approximating the PCDR. Specifically, Dr Guha-Sapir looks to retrospective sample surveys to derive her PCDR estimate. It is not at all clear to Uganda why she decided to rely on a UN statistic for one number but an entirely different source for the other. Absent a cogent explanation for doing so, such a methodology is not defensible.

⁶⁹ An Excel file with all the statistics for annual demographic indicators for the 2019 revision of *World Population Prospects* may be downloaded by clicking on the first link on this webpage: United Nations, *Department of Economic and Social Affairs, Population Division (2019), World Population Prospects 2019 – Special Aggregates, Online Edition. Rev. 1., available at <https://population.un.org/wpp/Download/SpecialAggregates/EconomicTrading/>* (last accessed 12 Feb. 2021). The estimate of 16.633 for the CDR of the DRC in 1997 can be seen at cells L-49706, L-49916, L-50015, L-50170, L-50328, L-50353, and L-50471.

⁷⁰ Experts Report, p. 28 Table 2.2.

⁷¹ See *supra* Section II.B. The weighted average of the CDR in the DRC during the relevant period estimated by the UN Population Division is 1.306 per 1,000 individuals per month.

45. In any event, even setting this issue aside, relying on retrospective sample surveys to calculate any CDR is exceedingly problematic. One well-known review of mortality surveys, approvingly cited by Dr Guha-Sapir,⁷² observes:

“Significant errors and imprecision in the methodology and reporting of nutrition and mortality surveys were identified. While there was an improvement in the quality of nutrition surveys over the years, the quality of mortality surveys remained poor.”⁷³

46. Even Dr Guha-Sapir herself has acknowledged that sample surveys have “inevitably large confidence intervals and all the usual sampling biases that prevail in affected communities”, and has thus stated that “estimations from sample surveys need more innovative thinking”.⁷⁴

47. Moreover, even if retrospective sample surveys in theory could constitute an acceptable methodology for estimating the PCDR, the specific surveys Dr Guha-Sapir relies on are not credible. She states that her PCDR estimate is derived from 38 surveys,⁷⁵ but that is misleading. The 38 surveys in question were not independent from one another. They were also not impartially conducted. All of them were conducted by advocacy organisations: 33 by the IRC, 31 of which were under the same lead investigator (Dr Les Roberts), and the remaining five by Médecins sans Frontières (“MSF”).⁷⁶

⁷² P. Heudtlass, N. Speybroeck & D. Guha-Sapir, “Excess mortality in refugees, internally displaced persons and resident populations in complex humanitarian emergencies (1998-2012) - Insights from operational data, Conflict and Health”, *Conflict and Health*, Vol. 10 (2016) p. 2, note 11.

⁷³ C. Prudhon & P. Spiegel, “A review of methodology and analysis of nutrition and mortality surveys conducted in humanitarian emergencies from October 1993 to April 2004”, *Emerging Themes in Epidemiology*, No. 4:10 (2007).

⁷⁴ D. Guha-Sapir & F. Checchi, “Science and politics of disaster death tolls”, *British Medical Journal*, Vol. 362 (2018).

⁷⁵ Experts Report, para. 55.

⁷⁶ *Ibid.*, pp. 37-38, Appendix 2.3.

48. Uganda explained in its Counter-Memorial why the IRC surveys could not be trusted.⁷⁷ In summary, they were undertaken for advocacy purposes, are inconsistent with UN data, had many methodological weaknesses likely to inflate the numbers, and were substantially criticised by three independent and reputable studies, including one conducted by the World Health Organization's Health and Nutrition Tracking Service.⁷⁸ Even Dr Roberts, the lead investigator on most of the IRC surveys, has acknowledged that they suffered from methodological weaknesses.⁷⁹ Dr Guha-Sapir herself has also joined in the criticism of the reliability of the IRC surveys.⁸⁰ It is thus curious that in her report she does not address any of those criticisms but rather accepts the surveys at face value, a fact that casts doubt on her impartiality.

⁷⁷ UCM, paras. 5.24-5.49.

⁷⁸ *Ibid.*

⁷⁹ See *ibid.*, paras. 5.27, 5.29 (citing Les Roberts, IRC Health Unit, *Mortality in eastern Democratic Republic of the Congo: Results from 11 Surveys* (2001), p. 15 (UCM Annex 51) (“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.’”); Human Security Report Project, “Part II, The Shrinking Costs of War”, Human Security Report (2009-2010) (UCM Annex 64); see also F. Checchi & L. Roberts, “Documenting Mortality in Crises: What Keeps Us from Doing Better?” *PLOS Med*, Vol. 5 No. 7, e146 (2008) (“Survey implementation is often haphazard and fraught with biases, and surveys conducted during complex humanitarian emergencies are prone to several methodological limitations. In most crises, lists of households are non-existent and the residential layout is chaotic, making simple or systematic random sampling difficult. An alternative sampling design that is commonly employed, even though it is less precise and more prone to bias, is multi-stage cluster sampling.”).

⁸⁰ R. Ratnayake, O. Degomme, C. Altare & D. Guha-Sapir, “Coming together to document mortality in conflict situations: proceedings of a symposium”, *Conflict and Health*, No. 3:2 (2009) (“[Surveys in] the Democratic Republic of Congo by the International Rescue Committee (IRC) have faced security and logistical obstacles that intensify the methodological limitations and risk to personnel, hinder the implementation of best practices and ensure that difficult choices must be made throughout the data collection period.”; “[D]ata... may be anecdotal, unsound or unrepresentative.”; “[A court case] may require that mortality data is substantiated by the identification of victims.”).

49. The MSF surveys, which have not yet been cited to or addressed by the Parties, suffer from similar issues. The data was gathered simply through questionnaires, without requiring documentary evidence.⁸¹ And the researchers themselves admitted that an aim of the project was “to inform advocacy efforts”,⁸² and in particular to justify their conclusion that “[f]unds allocated to humanitarian action in the DRC must be increased considerably”.⁸³

50. In an attempt to defend the credibility of the IRC and MSF surveys, Dr Guha-Sapir points out that they “were readily available in Conflict Survey Repository – CEDAT”.⁸⁴ Yet in her academic writing she has previously expressed the view that, in CEDAT, the “quality of mortality surveys in conflicts were variable and coverage uneven”,⁸⁵ “[d]ata quality is a matter of concern”,⁸⁶ and “limited peer review ... affects both quality and credibility of their work”.⁸⁷

51. In light of the credibility issues with the IRC and MSF surveys, it is not clear why Dr Guha-Sapir does not give any weight to the study conducted by two demographers working for the Association for the Development of Applied Research to Social Sciences, which provides an estimate of 200,000 deaths

⁸¹ M. Van Herp et al., “Mortality, Violence and Lack of Access to Health-care in the Democratic Republic of Congo”, *Disasters*, Vol. 27, No. 2 (2003), p. 145.

⁸² *Ibid.*, p. 142.

⁸³ *Ibid.*, p. 152.

⁸⁴ Experts Report, para. 55.

⁸⁵ O. Degomme & D. Guha-Sapir, “Mortality and nutrition surveys by Non-Governmental organisations. Perspectives from the CE-DAT database”, *Emerging Themes in Epidemiology*, No. 4:11 (2007).

⁸⁶ C. Altare & D. Guha-Sapir, “The Complex Emergency Database: A Global Repository of Small-Scale Surveys on Nutrition, Health and Mortality”, *PLoS ONE*, No. 9(10): e109022 (2014).

⁸⁷ O. Degomme & D. Guha-Sapir, “Mortality and nutrition surveys by Non-Governmental organisations. Perspectives from the CE-DAT database”, *Emerging Themes in Epidemiology*, No. 4:11 (2007).

attributable to the conflict.⁸⁸ The DRC itself cites to this study in its Memorial, and indeed ultimately puts forward an estimate much closer to this figure.⁸⁹

E. The Experts' Estimated Reparation for Indirect Deaths Improperly Assumes That Uganda Is Responsible for All the Deaths Attributable to the Conflict

52. Dr Guha-Sapir concludes at the end of her report that there were 4,958,775 indirect deaths attributable to the conflict, and notes that “[t]he unit costs per life for indirect civilian life lost is USD 15 000 as per estimation of Geoffrey Senogles”.⁹⁰ Table A included in the Introduction to the Experts Report makes clear that these two numbers are simply multiplied together to yield the quantum ostensibly due for indirect deaths: US\$ 74,381,625,000.⁹¹ Among the many other problems with this number, it improperly assumes that Uganda is responsible for all the deaths attributable to the conflict, which it plainly is not.

53. In its 2005 Judgment, the Court made clear that the deaths that occurred because of the armed conflict were due to “the actions of the various parties”, not just Uganda.⁹² The DRC has expressed its agreement, stating in its Memorial: “Of course, it is out of the question for the DRC to claim that Uganda

⁸⁸ 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) (DRCM Annex 2.19; UCM Annex 62) (“We can estimate at 200,000 the excess deaths in the half of the country which was subject to unrest.”) (Translation by Counsel, original in French: “[O]n peut estimer à 200 000 les morts en surnombre dans la moitié du pays qui a été soumise aux troubles.”); see DRCM, para. 2.68; UCM, para. 5.25.

⁸⁹ The DRC considered it reasonable to use an estimate of 400,000 victims, ten times lower than the four-million figure, because of “the carefulness that has to be observed in a legal proceeding”. See DRCM, para. 2.70 (Translation by Counsel, original in French: “la prudence qu’il convient d’observer dans le cadre d’une procédure judiciaire”).

⁹⁰ Experts Report, para. 71.

⁹¹ *Ibid.*, p. 4, Table A.

⁹² *Armed Activities* (2005), para. 221.

is responsible for all victims caused by the conflict.”⁹³ Indeed, this is why the Court has held that, in order to receive compensation, the DRC must “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”.⁹⁴

54. Unable to supply evidence of this causation, the DRC’s Memorial proposes simply to use a “distribution key” of 45%, thereby asserting that Uganda was responsible for 45% of the alleged 400,000 deaths attributable to the conflict (i.e., 180,000 deaths).⁹⁵ Uganda explained in its Counter-Memorial how this distribution key was entirely arbitrary.⁹⁶ Dr Guha-Sapir admits that “the specific details of the methods and reasoning behind [this number] are not readily available”,⁹⁷ which suggests that she too found the number unsustainable. Nevertheless, she proceeds to apply it in Table 2.2 of her report in order “[t]o make [her] estimates roughly comparable to those presented by Congo”.⁹⁸ Why it is appropriate to alter her numbers so as to fit the DRC’s claims is not explained.

55. In Table A at the beginning of the Experts Report, on the other hand, the 45% “distribution key” is not applied, nor is any other coefficient applied to account for the fact that Uganda was not responsible for all of the deaths attributable to the conflict. If one were to apply the DRC’s distribution key of 45% across-the-board to the figures produced in the Experts Report, this would reduce the amount of the Experts’ estimated reparation for indirect deaths by US\$ 40.9

⁹³ DRCM, para. 2.71.

⁹⁴ *Armed Activities* (2005), para. 260 (emphasis added).

⁹⁵ DRCM, para. 2.71.

⁹⁶ UCM, paras. 5.50-5.56.

⁹⁷ Experts Report, para. 49.

⁹⁸ *Ibid.*, para. 65, p. 28, Table 2.2.

billion. Uganda submits that a differential of that magnitude based on unexplained and inconsistent use of a “distribution key” clearly calls into question the rigour of the Experts Report. Moreover, as explained in its pleadings,⁹⁹ Uganda’s share of responsibility should be far lower than 45%.

F. The Experts’ Estimated Reparation for Indirect Deaths Is *Ultra Petita*

56. The expert’s estimated reparations for indirect deaths should be disregarded for yet another reason: they are *ultra petita*.

57. As the Court well knows, the rule of *non ultra petita* precludes awarding a party more than it requested. The Court’s decision on compensation in *Corfu Channel* illustrates the point. There, the United Kingdom claimed £ 700,087 for the total loss of a warship.¹⁰⁰ Experts appointed by the Court estimated the damages at a higher figure: £ 716,780.¹⁰¹ The Court held that it “cannot award more than the amount claimed in the submission of the United Kingdom Government” and consequently awarded the lower amount presented in the claim.¹⁰²

58. The DRC requested approximately US\$ 4.2 billion in reparation for indirect deaths.¹⁰³ The experts’ estimated reparation of approximately US\$ 74.4 billion far exceeds that amount, and thus cannot be granted by the Court.

⁹⁹ UCM, paras. 5.57-5.83; Uganda’s Comments on the DRC’s Responses to the Questions from the Court dated 11 June 2018 (7 Jan. 2019) (hereinafter “UCDR”), paras. 9.1-9.10.

¹⁰⁰ *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Judgement of 15th December 1949: I.C.J. Reports 1949, p. 249

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

¹⁰³ The DRC does not neatly separate its requested reparations into direct and indirect deaths, but the summary figures at paragraph 7.15 of its Memorial make clear that it is requesting reparations

* * *

59. In conclusion, Dr Guha-Sapir's report does not provide a basis on which any conclusions of fact may be made. Her estimate that 4,987,756 deaths can be attributed to the conflict is wholly unfounded. Not only is her "excess deaths" methodology entirely inapposite in this judicial proceeding, the variables she has plugged into her equation are entirely unsupportable. Indeed, her own approach, if corrected to use the United Nations' most recently revised CDR statistics, would suggest that there were no indirect deaths attributable to the conflict at all. In Uganda's view, that fact only underscores the wholesale unreliability of her report.

for 220,000 indirect deaths, which the DRC values at US\$ 18,913 each, leading to a total figure of US\$ 4,160,860,000. DRCM, para. 7.15.

III. OBSERVATIONS ON THE SENOGLES REPORT

60. The third report included with the Experts Report is entitled “Quantum Recommended Amounts: Human Lives and Property Damage”, and was prepared by Mr Geoffrey Senogles (“Senogles Report”). As the title reflects, the Senogles Report deals with two broad issues: the quantum of compensation recommended for harms to individuals and for property damages. Uganda offer its observations on these two aspects of Mr Senogles Report in the sections that follow.

A. Injury to Persons

61. The portions of the Senogles Report relating to harms to individuals confirms what Uganda has already showed—that the compensation amounts the DRC claims for loss of life and other injuries are unfounded and unverifiable.¹⁰⁴

62. Mr Senogles makes this clear in his findings concerning the amounts the DRC seeks in alleged instances of deaths resulting from targeted violence, deaths not resulting from targeted violence, physical injuries, sexual violence, the recruitment of child soldiers, and displacement.

- With respect to the DRC’s claim for US\$ 34,000 for each death resulting from targeted violence, which is nominally based on Congolese court awards, Mr Senogles observes that his review of the DRC’s evidence “reveals that neither of the extracts [of court decisions] provided is complete and neither contains the amounts of compensation awarded by the two courts.”¹⁰⁵ He observes further that “it is not clear ... how these documents evidence, as they are asserted to do, the

¹⁰⁴ UCM, Chapter 5.

¹⁰⁵ Experts Report, para. 88.

amount of USD 34,000 per individual and it therefore follows that, in my opinion, the individual flat rate amount claimed has not been supported by clear documentary evidence.”¹⁰⁶ Accordingly, Mr Senogles concludes that there is “no evidentiary basis in the record on which to measure the extent to which this figure is robust, reliable and reasonable.”¹⁰⁷

- With respect to the DRC’s claim for US\$ 18,913 for each death not resulting from targeted violence, Mr Senogles concludes that the DRC’s methodology underlying that amount similarly “contains several matters of detail that are open to question”.¹⁰⁸ For example, “[t]he victim identification forms made available in the DRC evidence, do not facilitate a comprehensive review with which to assess the accuracy of the asserted average age of relevant victims.”¹⁰⁹ Nor did the DRC provide “clear support” for US\$ 753.20 as being the country’s GDP per head for the year 2015.¹¹⁰ And, he writes, the DRC’s “rationale for adopting the year 2015 for the GDP per head data point is not beyond debate” and cannot be “a robust basis on which to assert losses of income that, continuing the averaging methodology adopted by the DRC, may have commenced from as early as 1998 (some 17 years prior to the year chosen by the DRC).”¹¹¹

¹⁰⁶ Experts Report, para. 88.

¹⁰⁷ *Ibid.*, para. 88.

¹⁰⁸ *Ibid.*, para. 90.

¹⁰⁹ *Ibid.*, para. 91.1.

¹¹⁰ *Ibid.*, para. 91.2.

¹¹¹ *Ibid.*, para. 114.

- With respect to the amounts the DRC claims for serious physical injuries, Mr Senogles observes that “[n]o supporting evidence is provided by the DRC for the USD 3,500 claimed amount that is stated to be based on judgements of Congolese courts for serious injuries.” There is therefore, he concludes, “no evidentiary basis on which to assess this claim figure.”¹¹² Similarly “without evidence” are the two “minor injury” compensation figures of US\$ 150 and US\$ 100 that the DRC proposes.¹¹³
- With respect to the figures sought by the DRC in the case of sexual violence, the Senogles Report observes that “there is no supporting court evidence from the DRC for the US\$ 12,600 and US\$ 23,200 claimed amounts stated to be based on judgements of Congolese courts.”¹¹⁴ There is thus, he says, “no evidentiary basis on which to assess these claim figures.”¹¹⁵
- With respect to the US\$ 12,000 the DRC claims for each child soldier, Mr Senogles observes that it “is not based on evidence of loss, but rather is asserted for each individual” based solely on what “the DRC deems reasonable.”¹¹⁶ As with the other elements of the DRC’s claims, he writes that “it is the case that there is no supporting quantum evidence

¹¹² *Ibid.*, para. 114.

¹¹³ *Ibid.*, para. 117.

¹¹⁴ *Ibid.*, para. 122.

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*, para. 127.

from the DRC for the USD 12,000” per each individual, and therefore “no evidentiary basis on which to assess these claim figures.”¹¹⁷

- Finally, with respect to the DRC’s claim to “flat rates” of US\$ 300 and US\$ 100 for each allegedly displaced individual, Mr Senogles is equally frank, writing: “no supporting evidence is provided by the DRC for these two flat rates claimed.”¹¹⁸

63. These stark conclusions inescapably lead to a conclusion that the DRC has not provided sufficient evidence to prove its claims for loss of life and other injuries, notwithstanding the Court’s admonition in the 2005 Judgment that such evidence would be required at this stage of the proceedings.¹¹⁹

64. Moreover, Mr Senogles’ conclusions must be viewed against the backdrop of the Court’s Terms of Reference for the experts. The Court asked the experts, *inter alia*, to provide an opinion on the following question, which was limited to “loss of human life”:

“(b) What was, according to the prevailing practice in the Democratic Republic of the Congo in terms of loss of human life during the period in question, the scale of compensation due for the loss of individual human life?”¹²⁰

¹¹⁷ *Ibid.*, para. 130.

¹¹⁸ *Ibid.*, para. 135.

¹¹⁹ *Armed Activities* (2005), para. 260 (requiring the DRC 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”) (emphasis added).

¹²⁰ The Court’s Order of 8 September 2020, para. 16.

65. As stated, Mr Senogles was unable to make the requested determination based on the materials the DRC provided to the Court. Nor does he appear to have undertaken an independent examination of the question.

66. To the contrary, whether because he was unable to determine the relevant practice in the DRC or otherwise, he took a different approach that departed from the Court's mandate: he turned to the mass claims process before the UN Compensation Commission ("UNCC" or "Commission") to develop his recommended compensation figures.

67. Mr Senogles strayed from the Court's Terms of Reference in another respect as well. Instead of limiting his recommendations to the "loss of human life," Mr Senogles took it upon himself to also recommend compensation figures for physical injuries, sexual violence, recruitment of child soldiers, and displacement. Since these parts of his report are plainly *ultra vires*, Uganda considers that they should be disregarded by the Court.

68. In any event, none of the compensation rates the Senogles Report recommends can be transposed from the UNCC context to this one. Those proceedings could scarcely be more different from these. The UNCC adopted a unique mass claims process that bears no semblance to the traditional standard of proof in inter-State proceedings like this one. Mr Senogles' reliance on figures from the UNCC is therefore flawed at its very conception. To compound matters, Mr Senogles also misapprehends and misapplies the UNCC's methodologies. Uganda discusses each of these two fatal flaws in turn.

1. The UNCC Mass Claims Process Has No Application in This Case

69. As stated, rather than determine the prevailing practice in the DRC in respect of the compensation due for loss of life, the Senogles Report looks instead to the UNCC. Mr Senogles recommends "individual flat rate compensation

amounts” based on the UNCC’s “mass claims programme.”¹²¹ In particular, he recommends the following fixed amounts for *all alleged victims* of the various types of injuries claimed by the DRC,¹²² which are summarised in the table below:

¹²¹ Experts Report, paras. 92-94.

¹²² *Ibid.*, para. 139.

	Claimed amount	Recommended amount
A) Human lives lost		
Deaths/injuries resulting from acts of violence deliberately targeted at civilian populations	USD 34,000	USD 30,000
Deaths/injuries not resulting from violence targeted at civilian populations but rather, as collateral victims	USD 18,913	USD 15,000
B) Injuries and mutilations		
Injury resulting from acts of violence deliberately targeted at civilian populations		
Based on Congolese court awards:		
- Serious injury	USD 3,500	USD 3,500
- Minor injury	USD 150	USD 150
Based on Congolese ordinary courts:		
- Minor injury	USD 100	USD 100
Injury not resulting from violence targeted at civilian populations but as collateral victims		
Based on Congolese court awards:		
- Ituri: serious injury	USD 3,500	USD 3,500
- Ituri: minor injury	USD 150	USD 150
Based on Congolese ordinary courts:		
- Eastern Congo, Ituri, Kisangani: minor	USD 100	USD 100
C) Incidences of rape		
Based on Congolese court awards:		
- "Simple" rape	USD 12,600	USD 5,000
- Aggravated rape	USD 23,200	USD 5,000
D) Child soldiers		
Based on a figure deemed reasonable by DRC:	USD 12,000	USD 10,000
E) Population flight and displacement		
Based on figures deemed reasonable by DRC:		
- Ituri	USD 300	USD 300
- Eastern Congo and Kisangani	USD 100	USD 100

70. Mr Senogles purports to justify this resort to UNCC fixed amounts by claiming that “the UNCC’s methodologies, decisions and awards of compensation in respect of losses attributed to injury to persons” are “of most direct

relevance to the present matter under review.”¹²³ He is mistaken. The UNCC had a very different role than the Court and it developed a very specific methodology to fit that role. The results of that mass claims process are not transposable to these inter-State proceedings. Moreover, even if the UNCC approach could be transplanted to this very different setting (*quod non*), it would still be impossible to apply it in practice, given the DRC’s wholesale failure to present competent—or, frequently, *any*—evidence of the injuries it alleges.

71. The Court will recall that the UNCC was established by the UN Security Council to address the injuries resulting from Iraq’s invasion and occupation of Kuwait in 1990-1991.¹²⁴ The UN Secretary-General specifically stated at the time that the Commission “is *not a court or an arbitral tribunal* before which the parties appear; it is a *political organ* that performs an essentially fact-finding function of examining claims, verifying their validity, evaluating losses, assessing payments and resolving disputed claims.”¹²⁵

72. The UNCC operated for approximately 15 years, at its height employing roughly 300 lawyers, accountants, loss adjusters and information technology specialists to process a total of about 2.7 million claims.¹²⁶ To do its work, the Commission adopted a highly complex system in which claims were divided into categories, with certain fixed amounts used for the expedited

¹²³ Experts Report, paras. 92, 94.

¹²⁴ See U.N. Security Council, 2981st Meeting, *Resolution 687* (1991), U.N. Doc. S/RES/687 (8 Apr. 1991), para. 16, Annex 1 in Uganda’s Counter-Memorial.

¹²⁵ U.N. Security Council, *Report of the Secretary-General Pursuant to Paragraph 19 of Security Council Resolution 687*, U.N. Doc. S/22449 (2 May 1991), para. 20 (emphasis added).

¹²⁶ See United Nations Compensation Commission, *Home*, available at <http://www.uncc.ch/home> (last accessed 13 Feb. 2021).

processing of claims based on minimal evidence, and higher amounts awarded for less expedited claims based on greater evidence.¹²⁷

73. While this approach has merit in some circumstances,¹²⁸ it plainly cannot serve as a model in this inter-State proceeding, governed as it is by specific rules and requirements for proving damages that the Court itself set out in the 2005 Judgment.¹²⁹ The DRC may have alleged large amounts of harm, but that alone does not justify reliance on the UNCC model.

74. Uganda considers that a more relevant precedent is the EECC, which operated from 2001 to 2009. As here, the EECC dealt with large inter-State claims arising from the high-intensity 1998-2000 armed conflict between Eritrea and Ethiopia.¹³⁰ Although the EECC's precise mandate must be borne in mind

¹²⁷ 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.

¹²⁸ 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 Labour Compensation Program; International Commission on Holocaust Era Insurance Claims; Claims Resolution Tribunal for Dormant Accounts; and Holocaust Victim Assets Program.

¹²⁹ 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*". *Armed Activities* (2005), para. 260 (emphasis added).

¹³⁰ 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 26 Jan. 2021).

when considering it as a precedent, it was confronted, as the Court is now, with violations of international law during an armed conflict between two African States. These geographical, sociological and economic circumstances were not present in the context of the reparation scheme which the United Nations Security Council entrusted the UNCC.

75. Following the traditional approach of requiring convincing evidence establishing the existence of harm and its valuation to a high level of certainty, the EECC relied on and closely analysed large amounts of specific, corroborated evidence, including: documentary evidence; medical and hospital records; receipts of expenditures; photographs and satellite imagery; and signed and sworn declarations. Uganda considers it surprising that, having taken it upon himself to look beyond the Court's Terms of Reference, Mr Senogles focused only on the UNCC and took no account of the more pertinent experience from the EECC.

76. Another significant shortcoming with Mr Senogles' recommendations is that he cherry-picks one element from the UNCC's methodology—individual flat rate amounts—while completely ignoring that this element was just one part of an integrated package. It was designed to operate in tandem with other elements to the UNCC's overall methodology, elements that are missing in this case.

77. For example, the UNCC required 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 loss or injury at issue; (3) developing the evidentiary threshold necessary for an individual to prove membership in the class; (4) designing claims forms to be filed by or on behalf of each, named individual; and (5) establishing a mechanism to verify the evidence, through sampling and regression analysis, that did not require the

examination of each claim but did require testing of specific evidence on specific victims. Further, to the extent that a certain percentage of claims forms sampled did not meet the relevant evidentiary threshold, the total amount to be compensated for that entire class was reduced by that percentage.

78. None of these steps, let alone in that sequence, has been taken in this case. By failing to recognise the critical distinction between the UNCC's mass claims process and these inter-State proceedings, the Senogles Report commits a fundamental error. Mr Senogles separates two inseparable elements: (1) the proof of harm to a specific victim (an essential aspect never addressed in his report), and (2) the quantum due once the harm is proved. For the UNCC, these elements were inextricably bound together: awarding compensation for a particular category and for a particular harm within that category depended on meeting the required evidentiary threshold.

79. Mr Senogles also ignores the fact that the level of evidence presented to the UNCC determined what category individual claimants fell into and their corresponding entitlement to compensation. Depending on the type of evidence offered and what it showed, claimants for the same type of harm might fall within Category B (minimal evidence), Category C (evidence demonstrating harm at a quantum up to US\$ 100,000), or Category D (evidence demonstrating harm at a quantum of more than US\$ 100,000).

80. The would-be evidence that the DRC has presented in this case stands in stark contrast to that submitted before the UNCC. As Uganda has previously demonstrated, the "evidence" on which the DRC attempts to rely is irredeemably flawed. For example, unlike the claims forms before the UNCC, the "victim identification forms" that the DRC has submitted to the Court, viewed both

individually and collectively, do not constitute reliable evidence on which an award of compensation can be based.¹³¹

81. A majority of the DRC's claims forms do not even identify the victims of the harm alleged, but refer to them instead only as "*non signalé*" (unidentified). In addition, not a single victim identification form is connected to corroborating documentation of any kind. Other problems include—but are not limited to—the fact that many of the forms are illegible, state that the alleged perpetrators ("*auteurs présumés*") were actors other than Uganda, and/or fail to indicate a valuation for the injury alleged.¹³²

82. Quite apart from these elementary flaws, there are also broader, systemic reasons to doubt the reliability of the DRC's claims forms. On the DRC's own admission, they were prepared years after the events in question by a self-interested party specially for purposes of this litigation.¹³³

83. The DRC has also failed to provide a detailed description of its methodology for collecting these forms. This failure gives rise to obvious concerns: when a government official approaches someone and indicates that an international court may render compensation in his/her favour provided that he/she fills out a form, there are reasonable doubts as to whether objective information is actually being gathered. These concerns are only heightened in the absence of corroborating evidence, especially in circumstances where such evidence should exist, whether

¹³¹ See the detailed discussion in UCDR, paras. 1.4-1.69.

¹³² *Ibid.*

¹³³ According to the DRC Memorial, sometime after 2005 the DRC created a "Commission of Experts" that engaged in "extensive data collection" and dispatched "teams" to various locations to gather signed "claims forms" from victims setting out the injury they allegedly suffered. DRCM, paras. 1.30-1.35.

in the form of photographs, invoices, medical records, reconstruction estimates, police reports and so on.

84. In sum, contrary to the recommendation by Mr Senogles, “the UNCC’s methodologies, decisions and awards of compensation” have no “direct relevance”—or, indeed, any relevance—“to the present matter under review.”¹³⁴

2. The Senogles Report Misapprehends and Misapplies the UNCC’s Methodologies

85. In his report, Mr Senogles also misapprehends the UNCC’s methodologies and misapplies them to come up with the individual flat rate amounts he recommends. He plucks inapposite UNCC rates from inapplicable categories of claims that required an evidentiary showing that the DRC has not even begun to meet.

86. As previously stated, the amount and quality of evidence presented to the UNCC determined both the category into which each individual claimant fell as well as the corresponding compensation amount that particular claimant might receive. Mr Senogles should have been aware of this because he “worked on staff at the UNCC in Geneva between 2000 and 2003, and was engaged thereafter as an external independent consultant to continue advising Panels of Commissioners on their valuation decisions.”¹³⁵ On the other hand, since the UNCC during that time period was focused on Categories D, E and F claims, Mr Senogles may not have been familiar with the decisions and procedures most pertinent to the fixed amounts advanced in his report, which concern Categories B and C.

¹³⁴ Experts Report, para. 94.

¹³⁵ *Ibid.*, para. 93, note 33.

87. In any event, the Senogles Report entirely disregards this important aspect of the UNCC’s work (determining the amount and quality of evidence presented by a claimant) and, as a result, commits significant errors. As discussed below, he inexplicably ignores UNCC Category B claims corresponding to lower fixed amounts for minimal evidentiary showings, and instead recommends compensation amounts awarded for Category C claims, which required that “actual loss” be proved. He further compounds these errors by arbitrarily choosing inapposite compensation amounts from within Category C.

a. The Senogles Report Ignores the UNCC’s Approach to Category B Claims

88. The UNCC developed Category B claims to pay *fixed amounts* to any person who, as a result of Iraq’s unlawful invasion and occupation of Kuwait, suffered serious personal injury, or whose spouse, child, or parent died.¹³⁶ Through their government or an international organisation, each claimant submitted a claims form identifying the person killed or injured, his or her nationality, and the date of the injury or death.¹³⁷

89. The evidentiary standards applicable to category B claims were set forth in Article 35(2)(b) of the UNCC Rules:

“For the payment of fixed amounts in the case of serious personal injury not resulting in death, claimants are required to provide

¹³⁶ U.N. Compensation Commission, *First Session of the Governing Council of the United Nations Compensation Commission*, U.N. Doc. S/AC.26/1991/1 (2 Aug. 1991), paras. 10-13.

¹³⁷ *Ibid.*, paras. 17-19. Identification of the person was important as there was a limit of no more than US\$ 10,000 for recovery by family members for a person’s death. The date was important due to the presumption that Iraq was responsible for all death or injury in Kuwait occurring from 2 August 1990 and 2 March 1991; any injury or death outside that time-frame imposed an extra burden on a claimant to provide an explanation as to why such loss occurring outside this time-period should be considered a direct result of Iraq’s invasion and occupation of Kuwait. Nationality was important since no claims were admitted for Iraqi nationals. Claims also were precluded for members of armed forces, unless they were POWs held by Iraq. *Ibid.*

simple documentation of the fact and date of the injury; in the case of death, claimants are required to provide simple documentation of the death and the family relationship. Documentation of the actual amount of loss will not be required.”¹³⁸

90. When analysing the level of evidentiary support in this category, the panel of commissioners found that:

“Nearly all the claims for serious personal injury and death were supported by some form of proof, although most of the claims in the first instalment contained a minimal level of documentary evidence. The scarcity of evidentiary support characterising many claims may be attributable mainly to the circumstances prevailing in Kuwait and Iraq during the invasion and occupation period. Under the general emergency conditions prevailing in the two countries, thousands of individuals were forced to flee or hide, or were held captive, without retaining documents that later could be used to substantiate their losses.”¹³⁹

Compensation for successful claims in this category was set at *US\$2,500 for individuals* and (as noted above) up to *US\$10,000 for families*, with detailed rules identified for what constituted a ‘family unit’.”¹⁴⁰

91. Mr Senogles does not explain why he disregards Category B claims when choosing the fixed amounts he recommends for death, injury, and other harms. Uganda considers this silence all the more striking, if not inexplicable, given that even viewing the evidence in this case most charitably to the DRC, it fits more closely within the rubric of Category B claims than anything else. That said, in

¹³⁸ U.N Compensation Commission, *Decision taken by the Governing Council of the United Nations Compensation Commission at the 27th Meeting, Sixth session held on 26 June 1992*, U.N. Doc. S/AC.26/1992/10 (26 June 1992), Art. 35(2)(b).

¹³⁹ U.N. Compensation Commission, *Recommendations Made by the Panel of Commissioners Concerning Individual Claims for Personal Injury or Death (Category “B” Claims)*, U.N. Doc. S/AC.26/1994/1 (26 May 1994), p. 33.

¹⁴⁰ *Ibid.*, p. 18-19.

Uganda’s view, even the amounts corresponding to Category B claims could not be transposed to this case because the DRC has not even met the comparatively lower evidentiary standards the UNCC used for this category, to include the name of the victim, his or her nationality, and the date of the injury or death.

b. The Senogles Report Inappropriately Selects a Compensation Figure from UNCC Category C Claims

92. As stated, rather than adopt compensation figures from UNCC Category B claims, Mr Senogles chooses to recommend figures derived from UNCC Category C claims. Uganda considers this approach facially untenable. Not only are the economic realities in Kuwait and the DRC inherently very different, Category C claims required substantial proof of actual loss—a threshold the DRC has not even come close to meeting in this case.

93. As stated, the UNCC established Category C claims to pay compensation for *actual loss* up to US\$ 100,000 to any person who incurred damages in eight categories, including death and personal injury.¹⁴¹ Such claims had to be “documented by appropriate evidence of the circumstances *and amount of the claimed loss*.”¹⁴² Specific evidence was thus expected to prove the quantum of loss actually sustained; this category was not designed as a “fixed amount” category. Claims to higher amounts also required more stringent proof.

94. Category C claim forms reflected these requirements. The covering instructions on Category C claims forms directed that “[a]ppropriate evidence will

¹⁴¹ U.N. Compensation Commission, *Report and Recommendations Made by the Panel of Commissioners Concerning the First Installment of Individuals Claims for Damages up to US\$100,000 (Category “C” Claims)*, U.N. Doc. S/AC.26/1994/3 (21 Dec. 1994), p. 6-7.

¹⁴² *Ibid.*, p. 22 (emphasis added); see also U.N Compensation Commission, *Decision taken by the Governing Council of the United Nations Compensation Commission at the 27th Meeting, Sixth session held on 26 June 1992*, U.N. Doc. S/AC.26/1992/10 (26 June 1992), Art. 35(2)(c).

... be required documenting the circumstances and the amount of damages claimed,” and that compensation will be provided only for “[d]irect losses as a result of Iraq’s unlawful invasion and occupation of Kuwait.”¹⁴³ The instructions specified that documentation proving a claimant’s nationality was required, and that “compensation, whether in funds or in kind, already received from any source will be deducted from the total amount of losses suffered.”¹⁴⁴ It was also emphasised that the Commission would be alert to claims for exaggerated amounts that were not substantiated by satisfactory evidence or otherwise justified.

95. In the specific case of claims forms for the death of a spouse, child or parent (so-called “C3” claims), the forms required that the claimant indicate his or her “relationship to deceased,” inviting a choice between spouse, child and parent. It further requested the claimant to attach a copy of a marriage document, birth certificate or “any other official record.”¹⁴⁵ Regarding the cause of death, the loss page required that the claimant specify “how did the deceased die” and indicate the date of death. It also contained an instruction to attach “appropriate documentation such as a photocopy of a death or burial certificate and a separate statement describing the cause and circumstances of death.”¹⁴⁶

96. As Uganda has now repeatedly explained, the DRC offers nothing even remotely analogous in this case. Under the circumstances, Mr Senogles’

¹⁴³ U.N. Compensation Commission, *Report and Recommendations Made by the Panel of Commissioners Concerning the First Installment of Individuals Claims for Damages up to US\$100,000 (Category “C” Claims)*, U.N. Doc. S/AC.26/1994/3 (21 Dec. 1994), p. 8.

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*, p. 121.

¹⁴⁶ *Ibid.*

choice of compensation figures derived from UNCC Category C claims is entirely unjustified.

c. The Compensation Figures Mr Senogles Selects from Among UNCC Category C Claims Are Arbitrary

97. Quite apart from overlooking the fact that UNCC Category C claims required robust evidentiary showings, Mr Senogles also arbitrarily selects compensation figures from within that category to come up with the fixed rates that he recommends in this case.

98. For the categories of harms on which Mr Senogles bases his recommendations, the UNCC set the following *ceiling* amounts:

- As regards cases involving the death of a spouse, child or parent,¹⁴⁷ US\$ 15,000 per claimant or US\$ 30,000 per family unit.
- As regards cases of “serious personal injury”¹⁴⁸ involving dismemberment, permanent significant disfigurement, or permanent loss of use or permanent limitation of use of a body organ, member, function or system, US\$ 15,000.¹⁴⁹

¹⁴⁷ See U.N. Compensation Commission, *Report and Recommendations Made by the Panel of Commissioners Concerning the First Installment of Individual Claims for Damages up to US\$100,000 (Category “C” Claims)*, U.N. Doc. S/AC.26/1994/3 (21 Dec. 1994), pp. 120, 249.

¹⁴⁸ *Ibid.*, p. 104.

¹⁴⁹ *Ibid.*, p. 112. On 14 March 1993, a group of psychiatric experts to the UNCC prepared an MPA Report, which provided a list of criteria to be applied that would “allow the compensation to be adjusted in accordance with certain readily observable and objective standards that are intended to reflect different degrees of MPA suffered by claimants.” *Ibid.* The MPA Report appears at p. 240, Annex VI.

99. From these ceiling amounts, Mr Senogles presents the following recommendations for fixed sums to be awarded for deaths:

- US\$ 30,000 for deaths resulting from acts of violence deliberately targeting civilians.
- US\$ 15,000 for deaths not resulting from such violence.¹⁵⁰

100. Nowhere does Mr Senogles explain why he chose these numbers and not others. They appear to be entirely arbitrary. With respect to deaths from acts of targeted violence, Mr Senogles offers no rationale for relying on the amount associated with a family unit rather than an individual. Nor does he explain why he selected US\$ 15,000 for deaths not resulting from targeted acts of violence. Indeed, Mr Senogles does not even try to explain why the quantum should depend on the circumstances of the death. Certainly, that is not what the UNCC did; the amounts that the Commission awarded did not depend on the nature of the death.

101. Also disconcerting is Mr Senogles' failure to explain why he used the category "ceilings" as the fixed amounts he recommends, other than saying cryptically that the ceilings "in practice represented a form of *tariff* figures" (whatever that may mean).¹⁵¹

102. The arbitrary nature of Mr Senogles' approach is evident from the fact that the "ceilings" he recommends as fixed figures do not correspond to the categories of harm at issue in this case. He says simply that he thinks that these

¹⁵⁰ Experts Report, paras. 106, 109.

¹⁵¹ *Ibid.*, para. 99.

UNCC categories are “comparable” to categories at issue here.¹⁵² But they are not, as shown on the chart below:

Fixed amount selected by Mr Senogles	UNCC origin	Category at Issue in Our Case
US\$ 30,000	Ceiling for compensation to a family unit for claims relating to the death of a spouse, child or parent	Death from acts of violence deliberately targeted at civilian populations
US\$ 15,000	Ceiling for compensation for claims relating to personal injury in the form of dismemberment, permanent significant disfigurement, or permanent loss of use or permanent limitation of use of a body organ, member, function or system	Death not resulting from violence targeted at civilian populations (collateral)

103. Uganda notes finally that similar methodological flaws afflict the compensation figures that Mr Senogles recommends for other types of injuries other than death. Because those recommendations exceed the Terms of Reference and are therefore *ultra vires*, Uganda sees no need at this stage to burden the Court with its observations on those elements of his report. It reserves the right to do so during the oral hearings in the event it proves necessary to do so.

¹⁵² *Ibid.*, para. 97.

104. In sum, the compensation rates that Mr Senogles recommends should be disregarded as unfounded and arbitrary.

B. Property Damage

105. Turning to the portions of the Senogles Report relating to property damages, the relevant Terms of Reference provide:

“(a) Based on the evidence available in the case file and documents publicly available, particularly the United Nations Reports mentioned in the 2005 Judgment, what is the approximate number and type of properties damaged or destroyed by Ugandan armed forces in the relevant period in the district of Ituri and in June 2000 in Kisangani?”

(b) What is the approximate cost of rebuilding the kind of schools, hospitals and private dwellings destroyed in the district of Ituri and in Kisangani?”¹⁵³

106. In his report (the “Senogles Report”), Mr Senogles recommends the following amounts, which are shown alongside the amounts the DRC claimed in its Memorial:

Table: Property losses in Ituri¹⁵⁴

	The DRC’s Claimed Amount	Mr Senogles’ Recommended
Destruction of Dwellings		
- Basic	US\$ 2,086,200	US\$ 4,015,200
- Medium	US\$ 6,520,000	US\$ 995,000
- Luxury	US\$ 4,350,000	US\$ 260,000
	US\$ 12,956,200	US\$ 5,270,200
Destruction of Infrastructure		
- Schools	US\$ 15,000,000	US\$ 11,250,000
- Clinics	US\$ 3,750,000	US\$ 2,812,500

¹⁵³ The Court’s Order of 8 September 2020, para. 16.

¹⁵⁴ Experts Report, paras. 165.

- Administrative	US\$ 2,500,000	US\$ 1,875,000
	US\$ 21,250,000	US\$ 15,937,500
Looting	US\$ 7,318,413	US\$ 3,659,206
Total – Property Damage (Ituri)	US\$ 41,524,613	US\$ 24,866,906

Table: Property losses in Kisangani, Beni, Butembo, and Gmena, including the property losses of SNEL and the Congolese Army¹⁵⁵

Property	The DRC’s Claimed Amount	Mr. Senogles Recommended
Four Named Locations	US\$ 25,628,075	US\$ 16,632,776
La Société Nationale d’Electricité	US\$ 97,412,090	US\$ 56,974,865
Congolese Armed Forces	US\$ 69,417,192	US\$ 41,650,315
	US\$ 192,457,357	US\$ 115,257,956

107. The substantial difference between the amounts claimed by the DRC and recommended by Mr Senogles by itself underscores the inflated nature of the DRC’s claims. That said, even the amounts Mr Senogles recommends should not be awarded because they still suffer from two fundamental flaws:

- *First*, the Court directed the experts to make their determination “based on the evidence available in the case file and documents publicly available.”¹⁵⁶ In his report, however, Mr Senogles does not appear to have undertaken any independent assessment of the evidence underlying the DRC’s claims. Instead, he routinely accepts at face value the assertions that the DRC made in its Memorial and disregards other

¹⁵⁵ *Ibid.*, para. 190.

¹⁵⁶ The Court’s Order of 8 September 2020, para. 16.

materials available in the case file, including the materials submitted by the DRC that directly contradict or undermine its assertions, and Uganda’s materials and comments.

- *Second*, Mr Senogles’ report repeatedly acknowledges and confirms the very significant evidentiary and methodological flaws infecting the DRC’s claims. Even so, he makes no attempt to address those issues based on objective and reasoned criteria. Instead, he does nothing more than mechanically reduce the amounts the DRC claims by applying various evidentiary “discount rates.”

108. The result is that the amounts Mr Senogles recommends are not more rigorous, scientific, or justified, or any less arbitrary, than the amounts claimed by the DRC. In Uganda’s view, “evidentiary discounts” seemingly pulled out of a hat cannot cure a total lack of evidence. Damage claims that are unsupported by any actual evidence must be rejected. In its Judgment on compensation in *Costa Rica v. Nicaragua*, for example, the Court refused to award compensation for alleged damages where the requesting party failed to clarify and support the nature, extent and valuation of damages.¹⁵⁷ The Court should come to the same conclusion here with respect to the alleged property losses in Ituri and elsewhere for the reasons explained below.

1. Property Losses in Ituri

109. The DRC claims US\$ 41,524,613 for alleged property damages in Ituri. Uganda has previously showed that this claim is unfounded.¹⁵⁸ The Senogles

¹⁵⁷ *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Compensation, Judgment, I.C.J. Reports 2018, para. 103.

¹⁵⁸ UCM, paras. 7.20-7.34; UCDR, paras. 14.1-14.14.

Report similarly concludes that there is no basis for the Court to award the amount the DRC claims and recommends US\$ 24,866,906 instead.¹⁵⁹

110. Although the recommended amount is nearly 50% less than the claimed amount, it is no less arbitrary. It results from an arbitrary application of unexplained discounts in a misguided effort to make up for the evidentiary and methodological shortcomings that undermine the DRC's claims in their entirety.

a. Destruction of Dwellings in Ituri

111. The DRC claims US\$ 12,956,200 in compensation for the alleged destruction of 8,693 dwellings in Ituri.¹⁶⁰ The Senogles Report recommends reducing the claimed amount by approximately 60% to US\$ 5,270,200 to take account of the evidentiary and methodological flaws infecting this head of damages¹⁶¹—flaws Uganda also previously highlighted.¹⁶² Nevertheless, the recommended amount cannot be awarded for two reasons.

- *First*, in establishing the extent of damages, the Senogles Report simply accepts and relies on the DRC's unfounded assertions concerning the number of dwellings destroyed and ignores other materials that the DRC has put before the Court, which contradict those assertions.

¹⁵⁹ Experts Report, para. 165.

¹⁶⁰ DRCM, 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.”).

¹⁶¹ Experts Report, paras. 152-153

¹⁶² UCM, paras. 7.20-7.34; UCDR, paras. 14.1-14.14.

- *Second*, in evaluating damages, the Senogles Report similarly accepts and adopts the reconstruction costs alleged by the DRC, which have no foundation in evidence.

112. As regards the number of dwellings, the DRC Memorial asserts that “one can reasonably estimate” that 8,693 allegedly destroyed dwellings “can be distinguished pursuant to the following distribution allocation: 5% for luxury houses, 15% for medium houses and 80% for simple houses”.¹⁶³ Based on this ostensible “distribution allocation”, the DRC seeks compensation for damages allegedly caused to:

- Basic houses 6,954
- Medium houses 1,304
- Luxury houses 435¹⁶⁴

113. Uganda has already showed that these proportions are unfounded.¹⁶⁵ The Senogles Report confirms the same conclusion.¹⁶⁶

114. The Senogles Report, however, arrives at “a different total number of properties destroyed in Ituri (13,609)” and at “a different pattern of the split between their designated grades,”¹⁶⁷ summarising them as follows:

¹⁶³ DRCM, 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”).

¹⁶⁴ *Ibid.*, paras. 7.35, 3.45(c).

¹⁶⁵ UCM, paras. 7.20-7.34; UCDR, paras. 14.1-14.14.

¹⁶⁶ Experts Report, paras. 147-148.

¹⁶⁷ *Ibid.*, para. 148.

- Basic houses 98% 13,384
- Medium houses 1% 199
- Luxury houses 1% (*de minimis*) 26¹⁶⁸

115. Although the total number of dwellings is higher, the proportions of “medium” and “luxury” houses are significantly lower than the numbers alleged by the DRC. This alone reduces the amount of the claimed compensation by more than 50% (from US\$ 12,956,200 to US\$ 5,270,200).

116. But even this reduced amount is without evidentiary foundation. To arrive at the new total number of dwellings destroyed and the stated proportions, the Senogles Report relies entirely on Annex 1.3 of the DRC’s Memorial,¹⁶⁹ which contains only the summary table shown below:

¹⁶⁸ The Senogles Report apparently rounded up those distributions because dividing the total number of dwellings by the numbers for each category of allegedly destroyed dwellings yields the following percentages:

- 98.3% for “simple” houses;
- 1.5% for “medium” houses; and
- 0.2% for “luxury” houses.

¹⁶⁹ See note 75 of the Experts Report referring to “DRC Memorial, Annexe 1.3, page 3, « Liste biens perdus et leurs fréquences ITURI.pdf », line items no. 118 [habitation de luxe, 26], no. 119 [habitation légère, 13384], no. 120 [habitation moyenne, 199].”

102	FORET	1
103	FOURNITURE SCOLAIRE	7
104	FRAIS DE DÉPLACEMENT	3
105	FRIGO	6
106	FUSIL	1
107	FUT ESSENCE	52
108	FUT HUILE	29
109	FUT HUILLE DE PALME	2
110	FUT MAZOUT	3
111	FUT(VIDE)	2
112	GARDE ROBE	5
113	GAUREE	3
114	GITE	4
115	GLASSIERE	3
116	GORET	1
117	GROUPE ELECTROGENE	18
118	HABITATION DE LUXE	26
119	HABITATION LEGERE	13384
120	HABITATION MOYENNE	199
121	HABITS(VALISE)	229
122	HACHE	1
123	HARICOT (SAC)	1175
124	HECTARE DE MANIOC	3
125	HOPITAL	7
126	HORLOGE	2
127	HORS BORD	2
128	HOUE	3
129	IMMEUBLE	7
130	INSTALLATION ELECTRIQUE	1
131	INSTALLATION SANITAIRE	2
132	INSTRUMENT DE CHAMP	1
133	INSTRUMENT MEDICAL	1
134	INSTRUMENT MUSICAL	2
135	JARDIN SCOLAIRE	13
136	JOINT	5
137	KIOSQUE	2
138	KIT CENTRE DE SANTE	1
139	KIT POUR LA CONSTRUCTION	1
140	LABO ELECTRONIQUE	1
141	LAMPE	4
142	LAPIN	182
143	LECTEUR VIDEO	2
144	LIT	111
145	LIVRE	4
146	MACHETTE	5
147	MACHINE	3
148	MACHINE A BRODER	1
149	MACHINE A CAFE	1
150	MACHINE A COUDRE	203
151	MACHINE A ECRIRE	17
152	MACHINE A RIZ	1
153	MACHINE A ZIXAQUE	2

117. Neither with its Memorial nor at any other time has the DRC submitted *any* evidence to support the numbers stated on this summary table. *Not a single building* is identified, even with respect to a general location. This table therefore has no value as evidence on which either the Court or Mr Senogles can rely.

118. Moreover, the numbers in this summary table are actually contradicted by other materials that the DRC has put before the Court. The DRC’s annex entitled “Evaluation pertes des biens” (submitted the file “Victimes_Perte Biens_Ituri” as Annex 1.3 to the DRC Memorial and as Annex 1.9.E in response to the Court’s Question 14), presents a very different picture about the number and types of dwellings allegedly destroyed:

- Basic houses 658
- Medium houses 104
- Luxury houses 16¹⁷⁰

119. The Senogles Report never explains why it ignored these contradictory materials, even though the Court directed the experts to examine “the evidence available in the case file.”¹⁷¹ Had Mr Senogles done so, he would either have had to explain why he ignored this evidence or to reduce the DRC’s claimed amount even more. For example, even if the nominal reconstruction costs were not themselves arbitrary (*quod non*), applying them to the numbers that the DRC stated

¹⁷⁰ “Evaluation Pertes des Biens” in file *Victimes_PerteBien_ITURI*, DRCM, Annex 1.3 ; DRCRQ, Annex 1.9.E.

¹⁷¹ The Court’s Order of 8 September 2020, para. 16.

in Annex 1.3 and Annex 1.9.E would result in reparation under this head of damage in the amount of US\$ 877,400:

- US\$ 197,400 for basic houses (658 x US\$ 300)
- US\$ 520,000 for medium houses (104 x US\$ 5,000)
- US\$ 160,000 for luxury houses (16 x US\$ 10,000)

120. Even this reduced amount would be unfounded because Annex 1.3. and Annex 1.9.E offer no basis to prove with any degree of confidence, much less certainty, the number of dwellings allegedly destroyed.¹⁷²

121. Moreover, the reconstruction costs that the Senogles Report recommends are equally baseless. For its part, the DRC purports to apply a three-tier scale nominally “created on the basis of the cost to rebuild the houses”, which it asserts are:

- US\$ 300 for a basic house
- US\$ 5,000 for a medium house
- US\$ 10,000 for a luxury house¹⁷³

122. The Senogles Report confirms that the alleged reconstruction costs “are not evidenced and are not explained in the DRC Memorial.”¹⁷⁴ The report also

¹⁷² UCM, Chapter 7, Section II(A)(1); UCDR, Question 14.

¹⁷³ DRCM, para. 7.35 (Translation by Counsel, original in French: “établi sur la base de la valeur de reconstruction des habitations en cause.”).

¹⁷⁴ Experts Report, para. 149.

frankly acknowledges that its “desk research into potential property replacement costs reveals no useful data.”¹⁷⁵

123. Even as the Senogles Report recognises this evidentiary void, it tries to fill it with conjecture, by stating that “the claimed replacement costs asserted by the DRC are not unreasonable in their amounts, particularly given that the overwhelming majority of the properties are being valued for claim purposes at US\$ 300 each.”¹⁷⁶ Based on this conclusory statement, the Senogles Report adopts the reconstruction costs alleged by the DRC.

124. This approach leads to an arbitrary result, especially since the alleged reconstruction costs are wholly unfounded. Those costs, according to the DRC’s response to the Court’s Question 14, are based on victim identification forms where “some of the victims ... described the dwellings they had lost and the materials of which they were composed.”¹⁷⁷ The DRC further asserted that “[k]nowing the cost of such buildings in this region of the DRC”, it chose “the least expensive possible price”. As Uganda previously showed, however, none of these assertions is supported by evidence:

- *First*, many of the victim identification forms do not even specify the location of houses, let alone prove any reconstruction costs through competent evidence such as invoices, receipts, construction contracts, or bank statements.

¹⁷⁵ *Ibid.*, para. 150.

¹⁷⁶ *Ibid.*, para. 151.

¹⁷⁷ Response to the Court’s Questions of the Democratic Republic of the Congo (26 Nov. 2018) (hereinafter “DRCRQ”) para. 14.5 (Translation by Counsel, original in French: “certaines victimes ... décrivaient les bâtiments qu’elles avaient perdus et les matières desquelles ils étaient faits”).

- *Second*, even though the DRC alleges it surveyed reconstruction costs across different regions and selected the lowest numbers, it provides no information about this survey or how it resulted in the estimated costs. If such a survey had really been undertaken, the DRC should have submitted it, or at least some supporting materials in the form of bills, receipts or other documents that might corroborate the alleged costs.
- *Third*, the DRC has provided no other evidence of reconstruction costs or estimates to support its claimed lump-sum amounts. For example, the DRC could have obtained signed declarations from mayors or village leaders, urban planners or building companies as to the average costs of reconstructing houses at particular locations, based on their knowledge as to the damage inflicted and the materials needed. But no such information has been provided to the Court.

125. The mere fact that Mr Senogles’ “desk research” into potential property replacement costs “reveals no useful data” does not justify accepting the DRC’s alleged reconstruction costs, especially given that they are literally without foundation.

126. In sum, although the Senogles Report recommends reducing the amount the DRC claims for property losses in Ituri from US\$ 12,956,200 to US\$ 5,270,200, the latter amount is as unfounded as the former and cannot be awarded.

b. Destruction of Infrastructure

127. The DRC seeks US\$ 21,250,000 in compensation for the alleged destruction of 200 schools, 50 health facilities and 50 office buildings in Ituri.¹⁷⁸

¹⁷⁸ DRCM, paras. 7.39-7.42.

The amount claimed for each 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.¹⁷⁹

128. Uganda has previously shown that there is no basis on which the Court can award the compensation claimed.¹⁸⁰ Mr Senogles confirms that the DRC has offered no evidence justifying its claim for US\$ 21,250,000 but recommends reducing that amount to US\$ 15,937,500.¹⁸¹ His recommended amount cannot, however, be awarded for two reasons.

- *First*, in purporting to establish the extent of damages, the Senogles Report simply accepts the DRC’s unfounded assertions concerning the

¹⁷⁹ DRCM, 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 regard 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, 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”); *Ibid.*, para. 7.40.

In regard 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”); *Ibid.*, para. 7.41.

¹⁸⁰ UCM, paras. 7.35-7.48; UCDR, paras. 4.1-4.29.

¹⁸¹ Experts Report, para. 158.

number of allegedly destroyed schools, clinics and administrative buildings, and ignores other materials that the DRC has put before the Court that actually contradict those assertions.¹⁸²

- *Second*, in assessing the relevant quantum, the Senogles Report similarly accepts the DRC’s claimed “average costs” but arbitrarily reduces them by what is termed an “evidentiary discount” of 25% even as it admits that “no evidence is provided in respect of any” of the average costs for infrastructure buildings.¹⁸³

129. The first fundamental flaw in the Senogles Report is that it accepts whole-cloth the unfounded numbers of infrastructure buildings allegedly destroyed as claimed by the DRC. Citing the DRC Memorial, the Senogles Report states that “the figure for the number of [200] schools destroyed can be verified to a report of the Secretary General of the United Nations on the MONUC mission, dated 27 May 2003.”¹⁸⁴ 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. The cost of repairs cannot be the same whether a school has been destroyed or required only minor repairs. The report also does not attribute those damages to Uganda.

130. The Senogles Report also ignores other evidence available in the case file, which does not corroborate—and, in fact, contradicts—the 200 figure that the DRC plucks from the 2003 MONUC mission report. The UN Mapping Report, which also examined the 2003 MONUC mission report, does not mention any

¹⁸² *Ibid.*, paras. 155-156.

¹⁸³ *Ibid.*, para. 157.

¹⁸⁴ *Ibid.*, para. 155.

number of destroyed schools, let alone that Uganda is responsible for the destruction of any school. Moreover, the number on which the Senogles Report relies is contradicted by the DRC's own "investigations". Annex 1.3 to the DRC Memorial, which the Mr Senogles ignores, contains a table entitled "*Evaluation Pertes des Biens*" that lists only 18 schools and 12 kindergartens ("*jardin scolaire*") as having been "damaged".¹⁸⁵ But even these vastly smaller numbers are unfounded as the DRC has presented no underlying documentation to support the information listed in the summary table.

131. The same is true with respect to the 50 clinics and 50 administrative buildings allegedly destroyed. The Senogles Report frankly admits that "they are round sums," which "inevitably makes them subject to uncertainties due to an absence of detail or evidence in respect of each individual property."¹⁸⁶ Nonetheless, the report blithely accepts those numbers, ignoring that their sole basis is the DRC's assertion that it "deems reasonable to use" them.¹⁸⁷

132. Such subjective assertions of reasonableness cannot form a basis for the award of damages. This is especially so because the numbers alleged are, like others, actually contradicted by other materials that the DRC presented to the Court. For example, the Senogles Report ignores the table on "Valuation of property damages in Ituri" included in Annex 1.3 of the DRC Memorial, which

¹⁸⁵ "Evaluation Pertes des Biens" in file *Victimes_PerteBien_ITURI*, DRCM, Annex 1.3.

¹⁸⁶ Experts Report, para. 156.

¹⁸⁷ 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"); DRCM, para. 3.45(c), (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").

refers to the destruction of just seven hospitals and one dispensary.¹⁸⁸ 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 Uganda (or anyone else) is not established. Moreover, even if it were accepted as reliable and true (*quod non*), the summary table would afford no basis on which compensation could be assessed.

133. The second major flaw is that the Senogles Report merely accepts the DRC's alleged "average costs" for infrastructure buildings, even though it admits that "no evidence is provided in respect of any" of them.¹⁸⁹ Nominally to take account of this deficiency, Mr Senogles applies an arbitrary "evidentiary discount" of 25%.¹⁹⁰ In Uganda's view, no "evidentiary discount" can cure a total lack of evidence. Any number times zero is still zero.

134. As stated, the DRC provides no 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. These numbers appear to have been randomly selected for the purpose of this litigation, and the Senogles Report provides no basis for thinking otherwise. Such numbers do not even purport to be grounded in the actual repair or reconstruction costs for the allegedly damaged schools, health facilities and office buildings. This is all the more remarkable because 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

¹⁸⁸ "Evaluation Pertes des Biens" in file *Victimes_PerteBien_ITURI*, pp. 41-42, 58, DRCM, Annex 1.3.

¹⁸⁹ Experts Report, para. 157.

¹⁹⁰ *Ibid.*

buildings. If any such repairs or reconstruction had actually been done, the DRC would also be expected to have documentary evidence proving costs incurred. Yet the DRC provided no such evidence in its Memorial. Nor did the DRC provide any explanation, much less evidence, in its response to the Court's Question 4.¹⁹¹

135. In conclusion, although the Senogles Report recommends reducing the DRC's claimed amount of US\$ 15,937,500 to US\$ 12,956,200, there is no basis on which the Court can award even this reduced amount.

c. Looting

136. The DRC Memorial claims US\$ 7,318,413 in compensation for property allegedly looted in Ituri.¹⁹² Uganda has already showed that this claim is without foundation.¹⁹³ The Senogles Report similarly confirms that there is "no practicable evidentiary basis on which to assess the claimed amount put forward."¹⁹⁴ It nevertheless recommends US\$ 3,659,206 in compensation under this head of damages after applying an arbitrary "evidentiary discount" of 50%.¹⁹⁵

137. The Court should not countenance such a haphazard approach, especially where the party seeking compensation has not produced *any* evidence on which compensation might credibly be assessed. As Uganda demonstrated in its Counter-Memorial, the DRC offers no supporting evidence showing that the property in question was actually looted, or that it was looted by Ugandan soldiers or as a result of Uganda's non-performance of its obligations as an occupying

¹⁹¹ UCDR, paras. 4.1-4.29.

¹⁹² DRCM, para. 7.43.

¹⁹³ UCM, paras. 7.49-7.57.

¹⁹⁴ Experts Report, para. 162.

¹⁹⁵ *Ibid.*, para. 163.

Power. Moreover, the DRC's valuation of the property nominally looted is wholly arbitrary. It has not adduced even a single document proving the ownership or 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.¹⁹⁶

138. In sum, both the DRC's claimed amount of US\$ 7,318,413 and the recommended amount of US\$ 3,659,206 should be rejected as unfounded and arbitrary.

2. Property Losses in Areas Other than Ituri

a. Property Losses in Kisangani, Beni, Butembo and Gemena

139. The DRC claims US\$ 25,628,075 in compensation for property damage allegedly suffered in areas outside Ituri; namely, Kisangani, Beni, Butembo and Gemena. The amount claimed is broken down as follows:

- US\$ 17,323,998 for Kisangani¹⁹⁷
- US\$ 5,526,527 for Beni¹⁹⁸
- US\$ 2,680,000 for Butembo¹⁹⁹ and
- US\$ 97,550 for Gemena²⁰⁰

¹⁹⁶ UCM, paras. 7.52-7.57; UCDR, paras. 1.4-1.69.

¹⁹⁷ DRCM, para. 4.71.

¹⁹⁸ *Ibid.*, paras. 2.87 and 7.46.

¹⁹⁹ *Ibid.*

²⁰⁰ *Ibid.*

140. Uganda has already demonstrated that the amounts claimed are unfounded.²⁰¹ The Senogles Report agrees as much but rather than draw the logical conclusions flowing therefrom, opts instead for arbitrary “evidentiary discounts” of 25% in the cases of Beni, Butembo and Gemena,²⁰² and 40% in the case of Kisangani.²⁰³ This results in a recommended figure of US\$ 16,632,776, as shown in the table below²⁰⁴:

	The DRC’s Claimed Amount	Mr Senogles’ Recommended
Kisangani	US\$ 17,323,998	US\$ 10,394,399
Beni	US\$ 5,526,527	US\$ 4,163,570
Butembo	US\$ 2,680,000	US\$ 2,010,022
Gemena	US\$ 97,550	US\$ 64,785
	US\$ 25,628,075	US\$ 16,632,776

141. As was true with respect to other elements of the DRC’s claim, Uganda considers that applying such subjective “evidentiary discounts” is not an acceptable means of dealing with a fundamental lack of evidence. That is all the more true when the Senogles Report comes up with such “discounts” based on nothing more than a perfunctory review and even misapprehension of the evidence in this case.

142. As a threshold matter, the Senogles Report applies the stated discounts to the wrong numbers. The DRC admitted in its response to Question 13

²⁰¹ UCM, Chapter 7, Section II(B)-(C); UCDR, paras. 13.1-13.17.

²⁰² Experts Report, para. 171.

²⁰³ *Ibid.*, para. 172.

²⁰⁴ *Ibid.*, para. 174.

that it had to make “substantive adjustments” to the amounts claimed in its Memorial and “revised [them] downward” as follows:

- for Kisangani: originally US\$ 17,323,998, now US\$ 15,197,287.33
- for Beni: originally US\$ 5,526,527, now US\$ 5,022,087
- for Butembo: originally US\$ 2,680,000, now US\$ 2,616,444²⁰⁵

143. The fact that the DRC revised its claim downward by more than US\$ 2,000,000 at the late stage of the proceedings, without explaining why or how it made those “substantive adjustments,” by itself raises serious concerns about the accuracy of the DRC’s claims and inspires little confidence in the current numbers. It is equally disconcerting that the Senogles Report ignores the adjusted amounts and instead applies the proposed “evidentiary discounts” to the originally made, but since abandoned, claims of the DRC. Such a simple yet obvious mistake raises concerns in Uganda’s view about the expert’s reliability writ large. Equally concerning, here again, the Senogles Report appears to have accepted the DRC’s numbers at face value without testing their accuracy against the evidence in this case, while ignoring the many contradictions in the DRC’s own materials.²⁰⁶

144. This is a significant oversight. The DRC purports to derive the sums it seeks from the EVADO 1.1 software it created for purposes of this litigation. According to the DRC, this software nominally relies on numbers derived from its valuation lists, which in turn are derived from its “victim identification forms”.

²⁰⁵ DRCRQ, paras. 1, 13.1, 13.3.

²⁰⁶ As Uganda showed in its Counter-Memorial, the numbers for Beni, Butembo and Gemena, stated in The DRC’s 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. UCM, paras. 7.132-7.134. The DRC has never explained those contradictions.

However, as Uganda demonstrated in its comments to the DRC's responses to Questions 1 and 13,²⁰⁷ the DRC's victim identification forms entirely lack supporting evidence for either the damages alleged or their valuation. Indeed, many of the forms do not even specify the damages alleged or valuations claimed. The amounts stated in the valuation lists corresponding to such forms appear to be nothing more than arbitrary lump sum amounts for which no explanation or justification is offered.

145. When such baseless numbers are fed into the "EVADO 1.1" software, the resulting figures are equally unfounded. The point is illustrated by many examples that Uganda identified in both its Counter-Memorial and its comments to the DRC's responses to Questions 1 and 13.²⁰⁸ Uganda considers it as disturbing as it is striking that the Senogles Report does not even attempt to analyse any of those examples, all of which serve to illustrate the baselessness of the DRC's claims for property loss and damage in Beni, Butembo and Kisangani.

146. For all these reasons, the Senogles Report's recommended compensation in the amount of US\$ 16,632,776 should not be accepted because it is no less arbitrary than the original amount claimed by the DRC.

b. Property of la Société Nationale d'Electricité SA ("SNEL")

147. The DRC also seeks compensation in the amount of US\$ 97,412,090 on behalf of the National Electricity Company (*Société Nationale d'Électricité*

²⁰⁷ UCDR, Questions 1 and 13.

²⁰⁸ UCM, Chapter 7, Section II(B)-(C); UCDR, Questions 1 and 13.

(“SNEL”)), a Congolese public company.²⁰⁹ With respect to this claim too, Uganda previously showed that it is without foundation.²¹⁰ The Senogles Report essentially agrees, but nevertheless recommends compensation in the amount of US\$ 56,974,865²¹¹ after applying a 40% “evidentiary discount” to the amount claimed to account for the evident “methodological overstatements and other evidentiary gaps”.²¹²

148. The Senogles Report does not explain why 40% is an appropriate “evidentiary discount”. Applying a random discount to an unfounded claim does not make the recommended amount any more grounded in evidence or any less arbitrary.

149. Three clear findings from the Senogles Report confirm that the amount the DRC claims in respect of SNEL is unsupported, flawed and overstated:

- *First*, SNEL’s 17-page damages report is devoid of evidence supporting the alleged damages listed in its summary tables. The Senogles Report observes that “[n]o annexes containing underlying details or evidence appear to have been referenced by, or attached to, the SNEL report;”²¹³ and that SNEL’s report “provides no detailed backup calculations or underlying evidence supporting the various replacement costs or

²⁰⁹ Société nationale d’électricité (SNEL), *Réclamation*, N/Réf/DG/2016/4208 (9 juin 2016), p. 4, DRCM Annex 4.26.

²¹⁰ UCM, paras. 7.98-7.115.

²¹¹ Experts Report, paras. 180-181.

²¹² *Ibid.*, para. 180.

²¹³ *Ibid.*, para. 178(d).

services claimed.”²¹⁴ SNEL’s report thus gives no answer to such basic issues as the time, origin, existence and extent of the claimed damages.

- *Second*, SNEL’s valuation methodology is not only incorrect but also inapplicable in this case. As the Senogles Report notes, the valuation methodology “adopted by SNEL is that of (new) replacement cost, even though many assets destroyed or lost were identified as having been aged at the time.”²¹⁵ It would have been “more appropriate for the DRC and SNEL to present this claim using a ‘depreciated replacement cost’ approach.”²¹⁶ Therefore, “the adoption of a ‘new for old’ replacement cost approach requires to be adjusted for since, as SNEL acknowledges, much of the equipment destroyed was already old and heavily used.”²¹⁷
- *Third*, the claimed amount is inflated. As an example of “a methodological overstatement in the calculations,”²¹⁸ the Senogles Report points out that SNEL calculated the alleged lost revenues “for an 8-year period of war (“1998-2005”) which goes beyond the findings of the Court in its December 2005 judgement.”²¹⁹ Therefore, “this claim[ed] amount needs to be reduced from eight to five years.”²²⁰ Correcting this mistake reduces the claimed amount “from US\$

²¹⁴ *Ibid.*, para. 179.

²¹⁵ *Ibid.*, para. 178(b).

²¹⁶ *Ibid.*

²¹⁷ *Ibid.*, para. 179.

²¹⁸ *Ibid.*, para. 178(e).

²¹⁹ *Ibid.*

²²⁰ *Ibid.*

6,543,953 to US\$ 4,089,970 (a reduction of US\$ 2,453,983)”.²²¹

Although “the overstatement in the loss of revenue claim item must be adjusted for,” the Senogles Report concludes that this glaring mistake “leads to an inference that other claim components may also contain overstatements.”²²²

150. By the same token, the Senogles Report overlooks other material and incurable deficiencies infecting SNEL’s report. First, Mr Senogles ignores other examples that underscore the arbitrary nature of the claimed amount. For example, the single largest element of the SNEL claim concerns “*Dégâts et forfait humains*” (“human damage and loss”), which the SNEL claims to be US\$ 27,163,539.²²³ This claim rests on nothing more than vague, sometimes inscrutable, assertions presented in a summary table that, like the report itself, is unsigned.²²⁴ Some assertions in the table are also incomplete. For example, the table states that “before the conflict the centre had ... agents,... were transferred ... agents were dead”.²²⁵ (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

²²¹ *Ibid.*

²²² *Ibid.*, para. 179.

²²³ Société nationale d’électricité (SNEL), *Réclamation*, N/Réf/DG/2016/4208 (9 juin 2016), p. 4, DRCM Annex 4.26. The actual number claimed is “US\$ 27 163 539,11”.

²²⁴ *Ibid.*, p. 5, DRCM Annex 4.26, 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 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”).

²²⁵ *Ibid.* (Translation by Counsel, original in French: “Avant les hostilités, le centre avait avait [sic] ... agents... ont été mutés... agents étaient morts”).

unintelligible; for example, the phrase: “project no agent except the agents of the project”.²²⁶

151. The most that could possibly be gleaned from the summary table on the most charitable reading 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. Uganda considers that such an obscure and limited set of “facts” cannot possibly justify a claim exceeding US\$ 27 million. Further, aside from failing to prove that any damage actually occurred, the DRC has also failed to present any evidence, let alone convincing evidence, linking the alleged damages to specific wrongful actions attributable to Uganda.

152. The same is true with respect to the six other elements of the SNEL claim, which total approximately US\$ 70 million.²²⁷ 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 equipment of thermal power plants,” which appears on page 6 of the 2016 SNEL report and is absent from Mr Senogles’ analysis:

²²⁶ *Ibid.* (Translation by Counsel, original in French: “Projet pas d’agent sauf les agents du projet”).

²²⁷ 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).

7. Evaluation du coût de réparation des patrimoines (équipements et infrastructures) victimes des dégâts dus à l'occupation de l'armée ougandaise

7.1. Evaluation des équipements électromécaniques des centrales thermiques

Item	Centrales thermique/ Localité	Qté (Pce)	Caractéristiques groupes électrogènes	Valeurs installation et Mes (USD)		TOTAL VALEUR (USD)
				Groupe électrogène	Auxiliaires	
	1	2	3	4	5	6= (4)+(5)
1.	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
2.	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
3.	Gemena	3	3 X ABC-550 KVA-0,4kV	3.076.425,00	310.000,00	3.386.425,00
4.	Libenge	2	2 X ABC- 550 KVA- 0,4kV	2.088.240,00	270.000,00	2.358.240,00
5.	Lisala	3	2 X ABC-550kVA-0,4kV	2.088.240,00	273.000,00	2.361.240,00
6.	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
7.	Yakoma	2	CUMINS-160 kVA-0,4kV Perkins-450kVA-0,4kV	62.700,00 127.237,00	11.700,00	201.637,00
1.	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
0.	Butembo	2	ABC -250 kVA-0,4 kV DEUTZ- 400 kVA-0,4 KV	942.200,00 115.000,00	167.000,00	1.224.200,00
1.	Gbadolite		-	-	-	
2.	TOTAL			20.591.359,86	3.309.500,00	23.900.759,86

Les auxiliaires : TGBT,TGMT,Redresseur, Compresseur, Cellule C.A, Cellule C.C, Pont roulant

153. The DRC thus bases a claim for 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 with no information about

the alleged date, extent or other circumstances of the harm to that equipment (or who inflicted that harm).²²⁸ The Experts Report is silent on this glaring flaw.

154. Second, the Senogles Report conducted a perfunctory analysis of the claimed lost profits. While it correctly identifies that SNEL inflates the alleged lost profits, it nevertheless ignores other inflated and speculative aspects of this claim.

155. As stated, the lost revenues claimed cover a period of eight years, from 1998 to 2005. To determine how much revenue was lost at the two plants during each of these eight years, the authors of the SNEL report decided to estimate lost revenues during the years 2004, 2005 and 2007, and then to calculate an average across those three years that they applied retroactively across all eight years. For each of the years 2004, 2005 and 2007, global revenues (“*recettes globales*”) for all of SNEL and estimated revenues (“*recettes estimées*”) for the Kisangani and Gbadolite plants are listed.²²⁹ 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% of global revenues while Gbadolite generated 2% of global revenues (to determine these percentages, the

²²⁸ Similarly unsigned and unsupported tables form the sole basis for the other categories of SNEL’s claim: the claim of “Destruction of MT/MT stations and MT/BT booths” (“Destruction des postes MT/MT et cabines MT/BT”) in 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 catch-all 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.

²²⁹ Société nationale d’électricité (SNEL), *Réclamation*, N/Réf/DG/2016/4208 (9 juin 2016), DRCM Annex 4.26.

Commentary says it relied upon 2013-2015 data).²³⁰ Yet nowhere does SNEL’s report establish that these hydroelectric plants in fact were damaged, in whole or in part. Further, any meaningful calculation of lost profits should have been based on revenues made *before* August 1998—information that should be readily available to SNEL—not on revenues dating to after the withdrawal of Ugandan armed forces. In short, the SNEL report is so fundamentally flawed and misguided that it cannot serve as a basis for determining lost profits, if any.

156. Whether the claim on behalf of SNEL is taken as a whole, or viewed piece-by-piece, the conclusion is the same: applying a 40% “evidentiary discount”—or, indeed, any discount—to a wholly unfounded claim leads to an equally arbitrary result that is incompatible with the fundamental rules governing damages in inter-State proceedings. For all these reasons, the recommended amount of US\$ 56,974,865 in the Senogles Report should be rejected.

c. Property of the Congolese Military Forces

157. The DRC seeks US\$ 69,417,192 in compensation for the “material damages” allegedly suffered by the Congolese army.²³¹ Uganda previously demonstrated that this claim too is unfounded.²³² Here again, the Senogles Report essentially agrees with that conclusion but nevertheless recommends US\$ 41,650,315 as an appropriate amount of compensation under this head of damages.

²³⁰ Société nationale d’électricité (SNEL), *Réclamation*, N/Réf/DG/2016/4208 (9 juin 2016), DRCM Annex 4.26.

²³¹ 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”). Uganda showed in the Counter-Memorial on Reparation that there is no basis to award compensation for this head of damage. UCM, paras. 7.139-7.150.

²³² UCM, Chapter 7, Section II(D).

158. As elsewhere, the Court should not accept the recommended amount because it also results from the application of an arbitrary 40% “evidentiary discount” to the claimed amount, despite Mr Senogles’ recognition that the DRC’s claim is unfounded and unverifiable.

159. The Senogles Report acknowledges that the DRC’s claim rests solely on two summary tables²³³ prepared by a high-ranking officer of the Congolese Army on 31 August 2016, just two weeks before the DRC submitted its Memorial to the Court.²³⁴ 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.

²³³ Experts Report, para. 182.

²³⁴ The Court has routinely disregarded materials prepared by interested persons for purposes of litigation years after alleged events in question. *See, e.g., Armed Activities* (2005), paras. 64, 125.

Evaluation des dégâts militaires dans les rangs des FARDO par l'armée ougandaise et alliés				
N° Périodes et régions	Pertes subies	§	Valeur unitaire	Evaluation chiffrée
En hommes dans les rangs des FAC				
1 Pont de Télé (24 septembre 1998)	159 tués	2.45	\$ 18'913.00	\$ 3'007'167.00
2 Mindembo (octobre-décembre 1998)	202 tués	2.48	\$ 18'913.00	\$ 3'820'426.00
3 Mozamboli (novembre-décembre 1998)	40 tués	2.50	\$ 18'913.00	\$ 756'520.00
4 Pima (mai 1999)	pertes importantes	2.51		
5 Libanda (juin 1999)	plusieurs dizaines de victimes	2.52		
6 Libenge (août 2000)	300 tués	2.54	\$ 18'913.00	\$ 5'673'900.00
7 Ubangi (août 2000)	800 tués	2.55	\$ 18'913.00	\$ 15'130'400.00
	Total des décès répertoriés			\$ 28'388'413.00
9	Estimation du nombre total			\$ 37'826'000.00
En armement et munitions				
1 Mai 1998 à Pima	2 mortiers de 82 mm		\$ 5'432.00	\$ 10'864.00
	4 mortiers de 60 mm		\$ 5'432.00	\$ 21'728.00
	1 canon de 75 mm		\$ 13'000.00	\$ 13'000.00
	4 mitrailleuses		\$ 400.00	\$ 1'600.00
	10 plusieurs lance-roquettes (estimation)		\$ 900.00	\$ 9'000.00
2 En novembre et décembre 1998 à Mindembo	1 char de combat		\$ 60'000.00	\$ 60'000.00
	1 camion+ munitions détruits		\$ 40'000.00	\$ 40'000.00
3 Juin - Juillet 1998 à Gbadolite	400 tonnes de matériel et de munitions détruits		\$ 30'000.00	\$ 12'000'000.00
4 3 décembre 1998 à Mindembo	1 char et un camion chargé de munitions		\$ 110'000.00	\$ 110'000.00
5 9 août 2000 à Ubangi	8 camions		\$ 20'000.00	\$ 160'000.00
	2 de l'artillerie lourde (canons 75 mm)		\$ 13'000.00	\$ 26'000.00
	100 kalachs		\$ 400.00	\$ 40'000.00
	500 fusils d'assaut AKM		\$ 500.00	\$ 250'000.00
	800 tonnes de munition			\$ 8'000'000.00
	2 bateaux			\$ 48'350'000.00
	5 jeeps/blindés		\$ 65'000.00	\$ 325'000.00
				\$ 69'417'192.00

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	Coup	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	

160. The Senogles Report confirms that “no other evidence in support has been seen”.²³⁵ To underscore the speculative and arbitrary nature of the DRC’s claim, the Senogles Report refers to such “high value items” as:

- “a. Two ships (each one valued at over US\$ 21 million);
- b. 400 tonnes of material and munitions (valued at US\$ 30,000/tonne, making a total claim value of US\$ 12 million); and
- c. 800 tonnes of munitions (valued at 10,000/tonne, making a total claim value of US\$ 8 million).”²³⁶

161. Like Uganda, the Senogles Report shows that the DRC does not offer any evidence of the sort that one might have expected:

“Given the materiality of these three line items, I would have expected to see documentary support that could have included:

- a. Evidence in supporting for the events that caused the loss of each vessel, including the type, age and identifying name of each vessel;
- b. Evidence supporting the vessels’ claimed unit value/cost of US\$ 21,375,000; and
- c. Evidence for the unit value/cost of each tonne of munitions.”²³⁷

162. Indeed, Mr Senogles even admits that it is not possible to verify the DRC’s claim:

“In the absence of further details it has not proved possible for me to independently verify the claimed loss of these significant (and

²³⁵ Experts Report, para. 183.

²³⁶ *Ibid.*, para. 184.

²³⁷ *Ibid.*, para. 186.

potentially individually identifiable) military assets' or indeed, their unit values.”²³⁸

163. In such circumstances, Uganda considers that applying an unexplained “evidentiary discount factor” of 40% as the basis for the “recommended amount of US\$ 41,650,315”²³⁹ is not only arbitrary, but also unfair, all the more given that Mr Senogles himself rightly recognises that “significant evidentiary gaps remain – gaps that the DRC should reasonably have foreseen and rectified in advance of submitting [its] claim to the Court.”²⁴⁰

164. In sum, even assuming that damage to military hardware and material suffered during an armed conflict is a compensable head of damages, there is no basis for the Court to award the amount of US\$ 41,650,315 recommended in the Senogles Report.

²³⁸ *Ibid.*, para. 187.

²³⁹ *Ibid.*, para. 188.

²⁴⁰ *Ibid.*

IV. OBSERVATIONS ON THE NEST REPORT

165. The last of the reports included in the Experts Report is entitled “Exploitation of Natural Resources” and was prepared by Dr Michael Nest (“Nest Report”). In his report, Dr Nest attempts to estimate “quantity and value [of natural resources] that w[ere] ‘illegally exploited’ in the Ugandan area of influence (UAI) in the territory of the Democratic Republic of the Congo (DRC) between 1998 and 2003”.²⁴¹

166. The Nest Report confirms what Uganda has already showed—that the compensation the DRC claims for natural resources are unfounded.²⁴² This is immediately apparent from the substantial difference between the amounts the DRC claims for certain commodities and those Mr Nest recommends, as reflected in the table below:

	Amount Claimed by the DRC	Amount Recommended by Mr Nest
Gold	US\$ 675,541,972 ²⁴³	US\$ 42,846,866
Diamonds	US\$ 7,055,885 ²⁴⁴	US\$ 6,039,299
Coltan	US\$ 2,915,880 ²⁴⁵	US\$ 375,487
Timber	US\$ 100,000,000 ²⁴⁶	US\$ 3,438,704
Tin (cassiterite)	(Nothing)	US\$ 257,667
Tungsten (wolframite)	(Nothing)	US\$ 82,147
Coffee	(Nothing)	US\$ 2,769,372
TOTAL	US\$ 785,513,737	US\$ 55,809,542²⁴⁷

²⁴¹ Experts Report, para. 192.

²⁴² UCM, Chapter 8.

²⁴³ DRCM, para. 5.190.

²⁴⁴ *Ibid.*

²⁴⁵ *Ibid.*

²⁴⁶ *Ibid.*, paras. 5.173, 5.190.

²⁴⁷ Experts Report, para. 197.

167. The total amount recommended is roughly *14 times less* than the total amount claimed—even with Mr Nest’s addition of three commodities (tin, tungsten, and coffee) with respect to which the DRC itself has made no claim. As such, the Nest Report demonstrates that the evidence placed by the DRC before the Court cannot support the amounts that the DRC seeks.

168. At the same time, the mere fact that the amounts Mr Nest recommends as reparation for the listed commodities are significantly lower than those claimed by the DRC does not mean those amounts are well-founded. To the contrary, the approach by which Mr Nest arrived at these numbers suffers from at least two basic flaws:

- *First*, the parts of the Nest Report estimating the quantity and value of tin (cassiterite), tungsten (wolframite) and coffee are *ultra petita*, because they recommend reparations for things that the DRC has never claimed.
- *Second*, the Nest Report employs a highly subjective methodology that departs significantly from the methods required for proving damages for the illegal exploitation of natural resources and, as such, yields arbitrary results that effectively invite the Court to issue a decision *ex aequo et bono*.

169. Uganda addresses these flaws in turn.

A. Parts of the Nest Report are *Ultra Petita*

170. The Nest Report estimated the quantity and value of tin (cassiterite), tungsten (wolframite) and coffee. Those estimates should, however, be disregarded because they are *ultra petita*.

171. As explained above, the rule of *non ultra petita* precludes awarding a party more than it requested.²⁴⁸ At no point in these proceedings has the DRC claimed compensation for tin (cassiterite), tungsten (wolframite), or coffee. Nor has it proved any damages or provided any valuations with respect to these three resources. Insofar as commodities are concerned, the DRC has limited its claims to the alleged illegal exploitation of gold, diamonds, coltan, and timber. Any consideration of damages must therefore be limited to these resources.

172. It follows that the Court should reject the recommended estimates for tin (cassiterite), tungsten (wolframite) and coffee.²⁴⁹

B. The Estimates Recommended in the Nest Report Are Unfounded and Arbitrary

173. Mr Nest commits the same fundamental error as the DRC in estimating the quantity and value of illegally exploited natural resources: he concocts a highly subjective methodology that bears no connection to the standard methods for proving the existence and valuation of damages. Indeed, Mr Nest's methodology departs so far from standard practices that he arrives at arbitrary numbers that effectively invite the Court to award compensation *ex aequo et bono*.

174. As Uganda has previously underscored, relevant international practice requires that the existence and valuation of damages resulting from the illegal exploitation of natural resources be proved by specific evidence as to the (1) time, (2) place, (3) amount of resources extracted, and (4) the valuation thereof.²⁵⁰

²⁴⁸ See *supra* Section II.F.

²⁴⁹ Uganda sees no need at this stage to burden the Court with its substantive observations on the elements of the Nest Report relating to tin (cassiterite), tungsten (wolframite) and coffee. However, it reserves the right to do so at the oral hearings should it prove necessary.

²⁵⁰ See UCM, paras. 8.4-8.15.

The Court recognized as much in Question 5 to the DRC, which asked whether the DRC “could provide the Court with evidence regarding the locations, ownership, average production, and concessions or licenses for each mine and forest for which it claims compensation for illegal exploitation by Uganda.”²⁵¹ The DRC’s response did not do that.²⁵² Nor has Mr. Nest filled this gaping void. His report does not tackle any of these elements, let alone all of them.

175. Instead, Mr Nest develops a highly subjective methodology to estimate the quantity and value of selected natural resources. He describes his methodology as involving eight steps:

- “202.1 Identifying the distribution of resources within UAI [the Ugandan area of influence].
- 202.2 Estimating the distribution of each resource between Ituri and non-Ituri in the form of a percentage.
- 202.3 Estimating the quantity of resources produced.
- 202.4 Estimating the percentage of value extracted by different methods of exploitation.
- 202.5 Estimating an appropriate price per unit (kilogram or carat) for each resource.
- 202.6 Estimating value exploited from these resources by personnel.
- 202.7 Adjusting the value of exploitation into 2020 USD to reflect current prices.

²⁵¹ The Court’s Questions to the Parties, Question 5 (11 June 2018).

²⁵² See generally DRCRQ, Response to Question 5.

202.8 Estimating value of each resources exploited in Ituri and non-Ituri.”²⁵³

176. At every step along this path, Mr Nest relies on unfounded and uncorroborated allegations from questionable sources, engages in speculative assumptions, and develops arbitrary discount factors. This leads to recommended amounts that are no more scientific, rigorous, or well-founded than those claimed by the DRC.

177. Uganda will not burden the Court at this stage with an exhaustive exegesis detailing all the myriad evidentiary and methodological flaws infecting the Nest Report; the same basic points made with respect to the DRC’s methodology apply to the Nest Report as well. At this stage, Uganda will focus only on three fundamental flaws relating to (1) the quantity of resources produced and their geographic distribution; (2) the average prices of resources; and (3) the proxy taxes for estimating the exploitation value. Each of these elements by itself is sufficient to disregard the estimates Mr Nest proposes.

1. Quantity of Resources Produced and Their Geographic Distribution

178. An integral element in Mr Nest’s methodology is his estimate of the quantity of resources allegedly produced and their geographic distribution.²⁵⁴ Mr Nest acknowledges that there were challenges in estimating quantities of resources and their distribution between what he calls the Ugandan area of influence (“UAI”) and outside the UAI, as well as Ituri and non-Ituri areas.²⁵⁵ Among the many

²⁵³ Experts Report, paras. 202.1-202.8.

²⁵⁴ *Ibid.*, paras. 208-270.

²⁵⁵ *Ibid.*, para. 208.

challenges Mr Nest identifies is that “available data are incomplete, and it was often unclear what portion of production came from UAI.”²⁵⁶ How does he resolve this challenge? He explains as follows:

“The incompleteness of data meant other sources of information had to be relied on to inform estimates about resource distribution and quantities, including maps of deposits, anecdotal descriptions of resource distribution from field observations in THE DRC, or production data had to be combined from several sources.”²⁵⁷

179. This erroneous first step sent Mr Nest down the wrong path. Instead of evidence, he turns to “estimates” based on general maps, anecdotes and other sources that render his recommendations purely speculative. This approach sets Mr Nest onto a wrong path. One example is Mr Nest’s misguided attempt to use “the gap between Uganda’s production of a resource and the quantity of its exports” to assume that “when there were more exports than production...this ‘surplus’ was originated in the DRC.”²⁵⁸ He does this, for example, with respect to gold,²⁵⁹ coltan, tin (cassiterite) and tungsten (wolframite),²⁶⁰ and coffee.²⁶¹ Mr Nest falls into the same error as the DRC and the first UN Panel of Experts before it, both of whom purported to rely on this same “exports – domestic production” model. Uganda detailed the many problems with this approach in its Counter-Memorial,²⁶² among which is that it plainly contradicts the Court’s express finding in the 2005 Judgment

²⁵⁶ *Ibid.*, para. 208.1.

²⁵⁷ *Ibid.*, para. 206.

²⁵⁸ *Ibid.*, para. 229.

²⁵⁹ *Ibid.*, para. 236.

²⁶⁰ *Ibid.*, para. 241.

²⁶¹ *Ibid.*, para. 249.

²⁶² UCM, paras. 8.47-8.93.

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.”²⁶³ In other words, using macro-statistics about official Uganda production and export of natural resources is not consistent with the Court’s conclusion that there was no Uganda governmental policy favouring exploitation of DRC natural resources; any such exploitation would have had to occur *outside* the normal, public accounting of natural resource production by and exports from Uganda.

180. Mr Nest also makes arbitrary assumptions to estimate the proportions of resources within the UAI and Ituri.²⁶⁴ He assumes, for example, that “around 45% of gold production in UAI probably came from Ituri, and around 55% from non-Ituri.”²⁶⁵ But he offers no explanation for this assumption and how he extrapolates these percentages from the sources he cites. The same defect underlies his assumptions with respect to other resources.²⁶⁶

181. Mr Nest’ estimates of the quantity of resources allegedly produced and their geographic distribution are thus based on purely inapposite sources and speculative assumptions.

2. Annual Average Prices of Resources

182. Another element integral to Mr Nest’s methodology is his estimate of the annual average prices of resources. He uses this estimate to calculate the

²⁶³ *Armed Activities* (2005), para. 242.

²⁶⁴ Experts Report, paras. 231-270.

²⁶⁵ *Ibid.*, para. 254.

²⁶⁶ Experts Report, paras. 257, 260, 262, 264, 267, 270.

value of nominally exploited resources.²⁶⁷ He purports to determine the annual average price in three steps:

“271.1 Identifying base annual average prices for 1998-2003 (either an international price or a price specifically identified as relevant to the DRC, such as ComTrade data for imports from the DRC).

271.2 Discounting base prices by an appropriate amount to reflect probable prices relevant for producers, traders and exporters in UAI. This report calls this the ‘adopted price’.

271.3 Adjusting adopted prices into 2020 USD by ‘inflating’ them using a standard rate.”²⁶⁸

183. On this basis, Mr Nest comes up with annual average resource prices shown in the table below (reproduced from paragraph 274 of the Experts Report):

²⁶⁷ *Ibid.*, paras. 271-304.

²⁶⁸ *Ibid.*, paras. 271.1-271.3.

Table 4.2: Annual average resource prices, by year*

* Price is per kilogram except for diamonds, which is per carat

	1998	1999	2000	2001	2002	2003
Gold base price	9,455.20	8,956.22	8,973.26	8,714.13	9,956.43	11,680.99
Adopted price (35% less)	6,145.88	5,821.54	5,832.62	5,664.18	6,471.68	7,592.64
Diamond base price	18.59	12.55	14.34	18.79	19.33	27.43
Adopted price (35% less)	12.09	8.16	9.32	12.21	12.56	17.83
Niobium-Tantalite base price	12.98	47.90	114.62	86.73	47.24	14.11
Adopted price (35% less)	8.44	31.14	74.50	55.07	30.71	9.17
Cassiterite base price	3.27	2.31	2.82	3.12	3.10	6.35
Adopted price (35% less)	2.12	1.50	1.83	2.03	2.02	4.12
Wolframite base price	2.48	2.00	3.49	3.34	2.87	3.66
Adopted price (35% less)	1.61	1.30	2.27	2.17	1.86	2.38
Timber base price	0.67	0.67	0.52	0.62	0.52	0.64
Adopted price (35% less)	0.44	0.44	0.35	0.40	0.34	0.42
Coffee base price	2.04	1.71	1.42	1.18	1.04	1.06
Adopted price (35% less)	1.33	1.11	0.92	0.77	0.68	0.69
Inflator to est. 2020 USD (adopted for all)	x 1.60	x 1.56	x 1.51	x 1.47	x 1.45	x 1.41

184. The recommended annual average resource prices suffer from three basic flaws. *First*, Mr Nest derives his “base prices” from export and import prices, which reflect the market value of the nominally exploited resources.²⁶⁹ He overlooks the fact that the DRC seeks damages not for lost exports but for the alleged illegal *exploitation* of mineral resources. The measure of any loss to the DRC from the illegal exploitation of mineral resources is *not* the commercial value of the minerals on the open market, as Mr Nest erroneously assumes. Rather, it is the net loss in value to the State from the exploitation of those resources. If the State owned the mine, for example, the loss to the DRC would be the value of extracted minerals less the costs incurred in extracting and transporting (and possibly refining) those minerals for sale. If a private party owned the mine, the

²⁶⁹ *Ibid.*, paras. 276, 278, 280, 293, 299.

DRC's loss would be limited to foregone tax income, royalties or other fees payable to the State. Because Mr Nest erroneously relies on the alleged commercial value of the pertinent resources to develop "his base prices," his methodology inevitably inflates the value of the damages.

185. *Second*, as highlighted in the table above, Mr Nest discounts his "base prices" by 35% to reflect what he conjectures would have been "*probable* prices relevant for producers, traders and exporters."²⁷⁰ In this manner, he arrives at the "adopted price". But this price is entirely arbitrary, because Mr Nest does not explain why he chose 35% as opposed to any other figure.

186. *Finally*, Mr. Nest compounds the problem by adjusting the adopted prices to "2020 USD by 'inflating' them using a standard rate."²⁷¹ As highlighted in the table above, the inflator rates are different for each year. But they do have one thing in common: they appear to have been selected at random. Mr Nest nowhere explains on what basis he purports to derive these "inflaters".

187. In sum, because Mr Nest used inapplicable base prices and then adjusted them by arbitrary factors, the annual average resource prices are intrinsically flawed. This problem by itself renders Mr Nest's valuations unreliable.

3. Proxy Taxes for Estimating the Exploitation Value

188. Mr Nest's methodology also includes what he calls "proxy taxes" for "theft", "fees and licences", and "sales and exports", which are stated as

²⁷⁰ *Ibid.*, para. 271.2.

²⁷¹ *Ibid.*, para. 271.3.

percentages in the table below (reproduced from paragraph 119 of the Experts Report):

Table 4.5: Est. of proxy taxes on theft and fees & licences, and tax on profits as percentages

	A. Proxy Tax: Theft		B. Proxy Tax: Fees and Licences		C. Tax on Value: Sales and Exports		Total Tax Rate (A+B+C)	
	Ituri	Non-Ituri	Ituri	Non-Ituri	Ituri	Non-Ituri	Ituri	Non-Ituri
Gold	5.0	2.0	5.0	2.0	28.0	5.0	38.0	9.0
Diamonds	5.0	0.5	5.0	2.0	20.0	5.0	30.0	7.5
Coltan	5.0	0.5	5.0	2.0	20.0	5.0	30.0	7.5
Tin	5.0	0.5	5.0	2.0	20.0	5.0	30.0	7.5
Tungsten	5.0	0.5	5.0	2.0	20.0	5.0	30.0	8.0
Timber	2.0	0.5	1.0	1.0	8.0	1.0	11.0	2.5
Coffee	1.0	0.0	1.0	0.5	8.0	1.0	10.0	2.0

189. Mr Nest uses these “proxy taxes” to estimate the total value of natural resources allegedly exploited by applying them to the estimated quantity of resources nominally produced in the DRC.

190. Like other numbers in Mr Nest’s model, these taxes are unfounded and arbitrary. Illustrative in this respect is the manner in which Mr Nest derives two of these categories of proxy taxes: “fees and licences,” and “sales and exports”. He purports to calculate them from the alleged fees, licences and taxes summarized in the following table, which is attached as Annex 4 to his report:²⁷²

²⁷² *Ibid.*, para. 323.

Annex 4: Reported taxes on natural resources

This table summarised reports of taxes on value, profits and exports in case file and other documents.

Resource/ Source	Rate Reported	Tax on what?	Collector	Period	Region
Gold (UNPE 2001a: §59)	1gram/day (approx. 28%)	Daily 'fee'	'Ugandan local commanders and some of the soldiers'	Late 1999?	Haut-Uélé/Ituri border area.
Gold (International Alert 2010: 43)	40%	Export value	Civilian Administration	2010	Ituri
Gold (Johnson and Tegera 2007: 94)	40% (30% OKIMO) (10% Prov.)	Tax on ore leaving mine	OKIMO royalties; Ituri Admin.	2006?	Ituri
Gold (Johnson and Tegera 2007: 94)	\$1,392	Fees and licences to produce	All authorities	2006?	Ituri
Gold (Johnson and Tegera 2007: 87)	4.75%	Export taxes	All authorities	2006?	South Kivu
Gold (Johnson and Tegera 2007: 90)	\$75,000	Export licence fee	Paid in Kinshasa	2006?	All DRC
Gold, industrial (Johnson and Tegera 2007: 24)	3%	Exports	OFIDA	2007?	North Kivu
Gold, artisanal (Johnson and Tegera 2007: 24)	1.5%	Exports	OFIDA	2007?	North Kivu
Diamonds (RPE 2001a: §127)	5%	Export value	'Congo Desk' Rwanda	1998- 2001	Kisangani comptoirs
Diamonds (Johnson and Tegera 2005: 97)	4%	Value	DRC Government	2004	Nationwide
Diamonds (UNPE 2001b: §46.)	15%	Export value	Rwanda; RCD- Goma	2001	From the DRC
	(5%)	Export value	'Congo Desk', Rw	2001	From the DRC
	(10%)	Export value	'Rebel Admin.'	2001	From the DRC
Diamonds, industrial (Johnson and Tegera 2007: 24)	3%	Exports	OFIDA	2007?	North Kivu
Diamonds, artisanal (Johnson and Tegera 2007: 24)	1.5%	Exports	OFIDA	2007?	North Kivu
Coltan (IPIS, 2002: 10)	8%	Exports by comptoirs	RCD; RCD-Goma	1998- 2000	South Kivu
	40%? (\$10/kg)	Exports by SOMIGL	RCD-Goma	From Nov. 2000	South Kivu; North Kivu
Coltan (Le Billon and Hocquard, 2007)	7%	Profits	RCD-Goma	Circa 2000	South Kivu; North Kivu
	11%	Profits	'Armed Groups'	Circa 2000	South Kivu; North Kivu
	22%	Of profits spent on	RCD-Goma	Circa 2000	South Kivu; North Kivu

		'licences & Fees'			
Coltan (Johnson and Tegera 2005: 37)	11% total (7%) (2%) (2%)	Value (\$10/kg reported)	All authorities	2005	Mumba/Bibatama mine, North Kivu
Coltan (Johnson and Tegera 2002: 7)	\$20,000 per month	Coltan exports from the DRC	Commune Zone 'Mining Division', Goma RCD; RCD-Goma	1998-Nov 2000	South Kivu; North Kivu?
Coltan (Johnson and Tegera 2002: 7)	\$1,124,970	Coltan (and cassiterite?)	SOMIGL to RCD	Dec 2000 alone	Rwandan area of influence
Coltan (Redmond 2001: 11)	\$4/kg (approx. 17% tax)	Tax on exports by kilogram	Comptoirs to ? (RCD? RPA?)	April-May 2001	South Kivu; North Kivu
Coltan (Redmond 2001: 11)	\$7.50/kg (approx. 32% tax)	Weekly fee to work in mines	Paid by miners to (1) military and (2) 'Chef de colline)	April-May 2001	Kahuzi-Biéga NP, South Kivu
Coltan (Congo European Network 2001) ¹⁰⁹	\$6/kg (approx. 25% tax)	Export tax on value (plus \$40,000 annual fee to export).	RCD-Goma	Nov 2000-April 2001	From the DRC
	\$4/kg for more than 15mt (approx. 17% tax)	Export tax on consignments more than 15mt	RCD-Goma	Nov 2000-April 2001	From the DRC
Coltan (Johnson and Tegera 2005: 47)	Fixed royalty tax of \$5,000	On coltan miners	RCD-Goma	Pre-2004	South Kivu; North Kivu
Coltan/cassiterite? (Johnson and Tegera 2005: 57)	\$1-\$1.50/kg (approx. 5%)	Value	'Military Forces'	1998-2005	Walikale Territory (Goma/Bukavu-Kisangani road)
'Minerals' (coltan/ cassiterite?) (International Alert 2010: 43)	15%	'Value' (\$365/mt)	Civilian Admin. (b/w Bisie-Goma)	2010	Western North Kivu within Rwandan area of influence
Cassiterite (Garrett 2008: 32)	10%	\$4/kg + 10% of minerals carried	FARDC	2008	Bisie mine, western North Kivu
Cassiterite (Johnson and Tegera 2005: 47)	\$2,500 fee	Imposed on traders	RCD	Pre-2004	South Kivu; North Kivu
Cassiterite (Johnson and Tegera 2005: 59)	50%	Quantity	RCD	2004	Bisie mine, North Kivu
Cassiterite, artisanal (Johnson and Tegera 2007: 24)	15%	Value	North Kivu authorities	2003	North Kivu

¹⁰⁹ Reported in DRC (2016) Memorial Annex E, Vol. 2, p.15.

Cassiterite, artisanal (Johnson and Tegera 2007: 24)	10%	Prod. kept by mine authorities.	North Kivu authorities	2003	North Kivu
Cassiterite, industrial (Johnson and Tegera 2007: 24)	10%	Taxed before leaving mine	North Kivu authorities in Mine (OFIDA)	2003	North Kivu
Timber (Johnson and Tegera 2007: 24)	6%	Export tax on untreated timber	North Kivu authorities	2003	North Kivu
Green coffee beans (Johnson and Tegera 2007: 60)	7%	"Total" export taxes	North Kivu authorities	2003	North Kivu

191. The information in this table only underscores the unfounded nature of Mr Nest’s proposed “proxy taxes”. *First*, the economic data upon which he relies are a hodgepodge of inconsistent numbers reflecting different values, often with wide ranges, from uncorroborated sources. Publications by Johnson and Tegera are the most frequently cited source by Mr Nest for the dollar amounts and percentages. Yet those numbers, as the above table shows, are inapposite because they have nothing to do with Uganda and concern events after Uganda’s withdrawal from the DRC.²⁷³

192. *Second*, nearly all of the data have no direct connection to Uganda or UPDF personnel, but rather refer to other States, the DRC and/or Congolese rebels. Taxes and levies collected by third parties cannot serve as a reliable basis on which to extrapolate proxy taxes on Uganda and UPDF personnel. Indeed, only one entry among the sources cited in the table vaguely refers to “Ugandan local commanders and some of the soldiers.”²⁷⁴ And even this reference comes from the

²⁷³ See e.g. Expert Report, Table in Annex 4, referring to “Gold (Johnson and Tegera 2007: 94);” “Gold (Johnson and Tegera 2007: 87);” “Gold, industrial (Johnson and Tegera 2007: 24);” “Diamonds (Johnson and Tegera 2005: 97);” “Diamonds, industrial (Johnson and Tegera 2007: 24).”

²⁷⁴ Experts Report, Table in Annex 4 citing to “(UNPE 2001a: §59)”.

unsupported allegations of the discredited and criticized first UN Panel of Experts report.²⁷⁵

193. *Third*, more than ten references in the table above refer to dates that fall outside the temporal scope that is limited to August 1998-May 2003.

194. *Fourth*, many references relate to areas outside what Mr Nest calls the “Ugandan area of influence.”²⁷⁶

195. Such inherently unreliable data lead to inherently arbitrary results. Consider, for example, how Mr Nest comes up with his proposed “proxy taxes” for diamonds:

“The tax on diamonds is estimated at 20% even though the reported taxes range from 4-15%, because the rate is unlikely to be less than minerals, which are higher than this range. There is no apparent reason for a tax on diamonds to be less than for gold, but there is also no evidence that it was the same as for gold. Thus, while the tax rate for diamonds may have been more, I cannot be sure. 20% is a conservative confident estimate.”²⁷⁷

196. This conclusion is untenable. As the above table from Annex 4 confirms, the data Mr Nest relies on come primarily from a single source—publications by Johnson and Tegera that contain inapposite and inapplicable values because they relate to duties that the DRC imposed on the Congolese export of diamonds in 2005 and 2007.²⁷⁸ Moreover, no source Mr Nest cites shows that Uganda or UPDF personnel collected the alleged taxes. Rather, as the data

²⁷⁵ UCM, paras. 8.11, 8.49.

²⁷⁶ Experts Report, para. 192.

²⁷⁷ *Ibid.*, para. 340.

²⁷⁸ See Annex 4 of the Nest Report referring to “(Johnson and Tegera 2005:97)”, “(Johnson and Tegera 2007:24)”.

summarized in Mr Nest's Annex 4 show, they were collected by Rwanda, Congolese rebels, or the DRC. For example, Mr Nest relies on the UNPE report as a source on the 15% tax on diamonds, which states:

“Statistics from credible sources also showed that diamond exports from Rwanda to Antwerp, in contrast to Uganda, have not increased. They informed the Panel that the reason behind this is the Rwandan Congo desk's relatively high tax (10 per cent) levied on the export of diamonds from the Democratic Republic of the Congo, added to the 5 per cent tax charged by the Congolese rebel administration. These taxes have driven many of the artisanal miners from the Kisangani area to smuggle their production through the Central African Republic and the Republic of the Congo. Diamonds are also reportedly transported personally by Asian and Lebanese traders operating in the eastern region, to South Africa and to Belgium and other European countries.”²⁷⁹

197. It is thus unclear to Uganda how Mr Nest can credibly apply to Uganda the tax on diamonds at 20% by relying on data that have nothing to do with Uganda and by equating this tax with the tax on gold, especially when he himself admits that “there is also no evidence that [a tax on diamonds] was the same as for gold.”²⁸⁰ And yet Mr Nest uses this estimated 20% proxy tax on diamonds as part of his formula for recommending US\$ 7,000,000 in reparation for the alleged illegal exploitation of diamonds.

198. Still another example of the arbitrariness that infects Mr. Nest's approach is his estimated tax on timber. He claims to calculate it as follows:

“The reported tax on timber of 6% was only for exports from North Kivu in 2006 (Johnson and Tegera 2007) and does not include any other taxes on value. The working estimate was increased to 8% to include the probability that during the context of conflict from 1998-

²⁷⁹ See Annex 4 of the Nest Report referring to “(UNPE 2001b: §46)”.

²⁸⁰ Experts Report, para. 340.

2003, other taxes on value were also levied, such as at the point of production, trade or while in transit.”²⁸¹

199. This conclusion is pure speculation. As the table above from Annex 4 confirms, Mr Nest picks 6% from a single a publication by Johnson and Tegera, which refers to duties that the DRC imposed on the Congolese export of “untreated timber” in 2007.²⁸² Then he chooses to increase it to 8% “to include the probability” that “other taxes on value were also levied”, without articulating any support for that conclusion. And yet this speculative 8% tax on timber is one of the critical variables used in Mr Nest calculations for recommending that Uganda pay reparations in the amount of US\$ 3,438,704 for the illegal exploitation of timber.

200. Because these and other approximations of the taxes used for Mr Nest’s model are unfounded and arbitrary, the resulting estimates of the total value of all natural resources in his report are equally unfounded and arbitrary.

* * *

201. Uganda reserves its right to present additional observations on other elements of the Nest Report at the oral hearings. At the same time, it considers that the fundamental flaws highlighted in these observations themselves more than adequately demonstrate that Mr Nest’s methodology is very far removed from what is required to establish damages in inter-State proceedings. In Uganda’s view, conjecture based on speculation multiplied by arbitrary percentages, discounts or proxy taxes cannot be allowed to substitute actual evidence.

202. The solution in such circumstances must be the one the Court adopted in *Costa Rica v. Nicaragua*, where it rejected damage claims unsupported

²⁸¹ *Ibid.*, para. 342.

²⁸² See Annex 4 of the Nest Report referring to “(Johnson and Tegera 2007:24”).

by the evidence.²⁸³ Doing otherwise and accepting any of the recommendations presented in the Nest Report would effectively amount to impermissibly issuing a decision *ex aequo et bono*.

²⁸³ *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Compensation, Judgment, I.C.J. Reports 2018, para. 103.

Respectfully submitted,

A handwritten signature in black ink, consisting of a large, stylized initial 'W' followed by a long, horizontal stroke that tapers to the right.

Mr. William Byaruhanga, SC

Attorney General of the Republic of Uganda

AGENT OF THE REPUBLIC OF UGANDA

15 February 2021